

The Genesis of an American Legal Profession:

A Review of 150 Years of Change

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■ This article is taken from an address delivered by Mr. Justice Jackson at the commemoration of the sesquicentennial anniversary of the foundation of the Philadelphia Bar Association. The year 1802 presented a great challenge to American law and American lawyers. The Nation had a Supreme Court that had heard less than seventy cases in the thirteen years of its existence and which was considered so unimportant that its first Chief Justice resigned to run for Governor of New York and another spent most of his term of office in England. The Revolution had left the country without any systematic body of law, and the common-law heritage of the Colonies was denounced by pro-French elements of the Bar and the press. There were no books on American law, no official reports. Justice Jackson relates how the legal profession met this dilemma.

■ The opening of the nineteenth century was a critical period both for our lawyers and our law. The American people had just formed "a more perfect Union" and set out upon a separate national career. But nowhere in the world could they find a jurisprudence adapted to the political and social philosophy that conditions of life in the new continent had generated. When necessity arose they had either made uncritical borrowing of Old World rules or had improvised random measures with little heed to law as a system. Even highest courts had been manned mainly by nonprofessional judges, and their decisions were not enough esteemed to be published. The majority of the Bar were indifferently prepared and law practice was a part-time avocation of laymen. There were occasional lawyers learned in the English system of common law, but they were still only a disconnected branch of the profes-

sion beyond the seas. While America did have some eminent, scholarly and popular lawyers, it had developed no Bar that could merit that description, and the prospects for such a Bar were not encouraging.

Charles Warren describes Colonial and Revolutionary times as an era of "Law without Lawyers".¹ Royal Governors did not encourage what they regarded as a craft of troublemakers, and the powerful clergy was inclined to regard attorneys as secular rivals teaching law not found in the Scriptures. The Quakers had their own system of arbitrating disputes by "common peacemakers", or lay referees. During the Revolution, as during all such convulsions, considerable popular hostility to lawyers was manifest. Success of the Revolution propagated an egalitarian philosophy that all careers were open to any man and a rough idea of democracy which was hostile toward experts and specialists.

John Adams Described Place of Colonial Lawyer

John Adams, speaking of pre-Revolution New England, probably portrayed conditions throughout the Colonies when he wrote: "Looking about me, in the country, I found the practice of law was grasped into the hands of deputy sheriffs, petty-foggers, and even constables, who filled all the writs upon bonds, promissory notes, and accounts, received the fees established for lawyers, and stirred up many unnecessary suits . . ." He relates that a meeting was called and regulations proposed "for confining the practice of law to those who were educated to it, and sworn to fidelity in it, but to introduce more regularity, urbanity, candor, and politeness, as well as honor, equity, and humanity, among the regular professors".² It has a very modern ring, doesn't it?

1. Warren, *History of the American Bar*, is our standard authority. Wickser, "Bar Associations", 15 *Cornell L. Q.* 390, deals with the history of the Bar's efforts at organization.

2. Bowen, *John Adams and the American Revolution*, gives a readable and documented account of law practice in New England in the Revolutionary period, based largely on the Adams autobiographical writings. Stillé, *John Dickinson*, includes much Pennsylvania legal history for the period. Judge Bond's *Introduction to Proceedings of Maryland Court of Appeals, 1695-1729*, is a treasury of Colonial legal history. Meigs, *Charles J. Ingersoll*, portrays the post-Revolutionary law practice in Pennsylvania. Judge Hough's *Introduction to Cases in Vice-Admiralty and Admiralty, 1715-1788*, throws a good deal of light on conditions in New York. All these sources have been laid under tribute here.

This part-time dabbling in law practice by laymen was congenial to frontier spirit and, indeed, persisted in rural sections almost to my own time. Justice court litigations were often managed by men of the neighborhood who otherwise were farmers, merchants or small office-holders. Some were well-read, the best of them equal to a large part of the professional Bar. I have a good deal of respect for the old pettifogger—some of my contemporaries are acute enough to say it is a regard born of kinship. But in a rather pioneer state of society they performed a useful service and were dangerous adversaries for the most learned lawyer in a court presided over by a lay justice. There the law was apt to be anything “boldly asserted and plausibly maintained”. Law in this “people’s court” had a popular or communal quality, as the New York Court of Appeals once subtly recognized by saying of such a judgment that the Justice had rendered it “after thorough deliberation, for the entire time allowed by law for that purpose, doubtless, aided by consultation with the clearheaded commonsense men of the neighborhood”.³

The professional Bar just following the Revolution was handicapped in its competition with the self-acknowledged pettifoggers because, with few notable exceptions, it was probably not much better trained. (Alexander Hamilton’s preparation was reading law for four months.) They took their law where they found it and, like most of us who have come after them, got the best part of their education at the expense of their clients. The more inquisitive improved themselves and each other by forming debating and study groups, such as the little law club affectionately described by John Adams which met at the Tavern on Thursday evenings “for study of law and oratory” and to read aloud and discuss such authors as Cicero and Blackstone.

There were, however, a considerable number of Americans, perhaps considered the elite of the Bar, who

had imbibed the law of England, along with its best port, at London Inns of Court. Some, perhaps were so fortunate as to hear judgments pronounced by the great Mansfield, who waged his own revolution in English law that only ceased when he resigned in the year our Constitution was adopted. He must have communicated to them something of his spirit. From 1760 to the close of the Revolution, we learn that 115 students were accepted at the Inns, of which Pennsylvania sent eleven. However, South Carolina sent forty-seven, Virginia twenty-one, and Maryland sixteen, while New York contributed only five, New England two, and no other Colony more than one.⁴ Many of these lawyers showed no enthusiasm for the Revolution and some, of outright Royalist sympathy, fled to Canada. But those who cast their lot with the Revolutionary cause possessed a background of legal scholarship which gave them an influence on the young Nation’s Bench and Bar disproportionate to their numbers.

By 1802, the Bar was just beginning to feel the influence of recently established American law schools. The older colleges had no more than cautiously experimented with legal education. William and Mary, in 1779, established the first regular American law professorship. The College of Philadelphia named James Wilson, Associate Justice of the United States Supreme Court, Professor of Law in 1790. Although his inaugural lecture was attended by President Washington and a distinguished company, the course was discontinued in less than three years because of lack of interest. In 1793, James Kent was made Professor of Law at Columbia, but his course, after a few terms, was likewise abandoned for the same reason.

An American plan of legal education, on other principles than prevailed in Europe, had been foreshadowed by the founding, in 1784, of the pioneer law school of Judge Tapping Reeve. The small two-room building now stands in the dooryard of Judge Reeves’ home in the beau-

tiful county seat of Town of Litchfield, Connecticut, as a shrine for American lawyers. To it came students from all parts of the United States. Its influence during the formative period of our law was unparalleled and almost unbelievable. The alumni of this amazing little institution came to include sixteen United States Senators, fifty members of Congress, eight chief justices of state courts, forty-six judges of higher state courts, two Justices of the United States Supreme Court, ten governors of states, and five members of the Cabinet. And we must remember that this was in days when such officials were but a third of their present number.

But whether a lawyer starts his legal education by apprenticeship or by the discipline of a school, it is, as we know, a life-long process. The lawyers of 1802 were hindered in growth and improvement for want of adequate legal literature to nourish their intellectual life.

The barren state of the American legal bookshelf appears from a survey of the hundred years ending in 1788, which concluded that “not a single book that could be called a treatise intended for the use of a professional lawyer was published in the British Colonies and the American States. All of the books within this period which by any stretch of definition might be regarded as legal treatises were for the use of laymen. The merchant, the farmer, the artisan, might at any time be called upon to serve as a justice of the peace, or even, in some colonies and states, in a higher judicial capacity. As lawyers were not numerous, the layman frequently and perhaps generally drafted his own instruments, contracts, deeds, and wills, without professional assistance. He was also called upon frequently to serve as a juryman. Practically all of these books were designed to assist him in the performance of his judicial and other public duties, and to enable him to satisfy legal requirements in

3. *Lapham v. Rice*, 55 N. Y. 472, 480.

4. *Stillé*, *John Dickinson* 26.

the everyday matters of business and affairs."⁵

In its first three years the library of the Philadelphia Bar Association was able to accumulate 391 volumes. But the texts, commentaries and decisions useful for instruction of the lawyer in the technical learning of his craft were imported books written by foreign, chiefly British, authors. There was nothing of consequence from the pen of Americans. John Adams had written "An Essay on Canon and Feudal Law", which was well received in England. Some of the lectures of Wilson and Kent, which had failed to attract listeners, were put in the reach of readers and there were some "Dissertations" by Judge Chipman of Vermont and a few scattered pamphlets on special subjects. There were American editions of British works, most of them little more than reprints, an exception being St. George Tucker's *Blackstone*, which contained the first legal commentaries on the Federal Constitution to appear in this country. Even the first of Story's efforts, published somewhat later, consisted of editing British texts. Only a dozen volumes of American Reports were in print and official reporters were unknown. Jefferson had compiled his own reports but in nearly all cases the decisions dealt with some aspect of property in slaves. As yet there was no comprehensive American commentary and no native body of law or legal learning.

Colonial Courts Got Little Respect

If the general level of legal education was haphazard and rudimentary, if legal literature was scarce and foreign, also the courts to which the lawyer might look for development of law had little strength or credit. The lawyers were then making their reputations and their livings almost entirely from practice in state courts. These courts had some continuity and tradition and security. But if we could have eavesdropped at early meetings of the Bar, I am sure we should have over-

heard some pithy and censorious comments on the Supreme Court of the United States. In fact, I imagine it is not yet too late to hear some. But in 1802 its plight was such as to make it an appropriate symbol of the crude, indifferent, un-matured state of the American Bar.

It is hard to imagine the United States Supreme Court as it was then—an untried institution, recently superimposed upon the state systems, a Court without a courthouse, without a jurisprudence and also without much business. It had decided less than seventy cases in a dozen years. It organized and for a few terms sat in New York, where it heard no arguments of importance. Seated in Philadelphia, it decided few cases, chiefly notable for the opposition they aroused. One which upheld the power of a federal court to entertain a citizen's suit against a state raised a tempest.⁶ The Court had not yet become addicted to overruling itself, but this decision was promptly reversed by constitutional amendment.⁷ To have provoked popular recall of one of its first judicial decisions was not a promising start in constitutional interpretation.

In 1800 the Court had moved to Washington, where it was a stepchild of the Government which provided it with no books and not even a place to meet until finally a Senate Committee room was assigned to its use. Its low estate was exhibited by turnover in personnel. In its first dozen years the Chief Justiceship was twice declined and held by four incumbents. The first, John Jay, resigned to run for Governor of New York. Next, John Rutledge, after sitting briefly by recess appointment, was refused confirmation. The Chief Justiceship was then offered to Associate Justice William Cushing, who preferred to remain an Associate. Thereupon, Oliver Ellsworth accepted the post for a brief period, most of which was spent abroad. When he resigned, President Adams tried unsuccessfully to lure Jay "to resume his old station". The partisan *Aurora* commented, "That the Chief Justiceship is a sinecure needs no



ROBERT H. JACKSON

other evidence than that in one case the duties were discharged by one person who resided at the same time in England, and by another during a year's residence in France."

At the moment, also, the Bar must have been agitated by the political storm that was gathering over the insecurely established Court. Jefferson had come to power and the historic struggle between his party and the federal judiciary was opening—a struggle to which recent history has added some postscripts. Congress was debating a bill that would undo much of the Judiciary Act of 1789. The Supreme Court had incurred powerful opposition but had done little to earn popular respect. The 1800 August Term, last to be held in Philadelphia, was all too typical—only half of the Justices being present. Chief Justice Ellsworth was in Paris as Ambassador, Justice Cushing was ill, and Justice Chase was in Maryland electioneering for Adams in the presidential campaign.⁸

Down to 1802, the most significant work of Supreme Court Justices had been presiding at trials on circuit, as

5. James, "List of Treatises Printed in the British Colonies and the American States Before 1801", *Harvard Legal Essays* 159.

6. *Chisholm v. Georgia*, 2 Dall. 419 (1793).

7. Eleventh Amendment proposed at the first session of Congress after decision of *Chisholm v. Georgia*. Ratification completed 1795 and proclaimed by President Adams, January 8, 1798. 1 *Messages and Papers of the Presidents* 250.

8. Warren, *The Supreme Court* 156. This history is our source for the Court history recited herein.

the Judiciary Act required. In that capacity the Federal Bench created a better impression in Philadelphia than in some Circuits. James Wilson, of Pennsylvania, had been succeeded by one of his students, Bushrod Washington, of Virginia—nephew, confidant and legatee of President Washington. This Justice, often with Richard Peters, sat in many difficult and precedent-making federal trials in this city. The Supreme Court could hardly have been more favorably represented than through the exalted character and the luminous, if not brilliant, legal mind of Justice Washington.⁹

Jeffersonians Were Aroused Against Whole Federal Judiciary

But on circuit some Justices aroused animosities of the Jeffersonians against the whole federal judiciary. The judges were accused, and the charges are all too well supported, of surly and ostentatious partisanship, even on the Bench in charges to grand juries and especially in the conduct of trials under the Sedition Act. Soon impeachment proceedings against Justice Chase would spearhead an attack which might unseat many of the federal judges, and this momentous struggle must have been fiercely debated. No doubt the preponderance of the Bar's influence was on the side of the Federalist judges, but there were also powerful Jeffersonians in this Commonwealth. In the light of history, it probably is fortunate that neither side scored a total victory. Fanatical anti-Federalists, if unchecked, would have left only a dependent and impotent judiciary. Complete exoneration of the judges would have tolerated perversion of the judicial process to party ends. Judges learned—at least, I hope they did—that if they busy themselves with politics, politicians will retaliate by meddling with the courts. The people learned—at least, I hope they did—that second only to money venality, if indeed it is second to that, a partisan Bench will corrupt the judicial process and discredit courts.

It was such a Supreme Court, sad-

dled with embarrassments, weakened by the Justices' lack of dedication, unsupported by a strong organized Bar, that was venturing into an uncharted field of law. Never had a judicial body been called upon to interpret and apply, against Government and citizen, a written Constitution, or to resolve cases and controversies thrown up by the complicated legal structure of a federal state. For such problems there simply were no answers in law books, even if law books could be found.

A persistent uncertainty, characteristic of the whole state of the law and of our profession, concerned the source from which the Supreme Court would get its law. After 150 years lawyers still say that they cannot imagine where some of it comes from. And it has even puzzled members of the Court. About all I can say with conviction is that it is not from the Medes and Persians. You are familiar with one aspect of the source of law problem manifest in the rise and fall of *Swift v. Tyson*.¹⁰ Also, the dispute as to whether the federal courts would punish unacted common-law crimes was another aspect of the search for sources of law.¹¹ Of course, not even the most visionary men of 1802 could imagine the amount and extravagance of sheer invention that would be occasioned by the unthought-of Fourteenth Amendment.

Down to 1800 the administration of justice had been too casual and nonprofessional to create any systematic body of law. An era was opening which would see an American jurisprudence emerge from the arguments of professional lawyers at the Bar and their reported decisions from the Bench. The American lawyer's vassalage to Old World thought was about to end.

Revolution Created a Necessity for Original Work in the Law

The liquidation of the old Colonial order thrust upon the lawyers of the post-Revolutionary era a necessity for original work which was soon to bring forth the most constructive period of the American legal profes-

sion. It may be doubted that men of the common-law tradition ever experienced an opportunity for imaginative advocacy and creative judicial decision equaled by that in the United States during the first half of the nineteenth century. New constitutions, state and federal, were uninterpreted, governments were still in the formative stage, the courts were recently set up. Society had broken with Old World traditions and there had been no time for new ones to form. The authority of English and Colonial law had been thrown off and no substantial body of fresh statutes and precedents had accumulated. Whatever concepts of law had come down from the past must be molded to the conditions of a new continent and a revolutionary idea of society. For lack of precedents, lawyers would have to argue from principle, utility and public good, and law practice would be an exercise in reasoning instead of in research. Arguments could not be trivialized by flimsy distinctions between cases. Judges, too, would find it necessary to vindicate their decisions with reasons rather than to rest upon citations. There was ahead the supreme opportunity to close the gap that usually exists between law as it is and law as it ought to be.

It would, however, have taken unusual foresight at the threshold of the century to have known that the era of aimlessness, irresolution and mediocrity was so soon to end. That was the hidden meaning of the accession of the 45-year-old Virginian who had just been the second choice of a popularly discredited President for Chief Justice. While his standing was high at the Virginia Bar, he was innocent of judicial experience. Since Federalists accepted the appointment with misgivings and the opposition with contempt, we may well imagine that anxious inquiries were made and apprehensions confided at the first meetings of the Li-

(Continued on page 615)

9. For example, *Eulogium*, by Joseph Hopkinson (1830); *Bushrod Washington*, by Horace Binney (1858).

10. 16 Pet. 1.

11. See Warren, *History of the American Bar* 228 et seq.

The Genesis of an American Legal Profession

(Continued from page 550)

Library Company of Philadelphia Bar Association. But Marshall was destined for a place among the small number of personalities who appear to have changed the course of history. He would arrest the disintegration of the Court, give new vitality to that anemic institution and, through it, to the Constitution itself. But no one at that time—absolutely no one that I can find—had even a faint premonition of the importance which the advent of Marshall held for the Nation and the Bar. It is likely that at the first meeting of the Library Company, its

founders noticed that the Marshall Court had just issued a rule to show cause why a writ of mandamus should not be granted to require James Madison, Secretary of State, to deliver certain rather unimportant presidential commissions to William Marbury, and others. But could any magic have forecast the shape of its decision or the impact it would have on the Nation's life and law? If they could have pierced the veil that separates man from his future, they would have seen that a rapid succession of Marshall judgments would lay deep and solid foundations for an American constitutional law—a law so thoroughly original, as Mr. Warren reminds us, that in five great opinions Marshall did not cite

a single precedent.¹²

A ferment and awakening was to bestir the whole American profession to its depths and it would respond with a burst of creative energy. While public law was being made in the high Federal Court, private law in the state courts would undergo a process of naturalization. James Kent would soon become New York's Chancellor and, in a long series of judgments, would mold an American equity jurisprudence. Then his *Commentaries on American Law* would effectively establish the intellectual independence of the American legal profession.

In 1801, at Salem, Massachusetts,

12. Warren, *History of the American Bar* 403.

a young man was admitted to the Bar who in only ten years would become Mr. Justice Story and, in the 1830's, would bring forth *Commentaries on the Constitution* and a series of pioneering texts on such varied subjects as bailments, conflict of laws, equity, agency, partnership, bills of exchange and promissory notes. Before the Nation was torn by the Civil War, American pens embodied an American jurisprudence in law books worthy of the best traditions of the Old World. The American lawyer could find texts to guide his arguments and his counsel, the critical faculties of scholars were given impetus, the deliberations of judges were supplied materials in aid of discriminating judgment. Our profession had really found itself and so swift would be its ascendancy that men present at the founding of the Library Company in 1802 would live to read the Comte de Tocqueville's famous observation that the only real aristocracy in America was the lawyers.

But, because these men were innovators, let us not be under the delusion that they did not value the learning of other generations or the experience of other societies or believed themselves able to extemporize a rational scheme of law by mere overturn of the past. On the contrary, they went to the far-away and the long-ago for learning in any tongue that would contribute to their great task of giving shape to the legal structure of the New World. The period was characterized by speculation on the nature and sources of law and comparison of the practical merits and defects of all legal systems that had theretofore prevailed. It is not without significance that the most constructive was also the least intellectually isolationist period of our legal history.

It often is suggested that reception of the common law of England in the United States was almost automatic, unquestioned and inevitable. Among the learned and professional classes it surely had a preference, because its philosophy, method and tongue were most familiar. Also, it

had been somewhat popularized because many, led by those educated in the Temples, had justified their resistance to George III by principles of English law drawn from Magna Charta, the Petition of Right and the Act of Settlement. They were supported by British friends of the Colonies, such as Chatham, Burke and Fox, who asserted that rights under English law were being violated by the King and his ministers. Those educated in it were naturally tenacious in adhering to the common law, and this identification of it with American liberties helped powerfully with its popular acceptance.

But the common law had severe critics both here and in England who said it was feudal and aristocratic, rigid and subtle. Even those who urged that it be received as the groundwork of our law were obliged to admit that its particular rules would require many adaptations.

Dean Pound has suggested that our common law had to encounter and overcome four separate and serious dangers and that "very little would have sufficed more than once to turn the current of our law in a wholly different direction". One of these, "the danger of a debasement of the law through an untrained judiciary", I have already pointed out. The others are "danger of a reception of French law", "danger of a premature and crude codification during the legislative reform movement", and "danger of loss of unity and of rise of separate local systems".¹³

Certainly hostility, at least temporarily, toward England and things English was a legacy of the Revolution. Pennsylvania was among the three states to legislate against citation of English decisions in the courts. Some judges refused to listen to them. A powerful pro-French party came to power in the Nation and its leaders were among the most severe critics of the common law. The civil law of France had a foothold within the country after the Louisiana Purchase and Roman-Dutch law had some vestigial standing in New York.¹⁴ One can hardly

fail to be impressed with the frequency and ease with which early judges and writers such as Kent and Story consulted and cited civil-law sources, often in the foreign tongue. If they were not bound, at least they were often convinced by analogies and principles drawn from Rome's great gift of law as received and applied, especially by the French and the Dutch. Pound believes the danger of reception of civil law passed largely because it was so little available in our own tongue and we are not favorably disposed to unfamiliar language literature.

Codification has an illusory simplicity which appeals to laymen. It was early and vigorously advocated in this country, and with strengthened support after the promulgation of Code Napoleon. Had not Story and Kent rescued the common law from the hapless chaos in which the Revolution left it, a codification might have been attempted. The condition of the times makes us shudder at the thought. By the time Bentham's thunderings began to be effective here and the Field movement for codification came to pass, the common law had been given shape and foundation to stand upon its merits.

The danger of localism which would spawn conflicting varieties of common law was certainly very real and never passed entirely. Fear of it, no doubt, was one of the pressures which consciously or unconsciously led the United States Supreme Court to undertake an independent formulation of common law in such cases as *Swift v. Tyson*. But its interventions were too sporadic to exert a very sustained or useful influence for uniformity, and all attempt to do so has been abandoned in our time. Meanwhile, other unifying forces, such as the American Law Institute Restatements and the work of the Commissions on Uni-

13. Pound, "The Place of Judge Story in the Making of American Law". 7 *Proceedings of Cambridge Historical Society*, 1914.

14. For Roman-Dutch influence on New York Law, see Judge Daly's Introduction, 1 E. D. Smith's Reports (New York Common Pleas). *Dunham v. Williams*, 37 N. Y. 251, 253; *Van Giessen v. Bridgford*, 83 N. Y. 348, 356; *Smith v. Rentz*, 131 N. Y. 169, 175.

form Laws, have probably guided us safely past the worst dangers of parochialism.

Sharp difference of professional opinion must have existed among your founders, as it has since, about the degree of freedom with which courts might depart from the common law of England and to what source they should look for doctrines to replace or reshape it. Even the most uncompromising champions of common law did not let it limit their horizons. Civil law, canon law, the world's great legacy of Hebraic legal thought made familiar by the King James version of the Bible, were all brought to bear upon the law's evolution.

Then, of course, there was a very extensive acceptance of the doctrines of natural law. It had scholarly and persuasive support from books imported from Continental Europe, such as those of Grotius and Vattel. The forefathers invoked the law of nature and of nature's God to legitimize the Revolution and gave it political sanction in the Declaration of Independence. Its eloquent Virginian draftsman and his followers taught that there is a natural rightness which gives validity and vitality to law, just as there is a natural wrongness which can be so flagrant as to invalidate the commands of those who happen temporarily to be in power. Whatever may be thought of it as law, the appeal to laws of nature has proved to be a superb revolutionary weapon. Certainly it encouraged and provided rationale for judges to make departures from the common law and to resort to a rule of reason in interpreting statutes and Constitutions.

The American legal profession owes much to those who in the post-Revolutionary era established the credit of the profession and of the common law. What has been of most permanent importance to the lawyer is not substantive doctrine but the common-law method and habit of thought which leaves a large measure of discretion to judges and gives intellectual satisfaction to the advocate. The customs of civil-code coun-

tries do not develop a Bench or Bar of comparable prestige, creativeness or independence. Their judicial decisions, confined more strictly to applying the letter of positive law, are less constructive, the narrowness of choice leaves little scope for legal reasoning. Judgments decide only the instant litigation and carry little weight as precedents. Court opinions rarely bear the name of the writer, dissents often are not permitted, and the judicial post offers less incentive to originality in the judge. The word of authority is the law and it is not to be modified by reason. The judiciary often is a separate profession trained specially for the task of judging. The trial is an inquiry conducted largely by the judge rather than by lawyers. The consequence is that the legal profession on the Continent, in spite of its high level of ability, does not exert such influence on the evolution of law as it does in common-law countries, where the adversary system challenges the originality of the advocate and rewards his resourcefulness by crediting him with a leading case.

While evolution of the law is marked by judges' opinions and decisions, it would be difficult to exaggerate the contribution of the advocate to the common-law judicial process. This is true of his own case, and it is true of the law. The lawyer is the source of constructive contentions; it is he who sees the effect

of legal doctrine on the lives and affairs of men, and he must see that issues are properly raised and adequately supported to provide the basis for an important judicial decision. Advancement of the law is a joint responsibility of judge and advocate. Let us remember, when we complain of the uncertainties of judge-made law, that it is this very feature of our system which has made a strong, resourceful and influential Bar. The general level of competence and prestige of the American Bench is inseparable from that of the American Bar.

In the United States we have put a burden upon the techniques of the common law which they were not evolved to carry. In extending the litigation process to constitutional issues, we made it grapple with problems which in England and in civil-law countries are regarded as political ones and, hence, not within the province of the judiciary. The temptation here always is strong for judges to reach into political realms beyond their competence. It is chiefly in such matters that grievous mistakes have been made. Of course, no legal philosophy or custom can make sure that we will never depart from the true course. But we may find reassurance in reminding ourselves that, whatever its other defects, the influence and teaching of the common-law system do not lead toward the one mistake which, once

made, cannot be cured—that of sanctioning the rise of an authoritarian government.

The abundant opportunity for constructive talents which faced the lawyers of a century and a half ago does not seem likely to come again in our time. But the evolution of American law is not finished—it never will be. Your founders performed their task in a lull between feudalism and industrialism. The changing times are forcing our society to reshape old doctrine and to enter upon whole new fields of legal endeavor. The law, in our time, has taken on adjustments and regulations of matters formerly thought outside its domain.

The law intervenes in trade and commerce to enforce fair dealing

and commercial morality that once was optional with individuals. It prescribes rules for hiring and dismissal, for buying and selling, for liability without fault, and an expanding doctrine of actionable wrongs. Its powers are more and more applied through administrative agencies, and the reconciliation of the administrative and judicial processes taxes the ingenuity of lawyers. Only criminal law and procedure seem to stand still—the disgrace of our society, the shame of our profession.

Some of these changes that lie ahead of us are not much less fundamental than the changes that faced the Bar of 1802. They throw upon the legal profession creative tasks of the same delicacy, if not of the same

magnitude. But how greatly improved are our facilities and how expanded our resources in aid of legal craftsmanship. Perhaps they have reached the point of diminishing returns and reliance upon them tends to impede constructive thought. Bold, clear and scholarly minds at the Bar, receptive, studious and intellectually honest ones on the Bench, must carry on the tradition to which your Association has been dedicated this one and a half centuries. English-speaking lawyers throughout the world draw inspiration and guidance from the renaissance signified by the founding of the Law Library Company of Philadelphia. Those were, indeed, days of the genesis—the genesis of an American legal profession.