

# REVOLUTIONARY LAWYERING? ON LAWYERS' SOCIAL RESPONSIBILITIES AND ROLES DURING A DEMOCRATIC REVOLUTION

YANIV ROZNAI\*

*The first thing we do, let's kill all the lawyers.*<sup>1</sup>

## I. INTRODUCTION

The quotation at the top of this page is a known joke on lawyers. But, in fact, it might serve as a reminder of the importance of lawyers in a society during revolutionary times. The call to kill lawyers as a first step in the Shakespearian play does not only express the lay public's traditional suspicion of the legal profession<sup>2</sup> or the will of new post-revolutionary societies to free themselves of the lawyers' strata,<sup>3</sup> but may also derive

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\* Ph.D. Candidate, Law Department, The London School of Economics and Political Science ("LSE"); Visiting Student Research Collaborator, Woodrow Wilson School of Public and International Affairs at Princeton University (Spring, 2013); LL.M. (2009), LSE; LL.B. (2006), B.A. (2006), Interdisciplinary Center Herzliya ("IDC"). The author would like to thank Martin Loughlin, Nathan J. Brown, Thomas Poole, and Ozan O. Varol for helpful conversations and correspondence, and to Alona Hagay-Frey, Moran Kandelstein-Heina, Nir Yamin, and Tamar Waldman for their valuable comments on an earlier draft of this article. The author would also like to express his appreciation to the staff of the *Southern California Interdisciplinary Law Journal*, especially Felicity Lewis, Erinn Gansel, Valerie Marek, Scott Oranburg, Maureen Klewicki, Jaysen Borja, Colin Shaff, Brandon Fieldsted, Celina Kirchner, Becky McCullough, and Timothy D. Biché for their earnest diligence and insightful editing. The paper was presented at the 9th Cornell Law School Inter-University Graduate Conference (April 12–13, 2013) and the Queen Mary Postgraduate Legal Research Conference (June 6, 2013). All quotations and sources that are originally published in Hebrew were translated by the author.

1. William Shakespeare, *The Second Part of King Henry the Sixth* Act 4, Scene 2.

2. See Penelope J. Corfield, *Eighteenth-Century Lawyers and The Advent of The Professional Ethos*, in *DROIT ET SOCIÉTÉ EN FRANCE ET GRANDE BRETAGNE* 103, 103–05 (Philippe Chassaing & Jean-Philippe Genet eds., 2003).

3. MICHAEL BURRAGE, *REVOLUTION AND THE MAKING OF CONTEMPORARY LEGAL PROFESSION* 5 (2006) (noting the prevalence of discussion regarding "law without lawyers"); Michael Burrage, *Revolution and the Collective Action of the French, American, and English Legal Professions*, 13 *LAW & SOC. INQUIRY* 225, 274 (1988) (arguing that the English, American, and French revolutions all "shared a common revolutionary aspiration for a new kind of legal order—law without lawyers."). See also John C. Frank, Dean, Int'l Acad. of Trial Lawyers, *A History of Law—and Lawyers*, Dean's Address at the International Academy of Trial Lawyers (1968), [http://www.iatl.net/files/public/68\\_history.pdf](http://www.iatl.net/files/public/68_history.pdf) ("Every Utopia has been designed to dispense with the

from the belief that lawyers can hinder a revolution.<sup>4</sup> Lawyers, can indeed, serve as guardians of the existing constitutional order. Well-known is the story of the brave Pakistani lawyers who demonstrated in the streets—almost the only members of the Pakistani elite to do so—to prevent President Ferbus Musharraf from suspending the Pakistani Constitution in 2007. Those Pakistani lawyers saw themselves as the guardians of the constitutional order, of the legal system. The pictures that show the lawyers demonstrating in the streets and being forcefully evacuated by the police reminded many what lawyers could, and maybe should, do. In solidarity with the Pakistani lawyers, American lawyers carried out a protest march, and the American Bar Association awarded its 2008 Rule of Law Award to “those lawyers and judges in Pakistan that exhibited courage when defending the Rule of Law in their country.”<sup>5</sup>

Lawyers, however, can act not as hinders of a revolution, but rather as its catalytic agents. The involvement of many lawyers in the Egyptian revolution that brought about the termination of Hosni Mubarak’s regime is stimulating in that respect. On February 9, 2012, more than three thousand lawyers marched towards Tahrir Square and joined the multitude of protesters. They did not act as ordinary people but in their capacity as lawyers. For example, the lawyers protested wearing their black robes, granting their revolutionary act a sense of legitimacy.<sup>6</sup>

Is any social responsibility imposed on lawyers during a revolution? If so, do lawyers have a special role in the revolution? This Article will try to shed light on these questions and their related, but complicated theoretical and practical dilemmas. These questions are especially important in light of the “democratic revolutions” in the Arab world, also known as the “Arab Spring.” Part II of the Article conceptualizes the term “democratic revolution.” Part III reviews the historical role the lawyers have played in great Western revolutions: the English, American, and French Revolutions. Part IV discusses the lawyer’s characteristics as a conservative and, conversely, as a revolutionary. Part V outlines the conflicting commitments imposed on lawyers during a democratic revolution—preservation versus

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lawyers. The organized legal profession was abolished following the French Revolution, and after the Russian Revolution. In each case the attempt failed.”).

4. DANIEL KORNSTEIN, *KILL ALL THE LAWYERS?: SHAKESPEARE’S LEGAL APPEAL* 26–28 (1994).

5. See Taiyyaba Ahmed Qureshi, *State of Emergency: General Pervez Musharraf’s Executive Assault on Judicial Independence in Pakistan*, 35 N.C.J. INT’L L. & COM. REG. 485, 487–88 (2010).

6. Behrouz Mazloumi & Maryam Salimi, *Reviewing the Role of Facebook in Egyptian Revolution in February 2011*, 1 ASIAN J. SOC. SCI. & HUMAN. 76, 79 (2012).

improvement of the legal systems. Part VI describes the practical role lawyers may play during a democratic revolution. Part VII summarizes.

## II. DEMOCRATIC REVOLUTION: A CONCEPTUAL NOTE

Before discussing the role of lawyers during revolutions, this Article's definition of "democratic revolution" must be clarified. The term "revolution" does not have a uniform definition, and an extensive discussion of such exceeds the limits of this Article. However, the meaning of "revolution" has been carefully delineated by scholars and laypersons alike.<sup>7</sup> For example, according to a famous story of the French Revolution, when Louis XVI was informed of the raid of the Bastille by the Duc de Liancourt, Louis XVI shouted, "But good God! That is a revolt!" to which the Duc replied "No, Sir, . . . *c'est la revolution*" to imply that the raid was some kind of force of nature, not an uprising of the people.<sup>8</sup>

For purposes of this Article, I will use Ulrich Preuss's definition of "revolution," which asserts that the decisive element for defining political or social changes as "revolutionary" is whether the political or social changes collapse the existing order and its basic principles, and replace them with new ones.<sup>9</sup> Thus, "revolution" does not necessarily include fighting in the streets, a civil war, or bloodshed. This is not to deny that many revolutions are accompanied by violence, but rather to emphasize that, according to the definition used in this Article,<sup>10</sup> violence is not a necessary condition of a revolution.<sup>11</sup> Moreover, the meaning of "revolution" does not require a change to or a replacement of the constitution in a way that is incompatible with the constitutional amendment procedure as understood by legal philosopher Hans Kelsen.<sup>12</sup> Rather, a revolutionary change can also occur through legal means.<sup>13</sup> Nor

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7. For information on law, political philosophy, and revolution, see REVOLUTIONS IN LAW AND LEGAL THOUGHT (Zenon Bankowski ed., 1991) and SHAPING REVOLUTIONS (Elspeth Attwooll ed., 1991).

8. Eugene Kamenka, *The Concept of a Political Revolution*, in REVOLUTION 122, 125 (Carl J. Friedrich ed., 1966).

9. ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 81 (Deborah L. Schneider trans., 1995).

10. This definition is not accepted by some scholars, who do find violence to be a necessary part of a "revolution." See, e.g., Tuan Samahon, *Democracy, Violence, and Constitutional Revision in the Shadow of Democratic Revolution Theory*, 89 DENV. U. L. REV. 735, 739–42 (2012).

11. See Jes Bjarup, *The Concept of a Revolution*, in REVOLUTIONS IN LAW AND LEGAL THOUGHT, *supra* note 7, at 22, 27.

12. HANS KELSEN, PURE THEORY OF LAW 209 (Max Knight trans., 1967) (1960).

13. See Joel I Colón-Ríos & Allan C. Hutchinson, *Democracy and Revolution: An Enduring Relationship?*, 90 DENV. U. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1895450>.

does this Article's definition distinguish between a constitutional revolution, which aims to change the regime without essentially changing the social order or proprietary ownership, and a social revolution, which is characterized by a new division of wealth and changes in the ownership rules. The difference between these two types of revolutions is slender, and there is often reciprocation between them.<sup>14</sup>

The focus of this Article is the "democratic revolution." On its face, the term "democratic revolution" seems to be an oxymoron.<sup>15</sup> How can a revolution, which often deviates from the political-democratic rules, be democratic? First, it should be noted that "constituent authority"—the authority to constitute or establish a nation's constitutional order<sup>16</sup>—is connected, to the extent that it derives from the people, to the democratic idea. Therefore, a call for a revolution as part of the arousal of the original constituent power can, in itself, be an expression of the natural instinct of democracy—a Lockean "right of revolution."<sup>17</sup> Nevertheless, not every revolution is democratic. For example, a revolution may lead to the reign of a non-democratic regime, even if by an electoral process. Furthermore, a revolution that simply brings about elections does not qualify as a "democratic revolution" if, substantively, it is no more than a formal or procedural democracy.<sup>18</sup>

Therefore, this Article focuses not on the procedural or formal components of the revolution, but on its normative components. In such,

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My own ideas on revolutionary changes through the constitutional amendment process are elaborated in my Ph.D. thesis entitled "*Unconstitutional Constitutional Amendments*"—*A Theoretical and Comparative Study of the Constitutional Amendment Power and Its Limits* (in progress) (unpublished Ph.D. thesis, The London School of Economics and Political Science) (on file with author).

14. See, e.g., THEDA SKOCPOL, *STATES AND SOCIAL REVOLUTIONS: A COMPARATIVE ANALYSIS OF FRANCE, RUSSIA, & CHINA* 140–42 (1979) (arguing that the English Revolution was not a social revolution but a political one). *But see* Steven Pincus, *Nationalism, Universal Monarchy, and the Glorious Revolution*, in *STATE/CULTURE: STATE-FORMATION AFTER THE CULTURAL TURN* 182, 183 (George Steinmetz ed., 1999) (arguing that the English Revolution was a nationalist revolution).

15. See Charles H. Fairbanks, Jr., *Revolutions Reconsidered*, 18 *J. DEMOCRACY* 42, 45 (2007) ("Revolutions ultimately cannot be legal or constitutional because a revolution is a change of regime, and the laws derive from the regime.").

16. Richard S. Kay, *Constituent Authority*, 59 *AM. J. COMP. L.* 715, 716 (2011).

17. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* §§ 207–10, 220–31, 240–43 (Peter Laslett ed., Cambridge Univ. Press 1998) (1690). See also Kamenka, *supra* note 8, at 129. For further information on constituent power and democracy, see Colón-Ríos & Hutchinson, *supra* note 13; JOEL I. COLÓN-RÍOS, *WEAK CONSTITUTIONALISM* 7–8 (2012) and ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* 1 (Maurizia Boscagli trans., 1992) ("To speak of constituent power is to speak of democracy.").

18. For a description of different aspects of democracy, see AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 23–26 (2009).

the Article defines “democratic revolution” as a revolution whose goal is to weaken suppression and tyranny forces, and to promote liberal and democratic rights and liberties.<sup>19</sup> This definition is founded upon the assumption that democracy reflects a preferable value, and leads to the conclusion that a revolution that results in a better regime can be considered “just.”<sup>20</sup> Hence, the term “democratic revolution” includes both the revolution’s goals and its consequences.<sup>21</sup> Although ex-post research shows that much of the success of a “democratic revolution” may depend on the role played by the military,<sup>22</sup> this Article focuses on the role and consequences of the legal elite—the lawyers.

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19. See Richard Albert, *Democratic Revolutions*, 89 DENV. U. L. REV. 1, 39 (2012) (“Democratic revolution theory holds that democratic revolutions are in closer keeping with the purposes of revolution—which are to increase the range of liberty of citizens, expand opportunities to exercise liberal democratic rights and freedoms, and to multiply popular choice.”). See also Mark R. Thompson, *Whatever Happened to Democratic Revolutions?*, 7 DEMOCRATIZATION 1, 15 (2000), available at <http://dx.doi.org/10.1080/13510340008403682> (“Democratic revolutionaries do not aim to change the world but rather to democratize the political system.”). But see Carl J. Friedrich, *An Introductory Note on Revolution*, in REVOLUTION, *supra* note 8, at 3, 5 (“The democratic revolutions, characteristically, have pretended to be preoccupied with securing for the people the participation in politics which a preceding authoritarian regime had denied them. Actually, they also have always been concerned with the leadership.”).

20. Vincent Luizzi, *The Social Responsibility of Attorneys in Revolutionary Times*, in SHAPING REVOLUTIONS, *supra* note 7, at 176, 176–77 (Elspeth Attwoll ed., 1989). For a proposal of several accumulating conditions that would make a revolution “just,” see Haig Khatchadourian, *Just Revolution*, in SHAPING REVOLUTIONS, *supra* note 7, at 182, 182. For an approach to the democratic principle as reflecting a “definite virtue” which deserves to be an eternal constitutional principle, see Sharon Weintal, *Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory*, 44 ISR. L. REV. 449 (2011).

21. One cannot simply focus on the revolution’s goal, but must include some kind of reference to the revolution’s consequences and costs. See Michael Scriven, *The Evaluation of Revolutions*, in REVOLUTIONS, SYSTEMS, AND THEORIES 1, 1 (H.J. Johnson, J.J. Leach & R.G. Muehlmann eds., 1979). For a distinction between “sequences” of the revolution, which follow over time, and “consequences” of a revolution, which are clearly caused by the revolution, see Frederick M. Barnard, *The Evaluation of Revolutions—A Comment on Michael Scriven’s Paper*, in REVOLUTIONS, SYSTEMS, AND THEORIES, *supra*, at 11, 11–12, and David Braybrooke, *Self-Interest in Times of Revolution and Repression: Comment on Professor Tullock’s Analysis*, in REVOLUTIONS, SYSTEMS, AND THEORIES, *supra*, at 61, 61–64. However, it is important to bear in mind that, in general, a revolution’s influence on the democratization of the regime only can be determined ex-post. Compare Braybrooke, *supra*, with Ozan O. Varol, *The Democratic Coup d’État*, 53 HARV. INT’L L.J. 292, 296 (2012).

22. Mark N. Katz, *Democratic Revolutions: Why Some Succeed, Why Others Fail*, 166 WORLD AFF. 163 (2004) (noting that, when the army refuses to use force to protect the old regime, democratic revolutions may prevail). For a discussion of the role of militaries in promoting democracy, see Ozan O. Varol, *The Military as the Guardian of Constitutional Democracy*, 50 COLUM. J. TRANS. L. (forthcoming 2013) available at <http://ssrn.com/abstract=2161013>.

### III. THE HISTORICAL ROLE OF LAWYERS IN GREAT WESTERN REVOLUTIONS

Any proper reference to the issue of lawyers and revolutions requires a comparative analysis that is both geographically wide and historically distant. This Part will review the historical role of lawyers in the great revolutions of the Western world: the English Revolution of 1688–89, and the American and French Revolutions of the late eighteenth century.<sup>23</sup> I focus on these revolutions because they represent, at least to some extent, the beginning of modern democracies and, thus, could be termed “democratic revolutions.”<sup>24</sup> I will show that a relationship exists between the legal profession and revolutions in the Western world. All the great revolutions commenced alongside debates in representative assemblies that were governed by lawyers. Upon their completion, or shortly thereafter, the three revolutions succeeded in creating stable liberal traditions based on the idea of “rights.”<sup>25</sup> Lawyers played a central role in this process.

#### A. THE ENGLISH REVOLUTION

England’s Glorious Revolution<sup>26</sup> presents an image of a revolution in which lawyers held leading stances in the process of assuring the idea of “rights.”<sup>27</sup> The events of the Revolution are well-known. During his reign, King James II, a Catholic, asked that Catholics receive superiority and influence over the religious character of the country.<sup>28</sup> The senior aristocracy, who feared a Catholic monarchic dynasty, revolted against James II and requested William of Orange, a Protestant prince from

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23. For a similar comparison between the three revolutions with a focus on the legal profession see Burrage, *supra* note 3.

24. See, e.g., Herrbert Marcuse, *Ethics and Revolution*, in *ETHICS AND SOCIETY* 133, 140–43 (Richard T. De George ed., 1966) (arguing that the English and French Revolutions brought about “more liberal governments, a gradual democratization of society, and technical progress” and achieved “a demonstrable enlargement of the range of human freedom”). For commentary describing the French and American Revolutions as democratic, see generally J. G. A. Pocock, *Conservative Enlightenment and Democratic Revolutions: The American and French Cases in the British Perspective*, 24 *GOV’T & OPPOSITION* 81 (1989); Matthew Schoenbachler, *Republicanism in the Age of Democratic Revolution: The Democratic-Republican Societies of the 1790s*, 18 *J. EARLY REPUB.* 237 (1998).

25. Louis Henkin, *Revolutions and Constitutions*, 49 *LA. L. REV.* 1023, 1034 (1989) (analyzing the impact of the American and French revolutions on those countries’ theories of rights).

26. The “Glorious Revolution” is also known as the “Peaceful Revolution” because it was accomplished without bloodshed. See generally STUART E. PRALL, *THE BLOODLESS REVOLUTION: ENGLAND 1688* (1985).

27. See Lois G. Schwoerer, *The Role of Lawyers in the Revolution of 1688–1689*, in *DIE ROLLE DER JURISTEN BEI DER ENTSTEHUNG DES MODERNEN STAATES* 473, 473–98 (Roman Schnur ed., 1986).

28. See R. C. VAN CAENEGEM, *AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW* 113 (1995).

Holland, assist in his overthrow.<sup>29</sup> William was married to Mary, the Protestant daughter of James II from his previous marriage.<sup>30</sup> In November 1688, William invaded England with his army, and James II, lacking military support, escaped to France.<sup>31</sup> In these events, and those that followed, lawyers played a central role.<sup>32</sup>

In fact, this was a conflict conducted by law and not by sword.<sup>33</sup> Early on, scholarly lawyers played an important role in the conflict between the king and Parliament, hoping to keep the Crown's legal powers within the borders established by Parliament.<sup>34</sup> Members of the legal profession also played a prominent role in the struggle against the Crown, distributing satirical propaganda and legal theory, and engaging in legal litigation.<sup>35</sup> Moreover, the June 1688 trial of the Seven Bishops frequently symbolizes the beginning of the Revolution.<sup>36</sup> In the trial, seven bishops who had publicly resisted the religious policy of James II and wished to change it were acquitted from an incitement offence.<sup>37</sup> Their acquittal was a hard blow to James II and strengthened the resistance to his policy.<sup>38</sup>

As of December 1688, lawyers had played a significant role in all of the important political developments that accompanied the constitutional crisis following the escape of James II. Upon Prince William's arrival to London in December, lawyers shared the management of the crisis with the aristocrats.<sup>39</sup> For example, the lawyer George Treby greeted the prince on behalf of the city of London.<sup>40</sup> Lawyers were among the Parliament members assembled in December 1688 to advise Prince William on his

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29. *Id.*

30. *Id.*

31. *Id.*

32. See Schwoerer, *supra* note 27, at 480; MICHAEL LANDON, THE TRIUMPH OF THE LAWYERS 100–01, 181–218 (1970); MELINDA S. ZOOK, RADICAL WHIGS AND CONSPIRATORIAL POLITICS IN LATE STUART ENGLAND 149–71 (1999).

33. LANDON, *supra* note 32, at 101.

34. See *id.* at 99–100.

35. See *id.* at 100–01; ZOOK, *supra* note 32, at 149–71.

36. See WILLIAM GIBSON, JAMES II AND THE TRIAL OF THE SEVEN BISHOPS 203 (2009) (concluding that it would be overly powerful “to claim that there would not have been a Revolution without the bishops’ petition, imprisonment and trial,” however, if the seven bishops were not “the progenitors of the Glorious Revolution . . . they were its midwives”).

37. *Id.* at 132–38.

38. *Id.* at 139–61. See also Landon, *supra* note 32, at 100–01; ZOOK, *supra* note 32, at 149–72; Schwoerer, *supra* note 27 at 480. For an elaboration of the trial of the seven bishops, see generally GIBSON, *supra* note 36.

39. See LANDON, *supra* note 32, at 219–21.

40. *Id.* at 219; Schwoerer, *supra* note 27 at 474.

forthcoming actions and on how to fill the constitutional void.<sup>41</sup> Lawyer Henry Powle was selected as speaker for the House of Commons and helped run elections for a constituent parliament to handle the crisis.<sup>42</sup> Lawyer Henry Pollexfen also served in crucial revolutionary roles, and helped develop the legal theory that justified Prince William's ascension to the throne.<sup>43</sup> Additionally, lawyers served on all of the committees that had been appointed in the parliamentary framework and participated in all of the important deliberations in the House of Commons and in the meetings with representatives of the House of Lords.<sup>44</sup> Two of these committees were especially important to the revolution. The first committee, chaired by lawyer John Somers, was responsible for preparing the House of Lords' proposition declaring William and Mary king and queen of England on the basis of James II's flight.<sup>45</sup> The second committee, chaired by George Treby, was responsible for drafting The Declaration of Rights.<sup>46</sup> The members of these committees—many of whom were jurists—had an opportunity to influence the drafting and passage of the Declaration of Rights.<sup>47</sup>

The Constituent Parliament formally overthrew James II and decided that William and Mary would reign together.<sup>48</sup> At the same time, the Parliament implemented constitutional laws designing the new governmental structure, enacted finance regulations requiring the approval of Parliament for the king's expenses, outlined rules for bequeathing the Crown, and advocated the passage of the Toleration Act, a law extending freedom of worship to certain parts of the populations.<sup>49</sup> Furthermore, the new king and queen acknowledged the sovereignty and supremacy of Parliament and agreed to receive the Declaration of Rights—the festive declaration concerning the rights and freedoms of their subjects.<sup>50</sup> The

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41. LONDON, *supra* note 32, at 220–21; Schwoerer, *supra* note 27 at 474.

42. LONDON, *supra* note 32, at 226; Schwoerer, *supra* note 27 at 474–75.

43. LONDON, *supra* note 32, at 220–21; Schwoerer, *supra* note 27 at 474.

44. LONDON, *supra* note 32, at 225–36; Schwoerer, *supra* note 27 at 474–78.

45. Schwoerer, *supra* note 27 at 478; Lois G. Schwoerer, *Locke, Lockean Ideas, and the Glorious Revolution*, 51 J. HIST. IDEAS 531, 532 (1990).

46. LONDON, *supra* note 32, at 238; Schwoerer, *supra* note 27 at 478.

47. Schwoerer, *supra* note 27 at 479.

48. VAN CAENEGEM, *supra* note 28, at 115.

49. *Id.* at 116–18.

50. *Id.* at 115–16. See also MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 381 (2010) (“After the 1689 Revolution, the king’s prerogatives became subject to the legislative power of the Act of Parliament.”); LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS 1689, at 3 (1981).



Declaration of Rights is the most important achievement of the English Revolution, and lawyers had a very important role in its creation.

It should be mentioned, however, that lawyers were not united and some opposed the revolutionary plan.<sup>51</sup> Furthermore, the lawyers who did stand at the head of the parliamentary opposition did not see themselves as innovators, but rather as protectors of the common law and the principles of the Magna Carta.<sup>52</sup> Historian George Trevelyan describes the Glorious Revolution as, “the triumph of the Common Law and lawyers over the king, who had tried to put Prerogative above the law.”<sup>53</sup>

In sum, lawyers held key roles in the struggle against the crown and during the constitutional crisis and vacuum resulting from James II’s escape. Moreover, lawyers took central positions in the parliamentary committees which declared William and Mary king and queen of England and which drafted and formulated the Declaration of Rights. Thus, it was the legal profession that played a key role in revolutionary politics before the Glorious Revolution, during the Revolution, and in the post-Revolution settlement.

#### B. THE AMERICAN REVOLUTION

In America, Thomas Paine wrote in 1776: “THE LAW IS KING.”<sup>54</sup> He was right. In many senses the American Revolution was a lawyers’ revolution. The focal issues that spurred the American Revolution concerned royal constitutional law and the royal prerogative in the North American colonies.<sup>55</sup> Not only did these central issues deal with technical issues of the law, but lawyers were imperative in designing the political pamphlets’ constitutional rhetoric, which had an enormous influence on both the Revolution and the drafting of the basic documents that followed.<sup>56</sup>

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51. See LONDON, *supra* note 32, at 219–40.

52. Maria Borucka-Arctowa, *Innovation and Tradition Against the Background of Revolutionary Changes of Law—A Conceptual and Functional Analysis*, in *REVOLUTIONS IN LAW AND LEGAL THOUGHT*, *supra* note 7, at 79, 84. See also LOUGHLIN, *supra* note 50, at 3.

53. GEORGE MACAULAY TREVELYAN, *THE ENGLISH REVOLUTION OF 1688–1689*, at 133 (1938).

54. THOMAS PAINE, *Common Sense*, in *RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS* 1, 34 (Mark Phillip ed., Oxford Univ. Press 2009).

55. Erwin C. Surrency, *The Lawyer and the Revolution*, 8 *AM. J. LEGAL HIST.* 125, 134–35 (1964).

56. *Id.* For a comprehensive review of the sources of the American Revolution, see generally JOHN CHESTER MILLER, *ORIGINS OF THE AMERICAN REVOLUTION* (2nd ed. 1959).

Legal issues flared up the Revolution. Since their establishment, the colonies had been given a free hand in running their internal affairs, with minimal regulation and intervention.<sup>57</sup> This policy shifted toward tighter control in the 1760s.<sup>58</sup> Britain wanted to widen the British monopoly on trade in the colonies, so, to enforce its Navigation Acts in the colonies, Writs of Assistance were cast on the customs workers.<sup>59</sup> In 1761, a group of merchants from Massachusetts challenged the constitutionality of the Writs of Assistance.<sup>60</sup> The group was represented by the famous James Otis, a senior lawyer in the Massachusetts Bar Association.<sup>61</sup> Although Otis lost the trial, the claims he raised in the trial and in pamphlets he later published—that the Writs of Assistance were invalid because they violated the British Constitution as well as natural law—greatly contributed to bringing about the revolution.<sup>62</sup>

Lawyers also played a significant role in challenging numerous British acts that imposed taxes on the colonies—such as the Sugar Act of 1764—which eventually led to the Independence War.<sup>63</sup> Beyond the legal principles at issue, lawyers also had many familial connections to merchants and, thus, had strong commercial interests imperiled by the various British tax acts.<sup>64</sup> The decisive event, however, was the Stamp Act of 1765. Under the Stamp Act, Britain compelled American colonists to put stamps on printing-press and legal documents, such as newspapers, wills, deeds, and various trading documents.<sup>65</sup> Naturally, the Act had a significant economic effect on the legal sector. Lawyers believed that the tax would threaten their business by causing a mark-up in legal fees.<sup>66</sup> This was particularly problematic due to the limited commission lawyers were allowed to claim under government regulations, the collection problems

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57. Surrency, *supra* note 55, at 126–31.

58. *See id.*

59. M.H. SMITH, *THE WRITS OF ASSISTANCE CASE 1* (1978).

60. Joseph, R. Frese, *James Otis and Writs of Assistance*, 30 *NEW ENG. Q.* 496, 498 (1957); David Thomas Konig, *The Theory and Practice of Constitutionalism in Pre-Revolutionary Massachusetts Bay: James Otis on the Writs of Assistance, 1761*, 8 *DALHOUSIE L.J.* 25, 35, 40 (1984).

61. Frese, *supra* note 60, at 496–97; Konig, *supra* note 60, at 35, 40.

62. Frese, *supra* note 60, at 508; Konig, *supra* note 60, at 35, 40; SMITH, *supra* note 59, at 473, 477.

63. *See generally* EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* (3rd ed. 1995).

64. Surrency, *supra* note 55, at 126.

65. *Id.* at 127.

66. *Id.*

lawyers faced, and the fact that lawyers were frequently paid in tobacco and not currency.<sup>67</sup>

In New Jersey, lawyers led the protest against the Stamp Act.<sup>68</sup> At a September 1765 meeting of the New Jersey Bar Association, the lawyers decided to resist the Act, to refuse to use stamps for any purpose, and to suspend any legal action as long as the Act was in force.<sup>69</sup> Lawyers all over the colonies began refusing to perform legal actions that required stamps.<sup>70</sup> Lawyers boycotted the stamps despite the resulting financial detriment: judges refused to carry out trials without stamped documents, causing the closure of many courts.<sup>71</sup>

The Stamp Act was also unpopular with the colonial public in general. Surely, no community likes paying taxes, even more so when they are imposed by the British Parliament and not by the legislative bodies of the colonies themselves. Nevertheless, opposition to taxes alone was not enough to spark revolutionary resistance. A political theory was needed. Here, lawyers, as one of the most educated groups in the colonies, made their most significant contribution to the revolution.<sup>72</sup> Legal education at the time included literature that today might be regarded as the philosophy of natural law and common law, such as the writings of Samuel von Pufendorf, Emmerich de Vattel, Hugo Grotius, Sir William Blackstone, Sir Matthew Hale, and Thomas Wood.<sup>73</sup> American lawyers criticized the Writs of Assistance and tax laws as violating natural and common law rights, such as property rights.<sup>74</sup> Interestingly, the revolutionary patriots began their resistance believing that they were not rebelling against the British Constitution, but rather protecting the public against unconstitutional

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67. *Id.*

68. *Id.* at 128.

69. *Id.*; Anton-Hermann Chroust, *The Lawyers of New Jersey and the Stamp Act*, 6 AM. J. LEGAL HIST. 286, 290–91 (1962).

70. Surrency, *supra* note 55, at 128.

71. *Id.* at 129–31.

72. *Id.* at 131.

73. *Id.* at 132. For more information on the legal education of the late eighteenth and early nineteenth centuries see generally Mark Warren Bailey, *Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science*, 48 J. LEGAL EDUC. 311 (1998) (describing the role of natural law in early American legal education) and Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L. J. 775 (2004) (same).

74. Surrency, *supra* note 55, at 125–26. See also Richard B. Morris, *The Legal Profession in America on the Eve of the Revolution*, in *POLITICAL SEPARATION AND LEGAL CONTINUITY* 3, 18–23 (Harry W. Jones ed., 1976).

violations and the arbitrary use of authority.<sup>75</sup> Historian Richard Morris notes that the great paradox of the American Revolution is the sprouting of revolutionary ideas on the “barren soil” of the common law.<sup>76</sup> By legalizing revolutionary rhetoric, the lawyers supplied the legal claims the political leadership needed for a revolution.

When the lawyers reflected on their political relations with Britain, each had to decide individually what stance to take. Although the lawyers were united against the Stamp Act, which threatened the legal profession, they were divided on the propriety of abandoning loyalty to the British and demanding independence.<sup>77</sup> Many lawyers forsook the Revolution’s causes and remained loyal to Britain. In fact, only one-half of the lawyers of the Massachusetts Bar Association became revolutionaries, while the remainder stayed loyal to the British regime.<sup>78</sup>

The importance of lawyers in the Revolution is well documented. Great orators, authors of revolutionary pamphlets, and other noteworthy contributors to the establishment and development of the new state—such as Thomas Jefferson, John Adams, James Wilson, Alexander Hamilton, John Marshall, James Otis, John Dickinson, Patrick Henry, Arthur Lee, William Allen, John Jay, and Robert Livingston—all belonged to the legal profession.<sup>79</sup> In fact, twenty-five out of the fifty-six individuals who signed the Declaration of Independence, and thirty-one out of the fifty-five members of the Constituent Convention were lawyers.<sup>80</sup> This prominence of lawyers demonstrates the law’s key role in the nation’s early days, and law’s evolution into what legal historian Robert A. Ferguson calls a “national lore.”<sup>81</sup> Therefore, it should not come as a surprise that the “footprints of the legal profession are evident in the basic documents of the

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75. JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 237 (2003). See also James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1367–68 (1991).

76. Richard B. Morris, *Legalism versus Revolutionary Doctrine in New England*, 4 NEW ENG. Q. 195, 195 (1931).

77. Charles Robert McKirdy, *A Bar Divided: The Lawyers of Massachusetts and the American Revolution*, 16 AM. J. LEGAL HIST. 205, 206 (1972). See also Surrency, *supra* note 55, at 13–34.

78. McKirdy, *supra* note 77, at 206–07.

79. Surrency, *supra* note 55 (explaining the role of lawyers in the American Revolution).

80. *Id.* at 134.

81. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 11 (1984). See also CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 213 (2006); Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 LAW & HIST. REV. 389, 389–90 (2010); Herbert Alan Johnson, *John Jay: Lawyer in a Time of Transition, 1764–1775*, 124 U. PA. L. REV. 1260, 1289, 1292 (1976); Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 172–73 (2006).

Revolution and the basic documents establishing the United States.”<sup>82</sup> It was the prominent role of lawyers in the American Revolution, legal historians claim, that brought to the acknowledgment of lawyers as “leaders of the revolutionary movement” and to a pick in the public esteem towards the legal profession.<sup>83</sup>

To summarize, lawyers played a significant role in the events that led to the revolution by supplying a constitutional theory, providing necessary political leadership, and pioneering the revolutionary movement that ultimately led to the formulation of the U.S. Constitution.

### C. THE FRENCH REVOLUTION

The French legal profession grew in relatively stable conditions under the reign of Louis XIV, from 1643 to 1715. At the end of the seventeenth century, the legal profession was separated from the monarchy, winning professional independence. This growth trend continued during more difficult times under Louis XV, from 1715 to 1774.<sup>84</sup> The Lawyers’ Order was characterized as a kind of “absolutely independent little republic at the center of the country state.”<sup>85</sup> With the growth of their strength and status, lawyers sought additional positions of authority, as well as a more central role in legislative proceedings. In response, Louis XV denied the Order both its disciplinary authority and professional monopoly by stripping the Order of its power to give a lawyer’s license. As a consequence, the profession was opened to who was ready to acquire a law degree.<sup>86</sup> And indeed, many lawyers arrived individually in Paris, independent from any organized allegiance or local interests.

Lawyers played a significant role in the public discourse of the eighteenth century. Regarding themselves as the representatives of the

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82. CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 133 (2003).

83. MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY 1776–1876*, at 39 (1976).

84. Peter Grajzl & Peter Murrell, *Lawyers and Politicians: The Impact of Organized Legal Professions on Institutional Reforms*, 17 *CONST. POL. ECON.* 251, 266–67 (2006). For more information on the Order of Barristers under the Old Regime see Burrage, *supra* note 3, at 230–32 and MICHAEL P. FITZSIMMONS, *THE PARISIAN ORDER OF BARRISTERS AND THE FRENCH REVOLUTION* 1–8 (1987).

85. DAVID A. BELL, *LAWYERS AND CITIZENS: THE MAKING OF A POLITICAL ELITE IN OLD REGIME FRANCE* 67 (1994).

86. David A. Bell, *Barristers, Politics, and the Failure of Civil Society in Old Regime France*, in *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM* 65, 91–93 (Terence C. Halliday & Lucien Karpik eds., 1997); Michael Burrage, *Revolution as a Starting Point for the Comparative Analysis of the French, American, and English Legal Profession*, in *LAWYERS IN SOCIETY* 322, 330 (Richard L. Abel & Phillip S. C. Lewis eds., 1989).

public, they opposed the economic and religious policy of the crown.<sup>87</sup> Lawyers also contributed significantly to the conflict between the king and the parlements (the high courts that were manned by the legal aristocracy) by supporting the separation of the parlements from the monarchy and awarding the parlements independence.<sup>88</sup> The independence of parlements and the easy entrance into the legal profession created a new ideal lawyer: one that was ready to take on public cases.<sup>89</sup> For example, in the mid-eighteenth century, lawyers represented the Jansenists, an austere stream in Christianity, by submitting legal suits against priests who refused to carry out sacramental ceremonies for dying Jansenists—a refusal that provoked much anger against the church.<sup>90</sup>

In the decades prior to the French Revolution, the legal profession carried the flag of enlightenment. During this period, lawyers informed the public about court cases through published legal reports called “memoires judiciaries,” which they could publish free from any censorship.<sup>91</sup> In this way, a new kind of lawyer was created: a “man of letters” (“homme de lettres”), who gave the public thrilling reading material.<sup>92</sup> The legal profession, to some degree, assimilated into the world of literature; transitioning from “Barristers into Pamphleteers.”<sup>93</sup> Importantly, this created a public sphere, a sphere of legitimate public opinion that had not existed beforehand. Therefore, turning the law into literature was significant for creating the political-intellectual modern order.<sup>94</sup> As James

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87. LUCIEN KARPIK, *FRENCH LAWYERS: A STUDY IN COLLECTIVE ACTION, 1274–1994*, at 59 (Nora Scott trans., 1999) (noting that “[t]he bar’s engagement took four main forms: participation in struggles of the Parlement . . . , defence of the peasant communities, an independent stand in the political-religious quarrel that ran from 1728 to 1732, and polemical intervention through the publication and diffusion of written legal briefs”).

88. *Id.* at 75 (“[Lawyers] were among the first to develop the themes of ‘parlementary constitutionalism’: separation of king and nation, delegation to the Parlement of the function of upholding the fundamental laws, representing the nation and then acting as co-lawmakers.”). *See also* BELL, *supra* note 85, at 25–28; 1 HENRY MORSE STEPHENS, *A HISTORY OF THE FRENCH REVOLUTION* 4–8 (1911). On the struggle in general, see William Doyle, *The Parlements of France and the Breakdown of the Old Regime 1771–1988*, 6 *FRENCH HIST. STUD.* 415 (1970).

89. BELL, *supra* note 85, at 149–51; James Q. Whitman, *From Cause Celebre to Revolution*, 7 *YALE J.L. & HUMAN.* 457, 463 (1995) (reviewing BELL, *supra* note 85).

90. WILLIAM DOYLE, *THE FRENCH REVOLUTION: A VERY SHORT INTRODUCTION* 31 (2001). *See also* Dale Van Kley, *The Jansenist Constitutional Legacy in the French Prerevolution 1750–1789*, 13 *HIST. REFLECTIONS / RÉFLEXIONS HISTORIQUES* 393, 401–02 (1986).

91. *See* Whitman, *supra* note 89, at 464.

92. *Id.*, at 462–463; BELL, *supra* note 85, at 133–34.

93. BELL, *supra* note 85, at 81.

94. *Id.* at 204–09; KARPIK *supra* note 87, at 72–76. *See also* SARAH MAZA, *PRIVATE LIVES AND PUBLIC AFFAIRS: THE CAUSES CÉLÈBRES OF PRE-REVOLUTIONARY FRANCE* 256–62 (1995).

Q. Whitman notes, the importance of this was not only in the public dialogue it created, but also the insertion of an individual-rights discourse into the public sphere.<sup>95</sup> Due to the lawyers' publications, the public received the Enlightenment's literature from the legal writing. Starting as the monarchy's technocrats, the French lawyers became the voice of the "public opinion" and leaders of the written political opposition.<sup>96</sup>

Lastly, lawyers created the political elite that assumed leading positions within the Third Estate as well as key roles in the first stages of the French revolution.<sup>97</sup> The Third Estate consisted of poor lawyers, local administrators, provincial clerks, notaries and arbitrators for local disputes; all people who had suffered from relative deprivation compared to the rising bourgeoisie.<sup>98</sup> Therefore, most of the prominent supporters of the Revolution came from the growing intellectual class that had no hope for a bright future, bourgeoisie wealth, or access to high positions in public service.<sup>99</sup>

It is possible to learn from the lawyers' involvement in the French Revolution because the Constituent National Assembly consisted of more than 400 lawyers among the 663 representatives of the Third Estate.<sup>100</sup> Maximilien de Robespierre, the head of the radical group of Jacobins and one of the leaders of the Revolution, is an outstanding example.

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95. See Whitman, *supra* note 89, at 465.

96. *Id.* See also Benjamin Nathans, *Habermas's "Public Sphere" in the Era of the French Revolution*, 16 *FRENCH HIST. STUD.* 620, 629 (1990).

97. BELL, *supra* note 85, at. viii. See also THEDA SKOCPOL, *STATES AND SOCIAL REVOLUTIONS* 176 (1979) ("During the Revolution, political leadership came primarily from the ranks of professionals (especially lawyers), office holders, and intellectuals."); LYNN AVERY HUNT, *POLITICS, CULTURE, AND CLASS IN THE FRENCH REVOLUTION* 33 (1984) ("[T]his classical order derived from judicial oratory, precisely the kind of training most useful to the lawyers who dominated national politics during the Revolution.").

98. See, e.g., NORMAN HAMPSON, *A SOCIAL HISTORY OF THE FRENCH REVOLUTION* 132–33 (2002).

99. See FRANCESCO ALBERONI, *MOVEMENT AND INSTITUTION* 48 (1984) ("The members of classes threatened by decline and of classes which are growing in importance have in common a feeling of disillusionment toward an order they had believed in. Unable to realize their aims, they feel impelled to explore new roads. In the French Revolution, such frustration was experienced by the members of the lower nobility, impoverished and powerless, and by the members of the rapidly growing intellectual class who had no prospects either of bourgeois wealth or of access to office in the public administration, and it was from among them that there arose the most ardent protagonists of the revolution. As Burke pointed out, the third estate was composed of poor lawyers, the administrators of small local jurisdictions, provincial clerks, notaries, and the arbiters of municipal disputes - all people who suffered from relative deprivation by comparison with the rising bourgeoisie.").

100. ALFRED COBBAN, *ASPECTS OF THE FRENCH REVOLUTION* 100 (1968). See also BELL, *supra* note 85, at 6 ("When the deputies of the Third Estate convened in Versailles in May 1789, forty-six percent of them—by far the largest single professional group—belonged to the bar.").

Robespierre, who was elected in 1789 to represent the Third Estate in the province of Aras at the French classes assembly was, in fact, a fourth-generation lawyer, a member of the Aras academy, and a typical honorable provincial.<sup>101</sup> In 1790, Edmund Burke described the lawyers' involvement as follows:

Judge, Sir, of my surprise when I found that a very great proportion of the assembly (a majority, I believe, of the members who attended) was composed of practitioners in the law. It was composed, not of distinguished magistrates . . . not of leading advocates, the glory of the bar; not of renowned professors in universities;—but for the far greater part . . . of the inferior, unlearned, mechanical, merely instrumental members of the profession. There were distinguished exceptions, but the general composition was of obscure provincial advocates, of stewards of petty local jurisdictions, country attornies, notaries, and the whole train of the ministers of municipal litigation, the fomenters and conductors of the petty war of village vexation.<sup>102</sup>

The prolific representation of lawyers is, no doubt, one of the reasons that historian Alfred Cobban, described the French Revolution not as a revolution of poor people, but rather one of the declining class of lawyers.<sup>103</sup> Nevertheless, it is important to note that, similar to the English and American Revolutions, there was no unanimity among the lawyers; in fact, many of them served an important function in resisting the Revolution.<sup>104</sup>

To sum up, lawyers, as most historians contended, played a significant role in the French Revolution.<sup>105</sup> Jean-Sylvain Bailly, the first mayor of revolutionary Paris, wrote in his memories that “One can say that the success of the Revolution is owed to their [the barristers] Order.”<sup>106</sup> Lawyers not only created a public sphere in which the enlightenment ideas could be spread out, but also took political leadership during the revolution.

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101. Carolyn C. Lougee, *The Enlightenment and the French Revolution*, 11 EIGHTEENTH-CENTURY STUD. 84, 100 (1977).

102. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 32 (1790).

103. ALFRED COBBAN, THE SOCIAL INTERPRETATION OF THE FRENCH REVOLUTION 67 (2nd ed 1999) (“[T]he revolutionary bourgeoisie was primarily the declining class of *officers* and the lawyers and other professional men, and not the businessmen of commerce and industry.”).

104. FITZSIMMONS, *supra* note 84, at 194 (claiming the vast majority of the Order of Barristers of Paris did not support the Revolution).

105. See FITZSIMMONS, *supra* note 84, at ix (“Most historians have portrayed barristers largely as a professional group that played an important role in the Revolution.”). See also ELI SAGAN, CITIZENS AND CANNIBALS 160 (2001) (“Lawyers, from several different levels of the bourgeoisie, were quickly becoming the vanguard of the revolution. No other professional or bourgeoisie group had an influence on the course of the revolution equivalent to that of lawyers.”).

106. BELL, *supra* note 85, at 187.



It was, in the words of François Furet and Mona Ozouf, a “revolution of the lawyers.”<sup>107</sup>

#### D. SUMMARY

As the above sections show, lawyers played key roles in the major Western democratic revolutions. From presenting the public with legal arguments in support of revolution to ushering in the post-revolution regime, lawyers were instrumental in these watershed democratic events. While this Part has focused on the role of lawyers in the great revolutions in England, America, and France, it is important to note that lawyers took an active part in revolutions that occurred in other countries, as well.<sup>108</sup>

An organized legal profession can significantly contribute to structural and institutional reforms of society.<sup>109</sup> As shown, in periods of revolutionary constitutional changes, especially those in which the state is being developed and established, lawyers gain significant political relevance. They provide answers to political questions concerning quasi-legal issues, supply legal argumentation, and take part in political leadership—all elements that enable revolutions.<sup>110</sup> For more than three hundred years, the modern design of political liberalism owed much to the activity of lawyers.<sup>111</sup> Indeed, lawyers were so prominent in the revolutionary tradition that sociologists could not agree on the more accurate way to label them: conservatives or revolutionaries.<sup>112</sup>

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107. FRANÇOIS FURET & MONA OZOUF, *A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION* 126, 531 (1989).

108. For instance, lawyers have played a significant part in the revolutionary history of Hungary. The 1848 revolution against the feudal system and in favor of national independence originated from a law-student movement, and the 1848 Parliament was composed of a high percentage of lawyers. Later, lawyers took an active part in the transformation from communism to democracy. Andras Sajo, *The Role of Lawyers in Social Change: Hungary*, 25 CASE W. RES. J. INT'L L. 137, 138, 142 (1993).

109. See Grajzl & Murrell, *supra* note 84.

110. See Peter van den Berg, *Lawyers as Political Entrepreneurs? A Historical Perspective on the Contribution of Lawyers to Legal Integration in Europe*, in *LAWYERS' CIRCLES: LAWYERS AND EUROPEAN LEGAL INTEGRATION* 161, 187–88 (Alex Jettinghoff & Harm Schepel eds., 2004). For a discussion of “the use of positive law argument in the justification” of revolutions, see generally Richard S. Kay, *Legal Rhetoric and Revolutionary Change*, 7 CARIBBEAN L. REV. 161 (1997).

111. See generally Terence C. Halliday & Lucien Karpick, *Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism*, in *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM*, *supra* note 86, at 15.

112. See, e.g., Lawrence M. Friedman, *Lawyers in Cross-Cultural Perspective*, in *LAWYERS IN SOCIETY*, *supra* note 86, at 1, 20.

## IV. LAWYERS: CONSERVATIVE OR REVOLUTIONARY?

There is no clear or special connection between lawyers and a revolution. Presumably, lawyers, like any other professional, can be a conservative or a revolutionary.<sup>113</sup> Furthermore, at first glance, lawyers' involvement in revolutions seems puzzling: the legal system is usually considered a conservative institution.<sup>114</sup> And, as a class stratum, the conservative elite of lawyers usually play a central role in guarding the status quo.<sup>115</sup> In fact, some have claimed that a majority of lawyers are inclined to broadcast a collective, apolitical indifference in their professional role, and that only a minority of lawyers feel obliged to social change and is ready to make economic sacrifices for social and liberal goals.<sup>116</sup> Therefore, there are sociologists of law who suggest that, as a general rule, a lawyer does not have much influence on social movements.<sup>117</sup>

Beyond their interest in keeping their position in society, there are four main reasons why lawyers are considered anti-revolutionary.<sup>118</sup> First, legal education stresses respect for legal and governmental institutions. Lawyers believe in settling conflicts peacefully through legal procedures, not by illegal activity, and certainly not in a revolutionary attempt to collapse the legal order. Amir Paz-Fox noted this posture when trying to explain the absence of lawyers in the Israeli social protestation of the summer of 2011:

The legal education, in Israel and all over the world, gives generations of students tools and abilities to accomplish the best for their clients within the framework of the system, and if necessary—to act (in a bound and well defined way) for changing certain rules. . . . Similarly,

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113. *Contra* Richard Wasserstrom, *Lawyers and Revolution*, 30 U. PITT. L. REV. 125, 128 (1968).

114. *E.g.*, Edgar Bodenheimer, *The Inherent Conservatism of the Legal Profession*, 23 IND. L.J. 221 (1948).

115. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 279 (1977); Bodenheimer, *supra* note 114, at 221–22.

116. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* 170 (2004). *See also* Richard L. Abel, *Lawyers and the Power to Change*, 7 L. & POL. 5, 5–6 (1985) (noting the paucity of lawyers devoted to providing low-cost legal services to needy individuals); Daniel J. Dykstra, *Legislation and Change*, 1905 WIS. L. REV. 523 (1950) (“[T]he average lawyer has remained traditionally conservative, clinging to that which is and fearing that which seeks to be. . . . The practitioner, concerned as he is primarily with problems of individual clients and compelled by necessity to secure immediate results, views social, political, economic changes as making more uncertain, and thus more unpredictable, that which is already difficult to ascertain.”).

117. *See* Maureen Cain, *The Symbol Traders*, in *LAWYERS IN A POSTMODERN WORLD* 15, 45–46 (Maureen Cain & Christine B. Harrington eds., 1994).

118. *See* Wasserstrom, *supra* note 113, at 130–33.

ethic rules are embodied in lawyers, directly or indirectly, and implanting the comprehension that they are the long arm of the rule of law, officers of the court, infuses them with the feeling of borders—that is a far cry from the anarchistic characteristics that were somewhat expressed in the protest.<sup>119</sup>

Because so much of lawyers' formal training focuses on operating within a given system of rules, it is often difficult to imagine an appreciable number of lawyers taking action to defy the very rules that govern their profession.

Second, a lawyer plays an institutional role, or at least a quasi-institutional one. A lawyer is an "officer of the court." As such, clear and delineated limits are imposed on a lawyer's abilities and scope of action.<sup>120</sup> Therefore, Nancy Polikoff argues that the legal and activist roles of a lawyer have to be completely separated, especially when the activism involves a civilian rebellion.<sup>121</sup> When a person is supposed to serve as "officer of the court," activist behavior damages the lawyer's legitimacy; and, legitimacy provides a lawyer the access to the legal system the clients themselves lack.<sup>122</sup>

Third, a lawyer's role is not necessarily to judge. The essence of the lawyer's role is "to step into the client's shoes" and to represent a personal interest in the legal arena in the best way possible. A lawyer has no need, from the state-of-mind aspect, to be involved in radical judgmental thinking. Indeed, research shows that the cognitive orientation of lawyers is such that lawyers receive the socio-legal order as it is.<sup>123</sup> Therefore, lawyers cannot be expected to spearhead social change movements.<sup>124</sup>

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119. Amir Paz-Fuchs, *Law Under Protest: Lawyers and the Social Protest Movement of Summer 2011*, 4 MA'ASEI MISHPAT 93, 99 (2011) (in Hebrew). See also Shulamit Almog & Gad Barzilai, *Between Citizenship, Equality, and Law: The Language of the Summer 2011 Social Protests*, 27 ISR. STUD. REV. 201 (2012) (explaining the absence of lawyers from the 2011 protests in Israel).

120. Robert J. Martineau, *The Attorney as an Officer of the Court: Time to Take the Gown off the Bar*, 35 S.C. L. REV. 541, 559–68 (1983). But see James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 BUFF. L. REV. 349, 408 (2000) (arguing that "the rhetoric surrounding the label 'officer of the court' [is] conceptually empty" and that duties lawyers owe to the court are the same duties they owe to clients); Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 90 (1989) ("The characterization of lawyers as officers of the court under contemporary law is largely disingenuous. The law generally does not require lawyers to act in a manner that subordinates their own and their clients' interests in favor of the interests of the judicial system and the general public.").

121. Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443, 448–49 (1996).

122. *Id.*

123. See Lawrence J. Landwehr, *Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers*, 7 L. & PSYCHOL. REV. 39, 49–50 (1982).

124. *Id.*

A possible explanation for this mindset is that lawyers' academic training and practical work both force lawyers to think in logical "syllogisms"—by way of deduction and inference. This way of thinking is based on a primary assumption, a secondary assumption, and a conclusion, which is often referred to as *ratio decidendi*.<sup>125</sup> When consulting or representing a client, a lawyer chooses a legal rule (the primary assumption) that he will claim in the trial. Nevertheless, most of his efforts will be focused on supplying facts that support the client's claim (the secondary assumption). Suppose, for example, at a very high level of abstraction, the following assumptions: a primary assumption that murder is a crime of intentionally killing a human being, and a secondary assumption that the client unintentionally caused the death of a human being. Deduction leads to the following conclusion: the client did not commit murder. This procedure seldom leaves space for critical examination of the legal rule itself. Legally, it is very easy to search a deductive solution that will fall within the borders of a binding legal precedent. There is no need to search for a new legal rule. This so-called "precedence principle is part of that preserving mechanism that allows the law to operate as a continuing cultural and social creation."<sup>126</sup> Therefore, a revolutionary activity is contradictory to the senses of a lawyer accustomed to thinking according to precedence and existing legal doctrines.<sup>127</sup> This may be the reason why William Quigley wrote that, in order to become a revolutionary lawyer, a person must forget most of what he learned in law school.<sup>128</sup>

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125. H.K. Lücke, *Ratio Decidendi: Adjudicative Rational and Source of Law*, 1 BOND L. REV. 36, 46 (1989) ("The binding quality of a statutory provision stems, at least in part, from our syllogistic approach to its application. Once the case to be decided (the minor premise) fits under the provision (the major premise) the result seems to become a logical necessity."). *But see* Thomas Halper, *Logic in Judicial Reasoning*, 44 IND. L. J. 33, 42 (1968) ("The truth, of course, is that legal reasoning is rarely a simple matter of induction or deduction. . . . Much of legal reasoning reveals this proclivity for abridgment, and is by example and resemblance. This form is analogical. It involves not induction or deduction, but a process . . . in which the classification changes as the classification is made." (internal quotations omitted)). For a discussion of the uncertainty of the operation of syllogistic logic in judicial process, see JULIUS STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 240–41 (1964).

126. Nili Cohen, *Memory, Forgetfulness, Precedent*, 13 HAMISHPAT 195, 204 (2008) (in Hebrew).

127. Landwehr, *supra* note 123, at 49–50. *See also* Subha Dhanaraj, Comment, *Making Lawyers Good People: Possibility or Pipedream?*, 28 FORDHAM URB. L.J. 2037, 2066 (2001) (arguing "by definition, most lawyers born into societies with legal systems have little choice in formulating the laws or dramatically changing them. Instead, they simply learn the laws and the categories within which legal problems fall").

128. William P. Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 WASH. U. L.J. & POL'Y 101, 148 (2006).

Fourth, the lawyer has to secure the best utility possible for the client, an aim incompatible with the single-minded thinking that characterizes a radical revolutionary. Instead, lawyers tend to strike a compromise, make an adjustment, or propose an arrangement. A lawyer estimates the maximum he can get for his client, and then compromises when necessary. Furthermore, according to professional ethical rules, a lawyer must represent his client faithfully, acting in the best interest of the client rather than the public.<sup>129</sup> Certainly, sometimes the interest of the public and that of the client overlap. But, when these interests conflict and the client asks for something that is in the client's best interest but injurious to the public, so be it. The only time a lawyer is allowed to act against the client's interest is when the damage to the public will be significant.<sup>130</sup> Therefore, as fiduciaries to their clients, lawyers have duties and limits on their ability to act freely as agents of social change.<sup>131</sup>

As early as 1835, Alexis de Tocqueville wrote that people dedicated to the study of the law derive certain habits of order and a fondness of formality, which naturally make them hostile to any revolutionary spirit.<sup>132</sup> One must remember that "revolution . . . [is] antithetical to the idea of law."<sup>133</sup> Therefore, the involvement of lawyers in revolutions, as presented in Part II, is perplexing, and the whole idea of revolutionary lawyering seems to be oxymoronic.<sup>134</sup> On the other hand, lawyers proficient in legal material—both that of their own nation and of other countries—can identify when the legal rules no longer serve the nation and supply legal justifications that support the revolutionary call. Furthermore, lawyers have representative and rhetorical skills necessary for leading social

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129. See, e.g., A.B.A., COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 264 (2007).

130. James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 *FORDHAM L. REV.* 1559, 1561–62 (2009).

131. *Id.*; Kevin R. Johnson, *Lawyering For Social Change: What's A Lawyer To Do?*, 5 *MICH. J. RACE & L.* 201, 228 (1999).

132. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 243 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966).

133. Bodenheimer, *supra* note 114, at 228.

134. Almog & Barzilai, *supra* note 119, at 201 ("The intersection of law and protest may be perceived as an oxymoron. For many, law symbolizes stability and the maintenance of the socio-political and economic status quo while, at the same time, protecting human rights. Protest, conversely, points to the need to alter and reform the very same status quo, arguing that the conventional means of constructing politics and public policy through legislation and litigation have failed and that democratic and all other perceptions of justice have been halted.").

movements.<sup>135</sup> They are educated and can analyze and propose solutions to myriad scenarios. Leaders of social movements must not only raise inspiration within the movement, but must also express the movement's goals and connect it to the entire society.<sup>136</sup> Lawyers have speech and organizational abilities that make them especially useful in revolutions.

But, historically, lawyers were not just a useful tool for the great revolutions, but the creators of those revolutions.<sup>137</sup> How can this be explained? A skeptic would claim that lawyers are simply a strong, self-interested group. Once they see where the revolutionary wind blows, they ask to join the revolutionary movement, seek to hold leadership positions, and then serve their own interests by drafting the basic post-revolutionary documents to preserve and promote their status within the society.<sup>138</sup> Group interests play an important factor in a constitution-making process.<sup>139</sup>

Another answer is given by Tocqueville: a lawyer's world can be one of frustration that motivates political mobility. Lawyers are often people who not only possess great talent, but who, despite lacking high political stance, have leadership pretensions.<sup>140</sup> In his words: "In a state of society in which the members of the legal profession cannot hold that rank in the political world which they enjoy in private life, we may rest assured that they will be the foremost agents of revolution."<sup>141</sup> Thus, according to Tocqueville, the revolutionary lawyers are talented people whose aspirations have been thwarted.<sup>142</sup> As discussed earlier, this is especially true in the case of the French Revolution. A social structure can hurt and

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135. Moliterno, *supra* note 130, at 1566–68 ("Simple characteristics of successful leaders match those of lawyers.").

136. See Joseph R. Gusfield, *Functional Areas of Leadership in Social Movements*, 7 *SOC. Q.* 137, 140 (1966); Aldon D. Morris & Suzanne Staggenborg, *Leadership in Social Movements*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 171, 172 (David A. Snow et al. eds., 2003).

137. Whitman, *supra* note 89, at 457–58.

138. Cf. Varol, *supra* note 21, at 312–22 (claiming that while democratic coups end with free and fair elections, the military—as a self-interested actor—attempts to entrench its policy preferences in the new constitution drafted during the democratic transition process). For more information about self-interest in revolutionary times, see Braybrooke, *supra* note 21, at 61.

139. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364, 378–80 (1995).

140. Whitman, *supra* note 89, at 458; ALBERONI, *supra* note 99, at 48.

141. TOCQUEVILLE, *supra* note 132, at 318–19. For a discussion of Tocqueville and revolutions, see Melvin Richter, *Tocqueville's Contributions to the Theory of Revolution*, in *REVOLUTION*, *supra* note 8, at 75.

142. Whitman, *supra* note 89, at 458.

disappoint the poor for many generations, but when lawyers sit hungry and frozen in attics, the revolution will begin.<sup>143</sup>

## V. THE CONFLICTING DUTIES IMPOSED ON LAWYERS DURING REVOLUTIONS

The hypothesis of this Article is that lawyers have a responsibility to create social change and improvement. The “pursuit of the law is not only a privilege,” Neta Ziv rightly claimed, “[i]t holds in it the responsibility to repair our professional and public surroundings and to improve it.”<sup>144</sup> Every society needs a group that is guided by a non-particular, long-term vision of the state and the society. As an educated, active, and organized body independent and separate from the state, lawyers are capable of being this group.<sup>145</sup> Use of a knowledge and ability for the good of society distinguishes a profession from a business or occupation.<sup>146</sup> Society grants the legal profession a monopoly over the legal services market and independence in running its affairs.<sup>147</sup> The profession, in return, should use its influence for the good of society.<sup>148</sup> Nevertheless, many scholars argue that the engine of a radical social change (such as a revolution) is a social struggle, not a legal one.<sup>149</sup> Steve Bachmann, for instance, argued that an actual significant social change can be brought about by forming masses of peoples, not by lawyers.<sup>150</sup> Therefore, the question is asked, what role can lawyers play in social change and in the extra-judicial sphere? Bachmann replies that lawyers can still be valuable in promoting struggles for social

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143. See PAUL MASON, *WHY IT'S KICKING OFF EVERYWHERE: THE NEW GLOBAL REVOLUTIONS* 73 (2012).

144. Neta Ziv, *Lawyering, Social Justice and Legal Education* 1 ALEY MISHPAT 253, 260 (2000) (in Hebrew). See also William J. Brennan, Jr., *The Responsibilities of the Legal Profession*, 54 A.B.A. J. 121, 122, 124 (1968); Deborah J. Cantrell, *Lawyers, Loyalty, and Social Change* 13 (Univ. Colo. Law Legal Stud. Research Paper, Working Paper No. 11-19, 2011), available at <http://ssrn.com/abstract=1975051>.

145. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 15 (1988).

146. E.g., Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW. 4, 4–5 (2008) (“The public grants a profession autonomy. . . . In return, each member of the profession and the profession as a whole agree to meet certain correlative duties to the public. . . .”). *Contra* Thomas D. Morgan, *Calling Law a Profession Only Confuses Thinking About the Challenges Lawyers Face*, 9 U. ST. THOMAS L.J. 542, 543 (2011) (arguing that “professionalism best describes qualities of personal character, not occupational role”).

147. Hamilton, *supra* note 146, at 4–5.

148. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1238 (1995).

149. See Paz-Fuchs, *supra* note 119.

150. Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (1984).

change through their legal work and activities.<sup>151</sup> However, beyond these limited roles, Bachmann argues, lawyers are not likely to have any direct or substantial influence on social change.<sup>152</sup> In other words, while the masses are indeed the engine of social change, the lawyers are its oil.<sup>153</sup> Twenty-five years after his original article, Bachmann claimed that “While lawyers are not the primary vehicle for social change, they do have a role to play both in organizing groups and establishing legitimacy for various efforts.”<sup>154</sup>

As we have seen in Part III, and shall further see in Part VI, lawyers do in fact have important roles in revolutions.

Revolutionary times create complicated dilemmas for lawyers: the lawyer has a duty to protect the legal order, the rule of law and the legal system.<sup>155</sup> For example, the introduction to the American Professional Responsibility Code of 1970 states that, “Lawyers, as guardians of the law, play a vital role in the preservation of society.”<sup>156</sup> This is an ethical duty; not a legal one. On the ethics of the law, Meir Shamgar wrote the following:

The very existence of the profession is one of the basic conditions of the rule of law. The way of behaviour is intended to promote the strengthening of the rule of law because it holds emphasis on the exact meticulousness of legality . . . the ways of behaviour are meant to ingrain trust in the force of the law as a means for protecting the individual or the public against a sect interest or administrative arbitrariness and to educate the citizen to the truth that is accepted by

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151. *Id.* at 21–22.

152. *Id.* at 21.

153. *Id.*

154. Steve Bachmann, *Lawyers, Law, and Social Change –Update Year 2010*, 34 N.Y.U. REV. L. & SOC. CHANGE 499, 501 (2010).

155. David R. Brink, *Necessity Must Yield to the Constitution*, 21 JUDGES J. 12, 15 (1982) (“I am concerned that as Americans . . . it is difficult for us to believe that that liberty will ever vanish. I am concerned that we no longer believe that we can ever be anything but free. That concern should be the business of every citizen, but it is the special responsibility of lawyers as guardians of the rule of law.”); Dennis F. McLaughlin, Professor of Law, Seton Hall University School of Law, Incoming Address to the Class of 1996: On Becoming a Lawyer (August 1, 1993), in 26 SETON HALL L. REV. 505 (1996) (“As lawyers, unlike other professionals, we are directly involved with the administration of justice. We are charged with upholding and preserving the rule of law, which forms the fabric of our society.”); Judith A. McMorro, *Civil Disobedience and the Lawyer’s Obligation to the Law*, 48 WASH. & LEE L. REV. 139, 147 (1991) (“lawyers take on the special responsibility to protect and care for the rule of law”).

156. John V. Tunney, *The Bar’s Responsibility to the Public*, 58 JUDICATURE 108, 113 (1974–1975).



us, according to which the law is the only efficient guarantee against the tyranny of the individual or the group of people.<sup>157</sup>

Shamgar adds that, as “the servant of the law,” “the lawyer must not give legal service or consult that has to do with being disloyal to the law.”<sup>158</sup> Because of the lawyer’s responsibilities to preserve, serve, and encourage respect for the law, it seems lawyers should have ethical reservations from breaking the law to obtain social change.<sup>159</sup> Indeed, what is a more extreme violation of the law than a revolution seeking to fundamentally change, and sometimes to collapse, the existing legal order? Limor Zer-Guttman commented on the lawyer’s obligation to society:

In its abstract sense, the obligation towards society includes the role of each lawyer to protect the socio-legal order . . . lawyers are required to avoid actions that if carried out for a long time and systematically by a large number of people, could weaken the socio-legal framework and destroy the norms within it. This requirement applies upon every citizen, but as to lawyers it has a stronger implication, since these are in a special position which can assure obedience, or alternatively damage to the socio-legal order.<sup>160</sup>

Implicit in the very idea of a revolution is that the existing legal order might collapse. In its absolute form a revolution is the opposite of preserving the legal order. A revolution, as Edgar Bodenheimer wrote, “is essentially a negation of law; it is a dynamic phenomenon in which power is rampant, with few checks and restraints, and which is characterized by a more or less complete breakdown of law.”<sup>161</sup> Therefore, the duty of preserving the legal order might involve anti-revolutionary behavior.<sup>162</sup> Furthermore, one of the formal aspects of the rule of law, as taught by Lon Fuller, is the stability of the law.<sup>163</sup> Given the duty to protect the law, lawyers seemingly have to assure that the legal order remains quite stable.

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157. Meir Shamgar, *On the Ethics of the Jurist*, 11 TEL AVIV U. L. REV. 171, 173 (1985–1986) (in Hebrew).

158. *Id.* at 177.

159. Iris Marion Young, *Professional Ethics and Social Change: A Response to Minow*, 52 U. PITT. L. REV. 859, 859 (1991) (“Lawyers have an obligation to uphold and serve the law and encourage respect for laws and the legal system. From such an obligation it would seem to follow that lawyers ought morally to disapprove of the actions of persons who choose to break the law in order to accomplish some ends of social change.”). For a thorough analysis of the arguments against lawyers involvement with social change law-breaking see Kathryn Abrams, *Lawyers and Social Change Lawbreaking: Confronting a Plural Bar*, 52 U. PITT. L. REV. 753 (1991).

160. Limor Zer-Gutman, *The Legal Profession’s Image*, 11 HAMISHPAT 231, 245 (2007) (in Hebrew).

161. Bodenheimer, *supra* note 114, at 228.

162. Luizzi, *supra* note 20, at 176.

163. LON L. FULLER, *THE MORALITY OF LAW* 79–80 (rev. ed. 1977).

In its pure formal aspect, the rule of law has nothing to do with democratic values.<sup>164</sup> In this respect, protecting the law imposes a duty on the lawyer to resist revolutions, even democratic ones.

In addition to the duty of protection explained above, a lawyer also has a social responsibility to improve the legal system.<sup>165</sup> Usually, this responsibility will materialize in legal ways, such as bringing cases before the court and influencing the drafting of legislation. However, a lawyer's ability in these arenas is limited by the cases a lawyer has the opportunity to take on. Therefore, the responsibility of improving the legal system may involve revolutionary behavior.<sup>166</sup> Furthering the values and goals of a revolution—particularly a democratic revolution—is consistent with a lawyer's duty to promote the rule of law to the extent that duty looks toward democracy and civil rights. In turn, this dilemma between improvement and preservation helps foster the legal profession's division of loyalties between the old legal order and the new revolutionary order, as exemplified in the three great Western revolutions.

Democratic revolutions bring greater awareness of fundamental rights and values.<sup>167</sup> Such revolutions demand an independent legal profession willing to act as an intermediary between the people and their government.<sup>168</sup> Historically, lawyers have served as guardians of liberty and freedom in democratic societies.<sup>169</sup> In other words, the principal role of a lawyer in society can be described as “to aid the citizen and to complete what he lacks in the knowledge of the law and the ways of protecting his rights.”<sup>170</sup> Lawyers are representatives of legal, economic, and political liberalization: they build a culture of obedience to and respect for the law, while simultaneously protecting basic rights and establishing legal regimes

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164. However, substantive aspects of the rule of law principle may further democratic values. See, e.g., BARAK, *supra* note 18, at 51–56.

165. Luizzi, *supra* note 20, at 180; VINCENT LUIZZI, A CASE FOR LEGAL ETHICS 132 (1993).

166. Luizzi, *supra* note 20, at 180.

167. See Albert, *supra* note 19, at 39–40; Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*, 35 RUTGERS L.J. 569, 570 (2004) (“Democratic transitions in Africa have generally led to heightened awareness of legal rights and have put unprecedented pressures on governments to respect civil rights.”).

168. Oko, *supra* note 167, at 570–71.

169. *Id.* at 571; William W Kilgarlin, Justice, Supreme Court of Texas, Commencement Speech at Baylor Law School Graduation Ceremony: Lawyers: Guardians of Democracy (May 17, 1986), in 38 BAYLOR L. REV. 249, 250 (1986).

170. Abraham Weinshall, *The Status of The Lawyer in the State and in the Public*, 16 ISR. BAR ASSOC. L. REV. 20, 25 (1959) (in Hebrew).

that support liberal, capitalist institutions.<sup>171</sup> Lawyers, as Tocqueville noted, are the strongest barrier against the regression of democracy.<sup>172</sup> Lawyers also can be leverage for its ascent. When one deals with a democratic revolution, the responsibility of lawyers to preserve the legal order is undermined in favor of democracy. As David Luban wrote regarding the lawyer's obligation to respect the law: "There is no reason for a lawyer to display respect for the law unless the law deserves that respect."<sup>173</sup> In this sense, the rule of law is defined by its promotion of democracy and individual rights.

Similarly, David Dyzenhaus criticized South African judges and lawyers for breaching their duty to promote and protect the rule of law in the presence of the apartheid legal order.<sup>174</sup> For Dyzenhaus, the rule of law must stand as a platform for the struggle for freedom and equality.<sup>175</sup> Therefore, it can be claimed that, in the collision between the duty to preserve the legal system and to improve it, the principle of preserving the law sometimes retreats in favor of improving the law.

## VI. THE ROLE OF LAWYERS DURING A DEMOCRATIC REVOLUTION

As described above, despite the inherent contradiction presented by revolutionary lawyers, lawyers in fact can play a very important role in a democratic revolution. One revolutionary role of lawyers is to find creative ways to bring about social change within the existing legal framework, including litigation, solicitation, and legislation. In this role, lawyers simultaneously preserve and improve the legal order. Here, the question becomes to what extent can law—directly or indirectly—bring about social change? In an article published in 1958, Yehezkel Dror looked at Japan and Turkey as examples of countries where revolutionary or intellectual minorities won the legislative authority and used legislative amendments to change their culture and social structures.<sup>176</sup> Thus, social changes—even

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171. Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 448–49 (2010).

172. TOCQUEVILLE, *supra* note 132, at 247.

173. David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 797 (1991).

174. DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER 112–13 (1998). Similar to lawyers, and perhaps even more so, revolutionary times pose moral dilemmas before judges as well. S. A. de Smith, *Constitutional Lawyers in Revolutionary Situations*, 7 W. ONTARIO L. REV. 93, 104–05 (1968).

175. DYZENHAUS, *supra* note 174, at 183–84.

176. Yehezkel Dror, *Law and Social Change*, 33 TUL. L. REV. 787, 799 (1958–1959).

revolutionary ones—can be brought about through law. Even in the United States, social change has been garnered by lawyers, as, for example, in *Brown v. Board of Education*, in which the United States Supreme Court held racial segregation in public education to be unconstitutional.<sup>177</sup>

Nevertheless, the legal system is limited in its ability to bring about social and revolutionary changes.<sup>178</sup> Revolutions and legal reformations are concretely linked, each dependent on the other.<sup>179</sup> A revolution is accomplished through the shaping of new legal rules and principles; in other words, law is indispensable to the internalization and implementation of revolutionary changes.<sup>180</sup> Likewise, a revolutionary change of political or social forces must be accompanied by lawmaking activities aimed at substantially modifying the law. Even immediately after a revolution, provisional legal measures, such as temporary legal provisions, are usually taken.<sup>181</sup>

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177. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). However, Gerald Rosenberg argues that courts had no contribution to ending segregation in public schools in the Southern States by showing that, in the first decade after *Brown*, many judicial decisions which demanded an immediate execution of *Brown* were not enforced and only led to various objections and postponements. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42–57 (2d ed. 2008). Rosenberg argues that it was only after the actions of Congress, the Executive branch, and the civil rights movement that this pattern had changed in favor of advancing desegregation. According to Rosenberg, courts, which are generally ineffective and relatively weak, can bring about social change only when two conditions are met: (1) the sought change enjoys a vast public and political support, and (2) the change is hindered by institutionalized and bureaucratic obstacles that have an interest in the court's decision. *Id.* at 30–31.

Contrary to Rosenberg's position, one can argue that when a social change occurs after a judicial decision has been rendered, there should be a presumption that the change was influenced by the court, even if the social change did not occur immediately after the decisions. In any event, it is clear that such judicial decisions are part of the normative backdrop (at least in a symbolic sense, if not more) that affects and accelerates political activities. See Ruth Gavison, *The Hollow Hope – Can Courts Bring About Social Change? A Book Review of Gerald Rosenberg's 2nd Edition* (2008), 2 MA'ASEI MISHPAT 15, 20, 24–25 (2009) (in Hebrew).

178. See Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 727–33 (1991); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 135–44 (1974).

179. Bodenheimer, *supra* note 114, at 233 (“There is a constant interaction between power and law in the social process, and the actual relations between these two forces are as complex and unstable as the relations between energy and matter.”).

180. For a discussion of the influence of law on revolution, in the context of the American Revolution, see William B. Ewald, *The American Revolution and the Evolution of Law*, 42 AM. J. COMP. L. SUPP. 1 (1994).

181. Paul Schrecker explained that, during a revolution which overthrows the fundamental law, all laws and norms based on the pre-revolutionary constitution “are automatically abolished along with the base from which they drew their validity. . . . That is why, in order to avoid a state of anarchy, the revolutionary constitutions often retain, although provisionally, the norms and other laws which were

Nevertheless, in times of revolution, there is a gap between the speed of socio-political change and the speed of legal change. In this state of affairs, lawyers are of extreme significance.<sup>182</sup> In an often lawless revolutionary atmosphere, it is essential that the revolutionaries not forget the revolution's obligation to ultimately create a new legal order. Here, the lawyer's actions are imperative, as demonstrated by the three great Western revolutions.<sup>183</sup>

Lawyers' responsibility to create legal order can be met several ways. First, by using their legal knowledge, lawyers can assist in drafting the basic documents of both the new and the transitional legal orders.<sup>184</sup> Second, lawyers can both develop and represent the public's revolutionary justification. A lawyer can develop the revolutionary justification by delivering theoretical legal support to the public; and can represent the revolutionary justification in formal judicial proceedings. As shown by the great revolutions in England, America, and France, lawyers historically have provided ideological rationales by converting technical legal language into a general discourse on rights and liberties.<sup>185</sup> Third, lawyers can explain to the public the need to establish an improved legal order and to avoid a prolonged transitional period in which legal order is undermined. This is one of the great paradoxes of revolutions and the law: the law is meant to create stability and continuation, but a revolution yields chaos and change. A revolutionary change is not natural in law. Nevertheless, when a revolution occurs, the new, revolutionary law wishes to assure that the revolution will not occur again.<sup>186</sup> Preservation versus change is the greatest antinomy of law.<sup>187</sup> Finally, lawyers can call for action and change without using violent means. The absence of fighting turned the English Revolution into "a glorious" one. In France, Georges Lefebvre argued,

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legally ratified under the old constitution." See Paul Schrecker, *Revolution as a Problem in the Philosophy of History*, in *REVOLUTIONS*, *supra* note 8, at 34, 38.

182. Luizzi, *supra* note 20, at 180–81.

183. See, e.g., Yves Dezalay & Mikael Rask Madsen, *The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law*, 8 *ANNU. REV. L. SOC. SCI.* 433, 439 (2012) (noting that "[t]he key position of French lawyers both before and after the French Revolution more than anything sheds light on this ability to adapt to power and to carefully maintain the force of law under changing social and political conditions").

184. Bodenheimer, *supra* note 114, at 222 (arguing that lawyers' contributions to revolutions are "at best of an auxiliary nature, consisting in the preparation and drafting of constitutions and other legislation").

185. Gordon, *supra* note 171, at 466–67.

186. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 16–19 (1983).

187. BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 7 (1928).

“[i]n the view of the lawyers, who represented and guided the bourgeoisie, the Revolution was to be a peaceful readjustment, imposed by opinion and translated rather simply into new juridical formulations”;<sup>188</sup> and, in America, lawyers made a significant contribution by convincing the masses not to be overcome by enflamed spirits. The American Revolution’s relative lack of bloodshed and violence can, in part, be attributed to the conservative influence of lawyers in leadership who profoundly believed in orderly proceedings.<sup>189</sup>

## VII. CONCLUSION

Cause lawyering, also referred to as public interest or social lawyering, uses the law and legal tools to create social change.<sup>190</sup> Social change is the process of innovating and challenging the existing status quo.<sup>191</sup> This process reaches its peak during a revolution, through the “rebellious lawyer” or the “democratic lawyers”, to use Gerald López<sup>192</sup> and Ascanio Piomelli’s<sup>193</sup> terminology respectively. Every society needs revolutionary lawyers. William Quigley wrote:

There are enough lawyers in this world defending the way things are. Plenty of lawyers work for structures that perpetuate and increase the racism, militarism and materialism in our world. . . . True structural and fundamental change will not come by aiming at small revisions or reforms. If we are going to transform our world, we need lawyers willing to work with others toward a radical revolution of our world. We need no more lawyers defending the status quo. We need revolutionaries.<sup>194</sup>

What is and what ought to be the appropriate role of lawyers during a revolution? As stated above, the Western revolutionary tradition is, in fact, a tradition of lawyers. Surely, there is still a large space for theoretical and empirical studies concerning lawyers’ involvement in revolutions. The three case studies analyzed in the second part of this article are selective and nonexhaustive. For example, questions can be raised as to the extent to

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188. GEORGES LEFEBVRE, *THE COMING OF THE FRENCH REVOLUTION* 208 (R. R. Palmer trans., 2005).

189. See Surrency, *supra* note 55, at 131–34.

190. See Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287, 289 (1996). For more information about cause lawyering, see generally CAUSE LAWYERING (Austin Sarat & Stuart Scheingold eds, 1998).

191. Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171, 182 (1993).

192. See generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING* (1992).

193. See generally Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383 (2009).

194. Quigley, *supra* note 128, at 168.

which lawyers were involved in non-democratic revolutions and more modern revolutions not reviewed in this Article. In addition to distinguishing between different kinds of revolutions, future studies could also disentangle the roles played by different kinds of lawyers. For example, lawyers in the private sector may play a different role than lawyers in the public service, who face dueling obligations during revolutionary times, serving as both a long arm of the law and a servant of the public. The tools used by lawyers to promote revolutions—for example, litigation, legislation, or propaganda distribution—also merit closer attention. This Article seeks to open a debate on the social responsibilities and roles of lawyers during a revolution and to illuminate some of the questions that arise from this new understanding.

How should lawyers act during revolutions? This is a thorny question. Professional ethical duties rarely extend to the social responsibilities of professionals. Ethical duties only dictate the moral conduct lawyers are obliged to carry out (or to refrain from) in support of legal institutions and professional customs.<sup>195</sup> Nonetheless, lawyers also have a moral social responsibility.<sup>196</sup> Lawyering is driven by what David Luban termed “moral activism.”<sup>197</sup> When thinking of the social activist lawyer, the focus usually falls on lawyers’ responsibility to act out of a moral sense of what is right and just.<sup>198</sup> Wrapped up in this duty is the moral decision about which social battles are worth fighting for and which tools the lawyer possesses for these battles.<sup>199</sup>

A revolution takes social lawyering to an extreme, as revolutionary lawyering often involves taking extra-legal measures. Patricia Ewick wrote that if we wish to understand revolutionary social change, we must start by examining “where people are at.”<sup>200</sup> Asking where lawyers “are at” is a difficult question. As history teaches us, during a revolution, a lawyer’s conflicting duties collide and as a result, lawyers, as a group, divide. At the end of the day, how lawyers should act during a revolution is a moral

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195. See Young, *supra* note 159, at 859–60.

196. This might be termed “external ethics,” which “concerns the relation of members of the profession to the society as a whole.” Anatol Rapaport, *Ethics and Politics*, in *REVOLUTIONS, SYSTEMS, AND THEORIES*, *supra* note 21, at 75, 76.

197. DAVID LUBAN, *LAWYERS AND JUSTICE* xxii (1988).

198. See *id.* at 160. See generally David Luban, *The Social Responsibility of Lawyers: A Green Perspective*, 63 *GEO. WASH. L. REV.* 955 (1995); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 *VAND. L. REV.* 717 (1988); Paul R. Tremblay, *Practiced Moral Activism*, 8 *ST. THOMAS L. REV.* 9 (1995).

199. Karen L. Loewy, *Lawyering for Social Change*, 27 *FORDHAM URB. L.J.* 1869, 1875 (2000).

200. Patricia Ewick, Comment, *Postmodern Melancholia*, 26 *L. & SOC’Y REV.* 755, 761 (1992).

question; when a revolution breaks out, each lawyer must exercise his own “ethic discretion,”<sup>201</sup> listen to his conscience, and act accordingly.<sup>202</sup>

Importantly, a lawyer is not like any other citizen. The participation of lawyers in a revolution has a great influence on the legitimacy of the existing legal order. The public conceives lawyers as experts on acting within the boundaries of the existing legal institutions. When lawyers venture beyond the borders of the legal institutional context and seek social change in extralegal ways, their acts have tremendous influence on the legitimacy of the legal institutions and the rule of law, and may determine the legitimacy of the revolution itself.<sup>203</sup> It is enough if we only return to Tahrir square to watch the Egyptian lawyers, wearing suits and robes, demonstrating in favor of the revolution. What a great influence that was for the legitimacy of the revolutionary call.

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201. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1091 (1988).

202. Cf. Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591, 1607 (2009).

203. *Contra* McMorrow, *supra* note 155, at 146 (“If the rule of law means, in ordinary language, that rules have some moderate constraining force on the individual predilections of decisionmakers . . . then the individual actors who are charged with implementing the law *must* take seriously the goal of having something beyond purely individual choice govern the implementation of law . . . When these essential actors—lawyers and judges—disregard law unequivocally, individual citizens cannot help but question the legitimacy of our political system and the ideal of the rule of law.”).