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REVIEWS

Schools for Misrule: Legal Academia and an Overlawyered America, by Walter Olson. New York: Encounter Books, 2011, 284 pp., $25.95 hardbound.

Misusing the Rule Book

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The law is an intricate art, but it is not, with few exceptions, an especially profound one. Its special language, assumptions, and sometimes abstruse processes are tools to resolve problems without resorting to physical violence or political corruption; it is not a blueprint for a perfect society. In the traditional view, legal education was meant to inculcate in students a sense of their ethical obligations as well as a respect for the hard-won cultural achievement represented by the rule of law and its function in serving and protecting the everyday actions of ordinary citizens. Yet in the last half-century, and especially since the 1960s, the prevalent view among certain segments of the legal elite, especially law professors, some judges, and a growing class of "international" lawyers, has been that the law should rather be used to solve every conceivable social and economic problem.

The basic problem with most law professors is that they generally confuse the law's intricacy with profundity, and mistake advocacy for scholarship. This confusion is, like much else, a legacy of the 1960s, when some law professors saw themselves as agents of revolution rather than as members of a profession. In this respect the anomalies of legal academia had real consequences. For all of its pretensions to science or to established humanities disciplines, the law remains something of an intellectual oddity. While legal academia has adopted research standards similar to those of the sciences or humanities, there are still surprising weaknesses in the field: original research of the kind familiar to most historians or sociologists, for example, is shockingly rare, and the methods of such research are not generally taught to budding law professors. Further, the law is the only major discipline whose academic publications are edited by law *students*, with almost no professorial input or oversight. In other words,

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there are no real quality controls over the law's central criterion of academic merit.

In *Schools for Misrule: Legal Academia and an Overlawyered America*, Walter Olson trains his eye on such absurdities, though he focuses on the results of having an ideologically-driven academic class churn out scholarship that wreaks havoc with settled notions of ownership, control, and legal rights. A senior fellow at the Cato Institute, Olson has long exposed the perils of our "overlawyered" society. His impassioned argument here is to reform law and the legal process, in light of the perverse effects it has had on American law and society. Some of these effects are economic: as Olson shows, developments in class action litigation and statutory changes have cost businesses and the government many millions of dollars, without clear offsetting gains. Other effects are more general, such as the pervasive application of legal language to every social or economic problem. As others, such as veteran corporate lawyer Philip K. Howard, have noted, seeing every problem through the lens of the legal process paralyzes judgment for fear of a lawsuit, and relieves one of individual responsibility, for there is always someone to blame—and sue.

Olson has three central themes in this book. The first focuses on the academic groundwork for much of the legal disarray he sees. Law professors use their scholarship to advance positions almost wholly on the left. The liberalism of law professors is well-known, in part thanks to Olson's previous work. One more recent example he cites puts this liberalism sharply in relief: Olson recounts the campaign of Yale Law School faculty to oppose the confirmation of one of its own alumni, Samuel A. Alito, as an associate justice of the Supreme Court. The school itself seemed to support the movement, until it awkwardly distanced itself, yet it is quite clear that many law faculty see themselves as a group apart from the general citizenry, as forming a "republic of conscience," in the words of former Yale Law School dean Harold Koh (now Legal Advisor for the State Department).

As Olson notes, this stance creates a harmful separation between elite law professors and their students and the rest of the country, creating an "us-and-them disdain for the sort of everyday law, often in the representation of businesses and affluent individuals, that many or most students are likely to end up

practicing." Such business choices are derided in favor of "public interest law," leaving those students who do decide to go (or who must go, because of crushing law school loans) into private practice feeling that they are somehow failing their school's mission. More important, as Olson notes, such students are not given the ethical or professional background because of the underlying assumption at some schools that working for profit or in a corporate context is already ethically compromising.

This preference for public interest lawyering over training lawyers to represent clients has its roots in the rights revolution of the 1960s and 1970s, a process largely generated and managed by legal academics. Although there were some legitimate achievements, legal thinkers quickly ran riot among formerly quiet precincts of the law. "Legal academia was smitten with the idea of expanding rights to sue," Olson writes, "with less regard, for one, of the shrinking right to go about one's affairs without being sued. The bigger and more intractable problems, it was felt, the more pressing need for courts and lawyers to involve themselves." Thus, law professors and others moved to abolish statutes of limitation, which created deadlines within which a plaintiff must bring a case; such laws were considered oppressive and obstacles to full justice (never mind the injustice of suing people or institutions years, sometimes decades, after the events at issue).

So also public interest lawyering moved from representing actual people with concrete problems to representing the "interests" of groups presumed damaged by some societal practice or product. The former was termed merely "ameliorative," without the *frisson* of engineering large-scale legal change. The absence of actual clients released lawyers from the sometimes troublesome aspects of representation to pursue high-profile, high-paying cases. But as Olson notes, such public interest lawyering, usually done through law school clinics staffed by unpaid law students, usually failed to teach young lawyers the skills they would actually need in practice, in favor of high-impact abstract litigation.

This is one reason why the student-run journal is such a critical problem for law as a discipline. Student editors with little real-world experience and eager to add a credential to their résumé—especially in a tough job market—all too often accept articles that advance outlandish proposals or legal claims without regard for actual legal practice. They often overlook

basic flaws in logic or evidence that more seasoned practitioners would catch. But unlike badly-reasoned articles in other disciplines, legal analyses can have direct societal effects. Thus, articles advocating the creation of a legal cause of action based on "lookism" (i.e., discrimination against the average-looking) appear in the *Harvard Law Review*; and not long after, cities such as Washington, D.C., pass laws barring appearance-based discrimination, and lawsuits alleging such "discriminatory" practices have risen. Although silly ideas and ideological posturing exist in other academic fields, they do not all have a cadre of people ready to try to enact such ideas into law. As Olson writes, "Bad ideas in French university departments are of self-limiting importance….Bad law can take away your liberty, your property, or your family." Law professors do have such a cadre: they are called plaintiff or trial lawyers—Olson's second target.

Such lawyers have a place in the legal system; there are wrongs that can be addressed only through tools such as the class action suits and contingent-fee arrangements that allow people who would not otherwise be able to afford counsel to sue. However, as Olson shows, legal academia has provided a fertile ground for intellectually suspect action, and in turn is funded by those with an interest in such actions. In a series of striking examples, Olson shows how law schools provide ideas for litigation, which are then taken up by the trial lawyers, who then contribute heavily to law school programs, especially clinical programs that advance those particular causes. Though donors often place conditions on their bequests, in the law it is common for donation to be *designed* to achieve some legal or social program. So, for example, "clinical" programs serve as a training ground for lawyers to engage in the very advocacy supported by the funding sources for those programs. Such funding occurs for many different sides of important issues, but it is, or should be, a cause for skepticism.

Among legal elites, the commitment to certain notions of social justice has made this reciprocity a common, and lucrative, arrangement. The problems of such ideology-driven litigation is exacerbated when some of the putative defendants—usually government agencies staffed by lawyers with similar ideological and economic interests as those bringing the case—do not really put up a fight. Olson cites the example of the Campaign for Fiscal Equity, which is engaged in a school finance suit against the City of New York and has close ties to the teachers'

union; both would benefit if the campaign's lawsuits prevailed. In such cases, Olson writes, education departments "often end up feeding information to their nominal opponents, advising them on strategy, and even taking the stand as openly friendly witnesses, notwithstanding the contrary interests of their putative taxpayer bosses."

Finally, and perhaps most ominously, Olson shows that America's obsession with endless rights claims, "impact litigation," which demands redress for allegedly unequal outcomes on behalf of large classes of plaintiffs, and onerous impediments on business and the political process have not stayed within its borders. International law is now quickly conforming to the American style of policy through litigation and centered on lawyers rather than elected politicians or diplomats, with what Olson calls a "transnational elite" ready to govern. This elite has no patience for questions of sovereignty, national self-determination, or historical compromise. Thus, clams by Native American groups to lands resolved by treaty, agreement, or the passage of time have moved from the national arena to tribunals such as the Court of Human Rights. Although Americans may have only a dim awareness of such international bodies, and believe their jurisdiction is restricted to obvious international concerns such as genocide or torture, their reach is growing to include a wide variety of claims such as hate speech and discrimination of all kinds. These bodies have not hesitated to condemn the United States as a violator of human rights. Such insouciance with international law, by arresting foreign dignitaries or former leaders and condemning nations acting in self-defense, for example, has made a mockery of international law, which was supposed to decrease tensions among nations.

The law has important, if limited, objectives. At their best, common law rules and laws such as statutes of limitation provide clear procedures for individuals and businesses to go about their business without constant anxiety. International treaties create a basis for peaceful relationships. The exploding rights revolution has created a very different world, the dangers of which Olson, in clear and colorful prose, lays bare.