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The Law Professor as Advocate

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THE DEVELOPMENT OF the academic law school in the United States coincided with the rise of the modern research university.¹ Culminating a process that began shortly after the Civil War, virtually all accredited law schools now are part of universities, and law students typically have acquired baccalaureate degrees before embarking upon their professional studies.² Indeed, law schools have become so integral to their parent institutions that law professors hold important administrative positions on many campuses.³

Yet legal education differs significantly from graduate education. At the most basic level, law schools train students who will work in "the real world," whereas graduate schools prepare the next generation of scholars for positions in the academy.⁴ This es-

¹ The crucial event in the rise of academic legal training was the appointment of Christopher Columbus Langdell as dean of Harvard Law School in 1870. The selection of Charles Eliot as president of Harvard University in 1869 and the founding of The Johns Hopkins University in 1876 were among the most significant episodes in the growth of research-oriented institutions of higher education. For comprehensive accounts, see R. STEVENS, LAW SCHOOL (1983); L. VESEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY (1965). See also J. BEN-DAVID, THE SCIENTIST'S ROLE IN SOCIETY 139-59 (1971); C. JENCKS & D. RIESMAN, THE ACADEMIC REVOLUTION 12-20, 155-98 (Anchor ed. 1969).

² The number of proprietary law schools unaffiliated with universities declined substantially in the years following World War II. The past decade, however, has seen an increase in the number of unaccredited and often independent law schools. R. STEVENS, supra note 1, at 207-09, 243-44. For at least the past quarter-century, the typical entering law student has been a college graduate. Id. at 209; Thorne, Professional Education in Law, in E. HUGHES, B. THORNE, A. DEBAGGIS, A. GURIN & D. WILLIAMS, EDUCATION FOR THE PROFESSIONS OF MEDICINE, LAW, THEOLOGY, AND SOCIAL WELFARE 101, 109 (1973).

³ For example, the presidents of several of the nation's oldest and most distinguished universities, including Derek Bok of Harvard, Benno Schmidt of Yale, and Michael Sovern of Columbia, are former law professors.

⁴ Two qualifications are necessary at this point. First, not all persons who receive graduate degrees in the arts and sciences work in academic settings. In some fields, such as chemistry and physics, an appreciable proportion traditionally have found full-time employ-
sential difference influences the organization of both legal and graduate education. Law school courses typically have relatively large enrollments and are conducted more or less in the Socratic manner, while most graduate courses have far fewer students and operate as seminars. Law students rarely enjoy the close working relationships with their professors that many graduate students do. And law school writing requirements have never approached the magnitude of graduate school dissertation standards.

Despite these differences, important similarities also exist between the two types of education. For example, the criteria for appointment of law professors emphasize academic factors, and the standards for promotion increasingly stress scholarly publication. In these respects, law faculties apply selection and retention principles similar to those governing elsewhere on campus.

The emphasis on scholarship implies that university faculty do and should work in a relatively cloistered environment. Several factors, however, inexorably have pushed the academy toward greater engagement with the external world. Every state and many municipalities operate universities, and the federal government has become increasingly important as a source of support for research in both public and private institutions. This substantial public investment in higher education has led the nation to turn to universities for solutions to a vast array of social problems ranging from the development of sophisticated military technology to the improvement of life in deteriorating central cities. These developments have transformed what had been a relatively isolated institution into a complex service center, leading to a distinctive American university that is "neither entirely of the world nor entirely apart from it."6

The transformation of the university necessarily has affected

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members of the faculty. As professors have conducted research on subjects of concern to the community beyond the campus, they have found themselves drawn into discussions relating to public affairs. Occasionally scholars have felt moved to speak out of personal conviction; sometimes their views have been solicited by one or another party to the debate. The frequency of professorial involvement may have increased when faculty members discovered that their academic expertise leads others to accord disproportionate weight to their opinions on issues of public policy.7

Because the law occupies a uniquely powerful niche in the nation's social and political structure, law professors have enjoyed unusual access to the fora in which civic debate occurs. Thomas Emerson's career exemplifies the public role of the legal scholar. His writings include frequently cited standard works on the first amendment8 and civil rights.9 Beyond that, however, he has participated as a lawyer in several landmark constitutional cases. This symposium provides a fitting opportunity to reflect upon his remarkable career.

This essay reflects upon that career and considers some larger intellectual issues about the vocation of law teaching. Part I reviews three of Professor Emerson's cases which had an important impact on the law. Part II compares his participation in those cases with analogous public activities of contemporary law teachers. Finally, Part III tentatively explores the connection between the academic and the public roles of law professors.10 Drawing upon

10. Because Professor Emerson has not held elective or appointive office since entering the academy, this essay will not directly consider issues specific to office-holding. A surprisingly large number of academics have gone into government. The most prominent example was Woodrow Wilson, a leading political scientist who became governor of New Jersey before serving two terms as President. Other academic specialists in the arts and sciences who have been elected to public office include Senator Daniel Patrick Moynihan, another political scientist, former Wisconsin Governor Lee Dreyfus, a speech professor, and former Senator Paul Douglas, an economist. (Douglas eventually lost his seat to Charles Percy, who had been one of his students.) Law professors who have won election to high office include former Senators J.W. Fulbright and Wayne Morse, former Representative Robert Drinan, and former Colorado Governor Richard Lamm. Several law professors, including Shirley Abrahamson and Hans Linde, have been elected to state supreme courts.

Other scholars have been appointed to important governmental positions. Prominent re-
commentary from other disciplines, it suggests that faculty involvement in the external world can have costs as well as benefits for the academy. This portion of the essay is not intended in any sense as criticism of Professor Emerson. Rather, it is designed to suggest questions for contemplation by those of us who follow him.

I

In *Griswold v. Connecticut*, the Supreme Court invalidated a state law prohibiting the use of contraceptives. In *Sweezy v. New Hampshire*, the Court overturned a conviction for contempt arising from a university lecturer's refusal to cooperate with a state legislative investigation of subversive influences. And in *Sweatt v. Painter*, the Court effectively rejected state-mandated racial segregation in legal education. Professor Emerson represented the prevailing parties in *Griswold* and *Sweezy*, and he was one of the principal authors of an influential *amicus curiae* brief in *Sweatt*.

A

Of the three cases, *Griswold* is by far the most widely known. At issue there were the convictions of the executive director and the medical director of a Planned Parenthood affiliate for providing contraceptive advice and assistance to married couples in violation of a nineteenth-century state law. After finding that the Planned Parenthood officials had standing to raise the rights of their married patients, the Court held that the law violated the right of privacy.

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11. 381 U.S. 479 (1965).
14. The *Griswold* litigation initially was handled by Fowler Harper, Professor Emerson's colleague at Yale Law School. Harper organized a series of legal challenges to the Connecticut statute after two of his students expressed an interest in having the birth control ban overturned. A divided Supreme Court rejected the first case on justiciability grounds. Poe v. Ullman, 367 U.S. 497 (1961). Harper continued the legal battle in *Griswold*, in which he wrote the jurisdictional statement and the reply to the state's motion to dismiss before he died. Professor Emerson then took over the case, writing the brief on the merits and presenting the oral argument. See Emerson, *Fowler Vincent Harper*, 74 YALE L.J. 601, 602-03 (1965).
15. 381 U.S. at 481.
implicit in the first, third, fourth, fifth, and ninth amendments.\textsuperscript{16}

Justice Douglas' opinion for the Court has become celebrated (or notorious, depending upon one's point of view) for its reliance upon "penumbras" of the Bill of Rights. That word never appeared in Professor Emerson's submissions. Indeed, the privacy argument had a distinctly secondary place in the brief.\textsuperscript{17} Instead, Emerson emphasized that the state law denied married couples liberty and property without due process of law in contravention of the fourteenth amendment. This arbitrary statute, he maintained, lacked a reasonable connection to a proper legislative purpose and thus could not stand.\textsuperscript{18}

The Griswold decision has had an enormous impact. That ruling provided the basis for a series of later cases upholding a broad right of access to contraceptives.\textsuperscript{19} More recently, Griswold was the principal precedent upon which the Court relied in finding an expansive constitutional right to abortion.\textsuperscript{20} At the same time, the Court has made clear that Griswold does not protect an unlimited right of sexual privacy.\textsuperscript{21} Although the decision remains controversial, largely due to its foundational importance to the jurisprudence of abortion,\textsuperscript{22} the centrality of this case in the debate over the nominations of Judges Bork and Kennedy to the Supreme Court suggests that the precedent remains secure at least for the foreseeable future.

\textsuperscript{16} Id. at 484-86.

Several separate opinions reached the same conclusion on somewhat different grounds. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, emphasized the independent significance of the ninth amendment. Id. at 487-93 (Goldberg, J., concurring). Justices Harlan and White viewed the case in substantive due process terms. Id. at 499-500 (Harlan, J., concurring in the judgment); Id. at 502-03 (White, J., concurring in the judgment).

\textsuperscript{17} Brief for Appellants at 79-89.

\textsuperscript{18} Id. at 21-78. This argument has obvious overtones of the substantive due process doctrine which long had been anathema to persons of Professor Emerson's liberal views. Indeed, the brief recognizes this fact and seeks to limit the argument to situations involving personal rather than economic rights. See id. at 21-23. The difficulty of drawing the distinction between these categories of rights prompted the majority of the Court to rest its decision upon the privacy rationale. See 381 U.S. at 481-82.


\textsuperscript{21} Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (upholding state law against sodomy as applied to homosexual conduct in a private residence).


For criticism of Griswold from an explicitly prolife viewpoint, see Myers, \textit{The End of Substantive Due Process?}, 45 \textit{Wash. & Lee L. Rev. }\underline{__} (1988).
future.\(^{23}\)

**B**

The *Sweezy* case is much less familiar than *Griswold,* but the decision helped to limit legislative investigations of unpopular persons and ideas. The protagonist of this drama was Paul Sweezy, a prominent socialist and one-time Harvard economics professor who took up a career as a free-lance writer and lecturer after serving with the Office of Strategic Services during World War II.\(^{24}\) From 1952 to 1954, he spoke by faculty invitation to humanities classes at the University of New Hampshire. Eventually, his activities attracted the attention of the state legislature, which directed the attorney general on its behalf to investigate subversive persons and activities under a previously enacted statute.

Operating in effect as a single-member legislative committee,\(^{25}\) the attorney general questioned Sweezy at length on two separate occasions. Sweezy responded to most inquiries but refused to discuss his guest lectures at the university, his participation and associations in the Progressive Party, or his views on Communism.\(^{26}\) When he persisted in his refusal, the state courts held him in contempt.

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23. Some commentators have suggested that the laws at issue in both the contraception and the abortion cases might more comfortably have been viewed as imposing special burdens on women in violation of the equal protection clause. *See,* e.g., Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade,* 63 N.C.L. REV. 375 (1985); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 HARV. L. REV. 1, 57-59 (1977); *Law, Rethinking Sex and the Constitution,* 132 U. PA. L. REV. 955, 1007-28 (1984). Whatever the merits of these suggestions, the *Griswold* Court probably would not have accepted a sex-discrimination argument. *See* Ginsburg, *The Burger Court's Grapplings with Sex Discrimination,* in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 132, 132 (V. Blasi ed. 1983).


25. The legislature's delegation of its investigative authority to the attorney general, which might have raised serious separation-of-powers concerns had the case involved the federal government rather than a state, played no part in the Court's decision. *Sweezy v. New Hampshire,* 354 U.S. 234, 255 (1957) (plurality opinion); *id.* at 256-57 (Frankfurter, J., concurring in the result).

26. Sweezy declined to discuss the Progressive Party because it was an entirely legal organization. Its presidential candidate, Henry Wallace, received over a million votes in the 1948 election. *See* id. at 240 n.6, 242 n.7. Sweezy did testify that he had never belonged to the Communist Party. *Id.* at 244.
A fragmented Supreme Court reversed. Chief Justice Warren's plurality opinion reasoned that the record did not afford adequate assurance that the legislature had asked the attorney general to gather the type of facts encompassed within the questions that Sweezy had declined to answer. Justice Frankfurter, in a concurrence joined by Justice Harlan, took a quite different tack. Explicitly balancing the competing considerations, he concluded that the state's interest in protecting against "the remote, shadowy threat to [its] security" could not support the substantial threat which the disputed questions posed for Sweezy's interest in intellectual and political autonomy.

The Court's inability to agree upon a rationale makes the teaching of the case "obscure." When viewed in historical context, however, the result was significant. The legislative investigation occurred, and the authorizing statutes were passed, at the height of the McCarthy era. During this period, the Court had upheld a variety of federal and state antisubversion measures. The Sweezy decision departed strikingly from this pattern. While neither the first nor the only ruling to this effect, it did help to suggest the existence of legal limits upon loyalty and security programs.

One aspect of this case merits special attention. Many of the questions that Sweezy refused to answer concerned the content of his lectures at the University of New Hampshire. Professor Emerson from the beginning emphasized the special threat that such inquiries posed for academic freedom, which he characterized as "one of [the] most significant and sensitive" elements of first amendment concern. He devoted considerable attention to a broad claim that

27. Id. at 253-55 (plurality opinion).
28. Id. at 265 (Frankfurter, J., concurring in the result).
29. Id. at 266-67.
31. For a contemporaneous account of the national atmosphere at the time, see R. Rovere, Senator Joe McCarthy 3-74 (1959). For a sophisticated analysis of public and elite opinion during this period, see S. Stouffer, Communism, Conformity, and Civil Liberties (1955).
34. Jurisdictional Statement at 18; Brief for Appellant at 27. See also id. at 28-29 & n.11 (collecting authorities assessing the deleterious impact of legislative investigations upon academic freedom).
the state lacked any power to examine the content of classroom discussion.35

Professor Emerson’s academic freedom argument did not prove dispositive, but it was recognized. The plurality opinion, while resting its conclusion on other grounds, contains a paragraph remarking upon the “self-evident” importance of free inquiry in American universities.36 Justice Frankfurter, on the other hand, devoted several pages to the argument.37 He feared that political scrutiny of academic discussion would cause “grave harm” to higher education. Accordingly, he would require a substantial justification for inquiry into the content of classroom lectures. Because the state had only the most meager evidence that Sweezy believed in the violent overthrow of the existing order, the attorney general could not legitimately ask what he had told the University of New Hampshire humanities students.

Of course, dicta in a plurality opinion and extended discussion in a concurrence do not make legal doctrine. So far, at least, the full Court has not explicitly accorded first amendment protection to academic freedom. Nevertheless, the concept seems to underlie a number of decisions relating to educational issues.38

C

The Sweatt case was part of a trilogy of decisions that played an important part in the development of modern equal protection doctrine.39 Sweatt effectively required the desegregation of American legal education. The companion cases invalidated a series of practices designed to segregate a black graduate student within a previously all-white state university40 and a railroad’s rule requiring segregated seating in dining cars.41

The litigation in Sweatt was part of the NAACP’s extensive campaign against educational segregation that culminated in Brown

35. Brief for Appellant at 32-41.
36. 354 U.S. at 250.
37. Id. at 261-64 (Frankfurter, J., concurring in the result).
Heman M. Sweatt, a black postal worker, was denied admission to the University of Texas law school solely because of his race. The state instead offered him a place in a newly created law school for blacks. The state maintained that the rule of *Plessy v. Ferguson* allowed the provision of separate but equal educational facilities and that the black law school was substantially equal to the all-white school at Texas.

Thurgood Marshall, chief counsel for Sweatt, vigorously attacked the state's claim of equality. At trial he presented extensive expert testimony detailing the wide differences between the two law schools. The experts focused not only upon the obvious contrasts in physical facilities, but also upon the subtle effects of differences in class size, student background and experience, and extracurricular activities. Not surprisingly, the state courts rejected Sweatt's claim.

When the case reached the Supreme Court, the NAACP was supported by an extraordinary *amicus curiae* brief. Professor Emerson was one of the principal authors of that brief, which was submitted by an ad hoc group known as the Committee of Law Teachers Against Segregation in Legal Education and signed by nearly 200 law professors. That brief has become celebrated for

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43. The factual background is somewhat more complicated than the text suggests. The state initially proposed to establish the black law school as part of an existing black university. Soon afterward, the legislature created an entirely new institution, now known as Texas Southern University but originally called Texas State University for Negroes, which was to operate a law school. A temporary law school for blacks was authorized to begin operations in Austin before the new university opened in its permanent quarters in Houston. *See* Entin, supra note 39, at 9-10.

44. 163 U.S. 537 (1896).

45. Marshall's principal experts were Dean Earl Harrison of the University of Pennsylvania Law School and Professor Malcolm Sharp of the University of Chicago Law School. He also presented testimony from Robert Redfield, a lawyer and chairman of the anthropology department at the University of Chicago, and Charles Thompson, dean of the graduate school at Howard University.

46. The state offered its own experts to rebut this testimony. Among them were Dean Charles McCormick and Professor A.W. Walker, Jr., of the University of Texas Law School. For a summary of the unusual debate over educational philosophy that occurred at trial, see Entin, supra note 39, at 33-38.

47. Professors John Frank of Yale, Alexander Frey of the University of Pennsylvania, Robert Hale of Columbia, and Edward Levi of the University of Chicago, along with Deans Erwin Griswold of Harvard and Harold Havighurst of Northwestern, joined Professor Emerson as coauthors of the brief. The substantive portions of the brief were reprinted in the *Minnesota Law Review* shortly before the Supreme Court heard oral argument in the *Sweatt*
its high quality.\textsuperscript{48}

The professors' arguments reinforced many of the points which Marshall made on behalf of Sweatt, but the emphases contrasted sharply. Where Marshall obliquely attacked the "separate but equal" doctrine of \textit{Plessy}, the law teachers assailed it frontally. They contended that the Reconstruction Congresses which proposed the fourteenth amendment and enacted numerous civil rights statutes intended to outlaw all forms of segregation and discrimination against blacks. Thus, \textit{Plessy} was wrong as a matter of law and should be overruled.\textsuperscript{49}

The professors did not rest on this point. Instead, they advanced two alternative positions, both of which assumed that \textit{Plessy} had been correctly decided. Their broader contention emphasized that the \textit{Plessy} Court had limited its approval of "separate but equal" to contexts in which segregation was reasonable. In the field of education, they maintained, segregation was not reasonable. The practice caused serious harm to all students, and monitoring the equality of racially separate institutions would be extraordinarily difficult. Thus, segregated schooling could not be reconciled with \textit{Plessy} and, under the logic of that case, violated the Constitution.\textsuperscript{50}

More narrowly, the law teachers urged that, even if segregation in education were reasonable in at least some circumstances, the two law schools in question simply were not equal. Accordingly, the state had not complied with the \textit{Plessy} doctrine. Here again, although Marshall's brief for Sweatt made the same general argument, the professors developed the point in greater detail. Where Marshall emphasized physical differences, the law teachers focused primarily upon more intangible factors about which the experts had testified at trial.\textsuperscript{51}

The Supreme Court unanimously ruled in favor of Sweatt. In doing so, it declined to reconsider \textit{Plessy}. That question would have to wait for \textit{Brown}. The \textit{Sweatt} decision rested solely on the inequality of the two law schools. The Court's analysis of those differences rested upon a most expansive definition of equality. It encompassed case. \textit{See Segregation and the Equal Protection Clause: Brief for the Committee of Law Teachers Against Segregation in Legal Education, 34 Minn. L. Rev.} 289 (1950).


49. Brief of the Committee of Law Teachers Against Segregation in Legal Education as Amicus Curiae at 4-22, \textit{reprinted in} 34 Minn. L. Rev. at 291-307.

50. \textit{Id.} at 34-38, \textit{reprinted in} 34 Minn. L. Rev. at 316-20.

not only physical differences, but also "those qualities which are incapable of objective measurement but which make for greatness in a law school," including the reputation of the faculty, institutional prestige and tradition, and the influence of alumni in the profession and the community.\textsuperscript{52}

This analysis drew heavily upon arguments presented only in the law professors' \textit{amicus} brief. By defining equality in such sweeping terms, the Court called into question the constitutionality of segregation in legal education. When combined with the other cases in the 1950 trilogy, \textit{Sweatt} cast a long shadow over the continuing vitality of segregation at any level of public education. Thus, these decisions laid much of the groundwork for the landmark ruling in \textit{Brown}.

\textbf{II}

Professor Emerson's participation in these cases illustrates some of the ways in which law faculty can involve themselves in public affairs. His role in \textit{Griswold} and \textit{Sweezy} exemplifies the legal academic as full-fledged lawyer. His work in \textit{Sweatt} represents something of a hybrid: the \textit{amicus} brief is both a lawyer's argument and a form of legal scholarship aimed at influencing the outcome of a dispute over law and public policy.\textsuperscript{53} Because these activities represent varieties of the "committed arguments" which many law teachers advance in various aspects of their work,\textsuperscript{54} Professor Emerson's career can help us to begin to think about the public role of the law professor.

\textbf{A}

The law professor as lawyer has become increasingly familiar. During the past generation, distinguished legal scholars have appeared regularly before the Supreme Court. For example, Herbert Wechsler was lead counsel in \textit{New York Times Co. v. Sullivan},\textsuperscript{55} which effectively constitutionalized the law of libel, and Alexander

\textsuperscript{52} 339 U.S. at 634.

\textsuperscript{53} The many law professors who simply signed the brief without contributing to its substance in effect subscribed to a petition or open letter. This is, of course, a common means by which academics express themselves on matters of public concern. \textit{See infra} text accompanying note 63.

\textsuperscript{54} This phrase has been used in a somewhat different context. \textit{See} Fletcher, \textit{Two Modes of Legal Thought}, 90 YALE L.J. 970, 984-97 (1981).

\textsuperscript{55} 376 U.S. 254 (1964).
Bickel argued *New York Times Co. v. United States*,\(^{56}\) which rejected the government's attempt to suppress the Pentagon Papers. More recently, Laurence Tribe has appeared frequently in the Court even as he remains a prolific commentator on constitutional law.\(^{57}\) Perhaps the ultimate illustration of professorial advocacy, however, is *Williams v. Zbaraz*,\(^{58}\) an abortion case in which Robert Bennett and Victor Rosenblum, friends and colleagues on the law faculty of Northwestern University, argued against each other.\(^{59}\)

These and other instances involved only occasional forays into litigation, and then only before the nation's highest judicial tribunal. More commonly, some law professors maintain formal relationships "of counsel" to law firms, thereby enabling them to practice law while remaining, at least nominally, full-time academics. Others, either by choice or due to institutional policies prohibiting "of counsel" arrangements, engage in part-time practice or consult on an individual basis.\(^{60}\)

On a more mundane level, legal clinics operated by law schools and staffed by attorneys with faculty status represent clients before courts and administrative agencies on a daily basis.\(^{61}\) The work of the law school clinic differs from the previous examples in another

\(^{56}\) 403 U.S. 713 (1971).


\(^{58}\) 448 U.S. 358 (1980).

\(^{59}\) Law professors also occasionally become parties to litigation, of course. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Clark v. West, 193 N.Y. 349, 86 N.E. 1 (1908). That subject is outside the scope of this essay.

\(^{60}\) In addition, law professors can participate in the public arena as members of voluntary organizations. Examples include Norman Dorsen, Professor Emerson's sometime coauthor and a contributor to this symposium, who has headed the American Civil Liberties Union for more than a decade, and Archibald Cox, who at one time chaired Common Cause.

\(^{61}\) The use of the word "mundane" does not connote a pejorative assessment of the work of clinics. Rather, it recognizes that their primary purpose, training law students in professional skills, ordinarily precludes clinics from accepting extremely complex or lengthy cases. Nonetheless, this does not imply that the business of law school clinics is entirely routine. Sometimes the questions which occupy their attention require resolution at the highest level. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (involving a client of the Mandel Legal Aid Clinic of the University of Chicago Law School); Carey v. Piphus, 435 U.S. 247 (1978) (involving clients of the legal clinic of Northwestern University School of Law).
way as well. The clinic is an educational enterprise which gives students hands-on training in the tasks of the practicing lawyer, whereas the work of Professor Emerson and other scholars in the cases discussed earlier was not directly connected to the law school curriculum. Nevertheless, the law school clinic assists persons with grievances against a party unaffiliated with the institution.\textsuperscript{62} Regardless of the outcome, therefore, the clinic's efforts necessarily affect the outside community.

B

Law professors need not embroil themselves in litigation in order to participate in debates about public policy. As the \textit{amicus} brief in \textit{Sweatt} illustrates, legal scholars can simply subscribe to a position paper or petition drafted by someone else. In that instance, nearly 200 law teachers signed the brief which Professor Emerson and his six coauthors prepared. More recently, many others have signed statements condemning American assistance to the Nicaraguan rebels and various proposals to close offices of the Palestine Liberation Organization in this country. By far the most substantial instance of petition-signing by law professors was the controversy over the nomination of former Judge Robert Bork to the Supreme Court. Approximately half of the nation's full-time law school teachers put their names to statements submitted to the Senate Judiciary Committee on the issue.\textsuperscript{63}

Alternatively, some professors enter into the fray by means of their scholarship. For some years, there have been repeated claims (sometimes documented, sometimes not) that law review articles have been secretly solicited and paid for by parties with a direct interest in the resolution of the issues discussed.\textsuperscript{64} This practice, to

\textsuperscript{62} Representing a client in a dispute with the law school or the university would involve the clinic in an obvious conflict of interest. In such a situation, the clinic attorney would have to obtain "the consent of [the] client after full disclosure" of the connection between the institution and the clinic and of the possible impact of that connection upon the attorney's efforts on behalf of the client. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1979). Accord MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983). Several clinical professors have told me that they do not believe that a client could knowingly and intelligently waive that sort of conflict. This view is not unanimous, however. One of my colleagues has recounted several instances in which law faculty at various institutions have represented students in on-campus disciplinary proceedings.

\textsuperscript{63} The great majority of the professors who took a position on Judge Bork urged the Senate to reject his nomination, a fact which his supporters noted with considerable unhappiness. \textit{See}, \textit{e.g.}, Garment, \textit{The War Against Robert H. Bork}, COMMENTARY, Jan. 1988, at 17, 17-18.

\textsuperscript{64} \textit{See}, \textit{e.g.}, Ackerman, \textit{The Marketplace of Ideas}, 90 \textit{Yale L.J.} 1131, 1136, 1147-48
the extent that it exists, seriously compromises the intellectual integrity of the discipline.

The problem is not confined to situations in which an author has a pecuniary interest in the outcome of a controversy to which his writing might relate. Even in the absence of financial considerations, other subjective factors might affect a law professor's analysis. For example, one distinguished commentator has characterized much of the modern work in constitutional law as "advocacy scholarship—amicus briefs ultimately designed to persuade the [Supreme] Court to adopt our various notions of the public good." A similar conclusion presumably applies to doctrinal analysis in other fields of law. The reason is not hard to fathom. For law professors, as for others in the academy, prestige and access to professional opportunities depend in part upon evidence of influence in the discipline. In the law, in contrast to other fields, nonacademic tribunals have the authority to resolve intellectual controversies. This fact creates incentives for legal scholars to publish works that courts, legislatures, agencies, and other such decisionmakers will cite.

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One highly publicized recent controversy involving claims of pecuniary interest concerned a student Note, Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred, 97 Harv. L. Rev. 1964 (1984). Counsel for a corporation that was the target of a hostile takeover bid cited the Note as authority supporting the legality of management's defensive tactics. The author of the Note had been employed as a summer associate in the law firm which devised the tactics in question, a fact which was not disclosed to the reader. See Martin, The Law Review Citadel: Rodell Revisited, 71 Iowa L. Rev. 1093, 1095 & n.12 (1986). The court ultimately upheld the defensive tactics without citing the Note. See Moran v. Household Int'l, Inc., 490 A.2d 1059, 1076-80 (Del. Ch.), aff'd, 500 A.2d 1346 (Del. 1985).


Modern scholars are not the only ones who may have allowed advocacy to intrude upon the objectivity of their work. For example, Zechariah Chafee's writings concerning the origin and meaning of the clear and present danger test seem to have been colored by his desire to promote a more libertarian conception of the first amendment. See Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. Chi. L. Rev. 1205, 1294-303 (1983).

66. See Ackerman, supra note 64, at 1135-36; Austin, Footnotes as Product Differentiation, 40 Vand. L. Rev. 1131, 1136, 1147 n.68, 1151 & n.91 (1987); Kissam, The Decline of Law School Professionalism, 134 U. Pa. L. Rev. 251, 265 (1986); cf. Winter, Ward S. Bowman, Jr., 87 Yale L.J. 237, 237 (1977) (observing that "[l]mmense portions of legal literature seem to disappear without an intellectual trace"). For criticism of the use of measures of citation frequency as evidence of the quality of scholarly publications, see R. Jacoby, supra note 24, at 146.
The preceding discussion suggests that law professors can participate in and seek to influence the resolution of public controversies in various ways. It does not, however, address the propriety of such participation. Indeed, that subject has generated comparatively little legal commentary. Yet a substantial literature on the civic responsibility of the university and the social role of the academic expert has developed in other disciplines. That literature raises questions about the uncritical acceptance of professorial involvement in the public arena.

The commentary on this subject reflects fundamental disagreement over the meaning of the scholarly vocation. Some observers have urged that universities, including law schools, take an even more active role in the solution of social problems than they now do. According to this view, the campus contains unique resources which can and should be used to promote human progress.67

Others have argued that universities should not attempt to solve social problems. These critics contend that institutions of higher education exist to accumulate and transmit knowledge. Although that knowledge might indirectly lead to improvements in the external environment, universities simply lack the competence to reform the outside world.68 Moreover, these commentators question whether scholars have the detailed intellectual understanding and the requisite political skills to implement broad social changes.69 Thus, reform efforts probably will not succeed and, in any event, will seriously undermine the central mission of the academic community.

Much of this literature has arisen in the social sciences. To be sure, many law professors do not view social science as the appropriate intellectual model for their field.70 In one sense, this objec-


69. See, e.g., D. Bok, supra note 5, at 82; R. Nisbet, supra note 68, at 182.

70. Indeed, contemporary legal scholarship is marked by extraordinary dissensus on basic questions of scope and method. Most scholars continue to work on traditional forms of doctrinal analysis. Other approaches, however, have vocal adherents. Among these are law and economics, see, e.g., R. Posner, Economic Analysis of Law (3d ed. 1986); critical legal studies, see, e.g., M. Kelman, A Guide to Critical Legal Studies (1987); R. Unger, The Critical Legal Studies Movement (1986); literary theory, see, e.g., Balkin, Deconstructive Practice and Legal Theory, 96 Yale L.J. 743 (1987); Symposium, Law and Literature, 60 Tex. L. Rev. 373-586 (1982); feminist jurisprudence, see, e.g., C.
tion appears well taken. Social scientists, after all, seek to discover the truth. Lawyers, on the other hand, do not. Instead, the adversary system requires that they zealously represent clients on the assumption that similar advocacy by other lawyers on behalf of opposing parties will lead to the discovery of the truth.\textsuperscript{71}

On closer examination, however, the distinction between these disciplines tends to blur. Social science scholarship may be influenced by the researcher's prior experiences and beliefs, while the publications of university-based law professors may prove to be more than disguised advocacy. Moreover, both law and the various social sciences are concerned with the means by which society distributes authority, influence, and economic resources. Thus, consideration of the social science literature addressing this general subject could prove instructive.

A

For social scientists, the essential text for defining the place of the academician in the public arena is Max Weber's classic essay, \textit{Science as a Vocation}.\textsuperscript{72} Weber, the great German political sociologist and economic historian, sharply distinguished scientific judgments from political and religious commitments. For him, social science provided a means for understanding the world more clearly. Such understanding required an openness to new and inconvenient facts, an openness unavailable to persons with a preconceived worldview.\textsuperscript{73} Weber rested his position upon the limited and temporary nature of social scientific knowledge and the inevitability that subsequent research would refute or supersede current wisdom.\textsuperscript{74} For him, therefore, the only authentic social science was a
value-free social science.\textsuperscript{75}

The concept of a value-free social science can imply that scholars should completely avoid normative discussions of public affairs.\textsuperscript{76} Put more bluntly, the argument might run, "[t]he role of social science lies not in the formulation of social policy, but in the measurement of its results."\textsuperscript{77} This approach suggests that academic lawyers should confine themselves to assessing the impact of existing laws and regulations and evaluating the effects of changes proposed by others. Because most law professors lack the training to make reliable assessments, they would have no place at all in the arena of public debate.

There are compelling reasons to reject this extreme position, however. At the most basic level, Weber could not have meant to propose that social scientists hermetically isolate themselves from the world around them. Much of his analysis concerned the responsibilities of social scientists as teachers not to use the classroom as a forum for political or religious proselytizing, especially under the conditions prevailing in German universities in the first decades of this century.\textsuperscript{78} Moreover, Weber personally did not divorce himself from the world at large. He played a prominent role in the political and cultural life of his country.\textsuperscript{79} Thus, both the context of his essay and the facts of his own life refute a monastic interpretation of the scholar's role.

Even those who counsel academic experts to act with appropriate respect for the limits of their professional knowledge do not support the radical disjunction between the campus and the outside world that this position implies. Instead, they urge professors who become involved in matters of public concern to distinguish carefully in their statements and recommendations between what they know (and do not know) as scholars and what they believe as citizens.\textsuperscript{80}

\textsuperscript{75} See id. at 145-46.
\textsuperscript{77} D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING 193 (1970) (emphasis deleted).
\textsuperscript{78} See M. WEBER, supra note 72, at 129-34, 145-46, 150.
\textsuperscript{80} See, e.g., D. MOYNIHAN, supra note 77, at xxix-xxi, 190-201; J. WILSON, THINKING ABOUT CRIME 47-70 (1975); Millikan, supra note 76, at 166-67, 176-77, 179-80. For an application of this distinction, see D. BEM, BELIEFS, ATTITUDES, AND HUMAN AFFAIRS 62 n.2 (1970).

Natural scientists who become involved in discussions of public policy relating to science
At first glance, this approach appears to permit legal scholars to express themselves on a broad range of matters external to the university. For example, law professors should feel free to participate in outside activities designed to clarify or systematize discrete bodies of doctrine, at least as long as they do not allow their nonacademic views to influence their recommendations. Illustrations include the efforts of such bodies as the National Conference of Commissioners on Uniform State Laws to develop model statutes and of the American Law Institute to codify the common law.  

Even these illustrations present unanticipated complexities, however. Some observers have complained that participants in these activities have not always separated their personal views from their "expert" advice.  

Another form of permissible professorial involvement under this approach would be some form of statement advising outsiders about a settled body of law. Illustrative subjects for such a statement include the ineligibility of a naturalized citizen for the presidency and the invalidity of statutes requiring racial segregation in public schools. These, of course, are easy cases. More problematic examples include affirmative action and relationships between church and state, subjects in which the Supreme Court has followed a meandering path and about which law professors are more likely to be asked for advice. Separating specialized knowledge from personal and technology also have been urged to distinguish between their professional expertise and their personal attitudes. See, e.g., Brooks, The Scientific Adviser, in SCIENTISTS AND NATIONAL POLICY-MAKING 73, 84-85, 90-91 (R. Gilpin & C. Wright eds. 1964); Frankel, The Continental Drift Debate, in SCIENTIFIC CONTROVERSIES 203, 245 (H. Engelhardt, Jr. & A. Caplan eds. 1987); Schilling, Scientists, Foreign Policy, and Politics, in SCIENTISTS AND NATIONAL POLICY-MAKING 144, 169-70 (R. Gilpin & C. Wright eds. 1964).

81. See, e.g., J. AMES, The Vocation of the Law Professor, in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 354, 367-68 (1913); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 674-76 (2d ed. 1985); G. GILMORE, THE AGES OF AMERICAN LAW 71-74, 83-86 (1977); R. STEVENS, supra note 1, at 133, 144 nn.21 & 23.


83. See U.S. CONST. art. II, § 1, cl. 5.


views in such areas may prove impracticable.

Even if law professors could justify participation in public debate under this approach, however, the foregoing illustrations do not address the propriety of Professor Emerson's efforts in Griswold, Sweezy, and Sweatt. Those efforts went considerably beyond simple statements of existing law; they involved him in actual litigation on behalf of a party. While the adversary system is acclaimed as a search for truth, the lawyer participates in a lawsuit as an advocate, not as an impartial seeker after knowledge.86 In this context, it does not make sense to expect a law professor to distinguish statements based upon his disinterested expert knowledge from those based upon his personal views.

In short, if one were to follow this more realistic version of the Weberian approach, legal scholars could never represent a client. This conclusion would work a substantial change in current practices. Universities might have reason to limit the outside work of their law faculty, but no one has proposed an outright prohibition.87 This suggests that Weber does not provide the appropriate model for evaluating the public role of the law professor. In fact, Weber's analysis has proven surprisingly controversial within the social sciences themselves. In those fields, an alternative approach has emerged. This alternative might afford a more suitable framework for discussion of our subject.

B

Weber's critics have made two distinct, but related, arguments. Epistemologically, they claim that a truly value-free social science cannot exist. Nonscientific factors, including the unique facts of the scholar's personal life and the experience of living in a particular culture at a particular time, influence the selection of topics for investigation, the choice of methods for conducting research on those topics, and the content and format of the reported findings.88 Nor-

86. See Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119, 155-56; Kronman, supra note 71, at 959-64.
87. Law schools, including those which permit faculty members to maintain "of counsel" relationships with law firms, limit at least nominally the time commitments entailed in such outside work. Even a harsh critic of excessive consulting by law professors does not propose an outright ban. Instead, he suggests an elaborate profit-sharing agreement between the professor and the school which would discourage such external distractions from the academic enterprise. Ackerman, supra note 64, at 1144-47. A university which implements such a proposal might suffer adverse tax consequences, however. See Jensen, Taxation, the Student Athlete, and the Professionalization of College Athletics, 1987 UTAH L. REV. 35.
88. For a well-known exposition of this point, see Gouldner, Anti-Minotaur: The Myth
matively, the critics contend that social science should not be value-
free. Their fields having originated as branches of moral philoso-
phy, these writers believe that values can and do occupy a central
place in the social sciences. Under this view, social science repre-
sents a form of disciplined advocacy.89

This alternative conception of social science remains committed
to the search for truth. Scholars who work from this perspective
attempt to understand a particular process or phenomenon. While
researchers have a point of view, they seek to advance knowledge,
not simply to persuade others.90 Moreover, engagement with the
environment beyond the university can produce important benefits
for scholarship in these fields. Precisely because the social sciences
investigate the operation of institutions and processes in the exter-
nal world, faculty participation in public affairs can generate valu-
able first-hand insights that will inform academic research.91
Because legal scholars also investigate the workings of important
social institutions and processes, analogous reasoning appears to
justify some outside involvement by law professors.

Certain distinctive characteristics of law schools militate against
blindly accepting this reasoning, however. Law professors occupy a
position precariously balanced between the campus and the com-

munity. Their decision to attend law school rather than graduate
school reflects at least initial ambivalence about teaching and schol-

arship. Most engaged in some form of nonacademic practice before
accepting faculty appointments. In addition, because lawyers by
tradition and training play a disproportionate role in public affairs,
law professors often have unusual opportunities to enter the outside
arena, at least in comparison with their colleagues in other fields
who may also be interested in reform.92

In short, special risks exist that law professors might overcom-

89. See, e.g., R. Bellah, R. Madsen, W. Sullivan, A. Swidler & S. Tipton, Hab-

its of the Heart 297-307 (1985); R. Lynd, Knowledge For What? 180-201 (1939);
Essays on the Scientific Study of Politics (H. Storing ed. 1962); Values in Action: A
90. See Kronman, supra note 71, at 967-68.
91. See, e.g., D. Bok, supra note 5, at 74.
mit themselves to outside endeavors. That prospect threatens to harm legal education in two ways. First, excessive external involvement could delegitimize the law as an academic discipline. For example, publication requirements for law professors generally are strikingly modest compared to the standards applicable to faculty in most other disciplines.\(^9\) Extensive outside activities divert time and energy from research, thereby reducing the quantity (and perhaps also the quality) of legal scholarship. This could reinforce the opinions of intellectual traditionalists who maintain that law schools do not belong in universities. Law schools in this view are trade schools whose primary loyalty is to the bar; their existence on campus undermines the cohesion of the academic community and detracts from the central purposes of higher education.\(^9\)

Second, large-scale professorial involvement in public affairs could subvert the autonomy of law schools. Encroachments could arise at the behest of outsiders who view the off-campus activities of law faculty as threatening to their interests or as insufficiently academic in nature. A broad array of evidence suggests the plausibility of this concern. In the sciences, for instance, government support for research traditionally was allocated through an elaborate peer review mechanism designed to insulate funding decisions from the political process. Recently, however, as higher education came to be viewed as just another interest group, Congress has appropriated increasingly larger sums directly to specific universities.\(^9\)

Similarly, the Community Action Program, originally billed as the centerpiece of the War on Poverty two decades ago, ended ignominiously when local political leaders who viewed the effort as a threat to their positions helped to destroy it.\(^9\) Perhaps closer to home for present purposes, Legal Service Corporation lawyers, whose initial successes prompted strong criticism from officials whose policies those lawyers challenged, face significant restrictions on the types of cases they can litigate and the kinds of activities they may perform on behalf of their clients.\(^9\)

\(^9\) See, e.g., Ackerman, supra note 64, at 1133, 1135-36, 1141-44.

\(^9\) See D. Bok, supra note 5, at 71-73; R. Wolff, The Ideal of the University 12-13, 152-53 (1969).


\(^9\) For an account of the rise and fall of community action, see D. Moynihan, supra note 77, at 128-66.

\(^9\) Federal law prohibits legal services lawyers from engaging in electoral politics and severely restricts their lobbying. 42 U.S.C. § 2996e(e)(2), (e)(1) (1982). Other provisions
The concern for law school autonomy from external constraints is not entirely far-fetched. The academy and the bar traditionally have coexisted uneasily. Law schools are accredited by both the American Bar Association and the Association of American Law Schools. Although these organizations generally have worked cooperatively, long-standing tensions between them occasionally surface. During the past fifteen years judges and bar officials repeatedly have expressed concern over the professional competence of recent law graduates, expressions which at times have been accompanied by proposals for imposing extensive new curricular requirements upon law schools. Moreover, law schools rely upon the good will of the bar for placing their students, and many schools obtain financial support from law firms to underwrite various aspects of their educational programs. These factors underscore the fragile independence of legal education. They also suggest that, if the outside activities of law faculty became so extensive as to obscure the differences between law schools and the practicing bar, the practitioners can be expected to attempt to limit the off-campus endeavors of the professoriate.

These considerations will not end the outside activities of legal scholars. As noted earlier, no constituency exists for a monastic view of law schools, and significant intellectual benefits can flow from these activities. At the same time, this analysis simply justifies public involvement; it says nothing about the form and extent of that involvement. Those subjects present a host of complex problems. Space does not permit a complete discussion, but some of those problems deserve brief attention.

Consider first the question of “advocacy scholarship.” Some authors may have pecuniary or other personal interests in the resolution of particular legal controversies. At a minimum, professors should disclose the fact and source, if not the amount, of payments to prevent legal service agencies from litigating certain kinds of abortion and school desegregation cases. 42 U.S.C. §§ 2996e(c)(1), 2996f(b)(8)-(9) (1982). 98. See F. Allen, Law, Intellect, and Education 51-56, 60-62, 64-67, 82-83 (1979).


100. See F. Allen, supra note 98, at 51-52, 83; R. Stevens, supra note 1, at 238-40, 255-57 nn.80-83 & 86-89. Although the most draconian proposals have not been adopted, external pressures have had some impact on law school curricula. For example, the mandatory course on Professional Responsibility was instituted at the insistence of the ABA, which made such instruction a condition of accreditation in response to public concern over the ethical lapses of the many lawyers implicated in the Watergate scandal. See Kissam, supra note 66, at 283-84.

101. See Kissam, supra note 66, at 288-89.
they have received in connection with their written work.102 This small step surely represents progress, but it is a partial solution at best. For example, a dispassionate observer might find it difficult to accept the proposition that the judgments of a scholar who repeatedly obtains funding from interested parties can be entirely independent of the interests of those parties.

Even if an academic has no pecuniary interest in the resolution of a public issue to which his scholarship relates, exponents of the social-science-as-moral-philosophy approach maintain that he almost certainly will have personal views on the subject. The traditional prescription in this situation is for the scholar clearly and carefully to state those views.103 No doubt such a procedure will prove helpful, but its utility can be exaggerated. In many instances, individuals may not find it possible to articulate the influence of their moral, philosophical, or political views.104 Thus, disclosure can serve at best as only a partial antidote for advocacy scholarship.

Participation in litigation, whether as counsel of record (as Professor Emerson was in *Griswold* and *Sweezy*) or as amicus (as he was in *Sweatt*), presents at least two possibly sensitive issues. First, precisely because legal scholars do not typically appear in court on behalf of a party to a lawsuit, a professor's very presence could exert a subtle influence on the proceedings. The precise impact in any given case is difficult to predict, but the decisionmaker (whether judge or jury) could view such a case as unusual in some respect. For instance, because law professors ordinarily would not waste their time on inconsequential matters, some persons might believe that any client who has a professor for a lawyer has an unusually good case. Alternatively, other persons might wonder whether such a client could not get a "regular" lawyer because his case was especially bleak. Whether and to what extent either of these phenomena occurs is unclear, but the recent concern over attorney competence suggests that we should view the possibility as worthy of further consideration.

Second, some members of the public or of the government may

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102. See Douglas, supra note 64, at 232-33; Miller, supra note 64, at 301. For a suggestion that law reviews refuse to publish commissioned works of advocacy scholarship, see Ackerman, supra note 64, at 1147.

103. See, e.g., Miller, supra note 64, at 302-03. For an example of such disclosure in a work of legal scholarship, see L. Tribe, *American Constitutional Law* v (1st ed. 1978), reprinted in *id.* at ix (2d ed. 1988).

seek to retaliate in some fashion against the law school or university if a law professor becomes involved in unpopular or path-breaking litigation. Such retaliation could cause real harm to an institution, particularly if a state legislature or substantial donor withdrew or reduced important financial commitments. With respect to scholarship, the tradition of academic freedom holds that universities are not responsible for the personal views of faculty members and demands that the law school resist external threats of this kind.\textsuperscript{105}

While academic freedom may not extend completely to professorial involvement in litigation and the Constitution may not fully protect academic freedom,\textsuperscript{106} an analogy from first amendment law suggests that university regulation of law faculty involvement in sensitive lawsuits should not be excessively risk-averse. Until shortly after World War I, the federal judiciary almost without exception allowed the government to punish speech which advocated or tended to promote unlawful conduct.\textsuperscript{107} The Supreme Court then haltingly developed the clear and present danger test,\textsuperscript{108} which eventually afforded very strong protection to that type of speech.\textsuperscript{109} Although the analogy may be imperfect, it suggests that law professors should not have to justify their involvement in litigation unless the possible reaction includes something substantially more serious than the mere possibility of adverse consequences.\textsuperscript{110} At the same time, the potentially deleterious impact upon the law school or the university might well be an appropriate factor for a law professor to consider before deciding to participate in any particular case.\textsuperscript{111}

\textsuperscript{105} See, e.g., D. Bok, supra note 5, at 26-27, 299-300.

\textsuperscript{106} See supra note 38 and accompanying text.

\textsuperscript{107} See, e.g., Frohwerk v. United States, 249 U.S. 204 (1919); Shaffer v. United States, 255 F. 886 (9th Cir. 1919). But see Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y.), rev'd, 246 F. 24 (2d Cir. 1917).


\textsuperscript{110} Another analogy from first amendment jurisprudence might be more apt. The Supreme Court has struggled to define the circumstances in which the rights of a speaker must give way in the face of a hostile audience. Although many of these issues remain unsettled, the Court appears to have moved toward according greater protection to the speaker in order to avoid the problem of the heckler's veto. Compare Feiner v. New York, 340 U.S. 315 (1950) with Gregory v. City of Chicago, 394 U.S. 111 (1969) and Edwards v. South Carolina, 372 U.S. 229 (1963).

\textsuperscript{111} Even if no retaliation against the law school or the university actually does occur, the law professor's client might believe that the possibility of such retaliation influenced the professor's handling of the litigation, particularly if the case ends in less than complete vic-
The contemporary law school occupies an unusually ambiguous position. An important segment of a larger university devoted to the production and dissemination of knowledge, it also serves as a training ground for a very practical profession. Law professors therefore have divided loyalties: to an academic community which often regards them with suspicion for their connection to the real world, and to a bar which may perceive their interest in intellectual currents in the arts and sciences as indifference to the concerns of the practicing lawyer.

Educated as advocates and, for the most part, lacking the formal qualifications to contribute to the work of other disciplines, legal scholars generally concern themselves with doctrinal issues. While controversies in other fields are resolved by academicians, the power to determine disputes of concern to law professors rests with external decisionmakers such as courts and legislatures. This feature of the law creates incentives for legal scholars to seek to persuade the external decisionmakers, especially by participating as lawyers in an occasional case or other proceeding.

Thomas Emerson's efforts in *Griswold*, *Sweezy*, and *Sweatt* serve as a lasting reminder that distinguished professors can also be very good lawyers. Those courtroom efforts affected the course of the law and undoubtedly enriched his scholarship and teaching. Yet the very success of such practical work underscores the intractable conflict between the campus and the larger community which all members of law faculties and all law schools must address.