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Legal Scholarship Today

Richard A. Posner*

Notwithstanding its fads and philistinisms, its wobbly standards and general laxity, its pockets of incompetence and nepotism, its cult of political correctness¹ and virus of affirmative action,² the American university is without peer in the world. Peerless, but not uniformly progressive. Many fields of university scholarship, particularly but not only in the humanities, are declining, stagnant, or adrift. Theology (if we take a long view—comparing its position today with its position in the thirteenth century) is not an improving field. Nor education. Nor (and here I turn controversial) anthropology, geography, English literature, or architecture.

The situation in law is complex. The law schools are more or less holding their own as far as quality of teaching is concerned, though that most distinctive and, I think, most valuable technique of legal teaching, the Socratic method, is in decline at many law schools. This may be due in part to affirmative action, which, virtually by definition, entails the admission of minority students less qualified on average than the law school's nonminority students, hence more likely to be embarrassed by the "cold call" method of Socratic teaching. The taking and grading of written exams are more private activities and the danger of public humiliation is therefore slighter. But my interest here is in legal scholarship, where the past three decades have wrought profound changes.³

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1. By which I mean the belief, enforced if necessary by intimidation of nonbelievers, that certain opinions on sensitive subjects, such as racial or sexual differences, or the morality of homosexuality, or the behavior of minorities, or the heritability of IQ, or the value of different cultures, should be silenced. The Right has, of course, its own taboos, but the Left is currently in the ascendancy in most university faculties.

2. By which I mean the treatment of a particular racial, or ethnic, or gender identity, or sexual orientation, or some other nonmeritocratic factor, as a plus in deciding whether to admit a student or hire a faculty member—not merely seeking diversity of outlook and experience, which might or might not be correlated with such a factor, or making extra efforts to identify promising minority candidates. Affirmative action as I understand it is, thus, a form of racial, ethnic, sexual, or sexual-orientation favoritism or discrimination. I do not like it on a variety of grounds, including its capriciousness—frequently it involves a redistribution of income and opportunity from persons who have not practiced or benefitted from discrimination to people who have not been harmed by it—and I think it is hurting the weaker areas of university teaching and scholarship.

3. I discussed some of these changes, which were already well in train more than a decade ago, in my article *The Present Situation in Legal Scholarship*, 90 *YALE L.J.* 1113 (1981).

I

What has happened, most fundamentally, is that the career orientation of many of the ablest and most ambitious law professors, and of their acolytes and epigones as well, has changed. It used to be that law professors were *in* the university but *of* the legal profession. Usually they had spent the first few years after graduating from law school in some branch of the practice of law; but whether they had or not, they thought of themselves primarily not as professors but as lawyers. They were the lawyers training the next generation of lawyers and, through scholarship—through law review articles, treatises, model laws, and restatements of the law—guiding the judges and practicing lawyers of the current as well as succeeding generations in the path of sound legal reasoning. The superior intellects of these academic lawyers, in combination with their greater leisure for research, reflection, and the formulation of a personal professional agenda, enabled them to attain that synoptic view of an individual field which must forever elude the practitioner and judge immersed in a sea of particular cases. These intellects, this depth and breadth of knowledge, were, however, strictly at the service of the practical profession—the judges and practicing lawyers. Law professors aspired to Utility rather than to Truth. Their demeanor and attire were professional, worldly (as were their incomes), in comparison to the mild bohemianism by which the true don proclaimed (and proclaims) his independence from the quotidian. They moved easily between the practical and academic worlds, a notable example being the references to his practice before the Supreme Court that dot Herbert Wechsler's famous article on neutral principles—that summit of traditional legal scholarship.⁴

The self-identification of the professoriat with the practical profession was a source of great strength for the former. It provided anchor, balance, and goal. The job of the professor was to produce knowledge useful to the practitioner. To be useful it had to have a credible source and be packaged in a form the practitioner could use. That source was the law professor, viewed as a superior lawyer, and that form was the law review article or treatise or model law or restatement or casebook, genres that respected the practitioner's preoccupation with decided cases, his methodological conservatism, his deep-seated (as well as self-serving) belief in the autonomy of law as a subject of thought and practice, the high valuation he placed on tradition, convention, and stability, hence his aversion to any but incremental change. It implied too—this *useful* academic law that I am considering—a broad political congruence between the academy, on the one hand, and the judiciary, the bar, and the society as a whole, on the other. For the ultimate premises of many of the most interesting legal doctrines are political, and without at least broad political agreement between the professoriat and the profession, neither party to their symbiotic relationship will respect the objectivity, or the professionalism, of the other.

4. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

The traditional law professor was a student of legal doctrine. What he did, mainly, in a legal system such as that of the United States which is oriented toward case law, was to read judicial opinions and try to find the pattern in the cases or, failing that, to impose one of his own. Doctrinalists were, and are, law's talmudists. They proceeded from the welter of particular cases. The theory that guided their inquiry was muted, tacit, traditional. When they argued for reform they argued from within the tradition, using fragments of ethical or policy analysis found in the cases. The enterprise of doctrinal scholarship was heavily interpretive and rhetorical, often polemical, sometimes historical, very rarely empirical or scientific. Now casuistry, as Socrates in Plato's *Gorgias* famously observed,⁵ is a knack, and it is one that bright law students pick up quickly. When bright students edited the law reviews, therefore, law reviews were competent institutions for the selection and improvement of doctrinal scholarship. It is not surprising that as legal scholarship has trended away from the doctrinal, merit as measured by law school grades has become a decreasingly important criterion for the selection of law review editors (though here the causality probably works in both directions) and the number of faculty-edited law journals has increased.

In emphasizing the integration of the different parts of the legal profession in the heyday of doctrinalism, I do not deny the existence of a tension between the legal professoriat and the judges whose decisions were the professoriat's principal subject. Like the relation between literary critic and author, the relation between the law professors who analyzed judicial decisions and the judges who made these decisions had an inescapably adversarial element. The judge, like the author, wants to conceal his technique—wants to pretend that the decision follows as if without any human mediation at all from a previous decision or from the words of a statute or the Constitution—while the professor's business is to unmask the technique, to reveal (often disapprovingly) the falsification of fact or precedent, the omission of facts and arguments, the polemical or rhetorical thrusts over emptiness, that are the standard methods of judicial creativity.⁶

Despite these tensions, the continuity between the judiciary and the professoriat, and more broadly between the profession and the professoriat, was great. This has a further implication. No one doubts that the practice of law is a distinct profession. It is not economics, or psychology, or philosophy. It is an autonomous professional activity. The closer the law professor hewed to the professional model, the more academic legal scholarship was an autonomous department of academic scholarship, set apart from the other departments of the university: a secure monopoly of legal studies.

5. See PLATO'S *GORGIAS* 92 (E.M. Cope trans., 2d ed. 1883) (referring to cookery, and indirectly to rhetoric and sophistry): "[C]ookery seems to me to be no art at all but a mere empirical habit; . . . [it] proceeds in a manner absolutely irrational, as one may say, without the smallest calculation, a mere knack and routine, simply retaining the recollection of what usually happens"

6. Compare the illuminating discussion of the author-critic relation in JOSEPH BENSMAN & ROBERT LILJENFELD, *CRAFT AND CONSCIOUSNESS: OCCUPATIONAL TECHNIQUE AND THE DEVELOPMENT OF WORLD IMAGES* 19-22 (1973).

II

Doctrinal legal scholarship flourished between 1870 and 1965 (roughly). It has been in decline since,⁷ partly because of the defection of many law professors, especially but not only those who entered academic law after that date. The reasons for these defections are many; I shall emphasize two, though allude to others as well. One is the rise of disciplines that, by challenging the methods and results of doctrinal scholarship, have chipped away at the autonomy of academic law from other academic fields. The other is the decline of political consensus.

* * * *

Among the disciplines that have challenged the legal doctrinalists' monopoly of legal studies, I give pride of place to economics. Economics has made enormous progress in the last thirty years and, applied to law, has revolutionized the profession's understanding of fields as disparate as anti-trust, torts (mainly accidents), contracts, corporations, and bankruptcy. At the academic level, economic analysis has made inroads into a vast range of other fields as well, ranging from adoption to zoning. Fields closely related to economics, notably finance theory, public choice, and game theory, are also penetrating important areas of law. Finance theory has transformed academic thinking about corporations, securities, bankruptcy, secured lending, and trust investment; public choice is influencing the legal understanding of legislation and constitutional law; game theory is influencing the understanding of contracts, procedure, bankruptcy, and antitrust. And academic thinking about evidence is being transformed by new work in probability, statistics, and psychology.

Another example of a rising discipline extensively applied to law is political and moral philosophy, which, especially when broadly defined to include hermeneutics,⁸ has made great strides in recent decades. It has done so in part through the growing receptivity in American intellectual circles to the Continental philosophical tradition, in part through the continuation of that tradition by Foucault, Derrida, Gadamer, Habermas, and others, in part through the recognition of affinities between that tradition and our own native pragmatist tradition, and in part through the revival, led by John Rawls, of interest in both Kantian and social-contractarian political theory. The revitalization of moral and political philosophy has seemed to have major implications for jurisprudence, constitutional interpretation, and other topics of interest to law professors.

7. A decline regularly deplored. For recent examples, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992). For statistical evidence of the decline, see William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. (forthcoming 1993).

8. The study of interpretation—more precisely, the study of the *pervasiveness* of interpretation as a mode of understanding, implying the social and hence, in some versions, the political construction of reality.

The Continental savants have not only made legal philosophy a fashionable field; they have given critical legal studies its leading ideas. This field of academic law, now twenty years old, combines left-wing radicalism with a denial of law's objectivity; its motto is that law is politics and American law is right-wing politics. And feminism, which, though its roots are old, did not exist as an organized academic field thirty years ago, but which today flourishes across the humanities, has under the banner of feminist jurisprudence obtained an expanding lodgment in the legal academy, where it has influenced academic legal thinking not only about women's legal rights but also about the nature of legal reasoning, and bids fair to push critical legal studies out of the academic limelight. Through the efforts of Catharine MacKinnon and other feminists (not all of them lawyers—Andrea Dworkin, Carol Gilligan, and Martha Nussbaum are illustrative of the nonlawyer feminists who have influenced legal thinking), feminist jurisprudence has had an impact on the world outside the university as well as within it—has for example succeeded in persuading judges to recognize sexual harassment as a legal wrong (a form of sex discrimination)⁹ and in persuading legislatures to recognize marital rape as a crime¹⁰ and to make rape easier to prove.¹¹

But feminism is only one of the new academic disciplines shaped by the perspective of a group believed to have been slighted by the conventional disciplines. Another is black and ethnic studies, and it too has its academic legal branch, called critical race theory. Gay and lesbian legal studies are beginning to emerge, as well.

The Continental tradition has had still another impact on modern academic legal thought. Through its effect in making over literature departments into departments of interpretive theory, the tradition has armed English professors like Stanley Fish and Walter Benn Michaels to joust with Ronald Dworkin and other legal philosophers over issues of objectivity in interpretation. Feminist interest in literature, as well as the interest of old-fashioned New-Critics-turned-law-professors like James Boyd White, has joined with the new literary theory to make the interplay and overlap of law and literature still another interdisciplinary field of legal studies. Legal anthropology has received new impetus from the work of David Cohen, John Comaroff, and William Ian Miller, among others; legal sociology from the work of Richard Abel, Robert Ellickson, Kim Shepple, and others.

The doctrinalists—the traditionalists in academic law—thus are being crowded by economic analysts of law, by other social scientists of law, by Bayesians, by philosophers of law, by critical legal scholars, by feminist and by gay legal scholars, by the law and literature crowd, and by critical race theorists, all deploying the tools of nonlegal disciplines.¹² But that is not all

9. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

10. See, e.g., WIS. STAT. § 940.225(6) (Supp. 1992).

11. See, e.g., ILL. ANN. STAT. ch. 725, § 5/115-7 (Smith-Hurd 1992) (Illinois "rape shield" law).

12. There is some double or even triple counting here, since, for example, critical legal studies and feminist jurisprudence overlap both each other and conventional legal philosophy.

that is happening to doctrinal scholarship. A political gulf has opened between the doctrinalists, on the one hand, and the profession, the judiciary, and the larger society, on the other hand.

* * * *

The faculties of the leading American law schools are now substantially to the left of the judiciary, especially the federal judiciary (now dominated by judges appointed by Presidents Reagan and Bush—though this will not last), and of the public at large; and they are moderately to the left of the practicing legal profession. This is without regard to the leftward pull exerted by critical legal scholars, feminists, and critical race theorists. But none of these is as yet a large fraction of the legal professoriat, and their pull to the left is partly offset by the slight rightward tug exerted by the economic analysts of law, who are on average more conservative than other members of law faculties, and by the tiny band of social conservatives among law professors.

One reason for the political divergence between the legal academy and the profession is that the last two Republican Presidents appointed appellate judges, including the Supreme Court Justices, disproportionately from the right-hand tail of the political distribution within the legal profession. The effect was to siphon conservative lawyers from the academy to the judiciary and thus at one and the same time to tug the academy leftward and the judiciary rightward.

Another reason for the political divergence that I am discussing is the self-selection of leftward-leaning lawyers into academic law. Notwithstanding the recent depression in the legal services industry, the financial rewards of a commercial practice for top-flight lawyers are today very great, and naturally the law students most drawn to such a practice are those with conventional career goals, goals that emphasize financial success, held by persons comfortable with service to capitalist institutions. The opportunities to practice law in an interesting and remunerative fashion in fields like constitutional law, poverty law, and environmental law (unless you're on the side of the defendants) are few, and federal government service in the era of Reagan and Bush was not a congenial alternative to persons of liberal or left inclination. So for many years a number of left-leaning lawyers felt they had no alternative to teaching; they gravitated there and found themselves in an antagonistic relation to the courts. The law reviews reek of the smell of cordite from the salvoes with which today's law professors bombard today's Supreme Court Justices. The targets themselves are unscathed. No judge gives a hoot about criticism that he believes to be motivated by political disagreement. (Precious few pay any attention to criticism from outside the judiciary itself; but that is another story.)

Constitutional law remains the most prestigious field in the legal academy. It draws many of the ablest doctrinalists. But they have lost, for the time being anyway, their principal audience. They now write for each other.

Doctrinalists who do not share the basic political premises of the judges whose work they analyze do not produce a scholarship that those judges, or the lawyers who are trying to move those judges by their advocacy, find useful, either in a critical or in a constructive sense. Nondoctrinalists, with some exceptions, especially among economic analysts of law and legal feminists, do not produce scholarship of even potential interest to practitioners or judges, but that is not a critical problem for nondocrinalists because they identify with the university anyway rather than with the legal profession. It is the doctrinalists who have a sense of exile.

The political gulf has a further significance for the morale of doctrinal scholarship. It exposes the epistemic shallowness of the enterprise. Legal reasoning, like logical reasoning (which legal reasoning at its best approximates, and at its worst apes), is cogent only if there is agreement on premises; and those premises frequently, perhaps generally, are political or ideological. The roots of legal doctrines are in such norms as freedom of contract, personal liberty and responsibility, and racial and sexual equality. Today those norms are contested. The egalitarian, the libertarian, and the social conservative can use respectable methods of legal analysis to reach opposite conclusions across the whole range of legal controversy. The increased political diversity of American culture has shattered the political or ideological consensus upon which a confident sense of the law's objectivity rested.

* * * *

There is still more to discomfit the doctrinalist. He is a student of texts, and the hermeneuticist has exposed the naïveté of legal interpretation, while the economist has derided the doctrinalist's grasp of policy, and the feminist and the critical legal scholar have exposed the unconscious biases that permeate legal scholarship (no doubt including this article!). The new learning is not only competitive with the old but antagonistic to it. It has put the doctrinalist on the defensive, and as if that weren't bad enough, the very texts that are the material of his study and the source of his knowledge are deteriorating. Few judges write their own opinions anymore. The opinions are written by law clerks, the vast majority of whom are only one or (in the case of Supreme Court clerks) two years out of law school. Increasingly, the law professor's exegesis of the latest Supreme Court decision belongs to the same genre as his comments on his students' papers.

Increasingly, too, traditional legal scholars seem not to have the answers to the most pressing questions about law. In a period of change, systemic questions become more interesting, more urgent, than doctrinal ones. The last thirty years have seen an enormous upsurge in the amount of legal activity in the United States. There are more than twice as many lawyers today

than there were in 1970.¹³ Why has this happened, and what has been the effect? Are lawyers in today's numbers a drag on economic growth? Are they overpaid? Have lawyer-initiated reforms in bankruptcy and employment law, in criminal sentencing, and in the rights of criminal defendants, of juveniles, and of the insane increased or reduced social welfare? To these vital questions the close study of judicial opinions yields no answers.

The economists have shown that lawyers frequently do not understand the practices that law regulates (antitrust is a good example), the political scientists like Gerald Rosenberg that lawyers do not understand the consequences of law, the Bayesians and psychologists that lawyers do not understand proof, the feminists that law has been blind to the problems of women. The interdisciplinarians have, in other words, pointed up the *narrowness* of professional knowledge. Legal training and experience equip lawyers with a set of essentially casuistic tools and a feel for legal doctrines, but do not equip them with the tools they need to understand the social consequences of law. Legal doctrinalists believe that they practice a distinct art, that of "legal reasoning." But legal reasoning is, essentially, debaters' reasoning; and debaters' reasoning will not resolve fundamental clashes of value or difficult empirical questions. On both counts the enormous amount of academic legal ink spilled on the issues of abortion and gay rights has been almost completely wasted. This is changing only because of the emergence of a new *interdisciplinary* field of legal scholarship—that of gay and lesbian studies, more broadly the study of human sexuality in relation to issues of law and public policy.

It is instructive to compare traditional academic law with typical fields in the humanities, such as literature and philosophy, on the one hand, and typical scientific fields, such as biology and physics, on the other. The professor of literature or of philosophy is a student of texts created by some of the greatest minds in history, and some of the greatness rubs off on the student. The professor of biology or physics deploys, upon his or her rather less articulate subject matter, mathematical and experimental methods of great power and beauty. The professor of law is immersed in texts—primarily judicial opinions, statutes, rules and regulations—written by judges, law clerks, politicians, lobbyists, and civil servants. To these essentially, and perhaps increasingly, mediocre texts he applies analytical tools of no great power or beauty—unless they are tools borrowed from another field. The force and reach of doctrinal legal scholarship are inherently limited.

III

I do not know whether it is correct that traditional legal scholarship is in decline, or, if so, that viewed strictly as a service—namely as a service to the legal profession—academic law is in decline. What does seem clear is that doctrinal scholarship has been moving from the leading law schools to the

13. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 192, tbl. 314 (112th ed. 1992).

law schools of the second and third tiers. Fine doctrinal work continues to be done at first-tier schools, and much of the doctrinal work done at less prestigious schools is also fine. Nevertheless, the analysis of legal doctrine is a diminished fraction of first-rate academic legal work, to the distress of judges and other consumers of doctrinal scholarship.¹⁴ But in declining as a service profession while growing overall, academic law has, at least, become a good deal more—academic. The law faculties of our universities now produce a formidable quantity of scholarship intended mainly to be read by other scholars rather than by lawyers and judges.

How good is this scholarship? Some of it is good, but much of it is embarrassingly bad, and the overall impression is of enormous variance. I cannot adequately convey or substantiate this impression in the compass of this article. It would be unfair to quote the many silly titles, the many opaque passages, the antic proposals, the rude polemics, the myriad pretentious citations to Aristotle and Adorno, Heidegger and Habermas, Lacan and Lakatos, Freud and Foucault, Putnam and Pareto, in which this literature abounds. I would be quoting out of context, and anyway a field deserves to be judged by its best work rather than by its worst. Every academic field is populated mainly by drones (in only some fields are they highly intelligent ones) and can easily be made to look arid or even comical—the susceptibility ruthlessly exploited by Senator Proxmire in his shameful “Golden Fleece” awards.¹⁵ But there are reasons to expect the problem of quality to be more urgent in legal scholarship than elsewhere in the university, once law professors cut loose from their moorings in legal doctrine.

To begin with, there is a lack of competitive pressure. Academic law is artificially sustained, indeed bloated, by the fact that the states, under pressure from the legal profession, require prospective lawyers to spend three years at an accredited law school.¹⁶ This requirement creates in turn a demand for law professors who will teach advanced courses to keep the students occupied for the full three years. Law is a prosperous profession, and stiff accreditation standards limit the entry of new law schools while proprietary (that is, profit-making) law schools rarely can obtain accreditation at all. Relative to most other departments in a university, law schools are awash in tuition income and in gifts from wealthy alums. Every law school sports its own law review and many law schools sport several reviews. So law professors can easily find publication outlets for their scholarship, however defective it may be, especially since the editors of the law reviews are

14. Such as Judge Edwards. See note 7 *supra*.

15. Senator William Proxmire, a Democrat from Wisconsin, singled out examples of assertedly wasteful government research in his monthly “Golden Fleece” awards. See, e.g., Marjorie Hunter, *From the Fleece into the Myth*, N.Y. TIMES, June 25, 1985, at A18 (collecting examples). Senator Proxmire retired in 1988. Irvin Molotsky, *Proxmire Savors a Victory As He Bids a Farewell*, N.Y. TIMES, Oct. 24, 1988, at A14.

16. California, interestingly, does not require that a law school be accredited. See CAL. BUS. & PROF. CODE § 6060(e) (West Supp. 1993) (allowing bar applicants to study in law offices, judges’ chambers, and correspondence schools).

students, few of whom are competent to evaluate non-doctrinal scholarship. And law professors can always go into practice if they flop in the academy.

The result of all this is that legal scholarship largely escapes the discipline of the academic marketplace. Both the carrot and the stick are weak. There are some rewards for being a good legal scholar, but not many; and there are few sanctions for being a bad legal scholar, who can still find a publication outlet, still obtain tenure, still earn a decent wage, and still have good alternatives in other branches of the profession in the unlikely event that he is laughed out of law school.

This was not a big problem when most legal scholarship was doctrinal. The criteria for such scholarship were clear, and evaluation therefore straightforward. My concern is with the new legal scholarship, which borrows its ideas and methods from other fields, such as economics and philosophy, but does not subject itself to evaluation by the trained specialists in those fields, the real pros. This is what makes it so difficult to judge the new legal scholarship and separate the experts from the charlatans. Law review editors cannot judge. Neither can the doctrinal scholars who, despite their relative decline and their crisis of confidence, continue to dominate most law school faculties.

Interdisciplinary legal scholars often are not trained in the fields that they wish to bring to bear on the law; often they are not trained for any sort of scholarship except the doctrinal scholarship on which they, perhaps for excellent reasons, have turned their backs. Few American law professors have a graduate degree in law or in anything else. They have the same legal training as practitioners. Only the continuity between the practice of law and *traditional* legal scholarship made this a defensible method of preparing law professors. Our non-doctrinalists also lack the cadres of graduate students to help them with their work that scholars in conventional academic fields have. Law students, though technically graduate students because they have graduated from college, are in fact legal undergraduates.

I am not a degree-monger. The essence of most graduate education is not the courses or the exams, but the preparation for a career in scholarship that is afforded by the experience of writing a dissertation. Few law professors, even when they are practitioners of the new legal scholarship, have that experience.

The problem of evaluating the new legal scholarship is made more acute by a problem of commensurability. The methods and objectives in the different fields of non-doctrinal legal scholarship are very different. How then to compare the practitioners in the different fields? How to say that a critical race theorist's narratives of discrimination are superior or inferior, as scholarship, to an economist's rational model of discrimination? When practitioners of an academic discipline do not agree on criteria of excellence, that discipline—here I am treating the entire spectrum of non-doctrinal legal scholarship as a single field—is weak. The operational meaning of objectiv-

ity is consensus among recognized experts. When that consensus is missing, a field is perceived to lack, in fact does lack, objective standards.

A field that lacks objective standards is, in turn, defenseless against the onslaught of affirmative action. Pressure for affirmative action in a field of endeavor is inverse to the strength of the field, where by "strength" I mean a field governed by a single paradigm, in Kuhn's sense,¹⁷ that supplies objective standards of quality and achievement. The stronger a field is in this sense, the weaker will be the grounds for suspecting that able members of a minority group are being excluded for invidious reasons, and the weaker the basis for believing that ethnic or racial or sexual diversity will improve the field (a strong field isn't apt to seem in need of improvement) or at least that hiring the apparently less qualified applicant won't really dilute quality. Academic law is no longer a strong field in the sense that its practitioners are confident of the objectivity of their standards. One is not surprised that academic law today is riven by affirmative action, and has been weakened by it.

IV

Given all that I have said—and I have not exaggerated—the wonder is not that so much legal scholarship nowadays is slipshod, amateurish, outlandish, or worse, but that much is quite good and, perhaps, more is *excellent* than thirty years ago. Good doctrinal scholarship is still being produced; there is an impressive body of economic analysis of law; and a growing number of law professors have become respected participants in the scholarly discourse of fields outside of law. In the reorientation of legal scholarship from the legal profession to the university, something has been lost, but less than the traditionalists believe, because the strength of law thirty years ago rested in part on a homogeneity of background, training, experience, and outlook that imparted a spurious objectivity: the convergence of people who think alike because they are alike rather than because they are guided by a light from the same source—Truth.

This is an important point, deserving of elaboration. There is truth, and there is belief. Some truths are not credible, and hence are not believed. Some beliefs, including some that are credible to the entire community of interested inquirers, are false. Obviously the credence accorded false beliefs is based not on the way things really are but on the social organization of knowledge. Thirty years ago the academic legal profession was organized in such a way that a body of beliefs concerning the autonomy of the law, the criteria for evaluating legal decisions, the scope and meaning of the Constitution, and so forth commanded such widespread agreement as to be thought true. Academic law was then a strong field. But the sources of its strength were social rather than epistemic. The expansion of the legal profession, the greater diversity of its membership, political turmoil, and the rise

17. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 43 (2d ed. 1970).

of competing disciplines have shattered the consensus on which law's perceived objectivity rested.

So: A certain professionalism, a certain dependability, a certain craftsmanship has been lost, but intellectual sophistication has been gained, along with a broadening of legal scholarship that has for the first time enabled it to touch, and potentially to enrich, neighboring fields. Our age of narrow academic specialization creates room for generalists (though not many) who can breach the increasingly artificial bulkheads that separate the disciplines. Perhaps law professors, wakened from a dogmatic professionalism and emboldened by the security of early tenure and high salaries to undertake risky forms of scholarship, will occupy some of this room.

Improvement is possible in principle, of course, but not feasible at the moment. I would like to see the legal profession largely deregulated, and specifically the (historically novel) requirement that a lawyer must have attended law school to practice law abandoned. Law school curricula would become more practical. Room would thereby be created for true graduate departments of legal studies to train nondoctrinal legal scholars.

Enough pipedreaming. Competent lawyers lured by the siren song of Theory have wrecked their academic careers. But a few have had careers that could not have been envisaged when academic legal scholarship was at once a solid professional service and a complacent academic backwater. There is strength in the very weakness of modern legal scholarship.