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Ruminations of a Trial Lawyer on Judicial Politics: An Essay in Memory of Judge Earl E. Veron

J. Michael Veron

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I. INTRODUCTION

One of the first things law schools teach is that rules constitute the essence of law.[1] In fact the law student is told that rules distinguish law from politics. The mission of the law student, therefore, is to acquire and demonstrate specialized knowledge about rules. It is the mastery of this specialized knowledge that is the hallmark of the lawyer as a professional.

Consistent with this is the traditional view that politicians are concerned only about outcomes, while lawyers are equally devoted to the rules that define the process by which outcomes are reached. To oversimplify, politics is about ends, but law is about means as well as ends. To be sure, a political outcome today does not dictate a political outcome tomorrow. There is no *stare decisis* in politics, because politics is about power, which is ephemeral. Whoever is in power dictates political outcomes. However, law is supposed to be different. Through rules whose existence precedes the dispute (hence the term "prece-

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* This essay is dedicated to the memory of my father, Earl E. Veron, a 1959 graduate of the LSU Law Center. Dad was elected to the state district bench in 1967 and served from 1968 until 1977, when he was appointed to the federal bench by President Jimmy Carter. He served as United States District Judge for the Western District of Louisiana from that time until his death in 1990. His judicial integrity distinguished his career, and he abhorred any intrusion of politics into the judiciary.

** B.A. 1972, J.D. 1974, Tulane; L.L.M. 1976, Harvard. Member, Louisiana Bar. Adjunct Professor of Law, LSU Law Center. Member of the firm of Scofield, Gerard, Veron, Singletary & Pohorelsky, Lake Charles, Louisiana.

1. One of my first law professors, Ferd Stone, authored a wonderful little book entitled Introduction to the Study of Law. I am indebted to him for providing such a splendid orientation to the primacy of rules in the legal system. In addition, every law student (and lawyer, for that matter) should read Karl Llewellyn's The Bramble Bush, which comprises lectures given to introduce Columbia Law School students to the study of law in 1929 and 1930. According to Professor Llewellyn,

> *rules* are the heart of law, and the arrangement of rules in orderly coherent system is the business of the legal scholar, and argument in terms of rules, the drawing of a neat solution from a rule to fit the case in hand—that is the business of the judge and of the advocate.

Karl Llewellyn, The Bramble Bush 13 (1930). Of course, to a Louisiana lawyer steeped in a civil-law tradition whose ancestry can be traced to the Institutes of Justinian in 533 A.D., the idea that rules are the centerpiece of any legal system is hardly new. *See generally* Frederick H. Lawson, A Common Lawyer Looks at the Civil Law (1953); John H. Merryman, The Civil Law Tradition (1969). To a true civilian, not even judge-made law qualifies as a "rule" because rules can only come from the legislative branch of government.

dent"),[2] the law dictates legal outcomes irrespective of the political power of each side to the dispute.

Consistent rule application produces consistent and predictable results. If two cases present the same facts, one expects litigation results to be the same in each case, regardless of the lawyers, parties, or judges involved.[3] Ultimately, therefore, the single most important criterion by which we measure the performance of our courts and our judges is the extent to which we can predict outcomes, *i.e.*, the extent to which like cases produce like results.

For this reason, judges are traditionally measured by their rule-orientation. Historically, good judges are viewed as rule-oriented rather than result-oriented. Good judges independently reason through the rules to reach blind outcomes rather than manipulate the rules to reach foreordained outcomes. Of course, this is not as simple as it may seem. The process of rule application demands clarity of thought, intellectual honesty, scholarship, and an apolitical mindset. A good judge has no agenda other than rule application. His primary goal is to get it "right," meaning to find the facts correctly from the evidence and to apply the law correctly to resolve the case, regardless of whether he likes the outcome or agrees with the policies expressed by the applicable law.[4]

The law speaks to this in a number of ways. For example, numerous appellate opinions warn that a court of appeal is not to substitute its judgment for that of the trial judge merely because it disagrees with his findings.[5] In

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2. In his classic work, An Introduction to the Philosophy of Law, Dean Roscoe Pound identified twelve ideas about the nature of law, including divinely ordained rules, custom, philosophically discovered wisdom, moral codes, democratic rules, rules developed out of commercial necessity, and rules handed down by the will of the Emperor. All ideas presumed that the rules preceded the affairs they governed. Roscoe Pound, An Introduction to the Philosophy of Law 25-30 (1922).

3. This is not a new idea, even for me. *See* J. Michael Veron, *The Contracts Clause and the Court: A View of Precedent and Practice in Constitutional Adjudication*, 54 Tul. L. Rev. 117, 156-58 (1979).

4. This is not to say that rule-oriented judges *always* follow precedent. Even *stare decisis* permits exceptions, but the exceptions are rare and ordinarily occur only at the highest appellate levels. Consider the following description of the judicial process by Judge Cardozo:

> The first thing [the judge] does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory . . . . None the less, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. . . . *Stare decisis* is at least the everyday working rule of our law. . . .

Benjamin N. Cardozo, The Nature of the Judicial Process 19-20 (1921). Another excellent description of the judicial process can be found in Edward H. Levi, An Introduction to Legal Reasoning (1949). Except for a brief period in post-Revolutionary times, the American legal system has followed the English theory of precedent without significant variation. *See* Morton J. Horwitz, The Transformation of American Law 1780-1860, at 24-27 (1977). For an historical account of precedent in England, see Theodore Plucknett, A Concise History of the Common Law 324-32 (1948).

5. *E.g.*, Lewis v. State, 654 So. 2d 311 (La. 1995); Soileau v. South Cent. Bell Tel. Co., 406 So. 2d 182 (La. 1981); Schexnayder v. Carpenter, 346 So. 2d 196 (La. 1977).

order to overturn a lower court's findings of fact, the court of appeal must hold that the trial judge's findings constitute an abuse of discretion, or "manifest error," *i.e.*, there is virtually no evidentiary support in the record.[6] The Louisiana Code of Judicial Conduct requires judges to be "faithful to the law and maintain professional competence in it,"[7] prohibits them from political activities other than participating in their own campaigns for office,[8] and admonishes them not to use their office for political ends.[9] The Louisiana Codes of Civil and Criminal Procedure provide that a judge may be recused from any case in which he is biased, prejudiced, or interested in the outcome.[10] All of this clearly indicates the primacy of rules over politics in the judicial system.

Beyond these expressions in the law, the art of judging has been the subject of legal commentary for many years. The historical literature defines a judicial tradition that extolls judges who stand apart from politics.[11] However, it is only in recent years that any real effort to evaluate the performance of individual judges in objective terms enjoys popular support.[12] Perhaps there is a fear that evaluating a judge's performance compromises the independence of the judiciary. In point of fact, the contrary is true: Focusing on the extent to which a judge applies the rules by definition rewards legal, rather than political, behavior.

This traditional view that law and politics are separate is now being challenged. There is an increasing public perception—shared by many within the legal profession—that power has come to mean more than rules in the legal arena.[13] Litigation is increasingly viewed less as a civilized means by which

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6. The reported cases addressing the "manifest error" rule in Louisiana (also called the "clearly wrong" rule) are literally too numerous to count. For recent examples, see Jure v. Raviotta, 612 So. 2d 225 (La. App. 4th Cir. 1992), *writ denied*, 614 So. 2d 1257 (1993); Dominici v. Wal-Mart Stores, Inc., 606 So. 2d 555 (La. App. 4th Cir. 1992); Guaranty Bank & Trust Co. v. Holiday Inn of Leesville, 525 So. 2d 638 (La. App. 3d Cir. 1988). Critics have claimed that the "manifest error" rule is only invoked when a reviewing court decides to affirm the lower court.

7. La. Code of Judicial Conduct Canon 3 A(1).

8. La. Code of Judicial Conduct Canon 7 A.

9. La. Code of Judicial Conduct Canon 2 B.

10. La. Code Civ. P. art. 151(B)(5); La. Code Crim. P. art. 671(1).

11. Most of the studies have focused on appellate judges, particularly the most visible, to-wit: our Supreme Court justices. *E.g.*, G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges (1976). At that level, the interplay of politics and law is decidedly more philosophical than the conflict that often exists in lower courts. It is the latter variety that is the subject of concern here.

12. Beginning in the late 1970s and the early 1980s, established professional groups such as the American Judicature Society and the American Bar Association began endorsing proposals to survey practicing lawyers within various jurisdictions on the performance of the judges in the area. In many instances local bar groups conduct the surveys. In Louisiana, the New Orleans Bar Association publishes the results of their members' evaluations of the judicial candidates seeking office. In the absence of surveys of sitting judges by formal bar groups, several newspapers in the state (for example, the Baton Rouge Morning Advocate, Lafayette Daily Advertiser, and Monroe Newstar) fill the void by conducting surveys among local lawyers regarding judges in the area.

13. For example, two hour-long television programs addressed abuses in the legal system. The first was aimed at abusive plaintiffs. *The Blame Game: Are We Becoming a Nation of Victims?*

lawyers resolve their clients' differences and more as an excessively expensive process in which lawyers bash one another's clients into submission (and pocket excessive fees in the process). Under this view, lawyers are hired more for their meanness and political clout than for their integrity and legal acumen.

There are many who believe the courts have made this possible by default. They say that lawyers are ethically obliged to advocate their clients' positions to the full extent they are permitted to do so and, therefore, cannot be blamed for their zeal. Nor do these critics fault the "rules of the game," because the law makes full provision for abuses of the legal process, from sanctions for filing frivolous pleadings or obstructing discovery to proscriptions against the admission of irrelevant and prejudicial evidence.[14] Critics who see a disparity between the law as written and the law as fact point to poor judicial performance as the reason. They contend that when judges fail to control litigation, the result is not only added costs and delays to the litigants, but also confusion of issues that affects decisions on the merits.

As Professor Malone most certainly knew, the literal definition of "ruminate" is "to chew (the cud), as a cow does."[15] The intent here is to "chew on" this blurring of the line between law and politics that seems to have developed and, in the process, perhaps gain some insight into this troubling phenomenon.

II. JUDICIAL POLITICS

Louisiana judges are elected by popular vote.[16] That fact alone affects the Louisiana judiciary in a number of ways. Judicial office is significantly different

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(ABC television broadcast, Oct. 26, 1994). The second program more pointedly blamed lawyers for fomenting frivolous litigation. *The Trouble With Lawyers. . . .* (ABC television broadcast, Jan. 2, 1996). Both programs portray the legal system as ineffective. The most recent issue of the ABA Journal contains an article critical of the media for sensationalizing aberrational rulings and for taking a "tabloid" approach to covering legal proceedings in sharp contrast to the narrative and analytical standard set by Anthony Lewis in Gideon's Trumpet. Lincoln Caplan, *Why Play-by-Play Coverage Strikes Out for Lawyers*, 82 A.B.A. J. 62 (Jan. 1996). In particular, the ABA Journal piece addresses the issue of extending television coverage of murder trials such as those involving O.J. Simpson and the Menendez brothers. Regardless of the media's effect on public dissatisfaction with the legal system, it is clear that that cynicism is shared by lawyers as well. *See, e.g.*, Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J. 60 (Sept. 1993); *What the Members Think*, 78 A.B.A. J. 60 (Nov. 1992).

14. *See, e.g.*, La. Code Civ. P. arts. 221-227, 863, 1469-1472; La. Code Evid. arts. 401-403.

15. Webster's New World Dictionary 1245 (2d ed. 1970).

16. La. Const. art. V, § 22. It is beyond the scope of this essay to debate whether merit appointment or popular election is the better method of selecting judges. *See* John H. Hill, *Taking Texas Judges Out of Politics: An Argument For Merit Election*, 40 Baylor L. Rev. 339 (1988). However, comparisons to judicial performance in the federal courts where judges are appointed for life are inevitable. The level of performance on the federal bench is generally perceived as significantly higher than its state counterparts (not just in Louisiana but elsewhere). By virtue of their appointment for life, federal judges are free of any pressure to satisfy any segment of the voting public. Their approach to their work, therefore, is unencumbered by real or imagined political

from other political offices. Judicial offices are not representative offices (*i.e.*, city councilman, police juror, or state representative). A judge's primary mission is to administer and apply the law and not to represent the preferences of his constituency.[17] Presumably for this reason, only lawyers can become judges.[18]

People within the legal profession possess varying levels of skill and knowledge about the law. While fellow lawyers often find these differences among their colleagues to be rather evident, they are not often discernible to laymen. This problem becomes most apparent in judicial elections. Campaigns for judicial office rarely stress the professional qualifications of the candidates. Instead, armed with public opinion polls, judicial candidates typically campaign for office on popular political issues such as "law and order" or tort reform. Judicial campaigns are further politicized by the great number of lawyers who actively support various candidates, particularly with financial contributions and often in organized groups representing their own political interests. All of this tends to produce campaign rhetoric that generates much heat but little light on the extent to which the candidates possess the qualities required to be a good judge.

That is understandable. A thirty-second sound bite about victims' rights or insurance fraud is a lot more attention-getting than an ad about a candidate's law school grades or his knowledge of the hearsay rule. However, judges are elected to apply the law as it exists, not to change it according to their campaign platform under the guise of "doing justice." Thus, in the end, it *is* more important to know how well a candidate understands the hearsay rule than what his political views are about crime. Regrettably, the process of campaigning for

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mandates. Moreover, it seems clear that the process of appointment to the federal bench excludes less qualified candidates more effectively than popular elections. As this article went to press, Louisiana Governor Mike Foster publicly announced his interest in proposing a system of merit selection to replace the popular election of judges. The Louisiana Legislature may consider his proposal as early as its special session in the spring of 1996. At any rate, the focus of this essay is on judicial performance in state courts.

17. Over the past several years, numerous suits have been brought in federal courts in a number of states alleging that the method of electing judges in those states violates the Voting Rights Act of 1965. 42 U.S.C. § 1973 (1988). *See* Houston Lawyers' Ass'n v. Attorney General of Texas, 501 U.S. 419, 111 S. Ct. 2376 (1991); *see, e.g.*, Cousin v. McWherter, 46 F.3d 568 (6th Cir. 1995); Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994); League of United Latin Am. Citizen v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc); Magnolia Bar Ass'n v. Lee, 994 F.2d 1143 (5th Cir. 1993). In the *Clements* case, the Fifth Circuit held that the state of Texas has a substantial state interest in the "linkage" between coterminous electoral and jurisdictional boundaries for its trial judges. Hence, it rejected a claim that Texas' historical practice of setting the jurisdictional and electoral geographic boundaries of its judicial districts along the same lines results in unlawful racial discrimination. In the course of its opinion, the court recognized that linking jurisdictional and electoral boundaries effectively promotes a state's legitimate interest in maintaining a judiciary fully capable of performing the tasks that judges must perform. 999 F.2d at 871-75. Thus, the court's reasoning effectively recognized that the trial judge's primary duty is to perform judicial tasks, not represent the political interests of any segment of the population.

18. La. Const. art. V, § 24; *see also* La. R.S. 13:1873 (1983).

elective judicial office has the effect of politicizing the candidates, and newly-elected judges often enter office burdened with perceived political mandates that may be at odds with their real mission.

For these reasons, any efforts within the profession to identify good judges are laudable. All sitting judges benefit by knowing the ways in which they can improve their performance. Judges who perform well are rewarded by objective validation of their performance. Anything that makes it easier to identify good judges makes all judges more accountable and raises the level of debate in judicial campaigns.

III. PROFILE OF A GOOD TRIAL JUDGE

Trying a case before a good trial judge is perhaps the best experience the legal profession can offer a lawyer.[19] In the hands of a dedicated and talented judge, the trial of a lawsuit is a civilized mechanism to resolve disputes with dignity. With a steady hand at the helm, a trial moves with deliberate speed, neither rushing to judgment nor wasting unneeded motion. Lawyers fortunate enough to find themselves before one of these trial masters know that the rules are certain and apply equally to both sides. There is a sense of order in proceedings conducted by a good trial judge that epitomizes the essence of law.

Unfortunately, the procedural and evidentiary laws that regulate trials are not self-executing. Litigation is heavily dependent on the ability and will of the trial judge. Without a firm, steady, and enlightened hand, the trial of a lawsuit can exude all the dignity of a professional wrestling match. Nature abhors a vacuum and fundamentally so do trial lawyers. When a judge does not take control of the courtroom, the lawyers will vie to do so. When that happens, the experience is unpleasant and professionally embarrassing.

If asked, nearly every trial lawyer could quickly recite the qualities that distinguish a good trial judge. First is his level of preparation. Like good lawyers, good judges prepare. They come to trial knowing the issues and the positions of the parties. The second benchmark of a good trial judge is his mastery of the two areas of law that define his art: procedure and evidence.[20]

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19. The following observations are drawn from my own experiences as an active trial lawyer for 20 years as well as those of numerous members of the Bar. Although I cannot prove this conclusively, I doubt there is any real dispute among experienced trial lawyers about what makes a good judge. The various newspaper polls described *supra* note 12 consistently rank judges similar to those described above near the top of each poll regardless of locality. This suggests a strong professional consensus on the issue. The preparation of this essay reminds me of some of the talented trial judges before whom I have been blessed to practice in state courts. The lessons I learned from them inspired much of what appears here. Unfortunately, in the process I am also reminded of some of their less talented colleagues before whom I appeared and of what a difficult labor trying cases before them could be. Those experiences, too, find expression in the text.

20. The procedures for trying civil cases are generally set forth in the Louisiana Code of Civil Procedure, while the procedures for trying criminal cases are described in the Louisiana Code of Criminal Procedure. The evidentiary rules for all proceedings, whether civil or criminal, are provided

A good judge does not prejudge the final result, but he knows how to get there. The substantive rules of decision may change from case to case and in any event, can be briefed and studied outside the heat of battle when preparing jury instructions or the judge's opinion. The questions that must be decided on a moment's notice in the middle of trial are procedural and evidentiary. As a rule, it is simply not feasible to delay trials to research these questions. Objections to an opponent's trial methods or evidence must be ruled upon when made. A good judge can do so because he has a command of the procedural and evidentiary rules that govern trials. The third benchmark of a good trial judge is a product of his preparation and his knowledge: It is his ability to identify the critical issues to be tried and to mark out the boundaries of relevance pertaining to them. The final quality common to good judges is consistency. When lawyers refer to good judicial temperament, they are not describing personality, but rather the ability to maintain logical consistency when applying procedural and evidentiary rules throughout a trial. Simply put, in the hands of a good judge, the boundaries of relevance do not move.

IV. THE JUDGE'S IMPACT

While judges may perform well regardless of the quality of the lawyering before them, the reverse is not true. The performance of lawyers is markedly affected by the manner in which the judge conducts the trial. A judge whose evidentiary rulings (particularly those relating to relevance) have the consistency of a Ouija Board makes the trial a moving target for both sides. Moreover, lawyers are more likely to test blurred boundaries than those marked with bright lines. Probative evidence relating to the real issues can be forgotten when lawyers are allowed to present prejudicial evidence that inflames more than illuminates.[21] Evidentiary objections become imprecise orations on "fairness" that are in reality closing arguments given in bursts. To make matters worse, one counsel's license with a judge's lax rules inevitably provokes his opponent to do the same. Soon, the lawyers are speaking more than the witnesses, which is a certain sign that the trial has lost its focus.

A good trial judge understands that trial lawyers have no self-restraint, primarily because their role as advocates discourages it. For that reason, he announces and enforces the evidentiary and procedural law of the case from the outset. He draws bright lines around what is relevant to the case and keeps them

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for in the Louisiana Code of Evidence. The Louisiana Code of Evidence is, with few exceptions, identical to the Federal Rules of Evidence.

21. Evidence must be relevant in order to be admissible. La. Code Evid. art. 402. In order to be relevant, evidence must have a tendency to make the existence of a fact that is of consequence to the lawsuit more or less probable. La. Code Evid. art. 401. Irrelevant evidence is never admissible. La. Code Evid. art. 402. Relevant evidence may nonetheless be excluded if it is likely to cause unfair prejudice, confuse the issues, mislead the jury, or waste time. La. Code Evid. art. 403.

in place. During the taking of evidence, he allows the lawyers to ask questions and to make objections, but not to give speeches. He allows argument only when he asks for it. He forces counsel to stay focused on the issues and the evidence as he moves the case to its conclusion without distraction and confusion.

This judicial "ripple effect" indicates that much of the effort at law reform and the improvement of trial advocacy might be more productive if it were focused on the performance of our judges. A recent statewide public opinion poll reveals that Louisianians have as much, if not more, confidence in juries doing justice than in judges.[22] Given that Louisianians elect their judges, but must trust blind luck for their juries, this finding is rather startling. It suggests, at a minimum, that the politicization of the Louisiana judiciary has not gone unnoticed. Baldly put, the poll is strong evidence that the public believes that people off the street are more likely to be impartial than someone trained and experienced in the law who was specifically chosen to be a judge by a majority of the voters in his district. If so, this is another strong indication that the involvement of lawyers in judicial campaigns has compromised the perceived independence of the judiciary. More than one recent campaign for the bench was successfully predicated on a candidate's promise not to take financial contributions from lawyers. The message seems to be clear: People believe that judges are influenced by lawyers, and they do not like it.

V. PUTTING LAW ABOVE POLITICS

The answer to regaining public trust in the judiciary lies in our judicial tradition.[23] Good judges always separate law from politics. They do so by accepting the responsibility to apply the law regardless of the outcomes it produces. In so doing, they control the litigation and the lawyers that appear before them. A judge who allows himself to be politicized surrenders this control. When he does, he separates himself from an historical tradition rooted deep in the public consciousness. That tradition holds that judges occupy an independent branch of government that is removed from the partisan politics of the executive and legislative branches. It is no historical accident that becoming

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22. According to an Associated Press report, 48% of voters polled said they have considerable or complete confidence in juries, while only 46% said they have the same confidence in their elected judges. Lake Charles American Press, Jan. 6, 1996, at B1.

23. Professor Archibald Cox has described the importance of maintaining public confidence in the legal system in these compelling words:

> The most important quality of law in a free society is the power to command acceptance and support from the community so as to render force unnecessary, or necessary only upon a small scale against a few recalcitrants. I call this quality the "power of legitimacy" because it appears to attach to those commands of established organs of government which are seen to result from their performance in an authorized fashion of the functions assigned to them. Such commands, and only such, are legitimate.

Archibald Cox, The Role of the Supreme Court in American Government 103 (1976).

a new judge is described as "ascending to the bench." This is merely a more elegant way of saying that a lawyer is expected to rise above politics when he becomes a judge.

It is said that there are no new ideas, just old ones that are forgotten and rediscovered. This "rumination" has brought us full circle to the realization that restoring public and professional confidence in the legal system requires no radical innovation but instead, a return to a judicial tradition that distinguishes law from politics.