

Mature Enough to Disobey: Jurors, Women, and Radical Enfranchisement in Tocqueville's *Democracy in America*

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Abstract

While many have pointed to Tocqueville's admiration of the jury system as a schoolhouse for civic participation, I argue that Tocqueville sets up, but forgoes, the opportunity to make jurors empowered enough to counter the ills of democracy that he enumerates, specifically the tyranny of the majority and soft despotism. The education of American women, Tocqueville remarks, prepares them to be independent, confident and astute observers of social conditions, but these characteristics are eclipsed by their domestic responsibilities as wives and mothers. Juxtaposing two sections of *Democracy in America* that are normally thought of separately (juries and women), I show that Tocqueville falters in his perception of the radical enfranchisement of jurors and women because of his fears about the instability of democracy (with its delusions of equality) just as he provides some of the best arguments for the importance of their political interventions.

Keywords

Alexis deTocqueville, jury, juror, women, maturity, civil disobedience, *Democracy in America*, trial, radical enfranchisement

Any argument celebrating the distinctive legal and political role American juries play evokes a reference to Tocqueville's admiration of the institution that caught his attention during his trip to the US in 1831. While many have pointed to Tocqueville's admiration

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of the jury system as a schoolhouse for civic participation, I will argue that Tocqueville sets up, but forgoes, the opportunity to make jurors empowered enough to counter the ills of democracy he enumerates. His sense of moderation regarding the republican virtue of participation and his admiration for aristocratic leadership make it impossible for him to cultivate the ideal of jurors as *radically enfranchised* citizens, a concept I develop to refer to those who have an understanding of the weight and expectations of legal judgment but are also able to challenge the authority of the law in certain instances, such as via jury nullification (the undisclosed power a jury has to find a defendant not guilty because they find the law itself objectionable). As a way to explore both Tocqueville's celebration of the jury for its democratic value, and then his hamstringing of its power, I turn to an analysis of his perception of the education of girls in American society. By juxtaposing two sections of *Democracy in America* that are normally thought of separately, I will show that in the case of both jurors and women Tocqueville falters in his perception of their enfranchisement while also providing some of the best arguments for the value of their political interventions.

The right to a trial by jury is enshrined in the Sixth Amendment of the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."¹ Future case law established that juries in lower courts must have at least six persons and be unanimous in their decision while federal criminal juries require twelve.² A jury that cannot reach unanimity is considered to be a hung jury (and the occasion for a mistrial) and provides grounds for a new trial should the prosecution choose to proceed. At the state and local levels, the specific procedures for juries may vary but the essence remains the same: an impartial jury of citizens determines whether the state has met the burden of proof for establishing guilt. The enumeration of the jury trial in the Constitution alongside other rights of the accused confirms this defendant-protecting value of a jury. In contrast to an inquisitorial system in which the state acts as prosecutor, investigator, and arbiter, the adversarial model demands that the defendant have an array of protections and trial by jury is one such protection. Despite the attention given to the jury in the Constitution, scholars have declared the jury trial to be in crisis; more than 90 percent of defendants in federal cases plead guilty and forgo their right to a jury trial.³ A similar phenomenon is happening with trial by jury in civil cases, they are protected by the Seventh Amendment but their numbers are miniscule.⁴

1. U.S. Const. Amend. VI.

2. Dennis D. Devine, *Jury Decision-Making: The State of the Science* (New York: New York University Press, 2012); Gary J. Jacobsohn, "The Unanimous Verdict: Politics and the Jury Trial," *Washington University Law Quarterly* XXXIX (1977); Edward P. Schwartz and Warren F. Schwartz, "Decisionmaking by Juries under Unanimity and Supermajority Voting Rules," *Georgetown Law Journal* (1991–1992).

3. www.uscourts.gov. Accessed January 22, 2015.

4. Marc Galanter, "A World without Trials," *Journal of Dispute Resolution* I (2006).

I. The American Jury through the Eyes of a Frenchman

Coming to the United States in part to study the penal system, Tocqueville was particularly attuned to how the people he encountered, judges, lawyers, farmers, doctors among them, understood the legal process. While he is more drawn to how the culture of American life allows democracy to exist without a descent into mob violence, he accounts for institutional considerations. The most important of these is the Constitution and the authority it continues to have in legal and political life; it is responsible for preventing both the despotism of the elite and the unqualified sovereignty of the people through the balance of power it articulates and the codification of individual liberties. It is the Constitution that provides a shared understanding of justice and this curtails competing transcendent ideals that masquerade as justice but result in terror. As such, Tocqueville's appreciation of the Constitution closely fits with his sense that democracy, with all its flaws and attractions, was a historical inevitability and that France's experience with the transition to a constitutional republic was too violent but unavoidable. His task was not to persuade or dissuade his readers of democracy's normative desirability but rather to observe how its American instantiation was surviving, both in the everyday lives of its citizens and the robustness of its legal and political institutions.

At first glance one would think that a discussion of the role of juries in the political process and the independence of women would be unrelated but by looking at the concept of political maturity we see that these two concerns are deeply linked in Tocqueville's work. While radical enfranchisement is a way of thinking about political participation that can be applicable to all, it is particularly salient for groups that have been denied a standing of political maturity, that is, forced to occupy a liminal space between adolescence and the equality and respect given to fully autonomous citizens. This liminal space is social, intellectual, and ethical and while there may be fears about the impact of a demos truly composed of politically mature subjects, there should also be fears about the consequences of a legal system that perpetuates stunted development. Perceptions of women's political immaturity stems largely from cultural and social norms embedded in a variety of relationships and the relative narrowness of the role of juror provides a helpful contrast that elucidates the lost possibility for radical enfranchisement. Jurors in Tocqueville's account, I will argue, *partially* realize how important they are as a check on the power of the political and legal elite but are not empowered enough to be able to use this power in the most challenging circumstances. Women may be both less aware of the critical function they play and may only perceive insurmountable obstacles to enfranchisement.

At the beginning of the section on the jury (Book I, 16) Tocqueville celebrates the republican character of the jury and its prominence as an instrument of popular participation, but remarks that he is more concerned with its political rather than legal impact. In his words:

By the jury I mean a certain number of citizens chosen by lot and invested with a temporary right of judging. Trial by jury, as applied to the repression of crime, appears to me an eminently republican element in the government, for the following reasons. The institution of the jury may be aristocratic or democratic, according to the class from which the jurors are taken; but it always preserves its republican character, in that it places the real direction of

society in the hands of the governed, or of a portion of the governed, and not in that of the government.⁵

Just as with universal suffrage, with the final decision-making power of juries, power is truly in the hands of the people, with all of their foibles. While such power could make some feel ill at ease, Tocqueville's use of the language of republicanism, with its connotation of participation and self-rule, indicates an unexpected enthusiasm for such a mechanism of democracy in a situation of stark importance. When he mentions the aristocratic possibility within juries he suggests that jurors' existing orientations to privilege, hierarchy, and tradition are already engrained before they take on their civic responsibility. Nonetheless, Tocqueville is highlighting that even when it is made up of a subgroup of the elite, the jury represents a substantial check on other expressions of power.

Tocqueville famously described juries as "a school, free of charge and always open, where each juror comes to be instructed in his rights and comes into communication with the most instructed and enlightened members of the upper classes, where the laws are taught to him in a practical manner and are put within reach of his intelligence by the efforts of the attorneys, the advice of the judge, and the passions of the parties."⁶ Tocqueville considers French discussions about the standards for intelligence necessary for jury service to be misguided because of this pedagogical function of juries. To fixate on the cognitive ability any given juror brings to the process is to miss the point—jury service is itself a form of education and a type of treatment for inchoate citizens. Yet, within his description of the jury as schoolhouse, there is both a sense of ambition about what laypeople acting as a jury can achieve, and of paternalism manifested in the hope that they follow the expertise of court officials. Tocqueville seems to see these different qualities of the "schoolhouse" as mutually reinforcing; interaction with the elite and with the law can be complementary to interaction with fellow jurors. Education, while transformative, also requires that one accept the limitations of the autonomy of the student. The knowledge of rights, individually and as a collective, is not meant to ever challenge the interests of the court and Tocqueville is hopeful about the potential for harmony between the jury and the necessary aristocratic elements of the court and its officers, a type of nobility he purports to be badly needed in democratic societies.

Tocqueville's celebration of the opportunity for lay (including non-elite) participation on juries and his hope that they might be positively influenced by those who are the "most enlightened members of the upper classes" captures a contemporary tension in thinking about jury life. Even as he remarked on the importance of taking into account the insights of ordinary people as a check on centralized power and the potential misuse of legal statutes, he still harbored a belief in the wisdom of the officers of the courts and the assumption that laypeople should aspire to be more like them. This position is most clearly seen in his depiction of the civil jury, the place where the jury has the most influence in shaping social norms and the national character. On the stature of the judge in a

5. Alexis de Tocqueville, *Democracy in America*, Harvey C. Mansfield and Debra Winthrop (eds) (2 vols, Chicago, IL: University of Chicago Press, 2000), I, p. 258.

6. Op. cit.

civil case, Tocqueville explains, “The jurors view him with confidence, and they listen to him with respect; for here his intelligence entirely dominates theirs . . . His influence over them is almost boundless.”⁷ The power of the jury is thus, in Tocqueville’s estimation, a power given with one hand and pulled back with the other; saving the people from themselves while at the same time encouraging them to use the distinctive power that they have is at the crux of the Tocquevillian defense of juries. The argument I lay out aims to be more specific about the importance of jury power at exceptional moments of disagreement, particularly when a jury refuses to be led by the aristocratic elements of court.⁸

It is tempting to attribute Tocqueville’s comment about the wisdom jurors gain from elites to his affinity for aristocratic regimes, and a corresponding nostalgia for the stability ensured by such regimes. While his concern with stability is important for understanding the constraints he places on the political maturity of juries, Tocqueville is too nuanced a thinker and too honest about the flaws of each regime he considers to make such a reductionist claim about aristocracies and stability. Moreover, his insights about the manner in which aristocratic regimes crumble are helpful for thinking about juries. In describing the causes of the French Revolution, he places some of the blame on the monarchy’s willingness to destroy long-standing institutions and wield its own violent power. He writes, “When the people saw the parlement, almost as old as the monarchy and which had seemed up to then as unshakable as it was, fall and disappear, they vaguely understood that we were approaching those times of violence and chance when everything becomes possible, when there is nothing so old that it must be respected, nor so new that it may not be tried.”⁹ It is thus not aristocracy itself that contains a heightened understanding of the fragility of peace and the value of traditional institutions. Kings as well as revolutionaries are seduced by the allure of the new.

The legal arbitrariness of the old regime, in particular the utter disenfranchisement of a poor citizen who had a grievance with the state, was also compelling to Tocqueville as one of the ways in which the old regime sowed the seeds of its own destruction. Arrests without warrants, prolonged detention without charge, farcical trials – these commonplace occurrences in the old regime provided, in Tocqueville’s assessment, a blueprint for revolutionary action. In a wry comment that stands in parallel to the way Tocqueville describes juries as “schoolhouses” for democracy, he writes, “It is thus that a mild and well-established government daily taught the people the code of criminal justice most appropriate to revolutionary periods and best adapted to tyranny. *Its school was always open*. The old regime gave this dangerous education to the poorest of the poor.”¹⁰ The fact that the mores of the old regime were not enough to prevent it from the excesses of tyrannical oversight and corruption suggests the need for a legal code committed to the

7. Op. cit.

8. For more on the judge’s power to direct the jury, see Hugo Black’s dissent in *Galloway v. US*, 319 US 372 (1943).

9. Alexis de Tocqueville, *The Old Regime and the Revolution*, François Furet and Françoise Melonio (eds) (2 vols, Chicago, IL: University of Chicago Press, 1998), I, p. 230.

10. Op. cit., p. 232. Emphasis added.

protection of individual rights. Even regimes committed to excellence, tradition, and stability, as the best aristocratic ones are, can unravel in this particular way. In addition to the need for individual rights that emerges from Tocqueville's depiction, there is also a need, I would argue, for counter-elite checks within the legal system and this insight is immanent within his writings on the old regime. It is not just that the poor do not have rights, but also that their interests are different from those of the elite (and from those of the middle-class) and Tocqueville provides a foundation for thinking about the jury as a place where such divergences are given formal recognition.

While the Constitution is the blueprint for questions of justice, the role of interpretation is again left to fallible individuals. In considering the role of judges in relation to the law, Tocqueville points to the accumulated power of judicial censure. "Now, on the day when the judge refuses to apply a law in a case, at that instant it loses a part of its moral force. Americans have therefore entrusted an immense political power to their courts; but in obliging them to attack the laws only by judicial means, they have much diminished the dangers of this power."¹¹ The superiority of the legislative process over the judiciary is thus preserved with judicial review, in Tocqueville's mind, because the judicial branch can express its will in bounded ways – law by law, case by case – and thereby the constitutionality and the weight of circumstances can be tested episodically in the courtroom without a direct attack on authority. Such a perception about the importance of piecemeal and interpretive work should also carry over to jury decisions that may not be in line with what officers of the court would like. Tocqueville does not see widespread chaos emanating from a decision by the judge to exercise discretion in this manner; the same perception should be applied to the jury that nullifies. This would, however, necessitate a more mature understanding of the juror than the schoolhouse model allows.

When I speak of the need to see jurors as radically enfranchised I am referring to a distinctive set of qualities regarding their ability to make trade-offs among multiple desirable ends in the legal system, such as universalizability, fairness, mercy, etc., each of which holds a place within the ideals of justice enshrined in the Constitution, case law, and collective memory. The adversarial criminal justice system is itself imbued with many of these principles; it is conceived of as a battle between opponents wherein each legal counsel appeals to the values that best suit their needs. As the arbiters of such a melee, each juror and the jury must ultimately come to a decision that reflects a certain set of values. The iterative nature of the criminal justice process becomes a record for some of these values, though they are incomplete because the jury does not provide an explanation for its decision. Still, more attention to jurors as radically enfranchised citizens would encourage conversation of the values that are being disputed.

The trial of John Peter Zenger in 1735 offers an opportunity to consider the value of treating jurors as radically enfranchised citizens capable of resisting the will of the state when necessary.¹² Zenger, publisher of the *New-York Weekly Journal*, was charged with

11. Tocqueville, *Democracy in America*, I. p. 93.

12. Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (Cambridge, MA: Harvard University Press, 2000), p. 73; Randolph N. Jonakait, *The American Jury System* (New Haven, CT: Yale University Press, 2003), p. 23.

sedition libel for criticizing the royal governor of the colony. While the judge was clearly in favor of the governor and of the state's case against the publisher, Zenger's defense was argued by the former attorney general of Pennsylvania, Andrew Hamilton, who presented an argument about truth as a defense against libel. He directed this argument to the jury, tacitly acknowledging that he was asking them to make a decision without precedent in colonial case law. The jury found Zenger "Not Guilty," accepting Hamilton's argument, and changing the nature of future prosecution for libel. The action of the jury represented a radically enfranchised response because the jurors did not take the established law and its historical application as the essence of justice. Grounded in their knowledge of the conditions of political life, they were persuaded by a conception of the free press and the privilege to hear truths about the political actions of the sovereign, however unsavory or negative they may be. While this example shows the jury taking a position directly critical of the power of the sovereign, other types of actions salient in this model of political maturity include those critical of patterns of enforcement or methods of policing.

In some ways, the larger argument about juries as space where radical enfranchisement can occur, and may even require breaking with the established norms of what juries are supposed to do, can be seen as a critique of proceduralism – the idea that legitimacy is determined by whether the proper steps were followed rather than a substantive assessment of the final decision – that often characterizes the American criminal justice system. A strict emphasis on proceduralism could be partially to blame, as James Q. Whitman says, for the harsh standards of punishment in the US, including rates of incarceration, imprisonment for property crimes, and the continued use of the death penalty.¹³ An alternative to proceduralism is a greater emphasis on substantive justice and the awareness that the judgment required for decisions about punishment is always a careful triangulation of multiple considerations and involves a prioritizing of certain values over others, even if all are central to democracy.¹⁴ Proceduralism in its ideal was a means to protect against vagaries and prejudices of an arbitrary system and to ensure the protection of defendant rights against the excesses of the state. Yet once a procedure has become compromised in its application or when it contributes to the perpetuation of an undemocratic status quo, the possibility of an action that goes against established procedure may be desirable. Such an outlook has affinities with theories of the non-ideal – specifically the sense that in non-ideal circumstances extraordinary acts are needed to demonstrate a commitment to certain ideals such that the procedures can be brought into alignment with these ideals. A less flawed reality would have fewer extraordinary acts. Yet it is also true that even with well-functioning procedures, there may be legitimate reasons for unusual interventions by the jury.

Tocqueville strikes a careful tone when he distinguishes the republican value of self-legislation within juries from the anarchy of revolt. Jurors without the strict guidance of

13. James Q. Whitman, "What Happened to Tocqueville's America?," *Social Research* LXXIV (2007).

14. Robert Burns argues that this is the alchemy of the trial and the unusual opportunity the format permits for a nuanced consideration of values. Robert Burns, *A Theory of the Trial* (Princeton, NJ: Princeton University Press, 1999).

the law and the officers of the court, he implies, may take their power too far and will invite instability in precisely the institution that should be most governed by procedure. The argument here for the cultivation of political maturity is an argument against both revolution and strict proceduralism. Yet the way in which Tocqueville describes and understands the revolution makes it difficult for him to understand how more isolated and contained moments of dissent, especially those that challenge the way a law is applied, could be constructive. A political theory that includes exceptional moments of jury decision-making is, in fact, a blind spot that emerges from Tocqueville's perception of revolution. I follow Sheldon Wolin when he writes, "The extreme abstractness, which he attributes to revolutionary theory – to its ideas of natural right, the sovereignty of the people, the equality of all, and the absolute rejection of all traditional institutions and beliefs – and his refusal to discriminate among competing theories, allows Tocqueville to compact them into a form of myth rather than deal with them as arguments."¹⁵ When any challenge to conventional authority is seen as part of the myth of redemptive revolution, it can never be justified, moderated, or contextualized. The delicate balance of local and federal power, lay and expert, mass and elite, has been damaged. Democracy has already, in Tocqueville's mind, conceded so much to the egoistic needs of the people in allowing them to be seen as estimable even in their mediocrity, that to suggest that there are moments (exceptional, to be sure) when the jury should be skeptical of the legitimacy of the law offers far too much latitude to laypeople. Such latitude is, however, consistent with an understanding of the juror as a radically enfranchised actor who develops skills through jury service that may be used to promote an interpretation of the law that is counter to conventional applications.

Tocqueville's reputation as a great advocate for juries is accurate, but only to a certain degree, and I am influenced by Albert Dzur's analysis of the ways that an uncritical acceptance of Tocqueville's appreciation of the jury obscures how it might undermine other desirable functions of the jury.¹⁶ He posits that the jury is fundamentally a check on elite and professional power. It is not that jury members are bestowed a magistracy that comes from proximity to the aristocratic classes of judges and lawyers, but rather, Dzur suggests, the distinctive role they play as non-professionals in an institution dominated by professionals. Dzur writes, "What is useful in Tocqueville's account of the jury as a school can be deployed in contemporary debates only if we take care to notice how the jury is also not a school but a site that gathers, focuses and uses the already existing juridical capabilities of lay people."¹⁷ Instead of the schoolhouse model, Dzur looks to the analysis of German-American political scientist Francis Lieber (1798–1872) who held juries to be "ambivalent – not automatically trusting but careful about the knowledge and guidance of courthouse regulars."¹⁸ Thus, the relationship between juries and

15. Sheldon Wolin, *Tocqueville between Two Worlds: The Making of a Political and Theoretical Life* (Princeton, NJ: Princeton University Press, 2001), p. 534.

16. Albert Dzur, "Democracy's 'Free School': Tocqueville and Lieber on the Value of the Jury," *Political Theory*, XXXVIII (2010); *Punishment, Participatory Democracy, and the Jury* (Oxford: Oxford University Press, 2012).

17. Dzur, "Democracy's 'Free School': Tocqueville and Lieber on the Value of the Jury," 65.

18. Op. cit.

the court and its officers, while symbiotic by all accounts, takes on a more agonistic valence in Lieber's writing. While Tocqueville ultimately supports deference to professional knowledge in juries that diverges from how he understands the town hall meeting, for example, Dzur suggests that a more ambivalent approach by the jury to the professionalism of the court is an aspect worth highlighting in the contemporary context. The fact of conflict between the jury and others is not a threat to the legal system, but a sign that it is, in fact, bringing voices that are often excluded into the legal and political process in a meaningful way.

Lieber's position is consistent with the role of the jury within the common law tradition through the American revolutionary period. From the precedent set in the case of William Penn (known as *Bushel's case* after the jury foreman who brought suit), the jury as the ultimate arbiter of the law was cemented and extended to include a consistent strong hand in deciding on the law, not just on the facts of the case.¹⁹ In the medieval common law framework, the strengths of the jury – its proximity to the agents involved of the case, knowledge of social mores, and anti-elite sensibilities – were assets in determining how the law should be enforced, not merely to assess whether the facts were consistent with a standard for evidence. The anti-Federalists would carry this mantle through the ratification period but as the Federalist cause of centralized and consistently applied legal power took hold, the value of the jury as a robust local institution gradually declined. It was not just the check on state power that declined as jury power receded; there was a corresponding loss in thinking about jurors as harboring an epistemological and moral position distinct from other legal actors. Shannon Stimson recalls this trajectory when she writes,

It appears that for an increasing number of newly independent Americans, the demands of achieving some degree of legal uniformity in the aftermath of the Revolution, not only within the newly legitimated "states" but especially within the nation at large, required a curtailment of the jury's significant lawfinding powers. In particular, historians have suggested that jural powers were curtailed for largely economic reasons, because the "certainty and predictability of substantive rules that a commercial economy required would be to little avail if juries remained free to reject those roles or to apply them inconsistently."²⁰

The economic impact of jury decisions, most notably in civil cases but also in criminal cases, continues to play a large role in the skepticism surrounding arguments for a heightened awareness of jury power. In determining who should be punished and, in certain cases, for how long and in what way, a guilty verdict is the most dramatic decision a citizen can make. Tocqueville goes so far as to call jurors the "master of society," but could this be understood in a somewhat ironic way, given his fears about the maintenance of social order that are woven through his reflections on democracy? Can juries deflect anger from the true "master[s] of society" – that elite group that serves as representatives

19. Andrew Murphy, "Trial Transcript as Political Theory: Principles and Performance in the Penn-Mead Case," *Political Theory* XLI (2013).

20. Shannon Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall* (Princeton, NJ: Princeton University Press, 1990), p. 62.

and judges? If so, can we think about jurors as being duped by this responsibility, that is they are led to believe that they are the deciders, when in fact the outcome has been orchestrated from the start? This is perhaps one of the most cynical takes on the adversarial system – the performance of the trial is precisely that, a performance that obscures as much as it reveals where performers (officers of the court) can use sleights of hand to suggest agency in one part of the courtroom when in fact much greater power exists in another. Lawyers cannot rig the jury box but they can calibrate their efforts in a trial to facilitate one outcome or another. Tocqueville describes this starkly when talking about a civil jury: “The jurors pronounce the ruling that the judge has rendered. To his ruling, they lend the authority of the society that they represent, and he, that of the reason and of the law.”²¹ The jury thus serves to legitimate the decision that the judge, with his education, experience, and likely history of privilege has decided; again, the republican aspects of the jury lauded by Tocqueville are worthwhile only when carefully bounded.

Giving the jury a central role in the determination of whether the state will use punishment makes it complicit in the infliction of physical suffering. Robert Cover has argued that what distinguishes legal interpretation from other types of language is its relationship to legitimate violence.²² Judges sit in uneasy relation to this reality, at times trying to distance themselves from it and what better way to do this than by distributing the tasks necessary for such an act. In Cover’s words, “Because legal interpretation is as a practice incomplete without violence – because it depends upon the social practice of violence for its efficacy – it must be related in a strong way to the cues that operate to bypass or *suppress the psycho-social mechanisms that usually inhibit people’s actions* causing pain and death.”²³ The jury, it can be argued, is one of the most effective psycho-social mechanisms to make decisions to enact violence for which individuals, judges or not, may have difficulty taking responsibility. The framework of a group of laypeople with no further role in the criminal justice system provides the best form of a legitimate institution that is difficult to scrutinize after the fact. Tocqueville, himself, understood the value of having the most distressing part of the judicial process derogated to the people in the context of a democracy rather than to the elite officials of the court. Thus, the emphasis on the jury’s role in punishment plays a complex role within the balance of power between non-elite laypeople and the expert class of lawyers, judges, and elites. While they have genuine power, they also act as a buffer that protects elite officials from censure. Highlighting their status as radically enfranchised citizens may further allow criticism to be deflected from those responsible for perpetuating the injustices of the status quo, among other things. Yet, it is my hope that the further galvanization of jurors to act based on the knowledge and experiences that they bring to the courtroom, even when it is contrary to the expressed position of law enforcement, is in the service of greater uptake on the most vexing problems of the criminal justice system and a type of intellectual discipline that will also be useful for political life.

21. Tocqueville, *Democracy in America*, I, p. 258.

22. Robert Cover, “Violence and the Word,” *Yale Law Journal* XCV (1986).

23. Op. cit., 1613. Emphasis added.

II. On Women

I turn now to Tocqueville's perception of women in *Democracy in America*. Although his views represent a set of observations of social mores, rather than legal institutions, there are similarities in the promise of political maturity he saw in women, just as he gestures to with jurors. Tocqueville found much to celebrate in the conditions of American women, particularly in their education, sense of independence, and competence in understanding complex social realities. In contrast to young European women of similar social status, American girls are not sheltered from the reality of the public world and are given the confidence and intellectual training to opine on such conditions, at least during adolescence. He writes:

Long before the young American woman has attained the age of puberty, one begins to free her little by little from maternal tutelage; before she has entirely left childhood she already thinks for herself, speaks freely, and acts alone; the great picture of the world is constantly exposed before her; far from seeking to conceal the view of it from her, they uncover more and more of it to her regard every day and teach her to consider it with a firm and tranquil eye. Thus the vices and perils that society presents are not slow to be revealed to her; she sees them clearly, judges them without illusion, and faces them without fear; for she is full of confidence in her strength, and her confidence seems to be shared by all those who surround her.²⁴

Tocqueville thus appears taken with the remarkably high level of autonomy and decision-making capacity in young women and attributes this, in part, to the challenges of democracy – the “tyrannical passion of the human heart” and the contested shores of public opinion. Women are given an education in civic virtue and the tool of reason, rather than the script of religion, as a countervailing force to the liberty and licentiousness that is more prominent in democracy than in aristocratic regimes. It is notable that Tocqueville does not temper his discussion of young women with comparisons to their brothers on whom they seem to neither depend on for the protection of their virtue nor defer to in matters of cognitive capacity. Young women are ensconced in the protection and didacticism of the family, one that is headed by a man, but the independence Tocqueville notices in girls is not perpetually bound to a male figure. Remarkably, American girls are primed to conduct themselves in a world where authority is diffuse and may exist in conflicting configurations.

If Tocqueville appears to be empirically-driven in his thinking about the particular sociological qualities of the experiences of American girls and women, the one framing normative concept he brings to these observations is the idea that “Women make mores” and the task for adult women is to cultivate these mores in the private, domestic sphere. The moment of marriage marks a sharp contrast from the independence nurtured in girlhood. Though not without its value and even necessity in Tocqueville's account, “the independence of woman is irretrievably lost within the bonds of marriage.”²⁵ Marriage, a relationship undertaken by mature women, becomes a space in which to cultivate

24. Tocqueville, *Democracy in America*, II, p. 563.

25. Op. cit., p. 565.

distinct religious and secular ideals, including those of deference, self-abnegation, and frugality. The religious virtues now become more important than ethical judgment as the foil for the individualism and commercialism of the public sphere.

The equality of conditions that fostered the spirit of gumption in her youth, also gave women the semblance of choice when it came to choosing a husband (the ideology of anti-miscegenation and class prejudice notwithstanding), in contrast to the arranged marriages with which Tocqueville was familiar. Yet after the act of making the marital choice, their worldly knowledge and gumption is not particularly useful. He writes, "Almost all men in democracies follow a political career or exercise a profession, and, on the other hand, the mediocrity of fortunes obliges a woman to confine herself inside her dwelling every day in order to preside herself very closely over the details of domestic administration."²⁶ While the responsibilities for husbands and wives are defined and distinct, such conditions allow for the process of true affection, Tocqueville postures, between men and women because of their complementarity in the context of love and respect. Scholars have argued that while the idea of two spheres, public and private, with the former superior to the latter, is taken as immutable, Tocqueville does not attribute it to the differences of the body. De-emphasizing the biologically determinative aspects of the division of labor allows Tocqueville to highlight the political and moral value of such an arrangement.

Moreover, Tocqueville finds the strictness of such an arrangement to be voluntarily, even enthusiastically, supported by the women themselves. They are far too capable to be fooled into submission, although Tocqueville gestures toward his own socio-economic myopia when he says, in reference to the harmonious division of labor, "That is at least the sentiment that the most virtuous women express: the others are silent."²⁷ Still, deference to the authority of one's husband, coupled with a soft prohibition on public life, results in a case of the arrested development of American women. It is unfortunate because adult women seem to be particularly well poised to engage with the mores of society because of their own position vis-à-vis tradition. Again, Tocqueville's historical determinism makes it difficult to know whether he genuinely did not notice opportunities for greater female involvement in democratic life or the desire for it by women themselves (in part a problem with how he scheduled his trip) or whether he saw domestic confinement as a necessary constraint on the intellectual and political capabilities of women.

Were there to be the assumption of radical enfranchisement, women would be particularly competent in deciding punishment given Tocqueville's description. Their civic and moral education as young adults was marked, as he says, by an awareness of the realities of social problems without the paralysis of fear and would be a fitting precursor to the judgments necessary for punishment. Similarly, given the role of women in cultivating and perpetuating social mores apart from individualism and consumerism, they would also be capable of determining how punishments might contribute to the furthering of social ends, especially in punishment's deterrent and rehabilitative functions. Again,

26. *Op. cit.*

27. *Op. cit.*

both jurors and women have the potential to do the difficult and important work of determining punishment, but Tocqueville hobbles both of their abilities to do so.

Feminist scholarship has taken up the question of the significance of such a stark contrast in what Tocqueville valued in the life trajectories of youthful versus mature American women. A revival of interest in Tocqueville in the 1980s combined with greater attention to the gendered dimensions of the work led to more generous readings. Notably, Delba Winthrop suggested that Tocqueville's comfort with the confined role of women came from his understanding about the false promises of democracy and commercial life. Women's distance from the public world means that they are better off, not worse, because they are less compromised in their marketized daily exchanges and less prone to be driven by the narcissism democracy dares its practitioners to display. She writes, "Informed resignation to democracy's defects is as much as a woman or a man can reasonably hope to accomplish in (and for) democracy . . . To raise our collective consciousness, flout conventions and overturn or amend our laws" will only exacerbate the worst aspects of democratic life.²⁸ Winthrop is thus a sympathetic reader of Tocqueville's aristocratic yearnings – for her, it is best to keep democracy in check, even through mechanisms that rely on the confinement of human potential. Yet her reading supports the larger argument, in that the radical enfranchisement of women, that is the chance to flout conventions and overturn laws, is the process by which democracy evolves. There may be an equilibrium where aristocratic fears are kept in check but can there be another where some of the causes for revolution (inequality, *ressentiment*, etc.) are mitigated by greater political participation?

Laura Janara's work sees Tocqueville's defense of the boundary between the independent girl and the subservient woman as tied to his subconscious desires to both preserve and obscure the hierarchical arrangements that provide stability within aristocratic regimes. The playful esteem in which Tocqueville seems to hold American women belies deeper fears about what might emerge if they were to be seen as mature democratic citizens. She writes,

Even as this adult female soothes democracy's post-aristocratic anxieties, she continually pricks them. In relegating women to the household in order to install a new certainty in society, U.S. democracy staves off some of the tumult. But these women's deep influence – over mores and morality, bodies and erotic desire – undoubtedly triggers the opposing fear that, through them somehow, authority-from-above will reincarnate to dissolve men's newfound autonomy.²⁹

Such a psychoanalytic reading suggests that the arrested development of women as full political subjects may be the source of a double bind for male political subjects who feel anxious even when they are at their best, that is, when they are trying to achieve a balance between democratic procedures and an aristocratic tilt toward tradition and

28. Delba Winthrop, "Tocqueville's American Woman and 'the True Conception of Democratic Progress,'" *Political Theory* XIV (1986), 245.

29. Laura Janara, "Democracy's Family Values," in *Feminist Interpretations of Alexis de Tocqueville*, Jill Locke and Eileen Hunt Botting (eds) (University Park, PA: Penn State University Press, 2008), p. 64.

excellence. The double bind is as follows: on the one hand, the achievement of the full emancipation of women in a way that builds on the education and autonomy that has developed in democratic life would destabilize the privilege of masculinity that democracy offers alongside its rhetoric of equality. On the other hand, the continued suppression of female competency contributes to greater anxieties about the potential for instability in a democracy and the resentment that comes from unfulfilled promises. Tocqueville may deny that such anxiety is operational for men within democracy but his blithe observations about the gap between the potential of female education and the cultivation of autonomy and the use of such education evinces that another historical trajectory should be possible.

For Tocqueville to see jurors and women as radically enfranchised, he must afford them the opportunity to diverge from those who were instrumental in their education in order to enact a belief about the proper application of justice. For jurors, this would be divergence from the officers of the court, including the judge and attorneys, and for women, it would be the teachers and family elders of their childhood. The possibility of a legitimate difference in viewpoints from one's husband, although not necessarily tasked with female education, also represents a type of enfranchisement for women as it takes them to have insight and value in decisions beyond the private sphere. Radical enfranchisement in the case of jurors does not refer to the potential to break the procedures of the court *per se*, but, when the conditions necessitate it, for the jury to nullify the law in a particular case or be part of a minority that causes a hung jury. While both outcomes are technically acceptable, judges and lawyers frown upon them. For jurors to act in a radically enfranchised way does not mean that they can never be criticized for their actions – they will make mistakes or errors in judgment (just like prosecutors and judges) and this will cause public debate, but the starting assumption is that jury decisions in exceptional moments should be treated with greater attention and as a symptom of a functioning democracy.

III. The Ills of Democracy

Thus far I have showed that Tocqueville fails to see the possibility and necessity of the radical enfranchisement of jurors and women despite his own observations and assessments that both groups could meet such a standard. His own biases, psychological and theoretical, along with a sociological method that affirms the immanent as the normative prevents him from seeing the opportunities of radical enfranchisement for the two major ills of democracy that vex him: the tyranny of the majority and soft despotism. On the power of the majority to enact their will, he writes, “The majority in the United States therefore has an immense power in fact, and a power in opinion almost as great; and once it has formed a question, there are so to speak no obstacles that can, I shall not say stop, but even delay its advance, and allow it the time to hear the complaints of those it crushes as it passes.” The protection of individual rights enshrined within the Bill of Rights acts as a dam to the tides of majority desires, but the jury also tempers the tyranny of the majority through determining how and when the law should be applied. Tocqueville addresses this function directly, but for reasons described above does not highlight the even greater potential of the jury to resist majoritarian goals when they are considered to

be enfranchised subjects who are able to enact one-off outcomes that challenge the necessary proceduralism of democracy for the purposes of substantive justice.

The problem of soft despotism occurs when a political system is so governed by complex and tedious rules that acquiescence and passivity become conscious political choices for citizens who are politically aware. Soft despotism, a danger to democracy in Tocqueville's view, exists in productive tension with jury service. On the one hand, skeptics of juries along with those who bemoan being served a summons for jury duty would highlight the aspects of jury service that feel like tedious procedure. From the artifice of the trial to rules against casual discussion among jurors or note taking, many aspects of the legal system are decidedly opaque and difficult for outsiders to navigate. The prosecution in a criminal case, one might argue, exercises its own type of soft despotism within the criminal justice system because of its knowledge of the legal code and the camaraderie that often develops between police officer, prosecutor, and officers of the court. Compared with despotism conventionally understood, soft despotism engenders the same enfeebled will and impoverished sense of political possibility but does so without resentment against the oppressive sovereign. On the other hand, jury service and the empowerment of jurors could be an antidote to soft despotism. Jury service is, for many groups who have been traditionally excluded from political power because of race, class, gender, or other reasons, a type of Trojan horse that passes through the traditional fortifications of soft despotism. Jurors are given final decision-making power and the chance to interpret the law in a way that reflects their understanding of justice. Rather than the acquiescence that comes with soft despotism, jury service is active and carries an impact different from other types of civic service. Giving jurors further legitimacy to act on the epistemological and moral perspective they bring to the courtroom and refine through deliberation is a way to counter the pervasiveness of soft despotism.

In the cases of the jury and women, radical enfranchisement is a process that includes education, internal reflection, and deliberation and it should find expression with the legal and political system, particularly through the opportunity to make decisions that have direct impact. Such power would come with the responsibility to understand the limitations of both tradition and revolution. Radical enfranchisement is thus a position between inertia and fool-hardiness. Jurors arrive at such a position through the status that is granted to their service, their education in legal procedure during and after the trial, the leadership of judges and lawyers, jurors' deliberations with each other, and the filtering of life experiences in light of the law that occurs when one is called to make a judgment. In the vast majority of cases, the decision of the jury will follow the guidelines set forth by the judge and by case history, but there will also be extraordinary circumstances that require an activation of their distinctive perspective. My argument for thinking about jurors as radically enfranchised subjects capable of deciding between multiple values and conceptions of justice and capable of going against the wishes of the officers of the court, in the case of a hung jury for example, is indebted to Tocqueville and all the work his writings have inspired about juries and democratic life. Yet, situating his enthusiasm for juries alongside his hesitations, especially as revealed in his examination of women, shows how there is a need for a pro-jury position that cannot be Tocquevillian in spirit, because it requires a pivot to the left – with increased prominence for juries as a way to insert *more* democracy as the remedy for a *poisoned* democracy – when Tocqueville pivots to the right with his focus on the benefits of aristocratic exposure.