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The Scholar as Advocate

Rebecca S. Eisenberg

Academic freedom in this country has been so closely identified with faculty autonomy that the two terms are often used interchangeably, especially by faculty members who are resisting restraints on their freedom to do as they please. While there may be some dispute as to whether or how far academic freedom protects the autonomy of universities or of students, the autonomy of faculty members seems to lie close to the core of the traditional American conception of academic freedom. As elaborated by the American Association of University Professors, this conception of academic freedom calls for protecting individual faculty members from lay interference, especially from the university trustees and administrators on whom they depend for their livelihood, so that faculty may perform their social function of generating and disseminating new knowledge "without fear or favor."¹ Otherwise, according to this view, the public could not be certain that the opinions presented by faculty were the candid views of academic experts, undistorted by the less informed views of their lay benefactors.

I have previously argued that faculty autonomy fails to protect the academic values underlying this traditional conception of academic freedom when faculty members need to find external sponsors for their work.² Faculty who are eager for funding may face powerful incentives to accommodate the interests of sponsors who seek to control the agenda of academic research and the dissemination of its results. In this context deference to faculty autonomy in the name of academic freedom could tie the hands of universities and prevent them from responding effectively to certain contemporary threats to academic values.

Although law professors rarely rely on external research sponsors, many face as powerful a threat to their academic integrity from a different sort of benefactor—the consulting client. Unlike many academics, law professors are trained for lucrative careers outside the academy. Those who teach and write in fields of interest to the practicing bar can sell their technical expertise to

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1. American Association of University Professors, *General Report of the Committee on Academic Freedom and Academic Tenure (1915)*, reprinted in *Law & Contemp. Probs.*, Summer 1990, at 393, 396 [hereinafter 1915 Declaration].
2. *Academic Freedom and Academic Values in Sponsored Research*, 66 *Tex. L. Rev.* 1363 (1988).

lawyers and clients, and the cachet of their academic positions enhances the demand for their services.³ These consulting opportunities may be attractive professionally as well as financially. Consulting offers hands-on exposure to new legal problems that may not find their way into appellate opinions, and thereby come to the attention of law professors in the course of their academic reading, for years, if ever. Even familiar legal issues may take on new meaning for professors when they see them in complex, real-world contexts instead of thinking about them in the abstract. Legal academics may also be attracted by the opportunity to be effective in the real world, or to influence the development of the law, or to advance the legal interests of people or organizations that matter to them. Consulting may seem like a significant part of their professional lives that enhances their performance as teachers and scholars, and to the extent that law professors see academic freedom issues arising in their consulting activities, their first impulse might be to argue that academic freedom should protect their right to consult.

An argument that academic freedom protects the right of faculty members to consult outside the academy would find qualified support in AAUP policy statements. The AAUP's 1940 Statement of Principles on Academic Freedom and Tenure⁴ calls for protecting faculty members from institutional censorship or discipline not only in their teaching and scholarship but also when they speak or write as citizens, so long as they are "accurate," "exercise appropriate restraint," "show respect for the opinions of others," and make clear that they are not "institutional spokesm[e]n."⁵ This list of qualifiers suggests greater concern that the extramural activities of faculty could sully the public image of the academy than that they might interfere with the performance of academic duties. The latter concern is more salient in a 1968 Statement on Professional Ethics,⁶ which provides that the individual professor "determines the amount and character of the work he does outside his institution with due regard to his paramount responsibilities within it."⁷ Although this statement acknowledges that work outside the university may have an impact on performance within the university, the primary concern seems to be that outside activities will consume too much time. Many universities address this problem by limiting the amount of time that faculty may devote to work outside the university, as more recent AAUP reports have acknowledged.⁸

A potentially more serious and intractable problem than the effect of consulting on the time commitments of faculty is its effect on their intellectual

3. See Bruce A. Ackerman, *The Marketplace of Ideas*, 90 *Yale L.J.* 1131 (1981).

4. The text of this statement is reprinted in *Law & Contemp. Probs.*, Summer 1990, at 407 [hereinafter 1940 Statement].

5. *Id.* at 408.

6. The text of this statement is set forth in 55 *AAUP Bull.* 86 (1969).

7. *Id.* at 87.

8. See, e.g., *Academic Freedom and Tenure: Corporate Funding of Academic Research*, *Academe*, Nov.-Dec. 1983, at 18a, 20a, 22a.

commitments. This threat is particularly grave for law faculty, whose consulting activities often cast them in the role of advocates for the interests of clients. The role of advocate calls for constructing persuasive arguments that will generate favorable outcomes for clients. This is very different from the function they perform as scholars—the function that justifies their academic freedom—of saying what they think “without fear or favor.” There are reasons to question whether the academic views of legal scholars who do significant consulting are truly their own views, undistorted by the interests of their clients. And if consulting activities distort the views that law faculty espouse as scholars, then academic freedom is failing to perform its essential function.

At the basest level, we might suspect that financial self-interest distorts the views expressed by law professors who consult, just as the AAUP fears that it would distort the views expressed by untenured faculty who could be fired for making statements contrary to the interests of university benefactors. Although law faculty are generally better compensated than other academics and need not fear a devastating loss of livelihood if they alienate their consulting clients, consulting income can easily outpace even a rather generous academic salary and can provide a significant incentive to keep those clients happy. Consider, for example, a law professor who earns a comfortable academic salary of \$100,000 per year and scrupulously complies with university requirements to restrict consulting activities to one eight-hour day per week. At an hourly consulting rate of \$250, her annual consulting income would equal her academic salary. She might well be reluctant to take a scholarly stand on an issue that could contradict a client’s position, and she might remain silent rather than saying what she thinks. Worse yet, she might be encouraged to take a scholarly stand that serves her clients’ interests, either because she is explicitly paid to write an article⁹ or because she expects her published views to attract consulting business from clients who find her views congenial.

There are limits to this strategy, even for those shameless enough to follow it consciously. Law professors may tarnish their reputations as scholars, and perhaps even diminish their future effectiveness as advocates, if they publish patently foolish or disingenuous views. But good lawyers can make sensible arguments for a wide range of views, and it is often impossible to identify a disingenuous argument in the hands of a good advocate, or an unsound argument advanced by a leading expert in her field.

A more subtle distortion might arise from the tendency of good advocates to believe their own arguments. In other words, rather than taking positions that they don’t agree with, law professors may find themselves agreeing with positions that they would not otherwise have taken. Most litigators have seen their own views on legal questions transformed by the experience of advocacy. If they have previously taken an inconsistent position on the same issue, they may see this transformation occurring on a conscious level. More typically,

9. See William O. Douglas, *Law Reviews and Full Disclosure*, 40 Wash. L. Rev. 227, 230-32 (1965).

they will not yet have worked out their views on the precise issue presented, and may even be able to persuade themselves that had they thought about the issue hard enough beforehand they would have had to come to the same conclusion regardless of their clients' interests. But if they are candid and introspective, they may have to concede the impossibility of untangling their own views from their clients' interests.

Anthropologist Lawrence Rosen, who is also trained as a lawyer, describes this process of viewpoint transformation as he recalls an experience he had as a second-year law student preparing an attorney to cross-examine an anthropologist expert witness at trial:

As I prepared our attorney for his appearance in the case, my sense of indignation and my resolve in the wisdom of our own arguments grew. Yet at some point along the way I found myself asking how I, who had no field experience in the area, could be so sure that our own interpretations were correct. . . . As an anthropologist, I was less certain that I was right about many of the arguments I was, as a lawyer-to-be, encouraging our counsel to make.¹⁰

Rosen's perspective is particularly illuminating because his academic background in anthropology provides him with methodological commitments that allow him to distinguish the role of anthropologist-expert from the role of lawyer-advocate. Recognizing that he has no field experience in the area of the expert's testimony, he attributes his growing conviction in the wisdom of the position he is advancing to his role as advocate or lawyer-to-be rather than to his expertise as a trained anthropologist.

Even without legal training, academics in other fields who serve as expert witnesses at trial may find themselves feeling and behaving like advocates. They may be urged to take positions that are more emphatic and less qualified than they would be comfortable asserting in a purely academic context, and may subject themselves to professional criticism for complying.¹¹

The tension between the role of advocate and the role of scholar may be less apparent to legal scholars, who are trained as advocates and who often take something like an advocate's stance in their scholarly writing.¹² They may therefore be less alert to the distorting effects of extramural advocacy on their academic writing. Taken in by their own advocacy, they may embrace as

10. *The Anthropologist as Expert Witness*, 79 *Am. Anthropologist* 555, 566 (1977).

11. *Id.*; see also Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 *Tex. L. Rev.* 1629 (1988); cf. J. Morgan Kousser, *Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing*, *Pub. Historian*, Winter 1984, at 5, 19 (concluding that "the process by which a fundamentally honest expert witness arrives at conclusions . . . differs less from that which honest scholars employ in their everyday work than is sometimes charged").

12. See generally Gerald B. Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 *Va. L. Rev.* 1545 (1990) (arguing that both lawyers and legal scholars adopt a voice that is objective, neutral, impersonal, authoritative, judgmental, and certain as a rhetorical device to be persuasive); cf. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 *Mich. L. Rev.* 1835, 1847-50, 1881 (1988) (characterizing legal scholarship as a normative enterprise of addressing prescriptions to public decision-makers rather than an allegedly objective practice of describing truth).

scholars views they developed as advocates without consciously recalling that their viewpoints were initially dictated by the interests of their clients.

Ironically, it may be the most unabashedly biased scholars, rather than the most careful and fair-minded, who are the least vulnerable to this process of distortion. Committed scholars with a distinct political outlook who consult exclusively for interests that they have been advancing all along in their scholarship may feel that their viewpoints are not altered by serving as advocates for those interests. Indeed, they may have previously articulated their commitments on the issues they address as advocates in their published scholarship, allaying concerns that their views were developed while serving particular clients. Politically engaged scholars could also argue that their representation of clients is unlikely to mislead anyone as to the character of their scholarly writing because they make no pretense of objectivity. They may also be working pro bono and therefore have no personal financial stake in tailoring their scholarship to suit their clients' interests. Such persons may be motivated to consult for political reasons and may feel particularly strongly that academic freedom should protect their right to participate as advocates in the legal system.

But even politically engaged scholars run the risk of distorting or overstating their academic views when they serve as advocates for clients. Commitment to a political movement or set of normative values is rarely unambiguously congruent with an individual client's interests, and effective advocacy may dictate certain choices among plausible competing viewpoints or overrule a scholarly sense of nuance.

Here again, the experience of nonlawyer expert witnesses in litigation is illuminating. Much has been written about the role of feminist historians as experts in the case of *EEOC v. Sears, Roebuck & Co.*¹³ The EEOC charged Sears with employment discrimination primarily on the basis of statistical evidence indicating that most of its higher-paid commission sales jobs were filled by men, while most of its lower-paid noncommission sales jobs were held by women. The EEOC claimed that the gender disparities were the result of discrimination, and Sears countered that they reflected gender-based differences in job preferences and qualifications. Each side called upon feminist scholars in the field of women's history to buttress its inferences from the statistical record. Professor Rosalind Rosenberg provoked considerable controversy among feminist historians by testifying on behalf of Sears that women prefer selling apparel, housewares, and accessories to selling fencing, refrigeration equipment, and tires; that women tend to be more interested in the social and cooperative aspects of the workplace and less interested in competition; and that women prefer noncommission sales to commission sales because they can enter and leave the job more easily and because it entails more social contact and less stress.¹⁴ Professor Alice Kessler-Harris testified on

13. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). For an account of the controversy and its academic freedom implications, see Haskell & Levinson, *supra* note 11.

14. 628 F. Supp. at 1308.

behalf of the EEOC that statistical differences between men and women within jobs in the workforce can be explained only by sex discrimination on the part of employers.¹⁵

After the trial, Kessler-Harris conceded that her testimony was affected by her role in the adversary system, noting that in her rebuttal to Rosenberg's argument "subtlety and nuance were omitted, and . . . evidence was marshalled to make a point while complexities and exceptions vanished from sight."¹⁶ Advocacy in the legal system calls for commitment to a client's interests, and only by rare coincidence will those interests line up perfectly with a carefully considered, fully articulated scholarly position, even if that position has a distinct political outlook behind it.

The case of the politically engaged scholar raises the question whether concerns about the distorting effects of consulting rest on unrealistic assumptions about "objectivity" and "truth" in academic writing in general or in legal scholarship in particular. Indeed, it might seem to call into question the broader argument for academic freedom. If the justification for academic freedom is to preserve a neutral enclave in which disinterested scholars will seek out the truth, then why grant academic freedom to a scholar who is committed to a particular political agenda? On the other hand, if we concede the academic freedom of the politically engaged scholar, then why worry about the scholar who may be biased toward the interests of consulting clients? What remains of the traditional justification for academic freedom once we concede that values, preferences, and biases inevitably pervade all scholarship?

While a full response to these challenges is beyond the scope of these remarks, a few points are in order. First, it is not clear that our traditional justification for academic freedom necessarily requires acceptance of a now discredited conception of scholarly objectivity. Postmodernist critics might find the AAUP's 1915 Declaration of Principles on Academic Freedom, in contrast to the more recent AAUP statements that have followed it, to be a remarkably forward-looking document in this respect. Its authors avoid claiming objectivity or neutrality on behalf of scholars, instead describing an academy in which different "experts" will hold and espouse divergent viewpoints. They call for protecting scholars from lay intrusion in their work, not so that they will feel free to speak The Truth, but so that they may state candidly their own views, such as they are, undistorted by the views of their benefactors. The hallmarks of the scholar's role in this conception are genuineness of viewpoint and freedom from the partiality born of financial dependence, not objectivity in any angelic sense.¹⁷

15. *Id.* at 1314 n.63.

16. *Equal Employment Opportunity Commission v. Sears, Roebuck and Company: A Personal Account*, 35 *Radical Hist. Rev.* 57, 74 (1986).

17. See 1915 Declaration, *supra* note 1. Some more recent articulations appear to make stronger claims for scholarship, at least in an idealized form, as involving the objective pursuit and expression of truth. For example, the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure justifies academic freedom as a means of promoting the common good through "the free search for truth and its free exposition." 1940 Statement, *supra* note 4, at 407. Writing in 1981, Anthony Kronman articulated the difference between scholarship and

Second, even if we concede the impossibility of objectivity in scholarship, it does not follow that we should ignore bias in scholarship, nor that if we put up with some types of bias we must tolerate them all. Consider another familiar arena in which neutrality is no more possible than it is in scholarship, and yet it is at least as powerful as an ideal: a court of law. We recognize that judges are human beings with values and preferences and political outlooks that influence their views on legal questions. Yet our sense of justice is offended when a judge decides a case in which she has a direct financial stake, or in which her brother is a party. Sometimes the parties to a lawsuit might be willing to waive a trivial conflict of interest, such as a minor stockholding in a company with a small interest in the litigation, but they would certainly want to know about it and have the opportunity to decide for themselves whether they nonetheless trust the judge to resolve their dispute fairly.¹⁸ And if the judge were to accept a surreptitious payment from a party in exchange for a favorable resolution of a pending matter, it would be no answer to a charge of impropriety to say that there is no such thing as an impartial tribunal because all judges are human beings with inevitable biases.

Obviously there are important differences between judges and scholars, and the social function of judges calls for a type of fairness that we may not demand of scholars. Legal scholars are not responsible for actually deciding cases, although some purport to tell judges how to do so. Legal arguments, whether set forth in a judicial opinion or in a law review article or in a brief, inevitably proceed from value choices. But there is a difference between an analysis that proceeds from value choices and an analysis that proceeds from client interests. An advocate admittedly speaks on behalf of a client, while a legal scholar usually purports to speak for herself, whatever her underlying values may be. At the very least, if a legal scholar's views are in fact the product of a client's interests, her audience will want to know that. Otherwise, they might place undue credence in the views she publishes in the mistaken belief that they are her own.¹⁹

advocacy in terms of the role of truth: "[W]hereas [advocacy] is indifferent to truth in that it does not regard the discovery of truth as something valuable for its own sake, [scholarship] has the apprehension and expression of the truth as its internal, constitutive goal." Foreword: *Legal Scholarship and Moral Education*, 90 *Yale L.J.* 955, 968 (1981).

18. The current federal judicial-disqualification statute, 28 U.S.C. § 455 (1988), prohibits waiver in these circumstances. An earlier version of that statute required recusal only when the judge had a "substantial interest." See John P. Frank, *Clement Haynsworth, the Senate, and the Supreme Court* 41-42, 131-33 (Charlottesville, 1991); Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 *Case W. Res. L. Rev.* 662, 677-80, 698-705 (1985).
19. Some scholars define their role differently, not claiming to present their own views, but instead offering provocative ideas that they may or may not personally agree with, or demonstrating that counterintuitive conclusions follow from seemingly unexceptionable starting premises, whether or not they personally accept the premises or the conclusions. So long as it is clear that this is what they are doing, readers will know to read skeptically and will not be misled into believing that the author endorses the ideas presented. But this is a difficult line for scholars to draw when they speak out on policy issues of concern to the general public, as the controversies surrounding the nomination of Robert Bork to the Supreme Court, and more recently the nomination of Lani Guinier to head the Justice Department's Civil Rights Division, have demonstrated. Policy makers and the public may feel angry and skeptical when scholars seek to distinguish their personal beliefs from the apparent policy implications of their previously published work.

But even if no one is misled, readers are deprived of the sort of analysis that scholars are peculiarly able to provide when the analysis that an academic presents to them is conditioned by her clients' interests. The role of scholar permits the formulation of a coherent approach to a field, even though that approach is inevitably dominated by a set of underlying values. The role of advocate, by contrast, places a premium on expediency, often at the expense of coherence in any broad sense. Clients are generally more interested in winning a favorable outcome than in furthering any particular set of values in a coherent fashion. When scholars speak for themselves, they can and should be candid about the value choices underlying their analysis. But a client's interests may be better served by obfuscating underlying values than by elucidating them. However biased scholars may be, their work will be more useful to their audience if they speak candidly rather than strategically.

Third, some forms of legal scholarship make stronger implicit claims of objectivity than others, and thus present greater risks of deception when the authors' views are influenced by undisclosed client interests. When legal scholarship takes the form of unabashedly normative argument about what the law should be, readers will be alert to the value-dependence of the judgments set forth, whether they believe that the underlying values are those of the author or those of the author's client. But much legal scholarship consists of purportedly neutral, accurate description of what current law provides. Treatises in particular generally claim to provide such descriptions, and standard law review articles typically include substantial sections that purport to offer a neutral description of current doctrine. Treatise writers are particularly likely to be in demand as consultants, in part because their statements of legal doctrine are likely to be accepted as neutral and authoritative. There is thus a heightened risk of deception when treatise writers make descriptive statements about legal issues on which they have formed views while serving as consultants for clients. Moreover, whereas there may be a multitude of scholarly voices advancing competing normative arguments about particular controversial issues, in most fields there are few treatises.

If an analysis that is distorted by the interests of clients is inferior to an analysis that is not so distorted, perhaps there are mechanisms in place to correct the problem. Readers may recognize the distortions present in the writings of scholar-advocates, or perhaps other scholars will point out any flaws in the analysis. But legal scholars, particularly treatise writers, often write for readers who are less expert than they are, such as judges in courts of general jurisdiction who are not experts in any particular field and who may rely on the expertise and authority of leading scholars. Moreover, in spite of the vast numbers of pages written by legal scholars each year, present-day scholars do not typically revisit problems that have been addressed by other scholars in the past, apart from particularly controversial and enduring issues. When scholars write about issues that are important to parties with competing interests, other advocates, and perhaps other scholar-advocates, may be motivated to counter any prescriptive suggestions they make that would have untoward consequences for their clients. On the other hand, some parties with opposing interests on an issue may not have the resources to hire their

own scholars to develop and publish competing views, in which case the published views of a scholar-advocate retained by the party with greater resources may be the only scholarly view on the issue in the literature.

If consulting leads law professors to take expedient positions on legal issues and prevents them from developing coherent visions of their fields, they may lose the respect of some of their academic colleagues, and this may be reflected in their salaries. But once they have tenure, there is not much else that they stand to lose. And, as suggested above, consulting income could loom large in comparison to even a generous academic salary. Another mechanism that many universities use to limit the impact of consulting on the performance of academic duties is to restrict the amount of time that faculty may devote to outside work, typically to something like one day a week. If enforced, such restrictions may protect faculty from excessive time commitments outside the university, but they are unlikely to insulate law faculty from substantial financial incentives to keep their clients' interests firmly in mind. Even where consulting income is small relative to academic salary, faculty may be more responsive to the demands of clients who can fire them at will than to the broader interests of an academy that is bound to continue paying their salaries for life and is largely disabled by the institution of academic freedom from controlling them.

If financial self-interest were the only problem, disgorgement of consulting revenues might be a possible solution. Medical schools often require faculty to turn over or share the income that they earn through clinical practice. A similar system in law schools might reduce individual incentives to consult, but could present a corresponding danger that financially pressed law schools or universities would develop an interest in promoting faculty consulting so that they could share in the proceeds. Indeed, law schools in major cities with high costs of living may already have an interest in promoting or at least tolerating consulting by faculty to alleviate pressures for salary increases.

I do not believe that financial incentives are the only problem. The process of advocacy can distort the views of scholars even if they are working on a pro bono basis, although this may be less likely to occur than in the case of paid consulting, partly because of the absence of financial incentives and partly because typically advocates choose to advance in their pro bono work views to which they are already committed.

A more modest palliative that addresses the potential for deception when advocates speak as scholars is to strengthen academic norms concerning disclosure of consulting interests. Perhaps legal scholars should disclose prominently any clients whose interests might lurk behind their views whenever they publish books and articles that discuss issues they have been paid to think about, and not just when they publish works that they were specifically paid to produce. Such disclosure might include the identity of the client, a brief description of the relevant matter, and the role that the scholar played in it. Some scholars will feel quite uncomfortable doing this, in part because it is such an uncommon practice and disclosure of information that is not commonly disclosed may be experienced as a loss of privacy. Scholars who believe

that they can distinguish their own views from the views they advance on behalf of clients might also feel that such disclosures will undermine their credibility as scholars more than it should—but that is a judgment that they should leave to their readers. Clients may also be expected to oppose such disclosure, perhaps because their interests would be better served by having their arguments presented as the views of a scholar rather than as positions taken by a paid advocate. If the client is opposed to disclosure, a scholar would still have the options of either turning down the job or refraining from writing as a scholar about the issues she analyzed for the client. Rather than arguing against disclosure, the fact that disclosure runs counter to the interests of consulting professors and their clients may mean that we need strong norms about the importance of disclosure, perhaps backed up by institutional rules.

Beyond that, I think there is little to be done at the institutional level that does not threaten to do more harm than good. We must therefore rely on the good faith and judgment of individual faculty members to balance the professional value of their consulting activities against its distorting effects on their scholarship. The most important thing is that faculty acknowledge the problem and take responsibility for managing it. The problem lies peculiarly within our own minds. Skeptical self-awareness is our most important defense against self-deception, and avoiding self-deception is critical if we are to avoid deceiving our readers.