
BOOK NOTE

EXPLAINING THE ORGANIZATION AND ACTIONS OF LEGAL PROFESSIONS: HONOR SEEKING AND ECHOES OF POLITICAL REVOLUTION

REVOLUTION AND THE MAKING OF THE CONTEMPORARY LEGAL PROFESSION: ENGLAND, FRANCE, AND THE UNITED STATES. By Michael Burrage.¹ Oxford: Oxford University Press. 2006. Pp. xi, 683. \$150.00.

What explains how lawyers choose their work and organize themselves? A cynical, obvious answer is money.² A more idealistic answer, service to society, is suggested by the public pronouncements of bar associations and law schools. In his new book, *Revolution and the Making of the Contemporary Legal Profession*, historian of professions Michael Burrage argues that neither profit motive nor idealism, though present, sufficiently explains the divergent, historically contingent ways Western lawyers have actually organized themselves and practiced law. Instead, Burrage argues that honor seeking and the effects of political revolutions generally do explain lawyers' choices of practice and organization. These twin theses guide Burrage's tour through two centuries of development in the legal professions of England, France, and the United States. While Burrage's historical opus is both too broad and too selective to displace explanations based on profit motive or the rise of modern capitalism,³ he usefully advances honor seeking and political revolutions as strong candidate explanations for a variety of legal and professional phenomena.

Burrage's first thesis is that status motivation — a Hegelian desire for recognition⁴ — better explains lawyers' professional choices than

¹ Until retirement in 2003, Michael Burrage was Research Fellow in Industrial Relations at the London School of Economics and Political Science.

² Dickens, for example, concluded that “[t]he one great principle of the English law is[] to make business for itself.” CHARLES DICKENS, BLEAK HOUSE 482 (George Ford & Sylvère Monod eds., Modern Library 1985) (1853).

³ See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 (1977) (arguing that developing ideas of property rights in an industrial economy and the law's role in facilitating economic development shaped the law in antebellum America).

⁴ Burrage relies partly on Professor Francis Fukuyama's tracing of the role of “desire for recognition” through history in *The End of History and the Last Man* (1992). Hegel's development of the function of recognition is primarily spread through his *Phenomenology of Spirit* (1807) and *Philosophy of Right* (1821). John Adams wrote perhaps the finest evocation of the role of desire for honor and regard in motivating human action, revolutions, and social organizations (including professions). See JOHN ADAMS, DISCOURSES ON DAVILA (1805), reprinted in 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 223, 232–56 (AMS Press 1971) (Charles Francis Adams ed., 1851).

does profit motive (pp. 18–19). It is not that profit fails to motivate, nor that lawyers are less avaricious than others, but that profit motive and market forces underexplain the choices legal professionals have historically made. Burrage sees lawyers' desires for status — their honor seeking — channeled through historical events as explaining, for example, why British barristers insisted on professional separation from solicitors, why American bar associations preferred professional ethics codes prohibiting lucrative advertising or selling on commission, and why most French advocates ignored business opportunities created by industrialization (p. 593).

A thesis of honor seeking, however, requires an account of the honor grantor: the power-wielding audience of lawyers' behavior. Burrage's second thesis is that political revolutions in France, America, and England each, over time, reoriented the legal professions from playing to the audience of the centralized state and its courts to playing to the public audience of citizens and clients, whose suspicions of the legal profession became a force through popular representation and whose business, now found in the market rather than the courts, had to be won (pp. 18–21).⁵ Lawyers' search for honor, then, was not only for honor's sake. It became a tactic for winning a suspicious public's tolerance of professional monopolies and self-governance (pp. 34–37).

Burrage weaves his twin theses through large-scale historical narratives to argue that political revolutions shaped the contemporary legal profession by, first, creating the conditions against which the most elite English and French legal professions would remain honor bound and professionally formal. Those traits rendered these English and French professions stable and self-governing, but vulnerable, in the last thirty years, to state-mandated, market-based reforms and to foreign legal encroachments.⁶ Second, Burrage argues, the American Revolution inspired and enabled both anti-lawyer unrest (such as Shays's Rebellion) and the hostility of state legislatures (populated with less elite lawyers) toward elite-dominated bar associations (pp. 377–78). Each led to the collapse of American bar associations and traditional professional restraints, permitting the rise of American law schools. These novel university-based law schools together with industrial clients shaped an expansive, innovative, less ethical American profession (p. 378). Learning to take what business they could and ex-

⁵ This connection between the two theses deepens the revolutionary effects thesis, which would otherwise state the obvious: lawyers and laws are bounded by political jurisdictions and are affected by the origins of those boundaries. Cf. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 574 (2002) (arguing that law and its institutions are "as local as barnacles" but that a global law is nevertheless emerging).

⁶ Americans encroached on the English in London, and both Americans and the English encroached on the French in Paris (p. 592).

panding behind their globalizing clients, American lawyers finally threatened with market force the status-bound professions abroad (p. 383). Divergent revolutionary experiences thus not only drove divergent histories *within* the professions over the last two centuries, but also drive competition *between* the professions now.

Burrage focuses his French material on the Revolution's effect on the most elite French legal order, the advocates, arguing that "it is only because of the experience of the French advocates that one is prompted to ask questions about their American and English counterparts in the first place, or that one knows what questions to ask" (p. 44). By setting the most total revolution (the French) and the most rigid profession (the advocates) as backdrops, Burrage activates negative spaces in the American and English material. This comparative approach allows, for those countries, analysis of choices not taken and situations not faced, without resorting to counterfactuals.

Advocates had long held the monopoly on pleading before courts at trial and had, by the eve of revolution (circa 1780), formed themselves into a profession *par excellence*, at least as measured against Burrage's criteria (pp. 57-73).⁷ The profession did not withstand, however, the Revolution's ferocity and duration. Utopian visions of justice without lawyers or abstruse law seemed suddenly realizable (p. 109). Professional orders were, for a time, abolished, courts and procedure were simplified, and the codification of the law was begun, with hopes to bring law within the comprehension of any citizen (pp. 83-84).

But the Revolution and Empire eliminated advocates and their professional organizations only for a time. Indeed, revolution gave the advocates new and honorable purpose, and by threatening their existence engendered solidarity (pp. 114-15). Specifically, French Republican and Imperial restrictions on speech shunted political expression into a channel of free expression whose existence was preserved by revolutionary ideals: courtroom pleading by advocates. The revolutionary ideal of a fair opportunity to present a defense preserved the right of advocates, pleading in defense of prisoners, to say what they chose. The ideal of open courts, moreover, implied the right to publish complete transcripts of such pleadings, while nearly all other print outlets were censored. Thus, through the mid-nineteenth century, the advocates became "spokesmen, or even the leaders of the political opposi-

⁷ Burrage assesses legal professions with respect to four things they have "consistently tried to do" (p. 22): control their admission and training (p. 23); define and defend their exclusive work domain (p. 28); regulate their members' behavior (p. 31); and defend and enhance their corporate status (p. 37). Burrage is not the first to suggest such criteria. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 34-39 (1989) (expounding a functional theory of the legal profession focused on stratification, autonomy, solidarity, and self-regulation).

tion" (p. 114), championing ideals of liberty to packed audiences and newspaper readers (pp. 118, 122).

Guided by his twin theses of honor seeking and revolutionary effects, Burrage argues that, long after liberalization and normalization allowed political discourse to flow back into normal channels, the memory of this honorable episode continued to transfix the advocates themselves. It anchored (or ossified) their self-definition, and it determined their professional self-government, which came to value pleading exclusively, prohibiting participation in other aspects of law. Their glorification of independence prevented entrepreneurial adjustments to changing times, such as formation of partnerships, acceptance of state funding for legal aid, and even the open charging of fees (p. 179). Old practices outlasted their rationale. It required the intervention of the exasperated central government (chiefly through laws passed in 1971 and 1991) to force the advocates to adapt the profession to the market economy and to counter the influx of English and American law firms, which had, in the words of one government commission, "made Paris their privileged hunting ground" (p. 152).⁸

Burrage sets the less market-resistant American legal profession against this honor-soaked, Gallic backdrop. The American bar might seem to have had little to fear from its own revolution, which was less centralized, shorter, and led substantially by lawyers and elites with property and business interests to preserve. But, Burrage argues, the American Revolution kindled smoldering popular anti-lawyer sentiment.

Many of the ordinary folk who fought for the colonies saw the Revolution partly as a fight against elite courts, mysterious common law, and the lawyers who brought creditors' actions against them (pp. 233-34). Shays's Rebellion (1786), the first act of which was to close the courts in five counties, was only one violent episode in decades of popular resistance against courts, law, and lawyers. Republican pamphleteer Benjamin Austin put this resistance hotly but clearly when he cast lawyers as "dictators of public life" and "oppressors of the people," insisting the Republic could not "be free from danger while this order are admitted so abundantly as members of our legislatures" (pp. 235-36). Eight Massachusetts towns called on their state's legislature to abolish or to control the legal profession (pp. 237). Nineteenth-century proposals for fee ceilings, simplification of the courts, codification of the law, extension of informal conflict resolution, and election of judges are, Burrage suggests, explained by the democratic ideals of the

⁸ The government was also partly responding to a national, but minority, association of advocates (the Association Nationale d'Avocats, or ANA), which had, from the 1920s, argued that the profession must "adapt to the realities of earning a living in capitalist society" (p. 582). Burrage sometimes refers to the ANA as the alter ego to advocates' professional collective conscience (*id.*).

Revolution (pp. 239–53).⁹ He suggests these ideals also motivated indirect attacks such as state removal of self-regulation by the bar and removal by a majority of states of any admission requirements to practice. In the face of these attacks, by 1850, the bar associations collapsed (pp. 251–54, 258–59).¹⁰

Burrage thus argues the American Revolution led to an institutional vacuum that enabled the entrenchment and success of American universities' law schools. Less influenced by the bar and the state, Burrage claims, American lawyers by the late 1800s were shaped by the market and the law schools. Far from balancing the market's effect on American lawyers, the law schools were themselves "entrepreneurial, competitive, market-driven institutions, enrolling and graduating as many students as they conveniently and profitably could They were indifferent to any larger professional interest, and also indifferent to any ethical rules of conduct of their graduates. Legal practitioners came to reflect many of these characteristics" (p. 311).¹¹

Burrage sees revolutionary effects and honor seeking at work in other aspects of the contemporary American profession. For example, since debates surrounding the revision of the ABA's Model Code in the 1980s revealed a serious lack of consensus, Burrage argues that an emphasis on pro bono work and diversity has partly displaced professional codes of conduct and discipline as the means by which the American bar presents itself as honorable to a public made powerful

⁹ Burrage strains to attach anti-lawyer sentiment to the democratic impulses "of" the revolution (an example of Burrage's commitment to a form of revolutionary exceptionalism, in which the event makes the impulse, rather than the reverse). Americans may have *always* disliked lawyers, apart from the Revolution, but this is debated. Compare LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 94–101 (2d ed. 1985) (finding a constant American antipathy to lawyers), with 3 CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 211 (1911) (finding that early colonial antipathy toward lawyers had waned by the eve of revolution).

¹⁰ Burrage also claims that shifts from appointed to elected judges (pp. 264–65) and adoptions of Field's Code of Civil Procedure were born of revolution-inspired democratic feeling. David Dudley Field's rhetoric, quoted by Burrage (p. 267), is consonant with this claim: "[K]nowledge of the law is confined to a particular class; it is the interest of that class that it should be so confined" David Dudley Field, *Codification*, AM. L. REV., Jan.–Feb. 1886, reprinted in 3 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 238, 238 (Titus Munson Coan ed., New York, D. Appleton & Co. 1890). Burrage further quotes Field (p. 267) as stating, "that this should happen in a republic, where all the citizens both legislate and obey[,] is . . . at first sight incredible." David Dudley Field, *Reform in the Legal Profession and the Laws* (Mar. 23, 1855), in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 494, 510 (A.P. Sprague ed., New York, D. Appleton & Co. 1884).

¹¹ For example, Burrage states that despite Justice Story's early imposition of rigor and his veneration of the greater purposes of genuine scholarship, Harvard Law School lowered admission standards in the 1840s, dropping admissions requirements altogether by 1848. Lest this be not inducement enough to paying students, the graduation standards were lowered until, in 1869, the school eliminated examination requirements. What the university-affiliated schools sold in this period was not, for most students, an education, but a marketable credential (pp. 288–89).

by political revolution, which might otherwise threaten reform.¹² Burrage suggests that the profession has made this shift not only because pro bono efforts and diversity are less costly to implement, less disruptive to impose uniformly across a heterogeneous profession, and less restrictive on business development and practice methods, but also because pro bono and diversity are better understood (and therefore more honored) by the public (pp. 324–26).

The British legal professions (barristers and solicitors), unlike the American or French, Burrage argues, were directly strengthened by the two revolutions they weathered, not because populist winds blew differently,¹³ but because of particular revolutionary tactics. For example, Cromwell's Commonwealth chose to demonstrate its legitimacy by pointedly adhering (mostly) to institutions and processes of law (p. 430). Forestalled by the strong professional self-government the English revolutions left intact and strengthened, Burrage suggests, serious reform came to the English barristers and solicitors late, as part of the overall Thatcherite reforms of the 1980s (which were continued by Labor governments in the 1990s) (pp. 568, 576). These reforms forced barristers toward the market and away from centuries of self-regulation, self-selection, and monopolies on areas of work. As a result, barristers and solicitors since the 1980s increasingly compare themselves with multinational accountancies and American law firms in London (pp. 575–76). Neither model, Burrage observes, offers "much support for traditional professional notions of corporate honour" (p. 576). Instead, Burrage expects the English lawyers to conclude (like their American counterparts) that "prestige depend[s] less on the kind of work performed than on the success with which it was performed, and success, whether for a firm or chambers, or for an individual, is . . . measured by fees earned and published" (*id.*).

Burrage's twin theses of honor seeking and revolutionary effects sometimes suffer from strained application, often where economic explanations fit better.¹⁴ But they also provide explanations, as with

¹² Cf. ABEL, *supra* note 7, at 38 (suggesting pro bono work is performed by the profession in proportion to "the publicity it receives").

¹³ Burrage makes clear that the English Revolution and, to a lesser extent, the Glorious Revolution (circa 1642–1651 and 1688) were akin to the French and American revolutions. Revolutions in all three countries engendered populist speeches, pamphlets, and legislative agitation for lay justice, lay review of court decisions, plain-meaning procedure and opinions, lay pleading, codification, strict construction, and speedy decisions. Burrage identifies these as notes struck by all "authentic revolutionary voices," whether in Philadelphia, London, Paris, or, "for that matter, in Petrograd and Moscow" (pp. 414–15).

¹⁴ For a market explanation that fits better than Burrage's revolutionary effects explanation, see Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747 (1990). Burrage strains to attribute large firm size, at least in part, to imitation of the sizable faculties of law schools (pp. 284, 311, 346).

the French advocates' market behavior, where profit motive cannot. Burrage's theses, along with the comparative, historical approach by which he develops them, deserve application to many legal phenomena.

Burrage's unusual twin theses prevent *Revolution* from serving well as a standard history, yet allow the book to illuminate aspects of the legal profession underexplained or unnoticed by more mainstream historiography. No American, English, or French historian of law appears to have advanced honor seeking so comprehensively as an explanation of lawyers' choices, nor have political revolutions' effects on the legal profession been much examined in comparative perspective.¹⁵ Both honor seeking and political revolutions are, however, found in legal histories alongside or subordinated to substantive law, nonrevolutionary politics, and, of course, profit motive.¹⁶

Burrage's comparative approach also has clear advantages, such as allowing analysis of why events do not occur without resort to counterfactuals. Thus, Burrage is able to treat the continuity of the English legal professions in the face of revolutions as genuinely exceptional. However, the strain to make the comparisons work sometimes distorts the selection and exposition of material. Most notably, Burrage's focus on aspects of the profession and professional structure, even confined to the functional definition Burrage maintains (pp. 22-41), privileges the rigid orders of French advocates, with their inflexible *incompatibilités*, and those peculiar institutions of English Barristers, the Inns, over the less structured American bar.¹⁷ Burrage's comparative approach to the American and English material requires a constant eye to the French example even to know what questions to ask (p. 44). This grounding limits the capacity of Burrage's core historical analysis to evaluate how much work his (rather Gallic) theses of honor and revolution are actually doing on their own. Even *within* the French material, Burrage must emphasize the corps of advocates, for the sake of his comparative project, well beyond what could be justified in a specifically French study, given their small number and anomalous an-

¹⁵ A few narrow comparisons exist. See, e.g., JOHN PHILLIP REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION (1977).

¹⁶ See, e.g., FRIEDMAN, *supra* note 9, at 304-14. For an example of subordination of revolutionary explanations to ordinary political explanations (by calling anti-elite legal reforms "Jeffersonian"), see KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 78-86 (1989).

¹⁷ Burrage argues American lawyers consider their work as no more definable than "what lawyers do," based on the generality of the Model Rules of Professional Responsibility (p. 362). Cf. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 45-53 (1981) (criticizing state prohibitions on unauthorized practice for defining the practice of law as nothing more specific than "what lawyers do").

tipathy to the market relative to other legal professional orders (pp. 189, 204–05).

Burrage's comparative approach is also useful because it requires the development of more historical material, allowing his twin theses to accrue more inductive force than they could over one historical narrative. Like long exposure photography, this approach reveals phenomena that elude rapid analysis. Burrage is thus able to expose a coherent narrative within the political gumbo of opportunism, media exposés of lawyers' scandals, ideology, and attempts to keep national economies and professions competitive that finally precipitated into reform of the French and English legal professions.¹⁸ Yet, extended historical narratives and comparative analyses risk overgeneralization. Burrage's work is no exception, as when he claims the American states, tracking the interests of the non-elite lawyers more likely to be state legislators, maintained a profession wide open by both European and earlier, more elite, American standards (p. 253). The facts, across decades of time, varieties of regulation, and dozens of legislatures, are more complex.¹⁹

Burrage succeeds best in *Revolution* — and offers legal scholarship the most — when he shows how honor seeking and revolutionary effects can explain how lawyers interact with market forces, without denying the role of profit motive or resorting to idealism. That approach can and should be applied to professional phenomena Burrage does not consider, such as how lawyers choose specialties, where they locate, and what size firms they join, if they join one at all. Broader legal phenomena often studied using economic methods, such as administrative rulemaking, may also be illuminated by historically nuanced consideration of whether honor seeking and revolutionary effects are subtly, but fundamentally, at work.

¹⁸ For the story of the Thatcher government's dismantling (culminating in 1990) of barristers' and solicitors' self-government, arguing that each should be treated "like any other industry" and "historical precedents [should] count for naught," see pp. 552–64. For the French government's determination to save advocates from the market by drawing them into the market (also culminating in 1990), see p. 204.

¹⁹ Although agreeing with Burrage that American state legislators were generally hostile to the bar associations and elite lawyers, Professor Anton-Hermann Chroust disagrees that they left the profession wide open, arguing instead that the states imposed a multitude of harassing restrictions on practice. 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 224–80 (1965). A third, contrary view of the legislature-lawyer relationship is one of wholesale capture of the legislatures by lawyers. See, e.g., MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS* 57 (1995).