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The Present Situation in Legal Scholarship

Richard A. Posner[†]

I shall discuss three principal types of legal scholarship in this article: clarification of legal doctrine; positive analysis of law by the methods of social science, broadly defined to include history; and normative analysis of law, based sometimes on the social sciences and sometimes on moral and political philosophy. I acknowledge that my taxonomy is crude, the categories both incomplete and overlapping.

I shall make two principal points: First, doctrinal analysis, which is and should remain the core of legal scholarship, is currently endangered at leading law schools. Second, the other types of legal scholarship are not well-served by the existing organization of legal education. I shall close with some practical suggestions for overcoming these problems.

I. Types of Legal Scholarship

A. *Doctrinal Analysis*

The clarification of legal doctrine, what I shall sometimes call "doctrinal analysis," is the traditional and still the dominant mode of legal scholarship. Because my own interests lie primarily in another area of legal scholarship, I am concerned lest my remarks on doctrinal analysis be thought critical or condescending. That is not my intention. I have a high regard for this branch of legal scholarship and feel regret mingled with surprise at its apparent decline in recent years.

Doctrinal analysis is carried on in classroom instruction, in articles published in the traditional, student-edited law reviews, and in casebooks, hornbooks, and treatises. It involves the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis. It is the scholarly tradition most closely associated with the Harvard Law School, though

[†] Lee and Brena Freeman Professor of Law, University of Chicago. I am grateful to Bruce Ackerman, Gerhard Casper, Frank Easterbrook, Gareth Jones, Edmund Kitch, and George Stigler for helpful comments on an earlier draft.

it is waning even there. It is embodied in such works as Austin Scott's treatise on trust law,¹ Warren Seavey's essays on tort law,² Thomas Reed Powell's essays on the commerce clause,³ and the Hart and Wechsler casebook on federal jurisdiction.⁴ A contemporary example is Phillip Areeda's antitrust casebook.⁵ Of course, many more examples, recent and remote, could be adduced.

This branch of legal scholarship is largely autonomous; that is, its practitioners do not have to know any other field of learning in order to contribute to it. This is not to say that the only criteria they use in evaluating judicial opinions are formal ones. They consider not only whether an opinion is clear, well reasoned, and consistent with the precedents, the statutes, and the Constitution, but also whether it is right in the sense that it is consistent with certain premises about justice and administrative practicality. In making judgments on these points, doctrinal analysts necessarily go outside the logic of the opinion or the series of opinions that they are examining—but they don't go far. They use their study of cases, their experience as lawyers, their common sense, and the shared moral and political values of their society to evaluate the practicality and justice, as distinct from the clarity and consistency, of existing or proposed legal rules. But they do not use the theories or methods of the social sciences or of philosophy. When Ames, as a preface to advocating tort liability in certain cases of failure to warn or rescue a stranger in distress, stated that "[t]he law is utilitarian,"⁶ he was stating what was then a commonplace of educated opinion about the relationship between law and morality; he was not expounding a philosophical concept. The same is true of Prosser's statement that it is "unjust" that the rule of no contribution among joint tortfeasors lets a wrongdoer get off scot-free just because his victim chooses to levy the entire judgment against another tortfeasor.⁷

1. A. SCOTT, *THE LAW OF TRUSTS* (3d ed. 1967).

2. W. SEAVEY, *COGITATIONS ON TORTS* (1954).

3. E.g., Powell, *Commerce, Pensions, and Codes* (pts. 1-2), 49 HARV. L. REV. 1, 193 (1935); Powell, *Contemporary Commerce Clause Controversies Over State Taxation* (pts. 1-2), 76 U. PA. L. REV. 773, 958 (1928); Powell, *Current Conflicts Between the Commerce Clause and State Police Power, 1922-1927*, 12 MINN. L. REV. 321 (1928); Powell, *Supreme Court Decisions on Federal Power Over Commerce, 1910-1914* (pts. 1-3), 6 MINN. L. REV. 1, 123, 194 (1921-1922).

4. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973); H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

5. P. AREEDA, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* (2d ed. 1974).

6. AMES, *Law and Morals*, 22 HARV. L. REV. 97, 110 (1908).

7. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 307 (4th ed. 1971).

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As it happens, economic analysis suggests that both Ames's and Prosser's conclusions on these issues were, at best, superficial.⁸ There is a moral here. When doctrinal analysts stray from the narrow path of doctrinal clarification and enter the realm of policy analysis, their lack of social science training may lead them into error. Like the common-law judges themselves, the doctrinal analysts, in their role of policy analysts, are on the firmest ground when they are addressing incremental rather than fundamental policy issues.

This leads me to suggest two variants of traditional doctrinal analysis: economic analysis of law, and the "values" school. Ames and Prosser, when writing on issues of policy, wrote as practical utilitarians. With qualifications not important here, economics can be described as scientific utilitarianism. Someone who uses economics to expose the inner logic of the common law or to propose reforms designed to make the law more efficient is therefore taking up where Ames and Prosser left off; he is using a similar methodology but one that is more powerful because it is informed by modern advances in economic thinking. Many economic analysts of law, such as myself, are very interested in cases, and when we use economics to reconcile and to distinguish cases, we are carrying on the tradition of the doctrinal analysts. But insofar as we are trying to use modern economic concepts in this task, we fall into the category of positive analysts who use social science and we face the problems peculiar to that group of scholars, which I discuss below.

It is possible to do doctrinal analysis without knowing economics. But insofar as doctrinal analysts venture to make economic assertions, implicit or explicit, as in the examples from Ames and Prosser, they are obligated, it would seem, to keep abreast of economic thinking. Given the rapid advances in economic analysis of law, it may be that doctrinal analysts and economic analysts are no longer, as a practical matter, easily separable.

The "values" school comprises those doctrinal analyses in which normative swallows up positive analysis. Doctrinal analysis has always been at once positive and normative. It analyzes what the law is but often it also advocates changing some rule of law to make it conform better to the central trends, themes, or concepts that are

8. Liability may actually deter rescues. See Landes & Posner, *Salvors, Finders, Rescuers, and Other Good Samaritans: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 119-27 (1978). And under the common-law rule of no contribution, no joint tortfeasor gets off scot-free on an ex ante perspective, which is the correct one from an economic standpoint. See Landes & Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 519-20 (1980).

revealed in the positive analysis. Particularly in constitutional law scholarship, however, contemporary doctrinal analysts often display little interest in discovering what the law is, though great interest in telling the Supreme Court what it should be. Those doctrinal analysts who read a handful of Supreme Court opinions on some controversial subject and then offer a normative judgment that is uninformed by any close study of sources of normative principles, such as moral philosophy and welfare economics, are engaged in an enterprise very different from traditional doctrinal analysis. The traditional analysis involved the careful synthesis of extensive bodies of case law, as in the work of Hart and Wechsler,⁹ Prosser,¹⁰ Wigmore,¹¹ and Williston.¹² The "values" school is neither craftsmanlike nor rigorously interdisciplinary.

Because doctrinal analysis is, with the qualifications noted above, an autonomous sphere of legal scholarship, its pursuit within the existing framework of legal education—a framework unchanged in essentials since the turn of the century—does not raise any serious question. Legal education aims to develop precisely those skills of legal analysis that are deployed by doctrinal analysts, and it does an excellent job of developing those skills, though less so than when the Socratic technique was more fully utilized in the law school classroom. And students who get excellent grades in law school thereby demonstrate their mastery of precisely those skills whose possession is the main qualification for doing doctrinal analysis, although it is only one of several qualifications for being an outstanding practicing lawyer; law school grades can therefore be used to screen applicants for law teaching jobs. Finally, when the students that staff law reviews are those who have demonstrated by their excellent grades that they possess good skills of doctrinal analysis, they are likely to prove skillful editors of doctrinal-analytic scholarship. Thus, the classroom technique, the method of recruiting teacher-scholars, and the mode of publishing the fruits of scholarship all fit snugly together when the scholarly pursuit is defined as the clarification of legal doctrine.

As the body of published appellate opinions and of statutes swells, and as judges become ever less disciplined practitioners of the craft of incremental legal rulemaking through common-law adjudication, one might expect the need, the opportunities, and hence the enthu-

9. H. HART & H. WECHSLER, *supra* note 4.

10. W. PROSSER, *supra* note 7.

11. J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940).

12. S. WILLISTON, LAW OF CONTRACTS (1920).

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siasm for doctrinal analysis to grow apace. Yet a malaise afflicts this branch of legal scholarship today. Many of its practitioners seem dispirited and defensive. It fails to generate the excitement of the newer branches of legal scholarship. One reason for the malaise is highly practical. It is the growing disparity in income between the teaching and the practice of the law. This disparity has had its greatest impact on the doctrinal analysts because the practice of law is so close a substitute for what they do as teachers and, especially, as scholars. I do not have statistics, but it is reasonably clear that over the past twenty years the incomes of law teachers (apart from the minority who are heavily involved in consulting or part-time practice) have barely kept pace with inflation, while the growth in income of practitioners in the best law firms, which compete with the best law schools in recruiting, has exceeded the rate of inflation by a considerable margin—though there are recent signs of softening.

The divergence in the trends of overall job satisfaction has been even greater than in the trends of income. The “tenure” period at law firms has been shortened; and the practice of law at the leading law firms has become more interesting, both because firms now use paralegals to do the drudge work and because corporations’ legal departments do an increasing amount of the routine corporate law work. Furthermore, in a number of fields courts have been impatiently sweeping away the nice distinctions that challenge the doctrinal analyst. In tort law, for example, the state courts have been busily abolishing the doctrines of assumption of risk and last clear chance and the distinctions between a landowner’s duty of care to licensees and invitees, between indemnity and contribution, and between the proprietary and governmental functions of municipalities. That most lawless body of law, federal constitutional law, has displaced large areas of tort and family law, further constricting the field for the traditional doctrinal analyst. Conflict of laws has become a field without rules. There seems to be a general tendency for our law to become more a matter of discretion, explicit policy, and politics and less a matter of rules and distinctively legal principles. This tendency has made the study of law less congenial to the doctrinal analyst.

Another reason for the malaise of doctrinal analysis is that some of the practitioners of the newer fields of legal scholarship do not respect doctrinal analysis. I will give two examples of this attitude. The first is from Packer and Ehrlich’s 1972 report on legal education, prepared for the Carnegie Commission on Higher Education:

We must admit, however, that [law teachers'] research output is rather slight. Legal writing has tended, until very recently, to be primarily doctrinal and to be based mainly on research in the law library. To the extent that law teachers have written, their books have tended to be treatises (often multivolume) on doctrinal subjects. Their articles, published in the 80-odd law reviews, have been treatments of less general legal problems, again purely from a doctrinal, analytic standpoint. The reasons for this heavily focused unproductivity are manifold¹³

The tone of disparagement is unmistakable. Law professors' research output is "rather slight" and is not redeemed by their penchant for multivolume treatises. Their writing is "purely doctrinal," and adds up to "heavily focused unproductivity."

The next example is from a recent talk by the Dean of the Yale Law School, Harry Wellington:

There are a dozen or so university law schools in the country that can properly claim to be more than trade schools. A trade school is an institution that views its purpose as graduating students who will pass a bar examination. Schools that are more than trade schools share this purpose, but they are centrally concerned with the advance of knowledge through teaching and research. Among the twelve or so law schools with these larger aspirations, Yale rightly is regarded as the most ambitious.

This is an exciting time for academic law, perhaps the most exciting time since the end of the second World War. In the 1920s and early '30s, academic law in America was, as you know, transformed by legal realism. The realist movement established itself at Yale and Columbia and was a reaction to the excessive formalism that had beset legal thinking and that was practiced most successfully at Harvard

....

Academic lawyers today are concerned with the appropriate limits of law and with the interrelationship between procedural matters—in the large sense of that term—and substantive and distributive justice. Relative to his predecessor, today's young academic is enormously sophisticated in humanistic and social science studies. To get a grip on the limits of law, an academic must work in political philosophy; so, too, if he is interested in distributive justice. Nor can he fail to know economics, and he is delinquent if he ignores history. The demands, then, on the academic lawyer are truly prodigious. But the challenge is being met and Yale has assumed a leadership role. No one who knows can doubt this.¹⁴

13. H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 32 (1972).

14. *YALE LAW REPORT*, Winter 1978-1979, at 7-8.

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In this passage, Dean Wellington describes the advance of legal scholarship as having occurred in two stages: a first, essentially negative stage—Legal Realism—when the “excessive formalism”—doctrinal analysis—of the Harvard Law School was discredited; and a second, constructive stage, the stage we are now in, when the academic lawyer must master every relevant branch of learning in order to meet the prodigious challenge that has been laid at his feet of understanding the limits of law and the nature of justice. The academic lawyer, or at least the academic lawyer who aspires to a status loftier than that of a teacher at a trade school, studies not procedure, but “procedural matters—in the large sense of that term.” The academic lawyer who makes it his business to be learned in the law and expert in parsing cases and statutes is made by Dean Wellington to seem a paltry fellow, a Philistine who has shirked the more ambitious and challenging task of mastering political and moral philosophy, economics, history, and other social sciences and humanities so that he can discourse on large questions of policy and justice.

B. *Positive Analysis with Social Science Methods*

I turn now from doctrinal analysis, the traditional mode of legal scholarship, to the new-fangled mode evoked in Wellington's remarks—interdisciplinary research, or, as it is sometimes called, “law and . . .” I divide this domain into two parts, the positive and the normative. Positive analysis is the effort to understand phenomena, here legal phenomena, and normative analysis is the effort to prescribe and reform the law.¹⁵

The idea that the legal system could be studied by the methods of science is an old one. The inventors of the case method of teaching law thought they were doing science.¹⁶ They thought that cases were like scientific observations and that extracting the true rule from a line of cases was the equivalent of the inductive method of scientific research. I am not interested in whether they were right or wrong about this; if doctrinal analysis is science, it is a different sort from the social sciences as we know them. Holmes's method in *The Common Law*¹⁷ was more like social science in the modern sense. He thought that one could discover the true meaning of a legal doctrine by studying its historical evolution. He used this method to delve

15. See Posner, *The Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979).

16. See Woodard, *The Limits of Legal Realism: An Historical Perspective*, in H. PACKER & T. EHRLICH, *supra* note 13, at 354-60.

17. O.W. HOLMES, *THE COMMON LAW* (1881).

far beneath the stated grounds of decision—for example, in developing his famous distinction between “external” and “internal” standards of liability.¹⁸ A distinction of this sort would not be likely to emerge from a purely doctrinal analysis, although Fuller and Purdue’s classic analysis of the reliance interest in contract law illustrates, if an illustration is needed, the creative potential of “purely” doctrinal analysis.¹⁹

The line of descent from Holmes includes Legal Realism, a movement that fizzled for want of a theoretical framework to guide research. Legal Realism had both normative and positive features—it was both critical and scientific. The scholarly movement that is today’s counterpart to Legal Realism as the foremost alternative to doctrinal analysis is economic analysis of law, or, as it is sometimes called, “Law and Economics.” It too has both normative and positive aspects. The normative branch of the economic analysis of law can be viewed as a direct descendant of Legal Realism, by way of Guido Calabresi;²⁰ the positive branch comes from outside the law, from the work of economists such as Ronald Coase²¹ and Gary Becker.²²

Calabresi’s brand of normative economic analysis of law shares with Legal Realism a desire to perform radical surgery on the common law; for example, Calabresi wishes to do away with fault as the basic guide to allocating liability in accident cases.²³ The positive analysts such as myself resemble traditional doctrinal analysts in believing that there really are rules of law—that the law is not wholly a matter of judicial discretion, as the more extreme Legal Realists believed. We use economics to inquire to what extent the common law is a coherent system of rules concerned with promoting efficiency.

Economic analysis of law is only one mode of positive analysis of the legal system.²⁴ The Law and Society movement has developed another, which uses the methods of sociology, political science, and anthropology to explain diverse features of the legal system.²⁵ Legal history is a third type of positive analysis of the legal system. Some

18. *Id.* at 1-38.

19. Fuller & Purdue, *The Reliance Interest in Contract Damages* (pts. 1-2), 46 YALE L.J. 52, 373 (1936-1937).

20. *E.g.*, G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

21. *E.g.*, Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

22. G. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

23. *See* G. CALABRESI, *supra* note 20, at 237-308.

24. I have described the positive economic analysis of law elsewhere and will not repeat the discussion here. *See* Posner, *supra* note 15.

25. *See* the journal published by the Law and Society Association, called the *Law and Society Review*.

legal historians use a Marxian framework to offer a rival theory to that of the economists concerning the evolution of common law principles.²⁶ Finally, recent work in moral and political philosophy, notably that of John Rawls,²⁷ has been used by philosophically minded lawyers to explain legal doctrines.²⁸ Of all these efforts to use the ideas and methods of the social sciences to explain the legal system, economics is, in my biased opinion, the most promising, simply because economics is the most advanced social science.

With the maturing of the social sciences—dramatically illustrated by the growth in recent decades in the scope and sophistication of economics—the scientific study of the legal system, so long a seemingly hopeless aspiration, is now feasible. But its pace is being slowed by the institutional structure of legal education and scholarship. The obstacles to the scientific study of the legal system within the existing framework of legal education include the following:

1. Law professors are not trained to do social scientific research. They are trained to do doctrinal analysis.

2. Law students have little interest in the scientific study of the legal system as such. Few of them aspire to be academics, and of those who do, most expect to be doctrinal analysts. The vast majority of law students are interested only in studies that will contribute directly to their success as practicing lawyers. Because a knowledge of economics is recognized today to be an asset in certain fields of legal practice, especially those fields to which the graduates of the national law schools gravitate—for example, antitrust, regulated industries, corporations, securities regulation, international trade, and banking—there is a substantial market in these law schools for instruction in economics. But there is virtually no market for acquiring the research skills necessary to do positive economic, or other scientific, studies of the legal system. As a result, those members of a law school's faculty who want to do positive analysis of law do not receive feedback from students, find it difficult to integrate their teaching and research activities, and do not have at their disposal a corps of apprentices, corresponding to Ph.D. candidates in other fields, to extend their research.

3. Doctrinal analysts, who still dominate most law schools, are not in a good position to evaluate the work of social scientists or of lawyers using social science methods. This introduces a random element into

26. See, e.g., M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1977).

27. J. RAWLS, *A THEORY OF JUSTICE* (1971).

28. See, e.g., Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

the appointment and promotion process. Some individuals who may not be good social scientists are appointed and promoted because they impress the doctrinal analysts. Others, who may be good social scientists, are not appointed or promoted because they do not impress the doctrinal analysts.

4. The difficulty that doctrinal analysts face in evaluating the work of social scientists comes not only from a lack of understanding of the theories and empirical tools of the social scientist but also from a difference in outlook or culture. Despite the claims of Langdell and his disciples, doctrinal analysis today is a humane rather than scientific discipline. As in the other humanities, great emphasis is placed on writing well (sometimes on writing impressively—which is not the same thing), footnoting copiously, treating every topic exhaustively, and staying within the linguistic and conceptual parameters of the doctrines being analyzed. Soundness is valued above originality, thoroughness above brevity; originality, where it is present, tends, indeed, to be concealed. In these respects, doctrinal analysis also resembles appellate legal practice.²⁹ The writing style, the research interests, the overall approach of the doctrinal analyst are close to those of judges and brief writers, and doctrinal analysts move smoothly between academic positions and positions in private practice, in the judiciary, in the governmental legal service, and in legislative or quasi-legislative drafting positions such as being a reporter for one of the uniform codes or for a Restatement. The doctrinal analyst, in short, identifies more with the community of lawyers than with the community of scholars.

The style, broadly conceived, of the social scientific legal scholar is different. Emphasis on fine writing and copious documentation gives way to emphasis on originality of ideas and economy of expression. An article in the social sciences usually begins with an explicit statement of the article's place in the literature and of its incremental contribution to knowledge. One rarely finds such a preface in the work of legal-doctrinal analysts, originality being valued less. The social scientist is not concerned with being thought sound by judges and practicing lawyers; nor is he concerned with writing in a language they will understand or with using concepts familiar to them. He is not one of them. He is part of the scholarly rather than the legal community.

These differences in values create barriers to communication and

29. Because of the heavy emphasis on precedent and other sources of authority in judicial decisionmaking, judges and advocates stress continuity rather than originality in advancing novel legal theories.

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make it difficult for the doctrinal analyst to evaluate the work of the social scientist. They also make it difficult for the social scientist to evaluate the work of the doctrinal analyst, but that is less important insofar as doctrinal analysts continue to dominate the faculties of the law schools.

5. The doctrinal analyst and the social scientist differ in the emphasis they place on scholarship relative to teaching. The greatest thrill of scholarship is the sense of having discovered something new. It is a thrill only rarely vouchsafed the doctrinal analyst. He is not engaged in a search for something new but in tidying the doctrinal product of judges. His *metier* is not scholarship; it is the cut and parry of the classroom. Most doctrinal analysts are not highly productive as scholars by the usual standards of the social sciences and much of their scholarly production takes the form of teaching materials. (The treatise writers are a major exception to this generalization, but they are a vanishing species.) Social scientists tend to view teaching either as an adjunct to their research or as the price they pay for being given time in which to do research. They are rarely heard to discuss their teaching, whereas teaching is a staple of conversation among doctrinal analysts.

The conflict between doctrinal analysts and social scientists over the relative emphasis to be placed on scholarship and teaching retards the positive analysis of law by the methods of the social sciences. The doctrinal analyst may be little impressed by, and little interested in encouraging or rewarding, the scholarly productivity of social scientists. He may instead want them to place an emphasis on teaching that they consider destructive to their scholarly careers.³⁰

6. The mode of publication of legal scholarship is unusual by the standards of most other fields of academic inquiry, and makes it difficult for social scientific research on the legal system to flourish in law schools. When the doctrinal analyst writes an article, he may circulate drafts to some colleagues, but he is unlikely to give it at workshops or seminars at his own or other universities and he will submit the article for publication to a student-edited law review that rarely uses referees to assist it in making publication decisions or in providing authors with suggestions for improvement. The pattern

30. I do not want to exaggerate this conflict. Because the demand by law students for instruction in the social sciences is limited, the law school may be quite willing to offer the social scientist a reduced teaching load. The social scientist also escapes the burden of supervising Ph.D. dissertations, though, as I have suggested, this involves a loss as well as a gain. If, however, the social scientist appointed to a law faculty comes to share the law professors' preoccupation with teaching, his scholarly career may be seriously compromised.

in other academic fields is different. Most papers are not submitted for publication until they have been given at one or more workshops at which the author is exposed to the criticism of both peers and graduate students. The paper is then submitted to a journal that is edited by the author's peers, not by his students, and normally the editors do not make a publication decision without submitting the paper to one or more referees, who are scholars familiar with the particular subject on which the author is writing. Whether or not the paper is accepted by the journal, the referee's anonymous comments are sent to the author to help him improve it.

The publication system in the social sciences is superior to that in legal scholarship even for doctrinal analysis. But it is clearly sub-optimal to process social scientific studies of the legal system in the manner of conventional legal scholarship—not given at workshops, not submitted to peer-edited journals, and not refereed. The lack of competent evaluation and criticism results in the publication of social scientific papers on law that should not be published at all, in the occasional failure to publish good papers, and in the publication of papers that would have been improved greatly by the publication process characteristic of academic fields other than law.

Having spoken so critically of the law school as a habitat of social science scholarship, I may seem to be leading up to a proposal to move such scholarship outside the law school—to economics departments, for example. There are compelling reasons, however, for maintaining the law school as the center of social science research on the legal system:

1. Law students increasingly want to learn how economics can be applied to legal problems.³¹ A law school could refer them to economics departments for instruction, but it is more effective to offer courses tailored to meet law students' particular needs. This argues for teaching economics in the law school and therefore for appointing economists to law school faculties. The research congenial to them will be social science research rather than doctrinal analysis. And apart from what law students know they want to learn, economics can enrich the teaching of law. I would especially emphasize the role of economics in giving concrete content to legal concepts such as negligence, assumption of risk, and foreseeability, in displaying interrelationships among different fields of law, and (an earlier point) in exposing fallacies in implicit economic assertions (often concealed in

31. It is a detail that their main interest is in the normative, rather than the positive, uses of economics in law.

a vague rhetoric of rights, justice, and fairness) by judges and doctrinal analysts.

2. It may be even more difficult to learn law than to learn economics. Economics is a deductive system; law is like a language. An economist teaching in an economics department will find the law a baffling subject of study, while a lawyer in a law school may be able to apply a modest knowledge of economics to the law with pretty good results. This is not to deny the importance of the contributions that have been made to the law and economics field by economists such as Gary Becker who are not affiliated with law schools or working jointly with lawyers.³² Their contributions have been fundamental. But with the basic contributions perhaps largely made, and analysis turning to finer points of application, the pure economist may increasingly be disadvantaged in competing in the law and economics field with economists in law schools (including lawyer-economists), who may lack the theoretical sophistication of the pure economist but who compensate by their intimacy with legal materials.

These reasons argue for making the law school the center of social science scholarship on the legal system. Whether the law school can be made a fitter habitat for such scholarship I consider below. But I want first to examine the normative branch of "law and"

C. *The New Normativism*

The use of the social sciences (primarily economics) and the humanities (primarily philosophy) to evaluate legal doctrines goes back many years. Thus, the modern development of the use of normative economics in law schools can be dated—arbitrarily to be sure—from the middle 1950s, when Donald Turner at the Harvard Law School, a lawyer as well as a Ph.D. economist, and the economist Aaron Director at the University of Chicago Law School independently began to subject the antitrust laws to systematic and critical economic analysis.³³ Henry Manne's work analyzing corporation and securities law from an economic perspective also dates roughly from this period.³⁴ In 1961, Guido Calabresi of the Yale Law School began his

32. See, e.g., G. BECKER, *supra* note 22; Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

33. For Turner's early work, see K. KAYSEN & D. TURNER, *ANTITRUST POLICY* (1959), and Turner, *The Validity of Tying Arrangements under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958). On Director's contributions, largely unpublished under his own name, see the discussions and references in Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-28 (1979).

34. E.g., Manne, *Accounting for Share Issues Under Modern Corporation Laws*, 54 NW. U.L. REV. 285 (1959); Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); Manne, *The Perplexing du Pont Case: Additional Confusion in the Law of Mergers*, 106 U. PA. L. REV. 385 (1958).

influential series of publications applying economics to tort questions.³⁵

In the minds of most observers, the normative economic analysis of law, typified by the work of Calabresi, is not clearly distinguished from the positive economic analysis of law. The two branches, however, really are different, as I suggested earlier. And the normative is somewhat more congenial to the lawyer, including the academic lawyer, because his training and practice are so heavily oriented toward persuasion. The scientific claims of the positive analysts bother the lawyer, though the continuity between doctrinal analysis and positive economic analysis of law is greater, I have argued, than that between doctrinal analysis and the normative economic analysis of law. The positive economic analysis of law, like all other positive approaches to law, has been insufficiently emphasized. A principal focus of legal scholarship should be to clarify our understanding of the legal system. A better understanding of the system would, incidentally, provide a firmer basis for legal reform than a normative analysis that derives its view of what is sound and feasible from anecdote, intuition, and personal experience. Law reforms spearheaded by lawyers—bankruptcy reform, no-fault automobile compensation plans, liberalized rules of standing to sue, strict liability in products cases, the expansion of the class action under the Federal Rules of Civil Procedure, the liberalization of the insanity defense in criminal cases—have not been notably successful. They may have miscarried in part because lawyers' knowledge of how legal institutions actually work is meager.

The other major school of normative analysis of law today is the philosophical school. The great diversity within that school—greater than that within the economic analysis of law—reflects the lack of a single paradigm³⁶ of moral and political philosophy comparable to the paradigm of rational utility maximization that virtually all economists share. There are today Marxian philosophers of law, libertarians, social contractarians, left- and right-wing utilitarians, left- and right-wing Kantians, skeptics, intuitionists, eclectics, wealth maximizers, and others.

The new philosophy (or philosophies) of law differs strikingly from traditional jurisprudence in that it is not preoccupied with the question, what is law? The debate between positivists and natural-law theorists continues, but the new philosophers of law have also reached

35. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

36. I use the term "paradigm" here in the same sense that Thomas Kuhn used the term. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

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out for new issues to analyze—discrimination, including reverse discrimination,³⁷ the ethical basis of contract³⁸ and tort law,³⁹ just compensation in eminent domain cases,⁴⁰ causation and intent in tort and criminal law,⁴¹ and many others.

Two points should be noted about the diverse group of scholars addressing these questions:

1. Some Marxists play by different rules from those of the other normative scholars, and rather ugly ones. I am thinking, for example, of Tushnet's recent unpardonable personal abuse of Laurence Tribe.⁴² The Marxist scholars question the objectivity and integrity of the non-Marxists, whom they accuse of prostituting their intellectual abilities to personal or class interests. By this reasoning, the Marxists' motives should be equally suspect. Their emphasis on scholars' motives is, however, a distraction. Scholarship should be evaluated on its merits; it should not be disparaged by reference to the presumed motives of its practitioners.

2. Much of the recent philosophical work by lawyers is weak. This is also true of the economic analysis of law, some of whose practitioners, and antagonists, know too little economics, or too little law, to make a useful contribution. The corresponding deficiencies in the work of the philosophical lawyers are less obvious, however, because the lack of a single paradigm of philosophical analysis makes it difficult to distinguish bad analysis from merely unorthodox analysis.⁴³ In accordance with my focus on institutional questions throughout this paper, I want instead to ask why the academic lawyers' philosophical writings are so often unsatisfactory. The answer is the same that I offered earlier in discussing the positive economic analysis of law. The law schools are not set up to do philosophy any more than they are set up to do economics. Although it is now the norm for a national law school to have one or more economists on its faculty, it is rare that philosophers are on the faculty; and although some lawyers who do economics have published their work in economics journals, very few lawyers who do legal philosophy have published in philosophy

37. *E.g.*, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 223-39 (1977); *EQUALITY AND PREFERENTIAL TREATMENT* (M. Cohen, T. Nagel, & T. Scanlon eds. 1977).

38. *E.g.*, KRONMAN, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472 (1980).

39. *E.g.*, EPSTEIN, *A Theory of Strict Liability*, 2 *J. LEGAL STUD.* 151 (1973).

40. *E.g.*, B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); Michelman, *supra* note 28.

41. *E.g.*, G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968).

42. Tushnet, *Dia-Tribe* (Book Review), 78 *MICH. L. REV.* 694 (1980).

43. See Posner, *Lawyers as Philosophers: Ackerman and Others*, 1981 *AM. B. FOUNDATION RESEARCH J.* 231; Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 *J. LEGAL STUD.* 187 (1981).

journals. For these reasons, the conditions for sustained and effective scholarly activity are even more adverse for philosophical analysis of law than they are for economic analysis of law.

The philosophical approach is less securely a part of legal scholarship than the economic for another reason: it arouses even greater skepticism on the part of the traditional legal scholar. There are two related reasons for this skepticism. First, there is no apparent career payoff to students from studying philosophy in law school. This makes instruction in philosophy, in contrast to that in economics, seem unrelated to the professional training function of law schools—the function to which the traditional scholars are dedicated.

The second reason legal philosophy is of less secure status in the law schools than economic analysis is that many of the adherents to the philosophical approach to law are thought—in some cases correctly—to have little interest in training practicing lawyers. Some of these scholars belong to what a friend of mine, who must remain nameless here, calls the “anti-law” or “anti-society” bloc in law school faculties. The “anti-law” people do not want to train practicing lawyers, at least not practicing business lawyers. They do not like practicing lawyers. They do not like the traditional modes of legal analysis and training. They do not respect their conventional colleagues. Some of them will not vote to appoint to the faculty candidates who have traditional legal academic credentials and interests. The “anti-law” people do not speak or comport themselves like lawyers. They are, in short, unassimilable and irritating foreign substances in the body of the law school. Similar attitudes are found less frequently among the economic analysts of law.

All that notwithstanding, I believe that philosophical analysis of law is a serious and substantial enterprise; along with economic analysis of law, historical and comparative analysis of law, and perhaps non-doctrinal legal analysis of other types, it belongs in the law school, to enrich teaching as well as scholarship. The second conclusion (that philosophy belongs in the law school) does not, of course, follow automatically from the first (that philosophical analysis of law is a worthwhile activity). The philosophical analysis of law could be conducted in the philosophy department of the university rather than in the law school. But, although few law school students are interested in studying philosophy, both the philosopher and the economist who try to study law from outside the law school face the same obstacle: the impenetrable character of legal materials to one who is not trained as a lawyer or who is not working in close proximity to lawyers. Be-

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cause of law schools' traditional emphasis on professional training, sometimes rather narrowly conceived, it may be difficult to persuade the schools to be hospitable to a branch of scholarship largely unrelated to that function; but I hope they can be persuaded to take a broader view of the law school's function.

II. Proposals

I have tried in this paper to convey my view of the present situation in legal scholarship. The problems I have emphasized are the demoralization of conventional legal scholars—doctrinal analysts—and the difficulty and importance of fitting interdisciplinary research into the law-school mold without breaking the mold—that is, without destroying doctrinal analysis. The difficulty is compounded by the well-known hostility of scholars to types of scholarship different from their own, a hostility captured in the adage, “what I do not know is not knowledge.”

I want to conclude with a few brief suggestions for improving the situation.

1. The salaries of law school teachers should be raised substantially, but selectively, in order to attract and retain lawyers who will do doctrinal research, a form of legal scholarship whose importance has not been diminished by the growth of other forms. I foresee the emergence of a differentiated salary schedule at law schools, in which each faculty member's salary will reflect his opportunity costs. These will vary according to whether the faculty member in question has attractive opportunities to practice law in lieu of teaching.

2. The belittlement of conventional legal scholarship, especially by deans at leading law schools, should cease. Those of us, for example, who believe that economics holds the key to understanding and reforming the antitrust laws should remind ourselves from time to time that Phillip Areeda of the Harvard Law School has carved out for himself a leading position among academic antitrust lawyers more by mastery of legal doctrine than by application of economic concepts.

3. Leading law schools should seek to foster social scientific research on the legal system, to the extent compatible with retaining their basic focus on the training of practicing lawyers. The following means come to mind:

- a. The appointment of more economists, of philosophers, and perhaps of other nonlegal scholars such as anthropologists, sociologists, and statisticians, to full-time positions on law school faculties.

b. The sponsorship of faculty-edited, refereed journals dedicated to publishing articles on law, especially articles written from the standpoint of the social sciences.

c. The creation of special programs in law for budding social scientists that will attract a cadre of graduate students to spend time studying in law schools.

d. The establishment of norms of publication and of research for the purpose of evaluating nonlegal analysts for appointment to and promotion in law school faculties.

Through steps such as these, law schools can take advantage of the recent developments in unconventional legal scholarship to enhance the research function of the law school without impairing its primary mission of professional training; indeed, professional training may be improved.

I have deliberately omitted from my list of suggested reforms the idea of joint-degree programs in law and other fields such as economics. I have no objection to such programs, but I do not think they will have a great impact on legal scholarship. The economist who wants to work on legal questions needs to know something about law, but he does not need a J.D. The lawyer who wants to apply economics to law needs to know some economics, but he does not need to have a Ph.D. in economics. Of course, the economist who has not studied law for three years will know less law than one who has—but he will know more economics. And the lawyer who has not studied economics for three years or written a thesis will know less economics than one who has done these things—but he will know more law. There are opportunity costs in mastering a new field, a point overlooked by Dean Wellington in suggesting that a suitably ambitious academic lawyer today must be prepared to master the whole of social thought. These objections apply *pro tanto* to Yale's new D.C.L. program.⁴⁴ An alternative to joint-degree programs that does not invite underspecialization is collaboration between lawyer and economist, which the appointment of economists to law faculties would facilitate. It may be the superior alternative. But if it is to be successful, lawyers and economists will have to learn to bridge the cultural differences that divide them. The challenge is to make the law school a comfortable habitat for a diverse group of disciplines. A first requirement in meeting this challenge is mutual respect among the practitioners of the different disciplines.

44. See BULL. YALE U., 1980-1981, at 89-93. This program is a diluted J.D.-Ph.D. program.