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2001

### Legal Scholarship Today

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#### Recommended Citation

Richard A. Posner, "Legal Scholarship Today," 115 Harvard Law Review 1314 (2001).

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# LEGAL SCHOLARSHIP TODAY

Richard A. Posner\*

*In recent years legal scholarship has undergone changes so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution.*<sup>1</sup>

Academic law is very old. But the earliest recognizably protomodern academic legal scholarship was that of Friedrich Carl von Savigny, who in the early nineteenth century propounded an ambitious theory of law and elaborated it with detailed historical investigations.<sup>2</sup> He argued that Roman law, essentially a body of common law principles, should be made the basis for German law because it would provide a better framework for German unity and modernization than a code on the French model. He was a professor; the research into Roman law by which he sought to substantiate his theory was academic; and his research agenda was progressive in the sense of providing plenty of topics for research by other law professors. But it was also very definitely in the service of law and of political governance more broadly. The materials of his research were legal, although obviously they had a decided historical dimension as well as a political and social purpose that was, however, largely implicit rather than explicit. His theory was oriented toward reform. While his intended audience consisted primarily of law professors and law students, he hoped to reach everyone who might help to bring about the legal reforms that he was urging.

From Savigny's day to roughly 1970, academic legal scholarship (and from here on I confine myself to American academic legal scholarship) generally adhered to the model Savigny had devised. That is, the materials used in the research were legal, extralegal purposes and perspectives were tacit, and the research was oriented toward reform and hence sought its primary audience among those people — mainly legal professionals, including other law professors, judges, legislators, and practicing lawyers — who were interested in improving law and legal institutions. Some of this scholarship, for example Holmes's *The*

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<sup>1</sup> Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 192 (1991).

<sup>2</sup> See, e.g., FRIEDRICH CARL VON SAVIGNY, *RIGHT OF POSSESSION* (Erskine Perry trans., 6th ed., London, S. Sweet 1848); see also RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 193–221 (2001).

*Common Law*, was as ambitious as Savigny's had been. Holmes sought to reconceptualize the Anglo-American common law and by doing so to bring about a variety of reforms, such as the substitution of "objective" for "subjective" principles of criminal and tort liability.<sup>3</sup> Conceptual ambition was notable as well in Henry Maine's *Ancient Law*, which influenced Holmes the scholar.<sup>4</sup> And there was Thayer's famous article on judicial review,<sup>5</sup> which influenced Holmes the U.S. Supreme Court Justice. Most of the academic legal scholarship of the period, however, as is true of most scholarship in any field at any time, was much less ambitious. Most of it focused narrowly on specific legal questions, which it addressed in the same basic style and format as judicial opinions. But there were outcroppings of ambitious scholarship after Holmes, for example that of the legal realists in the 1920s and 1930s, that of the "legal process" school, led by Henry Hart, in the 1950s and 1960s, and that of the nascent law and economics movement, focused in that early era on antitrust and regulation. Legal realism was the noisiest of these movements and the one most critical of traditional legal scholarship. But it disappeared so abruptly in the early 1940s (a mysterious war casualty) that it came to seem merely a temporary derangement of the otherwise smooth course of legal scholarship.

Oriented as it was toward reform, desiring to communicate effectively with the judges and the leaders of the bar and the other movers and shakers of the legal community, even the most ambitious academic legal scholarship spoke a language that nonacademic lawyers, the members of the judiciary and the practicing bar, could understand with ease. The reason was that the perspective from which academic legal scholars conducted their research and wrote up their findings was an internal perspective, and it was the internal perspective of the legal profession rather than that of the university. The scholars used the same assumptions, vocabulary, and methods of argument and proof as found in judicial opinions. They identified with the legal profession rather than with their colleagues in other departments of their university. They even dressed like lawyers rather than like professors. They passed easily between the university and nonacademic venues such as the courtroom and the government agency. Harvard for many years pegged the salaries of its law professors to the salaries of federal court of appeals judges.

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<sup>3</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 39-163 (Dover Publ'ns, Inc. 1991) (1881).

<sup>4</sup> POSNER, *supra* note 2, at 199.

<sup>5</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

A profession's internal perspective can of course change; the academic lawyer's has, as we shall see. But as of 1960, say, the single word that best described it would have been "untheorized." Judges and practicing lawyers of that era, and hence the academic lawyers, who saw themselves as a kind of shadow judiciary, had no truck with anything that could seriously be called theory. The word was mainly used to denote the ground of a legal claim (for example, the plaintiff's "theory" is unjust enrichment). The task of the legal scholar was seen as being to extract a doctrine from a line of cases or from statutory text and history, restate it, perhaps criticize it or seek to extend it, all the while striving for "sensible" results in light of legal principles and common sense. Logic, analogy, judicial decisions, a handful of principles such as *stare decisis*, and common sense were the tools of analysis. The humanities and the social sciences were rarely mentioned.

There were genuine legal theorists, some of great distinction, such as Savigny, Maine, Thayer, and Holmes, but they were few and atypical; and they seem to have had few twentieth-century successors. Legal realism, as I said, was to a significant degree antidoctrinal, but what it offered in place of doctrine was, very largely, politics and a taste for empiricism, rather than theory.

Beginning in the late 1960s and early 1970s, a period that for convenience can be centered on 1970, a number of law professors, mainly but not only at the leading law schools, adopted a new model of legal scholarship. This model looked at the law from the outside, from perspectives shaped by other fields of scholarly inquiry, such as economics, political theory, moral philosophy, literary theory, Marxism, feminist theory, cultural studies, cultural anthropology, structuralism, and poststructuralism.<sup>6</sup>

There had always been a scholarly literature about but external to law; one can trace it back to Plato's *Gorgias*. But it had not penetrated academic law deeply. There had as well always been some borrowings by legal scholars from other fields, such as criminology, history, and philosophy; indeed, philosophy of law (jurisprudence) was a recognized subfield of legal scholarship, though a marginal one. What was new was the number and density of the external approaches that began to take hold in the legal academy around 1970 and the number and seriousness of their practitioners. I shall call the new approaches "interdisciplinary," in contrast to the "doctrinal" scholarship that until then had the field of academic law pretty much to itself. The interdisciplinary approaches include law and economics, law and society, law

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<sup>6</sup> For a brief survey, see POSNER, *supra* note 2, at 3-14; see also Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground"*, 91 MICH. L. REV. 2075, 2079-98 (1993). What I am calling "interdisciplinary" (or, occasionally, "external") scholarship in this Essay I called "legal theory" in *Frontiers*.

and literature, critical legal studies, critical race theory, feminist jurisprudence, gaylaw, law and political theory, even law and biology and law and cognitive science. In some the external perspective seems more a matter of politics than of discipline; for how much does critical legal studies ("did" may be more accurate, for it seems pretty dead) owe to "critical theory" and the Frankfurt School and how much, rather, to 1960s-style native radicalism? But this is a detail; the point is that the crits' stance, whatever its origin or best characterization, is not that of the judge or practicing lawyer, to whom, indeed, it is more alien than the most technical economic analysis.

Doctrinal scholarship continues; indeed, it continues to dominate legal scholarship if one counts the number of articles, student notes, treatises, casebooks, and textbooks, and even more so if one weights the number of publications by number of pages.<sup>7</sup> But interdisciplinary scholarship looms very large, and if it continues to grow as fast as it has in the last thirty years (not that it will; there is such a thing as saturation, and diminishing returns), it will come eventually to dominate academic law. Already there are signs that it is changing the internal perspective of the academic legal profession by infiltrating doctrinal scholarship and changing the professoriat's understanding of what constitutes good doctrinal scholarship and good teaching of core law courses: scholarship and teaching that incorporates, to a degree anyway, and with considerable simplification, the most influential of the interdisciplinary approaches, such as economic analysis of law and feminist jurisprudence.

I want to consider in the balance of this Essay why interdisciplinary scholarship has grown so rapidly and what the future may hold for it. I argue that it has grown mainly because of the advance of neighboring fields such as economics and political theory and because of the expansion in the size of the legal profession and hence in the number of law professors. I also argue that its future, which is threatened by problems of quality arising from the peculiar and inadequate institutional structure of interdisciplinary legal scholarship, depends on the ability of the practitioners of this scholarship to influence practice, rather than merely to circulate their ideas within the sealed network of a purely academic discourse.

A necessary condition for the growth of interdisciplinary legal scholarship was the evolution of the external disciplines to the point at which their potential to contribute to the understanding and improve-

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<sup>7</sup> See, e.g., Gordon, *supra* note 6, at 2099-101; William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385, 389 (1993); Michael J. Saks, Howard Larsen & Carol J. Hodne, *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK U. L. REV. 353, 369-71 (1996).

ment of the law was plainly visible. Until the 1960s, economics, though already a mature discipline, was generally thought to be just about explicit markets and therefore relevant only to fields of explicit economic regulation, such as antitrust and regulated industries, areas of law whose subject, competition and monopoly, was already the concern of a vast economic literature. Some economists associated with legal realism, such as Robert Hale,<sup>8</sup> did venture outside the antitrust and regulatory fields, but only into areas such as contract law that (though this was not generally understood) regulated commercial activities. During the 1960s, an economics of nonmarket behavior emerged (with some earlier roots, such as Gary Becker's book on the economics of racial discrimination<sup>9</sup>), and all at once it became apparent that economics could illuminate and improve large areas of law that until then had been thought dominated by considerations of "fairness" or "justice" remote from anything to do with economics.

One thing that made wide-ranging applications of economics to law feasible was that a number of important legal doctrines turned out to be isomorphic with economic theory. Learned Hand's algebraic formula for negligence,<sup>10</sup> which is readily translatable into the economic formula for optimizing care,<sup>11</sup> is only the most famous example. And one implication that followed from this was that economics might have great value in the teaching of law, as well as in scholarship; and teaching and scholarship are complementary. Economics is simpler (not easier) than law. It is algorithmic, whereas law is like a language. Language has rules, but a language cannot be learned by studying those rules. If law could be mapped onto economics, the more complex on the simpler, the structure of law might be rendered more transparent and comprehensible. And to a considerable extent this turned out to be doable, in areas ranging from torts, contracts, and property to family law, intellectual property, and civil procedure.<sup>12</sup> This development was a boon to students, and since legal academics often get their ideas for scholarship from the classroom — from thinking about the materials they are teaching and from the questions and comments of students — it was a boon to scholarship as well.

The rise of nonmarket economics was only one of the developments that brought the external disciplines closer to law. Another was the revival of moral and political philosophy, stimulated by John Rawls's

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<sup>8</sup> See, e.g., Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

<sup>9</sup> GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

<sup>10</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

<sup>11</sup> See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 87-88 (1987).

<sup>12</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998).

book *A Theory of Justice*, published in 1971. These fields had been dormant for decades, decades dominated by logical positivism and related arenas of epistemology and the philosophy of science and language. Rawls's work opened up the possibility of basing legal obligation on philosophical concepts more precise and sophisticated than "fairness" and "justice," terms that lawyers and judges like to toss around as if they were perfectly intuitive. Some scholars think that what is truly isomorphic with law is not economic theory at all, but philosophical concepts such as corrective justice and Kantian deontology.

Critical theory (the umbrella term for Marxian analysis of society by Continental scholars, mainly French and German) emerged, and we got hermeneutic and Foucauldian theories of law; feminist theory, leading to feminist approaches to law; and so forth. I need not continue the catalog. The point is simply that since roughly 1970 developments in disciplines external to law have enabled a range of new perspectives to be brought fruitfully to bear on law.

In addition, the rise of the regulatory state brought within the law's grasp a host of activities — notably involving the environment, safety and health, and discrimination of all sorts in labor markets — that had not been heavily regulated by law previously and that required lawyers to become familiar with disciplines previously remote from law and to integrate them with law.

There is something else important to an understanding of the trend toward interdisciplinary scholarship. It is the reason I called the developments in the external disciplines merely a necessary condition of the surge in interdisciplinary legal scholarship. That something else is the process so presciently described by Max Weber: the seemingly inexorable march of the twin phenomena of rationalization (bringing more and more activities under the rule of instrumental reason) and specialization. In the case of professional activities (the professions being the occupations that employ technical knowledge in the performance of their tasks), the Weberian phenomena express themselves in the academization of the theory part of the profession and the professionalization of the academy. Law has been a university subject in the United States for a long time, but as recently as the 1960s the law schools stood to one side of the academic culture of their universities, structurally as well as attitudinally. Law schools placed relatively little emphasis on scholarly writing, compared to the overwhelming emphasis placed on it in the other departments of the leading universities. At many law schools, including some of the best, scholarly publication was not even a condition of tenure, which was often granted after as few as three years in teaching, let alone a career expectation; other forms of service to the profession, such as work on the American Law Institute's *Restatements of the Law*, could be substituted. Such scholarly writing as was done was, as I noted earlier, mainly forensic or ju-

dicial in character, rather than disinterested or abstract, and there was little emphasis on originality and hence only a very weak norm of acknowledging previous work covering the same ground. In these respects legal scholarship was faithful to the judicial model, in which originality is concealed and it would be thought ludicrous for a judge in a judicial opinion to thank his colleagues or others for helpful comments on the opinion draft; indeed many judicial opinions were and are ghostwritten, by law clerks.

Terms that later came into vogue in the legal academy, such as "breakthrough scholarship," were unknown in that era, and if proposed would have invited derision. A claim of "breakthrough scholarship" would have been suspect as unsound, since judges, as I said, do their best to conceal innovation, the better to emphasize continuity with existing law. They do not flaunt innovation, as academics normally do, and so neither did law professors. The originality of the legal realists contributed to the sense that their ideas were unsound, or at least extreme; and legal realism, which even at its heyday had merely a foothold in a handful of law schools, died and was not much mourned.

Above all, legal scholarship was not directed at law professors as such; most of it was aimed squarely at the profession at large, particularly judges and lawyers. This orientation enabled judges and lawyers to contribute to it. Think only of Holmes, of Brandeis (in the famous article on privacy),<sup>13</sup> of Learned Hand (notably in his Bill of Rights lectures),<sup>14</sup> and of Cardozo<sup>15</sup> (and, persisting into the "modern" era, Henry Friendly<sup>16</sup>). I cannot think of a single work of English or American legal scholarship published before 1970 that would have posed the slightest difficulty of comprehension to judges and lawyers.<sup>17</sup>

This continues to be true of most legal scholarship. Legal treatises, still a mainstay of such scholarship, are directed primarily at and read primarily by practicing lawyers, judges, and judges' law clerks. The same is true of most law review articles and notes. They continue to differ from the scholarly norm in other fields. Think only of the length of law review articles, how unembarrassed the legal writer is to repeat what is well known, how seldom one finds an article that begins with a clear statement of what the author thinks the article adds to the existing literature, how mind-numbingly repetitious are the hundreds of

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<sup>13</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>14</sup> LEARNED HAND, *THE BILL OF RIGHTS* (1958).

<sup>15</sup> See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>16</sup> See, e.g., HENRY J. FRIENDLY, *FEDERAL JURISDICTION* (1973).

<sup>17</sup> This significantly excludes some Continental legal scholarship, notably Hans Kelsen's, which would have baffled many lawyers and judges — and still does today.

articles on *Roe v. Wade*,<sup>18</sup> now to be eclipsed it seems by a veritable avalanche of articles, most saying the same things, about *Bush v. Gore*.<sup>19</sup> As a percentage of all legal scholarship, it is true, treatises and doctrinal articles and notes have declined,<sup>20</sup> and the prestige of this work has declined more. Traditional doctrinal scholarship is disvalued at the leading law schools. They want their faculties to engage in “cutting edge” research and thus orient their scholarship toward, and seek their primary readership among, other scholars, not even limited to law professors, though they are the principal audience.

The contrast between the internal and the external perspective in legal scholarship that I discussed earlier tracks the contrast I am now discussing between scholarship written for the bar (broadly defined) and scholarship written for the academy. The latter type tends to be external, that is, to use techniques, vocabulary, and insights from other fields. Economic analysis of law is a clear example. A mixed example is the scholarly literature on constitutional interpretation, with its debates over originalism, textualism, dynamic interpretation, purposivism, translation, and the like. Economic theory is mandatory if one wants to discuss law from an economic standpoint. But political theory, epistemology, economics, and the other external disciplines are optional when it comes to discussing constitutional law. And so much of the current literature on constitutional law, not just its doctrines but its fundamental methods, its “theory,” is directed at and even written by judges; one thinks for example of influential articles by Justice Scalia<sup>21</sup> and Judge Easterbrook.<sup>22</sup> Their perspective is internal; they are writing as judges for judges and for practicing lawyers, as well as for professors; they do not draw on external disciplines. But much constitutional scholarship today is external, directed not at judges and practitioners but at academics; one thinks for example of the scholarly literature that applies Wittgenstein, Gadamer, Habermas, Austin, Grice, or public-choice theory to questions of constitutional and statutory interpretation.<sup>23</sup> One thinks of Ronald Dworkin, who argues

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<sup>18</sup> 410 U.S. 113 (1973).

<sup>19</sup> 121 S. Ct. 525 (2000) (per curiam).

<sup>20</sup> See sources cited *supra* note 7.

<sup>21</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>22</sup> Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

<sup>23</sup> See, e.g., Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837 (1994) (Wittgenstein); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 40–41 (1998) (Gadamer); William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 LAW & SOC. INQUIRY 969 (1998) (Habermas); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 824–25 (1999) (Austin); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179 (Grice); William N. Eskridge, Jr. & Philip P. Frickey, *The*

baldly that constitutional law is and should be a department of applied moral philosophy. Scalia's views are engaged by these interdisciplinary scholars because of his power as a Supreme Court Justice, not because those views are considered intellectually sophisticated.

One can imagine a style of constitutional scholarship that would be both internal and esoteric, building complex theories of interpretation out of case law with little explicit reference to other fields, but examples are few (*Hart and Wechsler's The Federal Courts and the Federal System* comes to mind). It would not be problematic, though. Judges and lawyers are not troubled by complexity as such; they revel in it. Though much of law is about coping with complexity, about simplifying overly complex law, you cannot simplify intelligently if you cannot master complexity. What judges and lawyers are troubled by is scholarship that employs unfamiliar approaches and materials, scholarship that is about law but is not of law.

The external disciplines that are becoming so marked a feature of today's legal scholarship differ from law not in being more rigorous, technical, difficult, or cogent (some are; some are not), but in their institutional configuration. Whether the field is physics or gender studies, economics or art history, the basic shape of the scholarly career is the same and differs markedly from that in law. The career begins with graduate study culminating usually in a book-length dissertation (in technical fields such as economics a series of essays can often be substituted) as the basis for the Ph.D. degree, which is the gateway to the tenure track. If the fledgling does well, meaning if he publishes articles in peer-reviewed journals in the expected quantity and, in some fields, if he publishes books with academic presses, he will obtain tenure after six or eight years, and he will continue after that, though perhaps with some reduced intensity (and anxiety), to publish in the manner I have described. He will also serve as a referee for the peer-reviewed journals in his field and perform other ancillary academic tasks. Increasingly, he will teach graduate students rather than undergraduates and interact with his graduate students as the supervisor of their Ph.D. dissertations rather than as a classroom instructor; indeed, much classroom instruction, especially of undergraduates, will be fobbed off on graduate students.

This standardized career pattern is perceived as irksome, narrowing, even sterile and stultifying, by some. With the expansion in the size of faculty in virtually all fields, specialization has increased and with it the isolation of scholars from broad currents of thought. There is a Sorcerer's Apprentice quality to much academic scholarship today,

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*Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994) (public-choice theory).

especially in the humanities. Do we really need several hundred philosophy journals? In some fields specialization has been carried to a point at which the number of practitioners within a specialty may be too few to ensure quality; who is to say whether "world's fair history" (yes, that is a recognized subfield of history) is a worthwhile use of academic resources? Maybe it is time to rethink the standard scholarly career. But that it ensures *some* minimum of quality and professionalism is apparent. That assurance is provided in legal doctrinal scholarship — even though law professors do not follow the standard academic career pattern that I have just sketched — by the fact that the scholar is writing in a medium fully accessible to the profession at large. Purely academic fields do not have such controls, but do not need them either, because they insist on the academic career pattern that I have described. Interdisciplinary legal scholarship, however, has neither a broad, knowledgeable professional audience nor a systematic, well-structured institutional substitute for the standard academic career pattern, which depends on such an audience. Most law professors who engage in interdisciplinary legal scholarship have not gone through the graduate school Ph.D. mill; their only degree is a J.D. And whether they have two degrees or one, they will submit their articles mainly to student-edited law reviews. It is true that these interdisciplinary law professors are reviewed for tenure — it is by no means automatic — but the review comes after a shorter period than in other academic fields, and the standard used is laxer than in the other fields. Because law professors have such a lucrative career alternative in the practice of law, they demand and receive better treatment from their academic employers (including much higher salaries, no longer tied to the relatively modest salaries of federal judges, though even those salaries exceed those of most professors in the humanities and many of the social sciences) than their downtrodden colleagues in the purer academic fields.

The tenure review is conducted, moreover, by law professors, most of whom lack any expertise in the tenure candidate's interdisciplinary field. (Doctrinal research is specialized, too, but there are plenty of academics and practitioners in all the principal specialties.) The characteristics of law review articles that I mentioned earlier, including inordinate length, repetitiousness, and failure to indicate clearly the incremental contribution that the author believes his article is making, continue to be found in interdisciplinary articles published in the conventional law reviews.

The number of dual-degree (Ph.D.-J.D.) law professors is increasing, and specialized journals, many of them faculty-edited (primarily in economic analysis of law), and a number of the faculty-edited ones

refereed, are a publication outlet of growing importance.<sup>24</sup> But interdisciplinary legal scholarship is still far from converging with the standard academic model, and the progress toward that convergence is slow.

I said that interdisciplinary legal scholarship is intended to be read by professors (mainly, but not only, law professors) rather than by practitioners (including judges). The latter are free to eavesdrop, as it were, but few bother to do so, because they would not understand the language they were overhearing. This causes occasional grumbling by the practitioners<sup>25</sup> and even by some law professors,<sup>26</sup> but it is not heeded. The change in the audience for legal scholarship brings to the fore a mundane but vital condition for the evolution of legal scholarship toward interdisciplinarity. For a significant number of law professors to turn their back on the practitioner audience, there must be enough law professors to create a critical mass of readership. There used not to be this critical mass, but now there is. Between 1960 and 2000 the number of American law professors grew from 2800 to 8827, a better than threefold increase.<sup>27</sup> Size of market and specialization go hand in hand: the larger the overall market, the likelier it is that specialists can find customers for their specialized product.

With the rise of external disciplines that seemed to have important things to say about law and with the increase in the number of law professors, the emergence of an interdisciplinary legal scholarship opaque to the bar should have come as no surprise. Nor should it have come as a surprise that this development would give rise to a serious problem of quality control. Doctrinal scholarship may have been (may be) dull and limited, but it is useful and it is conducted under conditions that ensure minimum quality. Those conditions — a large professional audience; a common academic culture; continuity with teaching, judging, and performance as a student; and law review editing — are missing from interdisciplinary legal scholarship; and the fact that its audience is almost entirely academic raises the issue of utility in acute form.

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<sup>24</sup> See Tracey E. George & Chris Guthrie, *An Empirical Evaluation of Specialized Law Reviews*, 26 FLA. ST. U. L. REV. 813, 814 (1999).

<sup>25</sup> See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992). For evidence in support of Judge Edwards's thesis, see Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 667-70 (1998).

<sup>26</sup> See, e.g., Mary Ann Glendon, *What's Wrong with the Elite Law Schools*, WALL ST. J., June 8, 1993, at A16.

<sup>27</sup> The 1960 figure is computed from ASS'N OF AM. LAW SCH., DIRECTORY OF LAW TEACHERS IN AMERICAN BAR ASSOCIATION APPROVED LAW SCHOOLS 19-55 (1960). The 2000 figure is from the AALS's web site. See Richard A. White, *Association of American Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions* tbl.1A (1999-2000), at <http://www.aals.org/statistics/index.html>.

Just how serious are these problems? Unfortunately, quality of scholarship is very difficult to measure. It is no good looking at scholarly citations. I am an enthusiast for citation studies,<sup>28</sup> but while they can be used (with a grain of salt) to evaluate scholars within fields, they cannot be used to evaluate a field — really a group of fields — as broad as interdisciplinary legal scholarship. That the workers in a field cite each other a lot is hardly evidence of quality, especially when it is a small, specialized field walled off from the larger academic culture. Criticisms by experts of particular works of interdisciplinary scholarship abound,<sup>29</sup> but it is difficult to infer the overall quality of the field from those criticisms. Only a small percentage of works of interdisciplinary legal scholarship receives sustained critical attention, and few of the critics know the external discipline used in the work well enough to spot any but the most glaring errors.

We can get a clue (no more) to quality, and to utility as well, by considering the extent to which interdisciplinary legal scholarship circulates in a closed rather than open network. By this I mean, is its only effect on its own tiny little world of specialized scholarship, or does it ramify into other areas of professional or other activity? The lack of a lawyer audience is not critical. For example, it might be the case that no practicing lawyer ever read articles applying game theory to bankruptcy law but that treatise writers and other doctrinal bankruptcy scholars read them and incorporated their insights into their own, practitioner-friendly works; by this indirect but effective path the game theorist would be affecting the legal system. But it might equally be the case that a law professor's article on Hegelian jurisprudence would be read only by other law professors interested in Continental philosophy and that there would be no leakage outside that narrow network, not even through the impact of the professors' teaching.

This self-sealing, or entombed, type of scholarship that I am describing need not necessarily be thought "irrelevant" or misguided just because it has no "real world" effects. There is no compelling reason to apply a utilitarian or pragmatic test to scholarship, or rather, a careful utilitarian or pragmatic test might well validate much "impractical" scholarship. If there is widespread curiosity about how people lived 10,000 years ago and a private university can support research into the

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<sup>28</sup> See, e.g., Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 AM. L. & ECON. REV. 381, 382–83 (2000); cf. RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE (2001).

<sup>29</sup> See, e.g., Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 79–80 (1992). For a view less skeptical of the use of other disciplines in legal scholarship, see Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 909–10 (1996).

question out of private donations and tuition, then allowing faculty to conduct and publish research on it may well be welfare maximizing in an uncontroversial sense even if their research would have absolutely no relevance to how we live today.<sup>30</sup> The donors and the students would, however, want this research to be conducted in a responsible fashion.

In the case of circulating-pump interdisciplinary legal research, it is unclear either that the research is conducted responsibly or that it caters to any widespread curiosity about external perspectives on the legal system. The legal system is less a subject of intrinsic fascination to the public at large than a feared and derided — though also valued and indeed indispensable — part of society's political framework.

There are other clues that there are serious problems of quality in external legal scholarship. One is (paradoxically, given the rise of specialization that I have noted) radical underspecialization in some areas of interdisciplinary legal scholarship, such as constitutional law. Modern U.S. constitutional law covers an enormous range of activities, from abortion to zoning. It is remarkable how many constitutional scholars consider themselves competent to discuss issues across the entire range, which they cannot possibly be. Remarkable, too, is the insouciance with which they discuss concepts from other fields, such as political science, with nary a reference to the scholarly literature in those fields.<sup>31</sup> And it is regrettable how politicized much legal scholarship is, owing to the advocacy tradition in legal training and practice and to the domination of many fields of academic law by left liberals; the problem is not that they are leftists rather than rightists, but that political uniformity breeds dogmatism.

My conclusion is that interdisciplinary legal scholarship is problematic unless subjected to the test of relevance, of practical impact. I hope I will not be accused of self-serving parochialism in suggesting that economic analysis of law passes this test; it has led to significant changes in legal doctrines and institutions, in the way law is practiced in certain fields, and in the teaching of those fields in law school.<sup>32</sup> The same is increasingly true of cognitive psychology. It is true of feminist jurisprudence. About other fields, such as moral philosophy, I am less confident. I do not want to go into those matters here. I am content to have raised the issue of the value of interdisciplinary scholarship and to have suggested a test of that value.

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<sup>30</sup> The issue is slightly complicated, however, because private universities receive substantial tax breaks, which are a public subsidy.

<sup>31</sup> See Mark Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 *LAW & SOC. INQUIRY* (forthcoming June 2002).

<sup>32</sup> One distinguished critic emphatically acknowledges as much. See Gordon, *supra* note 6, at 2083–85.