MIMESIS
LAW

Cross: Walter Olson, A Good Lawyer's Best Friend

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Ed. Note: Scott Greenfield crosses Walter Olson, whose blog, Overlawyered, is recognized as the first law blog ever, and who is a Senior Fellow with the Cato Institute.

Q. As the founder of what most of us consider the first law blog, Overlawyered, you have become as transparent in your views as you remain a mystery as a person. You went to Yale, long before all the safe space shouting began, but that's about all I could find out about your formative years. So where did Wally Olson come from? Any other university, degrees? What was your major? What did you want to do when you went into Yale? And then what did you want to do when you came out?

A. I myself escaped by a bare whisker from attending law school; many times since I've been told that had I gone there I would never have dared take such a disrespectful attitude later on in my books ("the professors would have beaten it out of you"). And of course the debt burden might have made it harder for me to persevere as a writer.

Instead I briefly started grad school in economics, which had been my undergrad major, but soon realized that although I was drawn toward economic history and the analysis of market phenomena, I didn't aspire to be a professional economist. You may wonder about my views on the law and economics movement, which are a bit of a love/hate mix – it has done so much splendid work, but also so much work that reads as if written by someone raised by wolves, such as models of litigation that assume it has zero transaction costs.

Q. When I first stumbled across Overlawyered, it was primarily about tort reform, with you and Ted Frank (who has since gone on to run the Center for Class Action Fairness) beating the crap out of personal injury and class action lawyers. What made you focus your interests on lawyers, in the first place, and personal injury lawyers in particular?

A. Two things combined to bump me from the economic onto the legal writing path. First, the litigation business in the 1980s was something completely new that was constantly making news, with stunning individual cases like Joe Jamail's $10 billion score against Pennzoil on a claim arguably worth zero, and a new business plan of mass litigation both arising from and itself stoking public fears on hazards both real and imagined (silicone breast implants, childhood vaccines).

Second, I found myself thrown in among brilliant legal thinkers who were very good at getting me interested in their subject. I was helping edit a magazine called Regulation (put out now by Cato, then by the American Enterprise Institute), edited by Nino Scalia. I worked on pieces by rising writers like Peter Huber, Richard Epstein, and many more. "These are the most interesting issues in public policy right now and no one has managed to explain them to a general readership yet," I thought.

Q. Since those early days, you've spread out to issues involving criminal law, school law (with an emphasis on the harm done to children by cops and school admins with their inflexible rules). Still, the name "Overlawyered" is itself a pointed political statement. Why (or why not)? Is your "issue" with the lawyers or the legal system? Why do you hate lawyers so much?

A. How silly to think I hate lawyers; they are (part of) the intended audience for almost every word I write. No, my target is the legal system especially as shaped by ideas, movements, and would-be reformers. Of course some members of the profession are personally quite evil but in the end I have trouble staying interested in evil persons; most of them are banal. I am much more fascinated by the way bad legal incentives built into a system can take nice, or at least ordinary, people and put them in a position where they are willing to destroy adversaries, connive at perjury, rationalize injustice, or whatever.

Q. You've been a scholar with the Manhattan Institute, a conservative Think Tank, and now the Cato Institute, a libertarian Think Tank. What drew you to the Think Tanks? What drew you to these Think Tanks in particular? What made you find a home in conservative libertarian politics? Are you a faithful member of the team, or do you have any disagreements with Manhattan Institute and/or Cato?

A. None of these organizations (including the American Enterprise Institute, where I started off) imposes a heavy-handed ideological line, and I have been grateful for that. I've always written on a broader range of interests than law alone and have helped launch many publications in other areas, such as the websites Secular Right and Independent Gay Forum.

I am especially grateful to Cato because they explicitly urged me to do more rather than less branching out. Six years ago, when they invited me to join them, I felt that after a quarter-century, I'd basically written most of what I ever wanted to say about tort controversies. Cato has real depth in areas I'd never had much occasion to write on during my years in New York City, such as constitutional law and Supreme Court coverage. It has a libertarian vantage point that combines a traditionalist's respect for the Anglo-American legal and constitutional inheritance with a more liberal stand on many present-day cultural issues. That happens to suit me exactly.

Q. Your first book, ***The Litigation Explosion***, rips civil litigators to shreds, laying the blight of litigiousness of American society at their feet for fostering a lawsuit for everything. Are lawyers really that greedy and manipulative? Certainly, there are some causes worthy of litigation, right? Where is the line drawn? Is Overlawyered over-tarring all civil litigators? Aren't there any lawyers with integrity out there handling personal injury?

A. *The Litigation Explosion* comes down hard on modern developments in legal ethics, procedure, and so forth, but in every case it's defending propositions — "don't stir up litigation,"

for example – that had been accepted, even seen as axiomatic, by generations of lawyers previously. I offered a wide-ranging critique, but there really isn't any major element of it, whether it be about notice pleading or forum-shopping or wide-open discovery, where I wasn't tracking the footprints of respected judges and practitioners who had already noted these problems.

Where I perhaps was a bit more original was in systematically challenging the then-fashionable ideology from the law schools that saw litigation as a socially productive way to get ever more justice and deterrence and social insurance and accordingly sought ways to promote more and more of these good things – Allow citizen suits over everything! Take any discovery you want! Let everything get to a jury! One-way attorneys' fees when it's over! I called this the "invisible fist theory," a Bizarro-version of Adam Smith's much more plausible invisible-hand theory of the economy, and I made fun of it. People forget how popular that view of litigation was for a while among supposedly advanced thinkers, though it has been in retreat for a while.

Q. In your next book, *The Excuse Factory*, you write about "how Kafkaesque employment laws make it nearly impossible to fire even the most incompetent and unmotivated workers." Is this about lawyers, or laws?

From the merely annoying, like the chronically late secretary, to the extremely dangerous, like the alcoholic airline pilot, Olson shows how the legal system coddles those who least deserve it. In the name of protecting victims of discrimination with laws like the Americans with Disabilities Act and the 1991 Civil Rights Act, we have made it tremendously difficult just to get people to do their jobs.

That was from 1997, and problems associated with the Civil Rights Act and the Americans with Disabilities Act are far more severe and ubiquitous today than anyone could have imagined back then. How did that happen? What has changed in America in the past two decades that has not merely reinforced the concerns, but expanded them to such unrelated issues as "fat shaming"? Was this the lawyers' fault?

A. I take no credit for being prescient; I could see the momentum building. In the law reviews, there were (and are) twenty articles urging the expansion of employment discrimination law for every one that sees problems or costs in it. Collective bargaining was shriveling year by year, while employment suits proliferated, resulting in the great aphorism I quoted from a now deceased-lawyer about how it's easier to get $100,000 for one worker than it is to get ten cents an hour for all the workers.

Identity politics never cools off, and the anti-discrimination principle is as close as we've got in this country to a secular creed. Whenever I find a case where I think, this time they've got to admit the law goes too far – the fire department, for example, ordered to stop discriminating in favor of applicants to have the upper-body strength to carry a charged hose or a human body — I find that the ACLU or the feminist or ADA groups are proud of that outcome and that Congress is utterly unwilling to say no to them.

Q. Your next book, *The Rule of Lawyers*, was published in 2003, where you take on the class action bar, and most notably, the $246 billion tobacco settlement. Is there any virtue to be had for

the lawyers representing the little guys against behemoth corporations? You attack the lawyers for fighting for their own paychecks rather than the interests of the class, but is that a flaw of the system or the lawyers who chose to put their efforts toward gaming the system? Should class actions be banned, or do they serve any purpose? And with guys like Ted watching the watchers, is there any hope for legitimacy for the future of class actions?

A. *The Rule of Lawyers* tackled industry-wide litigation and what came to be called regulation through litigation, and especially the phenomenon of private contingency lawyers teaming up with state AGs, mayors, or other levels of government to take down industries, which nearly worked against gunmakers and was tried with varying degrees of success against a half-dozen other lines of business following tobacco. If your idea is to enact a romantic David and Goliath story, lawsuits by Masters of the Universe tort guys flying around in their private jets against mom and pop gun stores or nonprofit hospital executives aren't my idea of that.

On tobacco, we lived through a period where not only were state AGs hiring their old professional and law-school chums without competitive bidding for eight- and nine-figure fee pots, but the legislatures of Maryland and Florida, to name two states, enacted statutes retroactively establishing liability in pending suits filed by those states, which made a cool budget enhancer, no? The whole process was just spectacularly corrupt on multiple levels, playing at the forms of a U.S.-style court system but really channeling loot to those in charge. I think the word is "tinpot."

Now I think there was a very healthy revulsion afterward among bench, bar, public officials, and others, to the things I wrote about, and many of them quietly resolved that things must not be done this way again in future. But with a very few exceptions, such as sending the then Texas AG to prison, there was never a reckoning over what happened in the tobacco episode.

Q. And not to belabor your books, but your last book, *Schools for Misrule* (which I reviewed), goes after law schools and its overwhelmingly liberal professoriate. That was in 2011, and by my highly unscientific calculations, the Legal Academy has not only grown more radical in its liberal politics, but more shameless in its exploitation of scholarly credentials to pursue its agenda. Is there any going back? Where are the intellectually honest scholars, the conservative academics? Law school isn't gender studies, so what has gone so horribly wrong that it has been consumed by progressivism?

A. Please do belabor my books. This may be one instance where my view is a bit less bleak than yours. Schools for Misrule is a book about bad ideas in the law schools, and those bad ideas (as at business schools and schools of education) often arrive in fads that sweep through with little resistance: public interest law, welfare rights law, international human rights law, law and inequality, and whatever the Ford Foundation decides to move onto next.

But that is only part of the picture. While the law schools now host many thinkers unfriendly to free expression and due process, they also host many of the leading advocates of those principles. Who raised objections at Harvard when administration decided to cave to the new Title IX regime? A bunch of law professors. And there's always that "compared to what" question: given the forces pushing ideological uniformity and indoctrination on many campuses, the law school – even where there is only a solitary one or two conservatives or libertarians –

will often be a locus of resistance, simply because most law teachers crave the freedom to show that issues have more than one side.

Q. While some might mistakenly see your books and Overlawyered and believe that you're a serious lawyer hater, that's really not the case at all. Indeed, you've been very supportive of lawyers who defend the Constitution, both criminal defense and First Amendment in particular. What makes them different? Is it just a matter of practice area, the particular niche served, that distinguishes good lawyers from bad? Perhaps your "overlawyered" issues is less a reflection of the legal profession, the sort of folks who choose to practice law, and more a condemnation of those who are greedy and disreputable?

A. I hope I haven't let criminal defense lawyers, or lawyers who fight the government, off too easily. I've run pieces poking fun at far-fetched or turn-over-every-rock criminal defenses, and (often) at overstuffed fee requests by lawyers who prevail against the government. And as you've acknowledged yourself, the fact that there's a ton of genuine police misconduct doesn't mean there isn't also a ton of bogus claiming of police misconduct, often by fairly arrested perps who may feel they have nothing to lose by such a bogus claim.

Even so, you're on to something about how needless civil lawsuits don't quite have a parallel on the criminal defense side. If you sprain your wrist slipping on your aunt's porch the socially optimal number of lawsuits may be zero, no matter how genuinely it hurts, but when someone is in peril of imprisonment the optimal amount of criminal defense effort is not zero; it is reasonable for the state to have to prove its case.

Q. While this will not likely surprise you, a lot of lawyers find themselves in general agreement with your criticism of the profession, even if not with every specific issue. That said, we would do better to have a society without lawyers? While much mischief can be attributed to the legal system, what would we do without it? How do we "raise" the next generation of lawyers to do a better job of serving their clients and society without taking away their incentives to enter the profession? Is an underlawyered future better than an overlawyered one?

A. The choice of not having lawyers or law at all is a false one. To criticize the medical profession over its dispensing of unneeded surgeries, side-effect-laden happy pills, or baseless psychiatric diagnoses is not to call for a world without the medical profession. Unlike some economists and some of my libertarian colleagues, I think there is merit in the tradition of recognizing certain learned professions that are subject to special ethical demands and elements of self-governance, as opposed to running on the business model of ordinary lines of commerce.

Unfortunately, our law often seems intent on keeping the bad aspects of guild governance (such as ferocious application of unauthorized-practice against innocuous service providers) while jettisoning core elements of ethics that are much more important in retaining public trust.