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# The Rule of Law in an Unruly Age

CRAIG BRADLEY*

## INTRODUCTION

"The first thing we do, let's kill all the lawyers."[1] Shakespeare's admonition is often cited to show that antipathy toward lawyers is both longstanding and intense. What is less well known is that the reason the rebels urge this course in *King Henry the Sixth, Part II* is so their claimant to the throne could act the tyrant—unconstrained by the dictates of law.

Similarly, it is generally not understood that comparatively large numbers of lawyers in America today are a necessary aspect of a uniquely American view of society that is characterized by distrust of institutional power, both governmental and private, and a high regard for individual rights. In fact, because of these attitudes, law is more influential than such institutions as churches, schools, families, political parties, and unions.[2] It has become the predominant external influence on how we, as well as these institutions, conduct affairs.

This extravagant-sounding claim is limited to law as an "external" force. Various internal motivations, such as personal moral codes, religious beliefs, individual psychological makeup, and concerns about finances, romances, and family may have a greater influence on our behavior than does the law. But law has become the greatest outside force and has a major impact on decisions that we consider to be highly personal. To cite but one example at the outset: As a result of public pressure, law changed in the fifties and sixties to make divorce easier. This promoted individual self-determination but, by leading to more broken homes, also weakened the influence of the family on the lives of many children. More divorces also required more lawyers.

Law is not a "brooding omnipresence in the sky" that has a separate existence from the nation's people. Rather, law is created by courts and legislatures acting at the behest of individuals who sue manufacturers for defective merchandise and apply for patents; businesses that sue for breaches of contract; and interest groups such as the AARP and the NRA that lobby for new laws that benefit their members. It affects every American, but it is also affected by every American who votes, litigates a lawsuit, or joins a political party or interest group. In short, to paraphrase Pogo, "We have met the law, and it is us!"[3]

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1. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2, line 72 (Norman Sanders ed., Penguin Books 1981).

2. For example, in 1966, 42% of Americans had a "great deal" of confidence in Congress, 41% in the Executive Branch, 55% in major companies, and 73% in medicine. By contrast, in 1994, the figures were 8% (Congress), 12% (the Executive Branch), 19% (major companies), and 23% (medicine). ROBERT J. SAMUELSON, THE GOOD LIFE AND ITS DISSENTERS: THE AMERICAN DREAM IN THE AGE OF ENTITLEMENT 1945-1995 (1995), *reprinted in* NEWSWEEK, Jan. 8, 1996, at 24, 32.

3. Of course lawyers do not merely carry out the law but are responsible for forming it as well. For a discussion of how lawyers have done a poor job in forming the criminal justice system, see Craig Bradley & Joseph Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. (forthcoming 1996). While public confidence in lawyers has also declined in this period, that is not inconsistent with the argument of this Article that the influence of *law* has grown.

It is only recently that law has emerged as the preeminent external force in our lives. I begin with a consideration of the decade of the 1950's, because that decade marks the end of the era of certitude and duty, and a relatively weak role of law—and the beginning of an era in which law, as a means of expressing our lack of trust in institutions and our desire to control our own destinies, has grown immensely important.

## I. THE 1950'S: THE AGE OF CERTAINTY

As John Updike observed in a retrospective on the fifties:

> The 1950s' condition as a postwar decade helps explain the something prim and spartan about it. There was a military rigor in its ticky-tacky housing developments and sternly boxy skyscrapers; a kind of platoon discipline in its swiftly assembled families. The nation was still war-hardened; when the nation's young draftees were asked to do battle in Korea, few thought to protest or resist, though few went with enthusiasm. When Senator McCarthy announced that traitorous Communists pervaded the government and that only draconian measures could defeat this inner enemy, many were willing to believe him; blacklists, congressional show trials and meaningless, redundant loyalty oaths for a time gave patriotism an ugly face. *The citizens of the '50s were relatively docile, with more consciousness of duties and less of rights than we have.*[4]

In that decade, when I was growing up, Americans held certain truths to be self-evident. Among these were that America was the greatest country that had ever stood upon the earth. It was a colossus with the strongest economy,[5] the most powerful army, the best political system, and a clear-headed world view unencumbered by such deviant influences as colonialism, communism, royalism, Muhammadanism, or any of a variety of other destructive "isms" to which the rest of the world was heir.[6] Our factories produced superior products—the best in the world in virtually every industry. The label "Made in Japan" was like a scarlet letter "I" for "inferior," found mostly on cheap party favors. General Motors was the greatest industrial concern that the world had ever seen.[7]

Of course we knew that things were not perfect, but we believed that with enough hard work and good-old American know-how, they could be made better. It was widely believed, for example, that poverty in America was a foe that would soon be vanquished.[8]

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4. John Updike, *The '50s: Each Man Was an Island*, NEWSWEEK, Jan. 3, 1994, at 37 (emphasis added).

5. In 1949, the British historian Robert Payne declared of America, that

> "no other power at any time in the world's history has possessed so varied or so great an influence on other nations. . . . Half of the wealth of the world, more than half of the productivity, nearly two-thirds of the world machines are concentrated in American hands; the rest of the world lies in the shadow of American industry . . ."

DAVID HALBERSTAM, THE FIFTIES 116 (1993).

Halberstam describes the contemporary media's praise of America. In 1954, *Life* magazine declared, "'Never before so much for so few.'" *Id.* at 496. *Fortune* magazine exalted in 1956 that "'[n]ever has a whole people spent so much money on so many expensive things in such an easy way as Americans are doing today.'" *Id.*

6. President Eisenhower stated that America was "the mightiest power that God has seen fit to put upon His footstool." DOUGLAS T. MILLER & MARION NOWAK, THE FIFTIES: THE WAY WE REALLY WERE 90 (1977).

7. Halberstam notes:

> If ever there was a symbol of America's industrial might in [the immediate postwar period], it was General Motors, a company so powerful that to call it merely a corporation seemed woefully inadequate. It was the largest, richest corporation in the world and would, in the coming decade, become the first corporation in the history of mankind to gross a billion dollars.

HALBERSTAM, *supra* note 5, at 118.

8. Miller and Nowak point out that

> [w]hen poverty was noticed at all it was generally assumed to be a temporary aberration; a few more years of an upswinging GNP and it would be eliminated. Thus David Riesman and Nathan Glazer in a 1955 essay related how "15 years of prosperity" had caused the "mass of underprivileged people" to

It was taken for granted that the future would be even better than the present. We were regularly treated to films, drawings, and narration that depicted a "Life in the Twenty-First Century" that was prosperous, enlightened, happy, and healthy for virtually all Americans. For example, philosopher Morris Ernst predicted in 1955 that by 1976 we would enjoy plastic cars and tires lasting for decades and would be able to control the weather. RCA's David Sarnoff predicted that every home would be equipped with an atomic generator to provide a lifetime of power.[9]

The self-confidence and exaltation of the American way of life was, of course, strongly influenced by the two decades that had gone before—first the desperate times of the Depression, followed by the desperate times of World War II, as well as by the desolation and destitution of the rest of the world after the war.[10] While Americans were very well off in the fifties compared to the rest of the world and compared to any previous period in American history, that prosperity pales before that which we enjoy today. Nevertheless, at the time, Americans were a very confident and, by their lights, prosperous people.

The second plank of the American belief system, after "America is the Greatest," was that we perceived ourselves as a "Christian nation." We were a nation "under God," as our Pledge of Allegiance was modified to declare,[11] that enjoyed the special protection of the Almighty and was destined to carry out His mission of spreading our way of life to the rest of the world. We sent thousands of missionaries around the globe, to beam the light of Christianity into the dark depths of the pagan souls of unfortunate heathens from Afghanistan to Zanzibar. By the same token we supported the nominally "Christian" regimes of Chiang Kai-shek in China and Diem in South Vietnam against the godless Communists.

Adlai Stevenson reflected the popular view when he declared in the 1952 presidential campaign that "'God has set for us an awesome mission: nothing less than the leadership of the free world.'"[12] Thus, government and religion marched side by side; Christian Soldiers marching onward to spread Christianity, democracy, and capitalism to our less fortunate brethren. Senator Joseph McCarthy declared "'the fate of the world rests with the clash between the atheism of Moscow and the Christian spirit throughout other parts of the world.'"[13]

Likewise, President Eisenhower constantly proclaimed his Christian beliefs. "'Our government makes no sense,'" he declared, "'unless it is founded in a deeply felt religious faith.'"[14] The Republican National Committee pronounced Eisenhower "'not only the political leader but the religious leader of our times.'"[15] The popular culture

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"virtually disappear"....

MILLER & NOWAK, *supra* note 6, at 122.

Miller and Nowak add that the essayists did comment, as an afterthought, that there were a few enclaves where poverty could still be found. *Id.*

9. *Id.* at 48.

10. *See supra* text accompanying notes 5-6.

11. When this change was proposed, 69% of the public supported it, 21% opposed, and 10% had no opinion. 2 GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-1971, at 1140 (1972).

12. MILLER & NOWAK, *supra* note 6, at 10. "That America would succeed in fulfilling its God-given mission few doubted." *Id.* Secretary of State John Foster Dulles claimed that "'there is no way to solve the great perplexing international problems except by bringing to bear on them the force of Christianity.'" *Id.* at 91.

13. *Id.* Similarly, J. Edgar Hoover urged people to encourage their children to be active in church because "Communists are anti-God." *Id.*

14. *Id.* at 90.

15. *Id.*

reflected this religiosity in such hit movies as "Ben Hur," "The Robe," and "The Ten Commandments." The Bible topped the bestseller list from 1952 to 1955, followed by Reverend Norman Vincent Peale's *The Power of Positive Thinking*.[16] In 1953, *Publisher's Weekly* related that "'the theme of religion dominates the non-fiction best-sellers.'"[17] Even popular music frequently was religious with hits such as "I Believe" and "The Man Upstairs."[18] In 1954, 75% of Americans declared that religion was "very important" in their lives.[19]

We were a nation of families, in which children were generally raised by two parents[20] who would remain married 'til death did they part. Divorce was rare[21] and disreputable.[22] Because of the durability of the family, the full-time presence of the mother, and the absence of mobility[23] and television,[24] parents were able to exercise great control over what their children saw and did, and thus, to an important extent, how they felt and thought. Moreover, in its early days, television reinforced the notions of family, church, and patriotism that the vast majority of Americans subscribed to, even if they did not necessarily practice them. This is in stark contrast to the television of today, which creates the impression that all families are dysfunctional.[25]

We also believed, at least early in the decade, that we had the best educational system in the world, a system that not only gave a superior basic education to all citizens but also provided an outstanding higher education, at both public and private universities, to all who had the necessary academic qualifications, regardless of their ability to pay. Once again, that educational system joined in the general cheerleading, teaching us that American history was "undimmed by human tears," but that Russian communism was the

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16. *Id.* at 86.

17. *Id.*

18. *Id.* at 87.

19. This figure hit a low of 53% in 1987 but, for reasons I shall discuss, has bounced back somewhat—to about 59% in 1993. *Gallup Poll Monthly*, Nov. 1993, No. 338, at 30.

20. Among families with children, the percentage headed by a married couple dropped from 89% in 1970 to 75% in 1992. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 61 (1993) [hereinafter 1993 STATISTICAL ABSTRACT]. No comparable statistics were available for the 1950's but, presumably, the percentages of two-parent families (excluding war widows) was higher.

21. The divorce rate for 1953 was 2.5 per 1000 population. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 59 (1955). The divorce rate for 1991 was 4.7 per 1000. 1993 STATISTICAL ABSTRACT, *supra* note 20, at 103.

22. For example, divorce was thought to be fatal to a politician's chance to become President. By 1980, Ronald Reagan was elected President with little attention being given to the fact that he had been divorced.

23. In 1950, there were 49.3 million motor vehicles registered in the United States, compared to 73.9 million in 1960, U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 545 (1970) [hereinafter 1970 STATISTICAL ABSTRACT], and 190 million in 1992. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 628 (1994) [hereinafter 1994 STATISTICAL ABSTRACT]. Only 7% of families had two cars in 1950, a number that had increased to 27% by 1969. 1970 STATISTICAL ABSTRACT, *supra*, at 546.

24. *See infra* text accompanying notes 64-65.

25. Halberstam explains:

> By the mid-fifties television portrayed a wonderfully antiseptic world of idealized homes in an idealized, unflawed America. There were no economic crises, no class divisions or resentments, no ethnic tensions, few if any hyphenated Americans, few if any minority characters. Indeed there were no intrusions from other cultures . . . .
>
> . . . [T]he family sitcoms reflected—and reinforced—much of the social conformity of the period. There was no divorce. There was no serious sickness, particularly mental illness. Families *liked* each other, and they tolerated each other's idiosyncracies.

HALBERSTAM, *supra* note 5, at 508-09 (emphasis in original).

very embodiment of evil.[26] In fact, all foreign cultures were suspect. Nor was the view of American moral superiority limited to elementary school curricula. It was also advanced by the intellectual elite. One commentator reported that "national self-congratulations ran through fifties writings as a secular cult of reassurance, a kind of wishful cheer—we're great, we're great, we're great . . . ."[27]

We were a nation in which, at the beginning of the decade at least, the separation of the races—de jure in the South and de facto in the North—was taken for granted. Any attempt by blacks to end this separation was met, in both the North and South, with violence.[28]

It was accepted that "a woman's place was in the home." Wives were expected to work to promote their husbands' careers[29] and to pull up stakes and move across the country whenever their husbands' job demanded it. The average American moved every five years, and for the white collar suburbanites it was more like every three years.[30] Employers, unencumbered by spousal concerns and constantly disrupting employees' community ties through transfers, became the primary focus of white-collar employees' lives. This influence, with its attendant conformity to corporate norms, was condemned in such books as Sloan Wilson's *The Man in the Grey Flannel Suit*[31] and C. Wright Mills' *White Collar*.[32]

For blue collar workers, the influence of labor unions was much greater in the fifties than it is today.[33] Major strikes, which could disrupt the entire national economy, were quite common.

In our relations with other countries we had a clear guiding principle that influenced almost every foreign policy decision: Communism was bad, and the Soviet Union, in

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26. The belief in the superiority of American education, if not in the moral and economic superiority of the United States, was shattered in October, 1957 when the Russians launched the Sputnik satellite. HALBERSTAM, *supra* note 5, at 626. The book, *Why Johnny Can't Read—and What You Can Do About It*, published in 1956, was ignored until Sputnik was launched. After Sputnik, it became a bestseller. *Id.*

27. MILLER & NOWAK, *supra* note 6, at 223. Miller and Nowak continue:

> The great majority of scholarly reassessments of the national scene corroborated the *Partisan Review* celebration of American virtues. "Why should *we* make a five-year plan for ourselves when God seems to have had a thousand-year plan ready-made for us?" asked Daniel Boorstin. America, eulogized Max Lerner, is "the only fabulous country." To Peter Viereck the United States "is the highest fulfillment of the honorable ideals of socialism (though achieved—significantly—not by a socialist means but by a democratic capitalism)". "Our society," concurred Jacques Barzun, "fulfills more and more purposes, recognizes the desires of more and more different kinds of human beings. It gives me music, others cyclotrons, and still others camping sites and football games." Such national self-congratulations ran through the fifties writings as a secular cult of reassurance . . . .

*Id.* at 222-23.

28. Miller and Nowak discuss the violence occasioned when a black family tried to move into Levittown, Pennsylvania, MILLER & NOWAK, *supra* note 6, at 198, and Halberstam describes the near civil war when blacks attempted to attend Little Rock, Arkansas' Central High School. HALBERSTAM, *supra* note 5, at 667-72.

29. Halberstam notes:

> The ideal fifties women were to strive for was articulated by *McCall's* in 1954: togetherness. A family was as one, its ambitions were twined. The husband was designated leader and hero, out there every day braving the treacherous corporate world to win a better life for his family; the wife was his mainstay on the domestic side, duly appreciative of the immense sacrifices being made for her and her children.

HALBERSTAM, *supra* note 5, at 591. Halberstam quotes Mrs. Dale Carnegie as saying in 1955: "'The two big steps that women must take are to help their husbands decide where they are going and use their pretty heads to help them get there.'" *Id.* at 591-92.

30. "In the Long Island Levittown, for instance, about 3000 of the 17,600 dwellings changed hands annually. By 1958 some 33 million Americans [almost 20%] moved each year." MILLER & NOWAK, *supra* note 6, at 136.

31. SLOAN WILSON, THE MAN IN THE GREY FLANNEL SUIT (1955).

32. C. WRIGHT MILLS, WHITE COLLAR; THE AMERICAN MIDDLE CLASS (1951).

33. In 1954, 25% of the workforce belonged to unions. This figure continued to rise into the 1960's, where it peaked at 29.5% in 1964. 1970 STATISTICAL ABSTRACT, *supra* note 23, at 238. *Compare id. with infra* note 52.

league with Red China, was trying to spread it all over the world. Only constant vigilance on our part would prevent this from happening. It was fear of communism, egged on by our "Onward Christian Soldiers" mentality, that triggered the Marshall Plan, the Korean War, and our involvement in Vietnam after the French defeat at Dienbienphu in 1954. This principle also had a powerful influence on our domestic policies.

The environment was something to be conquered, not preserved. The highest mountains were to be climbed, wild animals to be shot, and "wetlands" (known at the time as "swamps") to be drained and turned into subdivisions. Insects were eradicated with DDT.[34] Products that could be used once or twice and then be thrown away were highly desirable. Throughout the decade, cars—which changed every year—grew steadily larger and more powerful. No one worried about how much more fuel they consumed,[35] how much air pollution they caused,[36] or even the carnage that occurred when two of them collided on the highway.[37]

Our attitude toward our government was more complex. Throughout most of the fifties, the government was led by President Eisenhower, an avuncular, highly esteemed war hero. Everybody liked Ike.[38] If Ike said that nuclear radiation was a boon to mankind and perfectly safe, we believed him. If an American spy plane was shot down by the Russians and Ike said he knew nothing about it, we believed him. Perhaps the second most trusted, and most powerful,[39] American was FBI Director J. Edgar Hoover, "the man who shot Dillinger," who was prepared to dish out two-fisted American justice to any crooks or "Commies" he could find. He constantly reminded us of the terrible threat posed by the Communists, and we believed him.[40]

Fears of the Soviet Union and the threat of Communist expansion may have been overblown, but they were not unfounded. Russian expansionism in Eastern Europe, including the Berlin blockade, led to realistic fears that Western Europe was next on the Communist agenda. In 1949, the Chinese Communists were victorious in China and Russia exploded its first atomic bomb.[41] These events led to powerful concern that this happy, prosperous American way of life was threatened with attack. In 1950, the conviction of Alger Hiss, a mid-level State Department employee, for perjury, and the arrest of Klaus Fuchs, formerly of the Manhattan project at Los Alamos, for selling

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34. A *Fortune* article, "The Dawn of Farming's Chemical Age," praised the pesticides DDT, chlordane, and aldrion, all since linked to environmental damage. MILLER & NOWAK, *supra* note 6, at 48.

35. In 1950, average mileage per gallon for passenger cars was 14.95 miles per gallon ("mpg"). This went steadily down as cars were made more powerful and reached 13.91 mpg in 1968. 1970 STATISTICAL ABSTRACT, *supra* note 23, at 548. However, by 1981, average mpg for "household vehicles" had increased to 20.7 and was 22.1 by 1989. 1993 STATISTICAL ABSTRACT, *supra* note 20, at 625.

36. In 1950, total emission of carbon monoxide in the U.S. was 86.4 million metric tons. This rose, with the expanding economy, to 123.6 million in 1970. By 1991, despite continued expansion of the economy, total emissions of carbon monoxide had dropped to 62.1 million metric tons. Lead emissions have dropped from 199.1 million metric tons in 1970 to 5 million in 1991. All forms of emissions have dropped substantially since 1970 except nitrogen oxides. 1993 STATISTICAL ABSTRACT, *supra* note 20, at 225.

37. In 1950 there were 23.1 deaths per 100,000 people in motor vehicle accidents. In 1960 there were 21.3. 1970 STATISTICAL ABSTRACT, *supra* note 23, at 57. In 1990 there were 18.8. 1993 STATISTICAL ABSTRACT, *supra* note 20, at 98. However, in 1950, there were only 458 billion total vehicle miles traveled, compared to 718.8 billion miles in 1960 and 2.2 trillion miles in 1991. 1970 STATISTICAL ABSTRACT, *supra* note 23, at 542; 1993 STATISTICAL ABSTRACT, *supra* note 20, at 616. Thus the per capita deaths per mile traveled have dropped drastically.

38. In May, 1953, President Eisenhower enjoyed an approval rate of 74%, with only 10% disapproving of his job performance. 2 GALLUP, *supra* note 11, at 1142.

39. "Some thirty-five years after these events, it was hard to believe that at one time Hoover had been one of the two or three most powerful men in the country." HALBERSTAM, *supra* note 5, at 336.

40. *See, e.g.*, J. EDGAR HOOVER, MASTERS OF DECEIT: THE STORY OF COMMUNISM IN AMERICA AND HOW TO FIGHT IT (1958).

41. *See* MILLER & NOWAK, *supra* note 6, at 13.

atomic secrets to the Russians via the Rosenbergs,[42] convinced many that the Communist threat from within was greater, or at least more insidious and troubling, than the threat from without.

In 1950, when Senator McCarthy claimed to have a list of some 205 State Department employees who were "'known to the Secretary of State as members of the Communist Party,'"[43] the assertion was widely believed. Indeed, two months after McCarthy's charge, Attorney General Howard McGrath declared:

> "There are today many Communists in America. They are everywhere—in factories, offices, butcher shops, on street corners, in private business—and each carries in himself the germs of death for society. . . . [They] are busy at work—undermining your Government, plotting to destroy the liberties of every citizen, and feverishly trying, in whatever way they can, to aid the Soviet Union."[44]

Thus, while the top people in government were widely trusted in a way that now seems naive in the extreme (especially as to J. Edgar Hoover), lower level officials and other prominent citizens were mistrusted to a degree that also now strikes us as excessive.

It was, in short, a decade dominated by certainties: that American democracy, business, education, religion, and world view were good and right, and getting better, and that all others ranged from corroded and corrupt (England and France) to evil (Russia and China). All of our institutions cooperated, either directly or through the mass media, in insisting that citizens, members, students, employees, and parishioners be committed to, and not deviate from, "the American Way"—a "way" that included obedience to these same institutions.

We were even certain about our fears—of both Russian aggression, including nuclear attack, and Communist infiltration of our government and society. But this fear only caused us to cling more tenaciously to religion, family, union, employer, and "Americanism" generally, as havens from the storm of uncertainty that had characterized the preceding two decades and that threatened to flood this one as well.[45] The backyard fallout shelter, in which we would crouch with our family and our God, while our gallant military rained destruction on our enemies, foreign and domestic, symbolized both the optimism and the pessimism of the era.

There was, however, a major *un*certainty that developed as the decade progressed: the status of blacks and how and when the destructive separation of the races was to end.[46] This issue was to open the door of individual rights that so dominates our social thinking today.

Douglas Miller and Marion Nowak have summarized the decade in this way:

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42. *See id.* at 13-14, 27-28.

43. This announcement occurred in Wheeling, West Virginia on February 9, 1950. *See id.* at 29.

44. *Id.* In 1951, when President Truman fired General MacArthur, Senator Jenner of Indiana declared that "'this country is in the hands of a secret inner coterie which is directed by agents of the Soviet Union.'" *Id.* at 57.

45. *See id.* at 92.

> Fear, then, was probably the major cause of the phenomenal return to religion. People turned to religion in record numbers to find hope in an anxious world. Believing that "atheistic Communism" threatened America both without and within, Americans saw the world in terms of good and evil, godly and godless. The insecurity brought on by hydrogen bombs and atomic spies made the churches seem the mainstay of traditional values.

*Id.*

46. John Updike agrees that "Black equality was the main domestic issue: Truman desegregated the armed forces in 1950, and Eisenhower reluctantly sent troops to Little Rock in 1957 to enforce the Supreme Court's 1954 decision outlawing segregated schools." Updike, *supra* note 4, at 37.

> [In light of the fear of nuclear annihilation and insecurities caused by changing lifestyles] some of the most important social and cultural phenomena of the fifties are understandable. The overwhelming emphasis on the family gave people a sense of place and personal identity. The massive return to religion provided individuals with a sense of security; it reassured them that the traditional moral verities were still valid. Sustained and successful attacks against progressive education were another manifestation of the search for traditional, absolute values. So too was the intellectual emphasis on consensus. Historians, sociologists, and other social scientists played down conflict and instead stressed the harmonious and enduring nature of American democratic values. Blacks and other nonwhites, who did not share equally in America's bounty, were assured by the white media that they never had it so good.[47]

## II. THE DEATH OF CERTAINTY

Things *are* radically different now. The certainties of the fifties, many of which existed only because everybody refused to give in to *un*certainty, have broken down. Despite the general triumph of democracy around the globe, Americans are highly distrustful of the operation of our own democratic system. Although government is less captive to powerful financial interests than it was in the fifties, our *concern* with the power of those interests is greater. This concern is expressed in laws regulating voting practices, political contributions, formation of election districts, and term limits. It is also both expressed, and exacerbated, by the vastly expanded press coverage devoted to the activities of public officials. As *Newsweek* magazine has pointed out, "[d]eference [to political leaders] seems quaint; the operative ethos of modern journalism has been described, not unfairly, as 'mindless aggression.'"[48]

Confidence in American industry is similarly far less than the arrogant superiority felt in the 1950's. In a sense, this lack of confidence is justified, for we are no longer the preeminent economy, vastly superior to all others. Moreover, we do not see the sort of year-to-year progress that was present through much of the fifties and sixties. But we are still the world's largest economy, and we are, by *any* economic measure, vastly better off than we were at any time in the fifties. Even compared to other countries, when buying power is taken into account, we rank second only to Luxembourg in our standard of living.[49] Disposable per capita income *in constant dollars* is nearly two and one-half times greater than it was in 1950.[50] For example, in the early fifties at least, the following things that we take for granted either did not exist or were not generally available: enclosed shopping malls, television (much less cable and VCRs), freezers, two-car families, home air conditioning, family rooms, jet travel, and preschools.

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47. MILLER & NOWAK, *supra* note 6, at 11. In *The Lonely Crowd*, David Riesman and Nathan Glazer similarly expressed concern that American values and ambitions were derived not from their own desires and beliefs but from a value system imposed by society. *See* HALBERSTAM, *supra* note 5, at 533.

48. Evan Thomas, *The Tricks of Memory*, NEWSWEEK, Dec. 26, 1994/Jan. 2, 1995, at 40.

49. The World Bank Atlas shows that although six countries have higher per capita incomes than Americans, when buying power is taken into account, only Luxembourg ranks as more prosperous than America. *Americans Earn Less Than Citizens of Other Countries*, HERALD-TIMES (Bloomington, Ind.), Dec. 30, 1994, at A3. Interestingly, Luxembourgers also consume the most alcohol of any country in the world, further suggesting that prosperity does not necessarily bring happiness. Anne Cronin, *The Tipplers and the Temperate: Drinking Around the World*, N.Y. TIMES, Jan. 1, 1995, § 4, at 4.

50. Disposable per capita income in constant (1987) dollars rose from $6214 in 1950 to $6842 in 1955 and $7264 in 1960. By 1993, it had risen to $14,330. 1994 STATISTICAL ABSTRACT, *supra* note 23, at 451.

A major reason for our lack of confidence in industry mirrors the reasons for our lack of confidence in government: we now know, much more than we did then, how these institutions really work. We know that government can lead us into a war that kills thousands for no good reason, and we know that industry will knowingly build a car that is "unsafe at any speed."[51] We know that industry will also blithely pollute the environment and that, if not pressured, Congress and government regulators will allow them to do it.

The direct influence of labor unions and employers on how people act, think, and vote has declined greatly since the fifties. Corporations must confront two-career families, making frequent transfers—as well as value-reinforcing wives' tea parties—impossible. Union membership has declined drastically from highs in the late fifties and early sixties.[52] Try to remember the last time a national strike had any significant impact on the country.[53]

Our educational system today also receives low grades when compared with certain other countries, even though, again, the resources devoted to education far exceed those of the fifties.[54] We are also vastly better educated now than then. About 80% of Americans are high school graduates today, compared to only 34% in 1950. Twenty-one percent of today's Americans are college graduates compared to 6% in 1950.[55] If confidence in our educational system was unduly high in the fifties, today it may be unduly low.

Similarly, while church attendance has held fairly steady throughout the postwar decades, the influence of religion on people's lives and political views is considerably less than it was forty years ago.[56] Certainly the Vatican complains regularly that Catholics are not hewing to the Church's dictates as they should.[57] Nobody would now suppose, as was widely feared when John F. Kennedy was running for President in 1960, that a Catholic President would owe his first allegiance to Rome.[58] Nor do religious themes dominate the popular or political culture to the extent found in the fifties.

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51. RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1972) (referring to Chevy Corvairs).

52. By 1983, union membership had dropped to 20.1%, and as of 1993, only 15.8% of the workforce belonged to unions. 1994 STATISTICAL ABSTRACT, *supra* note 23, at 439.

53. The Air Traffic Controllers strike of 1982 was the most significant strike in recent times, and it was crushed by the firing of the strikers.

54. Expenditure on education rose from $8.8 billion in 1950 to $65.8 billion in 1970, 1970 STATISTICAL ABSTRACT, *supra* note 23, at 104, to $414 billion in 1991. 1994 STATISTICAL ABSTRACT, *supra* note 23, at 154. These figures do not take into account inflation and the larger numbers of students served by the system. As a percentage of gross national product, education expenditures rose from 3.4% in 1950 to 7.1% in 1970. 1970 STATISTICAL ABSTRACT, *supra* note 23, at 104. No comparable figures were available for 1990. In constant dollars, education expenditures in 1970 were about two-thirds of those in 1991. 1994 STATISTICAL ABSTRACT, *supra* note 23, at 154.

55. 1993 STATISTICAL ABSTRACT, *supra* note 20, at 152. College graduates have risen from 6.2% of the population over age 25 in 1950 to 21.3% in 1992. *Id.*

56. The percentage of people who considered religion "very important" in their lives has shrunk from 75% in 1952 to 58-59% in the nineties. GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1993, at 72-73 (1994).

57. James Brooke, *Protestant Message Takes Root in Brazil, Catholicism Faces Strong Challenge*, SAN DIEGO UNION TRIB., July 4, 1993, at A32. "A generation ago it would have been nearly unthinkable for Catholics to disagree in public over something as fundamental as the church's opposition to abortion." Richard Ostling, *MacNeil-Lehrer News Hour: Abortion* (PBS television broadcast, Aug. 9, 1994).

58. When Senator Ted Kennedy hinted that his Mormon opponent might be suspect because of his religion, he was quickly hooted down. Of course, Kennedy was the last person in America who could have credibly made such a claim. *Across the U.S.: News from Every State*, USA TODAY, Sept. 29, 1994, at 8A.

Finally, the mainstay of our foreign policy throughout the entire post-War era has been removed. Without anti-communism as our guiding light, our foreign activities are tentative and lacking in a clear purpose.[59]

The major elements of our world view in the fifties have been pulled out from under us. Our sense of our country's place in the world, of our economy and our religion, our views of race and education, and even of who our enemies are and whether our national policies are just, have become murky where once we perceived clear answers, despite or perhaps because of the fact that Americans in the 1950's were, compared to today, uninformed, intolerant, uneducated, ill-traveled, and poor. In short, to paraphrase a 1950's cigarette commercial, we seem to be spending more now, but enjoying it less.[60]

This trend can be explained by a series of developments that occurred primarily since the fifties began. As people have become more educated and familiar with scientific discoveries, some of the traditional underpinnings of religious beliefs have been removed. For example, a vaccine was shown to be a more effective way to combat polio than was prayer, and for many, the Darwinian approach to evolution has disproved Biblical claims. While religion remains an important influence in many people's lives, the fastest growing religions in the United States today are not those that insist on rigid adherence to hoary church dogma, but the so-called "cafeteria religions" that claim to "take the best and leave the rest" of older religions.[61]

Our view of our educational system was shaken first by Sputnik and then by comparative studies of foreign systems whose students seemed consistently to outperform ours on standardized tests. Prior to Sputnik and with Europe and Japan in ruins in the early fifties, our view of our educational system may not have been well informed, but it was temporarily correct. Now we are more aware of its failings, and the competition is much stiffer. Finally, our average educational statistics tend to be dragged down by the substantial percentage of our population that lives in substandard conditions and thus often produces substandard school work and test scores, as well as by greater numbers of students taking college entrance exams, rather than any decline in the number of high scorers.[62]

Complacency in American industry led to sloppy manufacturing and inadequate cost-control measures, leaving American markets ripe for conquest by more vigorous and efficient competitors with more modern factories, notably the Germans and Japanese. In Americans' rare trips abroad in the 1950's,[63] as well as what we read and heard of other countries, we were constantly reminded of the strength and grandeur of America by the weakness of the local currency and poverty of the local living conditions. Now when we travel, we are reminded of the weakness of the American dollar and, if the Japanese do not actually *look* more prosperous than we do, they *must* be if they can afford to spend three dollars for a cup of coffee.

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59. It was easy, for example, to justify our intervention in the Dominican Republic in 1965 as "fighting communists." Our reasons for intervention in 1994 on the other side of the same island, in Haiti, are much less clearly defined.

60. *See* Nancy Millman, *Cigarette-makers in Dilemma*, CHI. SUN-TIMES, Jan. 17, 1992, at 43. The cigarette commercial paraphrased is from Camel Cigarettes. It queried, "Are you smoking more now, but enjoying it less?"

61. Barbara Kantrowitz, *In Search of the Sacred*, NEWSWEEK, Nov. 28, 1994, at 53, 55.

62. In 1967, the average verbal score on the SAT was 466, and the average math score was 492. By 1993, these averages had dropped to 424 verbal and 478 math. However, the percentage of students over 600 has stayed constant at about 8% on verbal and has risen from 15.6% to 18.8% on math. 1994 STATISTICAL ABSTRACT, *supra* note 23, at 174.

63. Americans took only 676,000 trips abroad in 1950 as compared to 16 million in 1990. 1993 STATISTICAL ABSTRACT, *supra* note 20, at 259.

Finally, after the exposure of McCarthy as a fraud, the debacle of the Vietnam War, and the Watergate disclosures, we have become considerably more cynical about the wisdom and integrity of our leaders, even though we may not doubt their essential patriotism. However, while Watergate and Vietnam were, respectively, the most disastrous political scandal and war in American history, they and other recent events have had a much more profound impact on Americans' attitudes toward government than they would have had they occurred thirty years earlier.

The major reason for the impact of these crises, and for our much more cynical, if better informed, view of every aspect of American society is the quintessential 1950's development: television. In 1946 there were only 7000 television sets in the United States and only 4.4 million by 1950. By 1960, there were 50 million sets.[64] The nightly news began in the fifties as a drab fifteen-minute affair; now it is one-half hour of live international coverage in living color plus numerous news-related shows ranging from *Meet the Press* to *60 Minutes* to *A Current Affair*, that keep Americans up to date and make them familiar with national figures in a way that would have seemed bizarre in 1952.[65]

Familiarity with our political leaders and issues, as we view them in our living room every night, naturally leads to a degree of contempt. This natural reaction is exacerbated by political advertising that portrays both candidates as scum, one of whom then becomes our representative or President. It is further aggravated by radio call-in shows in which malcontents are overrepresented and encouraged to overreact. Even the entertainment shows on television, featuring the likes of Roseanne and the work of the Baltimore Homicide Squad in gritty detail, give us a far gloomier, if more realistic, slant on life than did the Nelsons and the Cleavers, or even Jack Webb and Sheriff Matt Dillon.

## III. THE RISE OF LAW

Our 1950's values, for better or for worse, have eroded. What does this have to do with the law? A great deal. Prior to the arrival on the scene of the regulatory state, legal practice was largely independent of government. Lawyers drafted and enforced contracts and wills, searched titles to real property, and tried criminal cases, mostly for individual clients.[66] As long ago as 1948, however, Robert Swaine of the Wall Street firm Cravath, Swaine and Moore declared that "by far the greatest single part of the practice of law since 1928 has had to do with the efforts of clients to comply with federal legislation and to accommodate their businesses to the vagaries of the many federal regulatory agencies and executive departments."[67]

While this is an overstatement as applied to 1928, or even 1948, it is surely true today. In 1951, there were about 222,000 lawyers in this country.[68] The number has grown

64. MILLER & NOWAK, *supra* note 6, at 344. By 1992, there were 192 million television sets and over 98% of households had them. 1993 STATISTICAL ABSTRACT, *supra* note 20, at 561. Also, only 62% of Americans had telephones in 1950, U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 559 (1981), compared to 94% in 1992. 1993 STATISTICAL ABSTRACT, *supra* note 20, at 561.

65. My 10-year-old son, for example, knew the name of the President's cat, and the names of the last five Presidents, but did not know the name of the Governor of Indiana, who is rarely seen on television.

66. *See, e.g.*, SOL M. LINOWITZ, THE BETRAYED PROFESSION 70 (1994).

67. 2 ROBERT T. SWAINE, THE CRAVATH FIRM 713 (1948), *quoted in* LINOWITZ, *supra* note 66, at 77.

68. 1970 STATISTICAL ABSTRACT, *supra* note 23, at 155.

steadily to 355,000 in 1970, 542,000 in 1980, and 805,000 in 1991.[69] Court actions have similarly increased, with 52,000 civil cases terminated in U.S. district courts in 1959, compared with 72,000 in 1969, and 225,000 in 1993.[70] The number of lawyers in government at all levels has paralleled this increase, from 20,000 in 1951[71] to 66,000 in 1991.[72] Thus, both the total number of lawyers and their number in government have more than tripled since 1951.

It is impossible to conclude from this data alone that, for every lawyer employed by government, ten jobs for other lawyers are created, but there is a substantial connection. Each new law requires lawyers in government to write and enforce it. This in turn creates a need for lawyers to lobby for or against the law, or specific provisions of it, even before passage. Once it is passed, lawyers must inform their clients of its requirements, develop strategies to minimize the law's deleterious effects on their clients or their clients' businesses, and explain to clients what must be done, and what need not be done, to comply with the law. If the government regulators are not satisfied, then lawyers must be employed to negotiate and, as a last resort, litigate to resist government enforcement.

For example, according to the *New York Times*, "[i]n the 14 years since the Superfund was established, $22 billion has been spent, a sizable portion went to lawyers battling over the extent of the cleanups. The E.P.A. says that 346 sites have been cleaned, and the most dangerous compounds have been removed from 3,300 more."[73] Thus we get the bitter with the sweet—payments to lawyers in exchange for a cleaner environment.

This pervasive system of government regulation and distribution of benefits began with the Interstate Commerce Act of 1887[74] in which, "[f]or the first time, a national legislative scheme was enacted that provided for wide-ranging regulatory controls over an industry that was vital to the nation's economy—the railroads."[75] This was soon followed by the Sherman Antitrust Act of 1890.[76] The Pure Food and Drug Act of 1906[77] further expanded federal regulation of business.

In the ensuing years, despite pressure for further regulation, additional government action was made difficult by the Supreme Court's decisions in *Lochner v. New York* in 1905,[78] and *Hammer v. Dagenhart* in 1918,[79] which struck down, respectively, state and federal attempts to regulate conditions for workers, on the ground that such regulations interfered with the freedom to contract. Nevertheless, the passage of the Sixteenth Amendment, instituting the Federal Income Tax,[80] and the Federal Reserve Act in 1913[81]

69. 1994 STATISTICAL ABSTRACT, *supra* note 23, at 210. The ratio of lawyers to total population has also grown dramatically, from one lawyer for every 695 people in 1951 to one lawyer for every 340 people in 1988. AMERICAN BAR ASSOCIATION, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT 1 (1988). One of every 19 people in the District of Columbia is a lawyer. *Id.* at 57.

70. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 146 (1960) (reflecting 1959 figures); 1970 STATISTICAL ABSTRACT, *supra* note 23, at 154 (reflecting 1969 figures); 1994 STATISTICAL ABSTRACT, *supra* note 23, at 211 (reflecting 1993 figures).

71. 1970 STATISTICAL ABSTRACT, *supra* note 23, at 155.

72. 1994 STATISTICAL ABSTRACT, *supra* note 23, at 210.

73. Keith Schneider, *Guide: The Superfund, Present and Proposed*, N.Y. TIMES, Oct. 6, 1994, at A22.

74. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

75. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189 (1986).

76. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890).

77. Pure Food and Drug Act, ch. 3915, 34 Stat. 768 (1906).

78. 198 U.S. 45 (1905).

79. 247 U.S. 251 (1918).

80. U.S. CONST. amend. XVI.

81. Federal Reserve Act, ch. 6, 38 Stat. 251 (1913).

further increased federal authority and necessarily created jobs for lawyers to deal with that authority.

At the beginning of the New Deal, the Supreme Court initially continued its resistance to government's efforts to further regulate the economy, but ultimately accepted them.[82] For the time being, the Court's function was simply to stand aside and allow the other branches of the federal government to act. The era of Supreme Court activism was yet to come. The thirties was an era when the country moved to shift power away from private business and into the hands of government. *Individual* rights, which could be asserted by private people against both business *and* government, remained to be established.

We thus come back to the 1950's. By this time, the legislative and executive branches were dominated by Republicans and southern Democrats who were not interested in regulating the booming postwar businesses, nor in changing the racial status quo. The Supreme Court, by contrast, was manned by New Deal Democrats such as Justices Black and Douglas and, as of 1953, headed by an activist liberal Republican, Earl Warren.

Warren wasted no time. In his first term as Chief Justice, *Brown v. Board of Education* was reargued before the Court, and Warren authored the unanimous decision requiring that public schools be integrated.[83]

Even on its own terms, in ending legal separation of the races, *Brown* was an immensely important decision. However, its implications for society extended far beyond integration and its effects. *Brown* was the beginning of the Rights Revolution. It gave rise to a series of Supreme Court decisions that opened the doors of federal courthouses throughout the country to such traditionally disadvantaged groups as women,[84] legal aliens,[85] illegitimate children,[86] criminal defendants,[87] and the poor.[88]

To take the most striking example, each of the new rights granted to criminal defendants, including the rights to counsel, to jury trial, and to exclude illegally seized evidence, increased the number of legally contested issues and vastly extended the length of the criminal trial. Thus, as individual rights increased, the number of lawyers necessarily increased to vindicate those rights. Interestingly, the renewed use of the death penalty—an antidefendant measure—has also increased criminal law litigation.

Even when the Court was not elaborating rights for the disadvantaged, it vigorously advanced principles of individual self-determination which were, by definition, inconsistent with notions of institutional control that were prevalent in the fifties. Thus, *Roe v. Wade*,[89] in establishing in each woman a right to "choose" an abortion, necessarily

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82. *See, e.g.*, Rabin, *supra* note 75, at 1253-62.

83. 347 U.S. 483 (1954). For a detailed account of the background of *Brown* and Warren's negotiations to secure a unanimous opinion, see RICHARD KLUGER, THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

84. In Craig v. Boren, 429 U.S. 190 (1976), the Court held that classifications by gender are subject to heightened scrutiny by the courts, under the Equal Protection Clause. Such classifications will only be upheld if they serve important government objectives and are substantially related to achievement of those objectives.

85. In Graham v. Richardson, 403 U.S. 365 (1971), the Court held that states may not deny welfare benefits to legal aliens.

86. In Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972), the Court held that the claims of unacknowledged illegitimate children to a decedent's workmen's compensation benefits could not be subordinated to the claims of legitimate children.

87. For example, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court held that evidence obtained by local police in violation of the Fourth Amendment must be excluded from trial. In Gideon v. Wainwright, 372 U.S. 335 (1963), the Court held that indigent defendants in felony cases must be provided with a lawyer at government expense.

88. In Shapiro v. Thompson, 394 U.S. 618 (1969), the Court held that a state may not impose a residency requirement on welfare benefits.

89. 410 U.S. 113 (1973).

interfered with the efforts of the state, encouraged by the churches, to demand that the fetus be carried to term. Again, it has been constantly necessary for lawyers to be involved in both defending, and attempting to limit, this right.

Another landmark case, *New York Times v. Sullivan*,[90] was a victory for free press and for the public's right to be informed about the affairs of "public figures," a right inconsistent with the ability of such figures to use libel laws to shield their activities from public scrutiny. But such increased scrutiny has greatly diminished our trust in public figures. Similarly, the Court's finding of a First Amendment right to "commercial speech" (*i.e.*, advertising)[91] was specifically designed to allow the public access to commercial information, such as prescription drug prices, which had previously been unavailable. And, by the same token, lawyers themselves were accorded the right to advertise so that people could easily locate a champion to assert their rights in court.[92]

Although Congress and the Executive Branch were not interested in advancing or enforcing civil rights in the fifties, the Eisenhower administration was reluctantly dragged into the civil rights fray when the President, after much hesitation, sent federal troops to Little Rock to enforce court-ordered school integration in 1957.[93] The Little Rock crisis was particularly significant because, as David Halberstam observed,

> Television reporters, far more than their print predecessors, contributed to the speeding up of social change in America. Little Rock became the prime example of that, the first all out confrontation between the force of the law and the force of the mob, played out with television cameras whirring away . . . for a nation that was now largely wired.[94]

By generally supporting claims advanced by disadvantaged groups, and by continuing to press for de facto as well as de jure integration, the Supreme Court created a new climate of rugged individualism in the country: the appealingly American idea that people should have a large panoply of individual rights, and a further right to be informed of and to exercise those rights so that they could function most effectively in a democratic, capitalist society. But such "rights" exist only because they have been created, and are enforced, by law and by lawyers.

The widespread availability of television by the mid-fifties greatly stimulated this climate. Television made ordinary citizens *aware* of their rights, aware of what rights other groups were asserting, and aware of the possibility of litigating for more rights, in a way that would have been impossible before. Moreover, as television, after the Vietnam and Watergate debacles, began vigorously informing people of the malfunctions of government and other institutions, it gave people additional incentives to litigate. This trend has been furthered by the "information revolution" of recent years which has rendered more information available to the citizenry than ever before. It is then the information media, especially television, combined with the "Rights Genie" that the Supreme Court released from the bottle in *Brown*, that led to John Updike's observation of the greater consciousness of rights than of duties today compared to the fifties.[95] Duties are imposed upon us by others. Rights are our own.

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90. 376 U.S. 254 (1964).
91. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).
92. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977).
93. The Little Rock crisis is discussed at length in HALBERSTAM, *supra* note 5, at 667-90.
94. *Id.* at 678.
95. Updike, *supra* note 4, at 37.

By the 1960's, Congress and the White House had also been taken over by Democratic activists, and the Rights Revolution, as well as the growth of the regulatory state, continued apace. One of the most important laws was the Civil Rights Act of 1964,[96] which not only required integration of hotels and restaurants but also prohibited discrimination in hiring, promoting, and other employment practices on the basis of race, color, religion, sex, or national origin.[97] The Court, to no one's surprise, upheld this law,[98] and much litigation has been spawned by it. In 1966, the Freedom of Information Act[99] was passed, opening up vast new sources of information by which the public could judge government.

The last outburst of regulatory fervor came in the early 1970's when, despite a Republican president in the White House, a series of statutes such as the Clean Air Amendments of 1970,[100] the Federal Water Pollution Control Amendments,[101] and Occupational Safety and Health Act[102] were passed. These enactments, unlike most of the New Deal and Great Society programs, were designed to regulate industry, rather than to redistribute wealth or create social equality. Furthermore, as Robert Rabin has pointed out, this legislation "reject[ed] the prevailing New Deal wisdom that agency experts could best bring their technical expertise to bear on problems of public policy if they were pointed in the right direction . . . and told to regulate 'in the public interest.'"[103]

Rather, these Vietnam-era statutes reflect suspicion of government and business. They thus established specific standards on such things as pollution control and workplace safety, on the assumption that if regulators were left to their own devices, they would "delay, equivocate, and generally fail to establish in any precise way what the 'public interest' required."[104] And who is it that enforces or resists enforcement of these detailed requirements?

One measure of the importance of law is how much money is spent to influence it. For example, the Christian Right has vigorously attempted to influence law through political action committee ("PAC") spending. Unable to influence affairs directly from the pulpit, churches are turning to law, and its handmaiden, politics, to exert their influence.[105] Opponents, of course, are also using law and politics to resist church influence.

Similarly, organized labor, big business, the education establishment, and other institutions whose direct influence on people has diminished, have strove to maintain their power indirectly by influencing the development of the law. PACs, so essential to a congressman's need to raise money for his reelection campaign, were largely unheard of in the fifties.

Today, with government so widely involved in every aspect of American life, total PAC disbursements have more than tripled, just since 1980.[106] Even more striking is that

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96. Pub. L. No. 88-352, 78 Stat. 241 (1964).

97. *Id.*

98. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

99. Pub. L. No. 89-487, 80 Stat. 250 (1966).

100. Pub. L. No. 91-604, 84 Stat. 1676 (1970).

101. Pub. L. No. 92-500, 86 Stat. 816 (1972).

102. Pub. L. No. 91-596, 84 Stat. 1590 (1970).

103. Rabin, *supra* note 75, at 1289.

104. *Id.*

105. "In 1950 there were only sixteen major religious lobbies in Washington representing fairly narrow concerns. By 1985 there were at least eighty and the list is growing." Allen D. Hertzke, *The Role of Religious Lobbies*, *in* RELIGION IN AMERICAN POLITICS 123 (Charles W. Dunn ed., 1989).

106. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 273 (1991) [hereinafter 1991 STATISTICAL ABSTRACT]; 1994 STATISTICAL ABSTRACT, *supra* note 23, at 291.

*labor* PACs during the same period, despite declining union membership, have almost quadrupled their disbursements.[107] These payments are made for the purpose of obtaining favorable treatment by government. That is, they are aimed at influencing the law.

We thus return to my opening argument—that we live today under a "rule of law" in a way we never did before. In his prescient book written in the 1830's, *Democracy in America*, Alexis de Tocqueville observed that lawyers were "the American aristocracy" and "as a body form the most powerful, if not the only, counterpoise to the democratic element."[108] An active bench and bar is the very essence of the democratic system but no longer primarily as a counterpoise to the "democratic element." While lawyers represent both institutional and individual interests, the trend of the law since the fifties has been to favor the interests of individuals—as consumers, voters, and employees—over institutions. This explains why, as Marc Galanter has pointed out, antipathy toward lawyers is much greater among the society's elite than among its disadvantaged[109] (though the elite generally like their *own* lawyers).[110] A *Wall Street Journal* columnist observed that "'lawyers are replacing trade unions as the main scourge of the business community.'"[111] Anyone who doubts the pervasiveness of law today should look at the sports pages, which usually contain more law than sports.

The 1994 election did not signal a significant diminution of support for government regulation of such things as pure food and drugs, air and water pollution, and airline and automobile safety, though some Republican members of Congress and their corporate PAC supporters will claim that it did. We still remember what happened in the savings and loan industry the last time we, as Ronald Reagan urged, got government off the backs of honest businesspeople. Rather, the election was mostly a repudiation of government *spending*, not only for welfare but for pork barrel projects, such as agricultural subsidies and Lawrence Welk memorials, that benefit business or purely local interests. A useful rethinking, and limitation, of certain other federal regulations also seem to have resulted from the election.

While many developments in this country since the fifties have been desirable, this is not always true. Family and church influences, for example, are much more effective at creating law-abiding citizens and hence at preventing crime than is the criminal law. Still, while many Americans bemoan the state of society today, they would be distinctly unhappy if the politics and economy of the fifties were to be resurrected.

As much as we may feel that we despise lawyers, we have always revered the law. We take pride in the fact that we have a written Constitution and Bill of Rights that constrains, through the actions of judges and lawyers, the legislative and executive branches. And we generally approve of laws that protect the environment, our safety, our privacy, and the rights of minorities, and that give us a cause of action when we have been wronged.

It is, then, in no way surprising that America has many more lawyers than any other country. The Germans have a saying: "Ruhe ist des Bürgers erste Pflicht." (Peaceableness

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107. *See* 1991 STATISTICAL ABSTRACT, *supra* note 106, at 273; 1994 STATISTICAL ABSTRACT, *supra* note 23, at 291.

108. THE QUOTABLE LAWYER 188 (David S. Shrager & Elizabeth Frost eds., 1986).

109. "A 57% majority thought lawyers had 'too much influence and power in society' [but] distribution was skewed with more prosperous and powerful groups high (college graduates, 64%, professionals, 60%) and outsider groups low (blacks, 39%)." Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 665 (1994) (citations omitted).

110. *Id.*

111. *Id.* at 676.

and good order is a citizen's first duty). But we Americans are not peaceable and orderly. We are a nation of individuals, with diverse origins and backgrounds, who mistrust the major institutions of our country and who are willing to fight, using the law rather than armed insurrection, for what we believe is right. Lawyers are our champions in these fights, and the courts our battlegrounds. It has been said that a nation has the kind of government that it deserves. By the same token, we have, essentially, the kind of legal system that we want.[112]

112. *But see* Bradley & Hoffmann, *supra* note 3 (urging that our criminal justice system is in need of an overhaul).