

C H A P T E R S I X

L. Gordon Crovitz

RESTORING
THE RULE OF LAW

THE MANHATTAN INSTITUTE'S ACHIEVEMENTS over the past quarter-century are, to put it mildly, impressive. Charles Murray bucked deeply entrenched interest groups and laid the intellectual foundations for welfare reform—eventually embraced by the Left and the Right. George Kelling helped devise the “broken windows” policing strategy that made New York City’s streets safe again. Myron Magnet helped formulate the national agenda of “compassionate conservatism,” embraced by President George W. Bush. Other Manhattan Institute writers have led the charge against affirmative action and education policies that treat minorities as second-class citizens.

Any list of the institute’s accomplishments, however, must put near the top the long-term sponsorship of two of the nation’s leading legal minds: Peter Huber and Walter Olson. These two men have grappled with a problem—abuses of the U.S. civil justice system—even more deeply entrenched than welfare dependency and crime, with even more pow-

erful and more motivated special interests opposing reform. The interested parties here—trial lawyers—are interested indeed. Attorneys are making fortunes, thanks to spurious lawsuits. With Congress and state legislatures run largely by politicians who are also lawyers—for whom blocking legal reform has become a matter of professional courtesy (and a source of campaign funds from fellow litigators)—complete victory is likely a long-term goal at best. But if and when it comes, it will owe much to the pioneering work of Huber and Olson.

Less than a generation ago, after all, there was little public understanding of how the American legal system got into the mess it is in today. After several books and hundreds of articles by Huber and Olson that illuminate the intellectual history of the U.S. legal system's decline, though, we know a lot more about what went wrong. In fact, the legal crisis has gained so much attention that lawyer jokes have become reliable laugh-getters for talk-show hosts and after-dinner speakers—even among plaintiff lawyers themselves. A drum roll, please: “I have the greatest practice of law in the world,” deadpanned Bill Lerach of the class-action law firm Milberg Weiss. “I have no clients.”

Two Iconoclasts

The first groundbreaking book to appear on this subject was Huber's *Liability: The Legal Revolution and Its Consequences*, which in 1988 sketched the history of our civil justice system. Olson followed in 1991 with *The Litigation Explosion: What Happened When America Unleashed the Lawsuit*, detailing how unpredictable our rules had become. That same year, Huber released *Galileo's Revenge: Junk Science in the Courtroom*, introducing the phrase “junk science.” Later came Olson's *Excuse Factory* (1997) and *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (2003). The latter book describes how the litigation revolution jeopardizes the constitutional balance of powers among the three branches of government by empowering lawyers to use the courts as antidemocratic alternatives for lawmaking and regulation.

Olson and Huber do first-class scholarly work on a topic that garners

little interest—if not open hostility—in legal academic circles. Law professors are rarely open to the possibility that the legal profession may have undermined the rule of law, or that the nearly 1 million lawyers in the U.S.—a number refurbished every year with new law school graduates—may have exceeded their rightful influence. When the notion of a litigation morass does come up inside the law schools, it's often thanks to student groups such as the Federalist Society, not as part of the normal curriculum.

The two men came to their debate-changing work on legal reform via a seemingly roundabout route. During the early 1980s, they co-edited *Regulation*, a journal once published by the American Enterprise Institute and now put out by the Cato Institute. *Regulation* is a policy magazine with articles analyzing (appropriately enough) regulatory issues, antitrust, and trade—the kinds of microeconomic policy topics that usually matter deeply to specific industries and interest groups but only rarely generate great political interest.

While working on *Regulation*, Huber and Olson became interested in the problems of our legal system and their economic and social costs. In seeing the full extent of these problems, Olson has the advantage of not being a lawyer; Huber, who holds a Ph.D. in mechanical engineering from MIT, has somehow managed to keep his thinking about the law clear despite being an attorney (he once clerked for Ruth Bader Ginsburg and Sandra Day O'Connor and now helps run a Washington-based telecommunications law firm).

The Enormous Tort Tax

It was Huber's *Liability* that first estimated the total cost of our uncontrolled tort system at \$80 billion a year in direct costs—\$300 billion yearly if you include the indirect costs that businesses and doctors and other professionals incur to avoid liability. Huber presents the history of how lawyers and willing judges, beginning in the late nineteenth century, undermined the basic concepts of traditional tort and contract law. During the 1960s, he shows, the federal government joined in, throwing

overboard the rules of behavior that the common law had long taken as standard.

As Huber explains, complex regulatory edicts then took the place of the relatively well-understood rules that had guided business practices and set down liability guidelines for personal injuries. The proliferating regulatory agencies—from the Environmental Protection Agency to the Occupational Safety and Health Administration—swiftly accrued enormous power. “One advantage they enjoyed from the beginning,” Huber writes, “was in not having to work through a refractory political process, or even to explain their reforms to the unwashed public at all.” What was lost was considerable. While the common law may not have reimbursed for accidents in which no one was at fault, it did have the great virtue of creating predictable, reasonable, and generally fair rules of action.

Today, the country has more laws, purporting to control more of life, than ever before in its history. But the liability system fails the fundamental test of any legal system: Can citizens grasp the laws so that they can abide by them? Are the laws predictable? Do they generally make sense to reasonable people? We have blurred and expanded our definition of what acts can give rise to lawsuits and what constitutes permissible damage. The law has become so uncertain that defendants are often better off letting plaintiff contingency-fee lawyers shake them down for settlements or making preemptive declarations of bankruptcy than daring to fight back.

This chaotic situation has encouraged a proliferation of meritless lawsuits that have been fatal for many products, including the morning-sickness drug Bendectin. Indeed, entire American industries, such as contraceptives, private airplanes, and vaccines, have all but been eradicated. Recently, trial lawyers, following the Willie Sutton “go-where-the-money-is” jurisprudence, have targeted the high-tech companies whose shares fell after the Internet bubble burst, credit-card firms, tobacco companies, gun makers, biotech outfits, and fast-food giant McDonald’s—and who knows what industry is next. No economic theory can yet assess the full damage of this litigation, which, among many other ill effects, chills research and product development. But Huber’s scary estimates indicate the force of the impact.

Worse still, “civil procedure” has become an oxymoron. Defendants can find themselves dragged into court without plaintiff lawyers on the other side telling them first exactly what they have done wrong. Rules of discovery have been turned upside down. No longer do the rules protect people from nuisance litigation. Now they incentivize costly fishing expeditions for purported harms. Guideposts that set down which courts could hear which cases have also collapsed. Plaintiff lawyers can shop for sympathetic forums—a practice that has made certain states famous as litigation-jackpot venues.

Lawsuit Nation

In fact, things have gotten so bad that our legal system now stands as the leading example for other countries of what *not* to do. “Once upon a time, America was a self-reliant John Wayne society where a man’s gotta do what a man’s gotta do,” observed London’s *Independent* newspaper a few years ago. “Now, America has become an over-lawyered society where nobody takes responsibility for mistakes because it is more profitable to claim victimhood and reach for a lawyer. The new motto is: a man’s gotta sue what a man’s gotta sue.”

Another article, this one in the *London Times*, commenting on a lawsuit against McDonald’s for selling fattening fast food—the suit charged that the company “enticed” people to eat fast food “without disclosing the detrimental effects thereof”—noted that, happily, such bogus lawsuits couldn’t go forward in the British legal system (the basis of ours, of course) because it would “trigger the defense of *volenti non fit injuria*, meaning that a complainant cannot win if he has voluntarily submitted himself to the injury of which he now complains.” The article then quoted Olson’s observation that most people are aware that double cheeseburgers are “not the same as celery” when it comes to diet.

The notion of assumption of risk, a legal doctrine dating from Roman times, has become all but meaningless. Plaintiff lawyers can now make straight-faced arguments in court that the law should not permit Americans to do anything so ruggedly individualistic as to assume risk for *anything*.

Consider tobacco litigation, which resulted in a mind-boggling \$246 billion 1998 settlement with tobacco firms—a story that deserves a place of its own in the annals of a legal system gone awry. No one doubts that tobacco is harmful or that smokers have accepted risks that non-smokers have chosen to avoid. After all, the government has mandated warning labels on cigarettes for decades. But tobacco companies, tired of fighting hundreds of lawsuits around the country with no end in sight, calculated that if they could strike a once-and-for-all deal they could then free themselves from the uncertainty of endless litigation.

Some skeptics of the deal noted that it operated in effect as a tax on tobacco operations, erecting a barrier to entry against new competitors—which, of course, can make life easier for established firms. Other critics pointed out that states would come to rely on their share of the tobacco firms' annual payments—basically transforming the states into allies of the tobacco companies. Yet few predicted that, in the budget crunches of recent years, many states would no longer even pretend that their share of the settlement would fund tobacco-related health spending. By now, many states have become completely addicted to the revenues of the very tobacco firms that they once claimed deserved punishment.

A Problem with Deep Roots

Lawyers, Huber and Olson have explained, once understood that their role as “officers of the court” imposed an obligation to protect the basic workings of the legal system itself—including upholding the idea that there were limits to what actions could give rise to lawsuits. Nowadays, litigators consider it a professional birthright to be able to haul people into court for little reason. Attorneys simply presume that they should have access to the government's coercive power in order to drag people into court. Standards for proving injury have shrunk to near nonexistence.

Perhaps just as damaging, lawyers have changed how their industry operates. They have lifted prior restraints on how to finance lawsuits or to claim clients. Olson emphasizes in particular the revolutionary change in U.S. law that permitted one party to bring another to court without

needing to worry about reimbursing the other party's legal bills, as previously held true under the venerable "loser pays" English rule, which still prevails almost everywhere in the world outside the U.S.

Three important penalties of traditional common law went by the wayside in order to make launching lawsuits easier: *maintenance*, *champerty*, and *barratry*. The crime of maintenance occurred when someone who didn't have a legally recognized interest in litigation provided support or funding to a party in a lawsuit; champerty was a variant of maintenance under which the person "maintaining" was to share in the lawsuit's proceeds; and barratry was "exciting and maintaining suits and quarrels in courts," as the *Oxford Companion to Law* puts it. These rules prohibited lawyers from funding lawsuits—a practice that remains rare outside the U.S. The lawyer-funding of litigation would, in any case, be impractical in systems in which the "loser pays" rule still applied. The rule helps account for the comparative reasonableness of the common law as it still exists in England, Australia, Canada, and other countries.

By sharp contrast, the American legal system in 2004 is characterized by widespread contingency fees, typically in personal injury cases but now even in corporate litigation. As late as the 1930s, a federal appeals court was arguing against the emerging practice of contingency fees, predicting that it would encourage "officious intermeddlers" to "stir up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of law." The appeals court proved prescient.

As public-choice theorists might have predicted, the attorneys' bar as a trade group has developed a strong, continuing interest in maintaining all the legal uncertainty. If traditional rules no longer apply, the law can become more open-ended, increasing the chances that liability can apply where none existed before.

Lawyers representing plaintiffs, increasingly compensated by receiving a percentage of the settlement or damage award, have an especially intense personal interest in undermining once-predictable laws. Contingency-fee litigation often seeks to introduce pseudoscientific evidence of harm—think silicone breast implants—thus expanding liability. Once

some court somewhere permits dubious evidence of harm, presto! A new legal standard. All that's left is for lawyers to find "plaintiffs," coerce settlements from deep-pocket defendants, and take their share of the winnings to the bank.

The impact on particular industries, and on the general public, can be devastating. The Food and Drug Administration's ban on breast implants, encouraged by the trial lawyers, forced companies into bankruptcy and caused untold numbers of women to worry about potential health risks. Recently, FDA scientists have concluded that there's little or no evidence of harm from implants. Where do the bankrupt firms go to get back their livelihood? Where do women turn to make up for needless anguish?

Once a burden of proof has dropped low enough in a particular industry to allow a straight-faced legal claim, moreover, similar arguments wind up being employed in suits against other industries. "A one in ten chance of winning twenty times your stake," Huber calculates, "produces a very comfortable living if the bet is repeated often enough." Olson agrees: "As the Irish Republican Army said after its Brighton hotel bombing failed to assassinate Margaret Thatcher, 'We only have to be lucky once. You have to be lucky every time.'"

In *The Rule of Lawyers*, Olson goes so far as to argue that our litigation morass has reached the stage of a constitutional crisis. Our constitution establishes three separate branches of government—not a fourth branch for litigators to create new laws or legal standards without going through the legislative process. Outlaw tobacco? Few legislatures would incur the wrath of nicotine-supporting voters. But class-action lawyers, acting with the help of state attorneys general, can effectively restructure an entire industry. "At the root of America's litigation problem is a simple issue of power," Olson writes. "We first give lawyers far more power than other countries do and then we provide less supervision of the way they use that power."

Making the Case for Reform, Getting Results

In public policy debates, making the intellectual case is only the first necessary step. The second is to popularize the argument. Both Huber and

Olson have done this brilliantly through a stream of opinion columns, speeches, and television appearances. Such public outreach is especially invaluable when it comes to complex legal matters. Here's how Olson, writing in the *Wall Street Journal*, crisply summarized the litigation abuses committed in California under the state's infamous Business and Professions Code 17200:

"[The code] lets lawyers run to court without any injured client at all to sue against business practices that are either 'unfair'—a peerlessly amorphous term—or 'illegal,' a category that takes in countless technical violations that actual regulators and prosecutors have already settled or view as too trivial to pursue. Lawyers can file valid 17200 suits that piggyback on a business's claimed violation of entirely unrelated laws, even if those unrelated laws make clear that private parties can't sue to enforce their provisions. If the law were a prop in Alice in Wonderland, it would carry a little tag saying, 'Abuse me.'"

In addition to his highly readable books, articles, and columns, Olson also works in a rapid-response medium that can stay on top of all the outrages that our legal system has to offer. His website, www.overlawyered.com, gives daily updates on legal foolishness. Olson launched the site in 1999 after deciding "the Web had gone for too long without an attempt to collect, annotate and present in a (somewhat) systematic way the growing quantity of online material documenting the need for reform of the American civil justice system." The site is a treasure trove of links to case law and reporting on the liability system—often depressing reading but served up with a welcome sense of humor. The site includes a section entitled "What happened to personal responsibility?" which includes these amusing sub-headings and links to related news articles:

- Tipple your way to court: "Wasn't his fault for lying drunk under truck"; "Court says tipsy topless dancer can sue club"; "All-you-can-drink winner sues over fall."
- Maybe crime does pay: "Robber sues clerk who shot him during holdup"; "Mom who drugged kids' ice cream sues"; "Killed his mother, now suing psychiatrists."

- Couldn't help eating it: "Anti-diet activist hopes to sue Weight Watchers"; "McArdle on food as next tobacco."
- Plus: "Trips on shoelace, demands \$10 million from Nike"; "Skinny-dipping with killer whale: incredibly bad judgment."

And so on.

For his part, Peter Huber can claim to have changed the terms of the debate—literally. His *Galileo's Revenge* detailed the troubling consequences that follow when courts permit dubious expert-witness testimony. Huber coined the term "junk science" to characterize the preposterous scientific claims often used to argue for liability—claims that can't be justified at all if the evidence is properly understood. A search of the Factiva database of some 8,000 global publications and news services finds that the phrase "junk science" has appeared in more than 5,000 articles since Huber's book first came out. Huber's message has even reached the ear of the Supreme Court, which has warned federal courts to exclude unreliable science. Huber's column in *Forbes* often highlights new legal abuses in this area.

One measure of progress in policy debates can be the anger you provoke on the other side. Huber and Olson are scrupulously nonpartisan: they criticize abusers of the legal system of all political parties. Still, defenders of the litigation industry tend to be on the Left, and Huber and Olson have gotten them very irritated. A typical example: a 1999 article in the left-wing weekly *The Nation* by Eric Alterman, "The 'Right' Books and Big Ideas." The Manhattan Institute and its book writers feature in the piece prominently, with Olson and Huber paid the backhanded compliment of helping to "spark the national debate on civil justice, the use of social science in the courts and the nationwide attack on trial lawyers commonly known as 'tort reform.'" (Note the scare quotes.)

The influence of Huber and Olson goes beyond angering their opponents. When Karl Rove gave then-Texas-governor and presidential hopeful George W. Bush a copy of Olson's *The Litigation Explosion*, it revived legal reform as a national political issue. No surprise, then, that the Association of Trial Lawyers of America was the top political-action

committee contributor to the Democrats in the 2000 elections. Out of the \$2.6 million that the ATLA spent on candidates, 86 percent went to the Dems—and there’s a lot more where that came from. Olson: “The tobacco settlements have created a class of lawyers richer than any lawyers have dreamed of being in the history of the world. They really have become an institutional ATM for the Democratic Party.”

The Future

The great Austrian economist Friedrich Hayek once advised the founders of the Manhattan Institute to stay away from politics in any narrow sense if they wanted to make a difference, because public opinion lags intellectual thought for 20 or 30 years. Win the war of ideas first, then on-the-ground results will eventually follow. The battle to restore a sensible legal system to this country—a battle whose intellectual firepower Huber and Olson have helped supply—still has a long way to go before it can claim full success.

Encouragingly, though, there are several lobbying groups that are trying to achieve real policy gains on the foundations that Huber and Olson have laid. The American Tort Reform Association, to take one such group, represents several hundred businesses, municipalities, associations, and professional firms that support civil justice reform. Seeking to “bring greater fairness, predictability and efficiency to the civil justice system through public education and legislative reform,” ATRA’s report card gives a sense of the pace of legal reform. Since 1986, the year the organization launched, 45 states and the District of Columbia have enacted ATRA-supported tort reforms into law; 30 states have modified their rules relating to punitive damages; 29 states have established penalties for parties who bring frivolous lawsuits; and seven states have enacted comprehensive product liability reforms. Yet, as ATRA admits, “once tort reform has been enacted, reform opponents usually undertake orchestrated attempts to repeal the law, or have it declared unconstitutional by state courts.” The group monitors these rollback efforts and mounts defenses as required. But the lesson is clear: legal reform is painstaking—often a matter of two steps forward, one step back.

All of which is to say that the work of Huber and Olson becomes all the more important. If there is one criticism to make of these important thinkers, it's that they may be too kind to the other side. It's rare that they criticize particular judges, for example. But one of the core problems with tort reform is that most judges no longer consider it part of their job to review their decisions to ensure that the common law they create makes common sense. Having abdicated a responsibility to maintain legal standards, such judges open themselves up to ridicule—a tactic that can sometimes be effective. Huber and Olson could also be tougher on the defendants who make life too easy for plaintiffs. If more companies made the effort to explain to shareholders why it is better over the long run to fight meritless lawsuits rather than settle them, legal shakedowns might become less common. But these are quibbles.

It's clear that popular opinion is increasingly receptive to the Huber-Olson argument. Consider a recent poll, published in *USA Today*, which gauged the public's view on who benefits most from class-action lawsuits. The answers: 47 percent felt lawyers for plaintiffs benefited the most; 20 percent lawyers for companies; 9 percent the plaintiffs themselves; 7 percent the companies facing litigation; 5 percent consumers; and 12 percent didn't know. Similarly, a Gallup poll found that 89 percent of Americans oppose holding the fast-food industry legally responsible for the diet-related health problems of fast-food eaters. Even lawyers themselves (at least in private) often bemoan how wasteful our civil justice system has become. They are in the eye of this storm, and one senses that many of them would be glad—albeit somewhat poorer—if only someone could save them from themselves.

The courts can help reform the system, though appeals courts can review only a small share of outrageous cases. The U.S. Supreme Court has expressed some interest in encouraging a return to commonsense common law. After several attempts, the justices have at last started to draw some limits around punitive damages. Legislative efforts in states to cap damages can also help—though such reforms tend to happen only when things get so bad that members of a major profession, such as physicians, begin to flee areas where they can no longer function. And

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President Bush, whom Olson advises, has spoken up for the principle of legal reform.

It's possible, in other words, that we may be nearing a "tipping point," beyond which defending the system becomes difficult even for the most determined apologists for the status quo. Until that happy day, Huber and Olson will not run out of abuses to expose, reforms for which to agitate, and alternative visions of our legal system to imagine.