

# Lawyers, Gums, and Rummies

## Why do we hate attorneys?

By Walter Olson

**F**ew movie scenes of recent years have been bigger audience pleasers than the one in *Jurassic Park* where the dinosaur eats the lawyer. Audiences typically burst into laughter and cheers. Which raises the question: Do they react this way because Steven Spielberg has tainted their minds against this great profession, subtly planting the message that it's OK to laugh at attorneys? Or did Spielberg arrange his plot to get a lawyer munched like a cherry off the top of a sundae because he knew full well what would make audiences laugh and cheer? In other words, do lawyers have an image problem because Hollywood and the press keep picking on them, or do Hollywood and the press keep picking on lawyers because they know the public already has a low opinion of them?

The current unpopularity of lawyers has been the subject of much hand wringing and indignation on the part of the American Bar Association. In the ABA's view, the American public has been terri-

itself would be impossible. This slogan delights me because it calls to mind the slogan used by one of the big chemical manufacturers back in the 1970s, when terror about toxic substances was everywhere: "Without chemicals, life itself would be impossible." In a sense, of course, this point is very well taken: Without oxygen or water or salt we'd all be in big trouble. It's just that it may not seem very responsive to the grievance of someone who lives downstream from a factory dumping vinyl chloride.

You see similar arguments in the P.R. campaigns of other interest groups that find themselves unpopular at any given moment. "Without oil companies, driving itself would be impossible": equally true, and equally unsatisfying after a big tanker spill. Or try "without agribusiness, eating itself would be impossible" after an outbreak of food poisoning. The public is smart enough to recognize that whether there's going to be an oil industry is not really the issue. It wants to know: If you

them through these ordeals.

I am not impressed with the dentist theory, in part because surveys show dentists themselves are not all that unpopular. Most Americans are not especially critical of dentists, even if they wince at the memory of their last visit. One reason is that most dentists try hard to minimize the pain they inflict. People shop for dentistry for themselves and their loved ones, and dentists compete with each other in promising to keep the pain to a bare minimum. They boast of practicing "gentle" dentistry, "dentistry for cowards." I have yet to see a billboard advertising "gentle family lawyering," "painless lawyering," or "law for cowards." Maybe those would work as ads for mediation services. But when people buy "legal services," they are often buying something to be inflicted on their enemies, so services minimizing pain may not fit the bill.

**T**his brings us to the somewhat more plausible "bartender theory," which begins with the observation that clients actively seek out many of the lawyers' worst attributes. The vindictive spouse looks for the carpet-bombing divorce lawyer; the dishonest business wants shady help in stiffing its creditors; the person nursing a dubious injury claim looks for the skilled exaggerator. Alan Dershowitz, when criticized for some of his stratagems in criminal defense—things like telling the client on first meeting, "Don't tell me whether you're guilty or not; it would tie my hands to know; leave me free to come up with the best defense"—has defended himself by saying, Look, if your kid were arrested and charged with something, you'd want a lawyer just like me.

As a predictive matter, surely Dershowitz is right. Up against the wall, many of us would call the lawyer whose ethical code allowed him to, um, retain a lot of options in vigorous representation. But as federal appeals court judge Laurence Silberman has observed, just because we play the horses doesn't mean we respect the bookies.

So there's something to the bartender analogy. Many of us do head for the mix-

**Lawyers have not always been this unpopular.**

**Today's abuses are not wholly new, but they were formerly considered the unrespectable fringe of the profession.**

bly misled about lawyers. If it only knew more about how they do their work, it would not be so upset. Its antipathy arises from false consciousness.

If the problem is bad public relations, then the solution must be better public relations. And so our bar establishment has labored mightily to come up with talking points about the good lawyers do. Among my personal favorites is the official slogan of the 1996 ABA national convention: "Freedom, Justice, Liberty—Without Lawyers They're Just Words." Or, to paraphrase slightly: Without lawyers, justice

practice this line of work, how careful are you to avoid spills, and how willing are you to clean up when you do have one?

There are, of course, more sophisticated theories as to why lawyers' popularity stands so low. The "dentist theory" is based on the observation that people encounter lawyers at unhappy, painful times in their lives. They've been indicted, or they're being audited, or they're involved in a lawsuit. These are among the most unpleasant things that happen to people, and so, the theory goes, they transfer their pain into anger against those who accompany

ologist who hands out the stiffest drinks, rather than the drinks best for our own health or society's. (You may henceforth want to keep a new image in mind when you read about the leadership of "The Bar.") On the other hand, no one is forced to consume beverages foisted on them by their adversaries. It's worth keeping in mind, lest we be tempted to compare legal practice to a market, that most consumers of the product aren't taking it voluntarily. No wonder we see so many Mickey Finns.

**A**ny alternative to the dentist and bartender theories of lawyer unpopularity must come to grips with three observations:

First, the more continuing contact people have with lawyers, the more vocal and fully formed a critique they tend to give of them. Doctors, accountants, and business people are among the groups most upset with lawyers. This suggests that unfamiliarity and ill-informed prejudice may not be the full answer.

Second, and contra both the dentist and bartender theories, lawyers have not always been this unpopular. If you consult American history, in fact, you find an interesting pattern: Today's abuses are not wholly new, but they were formerly considered to be more on the unrespectable fringe of the profession. Nineteenth-century America did generate some celebrated criminal cases in which demagogic lawyers won acquittals for obviously guilty malefactors. And there were abuses in civil law, including appeals to sympathetic local juries for unreasonably high damage awards, some management of litigation by lawyers for their own benefit, and hardball tactics of various sorts. Yet there was a feeling that the legal profession as a whole stood against such abuses of law. The public is not so sure of that any more.

Third, the legal profession continues to enjoy a high degree of public esteem in most other countries, though it goes without saying that the operations of law are painful abroad, and though the urge to sic a mean lawyer on one's opponent, like other aspects of human nature, is also not unique to America.

So what has happened in the last 20 or 30 years in the United States? Why is law, though a far more lucrative profession, one

that people are less comfortable about wanting their children to enter? In my 1991 book *The Litigation Explosion*, I tried to give at least part of the answer by detailing some of the ways we've broken with principles that used to govern the legal system and profession:

We have enacted countless new laws, which control more of life and which are often vague, not clearly spelling out what conduct is wrongful and what the legal consequences of stepping over the line might be. We have expanded damage theories to the point where we are willing to mulct defendants of amounts that all previous American generations and the citizens of all foreign countries would consider fantastic.

We have liberalized procedure. As long ago as the 1930s we began to embrace the system of notice pleading, in which you

**Lawyers are so widely disliked in this country because they are so very widely, and correctly, feared for the power without responsibility they wield.**

can drag someone to court without saying what he may have done wrong. In the 1970s we drastically liberalized discovery, making it far easier to demand your opponent's filing cabinets. We liberalized forum shopping to make it easier to look around for a judge or jurisdiction hostile to your opponent or slanted toward your own ideological view. And we liberalized the admission of expert evidence to allow more testimony from hired experts outside the mainstream thinking of their discipline, thus giving lawyers more chances to keep weak cases alive.


And so on. At the same time, we were throwing out the old legal ethics books in search of a new role for attorneys in society. Lawyers had traditionally been seen as quasi-deputized officers of the court, with whose unusual power to wield compulsory process came responsibilities to refrain from many steps that advanced the interests of their clients but not those of justice. Now we have swung toward the contrasting ideal of zealous representation, red in tooth and claw, to the point where many

authorities, including some legal ethics professors, dismiss as outmoded lawyers' obligation to avoid misleading a judge or jury or inflicting tactical harm on an opponent's pocketbook or reputation.

We have drastically liberalized lawyers' rights to take a share in the claims they sue over, starting with the plaintiff's contingency fee but increasingly also through contingency arrangements in defense and transactional work. Rather than having them get along on boring old hourly fees, we now encourage them to get rich overnight if they obtain an unusually good result, and go hungry if they obtain an unusually bad one. By making the outcome one of feast or famine rather than more or some, we hyper-incentivize lawyers to do what it takes to win, though many of those things are far from attractive. And we've also drastically liberalized the scope for class actions, citizen suits, and other proceedings which encourage a lawyer to sue with no real clients.

**B**ehind all these trends is a unified view of litigation as basically a good thing to be encouraged, since the more lawsuits go forward, the more justice we'll supposedly see done.

The result has been not simply to encourage destructive wrangling but also to ensure that lawyers have more power to ruin your life in America than they do in any other advanced country. In no other major democracy can a freebooting lawyer show up, dump a pile of papers on your front lawn, tie you up for years, inflict untold damage to your business and reputation, and then walk away with hardly any consequences if he is proven wrong. Lawyers, I submit, are so widely disliked in this country because they are so very widely, and correctly, feared for the power without responsibility they wield.

So here is a question for the bar associations: Is the current state of your profession misunderstood? Or understood too well? 

*Contributing Editor Walter Olson (wo@walterolson.com) is a senior fellow at the Manhattan Institute and author of The Litigation Explosion (www.walterolson.com/litexpl.html). This column is adapted from a speech he delivered to the Federalist Society's National Lawyers Convention.*

# A Gray World

By Brink Lindsey

**False Dawn: The Delusions of Global Capitalism, by John Gray, New York: The New Press, 234 pages, \$25.00**

In *False Dawn*, John Gray attempts to attack global capitalism at its intellectual roots. In other words, he portrays the worldwide spread of markets as the manifestation of deeply flawed ideas about how the world works. The attack, a sloppy jumble of internal contradictions and factual distortions, fails spectacularly. Nevertheless, the book does achieve something: It articulates, quite boldly and with rhetorical verve, a relatively sophisticated version of reactionary globalphobia. It's not a pretty sight, but it merits our attention all the same.

Gray is a professor at the London School of Economics and a fairly prominent public intellectual in Britain. Like America's Pat Buchanan, Gray opposes globalization from the right; also like Buchanan, Gray is a repentant ex-free-trader. Gray's intellectual about-face, though, goes far beyond international eco-

lightenment pedigree. "A single global market," he writes, "is the Enlightenment's project of a universal civilization in what is likely to be its final form." In an invidious and oft-repeated comparison, he portrays global capitalism and the now-defunct ideal of collectivism as two sides of the same rationalist coin: "Even though a global free market cannot be reconciled with any kind of planned economy, what these Utopias have in common is more fundamental than their differences. In their cult of reason and efficiency, their ignorance of history and their contempt for the ways of life they consign to poverty or extinction, they embody the same rationalist hubris and cultural imperialism that have marked the central traditions of Enlightenment thinking throughout its history."

Gray does not dispute (at least not consistently) that, unlike socialism, free mar-

nullifies precedent, it snaps the threads of memory and scatters local knowledge. By privileging individual choice over any common good it tends to make relationships revocable and provisional."

At this point Gray sounds like a full-fledged neo-Luddite, rejecting the rat race of economic and technological progress in favor of some lost bucolic wonderland of cheerful, ruddy peasants and a wise and kindly nobility. But Gray's views are more complicated, and less coherent, than they first appear. Gray distinguishes between the "global free market," a utopian fantasy he harshly condemns, and globalization more generally, whose inevitability he recognizes and accepts.

"A global single market is very much a late-twentieth-century *political* project," he argues. "It is good to remind ourselves of this, and to make an important distinction. This political project is far more transient than the globalization of economic and cultural life that began in Europe in the early modern period from the fifteenth century onwards, and is set to advance for centuries. For humankind at the close of the modern period globalization is an historical fate. Its basic mechanism is the swift and inexorable spawning of new technologies throughout the world. That technology-driven modernization of the world's economic life will go ahead regardless of the fate of a worldwide free market."

**John Gray rejects not just free trade, not just liberalism, but the whole "Enlightenment project"—or at least his caricature thereof. Indeed, at the bottom of his hostility to the world economy is its supposed Enlightenment pedigree.**

nomics. He is a former classical liberal whose earlier books include intelligent and admiring analyses of J.S. Mill and F.A. Hayek. Now he rejects not just free trade, not just liberalism, but the whole "Enlightenment project"—or at least his caricature thereof. (In *The Future and Its Enemies*, Virginia Postrel identifies Gray as a leading voice of what she calls "reactionary stasis.")

Indeed, at the bottom of Gray's hostility to the world economy is its supposed En-

kets deliver the goods. "The argument against unrestricted global freedom in trade and capital movements," he concedes, "is not primarily an economic one. It is, rather, that the economy should serve the needs of society, not society the imperatives of the market." In particular, Gray argues that free markets undermine the "needs of society" by fomenting incessant and unsettling change. "The permanent revolution of the free market denies any authority to the past," he writes. "It

It appears, then, that John Gray is highly selective in his railings against the "Enlightenment project." The "universal civilization" of science and technology, after all, has its own "cult of reason and efficiency," heaps "contempt" on traditional superstitions and folkways, and spreads its own "cultural imperialism." Even more so than do free markets, the "permanent revolution" of scientific and technological advance "denies any authority to the past," "nullifies precedent," and "snaps the threads of memory." Yet while free markets are dismissed as a dangerous pipe dream, technological progress is a "historical fate."

The muddle gets deeper. Gray explicitly acknowledges that free markets and