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DE TOCQUEVILLE AND THE ROLE OF THE LAWYER IN SOCIETY

PHIL C. NEAL*

In keeping with the general theme of these lectures, your officers have asked me to discuss the role of the lawyer in society in the light of De Tocqueville's appraisal. I hope that I can give more than glancing respect to our assigned text. But I also hope it will be permissible if I interpret my invitation according to its spirit rather than its letter, and pose some questions about the role of the lawyer that are not directly suggested by De Tocqueville's opinions. The spirit of this lecture series, I take it, is that we should try to see our work as law students and as lawyers in a broader perspective and context than our daily close grappling with legal problems permits. That the students at Marquette Law School should initiate a lecture series with such an aim is itself evidence of a breadth of outlook here on which you should congratulate yourselves and your Student Bar Association.

Whatever its relevance to our own day, De Tocqueville's picture of the legal profession in America can hardly enable us to see its functions fully and accurately, still less to appraise its contribution to the fabric of society. For his was a narrow and partial view. To say this is not to criticize De Tocqueville nor to deny the panoramic perspective that he achieved in his work as a whole. His interest in lawyers was incidental to a larger theme. We must remember what that theme was.

For De Tocqueville the dominant fact of his time was a social revolution that he regarded as certain to continue into the foreseeable future. He saw about him irresistible forces leading everywhere toward the equality of men. America attracted his interest as the society in which this revolution was most advanced and which at the same time had adjusted most successfully to its stresses. He sought to learn the causes of this success, to understand the tendencies of the American system, and to speculate about its probable future.

Despite his unconcealed admiration for democracy in America, De Tocqueville's appraisal was heavy with misgivings for the future. His discussion of the legal profession was an outgrowth of one of the sources of his pessimism. In a chapter on "The Unlimited Power of the Majority" he had advanced the view that the main evil of democratic institutions in America was not in their weak-

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ness, as was often asserted, but in their irresistible strength. He professed to be alarmed by the inadequate securities against tyranny he found here. This led him in the succeeding chapter—the chapter that is our immediate concern—to examine the “Causes Which Mitigate the Tyranny of the Majority.” It is disconcerting to find that De Tocqueville could enumerate but three such countervailing forces against the tyranny he feared. The first was the institution of trial by jury; the third was the limited power of the central government; and the second was the legal profession itself.

Would De Tocqueville find confirmation of his views in the present condition of the United States? He would be compelled to conclude that the influence of lawyers in the public business has kept pace with the growth of government itself. It is true that he might wonder whether lawyers have recently been yielding some of their ubiquitous role in policy-making to economists, computer programmers, and other kinds of specialists. Whether he would judge that the net influence of lawyers over the last century or in more recent times has worked in the direction he imagined seems hard to say. We would have to assume, first, that he would agree that the excesses of democracy have been avoided. De Tocqueville was obscure as to what those excesses might be, but we can reasonably take for granted that he would admire the stable and prosperous society America has continued to develop along with the egalitarian revolution. He would no doubt give heavy credit for this condition to major economic, political and social reforms brought about by law and this, in turn, might lead him to renewed emphasis on the value of lawyers in the American development.

But it would distort the role of lawyers in this development to see them as a conservative and resistant force. One might as readily, perhaps more readily, assert that lawyers have been a primary source of innovation and change in American public law. From De Tocqueville's point of view the question would be, perhaps, whether the reforms in which lawyers have participated have been the means of moderating radical forces and averting violent, unstabilizing change. In this sense all reform short of revolution may be said to be conservative. Except in this sense, it seems difficult to say that either conservative or progressive tendencies have predominated in the contribution of lawyers to contemporary American society. They have been on both sides, and in the thick of the battle, at most of the points of contest, from the brain-trust days of the New Deal to the great constitutional revisions of the Warren Court.

In one respect, however, De Tocqueville's thesis has clearly been confirmed. It was an exaggeration in his own time to say that

"Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." It is still not entirely true, but it is probably nearer the truth today than when De Tocqueville wrote. The relaxation of such doctrines as standing, ripeness, and political questions has permitted the Supreme Court to become an ultimate arbiter on issues that might earlier have had to find political resolution.

De Tocqueville was a strong believer in judicial review. It was mainly through the institution of judicial review of legislative action that he expected the restraining influence of lawyers to be exerted. On this ground he should be expected to endorse the recent resurgence of what the Court's critics have called judicial activism. But he would of course find trends in constitutional decision that would pose hard problems for this general analysis. Given his preference for decentralized administration he could hardly take much comfort in the astuteness with which the Supreme Court has manipulated doctrine to provide underpinnings for an expanding federal power. In view of his professed fear of majority rule, it would very likely give him pause to note the role of the courts in the reconstitution of our political processes under the one-man, one-vote principle. As one who saw the problem of the Negro as the greatest shadow on America's future, he would doubtless be gratified by the enormous contribution of the courts toward giving the Negro full status in our society. But he would suffer some discomfort, one surmises, in adjusting his view of the courts and the legal profession to the broad egalitarian tendencies in recent readings of the Fourteenth Amendment. It would be highly interesting to him, surely, to discover that enthusiasm for judicial power has become the liberal rather than the conservative position.

It is fascinating to speculate about where De Tocqueville would stand on some of these questions and how he would revise his estimate of the influence of lawyers and courts. We may be sure that he would not be confounded by what he saw. For De Tocqueville had the lawyerlike virtue of avoiding oversimplification. He saw tendencies and countertendencies everywhere and was quick to note the possibilities that might upset his prophecies. It seems unlikely that his belief in a strong judiciary would be daunted by particular decisions or trends of which he disapproved. He accepted judicial review as a political function, with all its dangers. The judges, he said, "must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles that can be subdued, nor slow to turn away from the current when it threatens to sweep them off." There is welcome defense here for one of the currently contending schools of thought about the role of the Supreme Court.

But those who embrace it should also be prepared to quote De Tocqueville's warning: "The President, who exercises a limited power, may err without causing great mischief in the state. Congress may decide amiss without destroying the Union, because the electoral body . . . may cause it to retract its decision. . . . But if the Supreme Court is ever composed of imprudent or bad men, the Union may be plunged into anarchy or civil war."

Whether we agree or disagree with De Tocqueville's evaluation of the conservative influence of lawyers, we can hardly accept it as a full account of the value of lawyers in our society. If we wish to form our own estimate we must consider in more detail than he did the variety of functions lawyers perform and make a fresh appraisal of the utility of those functions in a good society. The problem could be put in various ways. What judgment can be made about the quality of a society by the proportion of human effort devoted to lawyers' work? If we had more power than we do to control the allocation of talent, would we channel more of it or less of it into the legal profession? Perhaps we have reasonably clear ideas about some other professions, such as teachers and physicians, but how deep are our convictions about the social utility of lawyers?

Of course we do not have much power to decide such questions and it is probably fortunate that we do not. Still, the questions are not altogether academic. Subsidies to higher education play an increasing role in determining who is to get graduate training and in what fields. Again, we are presently confronted with the question of priorities in a peculiarly painful form as we wrestle with the problem of a rational scheme of selective service. The "war on poverty" presents us with another instance in which decisions about the use of resources may be made that will influence the availability of lawyers. We do stand in need of some reasoned judgment about the contribution our profession can make to the general welfare.

The attempt to form such a judgment will make us see, I think, that the social role of lawyers is many-sided and it will lead us to distinguish different functions on which we may wish to place different values. I should like to suggest four such functions or four different spheres in which, it may be argued, lawyers make their contribution to the general welfare. As to the relative values of these functions and whether the importance of each is growing or declining, I shall not have much to say. My interest is in encouraging you to believe that these are questions worth reflecting upon and debating, and that they are susceptible of analysis.

First, then, there is what might be called the *instrumental* aspect of

the lawyer's role. The lawyer is a man who executes someone else's purposes, usually purposes that involve making arrangements with others. On a table of organization of society viewed as a going concern, lawyers would appear as criss-crossing lines, filling the interstices and making a fabric of the whole. Perhaps this metaphor suggests the indispensability of lawyers; perhaps that is why I have used it. But it is obviously inaccurate to suggest that lawyers are always essential to carrying out men's plans, even where those plans necessarily involve creating or changing legal relationships with others. Men can deal with each other directly or they can use other kinds of representatives. The real estate contract is an obvious example. The supreme court of Illinois has recently decided that it is lawful for real estate agents to effectuate binding contracts without the intervention of a lawyer. (Somewhat oddly, however, what they may not do is fill in the deed after the contract has been made.)

Nor do I mean to suggest that lawyers in their instrumental capacity are mere mechanics or servants. They are called upon to shape and clarify the purposes of those whom they serve, and sometimes to refuse to execute a given purpose. Indeed, their willingness to assume such responsibilities may be one clue to the fact that lawyers in America more than elsewhere have come to play the role of all-purpose social engineers, of roving experts in getting things done.

It would be interesting to have some measure of the effect that technological change and the general advance of knowledge are having upon this aspect of the lawyer's function. Since the lawyer's strength is in part his ability to function as a generalist, one might expect to see his gradual displacement by more specialized experts as knowledge in all fields becomes ever more refined and specialized. Whether lawyers can maintain their versatility and continue to command confidence as coordinators of the knowledge and efforts of others is perhaps one of the central questions facing legal education and our profession. On the other hand, perhaps the increasing complexity of our society is in itself assurance that lawyers have a future. From the viewpoint of self-interest, at least, there may be some comfort in the thought that lawyers tend to beget lawyers. The clearest evidence that a man needs a lawyer in a transaction may be the fact that there is a lawyer on the other side. Yet this is surely not the whole explanation of the importance of lawyers in getting things done. Officials of our overseas aid programs, for example, tell us that a major obstacle to carrying out our beneficent purposes in some underdeveloped nations is their lack of a corps of instrumentalists performing the kind of function that

we have relied on lawyers to perform. If that diagnosis is right, the reform of legal education may become an important goal of social policy in such countries.

For our own society, however, there seems to be no pressing issue about how much of this sort of talent we need to provide. In this role the lawyer's contribution is primarily economic and productive. The rewards he earns are as good a measure as any of his value to society, and we can be reasonably confident that those rewards will maintain a supply of the lawyer's skill that matches its social utility.

The same thing cannot be said, I think, as to the second sphere of the lawyer's activities that I wish to discuss, although it is one that obviously intersects with and overlaps the first. I shall call this the *protective* function. Along with other occupations such as doctors, safety engineers and insurance salesmen, lawyers have an important contribution to make in ameliorating the risks of life. I am speaking, of course, of what in more familiar terms we think of as the counseling function, and I have in mind the provocative question put by a thoughtful lawyer, Charles P. Curtis, who wondered whether there is any occasion when a man would not be better off for having a lawyer at his side. To describe the function as avoidance of risk is perhaps too narrow. A man turns to his lawyer not only to foresee the risks but to help him decide which risks to run. In this light it is the function of helping people avoid mistakes.

This aspect of the lawyer's function has given rise to some major current questions. They arise not because of doubts about the lawyer's potential value but precisely because of our confidence in his value, perhaps even more confidence than is justified. We have begun to recognize that the protective function of the lawyer may have value for all classes and conditions of society, not merely those with economic interests commensurate with the costs of the service and resources commensurate with their price. We are moving toward the view that some level of legal service should be made available to all citizens, like public education and medical care. Such a goal confronts us with a series of questions that for the legal profession are novel—questions of definition of the nature and level of services to be provided, questions of organization of the profession, questions of recruitment of the right men to engage in such work, questions of their education. That we should have been stimulated to pursue such questions is surely one of the most useful results of the War on Poverty. Legal services as such can hardly improve the economic condition of masses of men, but they can do something to give men, whatever their economic status, a

greater measure of control over their lives and a greater sense that the rules of society recognize the interests of the poor as well as the comfortable.

The lawyer's competence to counsel the average person on personal and family matters has undoubtedly been neglected in legal education, and there is reason to doubt that for most lawyers the neglect has been repaired by experience. The new focus on legal problems of the indigent may set us on the way to creating or reviving a type of professional adviser analogous to the vanishing family doctor, or it may lead to new types of agency combining the services of different kinds of specialists. In any event it seems clear that in this sphere the potential future of the lawyer is an expanding one. Intelligent response to these emerging needs will cause society to place an even greater value on the lawyer's protective role.

A third sphere of the lawyer in society is the sphere of *conflict*. It is in this sphere that the role of the lawyer is not only most visible but most clearly indispensable. We can hardly imagine a society without conflict. The lawyer, and the whole machinery of justice for which he is primarily responsible, are charged with maximizing the social interest in tranquility by providing means for the rational settlement of disputes. This is perhaps the highest sense in which lawyers as a group have the responsibility for reducing the arbitrary factors in our social life. Their function is not primarily to resist great political forces, the aspect of their role in society which drew De Tocqueville's attention, but to help remove the frictions and inequities and arbitrary consequences that are produced by the working out of the larger forces.

But here, in contrast to the lawyer's advisory or protective function, there are some perplexities in deciding how much of this kind of service is a good thing. Is the good society a litigious society or one which minimizes the occasions for litigation? Do we aspire to a society in which the need for lawyers in such a role is withering away, or to one in which the barrister flourishes because he is needed and there are resources to pay for his services?

We seem always to have had a somewhat ambivalent attitude toward litigation. One facet of it is the fact that the courtroom advocate has long represented a kind of ideal image of the profession; the barrister's function, performed at its best, has had greater prestige than the solicitor's. Again, the idea that the vindication of a man's rights in court is one of the hallmarks of liberty has occupied a high place in our scheme of things. But on the other hand there is a strong strain of doctrine hostile to litigation, both in the common law and in the ethical standards of the bar. Courts have worried or have professed to worry about whether the adoption of

this rule or that would tend to breed lawsuits and flood the courts with business. Lawyers are supposed to avoid various kinds of activity that smack of stirring up litigation.

The question is difficult because of the fact that conflict in society is an ambiguous symptom. It points to the presence of stresses and dissatisfactions, and thus suggests illness; it is also in a sense a wasteful diversion of energies. But at the same time it suggests the absence of repression, the airing of grievances, the existence of channels of resolution. In this sense it may be productive and it may be a symptom of fundamental health in the society.

One side of the problem has recently come to seem relatively clear in principle. Viewing the lawyer as a shield, an aid to the defending party to a dispute, we have no difficulty in saying that our society would be better off if it had more of this kind of resource. We have indeed adopted as a legal principle that in criminal cases the defendant must be provided with counsel if he wishes it, regardless of his ability to pay. There appears no good reason of policy why we should not wish to extend the same principle to civil matters. The obstacles, I take it, are almost entirely in the realm of economics.

But the lawyer is not merely a shield in conflicts. He is also a champion. Would our society be better off if every man had at his beck and call a skilled champion for every cause in which he might plausibly claim the support of official force? Perhaps the answer should be reasonably clear here, too, apart from the difficult economic problems. If it is not yet as clear, however, I suggest it is in part because of our ambivalence toward the value of conflict. The problem is made more difficult by the fact that the skillful, imaginative lawyer is himself a potent source of causes to champion. Many rights, many grievances that might be turned into rights, lie dormant simply because no lawyer has been turned loose to root them out, explore their foundations, and shape them into valid causes of action.

What is our attitude toward maximizing the role of conflict and conflict-resolution in our society? There are signs of a basic shift. We have created and are still developing important procedural devices such as the declaratory judgment and the class action which open still wider the potential field of legal conflict. Legal rules that inhibit organized effort to initiate litigation have recently been modified by new constitutional doctrine. The potential role of legal aid agencies in conducting test cases to establish new rights and remedies for classes of indigent clients is under serious discussion. These are some of the symptoms of an underlying issue that we must continue to explore as part of any effort to arrive at

a comprehensive view of the contemporary role of the lawyer in a good society.

I come, finally, to what may be the highest as well as the most difficult aspect of the lawyer's role in society. It is also the least tangible, and for that reason it is the one that is closest to what I think De Tocqueville was talking about. I shall call this the sphere of *civic wisdom*. We have no conventional term to describe the lawyer's role in this sphere. Perhaps it will suffice if we think of him as the practicing political philosopher, or, more simply, as educator. I am thinking of the public side of a lawyer's life and it includes, of course, all that he does as a volunteer in worthy civic enterprises; it includes the wide and expanding activities he engages in as a member of the organized bar and as participant in law-reform enterprises such as bar association committees, the American Law Institute, the President's commission of lawyers on civil rights problems, and the like. It includes lawyers as politicians, legislators, and public servants. All these represent important ways in which lawyers have contributed to the fabric and the quality of American life, and I do not underestimate the magnitude and value of the contribution. But I am thinking of something broader still, and I wish to suggest some doubts about whether in this broader sense lawyers have yet achieved the influence we might wish them to have.

Let me remind you of one of the things De Tocqueville said about the attributes of lawyers that qualify them for a special influence in public affairs. "Men who have made a special study of the laws," he said, "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." I believe he was correct about the tendency of law study to cultivate these qualities, but it seems to me there is a larger and in a sense more positive end they may serve than hostility to the revolutionary spirit and to the so-called passions of the multitude. One might add certain qualities that De Tocqueville failed to mention—among them, skepticism, independence of outlook (a quality that de Tocqueville did suggest, I suppose, when he referred to the lawyer's having "a certain contempt for the judgment of the multitude"), insistence upon knowing the facts, an accumulation of experience with all the manifold practical problems of human organization, a taste for rigorous analysis, and respect for theories.

It could be argued that lawyers have functioned superbly well in this role with respect to one large segment of our law. I mean,

of course, the body of judge-made law and the growing body of statutory law in technical fields that modifies or substitutes for judge-made law. In this field, in which the law is more or less directly the responsibility of lawyers and within their control, American lawyers have really disproved De Tocqueville's assertion that "lawyers are disinclined to innovate when they are left to their own choice." On the contrary they have shown great capacity for change and reform.

But the great shift in law since De Tocqueville's time has been the enormous growth of legislative law and the expansion of law to cover vast fields of activity largely unregulated by law in his day. It is a fair question whether the special capacities of lawyers have had their proper influence in this sphere, or have had much to do with shaping the character and direction of what is now the more important part of our legal system. Let me suggest two general issues that are relevant to this development. We have witnessed an immense growth in resort to regulatory systems and to the use of the administrative agency in carrying out the felt needs of the time. It is always a question whether a given public purpose should be carried out by such techniques or whether the alternative route of creating private rights of action, relying on individual initiative to enforce such rights, should be used. There is always, too, the question whether the field is one which law should occupy at all. How much ought we to expect, for example, from putting warning notices on packages of cigarettes? Are these not issues on which lawyers should have professional knowledge and professional views? If so, what are they and how are they to be brought to bear on the decisions of society? Again, we have witnessed enormous changes in the allocation of power in our system. The proper structure of political power would seem to be pre-eminently a question for lawyers' analysis. Do we as lawyers have any theories? Do we have anything to say about the values of federalism in general or about the wisdom of preserving or abandoning it in particular fields? If so, how are these views to be made influential?

Of course I do not really know what lawyers should be able to contribute to public understanding on such issues as these, and many others that might be mentioned. In part we suffer from a great lack of knowledge of how laws work and what they accomplish. But we also suffer from lack of obvious means by which lawyers can analyze such issues for the education of the people. We have to a large extent surrendered our influence on public affairs to newspaper columnists, editorial writers, television producers, and assorted pundits. Perhaps this is inevitable. I find myself as unable as was De Tocqueville to say precisely how the wis-

dom of lawyers, if we had more wisdom, could be made more influential than it is. But I do suggest that a necessary condition for the fulfillment of a spacious role for the lawyer in society is that the lawyer must first of all have a theory about society, a view of where we ought to be going and how law can modify our course in the proper ways.

De Tocqueville had a view of the good society, and he believed in the usefulness of knowledge and education in directing us toward it. That was why he wrote his book. In that fact lies the chief significance of De Tocqueville's commentary for our own times. The highest role of lawyers in our society is more likely to be realized if we take seriously the problems of statecraft that interested De Tocqueville.

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