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Schools for Misrule

Posted by [Larry Ribstein](#) on February 23, 2011

Walter Olson journeyed to Illinois yesterday to discuss his new book [Schools for Misrule](#). There was a good turnout and a lot of deserved buzz for this very interesting book.

Walter describes law schools as essentially the hatcheries of bad ideas that have led to the sort of excessive litigation that Olson has chronicled in his long-running blog, [Overlawyered.com](#). These include the undue expansion of tort law, class actions, courts running schools, new and potentially open-ended rights, international jurisdiction over U.S.-based legal disputes, the growth of the "new property, and institutional reform litigation.

The book deserves a lot of attention, particularly from law professors and their students as a source of critical perspective on trends in legal education. There is little doubt that the ideas Olson criticizes are hatched mainly in law schools rather than by practicing lawyers and judges, and have led to costly and questionable litigation. As Olson explains, the ideas gain power from legal academics' supposed independence (though they are amply paid for their opinions and law schools have been the beneficiaries of litigation and trial lawyers), and their publication in elite law reviews and influential casebooks.

Olson suggests that the source of the problem is law professors' becoming disconnected from simply teaching existing doctrine and turning to the creation of social policy. Olson traces this to an influential article, Harold D. Lasswell and Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L.J. 203, 206 (1943), which argued that

if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic training for policy-making. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.

As I said in my comments after Walter's talk, I was especially pleased by Olson's judgment that law

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professors have influenced the law. The main criticism I have been used to hearing, epitomized by Judge Harry Edwards' famous broadside (*The Growing Disjunction Between Legal Education and The Legal Profession*, 91 Michigan Law Review 34 (1992)), is that law professors are simply irrelevant to law practice. As Olson notes, our articles are usually cited only by our articles and rarely turn up in judicial opinions. But Olson convinced me that we really are important (though his words admittedly fell on fertile soil).

Olson documents some of the causes of this state of affairs — the empowering role of law school accreditation, the vast increase in law professors from 1967-1972, the role of US News rankings in causing all law schools to emulate Yale (on that, see [Gladwell](#)).

According to Olson, law schools "predictably churn out certain kinds of bad ideas:" expansion of law with little recognition of costs and limits, laws that increase the demand for lawyers, more power to international and federal lawmakers and less to state and local, positive rights rather than just the right to be left alone, more power to the courts, less to politicians.

Olson's solution is more science, less advocacy, more emphasis on training in lawyers' skills. He concludes that "we neither need nor want more philosopher-monarchs. But we could use more good lawyers."

Although I see much that's useful in Olson's provocative book, I have two qualifications or criticisms. First, I think it's important to see law schools as only the supply side of the idea market. Law professors manufacture ideas, but somebody has to buy. There would be no problem if our ideas had power just because they were objectively persuasive. The real problem is that those who control the legal system — lawyers, judges, professors — welcome a particular subset (pro-lawyer, pro-litigation) of the many good *and* bad ideas law schools manufacture. This is where Ben Barton's [new book on the Lawyer-Judge Bias](#) powerfully supplements Walter's ideas.

Second, I am not convinced by Olson's solution. Once we attend to the demand side of the market, we can see that the problem is not that law schools produce too many ideas and not enough practical training. We need good ideas, including ideas that challenge the status quo, that are not going to be produced by those immersed in the day-to-day practice of law. Olson's solution could help perpetuate an increasingly outmoded system that relies on one-to-one legal advice, costly litigation, and excessively complex legal rules. As Ben Barton explains, this is a system established, supported and benefiting lawyers and judges. If the market were freed from the constraints of licensing and mandatory accreditation, it could better produce the sort of law society needs at a price it can pay. Indeed, as Bruce Kobayashi and I explain in [Law's Information Revolution](#), this is already happening.

In short, the problem is not that law schools are hatching bad ideas. It is that we need more good ideas about law,

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and we're not going to get them under a legal system that empowers and privileges the ideas of a particular group of people — that is, lawyers and law professors.

So read Olson for the some of the symptoms of the disease, Barton for the root causes, and Kobayashi & Ribstein for the cure.

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