

LAWYERS, DEMOCRACY AND DISPUTE RESOLUTION: THE DECLINING INFLUENCE OF LAWYER-STATESMEN POLITICIANS AND LAWYERLY VALUES

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In commenting on Professor Carrie Menkel-Meadow's insightful observations about lawyers and dispute resolution in a democratic society,¹ I find little ground for disagreement. I particularly endorse her suggestions for framing public policy negotiation and attempting to soften inequalities of power to avoid coercive deliberation, as well as her emphasis of the multiple centers of perspectives on public policy questions. Professor Menkel-Meadow wisely reminds us that "[n]ot all processes are dyadic; not all issues have only 'two-sides,' arguments can have many parts and any group of people can agree on some issues (wholly or partially) and disagree about others."² She is also correct in observing the practical importance of achieving agreement about the means by which conflict is addressed and noting that substantive consensus is elusive in a diverse society.³ Further, Menkel-Meadow is also correct in arguing that the law school of the future should be something of a "liberal arts" law school that provides training not only in legal doctrine and closely related topics but also in the psychological fields of cognitive theory and behavioral science as well as economics, sociology and practical negotiation skills.⁴

Consequently, I am not seeking to criticize, expand, or fine-tune Professor Menkel-Meadow's basic thesis. She is, in my view, clearly correct: political and public policy dispute resolution would be substantially improved by the importation of the higher quality dispute resolution skills attorneys have injected into private disputing over the past three decades. The dispute resolution skills of lawyers could be better and more frequently brought to bear in the political arena to useful effect.

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¹ See Carrie Menkel-Meadow, *The Lawyers' Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2005).

² *Id.* at 358.

³ *Id.* at 336-58. See also STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (2000).

⁴ See Menkel-Meadow, *supra* note 1, at 367-68.

But at the risk of being a cynic, I am less than sanguine about the prospects for such development, at least for major political and public policy debate conducted in the electoral or wide media arena. Although "micro" public policy dispute resolution, which takes place in a less-heated atmosphere, may be able to absorb Menkel-Meadow's suggestions, my strong fear is that "macro" policymaking will not make use of such suggestions. In the larger macro arena, efforts to have political dispute resolution function more like rational private sector dispute resolution seem doomed to failure in the short term and problematic in the long term. I posit four reasons for this gloomy prediction.

First, there has been a decline in both the proportional presence and influence of attorneys in what is perhaps the most hard-core, macrocosmic arena of dispute resolution: politics and government. Second, many of the active lawyer-politicians act much more like politicians than lawyers, tending not to display the professional values that would improve political discourse and decisionmaking if brought to bear. Third, and perhaps most disturbingly to a legal educator, it may be that as much as attorney skill in dispute resolution technique has increased during the past twenty-five years, attorney professionalism in general has decreased, leaving the political arena with less professional lawyer-politicians. Fourth (and related to Reasons two and three), attorneys after law school are subject to a system of social and economic forces that tends to undermine the improvements in dispute resolution teaching that have been accomplished in the law school curriculum over the past thirty years.

Part I of this Comment reviews the shrinking presence of lawyers in the arena of macrocosmic public policy. Part II discusses the declining statesmanship of lawyer-politicians as part of a general decline of lawyer professionalism in the face of social and economic pressures tending to undermine lawyer professionalism. As addressed in Part III, the net impact of these factors undermines the potential of lawyers to act as a positive force for public policy dispute resolution.

I. THE DECLINE OF THE LAWYER-POLITICIAN AND LAWYER-STATESMAN

A core part of my thesis is that today, at least as compared to much of American history, lawyers are less central to resolution of political disputes in America. This is an ironic, and in my view, negative development. At the same time that attorneys are being better trained than ever in dispute resolution as a result of changes in the law school curriculum, advances in continuing legal education, and the general raising of professional consciousness in this regard, lawyers appear to be less important as dispute resolution engineers in the political process. Perhaps more important, the political process increasingly reflects a mode of dispute resolution that differs from the principled, problem-solving, client-centered model of modern negotiation that has increasingly taken hold in the legal academy and the legal profession.

My assessment and critique, of course, borrows from Anthony Kronman's observations about changes in the legal profession itself and the decline of the lawyer-statesman.⁵ But my thesis differs from Kronman's in a significant way.

⁵ See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FALLING IDEALS OF THE LEGAL PROFESSION* (1993).

In *The Lost Lawyer* and other writings,⁶ Kronman bemoaned the decline of the “lawyer-statesman,” figures such as Averill Harriman, John J. McCloy, John Foster Dulles, and Bernard Segal, who straddled the worlds of sophisticated private practice and public service.⁷ I agree with much of Kronman’s thesis despite finding it perhaps too nostalgic and too resistant to the possibility that things have gotten better as well as worse on this score during the second half of the 20th Century.⁸ My focus, however, is not so much on lawyer-statesmen as defined by Kronman – the type of wise “village elders” who advised politicians but themselves seldom held elective office,⁹ but on the lawyer-politician – lawyers as elected officials or politicians with a capital “P.”

My variant of the Kronman lament and thesis is this: Lawyers today play less of a role as elected leaders in Congress, state legislatures, governorships, and even the White House than was the case in the past. This has contributed

⁶ See, e.g., Anthony T. Kronman, *Legal Professionalism*, 27 FLA. ST. U. L. REV. 1 (1999); Anthony T. Kronman, *Our Beleaguered Public World*, 49 J. LEGAL EDUC. 50 (1999); Anthony T. Kronman, *The Fault in Legal Ethics*, 100 DICK. L. REV. 489 (1996).

⁷ McCloy became a name partner in a large, prestigious New York firm (Milbank, Tweed, Hadley & McCloy) and served in a number of advisory and diplomatic posts in government. John Foster Dulles was a major partner in a large, prestigious New York firm (Sullivan & Cromwell) and was active in politics, most prominently serving as President Dwight Eisenhower’s Secretary of State during what was probably the height of the Cold War in the 1950s. Bernard Segal was a Philadelphia lawyer who founded a large firm and distinguished himself through a variety of public service activities. See WALTER ISAACSON & EVAN THOMAS, *THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE* (1986); Jed S. Rakoff, *Is the Ethical Lawyer an Endangered Species?*, LITIG., Spring 2004, at 3 (describing Segal as “what used to be called a ‘lawyer-statesman,’ an independent professional whose exercise of judgment, whether in advising clients or in participating in public affairs, took account of the public purposes that the laws he was addressing were designed to serve”).

⁸ See Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25 (1999) (agreeing with much of Kronman’s assessment but arguing that in many ways, professionalism of lawyers was not exemplary during early-mid 20th Century and that there have been many improvements in lawyer professionalism along with negative developments such as the shrinking role of lawyers in public life).

⁹ Examples drawn from the careers of some prominent “village elders” helps to prove some of my misgivings about undue nostalgia for lawyers of the past. For example, two acknowledged and celebrated village elders (I draw the description from a *Washington Post* feature story of the 1970s that used the term to describe respected Washington insiders who frequently were sought for advice by powerful political and business interests) were Tommy Corcoran and Clark Clifford. Corcoran, a New Deal insider and confidant of Franklin Roosevelt late in his career was accused of improperly lobbying Supreme Court Justice Hugo Black in connection with a pending case. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 79-86 (1979). Apparently, the incident described by Woodward and Armstrong was in character with Corcoran’s standard operating procedures. See Wayne W. Whalen, *A Fixer, First-Class*, AM. LAW., Aug. 2004, at 67, 68 (reviewing DAVID MCKEAN, *TOMMY THE CORK, WASHINGTON’S ULTIMATE INSIDER FROM ROOSEVELT TO REAGAN* (2004)). Clifford, a name partner in a ‘boutique’ D.C. law firm (Clifford & Warnke) and former Secretary of Defense in the Lyndon Johnson Administration was late in his career accused of helping a corrupt banking enterprise evade regulation and engage in improper activities. See Gay Jervy & Stuart Taylor, Jr., *From Statesman to Front Man: How Clark Clifford’s Career Crashed*, THE AMERICAN LAWYER, Nov. 1992, at 49.

to a general decline in civility and principled negotiation,¹⁰ resulting in less effective government for the citizenry. In addition, as discussed in Part II of this Comment, there has been an accompanying reduction in the role of lawyers as informal participants in the political process. This combination has served to impoverish the quality of dispute resolution in politics and public policy. Moreover, as discussed below, the lawyer-politicians of today may be falling quite short of legal professional ideals in their conduct of the political process and public policy dispute resolution.

From the earliest days of the American state, lawyers and law played a prominent role, as chronicled by de Tocqueville and others.¹¹ Many of the framers of the Constitution were, of course, lawyers as well. Perhaps just as important, many of the community leaders of the time and many of the elected officials filling the legislatures of the early Republic were lawyers. There appears to have been a good deal of respect for the profession and a fairly cohesive legal establishment, despite the natural political differences one would expect among a group of attorneys.

If anything, the presence of lawyers as elected officials and political decisionmakers appears to have proportionately increased during the first century or so of the nation's history. Early political leaders tended to come from the ranks of the revolutionary leaders, many of whom were not attorneys despite the significant presence of lawyers surrounding the Declaration of Independence and during the Constitutional Convention. As might be expected, the Founders and prominent military figures tended to be the dominant early political figures. George Washington, the nation's first president, was of course both a war hero and a founding father. But many of the Founders such as Thomas Jefferson, Alexander Hamilton, John Adams, James Monroe, and John Quincy Adams were lawyer-politicians, although James Madison was not. The Andrew Jackson presidency reasserted the role of the military hero as well as brought a bit of anti-lawyer populism to the office even though Jackson was a lawyer (albeit a lawyer who was said to have killed several men in duels,¹² hardly the stuff to inspire great confidence in the rule of law, civility, or lawyers as dispute resolution specialists).

Abraham Lincoln's tenure as president certainly set an archetype for the lawyer politician. At the risk of some professional chauvinism, my thesis is

¹⁰ Because of the comparative brevity of this Comment, I will not discuss negotiation theory and principles at length. Throughout this Comment, I am taking the position that the dominant view among scholars and enlightened modern practitioners of negotiated dispute resolution follows the contours of the approach and school of "principled negotiation" set forth in works such as ROGER FISCHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991) (perhaps the "Bible" of modern negotiation), ROBERT MNOOKIN, ET. AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000), and other works emanating from the Harvard Negotiation Project. Similar works making more specific use of cognitive science data and game theory are RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* (2002); Chris Guthrie & Russell Korobkin, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997).

¹¹ See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., Lawbook Exchange 2002) (1838).

¹² See Michael Farquhar, *Giving the Devil His Duel: A Lesson in Conflict Resolution*, WASH. POST, Feb. 6, 1994, at F1.

that Lincoln's amazingly good performance as president at an amazingly bad and trying time reflects his background as a lawyer. Lincoln's traits of rational thought, reflection, reluctance to act in hate, controlled (but not banished) emotion – all these traits tend to be traits of a good attorney.¹³ But Lincoln's lawyer-presidency hardly ushered in a complete era of this type. Presidents with other backgrounds were common in the White House until the early 20th Century. Then came something of a reign of lawyer-presidents: Calvin Coolidge; Franklin Roosevelt; Harry Truman; Richard Nixon, and Gerald Ford. Sandwiched in between this comparative parade of lawyer-presidents were the presidencies of military heroes Dwight Eisenhower, John F. Kennedy,¹⁴ and Lyndon Johnson, a teacher/professional politician who attended Georgetown Law School for a year.¹⁵

In the mid-1970s, a shift took place that went beyond the historical cycling in of nonlawyer presidents from the military or some other springboard (such as Princeton President and New Jersey Governor Woodrow Wilson or businessman Herbert Hoover). In 1976, Gerald Ford was defeated by Jimmy Carter, who openly crowed about not being a lawyer, usually in a sentence placed closely to his promise never to lie to the American people.¹⁶ Undoubtedly, the presence of so many lawyers in and around the Watergate scandal helped to fuel an anti-lawyer trend. In addition, it may be that the 1976 election represented a significant political shift away from law as a particularly useful springboard for the presidency.¹⁷ Beginning with Carter, eighty percent of the presidents during the past quarter-century have been non-lawyers (Carter, Reagan, George H.W. Bush and George W. Bush), with Bill Clinton the only lawyer-president during this time.¹⁸

¹³ In addition to being perhaps the nation's greatest president serving during perhaps its most trying time, Lincoln was reportedly a very good "country lawyer" and an early proponent of dispute resolution rather than litigation. See FREDERICK T. HILL, *LINCOLN THE LAWYER* (Legal Classics Library 1996) (1906) (Lincoln's notes for a law lecture include the famous quote to "[d]iscourage litigation . . . [p]ersuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses, and waste of time.").

¹⁴ Dwight Eisenhower, a career soldier, commander of Allied forces in World War II, and leader of the Normandy Invasion, was clearly a major military hero in a way that Kennedy, the son of a wealthy businessman and former Ambassador to Great Britain, was not. But Kennedy's heroism in commanding PT-109, surviving in the Pacific and leading his crew to safety after the boat was destroyed, clearly made him at least a minor military hero and served his political career well. Because of Kennedy's inherited wealth and relatively early success in politics, it is a bit hard to assign to him a particular occupational category.

¹⁵ The backgrounds of the Presidents discussed in the text are available at www.whitehouse.gov/history/presidents.

¹⁶ See David Nyhan, *A Candidate Willing to Turn Himself Inside-Out*, BOSTON GLOBE, Mar. 5, 1995, at 84.

¹⁷ Not in-coincidentally (in my view), this same time period saw a shift in attitudes (both among leaders and the public at large) toward a less favorable view of law as an instrument for social change or resolving private claims. See Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 285-99 (2002); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Dis-Integrate*, 59 BROOK. L. REV. 1155, 1155-64 (1993).

¹⁸ Of course, if the Democratic candidates during this era had been a bit better at winning elections, the statistics would be significantly different. Losing Democratic nominees Wal-

A similar trend appears to exist in both federal and state legislatures. During much of the 20th Century, lawyers comprised a clear majority of Congress (both the House and the Senate) while state legislatures often found lawyers to be the most represented occupation even if it was not a majority. However, throughout the last half of the Century, the presence of lawyer-legislators declined.

For example, during the 1960s and 1970s, more than two-thirds of United States Senators (between sixty-five percent and sixty-eight percent, depending on the Congress) were lawyers. During the 1980s, this figure dipped, a trend that continued into the 21st Century. In the 107th Congress (2001), barely half of the Senators were lawyers.¹⁹ Although this is not a free-fall in the percentage of lawyer-senators, there clearly has been a proportional decline.

A similar trend is reflected in U.S. House of Representatives membership. The House of Representatives from the 1950s through the early 1970s had a majority of lawyer-members (between fifty-five and fifty-eight percent). The early 1980s brought a nearly nine percent decline in lawyer membership in the House and additional five percent declines during the ensuing two decades. Thirty-seven percent of members of the 106th Congress (1999-2001) were lawyers, a significant percentage but a marked decline from the ratio found during much of the 20th Century.²⁰

For state legislatures, the story is the same. There is more fluctuation due to the turnover of state legislative positions relative to the federal Congress, where incumbents tend to make a lifetime career of holding the office. But it is hard to deny that lawyer membership in even the less stable state legislative bodies appeared to peak during the 1960s and 1970s while declining significantly from 1980 on. Today, in many states, the proportion of lawyer-legislators is less than half of what it was in the 1960-1980 period, as reflected in the following table. Although some states (e.g., Alaska, Maine) have never had large percentages of lawyers in the legislature, they have even fewer lawyers today. Many states have seen the proportion of lawyer-legislators cut nearly in half (e.g., Texas, Minnesota) or more (e.g., Iowa, Virginia). Although there are some states with lower lawyer decline in membership (e.g., Maryland), the overall picture appears to be one of diminishing attorney presence in state houses.

ter Mondale and Michael Dukakis were both attorneys – but losing Democrats Carter and Al Gore were not. In addition, the one losing Republican candidate during this time period (other than George H.W. Bush) was Bob Dole, a lawyer. Although all of this can perhaps be “explained” as mere chance, I am positing that this turn away from lawyers is not an accident. Rather, during the past thirty years, lawyers appear to have become less attractive presidential candidates. The 2004 election results suggest additional support for my thesis. The Democratic ticket of John Kerry and John Edwards, two lawyers, lost to the Republican ticket of President George Bush and Vice-President Dick Cheney, two non-lawyers.

¹⁹ See NORMAN J. ORNSTEIN, ET. AL., *VITAL STATISTICS ON CONGRESS 2001-2002*, 46 (2002).

²⁰ See *id.* at 43.

TABLE I: PERCENTAGE OF ATTORNEY-LEGISLATORS BY SELECTED STATE²¹

| State | 1950 | 1960 | 1970 | 1980 | 1990 | 2000 |
|-----------|-------|-------|-------|-------|-------|-------|
| Alaska | 7.5 | 20.0 | 21.67 | 5.0 | 8.3 | 8.3 |
| Iowa | 20.0 | 16.0 | 17.33 | 12.67 | 9.3 | 7.33 |
| Kentucky | 20.29 | 20.29 | 26.62 | 28.06 | 16.09 | 23.74 |
| Maine | 10.87 | 9.78 | 9.29 | 3.80 | 5.38 | 9.15 |
| Maryland | 23.03 | 37.30 | 36.22 | 26.06 | 21.28 | 15.43 |
| Minnesota | 29.77 | 41.22 | 38.52 | 18.66 | 19.40 | 22.39 |
| Texas | 47.51 | 53.59 | 43.09 | 39.23 | 35.36 | 34.81 |
| Virginia | 55.0 | 67.50 | 70.0 | 55.0 | 42.5 | 22.5 |

Occupancy of state governor's mansions reflects a similar pattern. In 1950, almost exactly half the governors were attorneys,²² and in 1980, more than half (fifty-six percent) of the governors were lawyers. Today, however, only forty-four percent of governors are lawyers. Although this is not a huge decline and law remains a leading occupation of gubernatorial candidates, it nonetheless appears that lawyer-governors have declined in both empirical and symbolic terms. In the past half-century, Earl Warren (California Governor from 1949-54) and Grant Sawyer (Nevada Governor from 1958-1966) have given way to Arnold Schwarzenegger (an actor and former bodybuilder) and Kenny Guinn (a former businessman and educator).²³ There is nothing inherently wrong with this, of course. A good and effective public official can come from any occupational background. Schwarzenegger seems off to a good start (notwithstanding the occasional "girlie-man" comment and his backing of Education Secretary Richard Riordan in the wake of a bizarre interchange with an

²¹ See generally ALASKA OFFICE OF UNIVERSITY RELATIONS, *WHO'S WHO IN THE ALASKA LEGISLATURE* (1998); DIVISION OF STATE LIBRARIES AND ARCHIVES, *ALASKA BLUE BOOK* (1973-); FRANK J. STORK & CYNTHIA A. CLINGAN, *THE IOWA GENERAL ASSEMBLY: OUR LEGISLATIVE HERITAGE 1846-1980* (1980); JUDY NEFF & LEGISLATIVE SERVICES AGENCY, *MEMBERS OF IOWA GENERAL ASSEMBLIES 1981-2002* (2002); LEGISLATIVE RESEARCH COMM'N, *MEMBERS OF THE KENTUCKY GENERAL ASSEMBLY 1950-2000* (2004); MAINE REGISTER, *STATE YEAR-BOOK AND LEGISLATIVE MANUAL* (1870 -); MARYLAND OFFICE OF THE SECRETARY OF STATE, *MARYLAND MANUAL* (1873-); MINNESOTA STATE BAR ASSOCIATION, *150 YEARS OF LAW AND LAWYERS IN MINNESOTA* (1999); STATE OF TEXAS, *LEGISLATIVE MANUAL EXCERPTS 1901-1969* (1969); TEXAS ALMANAC (1970 -); STATE OF VIRGINIA, *VIRGINIA LEGISLATIVE DIRECTORY* (1900 -).

This examination of lawyer presence in legislative chambers does not purport to be comprehensive. Data for many states is lacking or difficult to obtain in the time available for submitting this commentary. My thesis posits that the basic patterns reflected in Table I hold for the nation as a whole. In particular sub-cases, there may, of course, be little or no decline in the proportion of lawyer-legislators. In other sub-cases, however, the percentage decline may be dramatic.

²² See generally National Governors Ass'n, *Governors of the American States, Commonwealths and Territories*, <http://www.nga.org/cda/files/biobook.pdf> (last visited Jan. 22, 2005).

²³ The juxtaposition of these names and reaching back to the 1950s is not purely coincidental. Earl Warren and Grant Sawyer were not run-of-the-mill lawyers but represented the apogee of the profession. Warren became a fabled, albeit controversial, Chief Justice and Sawyer a name partner in the state's largest law firm.

elementary school student)²⁴ and Guinn is widely regarded as having been a very good governor. But if you had to don a blindfold and pick names from a box to fill political office, would you rather pick from the box marked "attorney" or the one marked "bodybuilder," "actor," "utility executive," or "school superintendent?" Having the perhaps self-interested belief that law provides sound preparation for fact assessment, analytic thinking, decisionmaking, and dispute resolution, I would prefer to pull a lawyer from the box rather than one of the other occupations.

In addition, there appears to have been a change in the types of lawyers entering politics. In the 19th Century and much of the 20th Century, lawyer-politicians appeared to have actually worked a bit as practicing lawyers prior to entering politics full-time. Also, a popular rung on the political ladder for aspiring Senators was often the state Attorney General position. Names like Walter Mondale (D-Minn.), Thomas Eagleton (D-Mo.), and John Danforth (D-Mo.) provide modern examples. Earl Warren provides an example of a similar pattern in ascending to the California governorship.²⁵

Today, of course, body building or professional wrestling appears to be the better path to the statehouse.²⁶ As for Congress, occupations other than law appear to offer the inside track. For Senate races in particular, which involve more expensive statewide campaigns, a previous career as an entrepreneur

²⁴ See, e.g., Jill Stewart, *The Muscular Middle*, WALL ST. J., Aug. 31, 2004, at A12 (giving positive assessment of Schwarzenegger's governorship; also noting that "his poll numbers ticked upward after he dubbed California's Democrat [sic, the word is "Democratic," which gives one a flavor of Stewart's own politics] lawmakers "girlie men" for being so deeply beholden to special interests that they fought cuts in California's deficit-ridden budget").

²⁵ Warren's Attorney Generalship, however, arguably reflected a failure of professional values. As California Attorney General, Warren supported the internment of Japanese-Americans during World War II merely because they were Japanese-Americans (with no evidence to suggest that they were disloyal). See *Korematsu v. United States*, 323 U.S. 214 (1944). Subsequently, as Governor of California and U.S. Supreme Court Justice, Warren was widely hailed for his accomplishments and commitment to principle even though he was criticized for his opinions (and the Court's) in favor of defendants' rights, and civil liberties generally.

²⁶ I refer, of course, to the one-term Minnesota governorship of former professional wrestler-cum-actor/sports commentator Jesse Ventura and the more recent ascension of bodybuilder/actor Arnold Schwarzenegger to the governorship of California. On his way to the governorship, Ventura defeated, among others, state Attorney General Hubert H. Humphrey III, son of popular long-time Senator and one-time Vice-President. This is ironic but probably not completely coincidental. The election of novelty candidates like Ventura and the election of more conventional candidates from non-legal fields reflects to some degree the public's increasing disaffection with lawyers and law. Ventura's governorship is widely regarded as unsuccessful and he did not seek re-election, but he was replaced by a non-lawyer Governor. Early evaluations of the Schwarzenegger's governorship have been quite favorable, leading to the possibility that it may no longer be comic to think of weightlifting as preparation for politics. And, of course, successful politicians like Ronald Reagan and former Senator Fred Thompson (R-Tenn.) were actors. I am not so much of a lawyer chauvinist to suggest that only lawyers make good political leaders or that any particular occupation disqualifies one for political office. I do argue, however, that all other things being equal, the public's chances with a lawyer-politician are better than with an athlete-politician or entertainer-politician. We presume that good lawyers are equipped to be good elected officials. With those in other fields, particularly fields that do not involve law, professional judgment, or management, we are surprised (albeit pleasantly) when an elected official with such a non-traditional background performs well in office.

(e.g., Frank Lautenberg, D-N.J.) or an investment banker (e.g., John Corzine, D-N.J.) or executive (e.g., Maria Cantwell, D-Wash.) appears to have significant advantages over law. Former Senator and Vice-Presidential candidate John Edwards (D-N.C.), who made millions as a plaintiffs' personal injury lawyer, stands as the strongest counter-example. But other personal injury attorneys have not been able to duplicate the Edwards success. Prominent Michigan attorney Geoffrey Fieger, not only a well-known criminal lawyer and defender of Dr. Kevorkian but also a successful plaintiff's tort lawyer, won his party's primary but was crushed in the general election.²⁷ Similarly, W.C. Gentry, one of the lawyers hired by Florida to pursue its claims against tobacco companies for increasing health care costs, made millions in fees after the group achieved a lucrative settlement for the state but could not prevail in a state senate contest.²⁸

Lawyers attaining U.S. House or Senate office tend not to be high-profile private practitioners but rather are less colorful, more establishment figures who served in stepping-stone government positions (e.g., Lt. Governor, Secretary of State, County Commissioner) as a prelude to Congress. Their identities as lawyers are often muted, perhaps even unknown to the electorate. Viewing this landscape as a whole, it seems safe to say that this is not an era of great lawyer popularity or dominance regarding significant elective office.

In addition to seeing a decline in the proportion of lawyers in Congress, we also saw increasing hostility to lawyers in other quarters. Lawyers have traditionally been a good target for humor, but lawyer jokes have become more frequent and more pointed in recent years.²⁹ At the same time, the legal establishment itself has become less cohesive. For example, there is today no real core bar association position on the important public policy issue of civil liability. There is instead the advocacy of tort reform by the Defense Research Institute (DRI) and lawyer-business groups such as the American Tort Reform Association (ATRA) in combat with the anti-tort reform efforts of the American Trial Lawyers Association (ATLA).

The degree of division in the profession was illustrated by the different responses of the organized bar to the 1987 Supreme Court nomination of D.C. Circuit Judge and former Yale Law School professor Robert Bork. Bork, of course, was controversial both because of his conservative judicial views (particularly his very narrow view of First Amendment protections) and his role in the Nixon Administration's "Saturday Night Massacre" in which Bork fired Watergate Special Prosecutor Archibald Cox. Bork's nomination was defeated, in part because some quite established bar organizations such as the ABA Judicial Selection Committee and the Association of the Bar of the City of New York (ABCNY) found Bork unqualified for the post. Others in the organized

²⁷ See Donald W. Nauss, *Fieger's Invective Grabs Attention But Not Loyalty of Voters*, L.A. TIMES, Oct. 20, 1998, at A5.

²⁸ See Matthew I. Pinzur, *Mayoral Campaign Accounts Nears Million-Dollar Mark*, FLA. TIMES-UNION, April 11, 2002, at B-1 (Gentry "spent nearly \$500,000 to lose by a landslide for the State Senate last year"); Jim Saunders, *Wise Unites Usual Enemies*, FLA. TIMES-UNION (Jacksonville), Aug. 18, 2001, at B1.

²⁹ See Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998).

bar were appalled by the anti-Bork actions, arguing that whatever Bork's ideology or politics, it was unsupportable for bar leaders to argue that he was unqualified in light of his distinguished academic and judicial background.³⁰

Of course, the ability of the legal establishment, although divided, to assert itself in the Bork nomination and other judicial matters gives some attestation to their continued influence. However, it also reflects the increasing fragility of the legal profession's role in modern politics. In response to bar association criticism of Bork, the White House and the GOP Senate majority took the position that bar association ratings of judicial nominees were either not necessary or not trustworthy and cut the ABA and the ABCNY out of the nomination process for several years.³¹

Moreover, even if the role of the profession is rekindled as regards judicial nominees, this is at best only a baseline victory for lawyers. Any political system that does not consider lawyer opinion in selecting judicial officers would be regarded as irrational by most observers (but modern fights over many judicial nominations have become perilously close to pure ideological contests with resort to litmus tests and little assessment of the nominee's legal skills and case-specific situational judgment). What seems clear is that lawyer influence on the non-judicial aspects of politics and government has been in decline for some time and is likely to continue to erode.

Although the proportion of lawyers in the White House, Congress, and state analogs has decreased during the past quarter-century, the decline has, of course, been nothing tantamount to extinction. Lawyers still abound in political office and in political staffs. As recently as 2000, a lawyer was President. Congress still has a significant number of attorney-legislators, as do state legislatures. Many governors are also lawyers. By objective measures, lawyers are less dominant in politics than was once the case but they are hardly missing. In addition, by at least my subjective measure, the lawyers in politics are today less influential than in the past because of the decline of lawyers in leadership positions. Certainly, my assessment can be debated by those wishing to point to the continued prominence of many lawyer-legislators such as Senators Orrin Hatch (R-Utah) and Edward Kennedy (D-Mass.).

II. AN ALTERNATE BUT COORDINATE PROBLEM: DECLINE IN LAWYER PROFESSIONALISM

A. *Declining Professional Judgment Among Lawyer-Politicians*

I acknowledge that the decline in lawyer power in politics is not so steep that all changes can be attributed to the demographic shift away from lawyer-officials. In addition, I posit that a good deal of the changes in political con-

³⁰ See generally MICHAEL PERTCHUK & WENDY SCHAEZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* (1989); *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 249-55 (1987).

³¹ See Tony Mauro, *ABA Begins Study of Court Nominee*, USA TODAY, July 15, 1991, at 3A (noting that ABA ratings have come under greater scrutiny as a result of Bork nomination and were expected to get greater scrutiny than in the past regarding upcoming review of Clarence Thomas nomination).

duct during the past thirty years have been negative and stem not only from having fewer influential lawyers on the political scene but also from an overall decline in the quality of the remaining lawyer-politicians. This results from two factors: the tendency of lawyer-politicians to leave behind lawyerly values in favor of the poorer quality values of politics and the general decline in professional values among the pool of lawyers as a whole, creating more likelihood that a lawyer-politician will be less public-spirited than in the past.

I realize this is a sweeping indictment laced with perhaps a good deal of nostalgia (and perhaps nostalgia for a time of the more saintly lawyer-politician that never really existed), but on balance, there is significant reason to consider this explanation in determining why American politics has become more debased in recent years. Consider the behavior today of many prominent lawyer-politicians, attorney political operatives, and the "legal establishment" as contrasted with an earlier era.

In the 1950s, Senator Joseph McCarthy (R-Wis.), a nonlawyer, led what is now recognized as a baseless witch hunt and campaign of character assassination against suspected communists in government. As is often the case in times of national fear-cum-hysteria, there was comparatively little initial resistance to McCarthy. Gathering resistance was led by lawyers defending the civil rights of their (often wrongfully) accused clients, as exemplified by Boston attorney Joseph Welsh's defiance of McCarthy in defense of David Shine during the Army-McCarthy hearings.³² Many lawyer-politicians, the media, and the public subsequently rallied against McCarthy and reversed the "un-American activities" hysteria of the time.³³

During Watergate, despite the presence of criminal activity emanating from the highest levels of the White House occupied by a President who had won re-election in a landslide, lawyer-politicians and lawyer-advisors had the courage to investigate and displayed lawyerly restraint in both the congressional investigations (including preliminary impeachment proceedings) and litigation arising out of the incident.³⁴ Although, perhaps ironically, Watergate is seen as a tremendous black eye for the legal profession (many of the perpetrators or aiders and abettors were lawyers), it also reflected the political-legal system working well both in the representative arena and the judicial arena. For example, University of Texas law professor and subsequent American Law Institute President Charles Alan Wright, retained by Nixon, concluded that Nixon must comply with a subpoena to produce White House tapes after an adverse judicial ruling.³⁵ White House counsel Leonard Garment had previ-

³² The Hale & Dorr law firm, where Welsh was a partner, is widely seen as having a prominent role in lawyer opposition to McCarthy's excesses. See Vivia Chen, *Too Good to be True?*, AM. LAW., July 2004, at 80. In Washington, D.C., the firm of Arnold, Fortas, and Porter played a similar role, devoting thousands of hours (and lost dollars) to defending persons accused of being sufficiently "un-American." See SPENCER WALLER, THURMOND ARNOLD AND TWENTIETH CENTURY AMERICAN LAW (forthcoming 2005).

³³ See generally ELLEN SCHRECKER, *THE AGES OF MCCARTHYISM* (2d ed. 2002).

³⁴ See generally STANLEY KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1990).

³⁵ See *United States v. Nixon*, 417 U.S. 660 (1974); John H. Cushman, Jr., *Charles A. Wright, 72, Legal Consultant to Nixon, Dies*, N.Y. TIMES, July 9, 2000, at A31 (explaining that Wright had initially advised Nixon to ignore court rulings to turn over the tapes but after

ously concluded that Nixon could not destroy the tapes pending resolution of the case despite the advice of some lawyers that Nixon trash the tapes to avoid having them used as evidence against him.³⁶ Law schools responded well, too, giving renewed emphasis to legal ethics in their curriculum. The organized bar began specifically testing the subject as part of the requirements for bar admission through the Multistate Professional Responsibility Examination required in most states and through state-specific legal ethics questions. Bar discipline was also given renewed support and seriousness (although it continues to have much room for improvement).

In the Iran-Contra scandal of the 1980s, however, lawyer-politicians and the legal profession performed less admirably. The congressional investigation was flaccid (at least as compared to Watergate) and actually served to help Oliver North "beat the rap" by creating grounds the D.C. Circuit found adequate (in an admittedly controversial decision) to reverse North's conviction at trial.³⁷ There was, to be sure, lots of good lawyering among the bad lawyering — (Senator Daniel Inouye's (D-Haw.) wimpy questioning about North's open use of a briefing book during testimony and his weak acceptance of North's bogus claim of attorney-client privilege for the document remain for me the standout example of poor lawyering in that debacle).³⁸ The most memorable lawyering moment, however, was provided by North's lawyer, Brendan Sullivan, and his "I am not a potted plant" comment when Inouye attempted to prevent Sullivan from objecting.³⁹ While it was good lawyering by Sullivan, it

several bills emerged in the House to have the President impeached agreed with release of the tapes, stating "[t]he President does not defy the law").

³⁶ See STEPHEN GILLERS, REGULATION OF LAWYERS: STATUTES AND STANDARDS 524-26 (6th ed. 2002); LEONARD GARMENT, CRAZY RHYTHM: RICHARD NIXON AND ALL THAT JAZZ 280-81 (1997). Those who urged Nixon to destroy the tapes so long as they were not yet under subpoena, even though a subpoena was clearly likely, had significant precedential support for this position. See W. Laird Hart, Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979) (surveying rules and case law, concluding that legal profession and courts were quite tolerant of destruction of potential evidence during early stages of controversy). Thus, Garment arguably gave more attention to his role as an officer of the court than to his role as an advocate for Nixon, action that some find controversial but I find praiseworthy. But as Garment himself noted, there may have been no real tension between client interest and public interest. The tapes were priceless records of his presidency and Nixon did not want them destroyed even though he undoubtedly appreciated the risk that their contents might do him grave legal and political harm.

³⁷ See *United States v. North*, 713 F. Supp. 1448 (D.C. Cir. 1989).

³⁸ See John Applegate, *Witness Preparation*, 68 TEX. L. REV. 277 (1989) (describing incident and examining law of attorney-client privilege and work product protection in context of witness preparation). My own view is that, as a matter of law, North was obligated to turn over the briefing book because he waived whatever work product or attorney communication privilege may have existed by openly using the materials for preparing and delivering his testimony. At least this would have been the clear result had North's testimony been during a judicial proceeding. I see no reason to have a more privilege-protective approach to congressional proceedings, which are investigatory in nature rather than prosecutorial. At a minimum, Sen. Inouye, as a representative of Congress trying to get to the bottom of the subject of the investigation, should have insisted that North turn over testimonial preparation materials of this sort. That Inouye flinched at this miniature moment of truth reflects poorly on his legal skills and those of counsel.

³⁹ See Chuck Conconi, *Personalities*, WASH. POST, July 14, 1987, at D3.

was hardly the stuff of moral inspiration like Joseph Welsh's resistance to McCarthy 30 years earlier.

The 1990s brought a rebirth of prosecutorial zeal among lawyer-politicians, something lacking during Iran-Contra. However, the goal was suspect: impeachment of a President essentially for having an affair and then fibbing about it. To be sure, the fib was under oath, which made it something more than a "medium gray lie" of the "I really was working late at the office last night" variety given by compromised spouses at the rate of perhaps thousands per day in America.⁴⁰ But was this really the sort of presidential misconduct that required precipitating a constitutional crisis? Should lawyer-politicos not have used some professional judgment in favor of just letting this one go in the interests of concentrating the national political process on more important things (e.g., the economy, jobs, education, environmental protection, the tech stock bubble destined to burst, corporate crime and mismanagement, terrorism) or at least made greater effort toward a negotiated solution to this political impasse? My answer to the first question is a resounding "no," while my answer to the second, compound-question is an equally emphatic "yes."

The Clinton impeachment and attempted conviction was a foolish distraction and drain of resources fueled solely by attempts to take partisan advantage of human frailty. Although this has always been part of American politics (Lyndon Johnson during the 1940s-1960s was perhaps the greatest master of this skill), the impeachment episode represents a low point for lawyer-politicians. The Clinton impeachment drama demonstrates the failure of lawyer-politicians to deploy the type of good legal judgment that they supposedly learned during law school and practice. Although most of the impetus for impeachment may have come from the President's non-lawyer enemies, his lawyer-opponents gleefully joined in while many other lawyer-politicians were slow to point out the insanity of the entire episode. And even though the attempt to oust Clinton for being a fibbing philander failed, it remains an embarrassing moment in American history – as many lawyers and lawyer-politicians were catalysts in bringing about what can charitably be described as a bizarre abuse of political prosecutorial discretion.

At the risk of entering too partisan a thicket, I can't say enough bad things about the Clinton impeachment episode as reflecting poorly on the American legal profession as well as on American politics. In part, this is because even lawyers who should have known better took the view that this was simply part of "tit-for-tat" politics that may have been initiated by liberals who therefore should be estopped from complaining when conservatives resort to such tactics. For example, in *A Vast Conspiracy* and his television interviews promoting it, Jeffrey Toobin, a usually astute legal analyst, suggests that the pursuit of Bill and Hillary Clinton through legal actions such as the Whitewater investment investigation, the *Jones v. Clinton* sexual harassment litigation, and the Monica Lewinsky litigation was simply a case of rabid Clinton opponents (who Toobin concludes did act in concert even if "conspiracy" seems a bit too ominous a

⁴⁰ See generally NAN HUNTER, *THE POWER OF PROCEDURE* (2002); LEONARD V. KAPLAN & BEVERLY I. MORAN, *AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE* (2001) (describing Clinton impeachment, trial, and related legal proceedings stemming from *Jones v. Clinton* sexual harassment suit).

term) resorting to the courts for political gain in a manner similar to the way in which liberals resorted to litigation in voting rights cases, civil rights cases, environmental regulation cases, and defendants' rights cases.

According to Toobin, the common thread is that in both cases a group resorts to litigation to attempt to attain what it could not win electorally or even to reverse disliked electoral outcomes.⁴¹ Toobin observes:

In the years since the Second World War, there has been a conspiracy within the legal system to take over the political system of the United States The process was set in motion shortly after the war, when Thurgood Marshall and a small group of lawyers at the NAACP Legal Defense and Education Fund entered upon the first sustained and successful attempt to use the courts to achieve political change.

Marshall's extraordinary success had unforeseen consequences. Court cases became a central part of any organized political activity – even for those groups who could have used the ballot instead of the subpoena.

This legal activism eventually extended even to criminal law. Marshall and his immediate political heirs used the courts to target and change laws; the next generation of activists used the courts to target and prosecute individuals. The liberal triumph over Richard Nixon in Watergate led the Democratic Party to seek to institutionalize its gains [through enactment of the Independent Counsel law]. In Watergate and then Iran-contra, the pursuit of Republican officials became a central obsession of the political left.

Then, of course, the inevitable occurred. The political right discovered that it, too, could use the courts to advance its agenda

Two of the great social movements of the late twentieth century, feminism and the Christian right, were ordinarily seen as ideological opposites. But in one critical respect, they pushed the country in precisely the same direction, toward the idea that the private lives of public people mattered as much as their stands on issues. The feminist insistence that "the personal is the political" meant that private conduct, particularly when it came to sex, served as a useful metaphor for a politician's public acts. Yet conservatives, too, under the motto "Character counts," began to weigh personal behavior as heavily as did their ideological rivals.

This fixation on the personal amounted to a tremendous gift to the new media, which were experiencing their own transformations during this period. In the early 1960s, when reporters heard tales of the voracious sexual appetite of President John F. Kennedy, they kept the information to themselves. Public disclosure of such matters was literally unthinkable; that is, it wasn't even considered. But feminists and evangelicals gave journalists the permission – the pretext to go into areas that they wanted to examine anyway.⁴²

So, now we know. All this, according to Toobin, is the fault of feminists, evangelicals, and the news media. As to the media, he may have a point. The prurient seems to be seen as more commercial than standard news or serious investigative reporting, at least according to what one sees, hears, or reads, particularly in the electronic media. Witness the breathless, overblown coverage of cases like the Scott Peterson murder trial or the disappearance/murder of Chandra Levy, events covered (during their time of faddish fashion) with an

⁴¹ See generally JEFFREY TOOBIN, *A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT* 5-9 (1999). Toobin has also set forth a less nuanced version of this analysis in interviews, most notably on CNN's *Paula Zahn Now*, to which he is a regular contributor.

⁴² *Id.* See TOOBIN, *supra* note 41, at 6-8.

intensity far outstripping any real examination of world affairs, terrorism, the Iraq War, the economy, government corruption, institutionalized inefficiency, or any of the myriad things about which a free press might consider informing the citizenry. I might even grant Toobin some slack in his criticism of feminists and evangelicals. Perhaps they are subject to criticism for erroneously conflating personal conduct and public conduct. In the main, however, there is for me no doubt that Toobin's assessment is quite inaccurate and represents flawed "legal reasoning" from a smart person who ought to know better. In addition, he fails to place enough of the blame where it belongs: on the shoulders of those politicians, many of them lawyers, who should have exercised better judgment and concern for the nation as a whole in resisting the temptation to use civil and criminal law as a tool for attacking one's political enemies (rather than as a legitimate means of adjudicating legal-political issues).

My position, which I hope is noncontroversial, posits that legal training is designed to inculcate some degree of professional judgment and ability to make meaningful (i.e., not trivial or nitpicking or strained) distinctions when confronting a set of facts or an array of client options. Thus, even though the history of partisan/political use of the courts is not legal doctrinal analysis per se, good legal reasoning (or lawyer-style reasoning) should lead to a sound analysis. Here, the Toobin passage quoted above appears to fail.

First, there is the incomplete history. Toobin writes as though political forces discovered courts as an alternative to pesky legislatures and elections only during the NAACP's attack on segregation. Not true. Business forces have been using the courts to countermand the decisions of other political forces since the very founding of the Republic. Financial interests have regularly resorted to the courts to protect property rights and to strike down regulatory legislation, including a successful attack on the first income tax and an initially successful resistance to many of the New Deal programs. These commercial interests could have gone to the legislature or other elected entities but did not. Undoubtedly, they concluded that they would be more likely to win or win at reduced cost by resorting to the courts.

Seen in this light, it can hardly be said that anti-discrimination activists were the first to use courts as an alternative path for achieving political goals. Although one can attempt to describe earlier business challenges as being "private" because they involved property or money held by the litigants, this is not much of a distinction. In the desegregation and other impact litigation cases, the plaintiffs were all personally affected by challenged policies as were the commercial interests that have been resorting to the courts at least since the time of *Hunter v. Martin's Lessee* and *Dartmouth College v. Woodward*. Both types of litigants satisfied the requirements of standing and justiciability. Hence, both types of litigation were in my view perfectly legitimate resort to the courts. We should not fall into the fallacious trap of thinking that it all began with Thurgood Marshall.

Second, and more important, Toobin's analogy about the types of litigation is flawed. To be sure, liberals sought judicial relief that may not have been

attainable at the ballot box. Cases like *Roe v. Wade*,⁴³ *Baker v. Carr*,⁴⁴ and *TVA v. Hill*⁴⁵ (and of course *Brown v. Board of Education* and the cases attacking segregation) fit this description. But in cases of this type, the plaintiffs are bringing suit in order to get judicial review of particular policies. By contrast, conservatives using the courts against Clinton were not trying to change public policy on the merits because of perceived legal infirmities with the policy but were trying to remove a policymaker, or at least tar him. This use of courts as targeted attempts to hurt individuals is quite different from litigation as a means of testing the legal bona fides of particular laws restricting abortion, political systems giving greater political power to rural voters, or plans to build that might violate other (environmental) laws or make certain creatures extinct. Although the correctness (or lack thereof) of the liberal position on impact litigation can be reasonably debated, this is nonetheless adjudication directed at law and public policy itself. It is not litigation attempting to achieve political goals by harming particular individuals who have different political goals, as was the anti-Clinton effort.

The following example further demonstrates the weakness of Toobin's analogy: what if Democrats had hatched and supported a civil lawsuit against George W. Bush for the financial collapse of some of his past businesses in an effort to trap Bush into misstatements or prove up violations of federal securities laws with an eye toward (a) embarrassing Bush and hurting his chances for re-election or his influence upon Congress; (b) imposing massive civil liability on Bush; (c) impeaching Bush and removing him from office; or (d) criminally convicting Bush. What if, in response to the success of that civil suit in surfacing negative facts about Bush, his political enemies launched an impeachment effort? Under these circumstances, it would be clear that the resort to litigation is not a genuine effort to enlist the judiciary in review of public policy matters. It would be an attempt to use litigation as a weapon against a particular political enemy. By analogy, the efforts against Clinton must be seen in the same light.⁴⁶

⁴³ See *Roe v. Wade*, 410 U.S. 113 (1973) (striking down Texas abortion restrictions as undue infringement on privacy rights of pregnant woman).

⁴⁴ See *Baker v. Carr*, 369 U.S. 186 (1962) (striking down Tennessee state legislative districts as violative of equal protection due to dramatic over-weighting of rural votes).

⁴⁵ See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (halting construction of planned Tellico Dam because project would violate environmental laws including, notoriously, destroying last known habitat of "snail darter" fish).

⁴⁶ Let me be, to quote former President Richard Nixon, "perfectly clear:" I am not suggesting that politicians should be immune from prosecution or above the law. I am only arguing that litigation against politicians not be fomented due to politically motivated concerted actions by the target's opponents. If an individual prosecutor or office, using its normal, neutral, non-partisan protocols and professional judgment determines that prosecution is warranted, let the chips fall where they may. However, when a case is tinged with obvious political overtones but does not implicate public policy concerns requiring immediate adjudication, it seems to me perfectly appropriate to consider granting a stay of the matter during an incumbent's tenure in office. Consequently, I find myself in the unusual position of agreeing more with former Manson prosecutor Vincent Bugliosi and disagreeing with Justice John Paul Stevens. See *Clinton v. Jones*, 520 U.S. 681 (1997) (holding that the civil suit against Clinton could proceed and need not await conclusion of his presidency) (Justice Stevens has continued to support his majority opinion despite the consequent impeachment circus); VINCENT BUGLIOSI, NO ISLAND OF SANITY: PAULA JONES V. CLINTON:

Why am I harping about this part of the past? To be sure, I prefer Clinton's policies to those of Bush, but I have a larger motivation that I hope is not partisan. First, resort to courts to adjudicate large public policy questions, even those with obvious political overtones, is legitimate so long as there is a colorable legal basis for the claim. But use of courts simply to harm individual political opponents is not. Second, lawyers should know, appreciate and accept this distinction. Instead, many lawyers happily went along with the persecution of Clinton. Arguably, the episode is even celebrated to a degree by many, including former Clinton Administration official Professor Nan Hunter, who in her book *The Power of Procedure* uses the tale to illustrate that not even presidents are above the law and that civil litigation can accomplish quite a lot.⁴⁷ Although *Power of Procedure* is an excellent work, the book provides hardly as much as a hint that perhaps the activities of the lawyers were problematic. I disagree and am frankly a bit appalled at the entire episode. Anti-Clinton attorneys in private practice worked overtime to use litigation to bring down a President, not because of public policy miscues but because of alleged personal failings. Anti-Clinton lawyers in Congress or on congressional staffs attempted to do the same thing. On the other side, Clinton's lawyer defenders were often dilatory, unduly resistant, and less than candid.

The entire episode was an embarrassment for law, not a triumph. Unfortunately, analysts like Toobin, although correctly assessing the folly of the temporary insanity of the Clinton impeachment,⁴⁸ fail to use sound legal reasoning to make apt distinctions between legitimate public policy litigation (to desegregate schools, to strike down an unauthorized tax, to provide prisoners with access to an attorney, to prevent federal encroachment on state prerogatives, to demand adequate compensation for restrictions on property use, etc.) and litigation as a means of character assassination or even elimination of political characters one dislikes (at least for the length of a prison term).

Toobin suggests that Watergate and Iran-Contra are of a piece with Clinton-Jones-Lewinsky-Impeachment, but this seems clearly incorrect and erroneous as a matter of legal analysis. Undoubtedly, enemies of Richard Nixon and Ronald Reagan were pleased to see these Presidents besieged with bad publicity. But Watergate involved investigation of criminal activity that was directly related to an attempt to thwart electoral competitors. Iran-Contra involved possible violation of public law by public actors concerning the conduct of American foreign policy – and much of these investigations were conducted by Congress in first instance rather than by Congress on the basis of evidence created by litigation attacking an individual. Conflating different situations and suggesting that “it’s all politics” or “it’s all the same” reflects lawyer-politicos and lawyer-journalists failing to display sound lawyerly reasoning and judgment.

Following on the heels of the Clinton impeachment debacle came the 2000 presidential election, in which the outcome hinged on determining the winner

THE SUPREME COURT ON TRIAL (1998) (criticizing the *Jones v. Clinton* ruling in harsh terms).

⁴⁷ See generally HUNTER, *supra* note 40. Professor Hunter was an Assistant Secretary of the Department of Health and Human Services during the Clinton Administration.

⁴⁸ See TOOBIN, *supra* note 41, at 399-400.

of Florida's electoral votes. The race was close and there were ample reasons to wonder about the bona fides of the outcome initially announced by Florida authorities. There were questions about the classification and counting of ballots (the now-infamous "hanging chads"), the confusion caused by Palm Beach County's "butterfly ballot", which seemed to have made Pat Buchanan briefly popular among Jewish voters with Northeastern roots who normally voted Democratic, Seminole County's acceptance of absentee ballots in apparent violation of the rules, and reports of authorities intimidating African-American voters, including misuse of a "felon's list" of ineligible voters. When the Florida Secretary of State, Bush-partisan Katherine Harris, blithely brushed these concerns aside to quickly declare George Bush the winner of the state in which his brother was governor, reasonable persons probably should not have been surprised to see the election results questioned in the courts.⁴⁹

What happened then is, much like Watergate, both a moment of triumph and embarrassment for the legal profession and lawyer-politicians. The lawyers who actually pursued or defended the many strands of what became the *Bush v. Gore* litigation, including emerging TV lawyers David Boies and Barry Richard, provided strong advocacy and sound technical lawyering with civility and a good deal of grace.⁵⁰ But on the periphery, political partisans were engaging in spinning of the issue relatively unmoored to facts, fairness, or respect for the judicial process. Unfortunately, many of the partisans were lawyers who should have known better, or knew better but forged ahead with demagoguery nonetheless. Although there were rhetorical excesses on both sides, some of the Republican attacks on the Florida Supreme Court (which made some rulings favorable to Gore) were in my view beyond the pale of fair criticism of the courts. For example, James A. Baker, a prominent Houston lawyer, former White House Chief of Staff, and former Secretary of State, baselessly accused the Florida Supreme Court of lawless judicial activism and partisanship.⁵¹ Although one might expect this sort of slander from bottom-feeding politicians, it is more than a bit disheartening to hear it from the legal elite of a major political party. Strangely, Baker, who found fault with the Florida Justices because so many had been appointed by Democratic Governor Lawton Chiles, saw no similar problem with the U.S. Supreme Court dominated by Republican appointees, including two (David Souter and Clarence Thomas)

⁴⁹ See generally SAMUEL ISSACAROFF ET. AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (2001).

⁵⁰ See Peter Aronson, *Lawyers of the Year: Teams Bush & Gore*, NAT'L L.J., Dec. 25, 2000, at A7 (naming Boies, Richard, and other *Bush v. Gore* lawyers as "Lawyers of the Year" for the exemplary manner in which they conducted themselves during the fierce litigation).

⁵¹ See *Text of Remarks by James A. Baker III of the Bush Campaign*, WASH. POST, Nov. 22, 2000, at A17. Baker accused the Florida Supreme Court of, among other things "changing 'the rules in the middle of the game.'" The effect of this and other outside criticism and its intimidation was apparent when the Court heard additional oral argument in the matter. The Florida Justices, particularly Charles Wells, were falling all over themselves stressing the limited role of the judiciary and the need to avoid judicial activism. Pardon my nostalgia for the Warren Court, but I found the episode a bit embarrassing. A lawyer who does not want to be criticized for making legal decisions (which is what the Florida Court did prior to the criticism) should not take a job as a judge. Baker was out of bounds in his criticism but Wells and others need not have wilted before the criticism. All in all, the episode was another low point for the legal profession.

who owed their positions to the father of one of the litigants in the case that eventually made George W. Bush president. Similarly, Baker and other GOP lawyer-politicos were only too happy to have Justice Scalia halt the Florida recount in part on the grounds that the recount might show Gore to have won and thus cast doubt on the integrity of the original results.⁵² Imagine if a prosecutor sought to quash a habeas corpus petition based on similar reasoning ("the court should not hear the prisoner's complaint because it might reveal that he was framed").

In short, *Bush v. Gore* seems but a continuation of the decline in the behavior of lawyers in politics. To be sure, politics is a contact sport and one expects partisan advocates to be partisan. But lawyer-partisans should be able to remember that they are lawyers as well as partisans. As lawyers, they have certain obligations similar to those of lawyers in litigation or deal-making. They should eschew misrepresentation, half-truths, bullying, and extra-record attempts to undermine judicial legitimacy and the fairness of the litigation process.⁵³ Yet, many of today's lawyers in politics (both elected officials and advisor-staffers) seem to have forgotten these aspects of the rules and norms of professional conduct.

I have two trial hypotheses to explain my perceived phenomenon of political lawyers slouching toward ethical decline. One involves the practicalities of modern politics. The other theory, not a pretty one for lawyers and legal educators, is based on the possibility that lawyers in general have engaged in ethical decline and that the fault does not lie merely with lawyer politicians.

First, the political explanation. As compared to fifty years ago, politics today is simply a rougher enterprise. Marquis of Queensberry rules have been replaced by cage-match, tough man no-holds-barred norms. Certainly, today's tone is less civil than that of the mid-20th Century. Compare the gentility of *Meet the Press* or *Face the Nation* in the 1960s with the *McLaughlin Group* of the 1980s-90s and today's *Crossfire*, *Hannity & Colmes*, *O'Reilly Factor*, *Hardball*, and even the kinder, gentler *Capital Gang*. Respectful dialogue has been replaced by shouting matches and invective. Similarly, major candidates themselves, many of whom are attorneys, devote more time to questioning the opponents' personal lives or conduct thirty years earlier than to debating the public policy issues of today.

But a change in attitude alone does not explain the changing landscape of electoral politics. Rather, the modern persona of politics is probably a symptom of greater structural change that is the actual cause of the new era. In the mid-20th Century, political parties and the traditional editorial press had much more to do with candidate selection and election outcome.⁵⁴ In this atmosphere, lawyers as procedural experts and experts in rational, bounded discourse

⁵² See *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring regarding issuance of the Court's stay halting the Florida recount: "The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner [Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election.").

⁵³ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.1-3.5 (2004) (admonition to make only meritorious arguments, to be candid, and to show fairness to opponents).

⁵⁴ See FRANK SORAU, *PARTY POLITICS AND AMERICA* (2d ed. 1972); DAVID BRODER, *THE PARTY'S OVER: THE FAILURE OF POLITICS IN AMERICA* (1972).

had significant influence. But as television and other media grew in importance, the new power brokers of politics became media consultants and fundraisers. To win significant elections today costs a lot more money than it did fifty years ago and requires a much greater media presence, particularly television advertising.

In this environment, the media maven and the fundraiser are kings, with the lawyers relegated to lesser roles in the political court.⁵⁵ Although lawyers are of course still important as fundraisers and contributors, the task of raising money is not inherently a lawyering task and its rise has correspondingly reduced the importance of lawyers in politics. With the rise in media importance, the lawyer has shrunk further in importance as compared to the pollster and producer. Today, candidates (even if lawyers themselves) are much less interested in a lawyerly analysis of public policy issues than in polling data that can help them sync up with public opinion or at least avoid being on the wrong side of a wedge issue. Because television is more important than print coverage, an advisor able to convert focus group sentiment into a slick thirty-second spot is particularly valued. Comparatively, the lawyer-statesman has taken a back seat.

B. Declining Professionalism Among Lawyers

A second explanation of the decline in the professional responsibility of the lawyer-politician involves the current state of lawyer professionalism itself. Many observers have concluded that today's practice of law has become less of a public-spirited profession and more of a business. Although the situation is too complex to be assessed in a paragraph, the basic thrust of this critique is that although some degree of business discipline and efficiency may improve law practice, it has substantial risk of pointing lawyers more in the direction of bottom line profit and away from professional duties to courts, clients, opponents, and the public. In the more competitive and profit-driven legal marketplace of the late 20th and early 21st Century, it has been increasingly hard for lawyers to remember these other duties when pressed to satisfy clients' short-term needs, win cases or keep deals, and make enough money to avoid being chastised by colleagues in the legal trade press. Under these circumstances, is it any wonder that lawyers may appear to be nurturing the worst self-interestness in clients and one another while at the same time failing to take public-spirited actions economically adverse to their personal interests? The new regime of law practice is less that of wise counselor and officer of the court and more in the nature of Green Bay Packer football team Vince Lombardi's famous dictum ("Winning isn't everything. It's the only thing").⁵⁶

⁵⁵ See generally PATRICIA MOY & MICHAEL PFAU, *WITH MALICE TOWARD ALL?: THE MEDIA AND PUBLIC CONFIDENCE IN DEMOCRATIC INSTITUTIONS* (2000).

⁵⁶ See generally KRONMAN, *supra* note 5; SOL LINOWITZ & MARTIN MAYOR, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25 (1999); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990). For a contrary view articulating the thesis that legal activity is improved by the infusion of business values and considerations, see Russell G. Pearce, *The Profession-*

Too harsh an assessment? Perhaps. As noted at the outset of this comment, one must be careful not to romanticize the past. Many of the most successful lawyers of the supposedly public-spirited era of yore were more than a little ethically challenged.⁵⁷ And, at least from the perspective of the ivory tower, my own admittedly self-interested view is that legal education today stresses ethics and public-spiritedness more than ever. Professional responsibility courses are not only required but taken seriously (and for more credits than was the case prior to Watergate). Ethical lawyering is stressed in the more well-rounded lawyering process classes that have replaced the more bare bones legal writing and research courses of an earlier era. Alternative dispute resolution and cooperative negotiation are given significant attention in law school both through revised civil procedure curricula and specific course offerings in these subjects. Clinical legal programs place faculty in close proximity to student practitioners where faculty can supervise the student's discharge of ethical responsibilities in a real world lawyering context.

But despite what seems to be undeniable improvement in the professionalism component of legal education, the profession as a whole may be losing ground in terms of legal ethics. Why? My short answer is that the inexorable press of society and the real world of the law business are more powerful than even the molding of lawyers that takes place in law school. In the real world of law, business matters, profits matter, pleasing clients matters, and satisfying senior partners (who probably graduated before the current ethics regime took hold in law school) matters.⁵⁸ Over time, even the best trained new lawyer is at serious risk of ethical slouching and debased professionalism. Until the judiciary, bar associations and government regulators take a more active role in providing a counterweight to the negative professionalism pressures of the market, the culture and the market of practice will tend to beat law school influences over time.⁵⁹

alism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar, 70 N.Y.U. L. REV. 1229 (1995); Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-as-Business Paradigm*, 27 FLA. ST. U. L. REV. 9 (1999).

⁵⁷ See generally DAVID MCKEAN, *TOMMY THE CORK: WASHINGTON'S ULTIMATE INSIDER FROM ROOSEVELT TO REAGAN* (2004) (describing questionable behavior of influential lawyer-politico Thomas Corcoran); Wayne W. Whalen, *A Fixer, First Class*, AM. LAW., Aug. 2004, at 67-68 (book "provides fascinating accounts of Corcoran's . . . ex parte communications with many courts and commissions").

⁵⁸ See Nathan Koppel, *Wearing Blinders*, AM. LAW., July 2004, at 75 (describing eagerness with which prestigious Houston law firm Vinson & Elkins implemented business plans for Enron, including "the Dynegy gas-swap fraud") ("They [the attorneys] say they never saw what was coming. All the lawyers did was help make it possible. Does running structured finance deals mean never having to say you're sorry?"). The problem is not confined to the private sector. See Stephen Gillers, *Tortured Reasoning*, AM. LAW., July 2004, at 65 (criticizing Justice Department attorneys who wrote now infamous Jan. 9, 2002 memorandum suggesting that United States could engage in what many regard as torture; attorneys did not provide thorough examination of question posed by client Department of Defense, including reference to arguably contrary law, perhaps because of eagerness not to constrain client or others in political power from pursuing aggressive approach to treatment and interrogation of Al Qaeda and Taliban detainees).

⁵⁹ This is not to say that the organized bar has ignored the issue. On the contrary, its rhetoric is usually supportive of greater professionalism and legal statespersonship. See,

This is not to say that there is not a good deal happening in the real world that is “right” from a professionalism standpoint. My argument is simply that there are also plenty of ethically challenged lawyers out there – and many of them get involved in politics, either as elected officials or supporting players. Perhaps many are attracted to politics because that arena requires less professional constraint than active law practice. Certainly, the political arena is less subject to supervision by courts or regulatory agencies than standard law practice.

III. CONSEQUENCES OF THE DECLINING ROLE OF LAWYER-POLITICIANS

This comment has argued that American politics is today less subject to the positive influences of the legal profession than in the past as a result of a reduced role for lawyer-politicians and a decline in the conduct of lawyer-politicians. As the expression goes, “I could be wrong” (and “It’s only my opinion”), but there is considerable evidence of these shifts. Even if I am wrong about the magnitude of the changes of the past thirty years, I doubt I am wrong about the general direction of change toward reduced lawyer influence and lowered performance by lawyer-politicians. Further, the practice of today’s politics tends to provide further evidence that lawyer professionalism seems to be lacking, both regarding the dispute resolution Professor Menkel-Meadow wishes to foster and political discourse and conduct generally.

How so? Consider the baseline issue of civility. Although litigators may at times be pretty bellicose, particularly in the absence of judicial supervision, they are paragons of civility compared to the average elected official and particularly as compared to the unelected political partisans of the media, punditry, party governance, and electioneering. Although one might find some amusement, perhaps even enlightenment, in some of the attack advertisements of political campaigns and Section 527 organizations, one is hard pressed to find a civil and deep discussion of the issues.⁶⁰

But civility is hardly the be all and end all of civilization. Civility may even be a facade that papers over heinous behavior or at least impedes a forthright discussion of public policy issues. Most of us would be willing to sacrifice at least a bit of civility (assuming things stop short of violence) to get at the truth, gain greater understanding, or achieve a better result in governance. And the current comparative decline in political civility is hardly unprecedented in American history. Prior to the 20th Century, much political rhetoric was slan-

e.g., Robert J. Grey, Jr., President’s Page, *A Worthy Standard: We Can Meet Our Challenges by Celebrating and Becoming Citizen-Lawyers*, A.B.A. J., Sept. 2004, at 10. My concern is that the organized bar’s regulation has not matched its rhetoric.

⁶⁰ An obvious recent example of this sort of mudslinging being the flap over ads by the group “Swift Boat Veterans for Truth” attacking Democratic Presidential Candidate John Kerry; ads observers have found to be less than candid and seemingly more than coincidentally coordinated with the Bush re-election campaign. See Adam Nagourney & Jim Rutenberg, *Kerry TV Ad Pins Veterans’ Attack Firmly on Bush*, N.Y. TIMES, Aug. 23, 2004, at A1. Republicans have felt similarly aggrieved by attack ads done by liberal Section 527 groups such as MoveOn.org and the work of humorist/documentarian Michael Moore (*Fahrenheit 911*, *Dude, Where’s My Country?*).

derous character assassination, but nonetheless, the era sometimes produced great politicians and generally was marked by effective government.

My bemoaning of the decline in lawyerly values in politics goes beyond its impact on civility. My greater concern is that with less legal professionalism among lawyer-politicians, we have entered a period in which political activity is: (a) too unconcerned about the well-being of the populace; and (b) too focused on effective electioneering rather than good government.

As to the first criticism, my argument is as follows: Properly trained and behaving lawyers keep in perspective their duties to the client. Indeed, the lawyer has fiduciary duties to the client and must put the client's interest ahead of personal advantage. It goes without saying that a lawyer cannot sell a client down the river, favor one client to the detriment of another, engage in conflicted representation (at least not without informed written consent in situations where the attorney reasonably believes that the conflict will not adversely affect the quality of representation),⁶¹ steal from a client, or "rob Peter to pay Paul" by giving the client short-term satisfaction that the lawyer knows will result in long-term detriment to the client.

At least, that is how it is supposed to work in law. Although many lawyers at times fall short of these ideals, they are real, widely accepted, and enforced with significant sanctions, including disbarment, when lawyers are found in violation. In politics, there both seem to be little support for these principles and few sanctions for those behaving in the opposite manner. Politicians live for electoral support in the here-and-now, or at least on the short horizon of an election cycle. They rob Peter to pay Paul as standard operating procedure, a practice reflected in the recent dramatic growth in government debt and efforts to push a full accounting of program spending into the future. But as George Bernard Shaw famously quipped, a government that robs Peter to pay Paul can always count on the support of Paul.

One need not even give all that much to Paul so long as Paul believes he is getting something. Witness recent changes in Medicare, touted by a taxpayer-funded advertising campaign crowing about prescription drug coverage that has a "hole" or gap in its benefits and was part of legislation in which Congress barred the government from negotiating with pharmaceutical makers to achieve lower prices for seniors. Most learned observers seem to regard the Medicare reform of late 2003 as an abomination. But it was a bandwagon on which most politicians and interest groups gladly jumped, selling it to the electorate in the manner of Poke-e-mon cards. Considered analysis and reflection? That is for losers. The illusion of accomplishment is what gets politicians re-elected, and many have become extremely good at the shell game of selling the electorate on short-term, partial fixes that help vested interests more than the populace at large. That many of these snake oil salesman politicians are lawyers breaks my heart because it reflects lawyer-politicians who have essentially rejected the core ethical construct of the profession: do what is right for the overall interests of the client (and the system) rather than doing what is in one's individual short-term self-interest.

⁶¹ See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2004).

Much of problematic government stems from the sometimes difficult question of who or what is the "client." Lawyers frequently address this question to avoid falling short of their duties. Politicians seem almost never to ask the question. However, client organizations or entities must be distinguished from constituent elements of the entity or non-clients outside the entity.⁶²

Although this can be a difficult question, it need not be in many political contexts. To perhaps state the obvious, the elected official's "client" is the public, at least that part of the public located in his or her electoral district. Perhaps more controversially, I would argue that the representative's "client" is also the larger public of the nation as a whole and the public interest (long-term public interest) in general. If one accepts these propositions, it follows that elected officials, particularly lawyer-politicians, should know better than to: favor interest groups or unrepresentative individuals (e.g., the very wealthy, the official's former college roommate) over the public at large; favor one's narrow constituency over the national interest; follow an ideological or partisan agenda in disregard of the facts; or sacrifice tomorrow for today. But again and again one sees this happen in American politics. Although an explanation based on posited low intelligence of elected officials could explain some of this, the more likely case is that representatives are plenty smart (and at least certainly not stupid) but have chosen to serve entities other than their true "clients" of the public and the public interest. If nothing else, the typical representative has great allegiance to his or her success and correspondingly will at least trade off long-term losses for the type of short-term gains that make for re-election.⁶³

Consider, for example, the relatively recent feeding frenzy over abolishing the estate tax. Labeled the "death tax" by its opponents, it has become a whipping post and is slated for at least temporary elimination in 2010. Opponents of the estate tax have made an art out of disinformation, suggesting that the tax affects many Americans (it does not) and that it prevents people from passing significant accumulated wealth to heirs (there has long been an exception so large that only the richest families pay any estate tax). The poster child of the estate tax opponents is the specter of losing the family farm because it had to be sold in order to pay Ma and Pa Kettle's estate tax, leaving the Kettle children bereft of what should have been their birthright and leaving the nation with one less family farm that has been absorbed into a corporate farming empire.⁶⁴

Although this is great rhetorical theater that has proved effective in putting the estate tax on the canvas of public opinion (and perhaps out for the count), it

⁶² See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004).

⁶³ The phenomenon is hardly confined to the national or state government. My favorite example from personal experience, and one which is relatively devoid of ideological content, took place when I lived in a generally well-run New Jersey suburb. During one year's budget crunch, the city leaders latched on the bright idea of selling one of the elementary schools because a downturn of enrollment had left it in mothballs for a couple years. This avoided the nasty issue of raising taxes to cover that year's budget shortfall. Many citizens protested and pointed out that demographic trends predicted a need for more schools in the near future. Sure enough, within two years (count 'em, two), the city school district was making substantial outlays to expand existing facilities when it could have had an entire elementary school at its disposal.

⁶⁴ See generally Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261 (2002).

suffers from a significant problem: none of the rhetoric is true. The estate tax, prior to the latest successful assault upon it, significantly affected less than five percent of American families, largely because it had an exemption for wealth up to \$750,000 (more than the net worth of most decedents) and an exemption for life insurance death benefit payments (which for many decedents is the bulk of wealth they leave to an estate). There is not a single documented instance of a family farmer's children losing the family farm due to the estate tax. In other words, the attack on the estate tax is largely based on lies.⁶⁵

To the extent lawyer-politicos have been part of the demagoguery against the estate tax, this reflects poorly on their professionalism. Advocates in law are supposed to prevail based on meritorious arguments rather than disinformation or distracting "red herring" arguments. But, as is so often the case during recent years, many lawyer-politicians are shoveling the disinformation toward the media and the public in an effort to eliminate a tax for reasons other than those given by opponents of the tax. My own preference is for an open and honest debate over the estate tax and other fiscal issues.

Lawyers should both know better and behave better.⁶⁶ I had hoped that more lawyers would want this debate rather than the smear campaign against

⁶⁵ See *id.* One could make a principled attack on the estate tax by simply arguing that since the wealth that comes into an estate is presumably taxed when earned, the estate tax amounts to unwise double taxation. Some of the estate tax opponents have made this argument. Although I think it unpersuasive (because I think some degree of double taxation of really wealthy people should be permitted if this serves other valid public purposes such as revenue raising and discouragement of concentrated family wealth that can undermine democracy), it at least is not demagoguery and forces representatives and voters to confront the central issue presented by the estate tax: is it good or bad for society to have some strictures upon accumulated family wealth? Is it right or wrong for society to demand some further payments from those made wealthy by the society? The original purpose of the estate tax was not to tax again what was presumably taxed as income but instead was to prevent the U.S. from having the type of hereditary aristocracy found in Europe and other countries. I happen to like this rationale and support the estate tax. In addition, it generates badly needed revenue that can be used for what I regard as useful government programs. Others, of course, disagree. In addition, there is a serious empirical question: were those hit by the estate tax really taxed on the wealth when it was first accumulated? Many wealthy persons avoid a good deal of income taxation at the front end, thanks to the help of clever lawyers and lobbyists. The estate tax can thus perhaps be justified as a final safety net that subjects some wealth to taxation that might well have never been taxed. All this is debatable. My point is simply that the debate should be about these real policy choices and not based on mythical stories about Ma Kettle and kids losing the family farm.

⁶⁶ Not coincidentally perhaps, one of the more prominent defenders of the estate tax has been William Gates, Sr., a prominent Seattle lawyer and the father of Microsoft Corporation Chair Bill Gates, reputedly the world's richest man. See *Defending the Estate Tax*, N.Y. TIMES, Feb. 16, 2001, at A1. As a lawyer, the senior Gates appreciates the public policy rationale for the estate tax and also hardly has to worry about his son's future should some of the father's estate be taxed. More unexpectedly, perhaps, another leading defender of the estate tax has been investor Warren Buffett, reputedly the world's second-richest man. But Buffett is something of an anomaly: a wealthy business person who frequently is willing to speak out in favor of the public interest against his own self-interest. For example, in the wake of September 11, he publicly opposed some insurer efforts to attempt to argue that the "war risk" exclusion found in insurer policies could be used to refuse to pay September 11-related damages claims (even though Buffett's empire is largely built on owning insurance companies). See Jeffrey W. Stempel, *The Insurance Aftermath of September 11*, 37 TORT & INS. L.J. 817 (2002). As an economic advisor to then gubernatorial candidate Arnold

the "death tax" that we have witnessed in recent years. In addition, there remains the issue about who or what constitutes the "client" of the lawyer politician (or the "customer" of a nonlawyer politician). For example, in viewing the estate tax, whose interests should be considered by the lawyer-legislator? The glib answer is the "public interest." Unpeeled, this concept generally means the interests of the clear majority of the public, or at least the clear majority of one's constituents.⁶⁷

Using this concept of the elected official's client and this admittedly utilitarian construct for assessing the public interest (the long-term greatest good for the greatest number, without oppressive treatment of those who do not benefit from a regime, decision, or policy) seems to argue for treatment of the estate tax that is a complete about-face from the manner in which the issue is approached in the current political arena. Sometimes conducting cost-benefit analysis and toting up pluses and minuses is difficult. But in the matter of the estate tax, it seems to be quite clear that the correct analysis supports at least a modest estate tax that provides an exemption large enough to avoid imposing the tax on upper middle class or middle class families.

If the estate tax is repealed, this is great news for a relatively small number of very wealthy clans. They can now keep more money in the family. If they invest this money in means that spur economic growth, there may be some significant but probably not overwhelming job creation and other benefits of growth. In addition, removing the estate tax provides psychic/ideological benefit to those who feel that it is morally incorrect to prevent the financially successful from giving all their wealth at death to chosen entities other than the government. Finally, as discussed above, levying an estate tax on accumulated wealth is arguably a second round of taxation upon funds that were presumably taxed as income when initially acquired by the wealthy decedent. That seems to cover the benefits of estate tax repeal.

On the cost side: repeal of the estate tax removes a substantial amount of money from the federal coffers, money that could be used for building roads, funding educational programs, hiring more police officers and firefighters, improving homeland security, buying better equipment for soldiers, and so on. States also lose money unless they engage at some cost in their own tax reform measures. Currently, however, most state estate taxes are based on the state resident/decedent's federal estate tax bill.

In sum, without the estate tax, a few families build up tremendous wealth, which may impede economic growth, sap the initiative of the next generation (why work, right?), foster social resentment (due to a growing gap between the haves and have-nots), and create private power centers that may undermine organized governments. Although estate taxes may be seen as double taxation of income, they also serve as a backstop for taxing real acquisition of wealth

Schwarzenegger, Buffett also spoke out in favor of higher property taxes in California, a move that put him in candidate Schwarzenegger's figurative doghouse. See Stuart Pfeifer & Christine Hanley, *The Recall Campaign: A Buffett-ing on Property Taxes: The Billionaire Advisor to Schwarzenegger Raises Some Hackles Among Neighbors in an Orange County Enclave for Prop. 13 Remarks*, L.A. TIMES (Valley Ed.), Aug. 19, 2003, at B1.

⁶⁷ I differentiate the two in this way: An elected representative has certain constituents in his or her district or state. The public interest is that of the larger nation or society as a whole.

that may have resulted from the decedent's avoidance of income tax despite vast income.⁶⁸ At the margin, the estate tax softens the rough edges of inequality, aids social harmony, and provides at least some hope that the heirs of the wealthy will have some incentive to work productively (although it may be that after the first billion, it's hard to be motivated no matter what).

Although there is certainly room for debate, I think the cost-benefit analysis regarding the estate tax is, to use George Tenet's famous term, a "slam dunk."⁶⁹ In an era of greater economic plenty and government solvency, the case might be much closer. Today, however, the overriding truth is that the estate tax is a relatively painless way of raising needed revenue from sources that, literally and figuratively, will not miss the money. The decedent is of course dead and beyond being concerned (as the saying goes, "you can't take it with you") while the heirs of estates large enough to be subject to the tax will receive large inheritances in spite of the tax. Given the declining marginal utility of money (a person gets less enjoyment from his or her billionth dollar than from his or her first dollar), there just is not all that much pain inflicted on the wealthy from a one-shot tax that merely skims off the upper crust of large accumulated wealth.

The scope of this comment does not permit more seriatim discussion of examples of bizarre political behavior reaching counter-intuitive or even clearly erroneous decisions on matters of public policy. Suffice it to say that this seems to happen a lot in modern America, with the furor against the estate tax simply serving as a clear recent example of irrational public policy resulting from demagoguery and electioneering rather than lawyerly analysis. From Arizona's nearly bankrupting tax credits given to SUV owners⁷⁰ to the Iraq War, state and federal governments seem to continue to do unwise things based on inadequate analysis and discussion of public policy issues. This history reflects a comparative absence of the hard-headed legal analysis and the principled, problem-solving negotiation law schools teach and most of the legal profession professes to practice.

But if lawyer-politicians perform so poorly in this regard, how can we hope to achieve the improvements in dispute resolution sought by Professor Menkel-Meadow? Part of my argument is that we cannot and will not see great gains in public policy dispute resolution until lawyer-politicos act more like highly professional lawyers and less like opportunistic politicians. In addition, greater presence of lawyers in political office and positions of political leadership may be necessary. At the same time, I acknowledge that much of the Menkel-Meadow thesis and methodology applies to what might be termed "small-p" politics that is lower profile and, hence, less subject to many of the

⁶⁸ As President Bush himself has quipped, he favors low taxes because rich people always find ways to avoid paying taxes. See *America's Fiscal Shock: The American Economy*, THE ECONOMIST, Oct. 4, 2001, at 16. Finally, a fact on which Bush and I agree. But my response to this is to continue to have gap-filling estate tax to catch at least some of the money flowing to the wealthy that the income tax probably misses.

⁶⁹ See BOB WOODWARD, PLANT OF ATTACK 437-41 (2004) (former CIA Director George Tenet told President Bush that it was a "slam dunk" sure thing that Iraq had weapons of mass destruction - Tenet has thus far been completely wrong in that assessment).

⁷⁰ See Bill Hart, "Rainy Day Fund" Ignored: *Economists State Money Woes Avoidable*, ARIZ. REPUBLIC, Oct. 7, 2002, at 1A.

negative forces of modern mega-politics (e.g., huge need for funds; electronic media dominance; oversimplification of issues and demagogic attacks on opponents). In many sub-areas of policymaking, lawyers may indeed serve as valuable transactional engineers in the deliberative process, assuming that the lawyers involved possess and display high standards of professional conduct.

And even though there is promise, there remains danger. For example, Menkel-Meadow seems to approve of negotiated rule-making and similar dispute resolution as an alternative to pitched electoral and rhetorical battle⁷¹ (e.g., "polluters" vs. "tree-huggers"). But whether such "neg-reg" (negotiated regulation) succeeds and serves the public interest depends to some extent on which interests are invited into the process and allowed to bring a lawyer to the table. The "client" of the public interest must have a representative in the process but this does not happen as a matter of course when competing interest groups are convened. Enlightened self-interest in the Adam Smith vein may work well for market exchanges, but will it work so well for political trading among comparative elites?

Similarly, Menkel-Meadow advocates dialogue, discourse, and use of set procedural rules for productive discussion.⁷² These are valuable suggestions, but they are also, in my view, courses of behavior that work only if other participants in the process are dealing in good faith in such negotiations. Although this may take place with some frequency in more confined arenas of policymaking, it seems not to be the case with capital P politics, particularly during election years.

And, to return to a favored theme of mine: we must not be so naively optimistic about dispute resolution that we focus only on negotiation, volitional resolution, and obtaining agreement. In many cases, political gulfs may be too wide or some participants too opportunistic to effect a sound negotiated resolution. In such instances, participants acting in good faith may need to devote their resources to legal adjudication or straightforward political decisionmaking rather than protracted negotiation. Law and elections provide default rules for resolving conflict and there is no shame in resorting to these means when they are conducted fairly and on the merits.⁷³

CONCLUSION

As one noted amateur anthropologist (Billy Joel) famously observed, the "good old days weren't all that good and tomorrow's not as bad as it seems." It would be a mistake to read my commentary as suggesting that America is on the brink of some great apocalypse due to the decreasing influence of lawyers and the legal profession and my perceived slouching of the legal profession in the face of more powerful economic and social forces. The country may be on the brink of serious difficulty in many ways but this results from a number of other factors, including what I regard as some horrendously bad decisionmaking by some elected officials and a failure of either analysis or courage on the

⁷¹ See Menkel-Meadow, *supra* note 1, at 350-51.

⁷² See *id.* at 353-54.

⁷³ See generally Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247 (2000).

part of others. Nonetheless, the country will probably continue to function reasonably well as an industrial democracy.

Thus, it would be a mistake to overstate the debasement of political discourse and dispute resolution and the contribution of the declining role of lawyers in that debasement. But it would also be a mistake to overly minimize the downhill political trend and the degree to which reduced lawyer influence (and/or reduced lawyer professionalism) has helped fuel the trend. When the potentially positive contributions of lawyers to the political system are reduced, the system suffers. Instead of having the benefit of more principled analysis and negotiation of disputes, the system sees more polished efforts at winning without much reference to objective principles of good governance and lawyer-like rational analysis of problems and proposed solutions. The net result is poorer dispute resolution in the public arena and poorer public policy outcomes.

As members of the legal profession and citizens of a venerable democracy under stress, we should have some concerns about these developments and some motivation to work toward an increased role for the emerging modern lawyerly skills of principled negotiation and dispute resolution in the public arena. In addition, one might hope that the core legal training of lawyers as "officers of the court" and fiduciaries toward their clients (and not merely win-at-all-cost advocates) might inject some greater substantive rationality and civility into the political process.

My hope is that today's reduced influence of lawyer-politicians is but the bottom of a cycle that will soon pass. But the disturbing possibility remains that changes in the practice of law and the world of practical politics has permanently reduced the role of lawyer-politicians and their potential to contribute to the improvement of public policy dispute resolution. Professor Menkel-Meadow's ideas for improved public policy dispute resolution are well worthy of pursuit. But overlaying all of this is the brooding omnipresence of the possibility that the system that is the crucible for applying her suggested techniques is itself becoming permanently debased.