

The State of Legal Scholarship Today: A Comment on Schlag

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When I first read Professor Schlag's essay,¹ sent to me by the editors with a request that I write a brief Comment on it, I thought it was crazy; but since it made some important points that were either valid or challenging, I agreed to write the Comment. When I re-read the essay more carefully while preparing my Comment, I decided that the essay wasn't crazy, but rather, as Claudius said of Hamlet's ravings, "what he spake, though it lacked form a little, / Was not like madness."² It now seems to me a good essay (though there is much in it to disagree with), full of ingenious points often in the form of amusing riffs, though one must have patience in reading it. To illustrate: in his first footnote, Schlag introduces the reader to "air guitar":

During the rock n' roll era (circa 1955–1980), young males developed a habit of imitating their favorite rock stars by pretending to play a non-existent guitar. . . . On the one hand, air guitar produced no real sound. On the other hand, no one playing air guitar ever struck a false note.³

Only much later in the essay is the reader told the point of the earlier reference to air guitar:

The law review article is an imitation of the legal brief and the judicial opinion. There are, of course, some important differences. The law review article is typically more intricate, more thoroughly researched, more detached, and more abstract. It is also, interestingly, written on behalf of no client, in no pending case, without a court date and addressed to no one in particular. We're talking air law here.⁴

Right on.

The essay makes four important points, although it exaggerates the fourth and as a result paints too dark a picture of the current state of academic law. The first point concerns the relationship between judicial work and academic work. Schlag is right that judges are not academics *manqué*, trying to write law review articles in the form of judicial opinions and respectfully seeking the guidance of

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1. This is an invited Comment on Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L. J. 803 (2009).

2. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1, ll. 172–73 (Jack Randall Crawford ed., 1917).

3. Schlag, *supra* note 1, at 803 n.*.

4. *Id.* at 813.

the real academics. And he is also right that the very different orientations of the two branches of the legal profession limit academic influence on judges. As Schlag says, the first duty of a judge is to decide the case. “Judges can remand, they can decline jurisdiction, they can retain jurisdiction—they can do all sorts of things. But the one thing they cannot do is fail to decide. The judge cannot effectively write: ‘We don’t know whether we have jurisdiction or not. So ordered.’”⁵ And it follows, as he also says, that “[t]ruth and edification are valued by judges . . . only to the extent that these serve the end of reaching a decision.”⁶ The judge tries to be accurate, but that is not the same thing as making a serious attempt to attain truth or moral goodness. If, as is often the case, especially at the appellate level and above all at the level of the U.S. Supreme Court, the case is indeterminate—the orthodox materials (mainly precedents and statutory or constitutional text) do not resolve it and the policy considerations do not lean very far on one side or other—the judge still has to decide the case. Temperament, ideology, life experiences, personal identity, relations with colleagues, and background knowledge are among the factors likely to prove decisive in such a case.⁷ Ideas will play a role, but a supporting one. The judge will not know (though he may not know he does not know), and no one else will know either, whether his decision is “right,” “true,” or (in a moral sense) “good”; at most it will be acknowledged to be reasonable, sensible, or at least defensible.

So insofar as the academic seeks truth above all else, a law review article modeled on a legal brief or a judicial opinion will have the wrong model. “To the extent that legal thinkers pattern their thinking and writing on judicial discourse, the intellectual limitations will be severe.”⁸ Schlag rightly derides academics who try to pretend that judges are like them—try to bring the two professions, judging and academic law, together—by treating adjudication as a conversation. (There is bad faith in this pretense; most academic lawyers, especially at the elite law schools, have been judicial law clerks, and therefore know better.) As he pointedly remarks, “If adjudication is a kind of conversation, then one should remember that it is a fairly unusual kind of conversation—one that is initiated by a summons, where attendance is mandatory and which is

5. *Id.* at 815. This is what I have called “the imperative duty of judges to decide”:

The judge cannot throw up his hands, or stew indefinitely, just because he is confronted with a case in which the orthodox materials of judicial decision making, honestly deployed, will not produce any acceptable result. They may not produce *any* result, as in a case in which two canons of statutory construction are applicable and they point to different results.

....

... [A] case cannot be left undecided just because it is a toss-up from a legalistic standpoint. A convicted defendant cannot be left unsentenced.

RICHARD A. POSNER, *HOW JUDGES THINK* 79–80 (2008) (emphasis in original).

6. Schlag, *supra* note 1, at 816.

7. This is the major thrust of *HOW JUDGES THINK*, *supra* note 5.

8. Schlag, *supra* note 1, at 819.

played out under the threat of contempt.”⁹

Schlag’s second important point concerns academic efforts to influence the law. He explains that although the circumstances influencing a judge may include academic writing (usually mediated by a law clerk), it will be only one of several or even many influences, and often it will influence not the decision itself but the articulation of the decision—though the articulation may have an influence on future case outcomes. For example, there is no doubt that the Supreme Court has since the mid-1970s swung sharply toward a “Chicago school” conception of antitrust law, but it is unclear to what extent the swing is due to the influence of the economists and law professors of the Chicago school rather than to the appointment, beginning in the Nixon Administration, of politically conservative Justices and judges who were naturally inclined to skepticism about aggressive antitrust enforcement. But the work of the Chicago school did help to give the Supreme Court opinions an intellectual structure that in turn have influenced the lower-court judges.

Schlag’s third important point, an application of Thomas Kuhn’s famous theory of scientific revolutions¹⁰ (though he refers to Kuhn only in passing), is that academic excitement comes in waves. The Langdellians, as Schlag calls them—legal formalists, doctrinal analysts, and the like—had the challenging task of systematizing the common law. The great treatises (Williston, Corbin, Prosser, Scott, and so forth) and the Restatements were the product of their efforts. But eventually the basic task of systematization was done and only incremental improvements remained to be made.¹¹ The next wave was Legal Realism, and the third wave was “Law and . . .”—the rise of new interdisciplinary fields of law (the old interdisciplinary fields were jurisprudence, criminology, and the political scientists’ take on the Supreme Court)—in the 1970s. The principal new fields were law and economics, critical legal studies, feminist law, critical race theory, law and literature, law and society, and—insofar as it drew increasingly on political philosophy, intellectual history, critical theory, and political science—constitutional theory.

The sequence of the three waves is not quite so neat as Schlag implies. Langdellianism, though seasoned with a modest dose of Legal Realism, was still going strong in the 1930s, the heyday of the American Law Institute, and even later. Legal Realism, which had begun with Holmes and continued with Cardozo, both of whom had a foot in the Langdellian camp, crested in the 1930s. Langdellianism essentially merged with Legal Realism to form the Legal Process schools of the 1950s, Legal Realism as a distinct movement having fizzled by the end of World War II.

Schlag thinks that while Legal Realism has disappeared along with “Law

9. *Id.* at 817.

10. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed.1996).

11. See John H. Schlegel, *Langdell’s Legacy or, The Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1529–30 (1984), *quoted in* Schlag, *supra* note 1, at 822 n.45.

and . . .” (about which, however, he says very little), Langdellism—traditional doctrinal analysis, but now bereft of the challenges that faced the early Langdellians—remains. But it remains, he believes, solely in the degraded form of dull “normal science” (in Kuhn’s term) waiting to be swept away by the next, as yet unglimped wave of exciting academic legal thought (a new “paradigm,” to borrow from Kuhn again). Schlag could have quoted the last two lines of Yeats’s poem *The Second Coming*: “And what rough beast, its hour come round at last, / Slouches towards Bethlehem to be born.”¹² He might even have quoted Tennyson’s poem *The Kraken*:

Far far beneath in the abysmal sea,
His ancient, dreamless, uninvaded sleep
The Kraken sleepeth . . .
There hath he lain for ages, and will lie
Battening upon huge seaworms in his sleep,
Until the latter fire shall heat the deep;
Then once by man and angels to be seen,
In roaring he shall rise and on the surface die.¹³

Schlag does not tell us what “rough beast” he would like to see slouching toward the bastions of academic law, or what Kraken he would like to see roaring rise to the surface (only to die when a still newer paradigm appears), but I am guessing it would bear at least a faint resemblance to Mao’s Cultural Revolution. Schlag derides conventional academic scholarship as “the triumph of expertise as the dominant model of knowledge and of knowledge as the dominant mode of thinking about world and law.”¹⁴ The idea of thinking without knowledge inspired the Great Leap Forward.

Schlag’s fourth important point is that in the current era of “normal science,”¹⁵ the era in which legal academics are living “amidst the[] ruins” of the three great scholarly edifices of Langdellism, Legal Realism, and “Law and . . .,”¹⁶ the academic enterprise has become afflicted with perversities. They include the arbitrary rankings of law schools and law professors, which he argues serve “an anxiety-relieving function We don’t have to worry that the enterprise might be entirely worthless if we’re totally fixated on how well or how badly we are doing it relative to everybody else.”¹⁷

I would elaborate on his criticism of current academic legal scholarship as follows. If one asks why intellectually weak academic fields survive, the answer

12. WILLIAM BUTLER YEATS, *The Second Coming*, in *THE COLLECTED POEMS OF W.B. YEATS* 158, 159 (Wordsworth Editions 2000).

13. ALFRED TENNYSON, *The Kraken*, in *THE POEMS OF ALFRED TENNYSON* 58, 58 (Ernest Rhys ed., 1907) (1877).

14. Schlag, *supra* note 1, at 806 n.15.

15. See Kuhn, *supra* note 10, at 5–6.

16. Schlag, *supra* note 1, at 821.

17. *Id.* at 827.

is that fields that provide a significant service function in a university will retain their place even if they are intellectually weak. Two examples are philosophy and literature. Of course there have been and still are many brilliant philosophers. But “many” is a relative term and in every generation only a tiny handful of philosophers make an actual contribution to the field. It is the same with academic literary critics and scholars (excepting philologists, who do useful work in authenticating old texts).

But philosophy and literature are important undergraduate subjects because they broaden and enrich a student’s mind and sharpen his reading and analytical skills, so one needs to have a great many college teachers of both subjects. One needs them whether or not anything is “going on” in their fields. Waves of excitement have been a feature of philosophy and literature (science too) as well as of law. The great burst of modernist literature in the first quarter of the twentieth century made for exciting times in literary criticism, as did the later rise of postmodernist theory (deconstruction, reader response, and so forth), which originated outside of literary criticism and scholarship. The rise in roughly the same era of new schools of philosophy—such as pragmatism, logical positivism (which grew into analytic philosophy), phenomenology, and existentialism—had a parallel effect in philosophy. The waves have receded in both fields, but the need for philosophers and literary critics to teach in colleges, and to train their successors in graduate programs in universities, remains. And then the question becomes how to decide whom to hire and promote to perform this essential teaching function. There is reluctance to do so on the basis of teaching evaluations, both because of pied-piperism (teachers angling for popularity by manipulating the immaturity of their pupils) and because a teacher’s fame rarely extends beyond the institution at which he or she teaches, whereas scholarly publication will be noted in other institutions and so cast some glory on the institution at which the teacher is employed. Hence the pressure on faculty to publish even when the scholarship that is published has no value; hence the straining after novelty, the drive for specialization, the quest for rigor, the adoption of a technical vocabulary—all methods of signaling quality that may, however, have no effect except to turn off students and other readers.

An example will illustrate. More than half a century ago, Cleanth Brooks, a literature professor who was a distinguished proponent of the “New Criticism,” published a book of literary criticism consisting of close readings of famous poems.¹⁸ The New Critics were much taken with the metaphysical poets, the most prominent of whom was John Donne, and the high point of Brooks’s book is a brilliant close reading of *Canonization*,¹⁹ one of Donne’s most famous love poems. Just this past year (2008), a literature professor named Ramie Targoff

18. See generally CLEANTH BROOKS, *THE WELL WROUGHT URN: STUDIES IN THE STRUCTURE OF POETRY* (1947).

19. *Id.* at 10–19.

published a book on Donne called *John Donne, Body and Soul*,²⁰ which has an extensive treatment of Donne's love poetry, though she does not discuss *Canonization*. As far as I can judge, Targoff's book is a fine scholarly achievement—well-written (and not defaced by jargon), thoroughly researched, thoughtful, and imaginative. She argues that, contrary to some scholars who have regarded Donne as a Neoplatonist who therefore believed that the highest love is purely spiritual (as it was for Plato), he was, throughout his career and despite his having become a leading Anglican cleric and author of religious verse, a believer that body and soul were one in all important human activities, including sexual love.²¹ Targoff's book is a model of modern literary scholarship. But here is the difference between Cleanth Brooks's book, and specifically his discussion of Donne's poem, and her book. Brooks, who though a distinguished Yale English professor did not have a Ph.D., wrote for a mixed audience—academics, students, the general reader—and his book makes you want to read Donne, or read more Donne, or re-read Donne with greater understanding and enjoyment. Targoff writes for other scholars of early modern English literature. Someone else who chances on the book (like me) may read it and think well of it, but unless one has esoteric religious or philosophical interests, the experience of reading her book will not quicken one's interest in reading Donne's poetry. Literary studies have become professionalized in the sense of becoming closed to outsiders. Literary scholars are Ph.D.'s writing for other Ph.D.'s.²²

With the expansion of the legal profession and the concomitant expansion in the number and especially the size of law schools and hence in the number of law faculty (the number has reached over 7000 according to Schlag), an evolution parallel to that in the humanities has occurred. There are many more law professors than there used to be and they serve an essential service function, that of training the next generation of lawyers and law professors. There are also more cases and more (and more complex) statutes than there used to be and so there is more to write about—in principle. But in the current, “normal science” era of law (as of literature, philosophy, and classics), there are more law professors than there are good scholarly topics that they are capable of addressing (an important qualification to which I'll return). “[A]ll around us, there is more, vastly more, of nothing happening than ever before.”²³

One sees this most vividly in constitutional law and constitutional theory, fields in which elite scholarship circulates in a sealed academic medium with virtually no leakage into the world of legislation, adjudication, judicial appointments, legal practice, or public policy. The scholars think they have audience enough without communicating outside their field. In other law fields as well,

20. RAMIE TARGOFF, *JOHN DONNE, BODY AND SOUL* (2008).

21. *See id. passim*.

22. This development was well under way by 1969, though just beginning then in law. *See* JOHN GROSS, *THE RISE AND FALL OF THE MAN OF LETTERS: A STUDY OF THE IDIOSYNCRATIC AND THE HUMANE IN MODERN LITERATURE* 299 (1969).

23. Schlag, *supra* note 1, at 805.

one encounters an increasing tendency, especially at the elite law schools, for law professors to write exclusively for other law professors. Schlag speaks amusingly of academics' "argu[ing] among themselves . . . in a kind of mock common law sort of way."²⁴ It is one form of the dominant mode of academic legal scholarship today, which he dubs "case-law journalism."²⁵

But he is painting with too broad a brush. It is not true "that American legal scholarship today is dead—totally dead, deader than at any time in the past thirty years."²⁶ It is not "more dead, vastly and exponentially more dead, than critical legal studies was ever dead during its most dead period."²⁷ The "Law and . . ." wave has, it is true, crested. Many of the new fields of the 1970s have either disappeared (in the case of critical legal studies), or stalled, as in the case of constitutional theory, feminist law, and critical race theory. Others are moving, but on a level plane at a rather low altitude, having failed to achieve lift-off (law and literature, for example; law and society is an earlier example of this phenomenon). The most successful of the interdisciplinary fields—economic analysis of law—is continuing to grow, as measured by the number of professors, journals, and articles, but is showing signs of flattening into "normal science." So there is less ferment, less excitement, than there was in the 1970s. But that is not grounds for abandoning interdisciplinary legal studies; ebbs and flows of excitement are the norm in science and academic disciplines more broadly, as Kuhn teaches. Nor is doctrinal scholarship as valueless as Schlag thinks (I'll come back to this issue).

Even if average excitement is less, there are a number of highly promising new areas of interdisciplinary legal scholarship. One is the study of judicial behavior, using a variety of theoretical perspectives from economics, game theory, political science, and cognitive psychology,²⁸ and also a variety of sophisticated empirical techniques. The scholarly literature on judicial behavior is growing rapidly in size and intellectual sophistication, and it has not only intellectual interest but also direct application to such practical issues as judicial selection, election versus appointment of judges, judicial compensation and tenure, and the role in adjudication of politics and ideology, race, sex, age, and life experiences.

Cognitive psychology has a significance for legal scholarship that goes well

24. *Id.* at 822–23.

25. *Id.* at 821–23.

26. *Id.* at 804. I thought critical legal studies had died and been buried. Schlag implies that it has been resurrected.

27. *Id.*

28. See POSNER, *supra* note 5, ch. 1 ("Nine Theories of Judicial Behavior") and references cited there. See generally Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63 (2008); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* (Nov. 16, 2008) (unpublished manuscript, on file with author).

beyond the light that it casts on judicial behavior.²⁹ It has important implications for evidence, trial practice, jury behavior, punitive damages, consumer behavior, pension law, securities regulation, and corporate governance. And like the study of judicial behavior, it has a sophisticated empirical dimension.

In fact, the empirical study of law is, after many false starts (beginning with the Legal Realists of the 1920s and 1930s), making firm strides.³⁰ There is much to be done in placing law on a solid empirical basis (the analogy is to the movement for “evidence-based” medicine), and perhaps now it will be done. I will give one example. Courts have been wrestling for years with the question of whether a “walkaway” escape is a crime of violence, thus warranting a longer prison sentence. There are two types of escape. One is the escape from a locked facility, a jail or prison, and it is pretty obvious that such an escape carries with it a substantial risk of violence. But most escapes, the “walkaways,” involve either quietly leaving an unlocked facility, such as a halfway house, or failing to show up to begin serving a jail or prison term at the scheduled time. The courts have lumped the walkaways in with the locked-facility escapes, treating both as crimes of violence. The Supreme Court has agreed to hear a case from my court that presents the issue whether they should be treated the same.³¹ It would be a great academic project to collect statistics on the incidence of violence connected with the two types of escape. Many more such studies of sentencing issues would be feasible and would contribute mightily to placing sentencing on a rational foundation of fact.

There has been a burst of recent scholarship, some by outstanding economists, and some by outstanding law professors, both here and abroad, on foreign and international law, and on legal development—that is, on the problems of legal institutions in what are referred to, sometimes euphemistically, as “developing” countries³² (some of which do not seem to be developing, but rather to be unraveling).

The measures taken by the government in the wake of the September 11, 2001 terrorist attacks, including the war in Iraq, have given rise to a host of interrelated issues of national security law, executive power, surveillance, and interrogation, which in turn have given rise to an extensive interdisciplinary (as well as a purely doctrinal) scholarship with direct application to these issues.³³

Intellectual property, and the overlapping area of Internet law (involving

29. See generally BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2005); Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. CHI. L. REV. 207 (2006).

30. It has its own journal, the *Journal of Empirical Legal Studies*. See the publisher’s home page, www.blackwellpublishing.com/journal.asp?ref=1740-1453&site=1 (last visited Nov. 12, 2008), for information about the journal.

31. *United States v. Chambers*, 473 F.3d 724 (7th Cir. 2007), cert. granted, 128 S. Ct. 2046 (2008).

32. See POSNER, *supra* note 5, at 151–53; see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 8.6, at 262–65 (7th ed. 2007).

33. See, e.g., RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006) and references cited there.

fascinating issues of regulation, taxation, contract, defamation, and privacy), are the subject of a highly sophisticated, and also highly influential, interdisciplinary literature exemplified by the work of Larry Lessig, one of the most influential law professors in the world.³⁴

There are unexploited applications of organizational economics to law, and also of science and technology to law (beyond computers and the Internet).³⁵ I am also optimistic about the possibility of using literary classics more extensively than at present to enrich the teaching and practice of law, including judicial opinion writing.³⁶

As my footnote references reflect, I am speaking of areas with which I have personal familiarity as a result of my judicial and academic work. I am sure there are other promising areas that I—and Schlag—have overlooked.

I would not have objected had Schlag urged a major reallocation of legal academic resources from interdisciplinary research and teaching to Langdellian “normal science.” He thinks the needs of Langdellism can be satisfied by half a dozen professors in each field; the remaining ninety-five percent of the legal professoriat would do no scholarship, but just teach, do consulting, or practice law. I certainly would not object to a reallocation of substantial academic resources from constitutional law and constitutional theory to Langdellism. If ninety-nine percent of all the books and articles that have been written about constitutional law, including those written in 2007, were pulped, there would be a net social gain from just the saving in the cost of storage. Think of the hundreds of articles written about *Roe v. Wade* and the other Supreme Court abortion cases: have any of these articles the slightest significance beyond registering their authors’ convictions about the emotional subject of abortion? And the constitutional theories—originalism, textualism, representation reinforcement, passive virtues, active liberty, the living Constitution, the moral reading of the Constitution, intertextuality, and the rest—have any of them real intellectual depth or are they mainly just rationalizations of their authors’ political ideology?³⁷ The academics who are wasting their time writing about constitutional law and theory would be more profitably employed either teaching more or conducting research in other areas of law.

The aridity of much current legal academic scholarship, which Schlag rightly deplores, is due to changes in the understanding of professionalization in academic law. When law schools based grades on performance in exams that tested legal ability in a narrow sense (“legal analytic” ability), the law students who had the highest grades were usually the most promising future law professors. Before becoming academics they would put in a few years at a law firm or government agency to hone their legal analytic skills and become acquainted at

34. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2004).

35. See, e.g., RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* (2004).

36. See the forthcoming third edition of my book, RICHARD A. POSNER, *LAW AND LITERATURE* (1988).

37. See POSNER, *supra* note 5, ch. 11 (“Comprehensive Constitutional Theories”).

first hand with the mores and usages of the profession. They would be hired to teach without any record of scholarly writing, let alone actual publication, and they would receive tenure after a few years with minimum and sometimes no academic publications.

With the rise of interdisciplinary legal studies, a rise powered in part by advances in the social sciences and in part by the radicalism of the 1960s and the resulting pressures to diversify law school faculties and student bodies along politically correct dimensions, the old system of faculty recruitment faltered. Eventually it was largely replaced, especially at elite law schools (but at many nonelite ones as well), by a system more like that found in the standard academic fields. Now many new legal academics begin their teaching career after obtaining a Ph.D. in economics, or history, or some other field related to law, or after a two-year teaching and research fellowship at a leading law school, and invariably they have done some substantial academic legal writing, preferably published, before being hired for a tenure-track position. The period to tenure has been lengthened to enable the law school to base its decision to grant tenure on a larger sample of a candidate's written work.

The problem with the new system of recruitment and promotion is that it tends to freeze out the type of person who is very good just at legal analysis—whose identification is with the legal profession rather than with one of the standard academic fields, such as economics or history, philosophy or statistics, psychology or sociology. That is the type of person who, entering law teaching after a few years of law practice, would be superbly equipped to do Langdellian scholarship.

Might it not be a good idea for law schools, just as they have separate clinical departments, with clinical faculty whose credentials, job descriptions, and career tracks differ substantially from those of the “regular” faculty, to have a department of legal analysis? The members would be legal doctrinalists, and their salaries would probably exceed those of the other professors in the law school (because lucrative private practice would be a close substitute for what they would be doing in law school, which is not the case for more “academic” law professors), but they would have somewhat higher teaching loads and the school would have different and lower expectations with regard to their scholarly publication. The practice of law has become a team effort—so has medicine—so why not legal education? Already regular law professors and clinical law professors work side by side in general amity. Why not have a third group of specialists, the legal analysts, working alongside them?

The law schools *need* legal analysts, not merely as teachers but also as scholars. Doctrinal analysis cannot be left to judges. As Schlag puts it, “Courts have dockets. Legal academics have time. Given this asymmetry, the academics could always outdo the courts in the intricacy of their analysis.”³⁸ Schlag, it is true, doesn't admire intricacy of analysis—he thinks that what academic law-

38. Schlag, *supra* note 1, at 822.

yers are doing these days is at best “high-end mediocrity.”³⁹ He also sees no reason why legal academics should want to help judges; but that is because he is hoping against hope for a Cultural Revolution, or more modestly a paradigm shift, in legal education. He points out that “[m]aking people see things involves things far different from good judgment, groundedness, or reasonableness”—it involves among other things “a reorientation of the gaze, a disruption of complacency, a sabotage of habitual forms of thought, a derailing of cognitive defaults.”⁴⁰ I myself am a counterrevolutionary. I am not eager to be sent to the countryside to do farm work while wearing a dunce cap. I would like to see more academic effort devoted to tidying up after judges. That is a selfish desire on my part, but it is a desire for an important service function and one that academic legal analysts would be not only able but also willing, and perhaps even enthusiastic, to perform.

39. *Id.* at 809–10.

40. *Id.* at 829.