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ADDRESS

THE UNPOPULARITY OF LAWYERS IN AMERICA†

JON R. WALTZ*

A FEW MONTHS AGO I did what many of you did: I went to see the movie *Nashville*. A faceless presidential candidate, apparently a composite of George Wallace and Ronald Reagan, outlined his program for the presidency. Most of his ideas drew little response from the audience in the Chicago theater where I saw this movie until the candidate, Mr. Hal Philip Walker, announced one of his planks — that lawyers should be barred from all legislative bodies, especially the United States Congress. The theater erupted in a spontaneous burst of applause. I sat there half wishing I were a dentist.

It is perfectly evident that if Gilbert and Sullivan were alive and collaborating today, they would not feel compelled to retract anything they ever said about lawyers. The legal profession is being subjected to just as much mockery and scorn, or more, as it was when Gilbert and Sullivan wrote “Trial by Jury.”

The poet Keats said, “I think we may class the lawyer in the natural history of monsters.” If you have studied Watergate, you may agree. John W. Dean III was, at least until Colson started peddling his book, the most vocal of that pathetic chorus, the Watergate witnesses. And it was Dean, himself an attorney, who upon scanning the list of apparently indictable participants in the Watergate difficulty, remarked, “There are an awful lot of lawyers.” Media commentators have called Watergate “the lawyers’ scandal.”

Although the public declared open season on lawyers a long time ago, the hunting is now better than it has been in years — thanks in large part to the activities of such lawyers as Nixon, Agnew, Colson, Dean, Ehrlichman, Kalmbach, Liddy, Mitchell, and Segretti.

The legal profession is pretty fast on its feet, but we cannot dodge the intensified criticism inspired by Watergate. Not that some of us don’t try. Assorted bar association types, although briefly embarrassed by the circumstance that the likes of John Mitchell was once the operating head of the nation’s Department of Justice, announced that the men involved in Watergate were acting not as attorneys but as politicians. They asked whether, if all of the Watergate people had been registered pharmacists, it would be fair to call Watergate a pharmacists’ scandal.

† Condensed from a Cleveland-Marshall Fund Lecture presented by Professor Jon R. Waltz at the Cleveland State University College of Law on May 19, 1976.

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But that analogy won't wash. Pharmacists aren't trained to be consultants at all levels of foreign and domestic policymaking. Moreover, pharmacists — unlike lawyers — haven't been entrusted with the superintendence of those moral concepts that are bound up in much of what is collectively referred to as "law."

The man who authorizes a burglary, thinking it to be sound counsel in the service of a nation, will not be heard to say, "I did it as a politician, not as a person trained in the law, so blame me for being a political bungler and a bad burglar, but don't call me a disgrace to the legal profession."

Nor will an elitist approach divorce the Watergate scandal from the legal community. It is not possible for all our "important" lawyers out of front-rank law schools to dismiss the lawyers of Watergate as products of third-rate law schools. The whole sorry roster hailed from respectable institutions of legal learning. You can't sneer at Berkeley, Fordham, Georgetown, and Southern California.

Some of my barrister brothers and sisters say, "Well, they may have come from good law schools but they weren't on leave from top-notch law firms, where right thinking and ethical conduct are a way of life." However, when one ponders where some of the advisers from gilded law firms took us — John Foster Dulles of Sullivan & Cromwell, with his brinks and dominoes, for example — one hesitates to suggest that John Dean would have been a better man for a few years on Wall Street or even Cleveland's Euclid Avenue.

The scales are not noticeably tipped the other way by pointing out that, after all, Sam Ervin was a country lawyer from Harvard. Archibald Cox, Elliott Richardson, Howard Baker are all lawyers. But one Ervin doesn't make up for a Nixon; one Cox for a Mitchell; one Richardson for an Agnew. Even the circumstance that Ralph Nader, "Good Guy Number One" in the eyes of many, is a lawyer doesn't tell anyone what the rest of us present and future lawyers are or will be.

Two facts have to be faced by the legal community. First, Watergate set in motion a new wave of criticism by the general public. Second, a good bit of this criticism is deserved by some of us lawyers and some of it by all of us.

I do not wish to place too heavy an emphasis on the Watergate scandal. The sources of public criticism of the legal profession spread far beyond the Watergate phenomenon; Watergate only served to reopen some old wounds that the public has long thought to be lawyer-inflicted.

Some of the reasons that it is natural for laymen to be antagonistic toward lawyers grow out of the very considerations that lead some young men and women to compete for entry into the country's over-crowded law schools. Despite recent events, the law remains a preferred career prospect. While some may attribute this exclusively to the glowing idealism of everyone under 30 years of age, we law teachers know better. There are some other motivations for the record number of law school applications.

Often there is a belief by the law school applicant, right or wrong, that he or she is not cut out for much of anything else. I wanted to be a

surgeon until I discovered that I was incapable of cutting open anything of a higher order than a cantaloupe, so I went to law school. Some people go to law school because it sounds better than selling used cars.

Avarice can be a factor. Many young people believe that the practice of law is one of the guaranteed routes to a substantial income. (Sometimes it is; often it is not.)

Then there is the conviction, perhaps instilled by misguided parents, that it is important to be a member of a profession, particularly a "learned" one, in order to avoid getting one's hands dirty.

Some young people take pleasure in the perfection of technique and in the applause it can bring. The practice of some branches of the law can be very much a matter of technique; ask any successful trial lawyer. The law school applicant may suffer from visions of F. Lee Bailey.

A few of the college graduates who are flocking to the law schools seem to focus on the undeniable circumstance that, one way or another, many lawyers achieve more power than other people do. Sad to say, there are young people who enjoy the prospect of power for power's sake — or there were until the face of John Dean became familiar. I will later return to the matter of power.

Of course, I am at pains to add that there are men and women — hopefully, a high incidence of them at this institution — who want to be lawyers in large measure because they know that lawyers have the chance to help other people.

For my visit to Cleveland State University, I have catalogued some of the reasons the public finds it easy to condemn the legal profession. From time to time one can detect some parallels between that catalog and the list of less admirable motivations for entering the legal profession in the first place.

The entire legal community is an easy mark because it is so large; lawyers are everywhere, in numbers. I do not plan to anesthetize you with statistics but consider this: In China, the world's most populous nation, there are no practicing lawyers — or so we are told. There are a lot of people in Japan, but only 10,000 practicing lawyers. In another far-off and mysterious land, California, there are 40,000 lawyers. There are well over 300,000 practicing attorneys throughout the nation and about 100,000 law students waiting in the wings.

More to the point is this: The entire legal community is subjected to censure because, by and large, only its most reprehensible members are continuously visible to the general public. Many people, possibly beginning with the mistaken assumption that the best-publicized lawyer is bound to be the best, become disillusioned by those lawyers who have style but not much else, or who are under indictment or soon will be.

The public rarely sees the legal profession's most competent and most scrupulously ethical practitioners. They are too busy doing what they ought to be doing, and doing it very well, to receive much media exposure. Too often the public sees only the legal profession's clowns and criminals.

A closely related problem is presented by the myth of the lawyer as

Superman, a myth largely invented by television. Just as Marcus Welby has proved to be an albatross around the medical profession's neck, Perry Mason, Petrocelli, and an assorted variety of Bold Ones are the curse of the legal profession because their miraculous forensic exploits raise the public's expectations to absurd levels. There are people who seriously thought that Patricia Hearst would be acquitted for no better reason than that her family had been able to retain Superman. But, unlike Clark Kent, F. Lee Bailey is only F. Lee Bailey.

The very notion, the concept, of adversariness — the adversary trial process — spawns public antagonism. We no longer settle disputes through trial by ordeal; battling with axes and walking on hot coals as methods of truth-determination have been supplanted by the superficially more painless and polite jury trial. But the adversary trial method, with contending lawyers lined up on opposite sides of the courtroom to do battle for their clients, is simply a more contained form of combat governed by procedural rules that are a sort of Geneva Convention of litigation.

The animosity generated by this combative process does not flow exclusively from the fact that in a contested trial one side has to lose, a fact which smarts. The rhetoric of adversariness — the lawyer's sworn obligation to fight the good fight for his or her client — tends to legitimize courtroom antics which, in Watergate's tired lexicon, would be called "dirty tricks." Ask Bailey, Percy Foreman, Melvin Belli, or any of our zanier trial practitioners to describe his pet techniques and you will soon realize that he is regaling you with tales of dirty tricks played on opposing lawyers and their clients. Dropping law books in time to disrupt the other fellow's crucial cross-examination; during a trial recess, erasing the diagram that the other party's witness so laboriously drew on the blackboard — these stunts echo Watergate. They do not endear lawyers to anyone who has been the butt of them.

Of course, scoring off lawyers as a group comes naturally because they so often move hand-in-hand with adversity. It is something we cannot avoid; it is part of our reason for being. We are there soon after death occurs; we appear when there has been a bad automobile accident or the onset of an occupational disease. A lawyer is there when the mortgage is foreclosed and when a man's wages are garnished to pay a debt. We're there when a family's home is condemned to make way for another freeway. We appear when sentence is pronounced, wresting the defendant from his parents or his wife and children. Little wonder that we are not the beloved of all.

Some lawyers are subject to criticism because they are downright incompetent. Show me a man whose lawyer has negligently permitted the statute of limitations governing his meritorious claim to expire and I'll show you a man who thinks that some law school applicants should seriously reconsider the used car business. I have not even mentioned the occasional lawyer who steals from his clients.

In this last connection, we lawyers are subject to public criticism because we have a self-defined, self-regulating monopoly. By defining the practice of law and then making the unauthorized practice of it

illegal, we maintain an iron grip on a great deal of work that could be done as well and more cheaply by nonlawyers. By regulating ourselves and then brooking no lay interference, we often succeed in avoiding the disciplining of even the most venal and inept among us.

There is the claim that lawyers as a group are excessively conservative, too rooted in the past and too frequently opposed to overdue reforms. Ralph Nader espouses this view, and the public listens to articulate "gadflies" unless they are far more irresponsible than Nader has been. Over the years, Nader's claim has more often proved true than false.

Two things are clear enough, especially if you have read Jerold S. Auerbach's recent book, *Unequal Justice*: the legal profession has, in times past and currently, run a racist, sexist club. Take sexist: Recently a candidate for election to the Illinois Supreme Court addressed an auditorium full of Northwestern law students, about a third of whom were women. He began with a reference to how pretty they all were — all these "girls." Unaware that he was getting in over his head, he pressed on to say that in his experience as a practicing attorney he had found that many of "these girls" were capable of writing briefs — and sometimes of actually trying a case. He was startled by the audience's groans.

Another thing wrong with many of us lawyers is that we conduct our professional affairs in an impenetrable idiom, akin to the physician with his cryptic diagnoses and his inscrutable prescriptions, written in chicken-tracks. The truth is that the doctor's cryptography is a lesson in lucidity when compared with the lawyer's written and oral hieroglyphics. Like the people encountered by Gulliver in his travels, attorneys have "a peculiar cant and jargon of their own."

The late Fred Rodell, a Yale law professor, in his book, *Woe Unto You, Lawyers!* referred to our "dreary double-talk," our "solemn hocus-pocus," which he said "ranges only from the ambiguous to the completely incomprehensible."

Never having developed a bedside manner, we lawyers have gradually lost sight of the fact that almost no one is equipped to translate our private patois. We, who ought to be among the world's best communicators, sometimes seem capable of talking only to each other.

Now enters the confused layman, perhaps in trouble and frightened. He wants to know what's happening with his case. What he gets from his lawyer in response is too often a flurry of references to such legal esoterica as the *voir dire*, *res ipsa loquitur*, and the Rule in Shelley's Case. The lawyer assumes comprehension (or is attempting to prevent it). The client shakes his head and prays. He grows increasingly fond of the story about Arthur Balfour, who is supposed to have shut up a critic in the House of Commons by shouting, "I know that. I am talking English, not law!"

This lurking behind jargon turns some lawyers into conscious or unconscious perverters of both law and language. To borrow from Professor Rodell again, "the language of the law seems almost deliberately designed to confuse and muddle the ideas it purports to convey." For

an example I will go back to the Watergate scandal. Dispiriting as the fact may be, the previous occupant of the White House — who was fond of pointing out that he was a lawyer — engaged in word-bending exercises. You may recall his mangling of the term “privilege.”

In one of his last television speeches, which involved the suppressed Oval Office tapes, the former President undertook a lecture on the law’s confidence-shielding testimonial privileges. In attempting to describe “privilege,” Mr. Nixon cited the lawyer-client privilege, priest-penitent, and the privilege extending to confidential conversations between spouses. (Out of deference to Mr. Ellsberg’s physician, whose office had been officially burglarized, his string of examples did not include the psychiatrist-patient privilege.)

More significantly, the President’s privilege discussion omitted any mention that the law extends no shield to parties to a privileged relationship when they act unlawfully or scheme to do so. If a lawyer and his client plot to rob a bank, the attorney-client privilege will do very little for them when they are arrested and tried. The President had perverted the law’s own language, and lawyers were not the only ones who resented it.

Karl Llewellyn, a lawyer and legal scholar of consequence, once suggested that the great thing about the legal profession is not that it is a learned one but that it is comprised of practical problem-solvers. He was right, of course, and yet this idea, wrongly dealt with by those of us who have tried to teach new lawyers, can produce an intolerable trait. In the halls of legal learning abides the conceit that lawyers are never-failing problem-solvers, that although every issue has two or more sides (all of them defensible), still there must be a pragmatic and final solution to every problem — from the dropping of bombs on small Oriental states to the rear-end collision case.

Just as the lawyer’s love of jargon permits spokesmen for the Central Intelligence Agency to excuse felonies by designating them “covert operations,” the lawyer’s all-things-solvable attitude allows him or her to authorize burglaries to ensure the election of the right candidate. But nonlawyers know, and expect some lawyers to comprehend, that some problems can have no resolution except on the basis of decency and morality, that solutions must from time to time be ethical rather than tactical.

While I’m at it, I’ll mention that we lawyers should pay more attention to our own Law Day rhetoric. I hope you will forgive a personal example. Not so long ago, when I appeared before a bar association committee that screens federal judicial nominees, one elderly partner in a large LaSalle Street law firm ominously inquired, “Is it not a fact that you were associated with the defense of the Chicago Seven Conspiracy Case?” I responded affirmatively and asked him if he wanted me to recant. He answered, “No, not if you don’t want to, but I want to know why you did that.” I allowed myself to reply, “Because I believe what I say in the Law Day speeches that this association constantly asks me to make.”

I could extend my catalog of the public's grievances against lawyers to a great length. I have not talked about our egos, which are often swollen. I have not dwelt on the circumstance that the law, or at least representation in its tribunals, usually has to be purchased, so that its results tend to favor those who can best afford to buy it. I have not mentioned the fact that we lawyers are sometimes too closely connected to the political process for our own good or for that of society. Because I think I have already depressed you, I'll make just one final point.

In the main, I do believe, lawyers are objects of public suspicion, fear, and disapproval for the simple reason that we have so much more power than the average citizen.

It is not possible in the amount of time available to me to describe the meaning of "law" in any all-inclusive way, but it can fairly be said that power is one of the things that law is. The man or woman who knows the law and knows how it works has the ability to manipulate the power process for good or ill.

A lawyer can frustrate a grand jury's investigation; he can get your traffic case advanced to the top of the docket so you won't lose half a day's work waiting around a crowded courtroom. A lawyer knows how to get you clear title to the home you've dreamed of owning; some lawyers, conversant with the law's fine print, know how to take your dream house away from you by paying your one neglected tax installment. A lawyer can get the Internal Revenue Service off your back; in some places he can get meritorious criminal prosecutions delayed until the complainant sighs and goes away. We can settle an estate, create a corporation, convert an apartment building into a condominium, fight a sewer assessment. Lawyers have power in an increasingly complex and frightening world. But not everyone loves the powerful, especially if they exact a fierce price for their power-brokering.

All in all, an ugly picture, you may say. What's wrong with us lawyers? Mainly, it is that the worst among us pose for our portrait, so that we are viewed as avaricious and egomaniacal, all flair and no substance, seeking and wielding power without having the strength of character to wield it well.

Lost to the public is the portrait of most lawyers, the sorts of lawyers that I hope this University produces. They are quiet people who come to the law, and stay with it, because they know that the law's power lets them help people make the best of a trying world.

As for the Watergate crowd, I am tempted to fall back upon the insight of Montesquieu, who remarked that "sometimes a man who deserves to be looked down upon because he is a fool is despised only because he is a lawyer."

