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*301 "LAWYER"--A TITLE OF HONOR

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This article was triggered by inquiries and expressions of interest by students in my classes at Cumberland Law School. They expressed concerns about the role of the legal profession in our society and their participation in that role. They also asked what it means to be a lawyer in the emerging new century. The shorthand response is first, that the legal profession enjoys great power and authority, and we can be proud of its accomplishments past and present; second, the individual lawyer has full opportunity to participate in the exercise of that power and authority. Additionally, apart from that opportunity, the lawyer has the unique capacity to be a force in his community.

Examining the role of the legal profession requires us to look at what I call "the process of social ordering." "Social ordering" is my term, though a sociologist or political scientist may have another. By social ordering, I refer to the process that our society uses to consider and to adopt stabilizing means that will keep society intact and reasonably orderly and permit all of us to live together in security and with appropriate self-assertion. The legal profession is central to that process.

Rousseau's noble savage, man in his state of nature, lived in his cave and found his food and his mate, unrestrained by external societal forces. Short of the effects of climate and the need for food and shelter, he was free to exercise self-assertion. But the noble savage joined the family and the tribe, and began the tradeoff between social ordering and individual freedom that we have been caught up in ever since. He accepted the restraints imposed on him by the social ordering of the tribe and the priesthood. He gave up some of his freedom from restraints in exchange for other freedoms: freedom from being alone and freedom from being dependent solely on his own resources. He achieved a degree of freedom from hunger, and through security measures, freedom from marauders.

***302** The sources of social ordering changed. Family and tribe evolved into the organized agricultural society, commerce, and the feudal system. Ordering shifted to the squire and the lord and, in many towns, to the trade guilds. For a thousand years after the fall of Rome, the major social ordering force in the world was the Church. With the Reformation, the influence of the Church as a source of authority diminished. Kings and parliaments supplanted the barons, and ordering tended to centralize in a national authority. All along the way there were trade-offs, usually food and protection in exchange for less freedom of expression.

In this country, in 1789, there were fewer people, thinly scattered along the eastern seaboard, than there are now in the vicinity of Atlanta, Georgia. Daniel Boone left Kentucky for Missouri and then Missouri for the

West because he was uncomfortable when he had a neighbor within five miles. Now our population is concentrated in large urban centers. We are dependent upon large public and private delivery systems to supply food, water, light, heat and the means of mobility. Our vegetables do not come from the garden but from Mexico or California or Florida. Our medicine is not homemade sulphur and molasses; it comes from some mysterious miracle made far away by a corporate giant about whom we know nothing. The threat to my security is not the Comanche or the Creek but a nuclear warhead winging in from thousands of miles away. In this urbanized complex society we collide with each other, literally and figuratively, in many ways. Vast and powerful stabilizing forces, created by social ordering, keep our society from flying apart from centrifugal forces or disintegrating from the collisions that occur between us.

The winds of change have torn away many of the forces in society that once gave it stability. The informal control of the tribe is gone, and the guidance of the family circle has lost much of its vigor. The impact of the church and temple as institutions directly controlling individual conduct has receded. As these sources of social ordering have weakened, we have turned to government, the law and the courts to take their places. The wall is thin between a society that is orderly and secure and a society without order or security. In a democratic but law-ordered society, courts and lawyers are not the sole guardians of the wall, but they are essential performers.

The sweep of history has altered relations between one citizen and another, and between citizen and government. The modern citizen is more litigious. The citizen may consider himself threatened or abused or overcome by powerful forces in society*303 or by big, impersonal government. His individual dispute may be with a giant corporation based a thousand miles away or with large numbers of people. Sometimes the dispute is with the government itself. The subject matter may not be a minor dispute, but may concern governmental or social forces that affect thousands of lives and billions of dollars. If other institutions falter or hide from their duties, the citizen can go down the street to the courthouse and file papers that say, "I ask the law to help me in this contest in which I am overmatched." When he turns to the courts as alternate problem solver, the forum for societal direction of human activity moves to the courtroom. The court becomes an intermediary between the citizen and the government.

Frequently the federal court is called in. No federal judge is in the business of volunteering. He has no power to bring a dispute or problem before himself for resolution. He takes his cases as they are brought to him. Someone prepares correct legal documents and files them in the correct office, stating a case that the court must consider. The judge's oath of office obligates him to consider it. The judge cannot run for the hills or file the case away and forget it. In most situations he does not have the luxury of saying, "let someone else decide it." He operates in an independent judicial forum that for two hundred years has taken pride in a tradition that does not duck responsibility. His job is to decide. Moreover, he must decide without counting heads, without regard to the identity of the lawyers, and without considering the possibility of public approval or condemnation. This is not done out of bravado. It is simply his job.

On its part, Congress works at keeping our complex society orderly and operating. It addresses the ancient objective of keeping us safe and newer government objectives of trying to keep us fed, housed, educated and supplied with medical care. Congress regularly turns to the courts as implementers and problem solvers who are relatively independent of political considerations and assigns to them the ordering of new areas of human activity. Sometimes the judiciary becomes the sole forum, other times it is a mere participant in the system. The judiciary participates in ordering that protects the citizen from pollution of his air and water, and from poverty; assures medical and hospital services for the aged; protects the citizen from discrimination on account of race, gender, and economic status; and safeguards him from unsafe working conditions, plus hundreds*304 of other

tasks. Executive and legislative bodies are tempted to call on the judiciary. [FN1] The judicial system is established and in place; its facilities and its personnel are available, trained and on the job. It is detached and independent, and citizens have respect for it. There is a national tradition of obeying its orders. Courts and lawyers are predictably called by Congress to the social ordering process. Social ordering is our business--passing laws, enforcing laws, interpreting laws, and considering new laws and standards for society. Courts and lawyers are at the crossroads of restraint of citizens and unrestrained freedom of action. We are hired to perform justice that once lay elsewhere.

The judiciary also engages in social ordering by its authority over administrative agencies of the government. Since the 1876 creation of the first federal regulatory agency, the Interstate Commerce Commission, our national government has implemented legislation and policies through bureaus and agencies. Often when Congress delegates social ordering, it turns to the federal courts as a means of keeping agencies within the lines of their authority. Thus, federal judges review agency decisions on labor relations, employment discrimination, social security, wages and hours, air pollution, security regulation, purity and safety of drugs, and an almost limitless list of others.

Many duties which fall to the federal courts as instruments of social ordering originate from causes that affect citizens on a large scale. Citizens have now learned that if other institutions of government falter or hide, they can turn to the federal court as an alternate actor. The forum moves to the courtroom where the judge must decide whether the existing social order is to remain the same or change, and if changed, the form it is to take. Thus the courts reapportion legislatures, supervise prisons, direct mental health facilities, and desegregate school systems not because we enjoy the tasks but because other institutions in our society have not discharged their responsibilities. The courtroom is not the best place in which to reapportion a legislature, supervise the operation of a prison, or desegregate a school system. The judge lacks the expertise of the professional, the data available to him may be limited, and he lacks awareness ***305** of day-to-day nuances known to the government official in charge of the institution. Yet the court may be required to fill the vacuum. As it has been succinctly put, society punts to the court.

Social ordering is not, however, a synonym for change. The orderly society may rest upon principles that are never-changing or seldom-changing, or changing so slowly that a difference is not even recognized. Ordering may consist of deciding to leave matters as they are. This is especially so for a precedent-based world that draws stability from the past. The role of the bar in social ordering is not measured by how many principles or rights are changed. Rather, it is that judges and lawyers have a role in the ordering process. Indeed, lawyers are at the cutting edge.

Some types of social ordering assigned to the courts by Congress do not precisely fit legal norms. Problems to be addressed may be economic, political, social, geographic, scientific, or even emotional. They may be cast in a legal mold only because Congress chose to frame them in this manner. Thus, the courts may be delegated massive and multiform issues that affect millions of people: racial and gender discrimination in many contexts, environmental questions, location of major highways and dams, and protection of wild life and of wetlands. The court may lack the necessary staff. Lawyers may not be familiar with relevant law. There may be no relevant law. The subject matter may not have been dealt with by courts and lawyers. The lawyer who becomes involved must concern himself with standards and the capacity to make or reject changes, while at the same time he must nurture the rules and responsibilities of the past embedded in a precedent-based structure. At the other end of the spectrum, some matters delegated to the courts are too small. Whether a used car dealer has altered the mileage dial on a second-hand truck or whether the size of the print on a loan closing statement is too small

are not problems that should be addressed with the heavy artillery of a federal court. But however awkward the task, the courts accept the role given them.

Federal judges use various means to minimize the thrust of their role in social ordering. When we can, federal courts comment to Congress on the proposals to vest judges with authority to decide issues of social ordering. We insist that government agencies establish in-house procedures for addressing matters that otherwise might be brought to the courtroom. We encourage the use of private arbitration and mediation and promote certification of state-court issues to the state courts.

***306** In the process of considering the current status of the social order and whether changes are needed, lawyers have forced citizens and institutions to face up to themselves and to consider social changes when other institutions are not willing to do so. They have brought cases in hostile communities and before hostile judges. They have been scrutinized by hostile media and faced embittered adversaries at the bar. Some cases have been brought by young lawyers without great reputation or status. [FN2] These lawyers have earned our respect. Heroes come in all shapes and sizes.

Since World War II, in the process of social ordering, courts and judges have been deeply involved in considering claims of individual or civil rights and have recognized rights not previously recognized. Brown and its progeny required us to discontinue segregated school systems and the charade of separate but equal. [FN3] The ballot box has been freed of racial and property-based exclusions. [FN4] Courts have opened the jury box to women and minorities [FN5] and have made effective a litigant's right to a jury of his peers. [FN6] Representation in legislative bodies must now be redistricted so that one's ballot counts. [FN7] Courts and lawyers have required better standards in prisons in which there were "jungle like" conditions [FN8] and mandated improvement of mental institutions that one could not walk through without being reduced to tears. [FN9]

Rights of privacy have been developed to safeguard the citizen from intrusion into his life by government and by the electronic and mechanical devices that surround him. [FN10] Rights of the criminal defendant to counsel have been established. [FN11] Discrimination in employment because of race, gender and age have been curbed. [FN12] The sanctity of one's property and person ***307** against search and seizure by the sovereign has been firmly established. [FN13] Access to public accommodations has been implemented. [FN14] The protections of due process have been extended to inmates in mental institutions [FN15] and in prisons. [FN16] Exclusion of students from our universities on racial grounds has been brought to an end. [FN17] We in the South have ceased the practice--now embarrassing to recall--of shipping African American students to universities in other states, and paying their way, to keep them out of our universities. Use of incriminating statements taken from defendants during police interrogation without warning them of their constitutional rights has been substantially terminated; [FN18] indeed police everywhere now know better.

The list of newly recognized or newly implemented personal or civil rights could continue indefinitely. Some individual instances are worth describing. The reader probably would not know, and many in Alabama have forgotten, that in Pugh v. Locke, [FN19] the leading case on prison conditions, after the plaintiffs put on their evidence, the Attorney General of Alabama put on no defense. Rather he arose in open court and stipulated that conditions existed in the prisons as described in the plaintiff's evidence and stipulated that those conditions violated the Eighth Amendment to the Constitution. [FN20]

Take a moment to consider prison conditions described in 1975 in McCray v. Sullivan: [FN21]

Punitive isolation prisoners are segregated from the general prison population. As many as seven of them

are placed in a cell which measures six feet by eight feet. These cells are essentially concrete boxes with no bunks, toilets, sinks or other facilities. A hole in the cell floor serves as a toilet. This is flushed four times per day by a guard who has access to the flushing mechanism. Flushing frequently causes the waste to back up onto the floor of the cell. Inmates placed in punitive isolation ***308** live in these conditions day and night for as long as 21 days. [FN22] This was not a "tiger cage" in Vietnam. It was a facility in an Alabama prison.

In Alabama, for more than sixty years the legislature failed to reapportion itself although required by the state constitution to do so after each census. As a consequence, Lowndes County, Alabama, with fifteen thousand people, had one senator. Jefferson County, the most populous county in the state, with more than 600,000 people, also had one senator. In Reynolds v. Sims [FN23] the federal district court, as a participant in social ordering, addressed the problem and removed this unequal and unfair system.

In Harper v. James [FN24] the Alabama Supreme Court found that the state system of public elementary and secondary education was inequitable and inadequate and held that established education is a fundamental right under the state constitution. The supreme court affirmed the trial court's decision and remanded to the trial court, giving defendants a reasonable time to bring the system into compliance.

In 1971, in Weissinger v. Boswell, [FN25] the court grasped the nettle of Alabama's faulty ad valorem tax program. The court held that non-uniform evaluations of property for ad valorem tax purposes, and failure to equalize resulting tax assessments, were unconstitutional. Other forums that might have been sources of the social ordering that was needed had failed--legislature, state courts, state administrative agencies. Other forces in the social order, such as the business community and agricultural organizations, opposed change. A multi-year, multi-million dollar valuation program was ordered, under the supervision of the court. Every parcel of real property in Alabama was located, identified and newly assessed. Uniform standards for valuation were promulgated by the Department of Revenue. A sunburst of litigation ensued over methods and variations of evaluation, contracts for aerial photography and mapping, financial inability of counties to bear the cost, financial failures of mapping companies, custody of the work product of failed and unpaid companies, and a host of other administrative problems. The three-judge court met on Saturdays to implement its orders and maintain supervision. The Alabama legislature enacted new tax ***309** laws. [FN26] The Department of Revenue exercised its power over equalization of assessments. The litigation was brought to a conclusion after thousands of hours of attention by the court and massive subsidiary litigation. [FN27]

Judges too are involved in social ordering. We in the Southeast need not look far to see judges of whom we can be very proud: Frank M. Johnson, Jr. and Richard T. Rives of Alabama, and Elbert Tuttle of Georgia, to name just a few close at hand. At a time of great difficulty in the history of our country, judges of the South stood firm and recognized the rights of all our people. Some of them faced criticism and ostracism. They and their families endured threats and lived under the protection of guards. The home of Judge Johnson's mother was bombed. Judge Rives's local newspaper demanded that he not be buried in Alabama soil, and the gravestone of his only son was painted red and garbage was heaped on it. Judge Rives loved his church where he had been a lay official, where his daughter was married, and from which his son was buried. He left it for another when it posted ushers to bar its doors to a few black citizens of the same faith who wished to enter. In 1933, Alabama Circuit Judge James Horton set aside a guilty verdict in the second Scottsboro trial, which involved a charge against a young African American of raping white women. He did so with a sure expectation that it would cost him his seat at the next election. It did.

These judges refused to duck. They upheld the law and enforced the Constitution. The best description I

know of them is expressed in the words of Maxwell Anderson's play, Valley Forge: "There are some men who lift the level of the age in which they live, so that all men stand on higher ground."

***310** I was present at one searing event where I was bitterly ashamed of my profession. The significance of the event is not only that it took place but that courts and lawyers have so changed society that it would no longer occur. As a fledgling lawyer I sat in an Alabama courtroom waiting for my case to be called. A trembling, young black man was brought in, cuffed and shackled. The charge was read--"attempt to escape" . Asked if he had a lawyer, he responded that he did not. Asked if he had witnesses, he had none. He was asked whether he wished to subpoena any witnesses. He appeared to have no concept of what a subpoena was. Next, he was asked how he pleaded, and he responded that he ran away because a guard threatened to kill him. Pressed for an articulated plea, he fell to the floor, writhing in a paroxysm.

The court ordered that he be removed from the courtroom, and two guards took his arms, one on each side, and dragged him prone from the courtroom. In an anteroom they threw a bucket of water over him. Quieted, he was brought back to the courtroom, dripping wet and supported by the guards. He stood, and, in the absence of an articulated plea or evidence, was found guilty. And, as casually as if he were sentencing an animal, the judge announced that he found the defendant guilty and concluded "maybe ten years will teach you not to try to escape." No one in the capacity courtroom seemed to care or even to notice. I left the room and walked to the porch and leaned my head against a pillar, close to tears. I was humiliated that these events had occurred in my judicial system in my country. I was not sure I wanted to be a lawyer.

Today that event would be different. The defendant would not be brought to the courtroom in his prison uniform. He could not be shackled unless necessary. He would be entitled to a lawyer. The lawyer could investigate whether his explanation was false, whether he had witnesses to support it, and whether he was mentally competent to stand trial. Counsel would have the opportunity to learn the nature of the prosecution's evidence and, if appropriate, to negotiate for a plea agreement and lesser sentence. No court would permit him to be manhandled as he was, nor would a court permit him to enter a plea in the condition that he was in. The social ordering process has worked.

As I said in the beginning, students have expressed interest in the role of our profession and their participation in it. As an example of the lawyer's participation in our profession, and the courage it required of him, look to the late 1760s and early 1770s when our country was struggling to be born-- before the ***311** Revolution, before the Declaration of Independence, and before the Constitution. [FN28] England began to enforce long dormant taxes on the colonies and to adopt new regulations. Resistence to these changes centered in Virginia and Massachusetts. Massachusetts and Britain teetered on the edge of war. In Massachusetts, a mob destroyed the home of the British-appointed Chief Justice and Lieutenant Governor. In Connecticut, the tax collector was forced to resign. The chief means of enforcing the tax laws in Boston and New England was the writ of assistance, issued by the king without the affidavit of an informer as was required for ordinary search warrants. Sixty-three merchants petitioned the Massachusetts Superior Court urging that the writs were unconstitutional.

A town meeting was called in the village of Braintree to adopt instructions to be sent to the town's representative in the legislature. A young lawyer wrote the Braintree resolutions, which thereafter were adopted in forty town meetings across the state. An informal convention of representatives from nine colonies was held in New York to contest the British taxation. A tax informer was tarred and feathered and carried on a rail through the streets. Three regiments of British troops were brought to Boston.

For a modest fee the Braintree lawyer defended four American seamen charged with murder for the death of an English naval officer who had boarded an American vessel seeking to seize sailors and press them into service in the British Navy. The four were acquitted.

In Boston, in February 1770, a youth was killed by a customs informer whose home a group of boys was stoning. After the boy's funeral a crowd began throwing ice and snowballs at a British sentinel. He struck a boy with his musket. A brawl threatened between soldiers and a crowd of about a hundred men, some armed with clubs. Eight soldiers under the command of Captain Preston were dispatched to guard the front steps of the customs house. More oyster shells and snowballs were thrown at the soldiers. A soldier lost his footing and fell, and his gun flew out of his hand. The other soldiers fired their muskets into the crowd, apparently at the command of Captain Preston. Three men were left dead, two others mortally wounded. This was the Boston Massacre. Captain Preston was jailed along with the soldiers and questioned all night. The Sons of Liberty sent messages to surrounding towns asking for ***312** help and for arms.

A messenger came to the young lawyer's office, bearing a message from Captain Preston. He and the soldiers were charged with murder. His life was in danger, and he would be tried within ten days; he needed a lawyer and no one would help. The lawyer's response should be framed on every lawyer's wall: "If Captain Preston thinks he cannot have a fair trial without my help, then he shall have it." An angry crowd assembled on the lawyer's office steps. He told the group "tell whom you please that I have agreed to act as counsel for Captain Preston." He confirmed that he would defend the British soldiers as well and added, "if you desire more information you will know where to find me." On his way home to dinner the lawyer was stopped and questioned by a score of angry Sons of Liberty who asked if he was going to defend the murderers.

The next day a crowd of close to four thousand armed men gathered. They urged that British troops be removed from the town, and they threatened an uprising of fifteen thousand. Two days later the funeral was held for the men who had been killed. The streets were a mass of people six deep, marching behind the coffins, and the bells of Boston and surrounding towns tolled. The procession walked past the jail underneath the windows where Captain Preston lay. The lawyer walked in procession with the rest, though he must have known that every tolling bell, every tear, every processional footfall, would make the defense harder when the alleged murderers came to trial.

Depositions were taken from ninety-six witnesses. Ninety-four placed fault entirely with the soldiers. The trial took place. The lawyer secured the assistance of two other attorneys. English common law applied. Under that law, the sentry's post was his castle and to attack him an illegal act, and the crowd was an illegal assembly, with each member responsible for the actions of the others. Also, under the law, the soldiers sent to relieve the sentry were lawfully assembled and if assaulted could defend themselves to the death, and each was responsible for only his own acts. A jury of Massachusetts men acquitted Preston. In a subsequent trial, six soldiers were found not guilty and two found guilty of manslaughter and branded on the thumb. In a third trial of four prisoners, all were acquitted.

The lawyer had put at risk his career as an attorney, his expectancy of a seat in the legislature, and his status in Boston as a leader of those standing for liberty. The Sons of Liberty hinted that he had joined the king's cause. To his great embarrassment, supporters of the king did the same. For the rest of his life he would refute the charge that he had turned against the ***313** people's cause in 1770. He considered himself the most unpopular man in Boston and thought he had thrown away his prospects as lawyer and doomed his family to poverty and danger. He moved back to Braintree. To him the call of duty as a lawyer was stronger than the approval of his

fellow citizens, the security of his law practice, and the expectation of a political future. He rose above his own doubts and the doubts of the community. This was John Adams, the first Vice President of the United States, the second President, and the father of the sixth President.

Relations between the British and Bostonians deteriorated further. England began tighter enforcement of taxes previously levied, added new taxes, and clamped down on smuggling. Bostonians dumped cargoes of tea from three ships into the harbor. Massachusetts reorganized its militia and bought gunpowder. The legislature, which held office under the king, impeached its chief justice. Massachusetts organized its own superior court and named John Adams as its chief justice.

Virginia sided with Boston. A Virginia convention instructed its delegates to the Third Continental Congress, then meeting in Philadelphia, to propose that the Congress declare independence from Britain. The Virginia Resolution, drafted by Thomas Jefferson, lawyer, was presented to the Congress in Philadelphia and seconded by John Adams. [FN29] On June 8 the Congress debated the entire day and postponed the vote on the resolution until July 1. Meanwhile, a committee was appointed to draw up a written declaration of independence should the colonies later agree to break with Britain. Thomas Jefferson and John Adams were members of that committee. Drafting of the declaration was assigned to Jefferson. He labored at the task for seventeen days. The committee made few changes. Our national archives show us Jefferson's handwritten draft, with changes and eliminations.

The more pressing matter before Congress was whether, in accord with the written declaration, it should adopt the Virginia Resolution that declared for independence. The major debate on the issue was between John Adams, supporting the resolution, and John Dickinson, Pennsylvania lawyer, pleading for national reconciliation with England. A unanimous vote for adoption was required. A dispatcher arrived from the headquarters of George Washington at New York, informing Congress that British warships were massing off New York and that he needed ***314** men, materiel and support for his small Continental Army. The vote for the resolution was 11-1. Delaware's delegation was divided and it was the one state not voting in favor of independence. In an historic moment Caesar Rodney, an associate justice of the Delaware Supreme Court, arrived, mud-spattered and weary. [FN30] He had ridden on horseback eighty miles in the darkness, through rain and thunderstorms, to cast his vote for independence. The Delaware delegation ended its division and made the vote unanimous for independence.

During the Revolution, the former colonies had been held more or less together by friendship and common purpose. Beginning in 1776, it took five years to draft the Articles of Confederation, modify them, compromise, and finally persuade the Congress to ratify them. The Articles, America's first constitution, were written by a committee chaired and dominated by John Dickinson, lawyer. They attempted to create a nation out of the colonies, but they provided for minimal government, that is, a federation in which each state would remain essentially sovereign with Congress at their disposal. The Articles of Confederation were a failure. In the ensuing years Alexander Hamilton and James Madison, both lawyers, were a behind-the-scene force for calling another convention to create a government that would reach beyond the narrow sphere of the Articles. Congress voted in favor of another convention to meet for the sole and express purpose of revising the Articles. [FN31]

Fifty-five delegates turned up at Philadelphia for what we now call the Constitutional Convention. Thirty-four of them, more than sixty percent, were lawyers. If anyone was the father of the Convention, it was James Madison, Virginia lawyer. Two competing themes divided the Convention. The Virginia plan, supported by the larger states and said to have been prepared by Madison, proposed a national government with di-

vided legislative, executive and judiciary. The Virginia plan was presented to the meeting by Edmund Randolph, governor of Virginia and lawyer. The New Jersey plan, supported by the smaller states, proposed to revise and enlarge the Articles of Confederation and maintain the power of the states. It was presented by William Paterson, governor of New Jersey and lawyer. The Virginia plan prevailed.

***315** A committee was appointed to draw a draft document adhering to the resolutions the Convention had adopted. The chairman was John Rutledge, lawyer and judge. A committee on style was designated to put the final polish on the document. The chairman was William Samuel Johnson, lawyer and strong voice in the Convention. The delegates were unable to agree on whether to include in the proposed constitution a recital of basic rights of the citizen. Many delegates feared such a recital as dangerous. Others felt that the rights were sufficiently guaranteed by the constitutions of most states and thus were unnecessary. The Constitution was adopted without a bill of rights.

Ratification of the Constitution by nine states, each acting by convention, was required. Within the states much of the controversy centered on the absence of a bill of rights, but enough states voted to ratify the Constitution. At its first session the Congress adopted the first ten amendments to the Constitution, known to us as the Bill of Rights.

The fight to establish a country was over. The contributions of lawyers were unsurpassed. But their role did not end with the Constitution and the Bill of Rights. Our infant country came into existence as a narrow strip of land along the Atlantic seaboard. It grew to become a continental empire. As our country came to fruition, it was bounded by both the territory and the territorial claims of the empires of Europe. Their claims were somewhat theoretical, but were useful as pawns in their controversies with each other. Everyone knew that the Mississippi River ended in Spanish territory at New Orleans. [FN32] But nobody knew with assurance where the river began; nor did anyone know its tributaries and how far and in what direction they traversed before joining the Mississippi. Little was known of the vast lands west of the Mississippi. The area between the Mississippi and the Rockies (at least as far north as the Missouri River) was Spanish land, entered by and claimed for the king of Spain. [FN33] But, except for Mexico and the delta of the Mississippi River at New Orleans, Spain had done little to develop these vast geographical areas, and it maintained no effective military forces there. In addition, Spain had settlements in Florida and in California. Russia maintained a fort in California. [FN34] Britain maintained its colonial base in Canada and had a claim of sorts to the Oregon territory. [FN35] Britain proposed to build a fort in the ***316** Northwest, and it sent its traders southward into the Rocky Mountains, searching for fur and territory as well. France dreamed of pushing northward from the Caribbean Islands through New Orleans and up the Mississippi, hoping to destroy Britain's empire by eliminating its position on the North American continent. [FN36]

In this welter of claims Thomas Jefferson took charge. As Secretary of State and later as President, Jefferson accurately understood the events and forces at work. He understood that it was inevitable that citizens from east of the Mississippi would press westward, and in fact were already doing so. He believed that with the lands and materials of the West America would be self-supporting and no longer dependent on manufactures and trades of Europe.

In an age of imperialism, [Jefferson] was the greatest empire builder of all. His mind encompassed the continent. From the beginning of the revolution, he thought of the United States as a nation stretching from sea to sea. More than any other man, he made that happen. [FN37]

. . . .Jefferson wanted land. He wanted an empire. He reached out to seize what he wanted, first of all by continually expanding the boundaries of Louisiana . . . . Starting with the idea that the purchase was confined to the western waters of the Mississippi Valley, Jefferson's conception had gradually expanded until [by 1808] it included West Florida, Texas, and the Oregon Country, a view which was to be the basis of a large part of American diplomacy for nearly half a century. [FN38] When Jefferson was governor of Virginia during the Revolutionary War, he had helped George Rogers Clark raise the money needed to attack the British along the Ohio and secure the territory beyond the Cumberlands, which was to become known as Kentucky. [FN39]

Jefferson was determined that the "Louisiana Territory," the area west of the Mississippi, the river itself, and the port at its mouth must be American. [FN40] The United States was in no hurry ***317** to deal with Spain, which was becoming weaker each year while the United States was growing stronger. [FN41] Moreover, Spain permitted access to its port of New Orleans. But Jefferson learned of secret treaties between France and Spain by which the Louisiana Territory was to be transferred to France. For France to obtain control of the Mississippi River and New Orleans would threaten any movement westward by the United States and, Jefferson thought, would inevitably bring on war between the United States and France. Moreover, Napoleon had assembled in Santa Domingo the largest army ever seen in the Western Hemisphere, though this army eventually fell apart in disease and disorder. Jefferson sent Robert Livingston, attorney, to Paris as envoy to negotiate with the French. To assist him he sent attorney James Monroe, his friend and disciple. Jefferson's immediate concern was to purchase New Orleans and enough territory west of the Mississippi to make it an American river. If negotiations failed, the envoys were to seek a permanent treaty guaranteeing navigation rights on the river. If Napoleon refused, they were to stall the French and open secret negotiations with Britain for an alliance. France and Britain were at peace, but it was an uneasy peace and both sides were grouping their forces to go to war again with each other.

Livingston had been authorized to pay only two million dollars for New Orleans and territories Spain had held in Florida, and he offered that amount. The French countered with a proposal to sell New Orleans and everything that went with it, the whole territory west of the Mississippi, for twenty-five million dollars. A deal was struck for New Orleans, the Mississippi River, and all the "Louisiana Territory," roughly the formerly Spanish territory east of the Rockies, but not including Spain's territory in the southwest, for fifteen million dollars. Livingston had been sent to buy a village. He bought a domain of uncertain dimensions, the "Louisiana Purchase," for about $1.50 per square mile.

Jefferson did not wait for the completion of the negotiations in Paris. In January 1803, three months before reaching an agreement with France, he sent a secret message to Congress proposing an expedition to explore west to the Pacific. This was espionage, expensive and violative of international law, because the territory was still foreign land. Jefferson asked for an appropriation of $2,500 to finance the expedition. To avoid public controversy, the Houses of Congress met secretly as committees***318** of the whole and appropriated the funds. The expedition was organized and Lewis and Clark made their famous journey to the Pacific and back.

The five presidents after Washington were lawyers: John Adams, Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams. Other lawyers followed after breaks in sequence: Martin Van Buren, John Tyler, James Buchanan, and James K. Polk. Polk is obscure to us. He was a Tennessee lawyer who knew how to acquire territory. Historian Bernard DeVoto describes him as the only "strong" president between Jackson and Lincoln. [FN42]

[I]f his mind was narrow it was also powerful and he had guts. If he was orthodox, his integrity was abso-

lute and he could not be scared, manipulated, or brought to heel. No one bluffed him, no one moved him with direct or oblique pressure. Furthermore, he knew how to get things done, which is a first necessity of government, and he knew what he wanted done, which is the second. [FN43] The Democrats nominated Polk because he supported the annexation of Texas; however, Texas was annexed in the closing hours of the previous administration of President Tyler. As President, among Polk's fixed objectives were the acquisition of California and settlement of the dispute with Britain over Oregon. [FN44] He sent a confidential agent to California to encourage a native revolution against the slender rule of Mexico, hoping annexation by the United States would follow. The United States Navy sailed to California to support a revolution, and the Bear Flag Revolt followed. California became United States territory.

Next, the United States invaded Mexico. A difficult and bloody but powerful five months campaign on Mexican territory followed. A small American army then invaded New Mexico and took it without firing a shot.

Both Britain and the United States claimed parts of the Oregon territory. The area in question was under joint occupation pursuant to an agreement between the two countries. Polk's administration canceled the joint occupancy agreement and bullied Britain out of most of its territorial claims. Most of the disputed area became United States territory. With the Louisiana Purchase settled, California taken over, hostilities with Spain ended, and Oregon settled, Jefferson's dream of a continental empire had come to pass. Lawyers had led the way. Today's***319** lawyers walk in the shoes of the great. [FN45]

Another lawyer added a bit of territory and additional history. Franklin Pierce, lawyer, member of the House and Senate, and federal district attorney, enlisted as a private in the war with Mexico. He rose to the rank of brigadier general and commanded a brigade. In battle in Mexico, he was injured in a fall from his horse, but continued in the battle. He rode that wound into the presidency in 1852. He unsuccessfully attempted to purchase Cuba from Spain. He sent Commodore Perry's expedition to Japan to open it to trade. At a cost of ten million dollars, in order to open a southern railroad route to California, he completed the purchase from Mexico of a strip of land largely located in present day Arizona, the "Gadsden Purchase."

Move from events of history to the present and examine our profession apart from its role in societal ordering. The law offers a good opportunity to make a living, from modest to affluent. The profession imposes achievable standards on those who seek to enter it and examines and accredits the schools that train prospective members. The law offers intellectual exercise. It does an excellent job of managing associational affairs. It no longer treats women as second class citizens. The work is largely indoors in pleasant and safe surroundings and in conjunction with quality people. The younger lawyer can achieve full participation without waiting for older lawyers to move aside. Differing from many professions, our profession has carefully drawn standards of ethics and conduct for lawyers and judges and structures for disciplining those who do not comply. In appropriate cases the results of disciplinary procedures are made public. The profession maintains structures for pro bono representation of indigents who cannot secure aid elsewhere, and over twenty percent of lawyers participate in this work. There are new areas of the law in which attorneys may become participants and molders of the law. Law firms are creating new sections devoted to environmental law, medical and hospital law, arbitration and conciliation, pension rights, and rights of the aging. Lawyers will be in the middle as law is developed for computers and the electronic marvels that surround us.

It would be naive not to recognize our shortcomings. They include crowded dockets, trial delays and stays of decision, a decline in professionalism, lack of courtesy and respect between ***320** lawyers, damage to trials through statements by the media and uncontrolled counsel, and abuse of discovery. But the positive message is

that the profession does not bury shortcomings or pretend that they do not exist. Institutions of the bar and individual lawyers work to correct our failures and improve the quality of our work. Lawyers can take pride in our positive views toward shortcomings.

The Simpson trial shook our faith in ourselves. Doomsayers suggested that the day of jury trials was ended. The case demonstrated the failure of the bar to communicate to others the strength and worth of our profession. Every day, as the Simpson case stumbled forward, in hundreds (possibly even thousands) of courtrooms across the country, other jury trials were being conducted in orderly fashion under the firm hands of judges and with lawyers conducting themselves with dignity and restraint. Moreover, in thousands of offices across the country, lawyers were attending carefully and efficiently to the affairs of their clients. The trial in Simpson was an exception that hypnotized us, and it demonstrated a need for our profession to communicate better with the world at large.

The lawyer has a unique opportunity to participate in the world about him and to achieve status and respect in the eyes of the community. In nearly every city, town, village or countryside, the lawyer will be called on to lead, or at least participate, in government, legislative, charitable, church and social affairs. It is expected that he be a leader and a figure of importance in the community. The nature of his training leads him to the fore. His learning stretches backward over history. He is trained in ideas and accustomed to analyze problems. He knows how to speak and is trained in persuasion. He should know how to get along with persons around him. He may know--and can learn--how to deal with persons of differing opinions, how to respond to them and to persuade, how to end the differences between them, and how to leave the adversary a comfortable escape. If he will seize the day, it is his. Of course, there are lawyers who are lazy, discourteous, disinterested, or possessed of any shortcomings you may name. They have forfeited the advantages they had at the starting blocks.

Being a lawyer can take courage. There are many challenges in our profession:

- Try telling your million dollar client that the pollution arising from his plant is illegal.

- Try accepting an appointment to represent a criminal defendant accused of a horrible crime in an inflamed ***321** community that already considers him guilty. And when you are appointed try deciding whether you will raise the issue that women, African Americans and persons from the lower economic level of the community were systematically excluded from serving on the grand jury that indicted your client and the petit jury that convicted him.

- Try persuading your law firm to let you accept such an appointment and even to pay the expenses.

- Try advising your client, who has asked your opinion in a hotly contested divorce case, that the children will be better off with the other spouse.

- Try accepting a case alleging gender or racial discrimination or harassment of employees against the largest employer in the community.

- Try persuading your bar association to take an active, strong voice in community affairs.

- Try representing in a divorce action the wife of a prominent attorney when she is unable to obtain other counsel.

- Try taking a position of leadership yourself in a community activity that is foundering for want of leader- ship.

- Try insisting that your bar association follow a policy of coming to the defense of any judge who is attacked by the community because of a ruling.

- Try accepting a civil rights action for persons wrongly treated by our society who are unable to find representation by any other person or agency.

- Try facing an overbearing judge without surrendering an inch that should not be surrendered and without losing your cool.

- Try remaining cool and courteous when your adversary has become ugly.

In many of these instances you will be tested in the fire. In some of them you will quickly learn who your real friends are. Just keep in mind John Adams.

For many years, while I was still in private practice, a lady helped our family frequently with many matters, including care of our children. She had little formal education, but we shared thoughts and philosophies about the world in general, about ***322** life and religion and politics and children and race relations, and sometimes she advised me what candidate to vote for. Occasionally, she reprimanded me when I needed it. She was a great and wise woman and an admirable citizen. One night as I drove her home, with conversation tumbling out as it always did, I asked: "Except for friends who call me by my first name people call me 'Mr. Godbold.' Why do you always call me 'Lawyer Godbold?" ' Her response was immediate: "Because it is a title of honor." This moved me deeply at the time. It moves me now to tell about it.

[FNd1]. Senior Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit. U.S. Circuit Judge, 1966 to date. Chief Judge, U.S. Court of Appeals for the Eleventh Circuit, 1981-1986, and Fifth Circuit 1981. Director, Federal Judicial Center, 1987-1990. Edward J. Devitt Distinguished Service to Justice Award 1996. Leslie S. Wright Professor of Law, Cumberland Law School, 1990 to date.

[FN1]. During the 1970s alone Congress added not less than seventy new statutes enlarging the jurisdiction of the federal courts. Chief Justice Warren E. Burger, State-Federal Jurisdiction: A De Facto Merger? 4 Am. J. Trial Advoc. 333, 335 (1980). Recently the present Chief Justice addressed the problem of increasing federalization of local crimes that historically have been addressed by local courts. 145 Cong. Rec. S345-02, S366 (Jan. 19, 1999) (statement of Sen. Leahy).

[FN2]. See Weissinger v. Boswell, 330 F. Supp. 615 (M.D. Ala. 1971). Weissinger, discussed below, was brought by a young practitioner who specialized in public interest cases. One would suspect that at times, like John Adams, discussed infra, he has considered himself the most unpopular person in the jurisdiction.

[FN3]. Brown v. Board of Educ., 349 U.S. 294 (1955).

[FN4]. See Smith v. Allwright, 321 U.S. 414 (1944).

[FN5]. See J.E.B. v. Alabama, 511 U.S. 127 (1994).

[FN6]. See Batson v. Kentucky, 476 U.S. 79 (1986).

[FN7]. See Reynolds v. Sims, 377 U.S. 533 (1964).

[FN8]. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976).

[FN9]. See Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), aff'd in part, rev'd in part and remanded, 503 F.2d 1305 (5th Cir. 1974); Marable v. Alabama Mental Health Bd., 297 F. Supp. 291 (M.D. Ala. 1969).

[FN10]. See Katz v. United States, 389 U.S. 347 (1967).

[FN11]. See Gideon v. Wainwright, 372 U.S. 335 (1963).

[FN12]. See O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) (discussing age discrimination); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (identifying sexual harassment gender discrimination); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing balancing test in race discrimination case).

[FN13]. See Knowles v. Iowa, 119 S. Ct. 484 (1998).

[FN14]. See Miller v. Amusement Enters., Inc., 394 F.2d 342 (5th Cir. 1968).

[FN15]. See Burch v. Apalachee Community Mental Health Servs., Inc., 840 F.2d 797 (11th Cir. 1988).

[FN16]. See Parker v. A.F. Cook, 642 F.2d 865 (5th Cir. Unit B 1981).

[FN17]. See United States v. Fordice, 505 U.S. 717 (1992).

[FN18]. See Miranda v. Arizona, 384 U.S. 436 (1966).

[FN19]. 406 F. Supp. 318 (M.D. Ala. 1976).

[FN20]. See id. at 322.

[FN21]. 509 F.2d 1332 (5th Cir. 1975).

[FN22]. Id. at 1336.

[FN23]. 377 U.S. 533 (1964).

[FN24]. 713 So. 2d 869 (Ala. 1997).

[FN25]. 330 F. Supp. 615 (M.D. Ala. 1971).

[FN26]. See Weissinger v. White, 733 F.2d 802, 804 (11th Cir. 1984) (affirming district court judgment which upheld new taxing scheme).

[FN27]. See, e.g., Eagerton v. Valuations, Inc., 698 F.2d 1115, 1116 (11th Cir. 1983) (discussing state and county agencies which sought damages for appraisal firm's breach of contract); Green v. Russell County, 603 F.2d 571, 572 (5th Cir. 1979) (discussing interpretation of contract for the reappraisal of property); Eagerton v.

Williams, 433 So. 2d 436, 437 (Ala. 1983) (discussing class action brought by rural landowners challenging method used by county tax assessor to determine current use valuation of land); Mass Appraisal Servs., Inc. v. Carmichael, 404 So. 2d 666, 667 (Ala. 1981) (discussing subcontractor who sued contractor to define parties' obligations under contract to reappraise property); Johnston-Clark Appraisal Co. v. Department of Revenue, 392 So. 2d 1164, 1165 (Ala. 1980) (finding appraisal company unsuccessful in attempt to recover expenses incurred in excess of fee provided in contract); State v. International Paper Co., 394 So. 2d 28, 29 (Ala. Civ. App. 1980) (discussing taxpayer filing petition for writ of mandamus to compel tax assessor and tax collector to make changes in 1979 tax bill and incorporate amended report of board of equalization).

[FN28]. See Catherine Drinker Bowen, John Adams and the American Revolution 342-69 (1950).

[FN29]. See Leonard Wibberley, Man of Liberty: A Life of Thomas Jefferson 103-05 (1968) (describing Jefferson's role in this and subsequent events).

[FN30]. See Biographical Directory of the United States Congress 1774-1989, at 1734; Leonard Wibberley, Man of Liberty: A Life of Thomas Jefferson 115 (1968).

[FN31]. The proceedings of the Convention were noted in the voluminous notes of James Madison and are described in Bowen, supra note 28, and in a series of simulated daily reports, Jeffrey St. John, Constitutional Journal (1987).

[FN32]. See Stephen E. Ambrose, Undaunted Courage 56 (1996).

[FN33]. See id. at 55.

[FN34]. See id. at 56.

[FN35]. See id.

[FN36]. See id.

[FN37]. Ambrose, supra note 32, at 56.

[FN38]. Id. at 102.

[FN39]. See id. at 57.

[FN40]. Id. at 70-71. Jefferson also believed that there was a water route through the Rocky Mountains, joining the Mississippi River and the Columbia River, with perhaps a short portage between them. This route would eliminate the long sail around Cape Horn to the Pacific Coast, a benefit both civil and military. Jefferson clung to this view until Lewis and Clark returned from their expedition and reported that the route did not exist.

[FN41]. See Ambrose, supra note 32, at 71.

[FN42]. See Bernard DeVoto, The Year of Decision 1846, at 8 (1943).

[FN43]. Id. at 7-8.

[FN44]. See id. at 10.

[FN45]. There is no need to reiterate here the accomplishments of attorney Franklin Delano Roosevelt. Theodore Roosevelt brought the United States to the status of world power. He was a lawyer but was unhappy in the law and left the profession.
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