

## THE CHANGING PROFESSIONAL ENVIRONMENT AND THE IDEAL OF GENERAL PRACTICE

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In addressing this subject, like many other aspects of American institutions, it is interesting to begin with a passage from *Democracy in America* by Alexis de Tocqueville.<sup>1</sup> De Tocqueville had much to say about the legal profession, all of it interesting and much of it very acute. The following is part of his introduction to *On the Spirit of the Lawyer in the United States and How it Serves as a Counterweight to Democracy*:

The special knowledge that lawyers acquire in studying the law assures them a separate rank in society; they form a sort of privileged class among [persons of] intelligence. . . . [T]hey are masters of a necessary science, . . . they serve as arbiters between citizens, and the habit of directing the blind passions of the litigants toward a goal gives them a certain scorn for the judgment of the crowd. . . . It is not that they agree among themselves . . . but community of studies and unity of methods bind their minds to one another as interest could unite their wills.<sup>2</sup>

It is not politically correct, in most circles, to contrast law, lawyers or law practice with democracy, or to acknowledge differences in rank in society, or the existence of classes, let alone a “privileged class.” However, de Tocqueville was not subject to these constraints. He was examining American democracy from a perspective schooled in the *ancien regime* of France.<sup>3</sup> In that framework, the existence of classes and ranks in society was assumed and the very idea of democracy viewed with wonderment and apprehension. Indeed, it is that different

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1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

2. *Id.* at 252 (first alteration in original).

3. See Harvey C. Mansfield & Delba Winthrop, *Introduction* to DE TOCQUEVILLE, *supra* note 1, at xix-xxiii, xxxix.

framework that helped give de Tocqueville's observations their lasting interest and, in the minds of many, their cogency.

It will be helpful, however, to recall the characteristics of law practice as it stood in the first half of the nineteenth century, which of course was the scene observed by de Tocqueville.<sup>4</sup> At that time, most lawyers practiced in towns and relatively small cities, because there were no cities of great size. The populations of our largest cities, New York City and Philadelphia, for example, were under 205,000 and no other cities approximated that size.<sup>5</sup> Most of our population lived on farms or in small towns linked to farm economies. Farm economies are relatively stable over time; hence, they do not involve new types of legal transactions or legal disputes. Travel was not easy because the railroad had not yet been invented and the steamboat could operate only along navigable rivers. Hence, law practice was highly localized. Famous lawyers like Daniel Webster of Massachusetts might journey to Washington, but only on infrequent occasion.<sup>6</sup> Most lawyers lived out their professional lives in one community.

Lawyers typically practiced as solos, from time to time assisted by an apprentice or two.<sup>7</sup> A characteristic professional life cycle involved beginning with an apprenticeship, then perhaps a junior partnership, then going out on one's own.<sup>8</sup> There were a few law partnerships but apparently none having more than three lawyers.<sup>9</sup> Even within a firm each lawyer ordinarily did all the work required by his clients. Each lawyer also did whatever kind of work his clients might need, although there was some specialization as between court practice and office practice. Each lawyer's practice was his very own—there were very few women lawyers.<sup>10</sup> Thus, law practice was small in the scale of operation, personal in relationships with clients and with other lawyers, and limited in subject matter. The subject matter was "general" in that most lawyers could do all the kinds of work that their clientele might require. On this basis it could properly be described as "general practice."

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4. Alexis de Tocqueville was born on July 29, 1805 and died in April of 1859. *See id.* at xix.

5. *See id.* at 266; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 271 (1973).

6. For a discussion of the oratory talent of Daniel Webster, *see* FRIEDMAN, *supra* note 5, at 273-75, 285, 551.

7. *See id.* at 271-72.

8. *See id.* at 278, 281-82.

9. *See id.* at 552.

10. *See id.* at 550, 553 n.10.

Law practice in today's milieu is, of course, very different.<sup>11</sup> There are many very large law firms, with hundreds or even thousands of lawyers.<sup>12</sup> There are many more law firms having as many as fifty or one hundred lawyers.<sup>13</sup> Law firms of ten members are not uncommon even in small cities.<sup>14</sup> Firms of these sizes necessarily are internally specialized, at least to some degree, and they operate through more or less systematic office procedures such as those for checking conflicts of interest, assigning work according to subject specialization, managing the files, and handling money.<sup>15</sup> Smaller law firms located within metropolitan areas tend to be highly specialized, for example, in personal injury work, matrimonial matters, criminal defense, or other technical specialties.<sup>16</sup> Smaller firms outside the metropolitan areas are declining in number. That change appears to be partly the result of the external competitive force emanating from expanding metropolitan regions—"urban sprawl" as we call it—and partly the result of the internal force of difficulty in maintaining a satisfactory level of competence in a legal world of increasingly specialized knowledge.

The "general practitioner" thus has become a vanishing breed. This transformation of law practice began over a century ago, although the traditional image of general practice was still widely held until about one professional generation ago—thirty years or so. A similar transformation is now far advanced in England and other common law countries and, although more slowly evolving, in other countries. The path of evolution is clearly in that direction.

What, if anything, has been lost in the diminution and foreseeable disappearance of the solo practitioner that de Tocqueville portrayed? Not, I suggest, the "specialized knowledge" in the sense of legal knowledge as such. Lawyers' knowledge of the law is no less specialized than a century and a half ago and indeed has become much more specialized than in earlier eras. It is true that the fields of

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11. See generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991) (describing the transformation of the legal practice—particularly of large law firms—that occurred between the 1960s and the 1980s); Chief Justice William H. Rehnquist, *The Legal Profession Today*, 62 *IND. L.J.* 151 (1987) (discussing the changing nature of the legal profession in the late twentieth century).

12. See Michael D. Goldhaber, *Biggest Firms in the Nation Fare the Best*, *N.Y. L.J.*, Nov. 30, 2000, at 1 (stating that as of that date the seven largest firms in the United States have over one thousand attorneys and fifty-seven firms number over five hundred attorneys).

13. See GALANTER & PALAY, *supra* note 11, at 46.

14. See, e.g., Steven Keeva & Kerry Klumpe, *Small Firms, Big Clients*, *A.B.A. J.*, Jan. 1995, at 48, 48.

15. See GALANTER & PALAY, *supra* note 11, at 48; Rehnquist, *supra* note 11, at 153-54.

16. See Keeva & Klumpe, *supra* note 14, at 48-54.

specialized knowledge within law practice are increasingly shared with professionals from other disciplines, such as accountancy, employment practice, environmental science, or the construction industry, etc. The specialized knowledge and technical vocabulary in various fields are correspondingly incomprehensible outside the circles of each specialty. But most all lawyers still retain the kind of specialized knowledge that de Tocqueville had in mind. This remains particularly true of lawyers' access to relatively remote and written sources of authority—"lawyers' law"—as distinct from the authority of local custom and practice.

Also not lost has been the status of lawyers as a relatively privileged class. None of us wear work gloves and most of us read a daily newspaper.

Lawyers also still redirect "blind passion" on the part of clients. Of course, from time to time there are trials in which appeal is made to the "judgment of the crowd"—for example, in some jury trials in some parts of the country or in the increasingly prevalent competitive displays for the news media.<sup>17</sup> But over ninety-five percent of civil cases are resolved by settlement, not trial.<sup>18</sup> A corresponding proportion of criminal prosecutions are resolved in similar fashion.<sup>19</sup> These resolutions usually have been negotiated by the lawyers.<sup>20</sup> To get to a settlement or plea bargain, the lawyers typically have had to cool down their clients, or even chill them out, in order to bring their clients' respective expectations into the zone of settlement.<sup>21</sup> The sentiments involved are the opposite of "blind passion" and usually reflect highly sophisticated judgments rather than the "judgment of the crowd."

As de Tocqueville observed, however, it is not that the lawyers "agree among themselves" as to what is justice or sound public policy. Rather, it is that they are "masters of a necessary science."<sup>22</sup> That science is the knowledge required effectively to "bargain in the shadow of the law."<sup>23</sup> Lawyers serve as "arbiters," in de Tocqueville's phrase, because they are able to make reasonably accurate estimates of what the official

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17. See generally Roscoe C. Howard, Jr., *The Media, Attorneys, and Fair Criminal Trials*, 4 KAN. J.L. & PUB. POL'Y 61 (1995) (discussing the proper involvement the bar and the courts should have with the media in criminal cases in light of recent jury trial media spectacles); Anthony J. DeVito, *Calif. v. O.J.: Chicanery or Search for Truth?*, N.Y. L.J., Aug. 23, 1995, at 2 (describing how the defense team in the O.J. Simpson murder trial played to the courtroom television cameras).

18. See JOHN S. MURRAY ET AL., *NEGOTIATION* 147 (2d ed. 1996).

19. See *Brady v. United States*, 397 U.S. 742, 752 n.10 (1970).

20. See MURRAY ET AL., *supra* note 18, at 147.

21. See *id.* at 148.

22. DE TOCQUEVILLE, *supra* note 1, at 252.

23. See Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

arbiters will decide if a dispute proceeds to such a resolution, i.e., is submitted to a judge, jury, or administrative agency official.<sup>24</sup>

The model resolution of legal disputes remains settlement, typically negotiated by lawyers on either side. When the cases have gone through preliminary skirmishing, have completed discovery, and have finally been assigned a trial date, the cases typically settle through compromise worked out by the trial advocates.<sup>25</sup> To this extent lawyers still act as “arbiters,” just as they did in earlier days. Yet, I suggest there has been loss, one that occurs at an earlier stage of the process of dispute resolution.

The loss I refer to is the cost incurred where legal problems go far into legal process before resolution is achieved. In litigation matters, this loss is manifested in the seemingly mysterious combination of ever-increasing volumes of litigation but ever-diminishing numbers of actual adjudication. Our colleague Judge Patrick Higginbotham has thoughtfully commented on this phenomenon.<sup>26</sup> There is similar cost in the preliminaries of modern transaction practice. Here the loss is the cost of such procedures as due diligence investigation and often prolonged negotiation of “warranties and reps.” There are, of course, many possible explanations for this phenomenon. But one contributing cause would seem to be the diminishing significance of the role of lawyers at stages of interaction *before* resort is made to litigation of a dispute or to documentation of a transaction.

This possibility is revealed by bringing to mind the world of law practice as observed by de Tocqueville as compared with the world of contemporary law practice. A century and a half ago lawyers constituted a handful of individuals in any given community who were distinguished by their literacy, often very cultured literacy; by their familiarity with a complicated body of legal norms including federal and state law, constitutional law and legislation, and common law precedent; by their knowledge of legal procedure, particularly its potential for delay; by their acquaintance with local history and religious and moral sentiment; by their personal or second-hand acquaintance with most major actors in their community, and even third-hand knowledge of

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24. See MURRAY ET AL., *supra* note 18, at 3-5 (explaining the importance of information as a resource in settlement negotiations).

25. See *id.* at 148-49 (describing the impact each phase of litigation has on settlement negotiations).

26. See Judge Patrick Higginbotham, The Changing Times of the U.S. District Courts, Address at the ALI Annual Meeting (May 15, 2001), in A.L.I. REP. (Am. Law Inst., Phila.), Summer 2001, available at [http://www.ali-aba.org/ali/R2304\\_Rhenquist.htm](http://www.ali-aba.org/ali/R2304_Rhenquist.htm) (last visited Mar. 14, 2002).

many of the local laborers; and by their familiarity with the local judge and the likely makeup of a jury.

All members of the bar were acquainted on a more or less intimate basis with the local “establishment.” Most of them were more or less neutral in political attachment even though many of them held various elective offices. Few of them had an “ideology.” Almost all of them were skeptics in one degree or another. The mental world of the old-fashioned general practitioner is best captured in fiction, for example, Atticus Finch in *To Kill a Mockingbird*<sup>27</sup> and the various lawyers in James Gould Cozzens’s *By Love Possessed*.<sup>28</sup> All small town lawyers who continued to make a living in practice knew these matters—the kind of personal knowledge that is always ready at hand. They could draw together the strands of their experience into assessments of how a dispute was likely to be resolved (in litigation matters) or how a transaction could be effectuated (in transaction practice). Shared assessments of these imponderables were held by the small group holding the local monopoly for dealing with them—the lawyers of the town, typically the county seat. The lawyers in that milieu therefore usually would know, when a matter came in their office doors, what is known by modern trial lawyers only at the conclusion of discovery or known by modern transactional lawyers only at the end of a “due diligence” investigation.

By the same token, the lawyers in de Tocqueville’s era generally were highly visible in their local practice venues. Having lived their whole adult lives in full view of most everyone in town, they had “track records” that they were anxious to maintain.<sup>29</sup> Some lawyers of course were regarded as crooks or shysters, but most members of the bar carefully nurtured reputations for probity.<sup>30</sup> Since probity is difficult to simulate, most lawyers were in fact careful about how they conducted themselves.

In the modern setting, the situation for most lawyers is very different. A lawyer involved in a modern litigation matter lacks the kind of knowledge about a dispute which the lawyer in de Tocqueville’s era ordinarily would have even before the matter came into the office. A modern lawyer involved in a modern transaction similarly lacks the knowledge about a transaction that a lawyer of yesteryear would have had simply from having been around town. The modern lawyers have to

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27. HARPER LEE, *TO KILL A MOCKINGBIRD* (Warner Books 1982) (1960).

28. JAMES GOULD COZZENS, *BY LOVE POSSESSED* (Carroll & Graf 1998) (1957).

29. See FRIEDMAN, *supra* note 5, at 270.

30. See *id.* at 265-66.

use elaborate and often coercive procedures even to get oriented in a contemporary legal dispute or transaction. Lawyers of today therefore cannot constitute the body of “arbiters” that de Tocqueville described. To be sure, lawyers can come to be “arbiters” of a kind through their efforts to settle litigation and resolve conflict over the “boilerplate” in transaction documents. But they arrive at that position only after a preliminary, and often costly, set of court or office procedures.

That development no doubt has contributed to the lower esteem in which the legal profession is now held. It is not that our predecessors in the practice of law were all virtuous. It is simply that most old-fashioned lawyers performed valuable functions of reconciliation within their communities that offset the traditional vices committed by or attributed to many of our fellow professionals—dilatoriness, neglect, occasional conflict of interest, etc. Both the profession and the public are poorer for it.