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## The Law Is a Class

*Law schools wield more social influence than any other part of the American university. To what effect?*

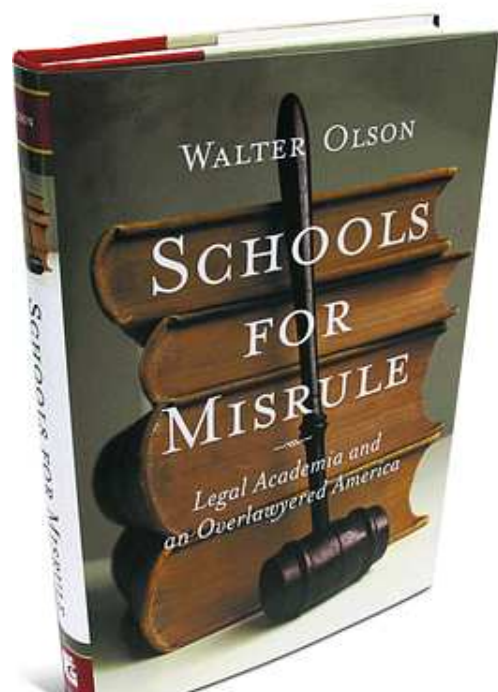
By JOHN O. MCGINNIS

The British economist John Maynard Keynes famously observed, 75 years ago, that statesmen who think that they are pursuing policies of their own devise are really showing themselves to be "the slaves of some defunct economist." In America today statesmen are more likely to be the slaves of some defunct legal theorist. Our litigation-prone culture and complex legal structure—not least the matrix of overlapping state and federal powers—regularly translate questions of policy into questions of law. As a result, American law schools wield more social influence than any other part of the American university.

In "Schools for Misrule," Walter Olson offers a fine dissection of these strangely powerful institutions. One of his themes is that law professors serve the interests of the legal profession above all else; they seek to enlarge the scope of the law, creating more work for lawyers even as the changes themselves impose more costs on society. By keeping legal rules in a state of endless churning, lawyers undermine a stable rule of law and make legal outcomes less predictable; the result is more litigation and, not incidentally, more billable hours for lawyers, who must now be consulted about the most routine matters of business practice and social life.

Mr. Olson reminds us that the mere presence of law schools on college campuses was deeply controversial at the turn of the last century. Thorstein Veblen said that law schools belonged in the academy no more than schools of dancing or fencing, because their practical, vocational training detracted from the enterprise of intellectual discovery. Thus if law teachers wanted to become members of the professoriate, they had to do more than merely impart the content of legal doctrine. They had to find arguments implicit in academic trends and critique the law's very architecture. To meet the need for intellectual respectability, Mr. Olson implies, professors became engineers of reform.

Mr. Olson shows that the reforms that had the most baleful effects were those that coincided with the expansionist interests of lawyers. Legal theorists dismissed, for instance, concerns that a wider use of "equitable relief"—a doctrine that judges properly employed to enforce school desegregation—would dissolve the difference between politics and judging. But the concerns were well placed: Courts ended up playing an important role in managing schools, prisons and welfare agencies. Law professors also helped to develop the class action into an extortionate threat: Companies now pay out million-dollar settlements rather than bet their very existence on a single trial that might well impose massive liability.



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### Schools for Misrule

By Walter Olson

Encounter, 284 pages, \$25.95

Mr. Olson superbly describes the rise of legal clinics, the law-school component ostensibly designed to give students hands-on training. He notes that the charitable foundations that first funded these clinics were more concerned with creating turbines of social change than with educating students. These days, many more clinics engage in public-interest litigation (defined by a rather predictable liberal agenda) than devote themselves to matters like the legal ordeals of small businesses, though thinking about a deli's contract dispute with a supplier would be more relevant to a law student's future working life. Some of these public-interest litigation shops have substantial funds. Mr. Olson observes that the budget of Brennan Center at New York University alone comes to roughly 80% of that of the Federalist Society, the national organization of legal conservatives that is routinely vilified by Democratic politicians for its inordinate—and, of course, pernicious—effect on our legal culture.

While Mr. Olson offers an excellent description of where law schools have been, he is less effective at showing where they are going. He makes much of causes that have captured the interests of law professors—reparations for African-Americans, the return of lost lands to Indian tribes, theories that charge American law with pervasive racism (so-called Critical Race Theory)—but these are by now outlier campaigns. Today a large part of legal scholarship taps into the ever increasing capacity of

computers for precise measurement and quantification. Indeed, the fastest-growing annual conference of law professors is the one that takes up legal empiricism, a field in which scholars measure the effects of laws in the real world (e.g., how certain laws may lead doctors to practice defensive medicine). The other vibrant field is law and economics, where scholars often compare the advantages of the market to other forms of social ordering.

Mr. Olson rightly complains of legal scholars who seem to have enormous enthusiasm for international norms. Domestically, they would use them to constrict democratic decisions, claiming, for instance, that life imprisonment for juveniles without parole violates universal human rights. But even in this area of scholarship a growing band of heretics contest the catechism—arguing, say, that the threat of being prosecuted at the International Criminal Court will make it less likely that dictators will give up power.

To be sure, intellectual life in the legal academy would be more vibrant if law schools were less lopsidedly left-liberal—if, that is, they encouraged more internal debate. Tenure also permits aging 1960s and 1970s ideologues to enjoy positions of academic power. But it is not aging scholars who generally advance the ideas that Keynes's statesmen will take to heart; it is the younger ones. The British Enlightenment ideas that shaped America's legal structure rested on the proposition that markets are central to prosperity and that government actions can be judged by real-world effects. What is novel about law schools today is that, compared with their checkered past, so many more scholars are vigorously returning to the methods that made America.

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