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Law's Paradise Lost?

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THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT. By *Walter K. Olson.* New York: Truman Talley Books/Dutton. 1991. Pp. viii, 388. $24.95.

"This book tells the story of how, in a series of specific changes over decades, we changed the rules in our courtrooms to encourage citizens to sue each other." Thus does Walter Olson[1] begin *The Litigation Explosion,* in which he describes "a unique experiment in freeing the legal profession and the litigious impulse from age-old constraints," and pronounces the experiment "a disaster, an unmitigated failure" (pp. 1-2).

In the author's version of events, there was first an Edenic "classical" age when rules were rules and not mere standards, and it could be "hoped that a lawyer would look at a prospective claim as a judge might look, and not just ask if it had raw settlement value" (p. 268). But then somehow the legal realists (and other social engineers only sometimes identified as economists) came on the scene and began to dismantle the set piece by piece. The ethical rules that had governed the legal profession in the classical period were discredited as merely a means by which the established bar tempered the competition of newcomers. The rules of civil procedure and the limitations of due process were relaxed so that anyone might be sued by some suspicious plaintiff whose greatest hope lay in finding, through pretrial discovery, that the defendant had injured him. Meanwhile, legislatures were encouraging litigation in their own ways, with long-arm statutes, "citizen suit" provisions, and damage multipliers expressly designed to encourage "private attorneys general" to vindicate public policies.

As the cited passages suggest, Olson has written for a popular audience. He treats the subject of litigiousness and its effect upon society in a serious but not in a scholarly fashion. For example, the book is punctuated with anecdotes, many taken from press accounts of cases and the stories behind them, and it contains only a few statistics, which makes it impossible to gauge the significance of the phenomena it describes. At the same time, Olson provides a useful overview and a challenging perspective, from which lawyers and judges too may profit.

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The book is divided into five parts. In "The Industry," referring to the litigation industry, Olson devotes a chapter each to the judicial deregulation of lawyer advertising, the rise of the contingent fee, and the resulting "reversal of roles" in which lawyers are the real parties in interest in the conduct of some types of litigation, prominently including personal injury and shareholder and other class actions.

As Olson's account reminds us, the norms regarding lawyers' solicitation of business changed very quickly. Indeed, less than twenty years ago it was still "thought that lawyers should not drum up their own business," although the rule was "widely if covertly evaded" (p. 16). "The ethical lawyer was supposed to sit back passively and wait for clients to come around" (p. 18). What, then, became of the person too timid, ignorant, or lacking in contacts even to seek out a lawyer, much less to find a lawyer with the expertise relevant to his or her problem? Olson acknowledges that some were "badly wronged for want of competent advice. . . . signing the grossly lopsided business deal, taking the insurance adjuster's low-ball offer, accepting the dangerous reconciliation with the hot-tempered spouse" (pp. 18-19). Nonetheless, by Olson's account, this (to me rather significant) objection to the norm against lawyer self-promotion did not make much headway until it was joined, in the 1970s, by "a different and on the whole more sophisticated school of thought . . . especially among economists. The new thinking emphasized the benefits rather than the dangers of sales promotion" (p. 19). Indeed, so powerful is the observation that a client is a consumer too that "antitrust enforcers started making menacing noises" about the organized bar's longstanding ethical tenets (p. 21). The rest, of course, is history.

In a series of cases, the Supreme Court grappled with the First Amendment objections lawyers raised against state regulation of advertising, and the result was, as every watcher of late-night television knows, very substantial deregulation.[2] "The Court . . . endorsed the emergent legal idealogy of the era. That idealogy encourages each citizen to be fully educated about, the better to seek complete vindication of, his set of legally defined interests" (p. 30). Can that be bad? Yes, says Olson, because it will stir up litigation, and litigation is injurious! Olson stands squarely with Blackstone who, Olson tells us, warned about the "pests of civil society, that are perpetually endeavoring to

2. See Shapero v. Kentucky Bar Assn., 486 U.S. 466 (1988) (First Amendment precludes state from categorically prohibiting lawyers from soliciting business by sending truthful and nondeceptive letters to potential clients known to face particular legal problems); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (First Amendment commercial speech doctrine precludes reprimand premised on lawyer's advertising for advice on specific legal problems and use of illustrations); *In re* Primus, 436 U.S. 412 (1978) (First Amendment protection of political expression and association precludes discipline of lawyers for sending letter offering free legal assistance to woman sterilized as condition of receiving public medical assistance); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (First Amendment protection of commercial speech precludes ban on lawyers' nonmisleading advertising of prices for routine services).

disturb the repose of their neighbors, and officiously interfering in other men's quarrels."[3]

Blackstone's hardly seems like a complete answer. In fact, Olson does no more than point out that there will be costs, starting with the cost of litigation, if people are fully apprised of their rights. But what are rights if they are not known, or once known cannot be vindicated? If Americans have too many rights — which is not at all implausible in light of the number that courts have discovered only in the last few decades — I should think that the solution is not to discourage publicity about them, as by lawyer advertising, but to cut them back to an appropriate level. Broad constraints upon lawyer advertising inevitably promote public ignorance about individual rights. The consequences of such ignorance are, moreover, at best distributed randomly and more often visited disproportionately upon those who can least afford to forego their rights. Unfortunately, although Olson emphasizes the costs of litigation throughout the book, he does not stop to examine separately the contribution that lawyer advertising (or other litigation-facilitating devices, such as the contingent fee) has made to the overall costs and benefits of litigation.

In the second part, entitled "The Lawsuit," the author devotes a chapter each to jurisdiction (i.e., forum shopping), notice pleading, and discovery, in each case providing a broad historical account of the journey from the classical period to the present, followed by a spirited description of the problems and abuses to which the current rules are prone. In Part Three, "The Law," Olson laments the demise of formal rules in a variety of areas — for example in custody cases, where the efficient presumption in favor of the mother gave way to "the best interests of the child" standard, creating much litigation but little change — except to give fathers more leverage in bargaining over financial terms (p. 137). He also derides the relaxation of the old limits on the use of expert testimony (pp. 156-66). There are separate chapters on the evolution of choice of law principles, from classical certainty to contemporary "interest analysis," and the much exaggerated "death of contract."

In the last-mentioned chapter, Olson gives the lay reader a succinct account of the legal realists' attack upon formalism in the law of contracts[4] and a deliciously ironic account of "a second, converging line of thinking" (p. 206) coming from the law schools to attack so-called contracts of adhesion. The concern with such contracts began with the faith among "[s]ome influential law professors . . . that capitalism had an irresistible tendency toward monopoly" (p. 206). In the

3. P. 27 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *135).

4. Olson explains that "[t]he problem [according to the legal realists] was that the courts pretended to object only to the way a deal had been negotiated or worded when they really objected to its content." P. 205.

capitalist end-state, the consumer would be confronted only with standard form contracts, one offered by each "trust." Olson continues:

> What was truly odd about this logic was not so much its fear of impending universal monopoly, which was typical of its day, as its flying leap to the idea that standard off-the-rack contracts are more dangerous to a monopoly's customers than contracts dickered one by one. The most fearsome monopoly would be precisely the one that dickered with each of its customers, because it could then skin each one to the exact limit of endurance. Even where monopoly as such is not a problem, markets where haggling is the norm . . . are hardly known for consistency of customer satisfaction. [p. 207]

He goes on to note that the rise of the store with the same price for all customers was hailed as a great advance in its time and that a seller's willingness to treat each customer alike is of special benefit for the unsophisticated. Anyone who has traveled outside the most advanced market economies knows that Olson is right and that the professors were wrong about standard form contracts.

To return to the structure of the book, however, we next encounter "The Consequences." First among them is that "the competitive pressure of the litigation industry tends to weed out softness. Increasingly lawyers are found who take the view that they owe opponents no ethical obligation at all beyond 'strict legal duty' " (p. 233). Second, a potential lawsuit now appeals to a lawyer not because of its merits (as in the Edenic past, when the lawyer was an agent, not a principal, in litigation) but because of its settlement value, which is determined by such matters as the adverse media coverage facing the defendant, the risk of joint and several liability for the shares of early-settling codefendants, and other tactical considerations (pp. 250-58). Finally, individual rights are trampled in the course of civil litigation in a way that is not tolerated in the criminal law, where accusations are made only by a public prosecutor who does not stand personally to benefit by the result, and the statutory standards by which the defendant's conduct is judged are construed narrowly. The irony, according to Olson, is that the institutions of the civil law are now expressly designed to shape behavior, often imposing punitive damages in order to deter unwanted conduct, while at the same time those accused of engaging in such conduct are denied the rights routinely accorded a person accused of even a minor crime (pp. 272-93).

In a final part, "The Way Out," Olson argues that "America is the litigious society it is because American lawyers wield such unparalleled powers of imposition" (p. 299), and that "[l]itigation must be reformed from within, by rolling back the powers of imposition that make it so fearful" (p. 313). Although he is not at all short of suggestions for piecemeal reform — from the curtailment of long arm jurisdiction and punitive damages to the restoration of limits upon the use of expert witnesses and discovery — Olson's only systemic solution is

"strict liability for litigators themselves" (p. 337). By this he means only that the lawyer who brings a losing claim or defends a losing position, and thereby imposes anguish and costs upon the other side, ought in fairness to pay for the harm he or she has done. According to Olson, this is the norm in virtually every other civilized country (although it is known here as the English rule) (p. 329).

The chapter on fee-shifting is the most compelling in the book, in no small part because it addresses systematically the problems discussed for the most part anecdotally over the preceding 300 pages. In addition, Olson is careful here to explain how the English approach to fee-shifting works; he even stops to examine the questions "If the American rule is so patently unjust, why did it ever take hold at all? And why has it lasted for more than a century?" (The answer — to the first question, anyway — is that "[t]he backers of the original American rule were in large measure farmers and frontiersmen who wanted to stave off the enforcement against them of debts and mortgages about whose face validity there was no real doubt" (pp. 330-31).)

In these regards, Olson's consideration of the solution he proposes is considerably more analytical than his treatment of the problems it addresses. Indeed, the greatest drawback to his book is that it is simply not very analytical. He "tells the story," as he said he would, "of how, in a series of specific changes over decades, we changed the rules in our courtrooms to encourage citizens to sue each other" (p. 1). But he does not really consider *why* we did these things. By Olson's account, only the litigators have gained, and only they had any material interest in promoting litigation. Why, then, were scholars, legislators, and judges so foolish as not just to go along but often even to lead the way? To be sure, Olson tells us that litigators have been active in state legislatures, both as members and as lobbyists. Is there reason to believe that they have been more active, however, than corporate general counsels, the insurance industry, and the many others whom one would expect to oppose them?

Time and again the reader who wants to know not only what happened, but why it happened, is left unsatisfied. Having confined himself to describing the problem, without much attending to the reasons for which presumably practical people created it, he labors under a significant limitation: We can agree with everything he says about the problems the litigation explosion has created and still not know whether it has been, on balance, a good or a bad thing.

I do not want to criticize Olson unduly, however, for the book that he did not write when there is much to praise in the book that he did write. He has written a lively and thought-provoking account of his subject. He brings home time and again the reminder that 'twas not always so, which raises the question whether it need be so now.