Democracy in America

By

Alexis de Tocqueville

Translator – Henry Reeve

A Penn State Electronic Classics Series Publication

Democracy in America, Volumes One and Two by Alexis de Tocqueville, trans. Henry Reeve, the Pennsylvania State University, *Electronic Classics Series*, Jim Manis, Faculty Editor, Hazleton, PA 18201-1291 is a Portable Document File produced as part of an ongoing student publication project to bring classical works of literature, in English, to free and easy access of those wishing to make use of them.

Cover Design: Jim Manis

individual is not secured against the violence of the stronger: and as in the latter state even the stronger individuals are prompted by the uncertainty of their condition to submit to a government which may protect the weak as well as themselves, so in the former state will the more powerful factions be gradually induced by a like motive to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that, if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of the factious majorities, that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it."

Jefferson has also thus expressed himself in a letter to Madison:* "The executive power in our Government is not the only, perhaps not even the principal, object of my solicitude. The tyranny of the Legislature is really the danger most to be feared, and will continue to be so for many years to come. The tyranny of the executive power will come in its turn, but at a more distant period." I am glad to cite the opinion of Jefferson upon this subject rather than that of another, because I consider him to be the most powerful advocate democracy has ever sent forth.

*March 15, 1789.

Chapter XVI: Causes Mitigating Tyranny in the United States – Part I

Chapter Summary

The national majority does not pretend to conduct all business – Is obliged to employ the town and county magistrates to execute its supreme decisions.

I have already pointed out the distinction which is to be made between a centralized government and a centralized administration. The former exists in America, but the latter is nearly unknown there. If the directing power of the American communities had both these instruments of government at its disposal, and united the habit of executing its own com-

mands to the right of commanding; if, after having established the general principles of government, it descended to the details of public business; and if, having regulated the great interests of the country, it could penetrate into the privacy of individual interests, freedom would soon be banished from the New World.

But in the United States the majority, which so frequently displays the tastes and the propensities of a despot, is still destitute of the more perfect instruments of tyranny. In the American republics the activity of the central Government has never as yet been extended beyond a limited number of objects sufficiently prominent to call forth its attention. The secondary affairs of society have never been regulated by its authority, and nothing has hitherto betrayed its desire of interfering in them. The majority is become more and more absolute, but it has not increased the prerogatives of the central government; those great prerogatives have been confined to a certain sphere; and although the despotism of the majority may be galling upon one point, it cannot be said to extend to all. However the predominant party in the nation may be carried away by its passions, however ardent it may be in the pursuit of its projects, it cannot oblige all the citizens to comply with its desires in the same manner and at the same time throughout the country. When the central Government which represents that majority has issued a decree, it must entrust the execution of its will to agents, over whom it frequently has no control, and whom it cannot perpetually direct. The townships, municipal bodies, and counties may therefore be looked upon as concealed break-waters, which check or part the tide of popular excitement. If an oppressive law were passed, the liberties of the people would still be protected by the means by which that law would be put in execution: the majority cannot descend to the details and (as I will venture to style them) the puerilities of administrative tyranny. Nor does the people entertain that full consciousness of its authority which would prompt it to interfere in these matters; it knows the extent of its natural powers, but it is unacquainted with the increased resources which the art of government might furnish.

This point deserves attention, for if a democratic republic similar to that of the United States were ever founded in a country where the power of a single individual had previ-

ously subsisted, and the effects of a centralized administration had sunk deep into the habits and the laws of the people, I do not hesitate to assert, that in that country a more insufferable despotism would prevail than any which now exists in the monarchical States of Europe, or indeed than any which could be found on this side of the confines of Asia.

The Profession of the Law in the United States Serves to Counterpoise the Democracy

Utility of discriminating the natural propensities of the members of the legal profession – These men called upon to act a prominent part in future society -In what manner the peculiar pursuits of lawyers give an aristocratic turn to their ideas -Accidental causes which may check this tendency – Ease with which the aristocracy coalesces with legal men – Use of lawyers to a despot – The profession of the law constitutes the only aristocratic element with which the natural elements of democracy will combine – Peculiar causes which tend to give an aristocratic turn of mind to the English and American lawyers – The aristocracy of America is on the bench and at the bar – Influence of lawyers upon American society – Their peculiar magisterial habits affect the legislature, the administration, and even the people.

In visiting the Americans and in studying their laws we perceive that the authority they have entrusted to members of the legal profession, and the influence which these individuals exercise in the Government, is 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, since it may produce analogous consequences elsewhere.

The members of the legal profession have taken an important part in all the vicissitudes of political society in Europe during the last five hundred years. At one time they have been the instruments of those who were invested with political authority, and at another they have succeeded in converting political authorities into their instrument. In the Middle Ages they afforded a powerful support to the Crown, and since that period they have exerted themselves to the utmost to limit the royal prerogative. In England they have

contracted a close alliance with the aristocracy; in France they have proved to be the most dangerous enemies of that class. It is my object to inquire whether, under all these circumstances, the members of the legal profession have been swayed by sudden and momentary impulses; or whether they have been impelled by principles which are inherent in their pursuits, and which will always recur in history. I am incited to this investigation by reflecting that this particular class of men will most likely play a prominent part in that order of things to which the events of our time are giving birth.

Men who have more especially devoted themselves to legal pursuits derive from those occupations 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 which lawyers derive from their studies ensures them a separate station in society, and they constitute a sort of privileged body in the scale of intelligence. 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 the blind passions of parties in litigation to their purpose inspires them with a certain contempt for the judgment of the multitude. To this it may be added that they naturally constitute a body, not by any previous understanding, or by an agreement which directs them to a common end; but the analogy of their studies and the uniformity of their proceedings connect their minds together, as much as a common interest could combine their endeavors.

A portion of the tastes and of the habits of the aristocracy may consequently be discovered in the characters of men in the profession of the law. They participate in the same instinctive love of order and of 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 the advantages of the moment.

In a state of society in which the members of the legal

profession are prevented from holding 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. But it must then be inquired whether the cause which induces them to innovate and to destroy is accidental, or whether it belongs to some lasting purpose which they entertain. It is true that lawyers mainly contributed to the overthrow of the French monarchy in 1789; but it remains to be seen whether they acted thus because they had studied the laws, or because they were prohibited from co-operating in the work of legislation.

Five hundred years ago the English nobles headed the people, and spoke in its name; at the present time the aristocracy supports the throne, and defends the royal prerogative. But aristocracy has, notwithstanding this, its peculiar instincts and propensities. We must be careful not to confound isolated members of a body with the body itself. In all free governments, of whatsoever form they may be, members of the legal profession will be found at the head of all parties. The same remark is also applicable to the aristocracy; for almost all the democratic convulsions which have agitated the world have been directed by nobles.

A privileged body can never satisfy the ambition of all its members; it has always more talents and more passions to content and to employ than it can find places; so that a considerable number of individuals are usually to be met with who are inclined to attack those very privileges which they find it impossible to turn to their own account.

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 usually are so. In a community in 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 which are the more formidable to its security as they are independent of the nobility by their industrious pursuits; and they feel themselves to be its equal in point of intelligence, although they enjoy less opulence and less 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, the consistency of a single order of family interests.

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 individuals and the executive power than there is between them and the people; 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 occasionally resisted the prerogative of the Crown in concert with the lower classes.

Lawyers are attached to public order beyond every other consideration, and the best security of public order is authority. It must not be forgotten that, if they prize the free institutions of their country much, they nevertheless value the legality of those institutions far more: they are less afraid of tyranny than of arbitrary power; and provided that the legislature take upon 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 at the shadow. He would act more wisely in introducing men connected with the law into the government; and if he entrusted them with the conduct of a despotic power, bearing some marks of violence, that power would most likely assume the external features of justice and of legality in their hands.

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, they are sure to occupy the highest stations, 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 to combine with the aristocracy and to support the Crown, they are naturally brought into 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 states does not mistrust the members of the legal profession, because it is well known that they are interested in serving the popular cause; and it listens to them without irritation, because it does not attribute to them any sinister designs. The object of lawyers is not, indeed, to overthrow the institutions of democracy, but they constantly endeavor to give it an impulse which diverts it from its real tendency, by means which are foreign to its nature. Lawyers belong to the people by birth and interest, to the aristocracy by habit and by taste, and they may be looked upon as the natural bond and connecting link of the two great classes of society.

The profession of the law is the only aristocratic element which can be amalgamated without violence with the natural elements of democracy, and which can be advantageously and permanently combined with them. I am not unacquainted with the defects which are inherent in the character of that 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 subsist 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 legislation, and the position which those persons 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 the decisions of their forefathers. In the mind of an English or American lawyer a taste and a reverence for what is old is almost always united to a love of regular and lawful proceedings.

This predisposition has another effect upon the character of the legal profession and upon the general course of society. The English and American lawyers investigate what has been done; the French advocate inquires what should have been done; the former produce precedents, the latter reasons. A French observer is surprised to hear how often an

English dr an American lawyer quotes the opinions of others, and how little he alludes to his own; whilst the reverse occurs in France. There the most trifling litigation is never conducted without the introduction of an entire system of ideas peculiar to the counsel employed; and the fundamental principles of law are discussed in order to obtain a perch of land by the decision of the court. This abnegation of his own opinion, and this implicit deference to the opinion of his forefathers, which are common to the English and American lawyer, this subjection of thought which he is obliged to profess, necessarily give him more timid habits and more sluggish inclinations in England and America than in France.

The French codes are often difficult of comprehension, but they can be read by every one; nothing, on the other hand, can be more impenetrable to the uninitiated than a legislation founded upon precedents. The indispensable want of legal assistance which is felt in England and in the United States, and the high opinion which is generally entertained of the ability of the legal profession, tend to separate it more and more from the people, and to place it in 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.

The station which lawyers occupy in England and America exercises no less an influence upon their habits and their opinions. The English aristocracy, which has taken care to attract to its sphere whatever is at all analogous to itself, has conferred a high degree of importance and of authority upon the members of the legal profession. In English society lawyers do not occupy the first rank, but they are contented with the station assigned to them; they constitute, as it were, the younger branch of the English aristocracy, and they are attached to their elder brothers, although they do not enjoy all their privileges. The English lawyers consequently mingle the taste and the ideas of the aristocratic circles in which they move with the aristocratic interests of their profession.

And indeed the lawyer-like character which I am endeavoring to depict is most distinctly to be met with in England: there laws are esteemed not so much because they are good as because they are old; and if it be necessary to modify them in any respect, or to adapt them the changes which time

operates in society, recourse is had to the most inconceivable contrivances in order to uphold the traditionary fabric, and to maintain that nothing has been done which does not square with the intentions and complete the labors of former generations. The very individuals who conduct these changes disclaim all intention of innovation, and they had rather resort to absurd expedients than plead guilty to so great a crime. This spirit appertains more especially to the English lawyers; they seem indifferent to the real meaning of what they treat, and they direct all their attention to the letter, seeming inclined to infringe the rules of common sense and of humanity rather than to swerve one title from the law. The English legislation may be compared to the stock of an old tree, upon which lawyers have engrafted the most various shoots, with the hope that, although their fruits may differ, their foliage at least will be confounded with the venerable trunk which supports them all.

In America there are no nobles or men of letters, and the people is apt to mistrust the wealthy; lawyers consequently form the highest political class, and the most cultivated circle 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 composed of the rich, who are united together 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 shall we 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 perceive how eminently the legal profession is qualified by its powers, and even by its defects, to neutralize the vices which are inherent in popular government. When the American people is intoxicated by passion, or carried away by the impetuosity of its ideas, it is checked and stopped by the almost invisible influence of its legal counsellors, who secretly oppose their aristocratic propensities to its democratic instincts, their superstitious attachment to what is antique 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 most 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 which he has contracted in the study of legislation, derives an additional love of stability from his own inalienable functions. His legal attainments have already raised him to a distinguished rank amongst his fellow-citizens; his political power completes the distinction of his station, and gives him the inclinations natural to privileged classes.

Armed with the power of declaring the laws to be unconstitutional,* the American magistrate perpetually interferes in political affairs. He cannot force the people to make laws, but at least he can oblige it not to disobey its own enactments; or to act inconsistently with its own principles. 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 the judges from their station. By some other constitutions the members of the tribunals are elected, 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 the attack which is made upon the judicial power has affected the democratic republic itself.

It must not, however, be supposed that the legal spirit of which I have been speaking has been confined, in the United States, to the courts of justice; it extends far beyond them. As the lawyers constitute the only enlightened class which the people does not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies, and they conduct the administration; they consequently exercise a powerful influence upon the formation of the law, and upon its execution. The lawyers are, however, obliged to yield to the current of public opinion, which is too strong for them to resist it, but it is easy to find indications of what their conduct would be if they were free to act as they chose. The Americans, who have made such copious innovations in their political legislation, have introduced very sparing alterations in their civil laws, and that with great difficulty, although those laws are frequently repugnant to their social condition. The reason of this is, that

*See chapter VI. on the "Judicial Power in the United States."

in matters of civil law the majority is obliged to defer to the authority of the legal profession, and that the American lawyers are disinclined to innovate when they are left to their own choice.

It is curious for a Frenchman, accustomed to a very different state of things, to hear the perpetual complaints which are made in the United States against the stationary propensities of legal men, and their prejudices in favor of existing institutions.

The influence of the legal habits which are common in America extends beyond the limits I have just pointed out. Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate; hence all parties are obliged to borrow the ideas, and even the language, usual in judicial proceedings in their daily controversies. As most public men are, or have been, legal practitioners, they introduce the customs and technicalities of their profession into the affairs of the country. The jury extends this habitude 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 the whole people contracts the habits and the tastes of the 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 to all the movements of the social body; but this party extends over the whole community, and it penetrates into all classes of society; it acts upon the country imperceptibly, but it finally fashions it to suit its purposes.

Chapter XVI: Causes Mitigating Tyranny in the United States – Part II

Trial by Jury in the United States Considered as a Political Institution

Trial by jury, which is one of the instruments of the sovereignty of the people, deserves to be compared with the other laws which establish that sovereignty – Composition of the jury in the United States – Effect of trial by jury upon the national character – It educates the people – It tends to establish the authority of the magistrates and to extend a knowledge of law among the people.

Since I have been led by my subject to recur to the administration of justice in the United States, I will not pass over this point without adverting to the institution of the jury. Trial by jury may be considered in two separate points of view, as a judicial and as a political institution. If it entered into my present purpose to inquire how far trial by jury (more especially in civil cases) contributes to insure the best administration of justice, I admit that its utility might be contested. As the jury was first introduced at a time when society was in an uncivilized state, and when courts of justice were merely called upon to decide on the evidence of facts, it is not an easy task to adapt it to the wants of a highly civilized community when the mutual relations of men are multiplied to a surprising extent, and have assumed the enlightened and intellectual character of the age.*

My present object is to consider the jury as a political institution, and any other course would divert me from my subject. Of trial by jury, considered as a judicial institution, I shall here say but very few words. When the English adopted trial by jury they were a semi-barbarous people; they are be-

*The investigation of trial by jury as a judicial institution, and the appreciation of its effects in the United States, together with the advantages the Americans have derived from it, would suffice to form a book, and a book upon a very useful and curious subject. The State of Louisiana would in particular afford the curious phenomenon of a French and English legislation, as well as a French and English population, which are gradually combining with each other. See the "Digeste des Lois de la Louisiane," in two volumes; and the "Traite sur les Regles des Actions civiles," printed in French and English at New Orleans in 1830.

come, in course of time, one of the most enlightened nations of the earth; and their attachment to this institution seems to have increased with their increasing cultivation. They soon spread beyond their insular boundaries to every corner of the habitable globe; some have formed colonies, others independent states; the mother-country has maintained its monarchical constitution; many of its offspring have founded powerful republics; but wherever the English have been they have boasted of the privilege of trial by jury.* They have established it, or hastened to re-establish it, in all their settlements. A judicial institution which obtains the suffrages of a great people for so long a series of ages, which is zealously renewed at every epoch of civilization, in all the climates of the earth and under every form of human government, cannot be contrary to the spirit of justice.**

*All the English and American jurists are unanimous upon this head. Mr. Story, judge of the Supreme Court of the United States, speaks, in his "Treatise on the Federal Constitution," of the advantages of trial by jury in civil cases: – " The inestimable privilege of a trial by jury in civil cases -a privilege scarcely inferior to that in criminal cases, which is counted by all persons to be essential to political and civil liberty… ." (Story, book iii., chap. xxxviii.)

**If it were our province to point out the utility of the jury as a judicial institution in this place, much might be said, and the following arguments might be brought forward amongst others: –

By introducing the jury into the business of the courts you are enabled to diminish the number of judges, which is a very great advantage. When judges are very numerous, death is perpetually thinning the ranks of the judicial functionaries, and laying places vacant for newcomers. The ambition of the magistrates is therefore continually excited, and they are naturally made dependent upon the will of the majority, or the individual who fills up the vacant appointments; the officers of the court then rise like the officers of an army. This state of things is entirely contrary to the sound administration of justice, and to the intentions of the legislator. The office of a judge is made inalienable in order that he may remain independent: but of what advantage is it that his independence should be protected if he be tempted to sacrifice it of his own accord? When judges are very numerous many of them must necessarily be incapable of performing their important duties, for a great magistrate is a man of no common powers; and I am inclined to believe that a half-enlightened tribunal is the worst of all instruments for attaining those objects which it is the purpose of courts of justice to accomplish. For my own part, I had rather submit the decision of a case to ignorant jurors directed by a skilful judge than to judges a majority of whom are imperfectly acquainted with jurisprudence and with the laws.

I turn, however, from this part of the subject. To look upon the jury as a mere judicial institution is to confine our attention to a very narrow view of it; for however great its influence may be upon the decisions of the law courts, that influence is very subordinate to the powerful effects which it produces on the destinies of the community at large. The jury is above all a political institution, and it must be regarded in this light in order to be duly appreciated.

By the jury I mean a certain number of citizens chosen indiscriminately, and invested with a temporary right of judging. Trial by jury, as applied to the repression of crime, appears to me to introduce an eminently republican element into the government upon the following grounds:-

The institution of the jury may be aristocratic or democratic, according to the class of society from which the jurors are selected; but it always preserves its republican character, inasmuch as it places the real direction of society in the hands of the governed, or of a portion of the governed, instead of leaving it under the authority of the Government. Force is never more than a transient element of success; and after force comes the notion of right. A government which should only be able to crush its enemies upon a field of battle would very soon be destroyed. The true sanction of political laws is to be found in penal legislation, and if that sanction be wanting the law will sooner or later lose its cogency. He who punishes infractions of the law is therefore the real master of society. Now the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.*

In England the jury is returned from the aristocratic portion of the nation;** the aristocracy makes the laws, applies

*An important remark must, however, be made. Trial by jury does unquestionably invest the people with a general control over the actions of citizens, but it does not furnish means of exercising this control in all cases, or with an absolute authority. When an absolute monarch has the right of trying offences by his representatives, the fate of the prisoner is, as it were, decided beforehand. But even if the people were predisposed to convict, the composition and the non-responsibility of the jury would still afford some chances favorable to the protection of innocence.

**This may be true to some extent of special juries, but not of common juries. The author seems not to have been aware that the qualifications of jurors in England vary exceedingly.

the laws, and punishes all infractions of the laws; everything is established upon a consistent footing, and England may with truth be said to constitute an aristocratic republic. In the United States the same system is applied to the whole people. Every American citizen is qualified to be an elector, a juror, and is eligible to office.* The system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. These institutions are two instruments of equal power, which contribute to the supremacy of the majority. All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury. The monarchs of the House of Tudor sent to prison jurors who refused to convict, and Napoleon caused them to be returned by his agents.

However clear most of these truths may seem to be, they do not command universal assent, and in France, at least, the institution of trial by jury is still very imperfectly understood. If the question arises as to the proper qualification of jurors, it is confined to a discussion of the intelligence and knowledge of the citizens who may be returned, as if the jury was merely a judicial institution. This appears to me to be the least part of the subject. The jury is pre-eminently a political institution; it must be regarded as one form of the sovereignty of the people; when that sovereignty is repudiated, it must be rejected, or it must be adapted to the laws by which that sovereignty is established. The jury is that portion of the nation to which the execution of the laws is entrusted, as the Houses of Parliament constitute that part of the nation which makes the laws; and in order that society may be governed with consistency and uniformity, the list of citizens qualified to serve on juries must increase and diminish with the list of electors. This I hold to be the point of view most worthy of the attention of the legislator, and all that remains is merely accessory.

I am so entirely convinced that the jury is pre-eminently a political institution that I still consider it in this light when it is applied in civil causes. Laws are always unstable unless they are founded upon the manners of a nation; manners are the only durable and resisting power in a people. When the

*See Appendix, Q.

jury is reserved for criminal offences, the people only witnesses its occasional action in certain particular cases; the ordinary course of life goes on without its interference, and it is considered as an instrument, but not as the only instrument, of obtaining justice. This is true a fortiori when the jury is only applied to certain criminal causes.

When, on the contrary, the influence of the jury is extended to civil causes, its application is constantly palpable; it affects all the interests of the community; everyone cooperates in its work: it thus penetrates into all the usages of life, it fashions the human mind to its peculiar forms, and is gradually associated with the idea of justice itself.

The institution of the jury, if confined to criminal causes, is always in danger, but when once it is introduced into civil proceedings it defies the aggressions of time and of man. If it had been as easy to remove the jury from the manners as from the laws of England, it would have perished under Henry VIII, and Elizabeth, and the civil jury did in reality, at that period, save the liberties of the country. In whatever manner the jury be applied, it cannot fail to exercise a powerful influence upon the national character; but this influence is prodigiously increased when it is introduced into civil causes. The jury, and more especially the jury in civil cases, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right. If these two elements be removed, the love of independence is reduced to a mere destructive passion. It teaches men to practice equity, every man learns to judge his neighbor as he would himself be judged; and this is especially true of the jury in civil causes, for, whilst the number of persons who have reason to apprehend a criminal prosecution is small, every one is liable to have a civil action brought against him. The jury teaches every man not to recoil before the responsibility of his own actions, and impresses him with that manly confidence without which political virtue cannot exist. It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it

rubs off that individual egotism which is the rust of society.

The jury contributes most powerfully to form the judgement and to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws of his country, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even by the passions of the parties. I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes. I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.

What I have hitherto said applies to all nations, but the remark I am now about to make is peculiar to the Americans and to democratic peoples. I have already observed that in democracies the members of the legal profession and the magistrates constitute the only aristocratic body which can check the irregularities of the people. This aristocracy is invested with no physical power, but it exercises its conservative influence upon the minds of men, and the most abundant source of its authority is the institution of the civil jury. In criminal causes, when society is armed against a single individual, the jury is apt to look upon the judge as the passive instrument of social power, and to mistrust his advice. Moreover, criminal causes are entirely founded upon the evidence of facts which common sense can readily appreciate; upon this ground the judge and the jury are equal. Such, however, is not the case in civil causes; then the judge appears as a disinterested arbiter between the conflicting passions of the parties. The jurors look up to him with confidence and listen to him with respect, for in this instance their intelligence is completely under the control of his learning. It is the judge who sums up the various arguments with which their memory has been wearied out, and who guides them through the devious course of the proceedings; he points their attention to the exact question of fact which they are

called upon to solve, and he puts the answer to the question of law into their mouths. His influence upon their verdict is almost unlimited.

If I am called upon to explain why I am but little moved by the arguments derived from the ignorance of jurors in civil causes, I reply, that in these proceedings, whenever the question to be solved is not a mere question of fact, the jury has only the semblance of a judicial body. The jury sanctions the decision of the judge, they by the authority of society which they represent, and he by that of reason and of law.*

In England and in America the judges exercise an influence upon criminal trials which the French judges have never possessed. The reason of this difference may easily be discovered; the English and American magistrates establish their authority in civil causes, and only transfer it afterwards to tribunals of another kind, where that authority was not acquired. In some cases (and they are frequently the most important ones) the American judges have the right of deciding causes alone.** Upon these occasions they are accidentally placed in the position which the French judges habitually occupy, but they are invested with far more power than the latter; they are still surrounded by the reminiscence of the jury, and their judgment has almost as much authority as the voice of the community at large, represented by that institution. Their influence extends beyond the limits of the courts; in the recreations of private life as well as in the turmoil of public business, abroad and in the legislative assemblies, the American judge is constantly surrounded by men who are accustomed to regard his intelligence as superior to their own, and after having exercised his power in the decision of causes, he continues to influence the habits of thought and the characters of the individuals who took a part in his judgment.

The jury, then, which seems to restrict the rights of magistracy, does in reality consolidate its power, and in no country are the judges so powerful as there, where the people partakes their privileges. It is more especially by means of the jury in civil causes that the American magistrates imbue all classes of society with the spirit of their profession. Thus the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it to rule well.

*See Appendix, R.

**The Federal judges decide upon their own authority almost all the questions most important to the country.