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TALKING OUT OF SCHOOL: NOTES ON THE TRANSMISSION OF INTELLECTUAL CAPITAL FROM THE LEGAL ACADEMY TO PUBLIC TRIBUNALS

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INTRODUCTION.....	000
I. THE PROBLEM	000
II. DISTINCTIONS BETWEEN TYPES OF EXPERTISE	000
A. <i>Generalists and Specialists</i>	000
B. <i>Hard and Soft Expertise</i>	000
C. <i>Summary</i>	000
III. THE IMPEACHMENT LETTER.....	000
A. <i>Generalists versus Specialists</i>	000
B. <i>Hard versus Soft Expertise</i>	000
C. <i>Trademark Consequences</i>	000
IV. PROPOSED CONVENTION	000
A. <i>The Proposal</i>	000
B. <i>An Alternative</i>	000
C. <i>Losses</i>	000
D. <i>A Note on Partisanship</i>	000
CONCLUSION.....	000

INTRODUCTION

This country's law schools taken together comprise a significant legal institution in their own right, one distinguished from all others by the extent of the intellectual capital it can create and by the weakness of its power to effect legal change directly. The transmission of such capital from the academy to tribunals making decisions thus ought to be a significant concern for anyone generally interested in the legal system and problems of coordination between its constituent bodies. But while law professors often sign their names to amicus briefs, letters, and petitions addressed to courts and other decision-makers considering questions of public interest, there are no common understandings of what a professor's signature on such a document means. Likewise, there are no shared definitions of expertise to which anyone might

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appeal in deciding when it is appropriate for an academic to render or join a professional opinion. In effect those questions all are left to the individuals who sign the documents to sort out for themselves however they see fit. This Article argues that the result is a collective action problem that threatens to undercut the valuable contributions to public debate that legal academics legitimately can make. It probably is not desirable or feasible for the profession to make rules about any of these matters, but it may be possible at least to arrive at some conventions that, if followed, would benefit both the legal academy and the institutions that law professors sometimes attempt to advise.

This Article will use as its principal case study the most prominent and controversial recent instance of such an academic contribution: the letter to Congress that several hundred law professors signed arguing that President Clinton should not be impeached.¹ The letter may be part of a trend toward greater use of documents submitted to tribunals with large numbers of signatures from legal academics; there have been a number of significant recent examples.² Even if one disputes the existence of such a trend,³ this is a timely moment to consider the issue because e-mail and similar technologies are rapidly driving down the cost of circulating such documents widely and

¹ See *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 374-83 (1999) [hereinafter *Impeachment Hearing*] (recording law professors' letter to Congress in opposition to the impeachment of President Clinton). Several hundred historians sent a separate letter also arguing against President Clinton's impeachment. See *id.* at 334-39 (recording historians' letter to Congress in opposition to impeachment).

² See, e.g., Law Professors' Letter in Support of U.S. Supreme Court Decision in *Bush v. Gore* (December 28, 2000) (on file with the author); *306 Law Professors Denounce United States Supreme Court Decision* <http://www.pfaw.org/news/law_prof.pdf> (visited December 20, 2000); Law Professors' Letter to the Members of the Florida Legislature (delivered December 11, 2000) (on file with the author); Brief for an Ad Hoc Group of Law Professors and Historians as Amici Curiae in Support of Appellant, *United States v. Emerson*, — F.3d — (5th Cir.) (No. 99-10331) (arguing that the Second Amendment protects the right to bear arms for the purpose of service in the militia and does not prohibit Congress from restricting firearm ownership unrelated to militia service); Brief Supporting Appellee of Amicus Curiae Academics for the Second Amendment, *United States v. Emerson*, — F.3d — (5th Cir.) (No. 99-10331) (contra); 146 CONG. REC. S2985-86 (daily ed. Apr. 27, 2000) (recording law professors' letter to Congress in opposition to the Victims' Rights Amendment to the Constitution); 144 CONG. REC. S10, 552-53 (daily ed. Sept. 18, 1998) (recording law professors' letter to Congress in support of the Partial-Birth Abortion Ban Act); 135 CONG. REC. 24,984-86 (1989) (recording law professors' letter to Congress in opposition to a constitutional amendment forbidding flag burning).

³ See Cass R. Sunstein, *Professors and Politics*, 148 U. PA. L. REV. 191, 191 (1999) (stating that although it is important to question the "legitimacy and consequences" of the involvement of professors in politics, "[i]t is not clear that there is anything like a trend in this direction").

soliciting signatures on them from thousands of professors.⁴ While the impeachment letter no doubt may come to be seen as an extreme case because of the very large number of signatures it attracted, the recent exchange between Professors Neal Devins and Cass Sunstein suggests its usefulness as a case study on the role of law professors in public debate in general and the impeachment controversy in particular.⁵ The debate was noteworthy for the absence of standards to which either side could point in arguing about whether the academics who signed the letter had sufficient expertise. Sunstein supposes that the signers of the letters opposing impeachment “probably believed that they knew enough—from training and from substantive conversations with colleagues—to have a reasonably informed opinion;”⁶ they “likely thought, in good faith, that they knew enough about the constitutional provision to conclude that an impeachable offense had not been made out. It is hard to see why there is anything untoward here.”⁷ Devins replies that a good faith standard of that sort would allow academics to hold themselves out as experts on all sorts of issues that they have not studied.⁸ But having said what expertise is not, Devins does not quite say what it *is*; he just says that academics only should sign letters that they would be ready to defend in public.⁹ Yet with this Sunstein fully agrees.¹⁰ Devins adds that “academics should embrace both ideological diversity and dialectic reasoning (where each thesis is challenged by a counter-thesis),” and that they should have a “commanding knowledge of the relevant sources” bearing on the positions they take.¹¹ This sounds right, but is likely to be too vague a standard to have much practical use.

This Article suggests that the impasse Devins reached with Sunstein arose from the absence of norms about expertise to which anyone can appeal in these sorts of debates. Its purpose is to initiate discussion of—and to propose—

⁴ See Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165, 173-74 (1999) (recounting that copies of the impeachment letter and a companion letter were distributed for signature through e-mail and the Internet).

⁵ Compare *id.* at 165 (arguing that by signing the impeachment letter, many professors “placed partisanship and self-interest above” truth-seeking) with Sunstein, *supra* note 3, at 202 (arguing that professors who signed the impeachment letter “founded their overwhelming opposition to the Clinton impeachment on a commitment to truth”).

⁶ Sunstein, *supra* note 3, at 195.

⁷ *Id.* at 196.

⁸ See Devins, *supra* note 4, at 187 (arguing that Sunstein’s good faith standard would allow “every law professor [to] speak as an expert on any issue”).

⁹ See *id.* at 189 (“When it comes to letter writing . . . academics should only sign letters that they could (if asked to) defend in public.”).

¹⁰ See Sunstein, *supra* note 3, at 196 (“I agree with Devins that people should not sign petitions when they are unable to defend the relevant position publicly; but I would give the signatories the benefit of the doubt on this point.”).

¹¹ Devins, *supra* note 4, at 189-90 & n.109.

conventions for law professors who render professional opinions in the course of public debate. Specifically, this Article argues that when academics offer opinions in their professional capacities, they should use the same care and have the same expertise called for in their published professional work, or should disclose that they are adhering to a lesser standard. Equivalently, they should not sign documents unless they would be ready to defend them orally in the tribunals to which the documents are being presented.

Part I of this Article sketches the nature of the collective action problem created by academics who sign documents indistinguishably on the basis of different levels of expertise. Part II demonstrates that some contributions of academic opinion to a tribunal are more valuable than others, even if the academics making the contributions are equally confident that what they are saying is correct; there are important differences in value between contributions made by generalists and specialists, and contributions made on the basis of “hard” expertise (involving factual representations) and “soft” expertise (involving normative judgments). Part III applies these distinctions to the law professors’ letter to Congress opposing the impeachment of President Clinton. Part IV discusses the proposed convention for legal academics to follow in deciding whether to sign an opinion addressed to a court or legislature, and adds a few notes on the problem of partisanship.

I. THE PROBLEM

Is it a problem if legal—or other—academics have no shared understanding of the expertise that ought to be expected if they participate in public debate? What business is it of anyone else if a law professor wants to participate casually? Whether a problem exists has to be measured, of course, by reference to the goals of the participation. The following discussion assumes that the relevant value at stake is the ability of academics to help public bodies increase their likelihood of answering legal questions correctly, or answering them better, by contributing the results of the sustained kinds of inquiries that academics are uniquely positioned to undertake. The legal academy can be analogized to a hypothetical firm with about 8,000 employees and offices in every major city. The firm is a non-profit enterprise dedicated to creating knowledge and other sorts of intellectual capital. On occasion the firm’s accumulated capital becomes valuable to other legal institutions, most obviously when the other institutions confront questions of public interest requiring greater knowledge than they have time to acquire. If the firm were dedicated to maximizing the quantity and quality of the contributions to public discussion that it makes on those occasions, and if it were operating in a competitive environment so that it felt the consequences of its failures, what policies or standards would it adopt to serve that purpose? Think of opinion committees at law firms. The analogy might seem too far afield because the legal academy is not under the sort of governance to which firms are subject; it is a collection of independent actors who decide for themselves whether, when, and how to contribute their knowledge to other institutions. But conventions

among academics can serve some of the same purposes that rules serve in a firm, so it nevertheless may be fruitful to consider what norms in the academy would best facilitate the communication of intellectual capital to other public institutions.

The value of an academic contribution to public debate increases in proportion to the expertise behind it. Unfortunately, academics sometimes contribute to public debate indistinguishably on the basis of greater and lesser expertise, and this creates difficulties for their colleagues and consumers of their opinions. The difficulties arise because when a legal academic takes a position in public and identifies himself as a “law professor,” he is trading on the equivalent of a trademark in that title. If academics regard the significance of that title differently—in other words, if they use it to connote varying levels of expertise without making this clear—the same general risks follow here that one might expect in any case where a trademark is employed carelessly: confusion of the consumer and dilution of the mark.¹² The firm has a problem of brand management.

The extent to which law professors trade on the “law professor” title when they offer opinions—and thus the extent to which their behavior is of interest here—varies. A long and anonymous letter to the editor written by a law professor is the consummate example of trading on substance rather than on a professional title. An extreme example of trading on the “law professor” title arises if an academic publicly offers a conclusion plus his signature and title, without more. This is especially true if he is not well known to the consumers of his conclusion, so that his professional title has greater significance to them than his name.¹³ This often is the case when academics add their signatures to briefs or letters. In this situation there may be solid arguments in the document, but they have all of their force once they are written; extra signatures do not add to their persuasiveness *per se*, and by assumption the signers are not contributing anything substantive. What the signatures are meant to add is a warranty: those who sign assert that as “law professors” they have the expertise to evaluate the arguments and that they endorse them. The academic who signs an argument written by someone else thus trades in part on his title, and on the strength of the mark it represents, rather than on his own ability to make an argument. This may be unobjectionable, but it means that other academics and consumers should pay attention to whether he is treating the mark properly.

¹² See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 2:33, 24:70 (4th ed. 2000) (discussing that trademark protection is based on the prevention of both consumer confusion and the dilution, or “gradual attenuation,” of a mark).

¹³ Cf. Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1108-09 (1995) (explaining that even though a client of a prestigious law firm may not know a particular lawyer who works for the firm, the name of the firm “speaks volumes” about the lawyer to the client).

For analytical purposes, the problem can be further explored by reducing the spectrum of law academics to two types: experts and kibitzers. For now regard these just as relative terms denoting academics with greater and lesser knowledge of a subject compared to one another; later in this Article the terms will be given more definite content. Assume that both experts and kibitzers are more knowledgeable about the subject at issue than most laymen; that the typical law professor is equipped to serve as an expert about a few things and as a kibitzer about many things; that on any given legal question of general interest there is a relatively small number of experts in the academy and a much larger number of potential kibitzers; that the opinions of experts are a good deal more valuable to people making decisions than the decisions of kibitzers; and that both kibitzers and experts sign many amicus briefs and letters to Congress on various subjects. The word “kibitzer” might be thought too tendentious as a category for analysis; it has belittling overtones and so assumes the truth of this Article’s eventual conclusion, which—to ruin the suspense—is that academics who pontificate in public without the expertise expected of them in their professional work injure their colleagues and consumers alike. But the foregoing disclosure should put the reader on sufficient notice of the risks involved in using the word, and in any event the word is not all bad. Everyone is a kibitzer some of the time; there is such a thing as good and very useful kibitzing, and all academics have colleagues whose thoughtful kibitzing they may regard as more enlightening than the serious scholarship of others.

If a law professor is promiscuous in offering or lending support to professional opinions on subjects about which he has relatively little expertise, one might expect his reputation to suffer and consumers to gradually take his opinions less seriously. (The reader may be able to think of prominent examples.) Consumers will recognize him as a chronic kibitzer. This may not suit his purposes in the long run, since it will damage his ability to offer opinions that are regarded as credible and important. But because the kibitzer internalizes the cost to his reputation he can make that decision for himself. In effect every law professor has a trademark in his own name¹⁴ as well as in his title, and is free to build up or squander the capital behind it. On this view, shared understandings between peddlers of academic expertise may be no more important than perhaps they are between sellers in many vigorous

¹⁴ Cf. BRUNO BITZI, DER FAMILIENNAME ALS MARKE 31-33 (1972) (discussing German trademark protection for family names):

In response [to the theory that, where trademark and family name are identical, the line between the two becomes blurred], the following is to be remarked: the mark, which consists of the family name, is and remains a trademark, i.e., an exclusive means of identifying products. Its individualizing function arises in human consciousness through the connection of the word (“family name”) and specific products. The family name performs the same function, by means of the same process of consciousness, for a group of people as well.

Id. at 31 (translation by David R. Franklin).

commercial markets, who are free to adhere to their own odd standards of quality and pay the price. If they sell bad goods, eventually people will stop buying them. The seller of automobiles that are lemons is likely to destroy his own reputation and thus be driven from the market before he does too much damage to the reputation of car dealers generally. Such a seller internalizes at least some of the costs of selling lemons, and in the course of trying to protect his own good name can be expected to protect the good name of his profession.¹⁵

Alas, analogies between this sort of well-functioning market and the “market” for academic expertise turn out to be badly flawed. Their strong point is that full information on the part of the consumers—here, the courts, legislatures, and other bodies to whom academic opinions are addressed—can compensate in part for shortcomings in the production of the good. If a scholar is a kibitzer, this may not be a serious problem if consumers of his opinions are aware of it. But kibitzers do not make such disclaimers, and without them the consumer often is in no position to tell whether the kibitzer is selling him the intellectual equivalent of a lemon. Unlike consumers of automobiles, and like consumers of opinions of other professionals—e.g., doctors and lawyers¹⁶—consumers of academic opinions often are in a poor position to monitor the quality of the input that they are receiving. They mostly rely on the purveyors of opinions to police themselves. If an academic shows that he has produced scholarship elsewhere addressing the point at issue, his credentials as an expert may be easily established; but otherwise it will be very difficult for a consumer to try to figure out how much real expertise the academic has brought to bear in offering the opinion. Indeed, the difficulties here in some ways are worse than when consumers take advice from doctors or lawyers because in those cases the quality of the advice at least may become clear with time. If the doctor’s advice is poor, his patients will do badly. The doctor’s reputation will suffer and he may be sued. The opinions that legal academics offer often are not falsifiable even in principle, however; and even when they are, too little is known about the consequences of many legal decisions to enable such opinions to be falsified decisively as a practical matter.

If consumers of academic opinions cannot tell whether their purveyors are experts or kibitzers, the most likely consequences are consumer confusion or dilution of the “law professor” mark. Confusion occurs if consumers react to their uncertainty by imagining that when law professors offer opinions in their professional capacities they always speak as experts and so give the views of kibitzers more weight than they deserve. This is the risk of *naïveté*. The other risk is *cynicism*, or dilution of the mark, which occurs if consumers react to

¹⁵ Cf. 1 MCCARTHY, *supra* note 12, § 2:4 (explaining that the uniformity of quality of products in a given market, or profession, may result from the use of trademarks).

¹⁶ See Eric A. Posner, *Agency Models in Law and Economics*, in CHICAGO LECTURES IN LAW AND ECONOMICS 225, 234 (Eric A. Posner ed., 2000) (explaining the difficulty patients and clients face in monitoring and evaluating the “output” of doctors and lawyers).

their uncertainty by concluding that law professors do not take their own expertise seriously enough. Consumers who see law professors offering opinions too casually might justifiably conclude that such opinions often reflect political preferences rather than serious scholarly expertise on the part of their purveyors. The kibitzers end up reducing the ability of scholars with genuine expertise to send strong, credible signals to decisionmakers, because the kibitzers have diluted the “law professor” trademark. Consumers who would benefit from genuinely expert views are worse off still.

The apparently self-correcting case, where an academic is so promiscuous in offering opinions that consumers stop taking him seriously as an expert, can occur only when the professor is prominent enough to have a strong trademark in his own name and the audience is attentive enough to realize that he has spread himself suspiciously thin. The vast majority of academics are neither well known enough nor intellectually promiscuous enough to be confronted with such a risk. An additional danger is that consumers may more broadly conclude that if one law professor seems to be something of a “bozo,” they will not only take him lightly but will take law academics in general more lightly. Maybe *many* of them are bozos. This case is distinguishable from that of the car dealer who avoids selling lemons to protect his own reputation, and thus protects the reputation of his profession as well. The car dealer risks being driven out of business; the kibitzing academic does not, and is subject to very weak discipline from the market. The kibitzing academic may run a risk that consumers will take his opinions somewhat less seriously, but for him the benefits of aggressive kibitzing may offset this cost: being on television a lot, weighing in on all sorts of legal issues of public interest, and so forth. The kibitzer is more analogous to a shirking franchisee whose abuse of a trademark brings him more costs than benefits, but also imposes costs (and no benefits) on other users of the same mark.

The resulting situation amounts to a collective action problem. Decision-making bodies that take input from academics are better off if academics hold themselves to high standards of expertise in deciding whether to lend support to some expression of legal opinion. But if most scholars obey that norm—and even more obviously if they do not—there is a temptation for any individual to use a laxer standard in making his own decisions. By doing so he may have a chance to advance some cause that appeals to him either by taking advantage of the higher expectations created by the restraint of others, if they are being more discriminating, or, if they are not, by just doing what everyone else does. Consider this the “bad man” theory of academic participation in public debate. A more generous reading of the situation is possible, however, and indeed is more plausible: academics are participating in a collective action game without any clear notions of what counts as cooperation; each thinks he is making contributions to the public interest, but may be undermining the ability of anyone to make such contributions effectively. Because kibitzers frequently may sign briefs and petitions, and because kibitzers often have strong opinions that to them seem reasonable and justified, they may not feel that they are

defecting when they offer their opinions. So the foregoing statement of the problem does not assume bad faith on anyone's part. It only suggests that it would be useful to have a convention to coordinate the standards academics use in deciding they have the expertise needed to support a professional opinion—a norm based on analysis of what behavior best would serve the interests of the various parties to the advice-giving game.

II. DISTINCTIONS BETWEEN TYPES OF EXPERTISE

The contributions that academics can make to public decisions might be illuminated if recast in terms of *hours*. The likelihood of a correct or good public decision improves as more ideas and information—i.e., intellectual capital—are brought to bear on it. Ideas and information take time to create, and so can be conceptualized in terms of man-hours put into the study of a question. But the decision-makers—judges, legislators, citizens—have other decisions to make, too, so they do not have as much time as they might like to learn about the considerations bearing on the question at hand. There are countless things one might *like* to know before deciding any question of law or policy. So the decision-maker “imports” time by hearing from others who have fewer decisions to make and can spend more time on this one—e.g., a lawyer or an academic. A judge and his clerks might be able to spend a total of fifty hours examining some question raised by an appeal. A lawyer on the case might have spent more time than that studying the question or the facts to which it applies, so his brief and argument have the potential to be helpful. An academic has an opportunity to focus on the issue that is greater by still another order of magnitude: he might have spent thousands of hours examining the question; if he can distill those hours into findings usable by a court, his input has the potential to multiply vastly the number of hours of research and study that the court's decision reflects, and thus improve the quality of the result.¹⁷

I want now to introduce some distinctions that are useful in thinking about expertise and “hours” but that often go unattended. The first is the distinction between opinions offered by generalists and by specialists; both may offer opinions with an equally high sense of confidence, but the views of the specialists are more valuable. The second is the distinction between opinions reflecting hard expertise and soft expertise, where “hardness” refers to the factual knowledge as opposed to the normative judgment reflected in the expert's opinion. The greater the factual component of the expertise, the more valuable it is likely to be to a consumer of the opinion—though again, opinions based on harder and softer expertise may be offered with the same sense of confidence on the academic's part. Indeed, a principal goal of this analysis is to show that the academic's own sense of confidence that he is correct is, by itself, weak evidence that his opinion will have much value to a tribunal

¹⁷ Cf. ALAN WATSON, *THE MAKING OF THE CIVIL LAW 171-72* (1981) (discussing the role of academics in contributing to judicial decisions in civil law jurisdictions).

making a decision.

A. *Generalists and Specialists*

The hours that academics can contribute to a problem may have been spent in a variety of different ways. There are background hours spent acquiring a generalist's expertise in a field, and foreground hours spent acquiring specific expertise about a problem. An economist may have spent many thousands of hours studying economics, and only a dozen examining the precise question on the table. Maybe he only needed a dozen hours to form his conclusion, or maybe he should have spent more time on it; in any event, figuring out how many hours he is contributing when he offers his opinion in these circumstances is tricky. The more background hours one has spent in the study of a field, the fewer the hours generally needed to form a conclusion about any specific question. But a generalist may also put his expertise to use alone as the basis for an answer to a relatively easy question, rather than as a quicker way to obtain specific expertise when necessary.

This distinction between generalization and specialization is important because academics often are asked to sign documents to which they bring only the knowledge of a generalist. Sometimes a generalist's knowledge is very useful to a decision-maker; often it is not. Any claim of expert knowledge has two dimensions: first, the distance between the knowledge of the putative expert and the knowledge of a layman, or of whoever the expert is attempting to advise; second, the distance between the knowledge of the putative expert and that of anyone who has more relevant knowledge than he does. This latter dimension is an important corrective to the fallacy that anyone who knows more about his subject than his audience is an expert. Rather, clear cases of expertise arise when the expert knows much more about a question than a layman does, and nobody knows more about the question than the expert does. The most accomplished members of an academic department typically fall into this category with respect to the questions that are their specialties.

Claims to the expertise of a generalist are slippery because they not only fall between those poles but can arise at almost any point between them: a generalist is anyone who knows more than the consumer of his opinions but less than a specialist. The *useful* generalist is one who has knowledge much greater than the consumer does, and whose knowledge about the question he is addressing is not surpassed in any *relevant* way by specialists. A general practitioner treating a conventional illness implicitly asserts that even if there are others who know more than he does, they all would agree with his view about how the patient's ailment should be treated. A generalist, in other words, normally makes two representations, whether they are spoken or not: one on the merits of the question and another on his own competence to answer it. This latter representation of competence, reflecting a kind of "jurisdictional" claim about expertise, is very important because the consumer of such an opinion often cannot tell how much there is to know about a question.

Suppose a doctor writes a book recommending a diet heavy on meat and other sources of protein and light on breads and other sources of carbohydrates. In the book he makes extensive arguments about the effects of such a diet on the activation of various hormones and other elements of human physiology. Four hundred doctors sign an open letter in a major newspaper condemning the diet as unsafe. The letter criticizes the diet in broad strokes. Two weeks later it is discovered that a few of the doctors who signed the letter were specialists on the relevant hormones or on nutrition, but that many who signed were podiatrists, psychiatrists, or limb reattachment specialists. When reporters interview one of the podiatrists about the extent of his expertise, he says the diet seems obviously unsafe to him because it involves the consumption of lots of meat, and as everyone knows, eating lots of meat can cause heart attacks. These revelations about the podiatrist's expertise would likely disappoint those who took the letter and its signatures seriously; a lack of disappointment would be a grim commentary on the public's expectations of the medical profession. The question is not whether the podiatrist was right or wrong. The question is what a doctor is purporting to say if he makes public claims about a medical question. The signature of the hypothetical podiatrist did not reflect much deeper knowledge about the diet and its consequences than what consumers of his opinions knew or could figure out for themselves, and the podiatrist knew much less about the issues raised by the diet than his specialist colleagues. If he had disclosed the extent of his expertise, there would be relatively little cause for concern. Because he did not, consumers of the opinion represented by his signature and title may have imagined that they were receiving more substantial expertise than they were. Now repeat the hypothetical, but this time with a document letter addressed to a legislature worried about the diet's popularity and considering whether to revise its recommended nutritional guidelines, or a brief to a court considering some sort of tort action against the book's author by a plaintiff the diet has allegedly injured. It should be even more obvious here that the consumers expect more than the knowledge furnished by the podiatrist.

The same point holds in contexts such as law where the important questions may not be subject to answers that can be considered correct in an empirical or otherwise verifiable sense. The point is subtler here because the generalist's likelihood of being "correct" may no longer be a meaningful benchmark to use in assessing his expertise; nor is the strength of his confidence in his answer. The relevant question is how the intellectual capital represented by his position on the issue compares to the capital impounded in the views of specialists. There are academics who have a firm view about whether the Second Amendment should be understood to prevent states from banning handguns, but who are not experts on the issue. They may have read no scholarship about it, and may know few of the details of the arguments that specialists make one way or the other. They nevertheless may be confident in their conclusions, and be sure that the consumption of scholarship or other forms of expertise would not change their minds. Still, if that question became important to you but you

knew nothing about it, you would not give the views of those generalist academics much weight; if you thought the issue were amenable to illumination by experts, you would want to hear from one who knew all there was to know about it. Opinions about whether the Constitution should be read to protect the right to have an abortion, about gun control, and about the desirability of affirmative action are additional examples of areas where a confident and even irrevocable view and an expert view are quite different things. A randomly chosen law professor may know more than a randomly chosen layman about any of these issues, and have confident views on them as well; yet he still may not be in a position to speak about them as an expert, at least without an extensive disclaimer. There are other law professors with relevant knowledge that he lacks. The unshakability of the opinion that a generalist academic may hold in these circumstances is a testament not to his expertise, but to the weak ability of scholarship and argument to force people to change their minds about such issues.

The important questions in deciding whether a generalist can speak as an “expert” on a normative question, then, are not whether he is confident in his view or whether more expertise would change his mind. The important questions are ones like these: if the responsibility for making this decision was yours alone, would you want to have a specialist’s knowledge before you made it? Would you expect the person who did make the decision to acquire that sort of knowledge? If you were forced to let a person other than yourself make the decision, and you were permitted to know nothing about him except the extent of his expertise, would you care whether he was a generalist or specialist? If the answer to these questions is “yes,” then the additional knowledge that specialists possess is relevant and important; the generalist’s opinions, even if confident, are not a good substitute.

B. *Hard and Soft Expertise*

A second set of problems concerns the character of the expertise that results from the academic’s labors. Some sorts of expertise are likely to be more valuable than others to a tribunal making a decision. I hypothesize that the practical usefulness of an assertion of expertise to such an audience—particularly of the authoritative variety (i.e., a conclusion plus a signature)—rises in proportion to its factual and empirical basis (which I will call its “hardness”), and drops in proportion to its theoretical and normative content (“softness”).¹⁸ Examples of relatively hard expertise include historical or

¹⁸ Judge Posner distinguishes between “hard” and “soft” academic subjects but includes history among the soft. See RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 230-31 (1999). A “hard” field, according to Posner, “is one in which agreement on the methods for resolving disagreements enables consensus to be forged despite the differing political agendas of the practitioners.” *Id.* at 240. My usage of the terms is similar, but focuses on the extent to which the expert makes potentially verifiable factual claims.

economic knowledge that has a high informational component.¹⁹ Examples of soft expertise include most questions of political value; most questions of ethics, morality, and other philosophical issues; and theories of constitutional interpretation. Soft expertise also encompasses judgments about the comparative weight that a decision-making body should give to disparate or incommensurable considerations—e.g., trade-offs between the value of adhering to precedent and the value of answering a question correctly, or between the separation of powers and the enforcement of norms of equality. These are questions on which one distinguishes experts from others less by what they know than by how long, how deeply, and how cogently they have thought about the issue.

Almost any decision worth worrying about requires some expertise of both the hard and soft types, and good judges and legislators frequently distinguish themselves by their expertise in various of the soft, normative varieties. There nevertheless are practical constraints on how academics can contribute that sort of expertise to public tribunals. Arguments or other demonstrations that manifest soft expertise may be effective, but appeals to authority *per se*—e.g., conclusions offered in the hope that the expertise of their authors alone will entitle them to weight—tend to accomplish little when the expertise is soft. If a scholar who is an expert on a historical question of fact attests that his answer is thus-and-so, others may give his conclusion significant weight just because he is an expert and is considered very likely to know the correct answer. But if an ethicist offers a comparable conclusion about an ethical question, or if a constitutional law professor offers a normative conclusion about the best way to answer a legal question, others are less likely to defer to those conclusions as such. There are several reasons for this:

1) The existence of hard expertise is relatively easy to demonstrate and verify. An academic using historical or economic knowledge to answer a question can explain what methods he used to arrive at his conclusions, and present factual results of his inquiries that a tribunal can verify. Likewise, it is easy enough for a court to determine that it *lacks* hard expertise on a question—that there is relevant historical information it does not have, or relevant economic tools it does not know how to use—and so to defer to experts who have these things. Expertise of the softer types—about what is ethical, for example, or about how the Constitution should be interpreted—is harder to verify, both for tribunals willing to receive it and for people who suspect that they have it themselves. Verification of soft expertise is empirically difficult because the author of the opinion may have no easy way to document the quality of his normative judgments or the methods he used to reach them. It also is conceptually difficult because even in principle it is not clear what it means to be an “expert” on many normative questions. The implications of expertise are different in different fields. A scholar might

¹⁹ Knowledge from the physical sciences is a clearer example, but this Article is just concerned with examples likely to be relevant to the resolution of questions of law.

spend forty years studying ethics or moral philosophy and have insightful things to say as a result, but nobody would conclude from this that they should defer to his conclusions about what is ethical, which may be entirely unpersuasive. It is perplexing but quite possible that he might be a first-class expert in that his views represent a gigantic investment of intellectual capital, but that at the same time he might be unable to convince anyone in the world that his views are *correct*. This possibility makes it hard to say what it means to be an expert on such issues in a sense useful to a tribunal making a decision; more precisely, it reveals that in some fields—the softer ones—expertise does not invite deference by others.

Sometimes law is like this—“sometimes” because expertise on law can mean countless different things. Take an assertion of this sort: “The Nazis should have just as much right to march as anyone else does.” This is a statement—along with its contrapositive, i.e., “the hell they do”—that could be made as easily by a law professor as by a cab driver, and perhaps with an equal or greater felt sense of confidence. In what sense could it reflect useful expertise, rather than being a normative opinion of the “garden” variety? It could reflect knowledge of various relatively hard sorts: knowledge of the relevant case law, and of what result best squares with it, or knowledge about the consequences of similar legal rules that have been tried in the past. Knowledge of both sorts often is inconclusive, however, in that people who know all there is to know about those things still disagree strongly. So *then* what does expertise mean? Generally it means the person has thought about the issue long and hard, and probably has written about it. Yet it may then be that the dividend of all these labors is a lovely, well-known, and yet widely unconvincing *theory* about free speech, rather than an entitlement to any deference from those making decisions about it. In that case, tribunals—or anyone else—are unlikely to be interested in knowing merely that the academic is an expert and that his conclusion is this or that. They will insist on an independent demonstration that his views are convincing.

2) Because of the absence of clear standards for what counts as expertise on many normative questions, it is easy to confuse strong opinions with expert opinions about them. They are not the same, but they may appear the same. Moreover, because many normative fields are “weak” in that their theories do not lend themselves to falsification, it is comparatively easy for political preferences to contaminate expertise on them. Academics working in empirically rich areas are constrained to some extent by their data. In most departments of constitutional interpretation there are few facts apart from the case law; there only are values and arguments, the impressiveness of which routinely tend to correspond with the sympathy of their makers for the results the arguments generate.²⁰ As well they might: in the absence of information

²⁰ See, e.g., Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHI. L. REV. 1071, 1111 (1993) (book review) (discussing the apparent correlation between many academics’ constitutional theories and policy preferences).

that can, when accumulated, amount to expertise, the aspiring expert has to find other sorts of raw materials that can provide a basis for his conclusions. The translation of values into theories, and the pursuit of their implications, are natural candidates. This can be done impressively or unimpressively, but its persuasiveness often will be limited by the extent to which the values behind it are agreeable.

The point can be put a bit more strongly. Whereas the purpose of work in relatively hard fields is to generate answers that others eventually will be compelled to accept—e.g., historical or economic conclusions—the purpose of a theory in a soft field typically is to take values or compelling intuitions and weave them into a coherent intellectual framework. If those values are so widely shared that they can bear the same foundational weight as empirical facts, a theory that accounts for them may indeed compel agreement; but commonly the relevant values are themselves controversial. In that case, the expert academic theorist is less like an expert on which mushrooms are poisonous and which are safe to eat, and more like an expert on modern art. He has the power to say remarkable and stimulating things that attract notice, but not the power to command deference from others trying to decide what they should *buy*. Deference from others is just not one of the payoffs of expertise in a soft field.

Concerns about the commingling of expertise and values can be mitigated if the background values held by the experts are understood to be the same as those of their audience, for then the expertise is somewhat less valuable but is not likely to do *harm*. But if a consumer of academic opinion perceives that an academic field is dominated by people with political values different from his own, he may be especially wary of receiving soft expertise from them because any contamination will be from values that he considers alien and unwelcome. Naturally this is a risk for the academy, the political values of which often do not correspond well with the political values of tribunals that are consumers of academic opinions.²¹

Another way to see the problem is by thinking of the consumption of expertise as a surrogate for first-hand study. The judge confronted with a hard question of fact might regret that he does not have years to become an expert on both the relevant history and the relevant economics. But it might be nearly as good for him to hear from academics who *have* spent years on the relevant history and economics; to the extent their expertise is based on their knowledge and understanding of facts (is “hard”), they might be able to tell

²¹ See Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 780 n.54 (1998) (reporting that “[a] large majority of [law professors] (75.4%) characterized themselves as ‘moderately’ or ‘strongly’ liberal or left” in a recent survey of the academy). With a Republican Congress and a fairly conservative Supreme Court, it seems safe to venture that consumers of academic opinions in those bodies do not share the same left-leaning political values of a “large majority” of legal academics.

him approximately what he would know and think if he had spent as much time studying the question as they have. That, after all, is what the consumer of an expert opinion often wants: not to be told what to do, but to improve his ability to decide what to do. He most wants to know not what experts think, but what he would think if he himself were an expert. Soft expertise tends not to work quite that way, however. It would be less plausible for a judge to imagine that when he hears from moral philosophers, he hears what he would think if he had been able to take years off to study the moral philosophy bearing on his question. The reason for this is that moral philosophy is deeply wound up with questions of value that hours of study do not necessarily cause to converge. Much the same can be said for normative constitutional theory. Some views may be more thoughtful or better informed than others, but in most cases they tend to be too intertwined with political values to allow a consumer of academic opinion to assume that he is being told what he would think if he had as much time to spend on the issue as the experts do. Since he cannot make that assumption, he is likely not to take appeals to expertise on those issues as seriously as he might when the expertise involves issues with a sturdier factual core. The difference is one of degree, naturally, since it often is hard as well for historians or economists to offer views uncontaminated by values that the consumer may or may not share.

3) It is plausible to suppose that academics tend to have high levels of hard expertise—i.e., expertise in areas with a strong informational component—because they more than most others have the time and skills to acquire it. Expertise of the softer varieties, however, cannot be accumulated dependably through long hours of effort. Sometimes, as where it entails artful judgment or difficult problems of value, such expertise may be a function of experience and character as well as instruction and reflection. The insulation from the practical difficulties of governing and judging that academics enjoy allows them to generate and analyze ideas in an independent and sustained manner, but it also has the potential to render their value judgments and normative views eccentric and unreliable—at least from the perspective of public tribunals—because their opinions have not been tempered by experience.

The same goes for the ability to offer sound legal judgments. The acquisition of prodigious powers of judgment is a worthy goal for a law professor as for anyone else. Yet it would not be fair to conclude that law professors are a group to whom others would or should defer on questions of normative judgment. Agreeable judgment is not the most important determinant of professional academic success. It is the intellectually innovative candidate who is most likely to get hired and succeed professionally, and ingenuity is not the same as dependable judgment. The traits may be opposed. On any law faculty there often will be academics who would make fine judges, and others who would not; but high marks on that scale are not necessarily likely to match up well with a list of the same faculty's best known members, whose intellectual handsprings may be very

much admired but who nobody would want to see making important legal decisions. The same could be said for the legal academy as a whole. This is one of the reasons why there is not a particularly well-worn path from scholarly stardom to stardom in judicial or administrative fields.

4) Some types of expertise are of greater interest than others simply because those making the decisions are more interested in some criteria than others. A historian's amicus brief may be of greater interest than a philosopher's brief because a court is more interested in using history than philosophy as an input into its decisions. I am not arguing against the value to legal tribunals of soft academic expertise; in many contexts that value may be questionable,²² but potential consumers of academic opinion, like trial judges deciding whether to admit expert opinions, have to decide for themselves whether an issue they are considering lends itself to illumination by experts of various sorts. I merely am pointing out that the value of soft expertise varies because the interest of judges and others in receiving such expertise varies, and that it varies more than their interest in being informed of facts relevant to their decisions, which tends to be high. Thus, there may be normative philosophical disciplines that are ignored despite being relatively "hard" and resistant to the problems outlined above: it is easy to tell who the experts are; the experts have a large comparative advantage in what they do over everyone else; and perhaps there is not much danger of their work being contaminated by politics; yet nobody pays attention to them. Formal logic is a possible example of such a field. If public tribunals ever decide to base their decisions on formal logic, academic formal logicians may find themselves in demand as experts and their conclusions may then receive some deference. For now, they do not.

C. Summary

The expertise that academics offer to public tribunals varies in value along at least two dimensions: the degree of specialization that the academic has brought to bear on the question and the extent to which the expertise is a matter of factual knowledge or normative judgment. The accumulation of normative, or "soft," expertise may be a highly worthwhile goal for an academic; my claim is just that expertise of that type is less likely than expertise of the more factual variety to be of interest to a judge or legislator making a decision when it is transmitted by a statement with an academic's signature at the end. A public tribunal is more likely to value hard, factual expertise offered by specialists than soft, normative expertise offered by generalists. The following table summarizes some examples of how the categories of expertise may be combined:

²² See generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) (arguing that moral theory is of little value to courts). For responses to Posner's arguments, see the collection of essays at 111 *HARV. L. REV.* 1718 (1998).

	Generalists	Specialists
Soft Expertise	Non - constitutional legal academics offering opinions about abortion.	Moral philosophers who have written about abortion offering their views on the subject.
Hard Expertise	Law professors who have thought about the use of firearms but who have not studied the subject offering opinions about the likely consequences of gun control.	Academics who have studied the history of the Second Amendment offering views about its original meaning; social scientists who have studied the use of firearms offering views about the likely consequences of gun control.

III. THE IMPEACHMENT LETTER

The distinctions just considered suggest that academics' views, even when offered with a uniformly high feeling of confidence, nevertheless may be far from uniform in their value to a consumer. Equipped with these distinctions, we now are in a position to examine the law professors' letter to Congress opposing President Clinton's impeachment as a study in some of the difficulties that can arise in the transmission of expertise from the academy to other institutions. The letter consisted of three pages of argument signed by 430 law professors.²³ In addition to constitutional scholars, legal academics with areas of specialty as diverse as antitrust, patent law, employment law, international law, criminal law, legal history, and civil rights also signed the letter.²⁴ While the signatures on the letter no doubt represented a wide range of expertise about impeachment, it will be useful for analytical purposes to focus on two most likely sorts of representations that those who signed the letter could have been making:

- 1) *The expert's implied warranty*: "I have used the skills and resources to which I have access as an academic to study the question of impeachment; I have the same sort of expertise about the letter's claims that I have about the claims I make in my usual published work as a law professor."

²³ See *Impeachment Hearing*, *supra* note 1, at 374-83 (recording law professors' letter to Congress in opposition to President Clinton's impeachment); see also 145 CONG. REC. S192 (daily ed. Jan. 14, 1999) (Trial Memorandum of President Clinton) (citing letter signed by "430 Constitutional law professors" for the proposition that "the substance of the articles [of impeachment] does not amount to impeachable offenses"). The reference to a letter signed by "430 Constitutional law professors" by President Clinton's lawyers was inaccurate; many of the law professors who signed the letter were not professors of constitutional law. See *infra* note 24 and accompanying text (noting that the signatories of the impeachment letter had diverse areas of specialty).

²⁴ And those are just the signatories from my own law school.

2) *The kibitzer's implied warranty*: "I have read the letter, I understand it, and I agree with it. Although I have read little if any scholarship on the subject of impeachment, I have followed the issue in the newspapers and am confident that more study or more detailed expertise would not change my mind."

The actual expertise of the signers was distributed over a spectrum, of course, rather than just those two points, but the two points probably describe at least approximately the positions of most who signed. The kibitzer's warranty also is consistent with the profile Sunstein has offered of a typical professor who signed the letter without having particular expertise on constitutional law.²⁵ It is possible that all of the signers had more expertise than the kibitzer's warranty suggests; I doubt it but don't want to argue about it, since my overall purpose is to shed light on general questions about when academics should make contributions of this sort, not to draw conclusions about the impeachment letter in particular. So for analytical purposes, let us assume that a substantial number of signers were kibitzers as just defined above. It will be useful to consider what would follow if this were so, regardless of whether it in fact was so.

A. *Generalists versus Specialists*

What was offered by a kibitzer—as just defined—who signed the impeachment letter? An initial possibility is *knowledge*, though the letter itself leaves this possibility a bit obscure. To the extent the impeachment controversy did call for information—e.g., the original understanding of the Impeachment Clause²⁶—the law professors' letter did not provide it. Rather, the signers of the letter were joining an *argument* about the most sensible way to read the words "high Crimes and Misdemeanors."²⁷ The argument consisted

²⁵ See *supra* text accompanying notes 6-7 (discussing Sunstein's view that "[t]he signatories likely thought, in good faith, that they knew enough about the constitutional provision to conclude that an impeachable offense had not been made out").

²⁶ By which I refer to U.S. CONST, art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

²⁷ The argument in the letter consisted primarily of these paragraphs:

Neither history nor legal definitions provide a precise list of high crimes and misdemeanors. Reasonable people have differed in interpreting these words. We believe that the proper interpretation of the Impeachment Clause must begin by recognizing treason and bribery as core or paradigmatic instances, from which the meaning of "other high Crimes and Misdemeanors" is to be extrapolated. The constitutional standard for impeachment would be very different if different offenses had been specified. The clause does not read, "Treason, Felony, or other Crime" (as does Article IV, Section 2 of the Constitution), so that any violation of a criminal statute would be impeachable. Nor does it read, "Arson, Larceny, or other high Crimes and Misdemeanors," implying that any serious crime, of whatever nature, would be impeachable. Nor does it read, "Adultery, Fornication, or other high Crimes and Misdemeanors," implying that any conduct deemed to reveal serious moral lapses

roughly of these steps: (1) historical and legal sources do not enable us to say precisely what those words mean; (2) treason and bribery should be considered the core cases that the words cover; (3) what treason and bribery have in common is that they are abuses of executive power; (4) President Clinton committed no abuse of executive power; (5) impeachment might be warranted for some heinous crimes not involving abuse of executive power, but not the crimes President Clinton is said to have committed; (6) even if the Constitution gives Congress the power to impeach in this case, the decision to do so is discretionary, and it should not do so here.²⁸ The merits of these claims, of course, are not the issue here, and I will assume for analytical purposes that they all were reasonable. The question is what the consumers of the claims received in the way of expertise.

Most of what was said in the letter could have been said (and was said) by thoughtful people with or without legal training who were reading the words of the Impeachment Clause for the first time and thinking about what they might mean. The letter provided no *information*, and did not purport to be based on any particular knowledge that its signers possessed. It simply was a piece of reasoning that the signers thought was persuasive. Yet the letter also did not

might be an impeachable offense.

Impeachment Hearing, supra note 1, at 375.

When a President commits treason, he exercises his *executive powers*, or uses information obtained by virtue of his *executive powers*, deliberately to aid an enemy. When a President is bribed, he exercises or offers to exercise his *executive powers* in exchange for corrupt gain. Both acts involve the criminal exercise of presidential powers, converting those awful powers into an instrument either of enemy interests or of purely personal gain. We believe that the critical, distinctive feature of treason and bribery is grossly derelict exercise of official power (or, in the case of bribery to obtain or retain office, gross criminality in the pursuit of official power) . . .

Id.

The letter goes on to say that most of the conduct of which President Clinton was accused did not involve the exercise of executive powers. *See id.* It then adds:

[E]ven if the House of Representatives had the constitutional authority to impeach for any instance of perjury or obstruction of justice, a responsible House would not exercise this awesome power on the facts alleged in this case. The House's power to impeach, like a prosecutor's power to indict, is discretionary. This power must be exercised not for partisan advantage, but only when circumstances genuinely justify the enormous price the nation will pay in governance and stature if its President is put through a long, public, voyeuristic trial. The American people understand this price. They demonstrate the political wisdom that has held the Constitution in place for two centuries when, even after the publication of Mr. Starr's report, with all its extraordinary revelations, they oppose impeachment for the offenses alleged therein.

Id.

The letter concludes by stating that there may be "heinous" crimes that would warrant impeachment even if unrelated to the President's executive powers, but that whatever those crimes may be, the offenses President Clinton was alleged to have committed are not among them. *See id.* at 375-76.

²⁸ *See id.* at 374-76.

contain any forms of reasoning or argument that were notably sophisticated. There was no explanation of why, if the Impeachment Clause covered some crimes not involving executive power, those crimes did not include perjury—the critical issue so far as the supporters of President Clinton’s impeachment were concerned.²⁹ Of course it was a short letter, and its authors no doubt had elaborate and informed views on that question;³⁰ and no doubt many others who signed the letters did, too³¹—though it also seems likely that many of them did not. For remember that we are trying here to address the significance of the signature from the hypothetical professor of, say, tax law whose position was described by the kibitzer’s warranty. I do not argue that the letter was wrong or bad. The claim here is just that *in itself* the letter did not supply or evidence expertise, at least compared to the likely expertise its audience already possessed. Put differently, if the text of the letter had appeared as an op-ed piece by a layman in the newspaper, or had been submitted to Congress anonymously, it would not have left the congressmen to whom it was addressed any more informed or otherwise better positioned to consider impeachment than they already were. All the real action in the letter was in the signatures at the end of it, and what they were intended to signify. This point is the answer to the claim that inquiries into expertise are a distraction from the more important question of the merits of the claims made in the document. If the merits are all that matter, they are self-explanatory and require no extra signatures for fortification. The addition of signatures presumably is supposed to mean something. It is important to ask what it means, and whether that meaning is consistent with the interpretations of its consumers.

²⁹ See, e.g., *id.* at 4 (statement of Charles T. Canady, Chairman, Subcomm. on the Constitution of the House Comm. on the Judiciary) (arguing that President Clinton’s alleged acts of perjury constitute impeachable offenses because they “undermine the integrity of office” even though they “may not directly involve the affirmative misuse of official power”); *id.* at 240 n.4 (statement of Professor William Van Alstyne) (“When linked to one’s behavior in office . . . the notion that neither perjury nor tampering with a witness nor subornation of perjury is any sort of ‘high crime [or] misdemeanor,’ when engaged by the President of the United States, is, well, facetious at best.”). In her testimony before the House Subcommittee on the Constitution, Professor Bloch, one of the letter’s authors and signers, did discuss why, in her opinion, perjury does not constitute an impeachable offense. See *id.* at 233, 235-36 (statement of Professor Susan Low Bloch).

³⁰ See, e.g., *id.* at 81-91, 230-37 (statements of Professors Susan Low Bloch and Cass R. Sunstein). Professors Bloch and Sunstein, authors of the impeachment letter, also gave elaborate testimony on the history and interpretation of the Impeachment Clause before the House Subcommittee on the Constitution. See *id.* Professor Sunstein has written extensively on the issue of impeachment. See generally Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279 (1998) (discussing at length the history and background of the Impeachment Clause).

³¹ Besides Professors Bloch and Sunstein, other signatories included Professor Tribe, who also testified before the House Subcommittee on the Constitution. See *id.* at 218-30 (statement of Professor Laurence H. Tribe).

The signatures on the impeachment letter might indeed have signified knowledge, even if the letter itself did not display very much of it. The idea would be that the signers were able to endorse the claims in the letter on the basis of what they knew, even if, by hypothesis, they may not have read much scholarship on impeachment. Hence Sunstein's suggestion that some may have signed based on their knowledge as, in effect, generalists: "Law professors who do not teach constitutional law have informed views about many constitutional issues—for example, about whether racial segregation is generally unconstitutional, whether quotas can make for an acceptable affirmative action program, and whether the Constitution protects the right to use contraceptives."³² Although this may be true, it is mainly because there is controlling case law on each of those questions. If you are more or less aware of the case law, you have a more or less informed view of how the questions should be answered as a legal matter. The expertise involved in those examples, in other words, is of a rather *hard* variety: information, and of a readily verifiable type. In the unlikely event that someone were unaware of that case law and were making a decision to which it was relevant, a law professor—maybe any law professor—might be able to make a difference just by calling the case law to his attention. Sunstein suggests that "[m]any law professors believe that with respect to the charges against President Clinton, impeachment falls in the same category"³³ as those other questions listed a moment ago. But there are important differences. There was detailed historical information that might well have been germane to the impeachment decision, but it was not the sort that is part of most professors' basic fund of legal knowledge.³⁴ In any event, the hard questions about impeachment really were not matters of information; they could not be answered definitively by pointing to case law or other authoritative legal sources.

It may be helpful to state the point in the terms introduced earlier to make sense out of appeals to the expertise of a generalist. So far as the knowledge of the relevant law and facts is concerned, it is not clear that generalists who signed the letter had any comparative advantage over their audience. They may have been at a disadvantage. The consumers of the impeachment letter were themselves greatly interested in the problem of impeachment.³⁵ Most

³² Sunstein, *supra* note 3, at 195-96.

³³ *Id.*

³⁴ As Professor Tribe wrote in his prepared statement submitted to the House Subcommittee on the Constitution, "[g]etting [the] right [answer to the question of what constitutes an impeachable offense] requires paying close attention to the historic evolution of the Impeachment Clause." *Impeachment Hearing, supra* note 1, at 225-27 (statement of Professor Laurence H. Tribe) (discussing the development of the Impeachment Clause in the Constitutional Convention); *see also id.* at 84-88 (statement of Professor Cass R. Sunstein) (discussing the framing and ratification of the Impeachment Clause and the historical evolution of the Clause from England to America).

³⁵ *See* Sunstein, *supra* note 3, at 192 & n.5 (recounting that before the impeachment

were lawyers, and many of them already had spent large amounts of time considering the question of impeachment and listening to testimony about it.³⁶ Many who signed the impeachment letter thus may have had less detailed knowledge than their audience did of the law and history of impeachment generally and of President Clinton's case in particular. By itself this does not make the opinions of the academic kibitzers worthless, because they still could have had background skills or a detached perspective sufficiently powerful to make their views useful. Still, there is something inevitably bothersome about academics offering professional judgments if they have less knowledge than their audience has. It is bothersome because their contributions may then decrease rather than increase the likely quality of the decision that is made; and it is bothersome because the consumers of academics' opinions are likely to assume—and surely ought to be able to assume, unless told otherwise—that the academics are at least as knowledgeable as they are in all relevant respects.

Another possible interpretation of the letter is that some signers who lacked detailed knowledge about impeachment were relying on the knowledge of the letter's authors, or of others with real expertise who already had signed the letter, or of colleagues with expertise who vouched that its claims "checked out." All of these sorts of piggybacking on the expertise of others are bad practice. They are understandable: the academic deciding whether to sign a document might be comforted to know that others whose views he respects wrote it, already have signed it, or think it is correct. But the signature on a letter expressing a professional opinion should express expertise on the letter's *claims*, not expertise on how much expertise others possess—whether the others are the author of the letter, other signers, or colleagues. Otherwise there is a danger of bootstrapping: Professor X signs a letter stating a conclusion; one hundred kibitzers, acting on their view—right or wrong—that professor X is an expert, join the letter; the consumers of the letter think that its views are endorsed by one hundred and one experts, rather than by one expert and a hundred kibitzers who trust him. Or the consumers wise up and start ignoring such letters, or at least their signatures, altogether. In any event, it is hard to imagine that an academic would disclose that he is doing this ("I hereby sign not because I am an expert myself, but largely because I trust the author of the

hearings, many members of the House of Representatives who were uncertain about the question of impeachment met with law professors in private meetings and "listened politely to the constitutional arguments, and were clearly interested in them . . . [although] some of their eyes really lit up only during discussion . . . of the underlying political dynamics").

³⁶ In addition to the testimony and prepared statements by law professors considered by the House Subcommittee on the Constitution, *see generally Impeachment Hearing, supra* note 1, the members of the House considering the question of impeachment—i.e., the consumers of the impeachment letter—also were provided with several staff reports and documents bearing on the issue of the constitutional grounds for impeachment, *see, e.g.,* STAFF OF HOUSE COMM. ON THE JUDICIARY, 105TH CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS (Comm. Print 1998) (Report by the Staff of the Impeachment Inquiry).

letter”); and if a practice is too embarrassing to disclose, it most likely should not be engaged in at all.

Then there is the other dimension of a generalist’s knowledge: not the distance between his knowledge and the knowledge of his audience, but the distance between his knowledge and the knowledge of specialists. There are specialists on the question of impeachment; some academics became specialists during the course of the Clinton controversy. The Impeachment Clause has a history, as does the practice of impeachment, and legal academics have generated and explored a fair amount of theory on the subject.³⁷ An academic without expertise on all this should have been bashful about offering a professional opinion about impeachment. Any suggestion that expertise is unimportant because it would not change the kibitzer’s mind can be promptly disposed of; as shown earlier, the fact that a kibitzer is certain—and, presumably, correct—in believing that his views would not change if he were to become an expert must not be confused with the actual possession of expertise. Stated in terms specific to impeachment, if everyone whose mind irrevocably was made up about that subject was an expert, then there were millions of experts, and law professors who felt like experts merely because they fit *that* description had nothing of any unusual value to contribute to the resolution of the controversy.

Perhaps the kibitzers’ signatures on the impeachment letter reflected not only a conclusion on the merits, but also a representation that specialists had no additional knowledge relevant to the controversy: they all would agree with the kibitzer about how it should be resolved. The kibitzers thus were generalists trading on their jurisdictional expertise,³⁸ and concluding that the impeachment question was the legal equivalent of a sprained ankle (“You hardly need to be an *expert* to see that impeachment is crazy.”). In the impeachment controversy, however, there was disagreement among specialists.

³⁷ See, e.g., PETER CHARLES HOFFER & N. E. H. HULL, *IMPEACHMENT IN AMERICA*, 1635-1805 96-106 (1984) (discussing the drafting and ratification of the Impeachment Clause and the influence of impeachment trials in the states and in England on the Federal Constitution); JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT* 1-131 (1978) (discussing the differing views on impeachment voiced by the Framers in the Constitutional Convention and analyzing the application of the Impeachment Clause in the cases of Presidents Andrew Johnson and Richard Nixon); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 53-102 (1973) (analyzing the meaning of “high Crimes and Misdemeanors” in the Impeachment Clause); CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 25-52 (1974) (analyzing what constitutes an impeachable offense under the Impeachment Clause based on cases and historical examples); see also *supra* note 34 (noting that Professors Tribe and Sunstein submitted prepared statements to Congress regarding the historical development of the Impeachment Clause).

³⁸ As stated earlier, “jurisdictional expertise” refers to the generalist’s representation of his own *competence* to answer a given question, as opposed to a representation on the merits of the question. See *supra* Part II.A (discussing the distinctions between generalists and specialists).

It may well be that a majority of specialists who exhaustively studied impeachment opposed impeaching President Clinton.³⁹ But some formidable legal scholars who did give the issue a specialist's examination concluded that impeachment would be constitutional, if not necessarily desirable (a separate issue).⁴⁰ There are various ways that actual differences of opinion among specialists can be interpreted. Perhaps the differences here showed that the legal materials bearing on the issue simply were inconclusive or that expertise on the question largely was of the value-laden soft rather than hard variety, so that the views of experts could not necessarily be expected to converge with close study. But whatever the differences of opinion showed, they did not warrant a representation by generalists that specialization was irrelevant because it was redundant; for specialists did not necessarily come out the same way on the question.⁴¹

In conclusion, the knowledge brought to the impeachment issue by academics who impliedly made the kibitzer's warranty did not entitle them to hold themselves out as experts. Their knowledge was not much greater than the knowledge of their audience, and may have been less; this is a common hazard when generalist academics try to advise courts and legislatures, since the members of those bodies typically are at least generalists themselves, and sometimes are specialists. In addition, there were specialists who possessed relevant knowledge that generalists did not have—knowledge that was not necessarily outcome-determinative, but that nevertheless was significant. This

³⁹ See, e.g., *supra* notes 30-31, 34 (noting that Professors Bloch, Tribe, and Sunstein testified before Congress in opposition to President Clinton's impeachment).

⁴⁰ Professors William Van Alstyne and John Harrison, among others, testified before Congress that impeachment would have been constitutional. See *Impeachment Hearing*, *supra* note 1, at 77-80, 237-42 (statements of Professors Harrison and Van Alstyne). Michael McConnell also concluded that impeachment would be constitutional, though he counseled against impeachment of a President "solely on the votes of his political rivals." Letter from Michael W. McConnell, Presidential Professor, The University of Utah College of Law, to Henry J. Hyde, Jr., Chairman, Committee on the Judiciary of the House of Representatives 1-2 (Dec. 12, 1998) (on file with the author).

Richard Posner, though not normally regarded first as a constitutional scholar, qualifies as an expert for purposes of this Article because he has written a book on the impeachment controversy. See POSNER, *supra* note 19; see also *supra* Part II.A (distinguishing between generalists and specialists or experts). In his book, Judge Posner is indecisive on whether impeachment would have been constitutional, but appears to believe that it would have been—while also indicating that in his view it probably would have been inadvisable on balance. See POSNER, *supra* note 19, at 170-87. In any event, he makes clear enough his rejection of Professor Sunstein's position. See *id.*

⁴¹ See POSNER, *supra* note 19, at 186 ("Although people who are not lawyers or political scientists may have exaggerated their competence to decide whether the President had committed impeachable offenses, they could hardly have deferred in the matter to the professional elite, because the elite was passionately divided, and, moreover, frequently unprofessional."); see also *supra* notes 39-40 and accompanying text (noting the disagreement between experts on the impeachment question).

made the absolute value of any kibitzer's contribution questionable. Even more clearly, it suggests that there was a significant danger of either consumer confusion or dilution of the "law professor" mark if such views were offered alongside—and indistinguishably from—the views of specialists.⁴²

B. *Hard versus Soft Expertise*

Now consider the possibility that kibitzers who signed the impeachment letter primarily offered their judgments, rather than their knowledge, to the letter's consumers. The conclusions in the letter were valuable on this view because they were offered by people professionally concerned with the good of the legal system, and with experience—indeed, expertise—in thinking about the consequences for that system of all sorts of decisions. This type of expertise is perfectly real. Some people have much better judgment than others, and the practical resolution of difficult legal problems often calls for judgment of the most seasoned and expert variety about how to balance very disparate pros and cons. The impeachment controversy is a good example of such a problem. Law professors faced with the choice to sign the letter were required to judge not only the strength of the arguments in the letter, but more generally the likely consequences of impeaching or not impeaching: moral and perhaps economic consequences, and consequences for the health and stability of the country's system of government.

The difficulty is that expertise of this judgmental variety is exceptionally soft. This is not to say that any given judgment was as good as the next, or that no one had any more insight into the problem of judgment than anyone else. What it means is that the requisite expertise was difficult to measure and controversial in content, and that claims to it were likely to be appraised skeptically and not receive deference. It was the sort of expertise that has to be convincingly demonstrated rather than asserted to be effective; appeals to it as expertise *per se* ("we law professors cultivate good judgment, and we think impeachment is a bad idea") are liable to be met with indifference. One who thought it sensible under the circumstances to impeach President Clinton would be unlikely to change his mind just because an "expert on law"—or for that matter an expert on *constitutional* law—assured him that his judgment was bad. "I *promise* you that impeachment would be senseless" is not likely to be a consequential utterance, regardless of the title of its speaker. The reasons for this are several, and by now familiar.

First, verification of a signer's good judgment is difficult to verify as both an empirical and conceptual matter. When judgments are offered en masse or in other circumstances where the author's title is supposed to carry weight, there is no way for the consumers of the claimed expertise to know whether the

⁴² See *supra* text accompanying note 12 (arguing that if academics use the title, or "mark," of "law professor" to connote varying levels of expertise without making this clear, the same results may follow as in the case where a trademark is employed carelessly: confusion of the consumer and dilution of the mark).

putative experts actually possess distinguished powers of judgment. Maybe they are sages, or maybe they are academics of the electrifying but woolly-minded variety. Their decision to sign the letter is not itself helpful in sorting one type from the other; it might as likely raise a red flag, since people with outstanding judgment often are slow to reach conclusions and modest in advertising them.

Nevertheless, it might remain possible for members of the legal academy *collectively* to send a strong, credible signal about a matter of judgment where all or most of them hold the same view. Such a consensus might obviate concerns that some academics have better judgment than others. The impeachment letter, however, was not such a signal because it did not evidence a consensus view. Ninety-five percent of the country's law professors did not sign the letter.⁴³ *There's* a consensus; but what were the non-signers thinking? A significant number may have been unaware of the letter, though this is unlikely as it was well publicized within the academy.⁴⁴ Of those who could have signed it but did not, many may have thought the standard for impeachment was best understood as a political question in a strong sense—i.e., not only not justiciable but defined by reference to prevailing views of morality—and therefore opposed impeachment without thinking it unconstitutional. Others may have suspected that impeachment under President Clinton's circumstances was unconstitutional, but concluded that they were not sufficiently informed to take a public position on the issue in their professional capacities. And then there may have been a significant minority who *wanted* to see President Clinton impeached. All this is conjecture, but if large numbers of law professors fell into any of these categories, it would be inaccurate to say there was a consensus of professional opinion among law academics that impeachment was unconstitutional. Because it is impossible to know how many professors did fall into these categories, one cannot assume that a letter signed by 430 self-selected law professors represents a consensus within the academy.

But even supposing that the letter was thought to represent a general consensus, there would remain other obstacles to its effectiveness. As noted earlier, soft expertise is hard to communicate in an authoritative manner in part

⁴³ According to the Association of American Law Schools, there were 8,719 full-time faculty members at American law schools in 1998-99. See Richard A. White, *Association of American Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions 1998-99* (visited Nov. 2000) <<http://aals.org/statistics/rpt9899w.html>>. Only 430 law professors signed the impeachment letter. See *supra* note 23 and accompanying text (noting that the impeachment letter consisted of three pages of argument signed by 430 law professors).

⁴⁴ See *supra* note 4 and accompanying text (noting that the impeachment letter was widely circulated through e-mail and posted on the Internet). The impeachment letter included signatures from all corners of the country. See *Impeachment Hearing*, *supra* note 1, at 376-83.

because it often is vulnerable to infection by political preferences.⁴⁵ The impeachment controversy is a good example, not because the signatures on the letter in fact were driven by partisanship—a separate question—but because consumers of the letter had no good way to determine *whether* they were. To say that the impeachment question had a political dimension is of course an understatement. It was the most politically divisive national controversy in recent times; it generated votes in both houses of Congress that closely followed party lines, making it difficult to avoid the worry that political interest was interfering with the dispassionate judgment of the legislators.⁴⁶ Readers of the law professors' letter might fairly have wondered whether it reflected a similar infection by politics. The answer is at least somewhat more straightforward in situations where the expertise is of the harder varieties, because then it may be more possible to verify the conclusions being offered and so dispel the fear that they largely are reflecting political views under the guise of legal expertise.

Likewise, worries about partisanship are likely to be somewhat less acute when a view is offered by academics with specialized expertise, because then they will have put the hours into the question needed to come up with something unusually insightful to say about it, and also because they then may have taken published positions to which their new positions can be compared. Conversely, soft expertise offered by an academic who has not given the issue the kind of study he gives to his published work is not likely to be worth a great deal to the consumer. It is likely to be closer to a normative view of the garden variety. It *may* be better than that, or perhaps worse; because by assumption he has not published on the subject, there is no good way to know. The impeachment letter once again is at the weak end of the spectrum because it presented a normative claim,⁴⁷ and one signed indistinguishably by law professors both with and without any particular expertise or record relevant to it. Any kibitzers who may have signed the letter offered the soft expertise of generalists, which is the expertise least valuable to a tribunal.

C. Trademark Consequences

The imprecisions in the impeachment letter weakened its likely value, and also may have contributed to a general weakening of the “law professor” trademark. A signature on the letter could have represented many different varieties and levels of expertise with very different degrees of value. The variations were largely invisible to the letter's consumers. The document

⁴⁵ See *supra* Part II.B.

⁴⁶ Cf. POSNER, *supra* note 19, at 198 (arguing that Senators in the impeachment trial would be disqualified as regular jurors because of their political biases and thus, “[a] finding by the Senate that the President had or had not committed the acts alleged in the articles of impeachment would be unreliable”).

⁴⁷ See *supra* Part III.A (arguing that the impeachment letter presented an *argument* against impeachment, instead of useful *information*).

ended simply with a list of names, each the equivalent of a black box with a “law professor” mark on it. The letter’s consumers may have inferred from the number of signatories, and the general designation of them as law professors, that it represented views backed by degrees of expertise best considered a hodgepodge. Alternatively, the number of signatories may have suggested to the letter’s consumers that expertise on the subject is rather easy to come by—which in another sense suggests that there may be no such thing as real expertise on the question worth worrying about. Yet another likely possibility is that the letter was more compelling than it should have been: some of its readers might have imagined that everyone who signed it really was an expert on the subject of impeachment in the strong sense of having given it scholarly study.

Because the letter did not appear to have much actual effect, and since such a letter probably could not have had much effect no matter how it had been executed, these costs may seem unimportant. But they also can be generalized into broader costs to the “law professor” mark on which the signers of the letter were trading. The possible long-run side effect here is that the masses of signatures send a signal that academics do not take details and distinctions regarding expertise particularly seriously when offering their views. If this impression is reinforced by repeated experience, it will likely reduce the ability of academics with real expertise to make a difference. It would not be surprising if others dismissed what academics say altogether, on the ground that distinguishing experts from the kibitzers just is not worth the bother.

The more likely possibility, however, is the creation of a rough pooling equilibrium:⁴⁸ the consumer, knowing that some academics only speak when they have real expertise, but that others are inclined to take public positions armed with confidence but little more relevant knowledge than the consumer himself has, averages out these possibilities in a rough way and so generally gives academic views an intermediate weight. The consumer does not disregard the positions of academics outright, but takes them lightly or with a “grain of salt.” Hence the unfortunate dilution of what it means to speak as a professor of law.

IV. A PROPOSED CONVENTION

A. *The Proposal*

The foregoing discussion suggests the desirability of a convention that would coordinate the warranties made by legal academics who offer professional opinions, whether by writing or signing them—and preferably one that facilitates the transmission of the most valuable sorts of expertise at the expense of the less valuable, rather than the other way around. So what to do?

⁴⁸ For an explanation of the concept of a pooling equilibrium, see DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 83, 155 (1994); ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* § 8.1 (2d ed. 1994).

It might appear as though this Article is building toward a set of suggestions about when generalists should offer their signatures or when signatures should be offered on the basis of soft expertise and so on. But that would be an impossible project. The kinds of issues on which legal academics speak, and the types of expertise they bring to bear on them, are too disparate to permit such suggestions. A better alternative would be a simple heuristic that, when adopted as a norm, causes academics to internalize these issues intuitively. I propose the following convention: when academics offer opinions in their professional capacities, they should use the same care and have the same expertise called for in their published professional work, or they should disclose that they are adhering to a lesser standard. There are alternative formulations of the standard that, as we shall see, are easier to apply in certain settings—e.g., an academic should not sign written arguments addressed to a tribunal unless he would be ready to defend them in testimony delivered orally to the same body. The purpose and operation of such formulations nevertheless is meant to be the same. It is to make the warranty of the expert, rather than the warranty of the kibitzer, the default assumption behind representations bearing the “law professor” mark.

This norm, whatever crudity may be attributed to it, has the virtue of being relatively simple and easy to remember. These are large advantages for a proposed solution to a coordination problem involving thousands of law professors who have widely varying levels and types of expertise. The convention would reduce many of the confusions that arise when generalists and specialists pontificate interchangeably, or when hard and soft expertise are offered interchangeably as the basis for an opinion. Sometimes a generalist’s knowledge is enough to provide comfortable support for a claim in a published article; sometimes it is not. It depends on the details of the claim and the person making it. But applying the proposed convention would rule out large amounts of kibitzing by academics who consider themselves generalists and merely mean by this that they have a view they are confident is correct—unless, of course, they are prepared to explain that this is all they mean when they offer their signatures. It also would rule out contributions based on soft expertise not backed up by the kind of sustained analysis and research expected in published professional work, thus curbing the academic’s temptation to weigh in on a question without advanced knowledge about it but with the hope that vague powers of judgment and “legal reasoning” abilities provide him with an adequate substitute.⁴⁹ As noted earlier, a great deal of mischief can result from confusing a confident answer with an expert answer;⁵⁰

⁴⁹ Judge Posner argues extensively in a forthcoming book that academics often do not hold themselves to the same standards in speaking as “public intellectuals” as they use in their ordinary professional work. See RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE (forthcoming 2001) (tentative title; manuscript at ch. 3-4, on file with author).

⁵⁰ See *supra* Part II.B (discussing the consequences of confusing strong and confident

the proposed convention helps to separate these standards because publishing an article on a question requires expertise about it, not just a confident belief about its answer.

The proposed convention also comports with the likely expectations, and in any event the *best* expectations, of consumers of academic opinion. Such consumers most reasonably expect that when a law professor makes a contribution in his professional capacity, he brings to bear the distinctive skills and opportunities he has by virtue of that position—i.e., that he has read the important scholarship bearing on both sides of the question, and has given both sides, and his own view, long and detailed consideration. That is the most plausible account of why people pay any attention to what legal academics say. Perhaps some consumers of academic opinion have reduced expectations; maybe they want to know what law professors think because they imagine that law professors generally are smarter and wiser than an average collection of people, or that they all are experts on all kinds of legal questions. This is the assumption behind the familiar and often ill-considered requests law professors often receive for legal advice from their friends and families. But setting the norm for participation lower in order to comport with those perceptions would encourage the less-valuable sorts of academic contributions, and make it harder for the higher-value types to make themselves known credibly.

This claim about the likely expectations of consumers is by no means self-evident, and it may be wrong. Some professors have suggested to me that the bar for signing documents as an academic is currently much lower than the norm proposed here, that academics and consumers alike understand this, and thus that there is not an important problem to be addressed. It is hard to know whether those premises are correct, but if they are, they only suggest that there is little danger that consumers overestimate the significance of signatures; they do not dispel—in fact they confirm—the risk of dilution of the “law professor” mark. It may well be that signatures from law professors are not now taken seriously, and that documents bearing them have little effect. Such a state of affairs should be considered a spur to rehabilitation of the mark through more demanding norms to govern what it means to offer a professional opinion. The behavior of academics gradually *creates* the expectations of consumers. Obviously, if enough academics sign documents on the basis of a kibitzer’s confidence, consumers of the documents sooner or later will realize this and adjust their expectations downward accordingly. Consumers would be better off if they could expect that academics who offer opinions in their professional capacities adhere to a common and demanding convention about the expertise they possess.

Let us consider some applications of the proposal. The simplest case is one where an academic is presented with a letter or brief that he lacks the knowledge to have written himself, but that sounds agreeable to him. He probably should not sign it. His agreement with the letter is not a useless

datum because he may know *something* about the subject matter and he may be a thoughtful person, etc. But his attempt to convey the datum by signing the letter is likely to do more harm than good because it undermines the ability of a consumer to interpret the meaning of the signatures accurately. The consumer ought to be able to assume that even if all of the signers did not co-author the document, they *could* have; in other words, each would be comfortable if his signature were the only one on the document. With that said, the notion that the academic “could have written” the document need not mean that he could have done so in a completely literal sense but rather in the sense familiar to any academic who has joined a co-authored article. It may be that others contributed some of the ideas; it may be that he has not spent as much time as his co-authors with some of the cited sources. Putting one’s name on a published article nevertheless means something. It means, among other things, that the signer has the background expertise to personally vouch that the document’s reasoning and conclusions reflect thorough consideration of the information and scholarship available on the subject.

This “could have written” criterion is meant to serve as a necessary condition for signing, not a sufficient condition. If an academic is expert enough to write the letter himself, but agrees with only some of its claims, or if he is expert enough to write much of the letter himself, but not all of it, he should sign the letter only if he agrees with it to the same extent he would require before putting his name on a co-authored piece in a professional journal. Co-authors often tolerate some disagreement between each another over minor issues, so the thought process should not be unfamiliar. If the disagreement would be a “deal breaker” in a professional setting, but the academic badly wants to support the bottom line of the letter or brief, he can take the time and space to disclose this, or submit an opinion separately, or else just abstain. True, this standard sometimes would make it harder to put together a document that can hold many signatures. But at least the consumers of such documents will have a clearer sense of what the signatures mean.

But then what of seemingly “easy” questions, the answers to which appear to a legal academic both obvious and important to state? A useful way to address this possibility is to ask whether the signer would be prepared to conduct an academic workshop on the subject that would be of the same caliber as the workshops he conducts when he presents his written work. Again, this is a familiar standard to which academics can refer; most of them present their papers in workshops from time to time, and are familiar with the preparation and expertise expected in those circumstances. If a question truly is an “easy” one, perhaps any law professor could conduct a competent workshop addressing it. But suppose that a hypothetical professor of commercial law—or for that matter constitutional law—were to conduct a workshop on impeachment, regarding it as an easy question despite not having studied the issue in any scholarly detail. He soon would be embarrassed by questions he is unable to answer about the available evidence of the original meaning of the Impeachment Clause, or about prior uses of impeachment in

arguably analogous contexts. He might also be asked to comment on the work of the various scholars who have written about impeachment, and he would have to confess that he has not read most of them. It would become apparent that he did not have very much knowledge beyond what was contained in a document that someone else wrote for his signature. Such a workshop would be a debacle despite the professor's complete confidence that his bottom line is correct. He had not "been a law professor" on the question of impeachment, and so should not conduct a workshop on the subject—or offer a public opinion about it in his professional capacity. The intellectual capital that he has to contribute to the question is not sufficiently great, and whatever its size in absolute terms, it does not compare to the capital that a professor has to offer who has done all those things called for in the workshop. The kibitzer should make way for the expert.

Workshops and articles provide two heuristics to help make sense of the convention proposed here; the testimony that courts and legislatures sometimes take from legal academics furnishes another. There is a natural analogy between the norm proposed here and the similar standard some federal courts use to assess the admissibility of expert testimony at trial: "the district court is responsible for making sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work."⁵¹ The analogy to the admission of expert testimony at trial is useful though inexact. One of the purposes of the federal standard for admissibility is to screen out testimony from experts who have relaxed their standards of inquiry to satisfy the demands of a paying client.⁵² Although the effect of payments to law professors for their participation in litigation raises interesting problems, the concern here is with cases where academics contribute to public debate on their own initiative rather than at the behest of a paying client. Yet even then there may be significant incentives encouraging an academic to weigh in on a question of public interest without possessing all the expertise he normally would require of himself in a professional setting. He might like to

⁵¹ *Braun v. Lorillard, Inc.*, 84 F.3d 230, 234 (7th Cir. 1996) (citations omitted) (construing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). The Fifth Circuit follows a similar standard:

[M]any experts are members of the academic community We know from our judicial experience that many such able persons present studies and express opinions that they might not be willing to express in an article submitted to a refereed journal of their discipline or in other contexts subject to peer review. We think that is one important signal . . . that ought to be considered in deciding whether to accept expert testimony.

In re Air Crash Disaster at New Orleans, La., 795 F.2d 1230, 1234 (5th Cir. 1986).

⁵² See L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1418-20 (1995) (arguing that experts "become paid advocates for the party" and "overstate the certainty of their opinions, use unreliable methodologies or rely on unproven theories" because they have financial incentives to do so).

see his name in print.⁵³ He might like to help his school by getting its name into print. Most likely and most dangerous of all, he might have a strong though inexpert opinion on the subject, or an ideological commitment that he would like to advance. In their power to warp an academic's judgment, these motivational forces can have the same effect as a financial stake in the outcome.

Likewise, legal academics testify in Congress from time to time about the desirability or constitutionality of proposed legislation. In both the courtroom and the legislature, the testifying academic is subject to close and sometimes hostile questioning about the extent of his preparation and expertise. If he cannot respond effectively to the questioning, his opinions will be discredited and his reputation sullied. It would not do for the expert on the witness stand to say, "I haven't given this issue very much academic study, but I'm sure that I am right anyway"—even if he probably *is* right anyway. Why should a different standard apply when legal academics offer professional opinions to those same tribunals in briefs or opinion letters, rather than in person? The problem with opinion letters and briefs is precisely that they are not subject to cross-examination in a usual sense, and not plausibly checked by any threat of a suit for malpractice. The purpose of a convention governing the signing of such documents should be to supply a substitute for those constraints. The best substitute is a norm that calls on the academic to ask the basic questions about his expertise that those constraints normally are meant to enforce. Indeed, an academic who signs a letter to Congress without having the expertise he would need to survive cross-examination about his expertise can be viewed as taking irresponsible advantage of the safety the letter provides from such scrutiny. If an academic does not know enough to testify orally, he does not know enough to testify in writing; and if he does not know enough to testify in writing, he does not know enough to sign written testimony someone else authored. This standard is roughly equivalent to the convention suggested earlier that academics have the same expertise about documents they sign that they have about the subjects on which they publish. The reason the standards are rough equivalents is that an academic cross-examined by a court or legislature about his claims usually will be in bad shape if it emerges that he not only has written nothing about the subject, but does not have the kind of expertise on the subject at hand that he has about the subjects on which he does write. Where these two formulations of the norm diverge, the more important one is that the signer be ready to defend the document orally before the tribunal to which it is addressed, because that is the way of thinking about the norm that is most relevant to consumer expectations.

The proposed norm cuts more directly to the question of expertise than the proxy for expertise most often used currently—i.e., whether the signer has

⁵³ Cf. Devins, *supra* note 4, at 165-66 (suggesting that professors who sign letters to Congress without the required expertise may be motivated by the desire to achieve celebrity status or power).

taught a course in the vicinity of the question treated in the letter or brief he signed. One of the letters opposing impeachment, for example, was signed by professors who had taught courses on constitutional law.⁵⁴ This is a dangerous credential to wield because it easily could cause a layman to imagine that all of the signers had expertise on the subject of impeachment. No such thing follows from having taught a course on constitutional law; most such courses spend little if any time on the subject of impeachment.⁵⁵ It is true that most teachers of constitutional law have given significant thought to how the Constitution should be interpreted, to general questions of how one should argue about its meaning, and to certain general considerations germane to impeachment such as the separation of powers. So even when presented with constitutional questions they have not considered before, and even without devoting close scholarly attention to these questions, their conclusions may be of greater-than-average interest. But that is not at all the same as expertise on impeachment. Some teachers of constitutional law may have nothing sophisticated to say about that subject; many of them no doubt know less about the subject by an order of magnitude than those scholars who actually have studied impeachment in detail. So regardless of whether the opinions of “generic” teachers of constitutional law have much value, it at least is clear that they have *less* value than the views of those who have specific expertise, and that the opinions of the two groups should not be confused. The best way to avoid the confusion is to avoid the “teacher of constitutional law” proxy and instead adhere to a more direct default norm that favors public pronouncements only when their makers in fact have the same level of expertise on the subject that they have when they publish. If professors of constitutional law lack such expertise, they still can offer their views, of course; they need only disclose that they have not given the question that sort of consideration.

The convention proposed here places a high value on disclosure as an antidote to possible confusion when professors sign letters on the basis of questionable or ambiguous expertise. One of the legal controversies surrounding the Presidential election of 2000 provides a useful example of the value of such disclosure. In early December of 2000, Professor Stephen Griffin drafted and sought signatures from other academics on a letter to the Florida legislature opposing its decision to call a special session to designate presidential electors. The letter argued that such a bill from the legislature would be “contrary to the United States Constitution, federal law, and the laws of Florida.”⁵⁶ On the subject of the expertise expected of those who signed the letter, Professor Griffin posted this advice to an e-mail list of several hundred

⁵⁴ See *Impeachment Hearing*, *supra* note 1, at 383-85 (recording letter in opposition to impeachment signed by thirteen constitutional law professors).

⁵⁵ Cf. Devins, *supra* note 4, at 171 n.29 (discussing the light treatment leading constitutional law casebooks give to impeachment).

⁵⁶ Law Professors’ Letter to the Members of the Florida Legislature (submitted Dec. 11, 2000) (on file with the author).

constitutional law professors: “If you read my letter, and you have a background teaching and writing about the Constitution, that’s all the expertise you need to decide whether my argument is more sound than the opposing view. Sign or not, but don’t fail to sign because you feel you are not an expert. That is a formula for the abdication of public responsibility by scholars who ought to know better.”⁵⁷ With all respect to Professor Griffin, whose intentions assuredly were noble, this is a troubling invitation. It is close to an explicit adoption of the kibitzer’s warranty described earlier in this Article. It does not even suggest that the potential signer should have read the submissions by those on the other side; finding *this* letter agreeable was enough. One might have thought that to avoid abdicating whatever public responsibility interested academics had, they should indeed have acquired expertise on the subject, rather than signing an opinion about it despite believing that they lacked expertise. Now of course many of the 48 professors who signed the letter might have had true expertise about its claims—the sort of expertise that would have enabled them to fully explain and defend the letter if called to do so in person by the legislature. I do not know, and the consumers of the letter could not have known. All that is known is that such expertise was disclaimed as a prerequisite for signing. It was necessary that the signers have written about some aspect of constitutional law; but if an issue is so simple that everyone with that description can sign as an expert, then probably a lot of academics who do not write about constitutional law should be qualified as experts, too.

In the end, however, the most important question is not whether Professor Griffin invited signatures from academics with too little expertise in some abstract sense. It is whether the consumers of his letter—i.e., the legislators—thought they were getting more expertise from the letter’s signers than the warranty Professor Griffin describes. One hopes so. If the consumers of such letters normally assume that scholars who sign them need not consider themselves experts on its particular subject matter, those consumers presumably do not take such letters very seriously. But if the consumers of this letter did expect that they were getting more, Professor Griffin’s invitation suggests that they may have been wrong. An obvious way to avoid the danger of confusion would have been through disclosure—most obviously by including Professor Griffin’s invitation (quoted in the previous paragraph) as an appendix to the letter to the legislature. If the assurance that the signers need not have been experts on its claims had been attached to the letter, it might have caused the letter to be taken less seriously by its readers. If so, the failure to include it was misleading. If not, the invitation only would have confirmed what the audience already thought; there would have been no harm

⁵⁷ Stephen M. Griffin, post to conlawprof@listserv.ucla.edu (Dec. 5, 2000) (on file with the author). Thirty-seven professors already had signed the letter when Professor Griffin said this; I do not know what those prior signatories understood the prerequisites for signature to be.

in including it. (If *nobody* had much expertise on the subject, then this too was a fit subject for disclosure.⁵⁸) True, one can imagine a worry about unilateral disarmament: if one side discloses that its letter was not signed by experts and the other does not, the candid side will be disadvantaged. That worry would be better addressed through direct public discussion of it than through a duel of potentially misleading omissions. In any event, it seems not to have been a major concern in the controversy before the Florida legislature, because there was no letter on the other side bearing masses of signatures. There was testimony offered against the Griffin letter by academics whose expertise was open to the usual questioning, but those academics wrote their own testimony and delivered it; there was no danger of a professor offering a signature on a document that he understood but could not have written, vouched for, or effectively defended in the tribunal where it was presented.

B. *An Alternative*

The coordination problem discussed above could be solved with a roughly opposite norm—a norm of kibitzing. The default assumption under this norm would be that academics who hold forth in public, whether by themselves or by offering their signatures beneath the work of others, do not have the same sort of expertise on the subject that they bring to their published work. They merely assert that they understand the claims in the document and are confident for whatever reason that the claims are correct. This alternative has to be taken seriously; as noted earlier, it may be the one that best describes current practice.⁵⁹ But as a normative matter it is inferior in several ways to the convention proposed here.

First, there is no obvious standard to use to decide whether someone has the lesser sort of expertise that a kibitzer's norm would call for. Academics would be thrown back on their own judgments, which would be idiosyncratic.

⁵⁸ Professor Sanford Levinson suggested at the time that perhaps no law professor had the sort of expertise on the issue that might normally be expected of scholars offering views about it:

The blunt fact is that all of us—lawyers, law professors, and judges, including justices on the United States Supreme Court—are basically amateurs in this area—that is, the implications of Article II, *not* the technicalities of Florida election law—suddenly faced with issues that we've literally never thought about before. We're like our students when presented with a final exam question drawn from left- or right-field that had never been discussed in class, but the professor insists that if one had been truly attentive, then he/she should be able to apply the legal concepts learned during the semester to this brand new issue. I think that is what we should say if reporters call us.

Sanford Levinson, post to conlawprof@listserv.ucla.edu (Dec. 6, 2000) (on file with the author). If this was true it would have been a good thing to say in the letter itself, which Professor Levinson signed. The understanding he lays out here is unlikely to be the default understanding of consumers who read an opinion letter signed by legal academics; if it does become the default understanding, that will be an unfortunate development.

⁵⁹ See *supra* Part IV.A. (discussing the generalist's view that specialized knowledge would not change his mind about an opinion he feels confident is correct).

Second, the kibitzer's norm would encourage low-value contributions by academics, and make high-value contributions more costly. Someone with real expertise would have to either write a separate document or try to convince readers that he has more knowledge than conventionally is expected of academics who offer professional opinions. Credibly opting out of a kibitzer's norm would be harder than credibly opting out of the stricter norm proposed here, because opting out of the stricter norm would amount to a declaration against interest. The academic would be admitting that he is speaking as a generalist, and without the expertise he brings to his professional work; consumers are likely to believe him. An attempt to opt out of the expectation that academics are kibitzers, however, would be self-serving and harder to verify. Third, the kibitzer's norm seems likely to be damaging to the "law professor" mark in a general sense: imagine a hypothetical announcement that when law academics weigh in on matters of public concerns, they *assume* themselves to speak without the expertise they use in their usual professional work. Consumers will likely, and correctly, view this as an unhappy commentary on the attitude of law academics toward the relationship between their professional work and their role in public life. ("I didn't say I was an *expert*; I just said I was a *law professor*.") Fourth, the kibitzer's norm would be hard to communicate effectively to the consumers of academic opinions. Such communication would be required to avoid serious dangers of confusion. Norms that silence about expertise should signify the *absence* of trustworthiness need to be communicated carefully to consumers to prevent them from being gulled by misreading the silence as a good sign. In contrast, norms that silence about expertise should signify the *presence* of trustworthiness are unlikely to deceive consumers—so long as the suppliers adhere to it.

C. Losses

Although the approach recommended here might well result in fewer contributions to public discourse by legal academics, or at least fewer signatures on those contributions that are made, it would improve their average quality.⁶⁰ The lost value from foregone signatures probably would not be great with respect to briefs submitted to courts and letters addressed to legislatures. Academics who have sufficient expertise to write those documents will continue to submit them, just as they currently do. The documents would have fewer signatures on them because the kibitzers would be sitting on their hands, but this should not be a significant concern. The masses of signatures on such letters nowadays may have little effect other than to confuse the question of the expertise the signatures represent.

A further loss would result if the proposed norm also were applied to public

⁶⁰ An alternative, unlikely as a practical matter, is that it would result in the same quantity of contributions but more disclosure that many of them are not based on the same sort of expertise that the author or signer brings to his usual professional work.

argument by law academics in newspaper op-ed pieces and the like. Though the focus of this discussion has been submissions to courts and legislatures, at least some of its reasoning can be extended as well to newspapers. The convention seems harsher there, because the gap in expertise between the public audience for such a document and the legal academic kibitzer may be very great, suggesting that the kibitzer may have a worthwhile role to play as an educator. It is on the basis of this gap that many legal academics offer quotes to newspaper reporters on subjects well outside their area of expertise: legal academics know more about the issue than the average newspaper reader, so they feel justified in telling them what they know. A convention of disclosing the limited extent of an academic's expertise here is unlikely to do any good, because newspapers would find them dull and decline to print them. So the academic following the proposed norm simply would decline to participate in punditry unless he had the sort of expertise on the question that he brings to his published work—typically though not necessarily meaning that he in fact has published on the question. Although this would mean less punditry by academics, this loss cannot be greatly mourned in view of the low quality of the punditry that academics frequently offer. Most law professors will have no trouble recalling newspaper pieces or television appearances by law academics—sometimes quite prominent ones—offering authoritative-sounding but inexpert and indeed amateurish or incorrect legal analysis of a public issue. The loss of that bad punditry would have to be reckoned a substantial social gain. Some good punditry stands to be lost, too, but there are non-academic pundits who generally can pick up the slack—for by definition we are speaking here of subjects amenable to kibitzing.

The real problem with applying a stiff norm to casual punditry is that *no* law professor may have expertise of the usual variety with respect to many momentary public controversies. Indeed, this is a potential problem with applying such a norm to academic comments of any sort in such circumstances, whether in the form of punditry or letters and briefs. In those novel sorts of cases the norm might sensibly be modified. The basic point of it, after all, is to avoid pronouncements by academics speaking as academics unless they (1) have substantially more expertise than their audience, and (2) have substantially as much relevant knowledge as anyone else in their profession. The appeals to the standards used in publishing articles, conducting workshops, and giving testimony all are heuristics meant to capture those criteria; if the criteria are satisfied but the heuristics are not, there is no problem in pontificating. But it would be a service to the cause of public understanding if academics offering punditry on this basis would mention that neither they nor anyone else has expertise of the usual scholarly type to share on the matter.

Finally, there is the “holocaust objection,” viz., is a professor of law supposed to stand mute while he watches atrocities committed in his community, because he is not an “expert” on the subject of atrocities? Obviously not; in that situation there are several sensible options. One can

speak out as a citizen rather than as a law professor; one can speak out as a law professor, but disclose that he is not purporting to offer a view of the question based on expertise. But of course the better route is to acquire authentic expertise about the atrocities and then protest them at great length and volume. One should not kibitz about atrocities.

There remains the matter of enforcement. The foregoing discussion assumes that inexpert academic pundits and other kibitzers tempted to sign professional opinions are prepared to silence themselves for the greater good of raising the average quality of academic contributions to public debate. What if they do not? How is the norm to be enforced against academics who persist in pontificating publicly on questions on which they lack real expertise? Consumers cannot effectively enforce the norm because they generally are not in a position to know whether an academic is complying with it. Neither can the norm be imposed publicly and unilaterally by those with expertise who want to protect their ability to send strong public signals, for there is little they can do that will cause the exposure of kibitzers by comparison. The forcible “outing” of kibitzers who offer public views without expertise is a tantalizing prospect, and may have some promise; but it could itself become partisan and undignified if not done sparingly. In any event, the proposed norm would depend for its enforcement primarily on reputational sanctions within the academic community—i.e., opprobrium—for those who casually offer opinions in public on the basis of “expertise” that would not be considered acceptable to support claims made in their ordinary professional work.⁶¹

D. *A Note on Partisanship*

Professor Devins argued that many of the signatures on the letters opposing impeachment were motivated by partisanship.⁶² Sunstein worries that in making this claim Devins is imputing bad faith to the signers of the letters, and replies that we ought to assume people act in good faith until the contrary is demonstrated.⁶³ But it is not quite clear what Devins meant by “partisanship;” the word has several possible meanings that might apply here, each with different implications. At a minimum, a claim of partisanship would imply that if the President subject to the impeachment inquiry had been, say, Newt Gingrich rather than Bill Clinton (with all other facts of the case held as

⁶¹ See Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2243-44 (1996) (discussing “[h]atred, contempt, ridicule . . . shame or reputational loss” as norm enforcement mechanisms); Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, With Special Reference to Sanctions*, 19 INT’L. REV. L. & ECON. 369, 374 (1999) (discussing informal sanctions for violations of norms).

⁶² See Devins, *supra* note 4, at 171 (“Many of the law professor and historian signatories were animated by partisanship and self-interest, not scholarship.”).

⁶³ See Sunstein, *supra* note 3, at 198 (arguing for a “principle of charity” under which one “should assume that those with whom [one] disagree[s] are acting in good faith and on the basis of evidence that they believe to be sufficient”).

constant as possible), fewer or different academics would have signed the letter opposing impeachment. I do not know whether that is true, but let us imagine that it is and consider how it might be interpreted.

One possibility is that some who signed the impeachment letter privately believed the arguments it contained were lousy, but signed anyway in order to help a Democrat being attacked by Republicans. This would indeed amount to bad faith, and would be an odious form of intellectual dishonesty. In the short run it would mislead the consumers of the opinions; in the long run it would destroy the ability of academics to make contributions that are taken seriously. Not much more need be said about bad faith of this variety. I assume, with Professor Sunstein, that nobody who signed the letter was engaged in it.⁶⁴

Second, partisanship might refer to the politics that can drive the conclusions reached by academics or anyone else, whether consciously or not. This might be called partisanship of the “realist” variety. The tendency of people to believe things because they want them to be true is well-known,⁶⁵ and has been recognized to have applications to judges;⁶⁶ the application of the principle to academics is less widely noted, but not necessarily less significant. Many legal academics in particular have strongly held political preferences, and their legal conclusions regarding public controversies often seem to align with those preferences with bothersome consistency. The consistency may reflect wishful thinking rather than bad faith. The point is hard to document decisively, but it will be familiar enough to any student of recent legal controversies that have political consequences—e.g., impeachment, or the controversies surrounding the Presidential election of 2000. Legal academics made many arguments about those controversies with great passion and earnestness. Yet it was rare to see a legal academic with liberal politics lining up in support of a legal position helpful to Republicans, or to see a legal academic with conservative politics lining up in support of a legal position

⁶⁴ See *id.* (“[I]n cases of doubt, we should assume that those with whom we disagree are acting in good faith and on the basis of evidence that they honestly believe to be sufficient.”).

⁶⁵ See JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 148-57 (1983) (discussing interest-induced beliefs); Ziva Kunda, *The Case for Motivated Reasoning*, 108 *PSYCHOL. BULL.* 480, 486-87 (1990) (discussing the effects of goals on judgments made about others).

⁶⁶ See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1945) (1881) (“The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”). For a modern application that might be interpreted as involving the same phenomenon, see generally Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *VA. L. REV.* 1717 (1997); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 *VA. L. REV.* 1335 (1998); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 *VA. L. REV.* 805 (1999).

helpful to Democrats. When a “declaration against interest” of either sort is made it is considered noteworthy,⁶⁷ and rightly so. A declaration against interest provides an unusually valuable datum to a public tribunal, because it suggests that the argument being advanced is strong enough to overcome the natural tendency of academics, like other humans, to dislike arguments helpful to their political enemies. The attention that declarations against interest attract suggests that consumers do not expect them to be made—that they assume academic signatures normally are motivated in at least some significant sense by political interest, and presumably discount them to some extent as a result. It is hard to fault them for doing so. On the other hand, the very act of signing the impeachment letter was at least mildly “against interest” for those who ordinarily do not like to sign such things at all, and perhaps that is an argument for giving some weight after all to letters with unusually large numbers of signatures on them. A difficulty then remains, however, in knowing whether the signers were moved to overcome their usual distaste for such letters by the depth of their belief in (and understanding of) purely legal arguments involved, or by the intensity of the more general revulsion they felt toward the impeachment effort.

All of these arguments, of course, are meant to apply to academic positions that are not *themselves* inherently political. There is no partisanship in any difficult sense if an academic signs briefs supporting Fourth Amendment claims by criminal defendants but never signs briefs opposing them because he favors a broad reading of the Amendment’s protections. My concern is with legal arguments endorsed by academics for reasons other than the ones explicitly stated. Impeachment is a classic example of a case where the potential for such problems existed; the arguments about the meaning of “high Crimes and Misdemeanors” were legal, and separate from the political question of who was helped by them. The claim of “realist” partisanship is that arguments may have seemed compelling to their makers precisely because of who they helped or hurt. The worrisome vice lies in allowing judgments about the quality of an argument to be influenced by underlying preferences that would cause the consumer to discount the judgments if he knew of them.

Unfortunately, the only cure for partisanship of the realist type is introspection in which the groups are reversed: “I oppose Clinton’s impeachment; would I take the same view if it were President Gingrich?” “I think that a ban on handguns violates the Second Amendment; would I still think so if I thought the ban was a great idea as a policy matter?” “I consider

⁶⁷ For example, Michael McConnell, who Sunstein correctly describes as “hardly a left-liberal,” wrote a letter to Chairman Henry Hyde that was highly critical of President Clinton, but in which he urged Congress to not impeach. *See* Sunstein, *supra* note 3, at 198; *see also supra* note 40 (discussing McConnell’s letter to Chairman Hyde). Sunstein noted the inconsistency between McConnell’s political views and his position on impeachment in responding to Devins. *See* Sunstein, *supra* note 3, at 198; *see also* Michael W. McConnell, *A Muddled Ruling*, WALL ST. J., Dec. 14, 2000 at A26 (criticizing the Supreme Court’s opinion in *Bush v. Gore*).

X allegations of sexual harassment spurious; would I have the same reaction if they were made not against my political friend but against my foe?" This kind of internal interrogation may be a weak check against the temptations of partisanship, but it often is all that we have. (It is weakest of all, and worries about realist-style partisanship justifiably are greatest, in situations where the shoe never is likely to quite be on the other foot. There is unlikely to be an impeachment proceeding soon enough and similar enough to President Clinton's to test the consistency of those who took either side in the debate over his impeachment.) One might imagine that legal academics would be specialists at this sort of mental exercise by virtue of their professional training and their detachment from immediate involvement in the political fray, but of this there is little evidence, at least when it comes to participation by academics in live public debates. Law academics do have considerable skill at pointing out the partisanship and double standards of their opponents, but that is not the same thing. More of this sort of questioning, and a renewed recognition of demonstrated impartiality as a virtue in academics who advise public tribunals, would do a lot to improve the credibility of the legal academy.

There remains another explanation for the possibility that the impeachment letter would have contained fewer signatures if the President had been a Republican: in that case many academics still might have agreed with the legal arguments in the letter, but might have declined to sign because they would not have wanted to come to the aid of a President who was, presumably, working to make changes in the law that the academics deeply opposed. One colleague who signed the impeachment letter expressed the point to me in approximately this way: "I oppose the death penalty, but that doesn't mean I necessarily would sign letters opposing the execution of every heinous murderer sentenced to death." The problem with this approach is now familiar: it leaves the meaning of a signature unclear, and leaves even more unclear the interpretation of non-signatures in the next case. If Democrats seek to impeach a Republican a few years hence and academics do not vigorously protest, that absence of protest might be understood as implied assent to the legal arguments behind the drive to impeach; after all, legal academics showed during the impeachment of President Clinton that they will speak up when they think the grounds for impeachment are spurious. But perhaps a non-reaction to the impeachment of a Republican would only mean that the liberal academics who lined up against the Clinton impeachment cannot be bothered to be similarly helpful to their enemies. The antidote to this risk of confusion (and to the accompanying risk that academic opinions will come to be seen as partisan) is straightforward: an academic should not sign a legal opinion about an issue unless he is ready to commit to signing legal opinions on the same subject in the future, regardless of who it helps politically.

If that suggestion sounds unrealistic, note that it already is the apparent implications of the assurance in the anti-impeachment letter that its signers

were writing “neither as Democrats nor as Republicans.”⁶⁸ That assurance, some version of which commonly is included in letters signed by academics, suggests that those who signed the letter would be precisely as willing to stand up for a Republican president, and would do so in the future under analogous circumstances. I have been relying here on a model of the academy that regards impartiality and nonpartisanship as important virtues. It is a model that emphasizes the similarities between academics and judges in the insulation they enjoy from politics, and in their concomitant opportunity and obligation to set aside political preferences when they offer their findings. The job of academics is to speak the truth. Some law professors may subscribe to a different vision, believing that their job is to fight the good fight and battle for the causes they regard as important at every turn—whether those outcomes are gay rights or the rights of gun owners or keeping the left or right wing at bay. When academics subscribing to this model make public statements, they may think of themselves as lawyers arguing those causes, pressing the best available arguments for the positions to which they are committed and never having a kind word for any points made by the other side.

While this model—the academic as crusading lawyer—probably is not how most law professors think of their role (it seems at odds with the academic enterprise as normally understood), it would help explain the behavior of those academics who appear regularly in public to make arguments helpful to Democrats but never to make arguments helpful to Republicans, and vice versa. An important difference between lawyers and academics, however, is that a lawyer’s job is to say what there is to be said for his client; sincerity—i.e., a lawyer’s belief that he himself would consider his arguments strong enough to prevail if he were the judge—may be helpful in a lawyer,⁶⁹ but it is by no means necessary or assumed by his audience, despite the occasional odd attempts by members of the media to get lawyers to say what they “really” think. And where sincerity *is* present in a lawyer, it still is not a very valuable datum because lawyers have such a strong interest in reaching the conclusions they reach and in believing their own arguments. That is why it would not add anything to a lawyer’s brief to append the signatures of four hundred more lawyers to it rather than just the signatures of one or two.

The premise behind a letter with lots of signatures from academics, however, is different: it is that the signatures do reflect their sincere and impartial belief in the merit of the claims presented. It follows that the academic-as-lawyer model is inconsistent with efforts such as the impeachment letter to compile large numbers of academics’ signatures. For if academics are significantly committed, lawyer-like, to aiding a friend or defeating an enemy (e.g., the Democratic or Republican party), they will *want* the arguments that assist that commitment to be right, and the legal materials at

⁶⁸ *Impeachment Hearing*, *supra* note 1, at 374.

⁶⁹ See generally James Boyd White, *The Ethics of Argument: Plato’s Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849 (1983).

issue often will be too weak to constrain their desires. In other words, they will have a lawyer's relationship to their arguments. The arguments themselves may be good; their makers may even believe them. But their makers' identities as academics lend the arguments no particular weight, because the signers are not acting like academics in the distinctive sense that makes academic contributions particularly useful. A long list of signatures then is more likely to reflect the intensity of the academics' preferences than a consensus reached by disinterested students of the problem.

The difficulty largely evaporates if an academic adopts the lawyer's role explicitly, as by serving as counsel to one of the parties to an appeal. For then the consumer can give the academic's view whatever weight he thinks it deserves, and will have good information on which to base such a judgment. The problem, in other words, is not academics moonlighting as lawyers; it is academics moonlighting as lawyers while pretending that they are speaking as academics and thus confusing the consumer or reducing the ability of other academics to offer nonpartisan views credibly. Here as elsewhere, disclosure cures most ills. Academics who regard themselves as lawyers for their favored causes simply should indicate this; they should not make public statements purporting to endorse arguments on a politically impartial basis ("neither as Democrats nor as Republicans") if their actual purpose—or actual practice—is to be helpful only to their favored political causes and friends.⁷⁰

CONCLUSION

Opinions from scholars, including law professors, can serve a valuable

⁷⁰ An unusually explicit example of this model is furnished in SUSAN ESTRICH, *SEX & POWER* (2000). Estrich, a professor at the University of Southern California Law Center, offers an explanation of why she was a prominent ally of Anita Hill when Hill made sexual harassment claims against Clarence Thomas in 1991, but was a prominent ally of President Clinton when he faced sexual harassment claims in 1998. Estrich says that "loyalty" to President Clinton and "politics"—"I was doing the same thing all the anti-Clinton conservatives who had fought against the laws prohibiting sexual harassment laws were doing"—were important considerations for her, *id.* at 166-67, and therefore that "I had to find a way to reconcile Anita Hill and Monica Lewinsky as a matter of principle, even if the motivation for the debate was political. I had to convince myself that there was a real difference[.]" Estrich's candor is commendable. She may well be saying what many others on both sides also felt during the impeachment controversy but would not admit. And as a lawyer and activist her approach may be defensible. But in her public statements she generally is identified as a law professor; and her confessions that personal loyalty and politics were inputs into her positions, and played an important role in motivating her reasoning, tend to undercut her credibility as an academic, just as they would be devastating to the reputation of a judge who spoke in such a way about a case that he was supposed to decide impartially. If this is how academics are understood to reason about the problems on which they speak publicly, their views should not and will not be given any more weight than is given to the views of others in the "spin" industry who may sometimes make appealing arguments, but whose identity or title adds no reassuring warranty to them.

purpose for tribunals making legal decisions. Generally accepted conventions governing the expertise behind such opinions would enhance their usefulness. This Article suggests a norm of expertise that would have benefits both for scholars and for the consumers of their opinions. This norm provides that when academics offer opinions in their professional capacities, they should use the same care and have the same expertise called for in their published professional work or they should disclose that they are adhering to a lesser standard. Equivalently, they should not sign documents addressed to tribunals unless they would be ready to defend the documents orally, and face cross-examination about their own expertise, in front of the same tribunal. Adopting this convention would entail some costs, such as the loss of some contributions by generalists who have useful knowledge to contribute but are not experts in the sense suggested here, and who would rather remain silent than speak and also disclose their inexpertise. The importance of those losses would not be great, however. And they likely would be offset by the benefits of having a clear default standard for academic participation in documents submitted to public tribunals and by improvements in the average quality of academic contributions and the respect they receive.