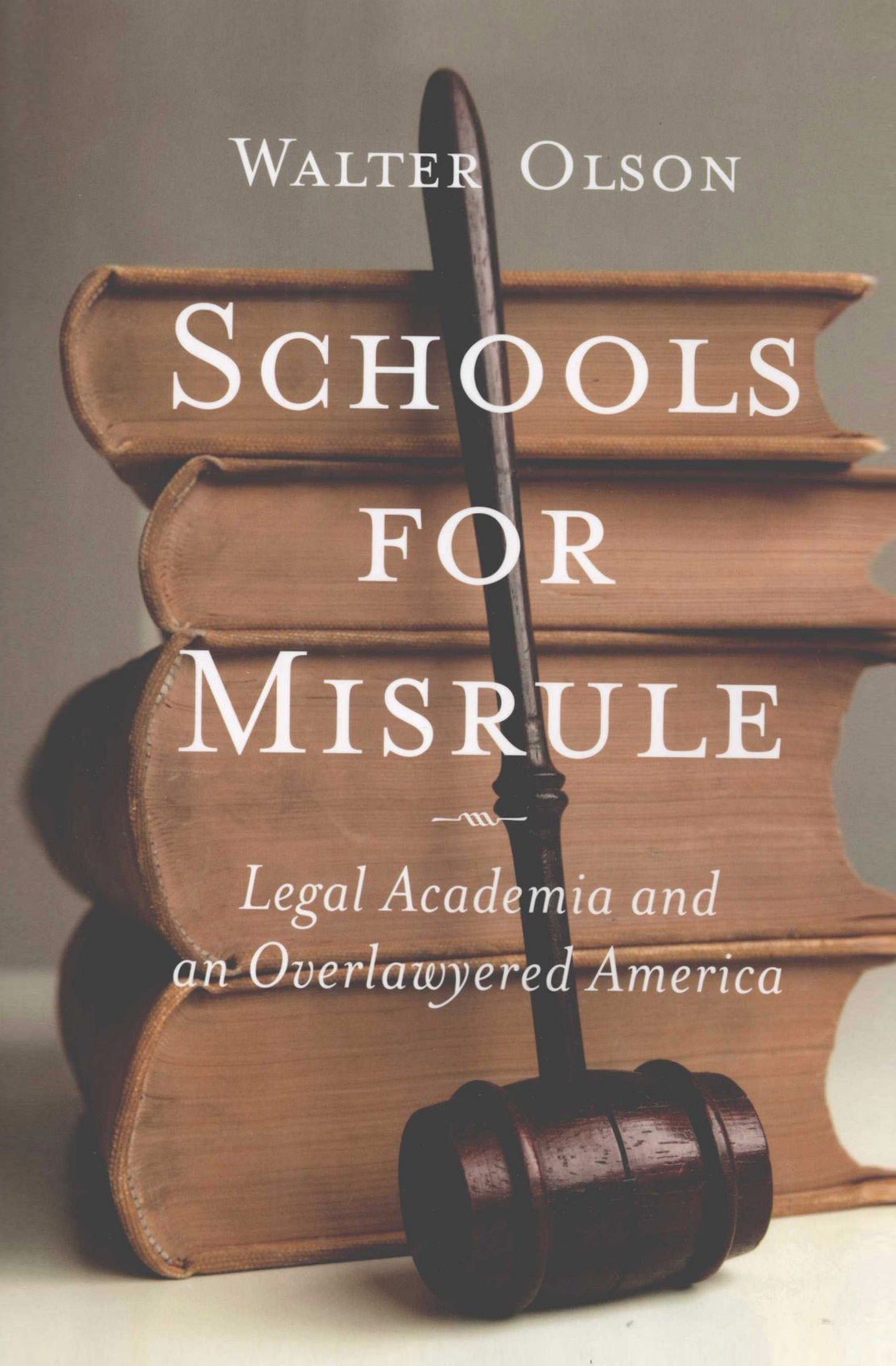
Walter Olson
Schools for Misrule
Legal Academia and an Overlawyered America

# SCHOOLS *for* MISRULE

## LEGAL ACADEMIA AND AN OVERLAWYERED AMERICA



*by* **WALTER OLSON**

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*to Timothy*

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chapter **ONE**

# *the hatchery of bad ideas*

IF YOUR GOAL IS TO REACH THE WHITE HOUSE, THESE DAYS the place to start would seem to be the law lectern. Before entering electoral politics, both Barack Obama and Bill Clinton spent time as law professors, at the University of Chicago and the University of Arkansas respectively. Earlier, both men had made their mark in the nation's most famously elite law school environments—Obama at Harvard, where he was elected the first black president of the *Harvard Law Review*, and Clinton at Yale, where he joined forces with the future Hillary Rodham Clinton. Both men used their time in Cambridge and New Haven to develop the sorts of connections of which students at lesser institutions can only dream; in later years both drew on these networks of movers and shakers old and young for advice, campaign and financial help, and as staff in their administrations, not just in lawyerly parts of the government like the Justice Department but across many other subject areas. And both men—at least in the opinion of many of their campus colleagues—went on to govern in ways shaped by their law school experience.

The United States is conventionally said to have no equivalent to France's *grandes écoles*, the exclusive, inbred educational institutions that train the country's ruling elite in technocratic fashion. But that is not quite true. We have our law schools, and in particular the dozen or two of them generally ranked as best—Yale and Harvard, Stanford, Columbia, and so forth. To a remarkable extent, the members of America's governing class and, perhaps more important, the received ideas that inform their views of government are products of these institutions.

Tocqueville noted long ago that in America those who rise to the political top tend to be lawyers. If anything, the rule has been confirmed in recent years: lawyers now hold nearly 60 percent of the seats in the U.S. Senate and nearly 40 percent of those in the U.S. House of Representatives. But politics and the law are just the start. Nowadays expensively trained lawyers are key players in many other sectors of society as well, including higher echelons of journalism and commentary, many categories of business management, and so forth. If you wait long enough, it has been said, any public issue in America—from Hollywood to Wall Street to Madison Avenue to K Street—eventually turns into a legal issue. When that happens, more often than not, lawyers will get to decide it.

Which brings us to the wider importance of law schools: they shape what the general community thinks about law, which in turn shapes the law itself. The work of legal scholars, as we will see, has revolutionized (or created from scratch) whole fields of law, from product liability to sexual harassment to class action law. Judges draft their opinions with one eye on the law commentators, most of whom are either in the legal academy or one jump away from it. (They also hire clerks who reliably import into their chambers the attitudes and presumptions of legal academia, year in and year out.) Anyone who takes part in the world of public controversy, from Capitol Hill staffers to radio hosts, is swayed directly or at a remove by the climate of opinion in legal academia. "[W]hat is taught in the law schools in one generation"—so a celebrated law professor once put it—"will be widely believed by the bar in the following generation"—and, by way of the bar, will come to be believed by many of the rest of us.

So what *is* being taught in the law schools these days? And what is the climate of opinion in which the Barack Obamas and Bill Clintons of tomorrow are being formed?

## THE LEFT-LEANING LECTERN

America's top law schools have a very distinct ideological profile, one that, as Chapter 2 of this book relates in more detail, fits comfortably with the liberal-left wing of American politics, more specifically its affluent *New York Times*-reader wing. "As the Anglican church was once described as the Tory Party at prayer," John McGinnis and Matthew Schwartz have noted, "the legal academy today is best seen as the Democratic Party at the lectern." Certain opinions are expected as a matter of course on everything from the death penalty (overdue to be abolished) to fast food (why isn't there more of a crackdown on it?). Meanwhile, positions held by very many well-educated, civically minded persons in the outside world—that immigration laws should be enforced, or that pain and suffering awards should be limited in tort cases, or that government should not engage in racial preferences—are infrequently encountered, occasionally even beyond the pale, in legal academia. As a result, persons who are used to the narrowly circumscribed dialogue afforded by the one context can be ill prepared to cope with the relative freedom of the other, and only the most agile—such as Clinton and Obama—are up to the challenge of switching back and forth without a gaffe.

The consensus can be all the more tight and hermetic for going unacknowledged. As one professor has put it without apparent self-consciousness, for judges to extend constitutional law in new directions, "there must be a broad consensus among members of the elite, thinking class and like-minded folk that some institutionalized practice is systematically depriving individuals of constitutional rights." Who counts as being in "the elite, thinking class and like-minded folk"? From the inside, the answer can seem satisfying and natural: people like us.

To outsiders, on the other hand, ideas that pass with little objection in the law school milieu can seem, to put it diplomatically, badly mistaken—daffy, eccentric, or bonkers would be less diplomatic

ways of putting it. "I don't see a difference between a chimpanzee and my 4½-year-old son," said one high-profile specialist in animal rights law who has taught at Harvard and Vermont, drawing gasps from some onlookers, but none that were recorded from his faculty colleagues.

Bad ideas in the law schools have a way of not remaining abstract. They tend to mature, if that is the right word, into bad real-life proposals. Bad ideas in university French departments are of self-limiting importance, given that people on the outside are likely to go on speaking French in the usual way. Bad law can take away your liberty, your property, or your family.

One fount of bad legal ideas is the nation's law reviews, whose content, despite their gray and dull appearance, often turns out to be madcap, terrifying, or both. Surveying contemporary law review scholarship, the formidable Richard Posner is struck by "the many silly titles, the many opaque passages, the antic proposals, the rude polemics, the myriad pretentious citations." The *Harvard Law Review* published an account of the supposed impact on judges' constitutional interpretation of Einstein's theory of relativity, space-time curvature, and quantum physics. An article in the *University of Pittsburgh Law Review* proclaims the need to banish from the legal system "sanism," defined as being the "irrational prejudice" held against the ideas and contributions of persons who happen to be mentally ill. French-derived high theory reliably engenders such marvels as "The Black Body as Fetish Object" (*Oregon Law Review*) and "Lacan and Voting Rights" ("Our wounds speak of rituals of scarification that are codified as law and made into memories of future behavior.")

Many law review articles teeter on the boundary between funny and alarming by advancing proposals of a can-this-be-serious nature. Thus one feminist law professor got a sober hearing for her proposal that companies sued by "less-empowered" individuals not only should have to prove affirmatively that they are innocent, but also should have to fork over claimed damages at the start of the controversy and then sue to get their money back. (Asked to respond to

this and similar theories, an evidently stunned practicing lawyer told one practicing reporter, "It's just so far from the way the legal system currently operates that I—I just don't have a reaction to it.")

Trouble is, many of the can-this-be-serious proposals in the legal academy are hailed as entirely serious. Thus a Northwestern law professor, building on the undeniable fact that many persons behave badly on the dating market, proposed as a remedy the development of a new tort of "sexual fraud," which would allow lawsuits for cash damages against persons who use lies or insincerity to get others to sleep with them ("You're really special to me," "Of course I'm not married"). It was one of the year's most widely applauded and talked-about articles.

Alas, the can-this-be-serious legal essay not infrequently leads to can-this-be-serious developments in real-life law. One lengthy piece in the *Harvard Law Review* argued that the law should do more to address the allegedly dire problem of lookism in the workplace; what with employer bias on the basis of physical appearance running rampant, face-to-face job interviews should be seen as the "prejudicial" affair that they are, permitting "illegitimate appearance evaluations" of the disabled, elderly, or just plain homely. The suggested solutions? Expanded use of telephone interviews and interviews held behind screens. While the idea of interviews behind screens has not yet caught on, the article was if anything ahead of its time; Washington, D.C. and other jurisdictions have indeed passed laws banning "appearance-based discrimination," and a recent survey found that litigation raising such claims is spreading fast around the country. As for the student author of the Harvard article, he went on to jobs with the *New York Times* editorial board and *Time*, writing commentary for those publications about law, and a professor's position at Yale.

## SCHOOLS FOR SOCIAL ENGINEERS?

Law schools were not always considered idea-hatcheries for social reform. As Chapter 3 explains, their origins were humbler, if still useful. Influential though lawyers were in early America, their actual training was mostly an unprestigious affair out of the public eye based

on apprentice-like work assisting more senior lawyers. True, some persons—among them great philosophers, judges, and statesmen—had won fame for profound thinking about law and jurisprudence, but few of those persons were associated with the university teaching of law. Aptitude in training novice lawyers was one thing; insight into what the law should ideally be was another, and the two skill sets did not necessarily overlap in any great degree. When it came to shaping the future course of the law, it was taken for granted that the primary actors would be elected lawmakers (who might or might not have legal training), other public officials, and of course judges, aided by the bar.

By the late nineteenth century, the success of the pioneering Harvard Law School had led to a new public image of law professors as persons of scholarly heft whose views on jurisprudence were to be listened to. With the arrival of the Progressive Era and the twentieth century, the law schools began to feel an ever stronger calling, and eventually a sort of entitlement, to prescribe the law's direction rather than merely to analyze where others were taking it. The eminent Roscoe Pound had described law as "continually more efficacious social engineering," and weren't law schools therefore akin to great schools of engineering? If so, why shouldn't they begin lending a hand at designing the engineering projects? Since then, American legal education has been torn between the not always easily reconciled goals of filling a public role as intellectual leaders and eminent authorities on the law and providing future lawyers with the practical skills and information needed to make a success of practice, or at least get past the bar exam.

Following the New Deal era some influential members of the Legal Realist school came to argue that law schools should see it as a primary part of their mission to drill their students in how to develop and evaluate public policy, even if it meant spending less time on skills useful in everyday legal practice. Elite lawyers themselves were beginning to develop a new self-image at around the same time, less as waiting upon clients' needs and instructions, and more as free to act on their own initiative on behalf of (what it was hoped would be) the public interest. By now law professors had become Authorities with a capital A, and it was not unheard of, as Chapter 4 explains, for

the treatises and casebooks they wrote to reshape whole areas of law, with results that include the modern tort revolution. At the same time, they enjoyed wider scope to assert their authority in other ways—as litigators working for love or money, as hired expert witnesses, or as popular authors and television celebrities. How well (or poorly) they have used this new prestige and authority is explored in Chapter 5.

One could argue either way about whether the Sixties brought us the modern law school. What seems undeniable is that the modern law school helped bring us the Sixties. In particular, it was central in advancing the so-called rights revolution that was the signal achievement of the courts in that era. From judicial takeovers of schools and prisons to widened environmental standing to due process for welfare recipients, the Warren Court heeded academics' urgings by devising a host of new legal rights, often of constitutional dimension. Rather neatly, one of the law professors most involved in laying the intellectual groundwork for the rights revolution, Yale's Charles Reich, leapfrogged the legal-cultural divide to write a 1970 bestseller (*The Greening of America*) which stands as a period-piece monument to the flower-child-shall-lead-us school of Sixties dream-spinning.

Much of the well-organized courtroom campaign that brought about the rights revolution was managed from within the law schools, as professors coordinated strategy with outside litigators, legal services programs, funders, sympathetic journalists, and other players. Law schools directly housed many key legal services programs supporting landmark suits, and provided assistance to others by way of the student-staffed legal clinics that sprang up on dozens of campuses.

A powerful influence in all this was philanthropy. As early as the 1950s the Ford Foundation had begun sinking large sums into the revamping of law school curricula, much of it aimed at reorienting law toward the cause of "social change"—an ill-defined term that included but was not limited to the championing of the poor and racial minorities. As it became evident that dollars invested in law

school-based activity could go a very long way toward reshaping the law itself, other foundations followed, setting a pattern that continues into our own Soros-and-MacArthur era: many high-profile law-school centers, programs, and initiatives are funded and often originated by donors interested in influencing law beyond the campus gates.

Chapters 6 through 8 look from varying angles at the movement that resulted, which sometimes flatteringly (and question-beggingly) refers to itself as "public interest law." A new cadre of public interest lawyers, it was imagined, would help rectify age-old gaps between rich and poor, powerful and powerless, effectively serving as lobbyists for the poor and other traditionally underrepresented groups. Judges would step in directly and force government bureaus and agencies to live up to the promise of their charters. Idealistic litigators would tie down the Gulliver of bureaucratic government and force it (at last) to heed the interests of its constituents. It was a heady time, in which law and cutting-edge lawyering took on an almost unheard-of glamour as ways of remaking society. Law schools would not merely serve as visionaries anticipating the new developments, but—in another of the Ford Foundation's most successful and durable initiatives—would take part directly, through the student litigation clinics that sprang up at more than a hundred law schools over this period.

Things didn't work out quite as planned. The new way of doing law was rife with unintended consequences, which often proved hard to correct. Litigation in areas like welfare, education, prison, and environmental law bogged down in what came to be termed paralysis by analysis. Court decrees extending over decades demoralized the loathed Establishment and drove up the cost of government yet failed to produce the advertised revolutionary results. Public opinion reacted sharply against much of the handiwork of the new rights revolution, from school busing to prison overcrowding release orders to the deinstitutionalization of mental patients. Congress and other key players began to distance themselves from the new trends, while the courts increasingly declined to create the new rights urged on them by the legal academy and the public interest litigators. The litigation didn't cease, by any means; indeed, it became a premier

way of gaining and exercising power in battles over government. But its glamour did fade, and with that came an end to what has been called the heroic period of the American law school.

After an interval marked by a lurch toward obscurantism and high theory, as symbolized by the brief ascendancy of the more-radical-than-thou Critical Legal Studies (CLS) movement, the mood in law schools shifted toward identity politics. The movements that resulted—Critical Race Theory, legal feminism, and a half-dozen others—changed the atmosphere within law schools and also had an impact on law outside the walls. Chapters 9 and 10 take up two case histories of identity grievance: the slavery reparations movement, in which support from law school activism played a surprisingly big role, and litigation over Indian land claims. While the slavery suits got more national attention, the Indian land claims, sparked by a pioneering 1971 law review article, actually got much further in court. Eventually they came to dispute the ownership of tens of millions of acres, including the land beneath cities as large as Syracuse and Denver.

Both the slavery and the Indian-reparations movements invoked implicit challenges to national sovereignty. But the greatest such challenge was yet to come. In recent years the hottest flavor in legal academia has been the suddenly ubiquitous international human rights movement. Dozens of schools have launched centers, programs, and professorships to advance the new specialty. Along the way, all sorts of old controversies—not only in defense and foreign policy, and in the treatment of minority and indigenous populations, but also in such far-flung areas as gender inequality, prison conditions, environmental, labor, housing, and welfare law—have been redefined as international human rights matters. Busy litigation centers at leading law schools now promote the view that the United States is a systematic violator of domestic human rights and should yield to the corrective authority of such transnational bodies as the United Nations' Committee for the Elimination of Racial Discrimination (CERD) and the new International Criminal Court. That

raises the prospect that elected U.S. officials could face reversal by international tribunals—or perhaps even personal liability, arrest, and prosecution—over questions that earlier generations would have seen as purely for domestic U.S. law and politics to settle.

## DISCONNECT AND SOUL-SEARCHING

A few years back the legal academy went through a certain period of soul-searching, not so much about its ideological out-of-touchness as about its disconnect from the world of practical law. The perceived uselessness of High Theory and ambitious interdisciplinary work had brought on a serious backlash from the bench and bar. Law review articles deploying the latest in game theory, or fictional narrative, or the study of urban slang might be (often) original, (sometimes) clever, and (occasionally) entertaining, but they were usually remote from the needs of lawyers grappling with real-world cases. "I haven't opened up a law review in years," the Second Circuit chief judge Dennis Jacobs told the *New York Times* in 2007. "No one speaks of them. No one relies on them."

There has followed a reversal fraught perhaps with both positive and negative promise. Younger faculty in recent years have been disengaging from unfruitful theory and purely inter-academic disputation and moving back to engage with real-life legal controversies. Blogging has caught on among law professors, encouraging such once-scarce writing qualities as clarity, timeliness, force, and accessibility. One consequence is that the practical influence of law schools on the law appears to be once again on the upswing. But will that be a good thing?



The problem, this book will argue, is not just that law schools generate so many bad ideas—mistaken and benighted ideas, impractical and socially destructive ideas—but that those ideas follow a predictable pattern. They confer power on legal intellectuals and their allies—at least the power to prescribe, often the power to litigate. The movement that results—whether couched as public interest

law, as minority empowerment law, or as international human rights law—is in fact a bid for power, whether naked or cleverly disguised.

On occasion one hears that the legal academy these days is chastened in its ambitions, that it has learned its lesson from the last time it tried to remake society, that it no longer looks to the courts to act in "transformative" ways. In a 2009 *New Yorker* article, the writer Jeffrey Toobin presents President Obama himself as emblematic of this new sobered-up breed of legal academic, who is careful to avoid the hubris of the Warren era and agrees that elected officials rather than courts or litigators inevitably will and should set the main contours of public policy.

Are the would-be social engineers of legal academia indeed chastened and sobered? Or have they rather been nursing their ambitions, saving up new theories and rationales, while they wait for a more favorable moment to strike out again in quest of heroic and transformative legal interventions? As we will see in the pages ahead, the signs are not reassuring.