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DEMOCRACY IN AMERICA AND THE POSSIBILITIES FOR LAW WITHOUT THE STATE

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> Nothing, at first sight, seems less important than the external formalities of human behavior, yet there is nothing to which men attach more importance. They can get used to anything except living in a society which does not share their manners.
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> —Alexis de Tocqueville, *Democracy in America*, p. 605

THE NOTION THAT MORES serve as the foundation of social order is a particularly important facet of eighteenth-century British philosophy, one which a wide range of political thinkers have carried into the present day (Berry 1997 and Pocock 1993). As such, these political ideas tend to eschew reliance on *a priori* abstractions in favor of more empirical and commonsensical notions of politics. However, the tide of post-Enlightenment thought was too strong and the rationalist aim of true intellectual autonomy undermined many attempts to maintain a political order without appeal to abstract principles (Oakeshott 1991). At least for a good portion of the last century, a philosophical understanding of politics that ignored the concrete particulars of a people's customs and history reigned (Rawls 1999).

To some extent contemporary thinking prejudices scholarship against the notion that civil peace is even possible without formal law that establishes intentionally and rationally constructed rules with the police power of a government to enforce those rules (Moore 2000, pp. 1–4). The modern prejudice toward what has been termed "legal centralism" led many of these scholars' predecessors to skewed conclusions about the nature of disputes and conflicts within

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social groups. However, recently scholars in anthropology, history, and economics have reemphasized the role of community norms in the maintenance of social order (Ellickson 1991, chaps. 8 and 9). Specifically, historians and anthropologists examining stateless and semi-stateless societies have done much to correct this trend of understanding society's laws only through the lens of a unitary state actor.[1] Building on these writings, a distinct branch of recent scholarship in legal circles suggests that even in the modern world, societies can maintain social order despite the absence of extensive state power.

It is no mere flight of fancy to suggest that citizens and groups often avoid involving the state in their disputes. In the 1950s, businesses in the United States dealt with roughly 75 percent of otherwise unresolved disputes through private arbitration. Today the figure is even higher (Benson 1998, p. 113). Yet this is not a solely economic phenomenon. In Shasta County, California, ranchers and farmers often completely ignore the law in favor of settling issues and keeping order between themselves using commonsensical notions of "neighborliness" and morality (Ellickson 1991, pp. 15–120). According to some, these studies carry with them the strong implication that the state need not be nearly as involved in the day-to-day regulation of legal affairs as it presently stands. Instead, they advocate the creation of a system of "polycentric" law, where the state could at least partially privatize many functions of the current system, returning justice and the maintenance of order to what these authors see as law's historic place in the private sphere (Benson 1990, chap. 14, and Barnett 1998, chap. 14).

In addition to historical evidence, these scholars rely on economics as their most significant analytical tool. Since economic theory describes the ways in which individuals respond to the constraints and incentives of their environment, it only requires a scenario where resources are scarce and must be allocated among individuals and groups. Consequently, they argue there is little reason not to apply it to the problems of the legal system (Benson 1990, p. 2). Economic reasoning naturally lends itself to certain sorts of questions such as whether one form of legal regime is more efficient than another (Benson 1998, p. 6). As such, these studies make significant

[1]The landmark works in anthropology are Moore (2000) and Roberts (1979). On the generally decentralized, practice-based as opposed to law- or rule-centered nature of Medieval social order, the best work is Althoff (1990). Other representative histories include Brown (2001), White (1987), Althoff (1997), and Geary (1994).

strides in pointing out the difficulties of our present methods in criminal justice and dispute resolution. Yet while it is quite capable of describing the formal characteristics of complex interaction, beyond pointing to entrenched interests changing incentive structures, this economic logic alone cannot explain why legal decentralization consistently fails to capture attention as a legitimate public policy option (Benson 1998, pp. 195–226).

Alexis de Tocqueville's *Democracy in America* raises a particularly provocative series of issues which challenge some of the basic assumptions of law and economics scholarship on dispute settlement.[2] Presuming that as a descriptive tool, the economic reasoning they use is correct, this article nonetheless suggests there is a deeper set of issues at work than simply interest-based politics in preventing a turn to polycentric law, and that these notions stand outside the scope of economic analysis. I proceed in three main parts. First, law and economics scholars point to the historical record, combine it with economic reasoning about contemporary problems, and assert we can return to various forms of legal decentralization. Therefore, it is critical to examine the historical anthropology underlying the move from order without law to legal centralism. Second, in *Democracy in America,* Tocqueville suggests that there are real, qualitative differences between the social makeup of democratic and aristocratic ages, and that each have distinctive and incommensurable characteristics. Third, I engage in an exposition of these differences to show that the historical anthropology of legal decentralization bears a striking resemblance to that of Tocqueville's bygone aristocratic age and that it is differences peculiar to democracies which lead them away from political decentralization and toward the nation-state. By way of conclusion, I discuss the forces which tend to keep democratic peoples out of the state's power and analyze the real possibilities for freedom and legal decentralization in a democracy.

Law, Economics, and Historical Anthropology

At risk of conflating several authors' arguments, those who advocate a new regime of legal decentralization make three major claims. First, they argue that historically, order without law existed in the past and persists today in many stateless and semi-stateless societies. The existence of such regimes provides a clear set of examples from which we might envision a better way of maintaining civic order and

[2]On the usefulness of abstractions in *Democracy in America*, see Nisbet (1988, pp. 189–90).

individual rights (Benson 1990, pp. 15–36, and 1998, pp. 195–226). Second, they point out that the state has already partially privatized portions of the criminal justice and legal system, and that this fact affects many areas of everyday life (Benson 1998, pp. 113–26). Alongside this privatizing trend, they cite clear precedents where individuals and groups are either unaware of or simply ignore the existing law in favor of their own customs and common sense (Ellickson 1991, pp. 15–120). They argue that both of these facts call into question the need for large-scale state intervention to maintain order. Third, they claim that in many ways the state consistently fails to provide the sort of security it promises. This creates a real need for a better method, one which we can find in a more thorough privatization of some or all legal and juridical functions. We would slowly replace the old system with a set of spontaneously generated and self-correcting customary rules suggested by the needs of business and everyday life; private companies would administer this new order (Benson 1990, pp. 357–74).

Of course, this requires a significant circumscription of what we think law should achieve. If we limit law merely to those measures that facilitate interaction and minimize conflict, the law would only provide three major functions:

> (1) determining individuals' property holdings (property law); (2) governing cooperative exchanges of property (contract law, including conveyancing); and (3) protecting persons and their property, including methods of property transfer, from third-party aggression (tort law). (Benson 1990, p. 351)

The language employed should make clear that this entire analysis presupposes efficiency is the fundamental goal of our social order.

Standing on its own terms, this vision of how we might rethink law makes a good deal of sense. But that presupposes efficiency is actually our goal in living together. At times, that objective seems very much at odds with the actions of many individuals. Despite the criminal justice system's clear failures, the resistance which any further legal decentralization faces is often rather stunning. While we can explain this opposition by pointing to the entrenched interests of government bureaucrats and police unions, there are good reasons to think this explanation fails to explain the reasons behind our attachment to the present order. Given the huge implications of privatizing law, it is worth asking whether any interest-based or efficiency-oriented explanation fully describes the obstacles to this end.[3]

[3]See Benson (1990, pp. 331–45) for an interest-based explanation of the obstacles facing legal decentralization.

Law and economics scholarship paints a picture of the rise of state-based or "authoritarian" law which assumes that individuals simply respond to the incentive structure presented to them. As such, it assigns a rather passive role to the populace that submits itself to state justice (Coase 1960). In Bruce Benson's account, the English nobility's efforts to gain wealth and power throughout medieval history provide the paradigm case for the demise of private law. Benson points to the existence of largely private justice in the United States as late as the mid-1800s, yet has no real answer as to why a well-armed, highly individualistic democratic people would willingly submit to the elimination of their long-standing customary freedom to deal with legal affairs (Benson 1990, pp. 43–77, and 1998, pp. 94–126, 195–226).

Benson and other law and economics scholars fail to convincingly address a crucial question: Why would any free people accept and later insist on the government's role in maintaining civic order when there is a clear alternative? I suggest this is a question economic theory alone cannot answer. Given that so much of the plausibility of legal decentralization arguments rest on the historical existence of an alternative form of social organization, the question of whether this old form of order comports with democratic society should weigh heavily upon the minds of those advocating such measures. And yet it does not. Instead of simply describing the political and economic case for making law polycentric, I submit that turning to actual cases of decentralized law provides us some insight into why modern people resist this change. Specifically, I argue if we are to understand how people understand the law, we must pay attention to its foundations of civil society.

I do not think it controversial to state that many people view contemporary society as a contract, one where the people rationally join together, creating a government and laws to rule them. A discussion of Hobbes's political thought may clarify the way our assumptions regarding social order follow a contractarian model. Where Hobbes argued for what are at heart epistemological reasons that the state must adopt a magisterial role in the construction of legal order, anthropological theory tells us that the Hobbesian equation of statelessness with perpetual fear and death is fundamentally flawed.[4] Hobbes denied the power of prudence, claiming it to be nothing

[4]A discussion of this point would be tangential to my main argument. Suffice it to say that I take Hobbes's materialist epistemology (in part 1 of *Leviathan*) as the ground upon which he later establishes the whole of his theory.

> but a Memory of successions of events in times past, wherein the omission of every little circumstance altering the effect, frustrateth the expectation of the most prudent: whereas nothing is produced by Reasoning aright, but generall, eternall, and immutable Truth. (Hobbes 1985, p. 682)

In suggesting prudence's weakness as a form of wisdom or constraint, Hobbes simultaneously denied men's ability to work in common over generations to reach understandings among one another without an ordering power above them. While the Leviathan might accept customary constraints on his behavior, his codified law had to stand absolute.[5] One way to understand Hobbe's importance for modern thought is that he sought a solution to what seemed a catastrophic failure of custom in the face of sectarian violence, and that the way he framed his solution has cast a long shadow over our understanding of how men and states create their laws.[6]

While I certainly do not wish to argue that advocates of legal decentralization are Hobbesian in their outlook, I argue they face strong opposition precisely because of the way modern life conditions us to think about law. Legal anthropology suggests that the Leviathan's "cure" is an overreaction to the problem of faction because even absent the state, extra-legal pressures *within* a certain sort of stable civil society demand the establishment of manners and socially-constituted rules that allow individuals to interact in day-to-day life. Individuals modify these rules, which usually remain uncodified, by acting together over time in response to specific events, and subsequently teach these rules to new members of the social group (Roberts 1979, pp. 11–16).[7] The crucial facet of communities that produce law without the state lay in their stability.

Indeed, without radical changes in the community's mode of living, such social norms can persist in very similar form for decades or

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[5]Hobbes writes:

> And the Commonwealth being in their Representative but one Person, there cannot easily arise any contradiction in the Lawes; and where there doth, the same Reason is able, by interpretation, or alteration, to take it away. In all Courts of Justice, the Sovereign (which is the Person of the Common-wealth,) is he that Judgeth. (1985, p. 317)

[6]My thanks to Joshua Mitchell for making this suggestion. On Hobbes's need for authoritative interpretation, particularly of Scripture see Mitchell (1993, esp. pp. 68–72).

[7]Ferguson (1995) is one example of this narrative in action as early as the days of the Scottish Enlightenment.

centuries (Hayek 1967). Over time, long-standing social groups increasingly respect the rules of order, repetition gives these rules "rightness," and society solidifies their habits of interaction through imitation by each successive generation. If the simple need to conform is insufficient to ensure order, a wide variety of options exist within such communities to exercise control over recalcitrant members such as violence, shaming, and in many stateless societies, the use of rituals. Indeed, if individuals casually disobey the stateless social group's decisions, they eventually enforce them by threat of ostracism or death (Roberts 1979, pp. 37, 45–79).

Because relationships among particular people matter more than the general and abstract link individuals usually experience with the state, these societies place a great deal of emphasis on honor and reputation over formal rights and tend toward the enforcement of collective rather than individual responsibility. Thus, it should not be surprising they use an entirely different language for the maintenance of order, for with them personal status, rules of propriety, and violent emotions all play prominent roles in the day-to-day practice of justice. With such societies as we understand them in history, statements evoking the passions and not the interests formed the legal norms of the day, a pattern which continued until the beginnings of the Enlightenment (Althoff 2001).

Here it is worth noting that even though it exists in all times, self-interest is a relatively recently developed category of popular public reason, and emerges as a specifically modern means of categorizing human motivation (Hirschman 1997). Obviously, citizens of advanced industrial societies retain little formal conception of honor, much less one which uses the language of deep passions and longings as the normal mode of political and legal discourse.[8] I believe applying economic theory to contemporary affairs to show that individuals and businesses that follow their private interests sometimes work to privatize aspects of the commercial legal order is a legitimate form of explanation. Yet making these same arguments while pointing to a historically different sort of civil order and then using it as proof that polycentric law is a modern possibility seems more problematic.

If somehow we should and can "go back," we must better understand the deeper reasons why the state became the final arbiter of the law. It seems clear, then, that any discussion of privatizing the legal

[8]For a discussion of the evolution of legal discourse, see Mellinkoff (1963). On honor's relationship to liberalism, see Krause (2002).

system in the United States will have to address this fundamental shift in affairs. Benson notes that today,

> [q]uestions about crime policy are almost inevitably stated in a fashion that immediately eliminates a huge number of potential options. The question typically asked is "What should the government do to solve the crime problem?" But there are other ways to solve problems. (Benson 1998, p. 1)

Indeed there may be other possibilities. However, if those alternatives are not just politically difficult to accomplish, but moreover *practically unthinkable* by the vast majority of citizens, it is worth asking what it is about the mentality of contemporary life which prevents beneficial change from coming to pass. For this, we require a theory which accounts for the differences between the tradition and honor-bound past and the more informal present. Tocqueville presents one such set of notions, and it is to his presentation of them in *Democracy in America* that I now turn.

THE MARCH OF EQUALITY AND ITS IMPLICATIONS FOR LAW

Addressing the problems stemming from the inexorable changes European aristocracy faced in the mid-nineteenth century, Tocqueville wrote:

> The first duty imposed on those who now direct society is to educate democracy; to put, if possible, new life into its beliefs; to purify its mores; to control its actions; gradually to substitute understanding of statecraft for present inexperience and knowledge of its true interests for blind instincts; to adapt government to the needs of time and place; and to modify it as men and circumstances require.
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> A new political science is needed for a world itself quite new. (Tocqueville 1988, p. 12)

In his introduction to *Democracy in America*, Tocqueville attempts to come to grips with a revolution. The state's centralization of legal power stood as only one part of the movement from the aristocratic to the democratic age. Living amidst this radical realignment of social relations, Tocqueville sensed that egalitarian thinking made the intellectual commitments of old to honor, nobility, and hierarchy not merely impractical; held in contrast to the conceptions of the new age, these ideas could no longer comprehend daily experience. Quite simply, they no longer made sense.

For Tocqueville, the march of equality through history stood as the principal force transforming his world (Nisbet 1988, pp. 189–90). More than just one of many historical forces, this "nodal point" of social life carries influence which

> extends far beyond political mores and laws, exercising dominion over civil society as much as over the government; it creates opinions, gives birth to feelings, suggests customs, and modifies whatever it does not create. (Tocqueville 1988, p. 9)

For this and many other reasons equality presents a real temptation for democracy:

> I think democratic peoples have a natural taste for liberty; left to themselves, they will seek it, cherish it, and be sad if it is taken from them. But their passion for equality is ardent, insatiable, eternal, and invincible. They want equality in freedom, and if they cannot have that, they still want equality in slavery. They will put up with poverty, servitude, and barbarism, but they will not endure aristocracy. (p. 506)

Tocqueville's essential lesson here is that while he thought men might oppose democratic equality and perhaps even delay it for a time, Providence ordains democracy's eventual victory (p. 12). An explanation of Tocqueville's two idealized ages—aristocracy and democracy—will clarify how deep the changes he saw between these two types ran.[9]

In doing so, it is crucial to note the place from which Tocqueville derives his concept of social order. On his account, religion and its concomitant moral teachings form the deepest foundation of society. A social order's manners and mores result from these moral convictions, acting as the common social glue which binds individuals together or tears them apart in day-to-day affairs. He considered legal and political regimes the concrete expressions of a society's mode of living and interaction. Bearing that in mind, we can see why Tocqueville emphasizes America's early religious and cultural founding rather than the later, political one. The beliefs and mores of the earliest settlers set the tone for what came later.[10] Within this scheme, democracy changes social relations by stripping away all the

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[9]For a good discussion of the ideal types of democracy and aristocracy, as well as what is common to them, see Manent (1998).

[10]See Tocqueville (1988, pp. 31–49). For Tocqueville, the *birth* of a society is often more important than what comes later:

> When a child is born, his first years pass unnoticed in the joys and activities of infancy. As he grows older and begins to become a man, . . . [f]or the first time notice is taken of him, and people think they can see the germs of the virtues and vices of his maturity taking shape. That, if I am not mistaken is a great error. Go back; look at the baby in his mother's arms. . . . The whole man is there, if one may put it so, in the cradle. (p. 31)

mediating elements between individuals. It erodes the stability of the manners, mores, and manifold formalities that dictate the basis upon which people act (Mitchell 1995, pp. 78–87).

Within an aristocratic social order, people always predicate their relationships on a complex set of manners which are difficult to learn and dangerous for individuals to transgress. In such an environment, "the outward intercourse of men is settled by more or less fixed conventions," a scenario where "everyone has a precise conception of how to show respect or affability." Here, various principles of moral conduct and the complicated etiquette of aristocratic peoples come together, preempting the need for much written law. In large part, aristocracy's stable customs obviate the need for codification (Tocqueville 1988, p. 568, and Althoff 1997, pp. 282–304). In such an order, social and political authority rests with one's station in life. As a consequence, "[t]rue dignity in manners consists in always taking one's proper place, not too high and not too low; that is as much within the reach of a peasant as of a prince" (Tocqueville 1988, p. 606). In the context of these relations, men only extend recognition to their fellows when they hold the same social station. Living in the tight social bonds of aristocracy, people found the very notion of general human fellowship inconceivable.[11] Tocqueville understands that in such a time, individuals bind themselves to their social group, and membership in these groups carries with it various privileges and much more importantly many responsibilities to one's fellows (Althoff 1990, chap. 2, and Roberts 1979, chap. 4). With aristocracy, customs and mores set strict limits that stand above any written law, limits no man can safely violate, and these social forms commonly "established a sort of law in the very midst of force" (Tocqueville 1988, p. 14).

According to Tocqueville, the march of equality destroys the foundations of such a system by social leveling. People still carry with them the vestiges of their former rank, but no set rule of behavior attaches to it (Sanctis 1992, p. 117). A few examples will illustrate this: Men in aristocratic ages know how to interact with one another because social station predicates the proper sort of behavior. A peasant speaks to the feudal lord not as a person deserving equal dignity,

[11]See ibid., pp. 507, 562–65. Think here of Nietzsche's "pathos of distance," with its "continuing and predominant feeling of complete and fundamental superiority of a higher ruling kind in relation to a lower kind, to those 'below'" (Nietzsche 1994, pp. 12–13).

but from the viewpoint and servile manner befitting a subject. In aristocracy,

> [t]he rules of politeness form a complicated code which it is difficult to master completely. . . . But as distinctions of rank are obliterated and men of different education and birth mix and mingle in the same places, it is almost impossible to agree upon the rules of good manners. . . . So the substance of behavior comes to count for more than the form, and men grow less polite but also less quarrelsome. (Tocqueville 1988, p. 568)

Democracy relaxes manners; this also brings confusion and uncertainty. Yet if democratic culture softens a people's mores, this is because of the death of honor as a normal category of justification for everyday behavior and its subsequent relegation to the realm of public opinion.[12]

In aristocracy, "each family was like a man who never died or changed," but in democracy things are in such flux that even if a sense of honor remains a distinct human need,

> such opinions never present themselves at the same time, in the same manner, and with equal intensity to the mind of every citizen; the law of honor exists, but it is often left without interpreters. . . . Honor among democratic nations, being less defined, is of necessity less powerful, for it is hard to apply an imperfectly understood law with certainty and firmness. Public opinion, which is the natural and supreme interpreter of the law of honor . . . always hesitates in giving judgment. (pp. 624–25)

So, where aristocrats develop particular rules for individual groups of people and situations, a privilege afforded by the slow evolution of manners that stable aristocracy reproduces across generations, democratic peoples have no such luxury:

> There is too much mobility in the population of a democracy for any definite group to be able to establish a code of behavior and see that it is observed. So everyone behaves more or less after his own fashion, and a certain incoherence of manners always prevails, because they conform to the feelings and ideas of each individual rather than to an ideal example provided for everyone to imitate. (p. 606)

If a people retain no way of stabilizing their manners over time, the bedrock upon which customary law functions falls away. If public opinion can supply no consensus amidst its changing forms, people

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[12]For the purposes of this discussion, Tocqueville defines honor as "all those rules by which such esteem, glory, and consideration are obtained" (1998, p. 616). For a longer discussion of Tocqueville and honor see Krause (2002, pp. 67–96).

must establish a new arbiter in its place. At the cost of looking upon one another as members of a class or social group, individuals in the democratic age develop a sympathetic imagination. Even as strangers, they commonly extend a sort of loose moral recognition to one another. Where aristocrats only feel sympathy for those of their own social class and think little of other groups, democratic peoples extend this idea to everyone. Because democrats tend to view every person as having equal rights and intrinsic moral worth, this makes the casually accepted inequalities of the aristocratic mind difficult to accept. Thus, the democratic concept of a common humanity undermines aristocratic social order and its tight social bonds (Tocqueville 1988, pp. 507–08, 564).

Despite these radical changes, a people might combine the new democratic manners with a concern for precedent and reputation. But this too poses a real problem within the new order because democracy also undermines the sort of mind inclined to such attentiveness. The routine and stability of aristocracy allows individuals the time and wealth to focus their attention on whatever goals they set. There, "every man has but one sole aim which he constantly pursues," and so the aristocrat acquires long experience and the crucial prudential knowledge which comes from it. We cannot say the same thing about democratic peoples:

> In a democracy, if necessity does not urge a man to action, longing will do so, for he sees that none of the good things all around are completely beyond his reach. Therefore he does everything in a hurry, is always satisfied with a "more or less," and never stops for more than one moment to consider each thing he does. . . . He hardly has the time, and he soon loses the taste, for going deeply into anything. . . . Habitual inattention must be reckoned the great vice of the democratic spirit. (p. 611)

Instead of cultivating deep knowledge of the world and the discontinuity between abstract theory and concrete reality, the democratic mind develops a kind of intellectual shorthand which allows those with neither the time nor inclination for deep study or long practice to comprehend the world.

Tocqueville develops a striking theory of how a people's social life shapes their general concept of reality. Certain ideas come naturally to those living in aristocracy, just as the conditions of democracy suggest very different notions about the world. Tocqueville claims that while Descartes could easily envision a critical rationalism which questioned tradition and "irrationality," and it gained enough currency for his theory "to be defined and generalized" in the seventeenth century, people did not commonly accept the

Cartesian style of thinking until the Enlightenment because the "political laws, the state of society, and habits of thought, all deriving from first causes of their own, were opposed to it" (pp. 429–31). However, the *philosophes* and other prophets of the Scientific Revolution eventually popularized it

> at a time when men were beginning to grow more equal and more like each other. It could not generally be followed except in centuries when conditions had become more or less similar and people like each other.

For it is only in such a social state that "each man undertakes to be sufficient to himself and glories in the fact that his beliefs about everything are peculiar to himself" (Tocqueville 1988, pp. 432–33). Within the framework of this sociology of knowledge, we can understand that certain ideas come naturally to democracies, and others do not—a point crucial to the fate of democratic freedom and its relationship to the law.

One way Tocqueville distinguishes aristocracy and democracy from one another most clearly is by their respective stances on abstract ideas. Where aristocracies engage with the minute, concrete particulars of day-to-day administration, democracies avail themselves of general notions. Despite the fact the "conceptions they convey are always incomplete," democrats find themselves able "to pass judgment quickly on a great number of things," a fact which meets a real necessity in any age of rapid change and social mobility (p. 437). The power of equality also adds other facets to the drive toward accepting general theories:

> the democratic citizen sees nothing but people more or less like himself around him, and so he cannot think about one branch of mankind without widening his view until it includes the whole. . . . Having acquired a taste for generalizations in the matters which mostly closely take up his attention . . . he carries it with him when dealing with everything else. Hence it becomes an ardent and often blind passion of the human spirit to discover common rules for everything. (p. 439)

Aristocracy demands particular rules for specific sorts of people; its intellectual adherents easily make distinctions of quality and rank. Democracy relentlessly moves to abolish differences among peoples, eradicating those created by artifice, and denying those which exist by nature.[13]

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[13]Tocqueville's discussion of the effects of equality on the relations between the sexes and the roles within the family are particularly important on this point. See Tocqueville (1988, pp. 584–89, 600–03).

In this drive toward abstraction, decentralized law becomes a casualty, as democracy undermines all those social pillars upon which customary law rests. Where aristocracies remain stable and change only when they must, a democracy always lives in flux. Unbound from tradition and the habits of a single time and place, manners and mores become freer but lose their authority. This failure means democratic peoples cannot use them as the measure for adjudicating disputes between parties. This, in turn, eliminates one necessary precondition for polycentric law. One clear message emerges from a study of Tocqueville on the democratic age: Civil society must develop sufficient moral authority to bind the human horizon of possibilities or people will look outside of it. If society will not provide this authority, people will turn to the state. An examination of the sensibilities and tendencies which remain common to all people—both aristocratic and democratic—will help to clarify why this is the case.

JUSTICE BETWEEN THE ARISTOCRATIC AND DEMOCRATIC AGES

With the coming of democracy, Tocqueville believed economics would gain ever greater favor as a means of analyzing human life. On principle, Tocqueville even thought a certain form of self-interested calculation contributed to the health of democracy:

> I am not afraid to say that the doctrine of self-interest properly understood appears to me the best suited of all philosophical theories to the wants of men in our time and that I see it as their strongest remaining guarantee against themselves. Contemporary moralists should therefore give most of their attention to it. Though they may well think it incomplete, they must nonetheless adopt it as necessary. (Tocqueville 1988, p. 527)

The real question, though, is whether a theory which reduces all human action to mere calculations of self-interest suffices as a description of social order's full complexity. This is particularly problematic when we note the easily observed irrationalities present in all human experience.

Tocqueville notes a *universal* tendency in people toward immoderacy, one which takes on a very specific form. Absent the strong bonds of civil society, people exhibit a periodic oscillation between furious engagement with the events of the world and sort of melancholy isolation (Mitchell 1995, chap. 2). Individuals strongly tend to

> cleave to the things of this world as if assured that they will never die, and yet are in such a rush to snatch any that come within their reach, as if expecting to stop living before they have relished them.

> They clutch everything but hold nothing fast, and so lose grip as they hurry after some new delight.[14]

Yet some people occasionally recognize that perhaps material things are insufficient for the good life. Disconsolate brooding then sets in. Left unchecked, the disintegration of old social relations in democracy and the market leads to a situation where

> not only does democracy make men forget their ancestors, but also clouds their view of their descendants and isolates them from their contemporaries. Each man is forever thrown back upon himself alone, and there is a danger he may be shut up in the solitude of his own heart. (Tocqueville 1988, p. 508)

Absent the salutary constraints of their old ways or some contrived substitute in civil society, humanity's natural condition becomes manic depression.

On Tocqueville's account, aristocracy provided more than a means to keep social order. By establishing a strict delimitation of rights, duties, and authority, aristocratic society bound humanity's mental horizon, attenuated the oscillating nature of the individual spirit, and calmed the restless longings of the heart. This is critical because the

> idea of secondary powers, between the sovereign and his subjects, was natural to the imagination of aristocratic peoples, because such powers were proper to individuals or families distinguished by birth, education, and riches, who seemed destined to command. (p. 668)

Indeed, the constant motion of democracies does not help this mania:

> When there is no authority in religion or politics, men are soon frightened by the limitless independence with which they are faced. They are worried and worn out by the constant restlessness of everything. With everything on the move in the realm of the mind, they want the material order at least to be firm and stable, and as they cannot accept their ancient beliefs again, they hand themselves over to a master. (p. 444)

Society and the market thrive on certainty. If people do not find a way to provide their polity with stability of an unchanging, ordered concept of the universe such as that suggested either through religion or strong civil bonds, individuals will turn to an explicitly political power to provide it. For such people, a sterile form of experiential unity is better than no conception of it at all. If they cannot have

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[14]See ibid., p. 536. Compare this to Plato (1991, pp. 239–40) and its discussion of the nature of the democratic soul.

such unity in everyday life, they seek it instead in servitude to the Leviathan state (pp. 734–35).

The movement into the democratic age tears down aristocracy's precise forms of stability and constraint. But this is not the only model through which societies can maintain the wellsprings of polycentric legal order. The genius of the American Founding and its later political manifestation in Union was its republican nature. Beginning with local practice in townships with the first Puritan colonies, Americans later institutionalized the very idea of secondary powers into government, but in such a way that the state was never the first and always the final site of appeal. Yet this delicate balance is difficult for democracy to maintain because

> in politics, as in philosophy and religion, democratic peoples give a ready welcome to simple general ideas. They are put off by complicated systems and like to picture a great nation in which every citizen resembles one set type and is controlled by one single power. (Tocqueville 1988, p. 668)

If this tendency toward generality and simplicity were not dangerous enough when combined with the desire for equality, democracy also suggests the idea of man's infinite perfectibility, and these forces make for a truly frightening combination.[15]

Here it is necessary to return to Tocqueville's concept of ideas being thinkable because of the social conditions prevalent at a given time. Aristocracy binds the intellectual horizon in such a way that "everyone thinks he can see the ultimate limits of human endeavor quite close in front of him," and because of that limit, "no one attempts to fight against an inevitable fate." Aristocrats rest comfortably with the limits of human reason and believe "that everything is in its right place." Indeed, such "nations are by their nature too much inclined to restrict the scope of human perfectibility," but on the other hand, "democratic nations sometimes stretch it beyond reason." Once the march of equality undermines secondary powers, if it erodes the bonds which once kept manners and mores stable, and when the mobility which accompanies the market takes hold, it is then that "the human mind imagines the possibility of an ideal but always fugitive perfection" (Tocqueville 1988, pp. 452–54).

For Tocqueville, the confluence of equality, general ideas, and the fleeting notion of perfectibility results inevitably in the concentration of state power. And indeed,

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[15]Two similar twentieth-century narratives of this can be found in Jouvenel (1993) and Hayek (1994).

> [n]ext after the idea of a single central power, that of uniform legislation equally spontaneously takes its place in the thought of men in times of equality. As each sees himself little different from his neighbors, he cannot understand why a rule applicable to one man should not be applied to all the rest. The slightest privileges are therefore repugnant to his reason. The faintest differences in the political institutions of a single people give him pain, and legislative uniformity strikes him as the first condition of good government. (p. 668)

By way of confirming these points, Tocqueville cynically notes that even ardent defenders of the idea that government should not interfere in private matters often wish, "as an exception . . . the state to help in the special matter with which he is preoccupied."[16] It might be argued that history sadly justifies at least some of Tocqueville's doubts about the American future (Higgs 1987). At this point we can fruitfully return to the claims of law and economics theory.

I believe I have shown that Tocqueville poses a rather daunting challenge for any who would attempt to explain the rise of the state and its legal apparatus merely as a question of interest in politics. Interestingly, some of the examples Benson and Ellickson use give credence to the idea that certain types of people are more willing and able to privatize legal functions than others. Benson cites one example of a successful, nongovernmental activist group in Washington, D.C. Facing rampant burglary, theft, and drug dealing, the residents of a deteriorating working-class neighborhood formed a group called the Fairlawn Coalition. The group,

> consisting mostly of middle-aged or older church-going citizens, many of whom are women, retired, and/or grandparents . . . could not intimidate the drug dealers and thieves who gathered on the streets by threatening force, so they adopted a much more passive approach. They wore "safety orange baseball hats" in order to distinguish themselves, . . . marched to the intersection [of Seventeenth and R Streets, Southwest], and simply spent the evening standing on the corner making those who regularly used the area . . . uncomfortable.

The coalition's actions produced immediate results. Armed with cameras, radios, and the moral force of the community, the "Orange Hats" took back the streets of their neighborhood (Benson 1998, pp. 121–24).

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[16]See Tocqueville (1988, p. 672n). Of course one can think of any number of examples of this in contemporary American political life. This resonates well with F.A. Hayek's (1960) argument against conservatism-as-statism.

In Shasta County, Ellickson's case studies show that residents of the area avoid involving the law in their disputes.

> And this norm is indeed entrenched. . . . Although [cattle grazing] trespasses are frequent, Shasta County's rural residents virtually never file formal trespass actions against one another. . . . Not only do the residents . . . refrain from filing formal lawsuits, but they are also strongly disinclined to submit informal monetary claims to the owners of trespassing animals. . . . When asked why they did not pursue meritorious legal claims . . . various homeowners replied: "I'm not that kind of guy"; "I don't believe in it"; "I don't like to create a stink"; "I try to get along." (Ellickson 1991, pp. 60–61)

Broadly understood, neighborliness stands as the basic rule of interpersonal conduct, and in the community, citizens hold one another responsible for their actions. Decent, "neighborly" actions result in forgiveness and recalcitrant behavior results in sanction through informal constraints like negative gossip and loss of reputation. Together, this system of praise and blame enforces this variation on the Golden Rule.

There are good reasons to think in certain cases that the privatization of law has everything to do with economic interest. This is in some ways especially true of business arbitration, where in today's market there is every incentive for corporate consumers of a good or service to go elsewhere when their current or potential partners have a reputation for poor business practices or costly legal entanglements. But what about individual people without the purpose-driven constraints found in a business environment? It is quite telling that nearly all the cases of legal systems among private citizens these authors mention have one thing in common in that they arise among people who have long-standing ties or frequent personal interaction. A brief digression will demonstrate the importance of this difference.

In the *Theory of Moral Sentiments*, Adam Smith demonstrates a keen awareness of the tendency among modern democratic peoples to restrict the scope of their sympathies:

> Let us suppose that the great empire of China, with all its myriads of inhabitants, was suddenly swallowed up by an earthquake, and let us consider how a man of humanity in Europe, who had no sort of connexion with that part of the world, would be affected upon receiving intelligence of this dreadful calamity. He would, I imagine, first of all, express, very strongly his sorrow. . . . He would too, perhaps, if he was a man of speculation, enter into many reasonings concerning the effects which this disaster might produce. . . . And when all this fine philosophy was over, when all these human sentiments had been once fairly expressed, he would pursue his business or his pleasure . . . as if no such accident had happened. . . . If

> he was to lose his little finger to-morrow, he would not sleep to-night; but, *provided he never saw them*, he would snore with the most profound security over the ruin of a hundred millions of his brethren. (Smith 1984, III.3.4, p. 136; emphasis added)

The key point to note here is the relative immediacy of moral events and reasoning about them. Even though democratic peoples have a generalized sense of sympathy, they "rarely sacrifice themselves for another" (Tocqueville 1988, p. 564). The implications of this are disheartening for any purely *political* effort to decentralize law.

In a sense, both Smith and Tocqueville address the issue of collective action in democracy on its most important, that is, its moral level. For both, distance reduces one's fellow citizens to the level of abstraction; they become, in modern parlance, the Other. In losing the aristocratic trait of *individual* recognition through station and authority, democratic peoples eradicate a major possibility for achieving both trust and sympathy among particular strangers. Given that democracies erode the mediational layers which allow communities to conduct themselves without appeal to a greater power, it is unsurprising that government's role in legal affairs grows. The appearance of infinite possibilities coupled with total uncertainty is often too much for individuals to bear. Absent some salutary constraints on their mental horizons, it is inevitable that democratic peoples will abdicate their freedom to an all-powerful, unitary state. In this scenario, merely educating such people into voting away their chains or exhorting policymakers to act in a way that defends freedom misses the problem entirely (Benson 1998, p. 317).

The difficulty rests not with what is efficient in a democratic political economy, but with what is *thinkable* to a democratic polity. Ironically, the emphasis on efficiency, which is nothing but an abstract ideal with a single end, may worsen the problem. If what is thinkable to a people rests with their experience, it is in reference to that experience and *it alone* that we might address the problems facing such people. Those who see nothing but abstractions in the place of equal human beings cannot imagine addressing their problems to a neighbor. Instead, they appeal to the state. But, in the case of democratic people subject to any general theory,

> the best possible corrective is to make the citizens pay daily, practical attention to it. This will force them to go into details, and the details will show them the weak points in the theory.
>
> The remedy is often painful but always effective. (Tocqueville 1988, p. 442)

Forcing a democratic people to deal with the details of everyday existence turns them away from more than simple abstract theory. Its indirect effect is to help recreate the bounded horizon of possibilities which they lack by forcing cognizance of the discontinuities between theory and reality. In much the same manner, recognition of the differences among individual humans can only come through regular, face-to-face interaction among them. In the democratic age, ancient customs may give way to abstract laws, but at the same time associations might still revive old practices or create new and beneficial ones in their place.

It is through associations that all social action becomes possible. Yet people only understand how to work together with constant practice. In aristocracy, collective action is simply not a problem. There, "men have no need to unite for action, since they are held firmly together." Aristocracy creates a social order where

> [e]very rich and powerful citizen is in practice the head of a permanent and enforced association composed of all those whom he makes help in the execution of his designs. . . . But among democratic peoples all the citizens are independent and weak . . . if they did not learn some habits of acting together in the affairs of daily life, civilization itself would be in peril. The morals and intelligence of a democratic people would be in as much danger as its commerce and industry if ever a government wholly usurped the place of private associations. (Tocqueville 1998, pp. 514–15)

Absent the habit of combining for particular ends, isolated individuals turn to the only remaining site of appeal in the state, and such a people cannot conceive of a world ordered any other way.

Libertarian scholars tend to assume the proper education leads citizens toward recognizing their true interests. Yet, if the nature of ideas rests on experience, suggesting any policy which rests almost totally outside the everyday life of a democratic polity is to invite ridicule and defeat. The lesson Tocqueville teaches us is that even if "[s]urveys and polls indicate growing dissatisfaction with all aspects of government law enforcement in the United States," that fact does not provide any obvious reason to believe citizens will accept a seemingly alien solution to the problem (Benson 1990, p. 1). To do so would entail forgetting that one of "the most familiar weaknesses of the human mind is to want to reconcile conflicting principles and to buy peace at the cost of logic" (Tocqueville 1988, p. 415). Barring any practical experience to the contrary on their part, attempts to decentralize the legal system will fail to win the hearts of democratic peoples. Despite this problem, there are still prospects which should provide hope. None is greater than that which rests in associations.

Conclusion: On Cultivating Freedom

For Tocqueville, civil society and religion formed the basic building blocks of the American Founding (p. 47). Although as moderns, we have gained so much from the advance of democracy, it is a mixed inheritance. Today, we stand far closer to Tocqueville's stark vision of the End of History. There, the unattenuated uncertainties and restless longings of the fully democratized citizen have but one result:

> Over this kind of men stands an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate. That power is absolute, thoughtful of detail, orderly, provident, and gentle. . . . Why should it not entirely relieve them from the trouble of thinking and all the cares of living? (Tocqueville 1988, p. 692)

And yet there are still signs that civic life is not dead; Benson and Ellickson provide some examples of this, daily experience confirms their existence.[17]

But technical debates about the relative merits of public versus private law will not lead to an abolition of the former's discontents in favor of a new birth of freedom. Yes, abstract ideas have their place, but political movements are not formed by ideas alone. It is only in face-to-face interaction that "[f]eelings and ideas are renewed, the heart enlarged, and the understanding developed only by the reciprocal action of men one upon another" (Tocqueville 1988, p. 515). Such interaction forces democratic peoples to accept reality's full complexity rather than the comfort of their abstractions, and this allows them to recognize the myriad ways they can take responsibility for their own affairs. Through associations, they can appreciate and clarify the differences between equals. It is there they can overcome clashes of ideology for the sake of living in community. And it is only there that a people conceive of settling disputes between themselves without appeal to an outside authority.

Tocqueville's understanding of the media's role in forming associations might produce a turn away from solutions which are principally legal or institutional in nature. Among a divided people who have no common place of meeting or unifying relationships, such individuals need a mechanism for transmitting ideas to large numbers at once. For Tocqueville, the answer lay in the newspaper since it "can put the same thought at the same time before a thousand readers" (p. 517). Modern forms of communication represent an even

[17]Of course, there are some dissenting voices on this point. For the most prominent examples, see Putnam (2001) and Bellah et al. (1996).

more powerful means by which associations advertise and spread their message. If they address not lawmakers and elites, but rather common people about the concerns close to their everyday life, perhaps activists can effect real legal change.

People living in a changing world of harbor uncertainties they must find a way to attenuate, and if their community and associations do not address these worries, they will turn to the state for help—even at the price of their freedom. We may find it difficult to concede that democratic politics renders us complicit in forfeiting our most cherished freedoms. It is harder still to acknowledge that a people can grow comfortable with its servitude, ignoring both its interests and customary freedoms in favor of being relieved of the burden of choice. But such concessions are the first step toward recognizing that the movement away from any centralized power is taken not by lonely advocates on the steps of the legislature or in the courts, but rather in common with one's friends and neighbors.

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