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Susan N. Herman

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# BALANCING THE FIVE HUNDRED HATS: ON BEING A LEGAL EDUCATOR/SCHOLAR/ACTIVIST

Susan N. Herman\*

## I. INTRODUCTION

In the story *The 500 Hats of Bartholomew Cubbins*,<sup>1</sup> Theodor Geisel, better known as Doctor Seuss, tells a cautionary tale about what can happen to someone who wears too many hats at the same time. As the story begins, Bartholomew is seen wearing a lumpy old hat decorated with a jaunty feather. When the King of Didd (King Derwin) passes by, Bartholomew respectfully removes his hat. Much to his surprise, the royal carriage screeches to a halt in front of him and the king angrily demands that Bartholomew remove his hat. Reaching his hand up, Bartholomew is astonished to find that there is another hat on his head. He removes the second hat only to find that there is yet another hat underneath that, and his head is still not bare. An increasingly panicky Bartholomew pulls off hat after hat as an increasingly furious king has Bartholomew arrested for his insubordination in not removing all his hats in the royal presence.

Determined to make Bartholomew conform, the king calls in a series of experts ranging from the royal hatmaker (who is baffled), to the executioner (who refuses to cut off Bartholomew's head unless he takes off his hat), to the wisest elders of the kingdom (equally baffled), to magicians (who cast a magic spell they say will become effective in only ten years), to bowmen (who try to shoot the hats off). But the hats persist. Uncannily, the hats at the bottom of the pile, beginning with hat number 451, are larger and more magnificent than the hats that evidently were covering them. In the whimsical world of Doctor Seuss illustrations, the increasingly extravagant plumage of the hats closest to Bartholomew's head is not visible until the smaller hats above are removed.

Because the story is by Doctor Seuss and not the Grimm Brothers, Bartholomew finally succeeds, after removing the five hundredth hat, in achieving a bare head and appeasing the king.<sup>2</sup> This is a happy ending to what could have been a horror story.

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\* Centennial Professor of Law, Brooklyn Law School. J.D., New York University Law School (1974); B.A., Barnard College (1968). I wish to thank Doris Short for her research assistance, Paul Finkelman for the symposium and the invitation, Nan Hunter and Minna Kotkin for their comments, and Nadine Strossen for her tireless work on behalf of the American Civil Liberties Union ("ACLU") and for the activist scholarship this symposium celebrates.

1. Dr. Seuss, *The 500 Hats of Bartholomew Cubbins* (Random House 1965).

2. The five hundredth hat is so magnificent—festooned with the largest ruby anyone has ever seen and the most outrageous plumage—that the king offers to buy it from Bartholomew. Bartholomew agrees and, for

Bartholomew almost lost his head because he did not know how many hats were on it.

Like Bartholomew, legal scholar/activists, including Nadine Strossen (the subject of this symposium) and myself, wear more than one hat. In addition to our scholarship and our chosen forms of activism, we also teach law. Like King Derwin, the sovereigns of our law schools could well become angry and threatening if we activists were to use our position in the front of the classroom to proselytize and inculcate our own viewpoints into our students. Most of us activist/educators, like Bartholomew, respect authority and agree to remove our activist hats in the classroom and to wear, instead, our objective, professorial hats. Unlike Bartholomew, who thought he only had one hat, we describe ourselves as having numerous hats, and we profess to believe that we can switch hats and wear only one at a time. By conscientiously selecting the appropriate hat for each occasion, we avoid angering the king and we keep our heads as well as our jobs.

Outside the classroom, we assume that we have a wider range of appropriate choices. Academic freedom is generally understood to mean that we can write, speak, or litigate on the subjects of our choice, in service of any ideal, without losing our law faculty heads—as long as our work has merit and does not exceed some distant boundary of decency or reason. We do not expect that we will be denied tenure or suffer other academic slights if we choose to associate ourselves with the American Civil Liberties Union (“ACLU”) or the Federalist Society, and we complain loudly if we think that we or our colleagues have been judged on the basis of politics rather than merits. But other sovereigns judge our choice of headgear even outside the classroom. The editors and publishers of legal scholarship sometimes expect us to conceal our activist hats when we write, asking that we adopt a neutral stance and fairly present and evaluate legal arguments including those with which we disagree.<sup>3</sup> Editors, publishers, and reporters beyond legal academia sometimes want to advertise our activist hats, and sometimes our academic hats. When we convene conferences, the conference sponsors (law schools, or other groups or institutions) commonly expect us to provide balanced panels with participants representing a variety of viewpoints, including those with which we disagree—panels sporting a complete array of millinery. As panelists on those panels, or as speakers in various contexts within and outside the academy, we choose which hat to wear—sometimes an activist hat, sometimes the ostensibly neutral law professor hat, sometimes a devil’s advocate hat—depending on the role we expect to play.

When we act as lawyers we are freest from demands of objectivity and balance. Lawyers are expected to act as partisans for their clients, regardless of what they believe personally, and to espouse only one side. As academics, we may choose our clients as freely as we choose our scholarly projects—we may represent a range of clients who have very disparate interests, or we may choose to represent only one type of interest. As activists, we may litigate the occasional case on behalf of the ACLU, National Rifle

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some reason known only to Doctor Seuss, the hats respond to the payment of five hundred pieces of gold and cease. Bartholomew goes home with no hats, but with a bag full of gold. *Id.* My interest in this article is in Bartholomew’s hats. I invite readers to ponder what message might lie in the fact that money solved a hat problem that stymied all the wisdom of all the professionals in the Kingdom of Didd.

3. The extent to which this is true may depend on whether we write treatises or other works that are advertised as neutral, rather than argumentative.

Association, or People for the Ethical Treatment of Animals. Again, we do not expect to be punished for our choices, by the law school sovereigns or our colleagues, as long as we do our day jobs well. If, as activists, we affiliate ourselves with an organization, whether the ACLU or the ACLJ,<sup>4</sup> that organization may have its own views about when we should present ourselves as academics, scholars, or spokespersons for the organization.<sup>5</sup>

In this article I want to pose two questions challenging the conventional wisdom about how we remove and switch hats in these different contexts. The first question is suggested by Bartholomew's dilemma: Whatever role we are playing, can we ever really take off our other hats, or are those other hats always lurking underneath our hat of choice, whether we realize it or not? Is it actually possible, outside of fairy tales, to get down to no hats at all? If we conclude that, like Bartholomew, the best we can do is to cover our other hats, how careful should we be to try to conceal the hats underneath? Because we do not live in a Doctor Seuss illustration, will the plumage of the hats underneath sometimes erupt, despite our best efforts at concealment? Second, even if our effort to do so is not futile, should we be *trying* to take off or to conceal our hats? Bartholomew managed, after five hundred attempts, to take off all his hats; he also managed, unwittingly, to hide all his hats but the one on top. If the goal of having no hat is desirable, should we commit ourselves to working as hard as Bartholomew did to achieve that goal? And what, if anything, is wrong with letting the world know that we are wearing all of our hats at once?

In exploring the question of what our goals should be, I want to consider five concepts, each of which is commonly understood to be a commandment in some or all of the contexts I discuss (legal education, scholarship, and activism). The first three of these commandments, on closer examination, turn out not to be achievable or even desirable in all contexts. First is the commandment of objectivity. As legal educators and sometimes as legal scholars, we are expected to sound (if not be) neutral and teach only what the law is, instead of our views about what the law should be. Because it is difficult, and perhaps even impossible, to remove all our hats and achieve neutrality, should we stop pretending that we are able to be objective? Should we decide not to fight the fact that our activist hats may, at least sometimes, peek out from under the professorial or scholarly hat we have selected for the occasion? Second is the commandment of balance. If we are not (or cannot be) neutral in presenting the law in our classrooms, in our writing, or in our public speaking, how much responsibility do we have to ensure that our views are balanced by the contrary or complementary views of others? The idea that balance is always a necessary solution suggests that imbalance is actually a problem in the classroom, in legal academic publications, or in public fora. Is this true, and how much does context matter even if it is true? Should we seek balance

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4. The American Center for Law and Justice ("ACLJ") litigates a broad range of issues, like the ACLU, but from a generally conservative stance.

5. The ACLU Board of Directors, for example, has promulgated a policy on the issue of directors identifying themselves with the ACLU when making statements beyond what ACLU policy authorizes. See *infra* n. 71 and accompanying text.

by providing students with antidotal experiences in our classrooms, or in other venues with teachers, scholars, and speakers who have different viewpoints, or can we assume that the marketplace will balance our ideas without our engineering? The third commandment is disclosure. To be armed against the consequences of exposure to non-neutral views, should our audiences be forewarned? If we do not believe that we can be bareheaded, should we advise our students, readers, and listeners of our views? How and how often should we provide warnings and disclaimers? Are there times when disclosure is inappropriate, i.e., when we may without guilt conceal one of our hats under another? Are there contexts in which disclosure can itself become a form of proselytizing?

None of these three purported norms (objectivity, balance, and disclosure), as I will discuss below, represents a categorical imperative. Each is more complex and ambiguous than might originally appear. There are two other commonly articulated commandments, however, that I do support unequivocally. The first is an anti-discrimination principle. We should not punish our students in any way for their political views, should not punish our colleagues for theirs, and should not ourselves be punished because of our views. Finally, the most challenging commandment, which seems to me to be a better and more realistic goal than objectivity—open mindedness. I believe that we should all strive to keep an open mind and listen to ideas that challenge our own views, whether from students, colleagues, or even those we would classify as our ideological adversaries. Sometimes, a hat that is not at all one's usual style can look surprisingly attractive.

## II. TAKE OFF YOUR HAT IN THE CLASSROOM?

### A. *The Quixotic Quest for Objectivity*

The question of whether a lawyer can attain objectivity by simply removing an advocacy hat was presented quite dramatically during the confirmation hearings of now Chief Justice John Roberts. Roberts had written memos while working at the Department of Justice, the office of White House Counsel, and the Solicitor General's office, consistently arguing aggressively partisan positions: opposing affirmative action, limiting federal civil rights enforcement, etc.<sup>6</sup> At his confirmation hearing, he claimed that he had taken those positions because of his role as a government lawyer and that any views he held or expressed in that capacity would not necessarily follow him to the bench.<sup>7</sup> As a Justice, he said, he would remove that advocate's hat and don an umpire's mask, judging cases as neutrally as an umpire calls balls and strikes.<sup>8</sup> I have expressed

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6. See CNN.com, *Roberts Fields Senators' Queries for Second Day: Chief Justice Nominee Avoids Specifics on Hot-Button Issues*, <http://www.cnn.com/2005/POLITICS/09/13/roberts.hearings> (Sept. 14, 2005); Adam Nagourney, *Onstage: Judge's Past, Politicians' Future*, § 4 *Week in Review* 1, in 154 N.Y. Times (July 24, 2005).

7. *Id.*

8. CNN.com, *I Come with 'No Agenda,' Roberts Tells Hearing: Chief Justice Nominee to Face Questions About Judicial Philosophy*, <http://www.cnn.com/2005/POLITICS/09/12/roberts.hearings/index.html> (Sept. 13, 2005).

my doubts about the ability of Roberts, or anyone else, to remove their deeply held predilections and beliefs as easily as a team's baseball cap.<sup>9</sup> I include myself.

In addition to teaching, I serve on the board of directors of the ACLU, on that board's executive committee, and as general counsel. So, like Nadine Strossen who currently serves as president of that board, I spend a considerable amount of time thinking about current legal events from an ACLU perspective. In recent years, for example, I have frequently spoken and written about the Patriot Act.<sup>10</sup> There are many stories I can tell about the Patriot Act, all of which seem to me to be true. I am often invited to debate the Patriot Act with people arguing the government position that the Act is only a technical and innocuous series of amendments updating previous law.<sup>11</sup> In that context, I focus on provisions that I do not think meet that description—provisions that go far (“too far,” I sometimes say) in sacrificing privacy and curtailing the proper role of the judiciary in limiting executive surveillance authority.<sup>12</sup> But depending on the context in which I am speaking, I sometimes tell other stories. I have spoken about the Patriot Act to various groups of judges and lawyers, as an individual speaker invited to provide information about how the Patriot Act has changed previous law. In that context, I generally do not highlight my critique of particular Patriot Act provisions but, instead, describe the provisions which most dramatically changed the law. Sometimes I include an account of the criticisms leveled against the sections I am describing in the same aloof tone in which a historian might describe the views of pre-Civil War abolitionists. In those speeches, I describe rather than advocate, sporting my professorial hat. I sometimes even point to parts of the Patriot Act I admire<sup>13</sup> in explaining that reactions to the Patriot Act on all sides have been overly generalized and sometimes based on misinformation.

I have also twice taught a seminar called “Terrorism and Civil Liberties,” in which the students have studied aspects of the Patriot Act (among other subjects). In that context, I have struggled with how far to pursue the ostensible academic ideal of objectivity. Students should, I think, learn of the critique of the Act as well as of the government's defense of it. But how far should I go in identifying myself with the

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9. Susan N. Herman, *Roberts' Pitch More Like a Curve Ball*, *Newsday* A57 (Sept. 16, 2005). Judge Samuel Alito, another former Reagan administration lawyer, followed in Roberts's footsteps by insisting that as a Justice he would keep an “open mind” on issues he was called on to decide, even where he had previously expressed a personal viewpoint. See e.g. Richard W. Stevenson & Neil A. Lewis, *Alito, at Hearing, Pledges an Open Mind on Abortion: Specifics Scarce as Democrats Push Him*, 155 N.Y. Times A1 (Jan. 11, 2006). Studies of the court of appeals opinions of each judge, however, showed a markedly consistent pro-government bent. See Amy Goldstein & Sarah Cohen, *Alito, In and Out of the Mainstream*, *Washington Post* A1 (Jan. 1, 2006); Charles Lane, *Nominee's Rulings Lean Right*, *Washington Post* A7 (Sept. 13, 2005).

10. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

11. Among the people I have been expected to balance on panels or in debates have been Michael Chertoff, Viet Dinh, Paul Rosenzweig, Larry Thompson, Ruth Wedgwood, and John Yoo. For more information on the government's positions on the Patriot Act, see the website of the United States Department of Justice. U.S. Dept. of Just., *Preserving Life and Liberty*, <http://www.lifeandliberty.gov> (last accessed Jan. 26, 2006).

12. Susan Herman, *The USA Patriot Act and the US Department of Justice: Losing Our Balances?* *Jurist* (Dec. 3, 2001) (available at <http://www.jurist.law.pitt.edu/forum/forumnew40.htm>).

13. One example is section 102: “Sense of Congress Condemning Discrimination against Arab and Muslim Americans.” 115 Stat. at 276.

critique? I decided not to assign the students my own current article about the Patriot Act in which I expound on my own critical views at some length, although I know that my colleagues at a number of law schools have assigned my article to their students as an introduction to the Patriot Act.<sup>14</sup> This was partly because of my perhaps misconceived notion that assigning my students to read my own writing smacks of vanity and potential abuse of my position. But I did post my article on the class webcourse so that interested students could read it. In class, I struggled with how to frame the Patriot Act discussion, when to use my descriptive voice and when to use my critical voice, when to rebut points made by students and when to leave it to other students to respond to points with which I disagreed. My students know of my ACLU affiliation and of my critical view of some Patriot Act provisions because I have been invited to speak at the law school, outside my classroom, on the subject of my views (sometimes at events sponsored by the Brooklyn Law School ACLU, my law school's student-run ACLU chapter). I could not have successfully pretended, in this case, to be neutral. Most, and perhaps all, of the students in the seminar knew what that other hat looked like.

So is it possible or desirable for me to teach the Patriot Act objectively? Should I strive for the same information-only voice I use when I speak not as a partisan but as a journalist/historian? I sometimes entertain the uneasy suspicion that even when I choose to be descriptive, I am probably not being objective, but I cannot be sure in which direction I am departing from neutrality. My critical views might be coloring my description of the facts, or at least my framing of the issues, in a way that might nudge listeners to agree with my own views, even if I do not intend or recognize my own thumb on the scale. It is equally possible that I am bending over so far backwards to avoid advocacy that I am actually putting a thumb on the scale against my own position. I think that what John Roberts meant when he said he would put his government lawyer role behind him as a Justice was the same thing I mean when I attempt to put my views of the Patriot Act aside and just describe the law in a situation where I deem that the appropriate role to play. We can try to be neutral, but it is difficult to guarantee, or sometimes even to recognize, success.

A judge, however, must choose only one position in each case, while I, as a teacher, can alternate hats during class. I have sometimes tried positioning my teaching hat firmly over my ACLU hat. When I do so, students do not seem to notice any feathers or plumes peeking out from underneath. At the end of a semester of teaching Constitutional Criminal Procedure, for example, I have had students speculate that I have a background as a prosecutor, obviously not having observed the fairly consistent defense orientation I know I carry with me even when I do not comment on it. I am never sure whether to be proud that I, like the Doctor Seuss illustrations, have so remarkably and thoroughly concealed that other hat that it is apparently invisible. Should I instead be dismayed that I have either concealed my bias so successfully that I am not remaining true to my own principles, or that I fooled students who did not

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14. Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 Harv. Civ. Rights-Civ. Libs. L. Rev. 67 (2006).

recognize ways in which my own orientation may indeed have influenced the discussion subliminally? Students have expressed different points of view about how they would prefer me to position myself. Not infrequently, I have had students in my Criminal Procedure and Constitutional Law classes tell me that they would like me to spend more time telling them my own opinion about various cases and arguments. So it seems that I may actually have some ability to set aside (or hide) my advocate's hat, just as Justice Roberts may indeed have some ability to call a ball or strike against his own team's interests, if that is what we want to do. But, whatever might be desirable for a Supreme Court Justice, I am not sure that achieving objectivity in the classroom should count as success.

I had a second problem with the John Roberts portrayal of a Justice as a neutral umpire. I think it misstates the nature of the law itself. Take a sample constitutional question, like whether the death penalty is unconstitutional. It is not possible to decide whether an answer to that question is a ball or a strike without adopting a theory of constitutional interpretation. Is it a strike to conclude that the death penalty is constitutional because the framers accepted it? Or does that conclusion miss the strike zone because the framers crafted a prohibition against "cruel and unusual punishment" that was intended to evolve over time? The idea that Justices can just do what the law, or the Constitution, tells them to do without injecting their own values is, in my opinion, a pernicious myth.

Similarly, I have been considering whether the ideal of objectivity in the classroom is inherently hollow. The idea that I am neutral as a teacher if I just describe the law is dependent on certain assumptions about the nature of law and of legal education. It is not a novel idea that law itself is not politically neutral, or that our teaching methods could, and perhaps should, take account of inherent bias in the law. Duncan Kennedy has been one of the most outspoken proponents of bringing politics into the classroom on the ground that law is inevitably politics.<sup>15</sup> Kennedy has become identified with the

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15. Duncan Kennedy, *Politicizing the Classroom*, 4 S. Cal. Rev. L. & Women's Stud. 81 (1994) [hereinafter Kennedy, *Politicizing the Classroom*]; see also Duncan Kennedy, *Liberal Values in Legal Education*, 10 Nova L.J. 603 (1986).

A recent reissue of Kennedy's self-published pamphlet, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (NYU Press 2004), inspired a *Journal of Legal Education* symposium on the contemporary relevance of Kennedy's polemic and strategy. See Melissa E. Murray, "I'd Like to Thank the Academy": *Eminem, Duncan Kennedy, and the Limits of Critique*, 55 J. Leg. Educ. 65 (2005) (agreeing that hierarchy persists, remarking on how the divide between Critical Legal Studies views and the mainstream has shrunk, criticizing Kennedy's reliance on students at the bottom of the hierarchy as the principal architects of change, and arguing that Kennedy's reliance on standard academic discourse limits the potential of achieving broad-based institutional transformation); Daria Roithmayr, *A Dangerous Supplement*, 55 J. Leg. Educ. 80 (2005) (finding that Kennedy's central observations about legal education reproducing the hierarchies of the legal profession and society are still valid, but observing that Kennedy's update neglected to pay sufficient attention to the rise of law and economics in the legal academy, or to the role critical theory might play in responding to shifts in the market); Steve Sheppard, *The Ghost in the Law School: How Duncan Kennedy Caught the Hierarchy Zeitgeist but Missed the Point*, 55 J. Leg. Educ. 94 (2005) (agreeing with Kennedy's description of the reinforcement of hierarchies, but finding his conclusions weaker than his statement of the problem).

Challenges to the neutrality of the law school classroom have also come from other perspectives. See e.g. Kim Brooks & Debra Parkes, *Queering Legal Education: A Project of Theoretical Discovery*, 27 Harv. Women's L.J. 89 (2004) (arguing that law professors should avoid decontextualization and attempts to leave



Critical Legal Studies position that neutral legal education is not in fact politically neutral because legal education reinforces conservative hierarchies in the profession and society, just as the law itself is a conservative engine that reinforces the existing hierarchies of society.<sup>16</sup> Kennedy describes the law teacher's strategy of "pretending to be neutral"<sup>17</sup> as "letting the students think they think the conservative rules are perfectly all right."<sup>18</sup> If I describe the Patriot Act in a neutral tone of voice as an updating of the law, am I being neutral, or am I actually putting a thumb on the scale—encouraging students to accept that change as legitimate?

Kennedy also rejects what is often characterized as the only pedagogical choice other than neutrality: taking a position and "preaching" it.<sup>19</sup> He describes his own third-path teaching methodology, using discussion of provocative cases or hypotheticals to serve three goals: (1) to teach black letter law; (2) to expose gaps, conflicts, and ambiguities in the system of black letter law; and (3) to polarize the class around the students' own political views, which will emerge in discussion of a case or hypothetical that exposes the gaps, conflicts, and ambiguities in black letter law. I often use this technique to engage student views, instead of having my own views be the fulcrum of class discussion. The first time I taught my seminar, this approach worked well in the Patriot Act discussion, because the twenty students in that particular class held a wide range of political viewpoints, and were passionate and outspoken about their different views. They challenged each other and me in a discussion that recognized the complexity of the issues, and rejected easy generalizations of either Patriot Act partisans or critics. This year, as the luck of the draw would have it, the twenty students who were enrolled in my seminar<sup>20</sup> were almost all committed civil libertarians who had a hard time entertaining the possibility that the Patriot Act was not pure evil. I found myself playing devil's advocate in order to try to promote a critical discussion. But I think some students may not have taken my pro-government arguments seriously because they had already identified me with their own skepticism. I even had the sense that some students may have felt they had been subject to a bait and switch, listening to me expound on the most reasonable arguments I thought the government could make in defense of certain Patriot Act provisions. Many had selected the course knowing that I would be teaching

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behind identities and politics at the classroom door, and questioning to what extent the professor should reveal him or herself); Chris K. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 Ind. L. Rev. 737 (2000) (critiquing academic support programs that subordinate minority students by focusing on improving performance within ostensibly "neutral" law school pedagogy); William F. Kullman, *Feminist Methodologies in the Law School Classroom: Listening for a Change*, 4 Temp. Pol. & Civ. Rights L. Rev. 117 (1994) (summarizing feminist critiques of the ostensibly neutral, but actually male dominated legal classroom); Stephanie M. Wildman, *Democratic Community and Privilege: The Mandate for Inclusive Education*, 81 Minn. L. Rev. 1429 (1997) (arguing that legal educators share a responsibility to unmask privilege, and to privilege the underprivileged).

16. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *The Politics of Law: A Progressive Critique* 38 (David Kairys ed., rev. ed., Pantheon Bks. 1990).

17. Kennedy, *Politicizing the Classroom*, *supra* n. 15, at 83.

18. *Id.*

19. *Id.* at 84.

20. This was not wholly a self-selected group, since there was a waiting list of students who did not get into the course. There is no way to tell whether the students who were enrolled according to neutral registration principles were representative of all the students who signed up for the course.

it, knowing of my ACLU affiliation, and perhaps wanting to hear more about my views in order to substantiate their own skepticism.<sup>21</sup>

I agree with Kennedy's perception that "neutrality" is not always neutral, and with his acknowledgement of the respect due to the king. I agree that I should not be using my teaching position to preach. However, I do not believe that forswearing preaching means that I should conceal my own views in the classroom, although I am still in considerable doubt about how far to take this idea. I have experimented with self-consciously alternating hats in teaching. Instead of projecting neutrality throughout the semester, I sometimes tell students that in my ACLU capacity I have a position on an issue and then explain the position briefly, inviting questions or discussion. Many students react well to this technique because they find it exciting to have any voice from the real world enter the classroom. I think they also respond to the passion I bring to the discussion when I talk about my own tenets of belief. (My tenets are many and not all partisan—I think I also convey my enthusiastic admiration for the structures of the Constitution.) But not all students are pleased. Even when I have been striving, to my own satisfaction, to sound neutral, the occasional student will complain in a course evaluation that I have taught Constitutional Law in a liberal fashion—because I talk about rights, for example.<sup>22</sup>

The more I depart from a stance of self-styled neutrality, the more I open myself up to criticism. I know that Nadine Strossen sometimes invites ACLU lawyers and clients into her classroom to talk about their own involvement in current litigation of constitutional issues—an opportunity for her students to benefit from her ACLU connections. I have done this occasionally, inviting a lawyer from the ACLU Reproductive Freedom Project one year, for example, to talk to my Constitutional Law students about current issues and litigation concerning abortion. Most of the students in the class were thrilled to hear a real world, up-to-the-minute account of the sequels to *Roe v. Wade*<sup>23</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>24</sup> from a brilliant lawyer who was passionate about her work. One student, however, complained anonymously in a course evaluation that this presentation had not been balanced by someone presenting an opposing point of view to the class. I had mixed feelings about this criticism. On panels outside the classroom, balance rules. In a class studying

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21. In addition to the question of how I view the goal of objectivity in teaching as a general matter, the difference between the students in these two classes raises another question: Is role, at least for an educator, so dependent on context that in addition to considering the venue when I decide how to conduct myself (i.e., is it a classroom or some other forum?), I also need to consider the identities and views of the other participants?

22. I would be interested in attending Constitutional Law classes taught by conservatives of various stripes to observe, for example, their approaches to teaching the *Carolene Products* footnote. See *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938) (setting out Justice Stone's theory that judicial intervention is most appropriate in cases involving suspect classifications, fundamental rights, or failures of political representation). I do not teach that Justice Stone is correct, just that he has propounded one theory of constitutional interpretation worth discussing. Putting together what I have said in class with what they know of my views from other sources, students may conclude that I agree with this theory of judicial review even if I have not said so. Would students hear the exact same class discussion differently if they believed I was affiliated with the ACLJ?

23. 410 U.S. 113 (1973).

24. 505 U.S. 833 (1992).

constitutional decisions, I thought it appropriate to introduce a lawyer who provided the students with information about how the doctrine in the cases they read was evolving, even if she did have a side in the litigation. Understanding the context of the classroom, she tempered what could have been an advocate's proselytizing voice by teaching more than preaching. I did not think it was necessary to double the amount of time I was spending on current issues in abortion litigation by also inviting someone who would have described the same cases, coming from a defensive posture. I reassured myself that what my guest had conveyed was a description of the current litigation (like my description of the Patriot Act changes in the law) rather than advocacy of her position, and thus did not require balancing. But knowing about her affiliation, students may have read advocacy into what she was saying—most, but not all, approvingly. I do understand how some students might conclude that a particular viewpoint is being privileged, regardless of whether that viewpoint is actually being articulated in the classroom.

My students, like Nadine's, get the benefit and disadvantage of the fact that my contact list includes more ACLU lawyers than Operation Rescue lawyers. I am not neutral, and I would be fooling myself if I believed that I could become neutral in a classroom, or that I could make my classroom a wholly neutral place.<sup>25</sup> So if neutrality is not genuinely possible or even desirable in the classroom, what should I be doing to provide my students with balance, either within my classroom or in the context of the law school as a whole?

### B. Balance

I believe that good teaching invites students to consider a range of points of view over a range of issues. Students in my classes sometimes express surprise that I pay careful attention to dissenting opinions, especially in Constitutional Law, whether the dissent is by Antonin Scalia or William Brennan. I do this to try to get students to think about why a certain decision was reached and what alternatives existed, instead of being content to memorize the majority's holding as one more nugget of black letter law. During class discussions, I profess my welcome for all points of view, whether the students are expressing their own agreement with a position (Scalia's, Brennan's, or some other position the student is introducing), or just exploring various arguments. In order to promote open discussion, I tell students that they should feel free to articulate any point without endorsing it by beginning their comment with the words "It could be argued that . . ." My hope is that using these words to note that they might only be arguing in role will liberate students from trying to please either their classmates or me. Students expressing a view disagreeing with what they think my position is will not have to fear that they are disappointing me, or that I will give them a poor grade because of my disagreement. Students expressing an unpopular or controversial view will not have to fear taking heat after class from other students who disagree with the position they have articulated, or being branded as a "liberal," "conservative," or "libertarian."

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25. Whether a class run by me can nevertheless feel welcoming to students who have, or might develop, views different from mine, is a separate question. See *infra* nn. 38–44 and accompanying text.

(In class, I only allow what I think is reasoned response rather than heat, and I discourage reductionist labels.) When I plan reading assignments on controversial subjects, I usually try to provide students with a range of viewpoints so that they are able to engage, either in class or in their own minds, in an energetically polarized debate. In Constitutional Law, for example, I invite students to read the views of both Ronald Dworkin and Robert Bork on constitutional interpretation.

Constitutional law cases on controversial issues usually contain balance in the form of dueling opinions. Students in Constitutional Law can use the opinions of Antonin Scalia as an antidote to any partisan viewpoint I might express, whether intentionally or not. I tell students who might be inclined to think that they need to parrot my own views back to me in order to get a good grade that I would give either the majority or dissenting opinion in various cases an “A,” because neither point of view is objectively correct.<sup>26</sup> And I am gratified on those occasions when it turns out that my anonymous grading has resulted in my giving the highest grades to students whose political views are very different from my own—something that does happen, even though there have probably been a few students in my classes over the years who suspect otherwise. So can balancing the reading and discussion within my class make up for the fact that I cannot (and do not really wish to) make myself a blank slate? Or, can I assume that students will gain balance by attending other classes led by professors with viewpoints different from mine?

There has been a great deal of discussion lately about balance in the legal academy. A recent article by John McGinnis and co-authors<sup>27</sup> sought to support empirically the frequently made assertion that law school faculties lean overwhelmingly to the left.<sup>28</sup> The authors’ methodology was to study political contributions by law school faculty members, taking that as a proxy for political views.<sup>29</sup> They found that of the 29% of law professors who made political contributions, 81% contributed to Democratic candidates.<sup>30</sup> If we assume that the bottom line here is correct, after disagreements about methodology have been hashed out, then most law school faculty members seem to be closer to my ACLU views than to Professor McGinnis’s more conservative view of the law. How should I react to the conclusion that my views are within the academic mainstream?

It is easy for me to conclude that I should guard against viewpoint discrimination, but more difficult for me to evaluate arguments about balance. The chief controversy surrounding reports of a liberal tilt in legal academia has centered on claims of discrimination against those with conservative viewpoints. Concerns have been raised

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26. For example, *United States v. Morrison*, 529 U.S. 598 (2000), involved a five-to-four decision with powerful conflicting opinions by Chief Justice William Rehnquist for the majority, and Associate Justices David Souter and Stephen Breyer for the dissent.

27. John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 Geo. L.J. 1167 (2005).

28. See Adam Liptak, *If the Law Is a Ass, the Law Professor Is a Donkey*, § 4 Week in Review 4, in 154 N.Y. Times (Aug. 28, 2005); John Tierney, *Where Cronies Dwell*, 155 N.Y. Times A23 (Oct. 11, 2005).

29. McGinnis, Schwartz & Tisdell, *supra* n. 27, at 1169.

30. *Id.* at 1175–77, 1182.

about whether conservatives have a harder time being hired, winning promotion or tenure, or getting to teach the courses they want to teach.<sup>31</sup> The recent focus on legal academia is part of a more general critique of academia, not just for liberal bias, but for discriminating against faculty and students who disagree with the dominant views. David Horowitz, for example, won considerable attention campaigning for an “Academic Bill of Rights” to counteract what he portrays as a widespread problem of academic discrimination against conservatives.<sup>32</sup> Horowitz levels extreme charges:

Leftist professors think nothing of intruding their political passions into the classroom in a manner that is inappropriate and abusive, and an unprofessional attempt to politically indoctrinate their charges. Professorial remarks denigrating conservative ideas and personalities—often in the most inappropriate context imaginable—powerfully convey the message that conservative ideas are unacceptable in the academic community. While reading lists are stripped of conservative texts, professorial expectations are defined as agreement with the ideology and political biases of the instructor. Grades often (but not always) are employed to make the bias stick.<sup>33</sup>

These charges would, of course, be troubling if true. But whether or not Horowitz’s charges can be substantiated, or whether or not they reflect more than isolated instances, his overreaching Academic Bill of Rights was considered, although not adopted, by the legislatures of fourteen states.<sup>34</sup>

ACLU liberals as well as conservatives should have no problem agreeing to the basic non-discrimination principles reflected in the Academic Bill of Rights.<sup>35</sup> Of course people should not be discriminated against in hiring or in grading on the basis of their political beliefs. But because not everyone is in agreement about the underlying facts, or whether the horror stories Horowitz recounts paint an accurate picture of

31. See Jennifer Jacobson, *Conservatives in a Liberal Landscape: On Left-leaning Campuses Around the Country, Professors on the Right Feel Disenfranchised*, 51 Chron. Higher Educ. A8 (Sept. 24, 2004) (available at <http://chronicle.com/free/v51/i05/05a00801.htm>) (quoting several conservative law professors recounting examples of their negative treatment by liberal students and colleagues).

32. David Horowitz, *The Campus Blacklist*, <http://www.frontpagemag.com/articles/ReadArticle.asp?ID=7357> (Apr. 18, 2003).

33. *Id.*

34. Am. Assn. U. Profs., *The “Academic Bill of Rights” Campaign*, <http://www.aaup.org/issues/abor/aborintro2.htm> (last updated Feb. 2006).

35. These proposals (I have omitted Horowitz’s rhetorical justifications) are described on Horowitz’s *Frontpage Magazine*’s website as:

- Hiring, firing, promoting or granting tenure shall be on the basis of performance—not on the basis of political or religious beliefs. . . .
- Students will be graded on their work . . . not their political beliefs or religion.
- Course content and reading lists in humanities and social sciences will reflect diverse concepts and viewpoints.
- Selection of speakers, allocation of funds for speaker activities and other student activities will observe the principles of academic freedom and promote intellectual balance. . . .
- Academic institutions and professional societies should maintain a posture of organizational neutrality.

David Horowitz, *From the Desk of David Horowitz*, <http://www.frontpagemag.com/Content/read.asp?ID=50> (accessed Mar. 13, 2006) (second ellipses in original). Other proposals by Horowitz go beyond non-discrimination proposals, to political oversight of academic decisions: “Tenure, search and hiring committee meetings will be recorded and available to duly authorized authorities empowered to inquire into the integrity of the process.” *Id.* These proposals are more controversial.

conservatives being systemically victimized, not everyone agrees that individual determination not to discriminate is an adequate response.

As a member of a law school faculty, I play some role in hiring faculty members and in decisions about reappointments, promotion, and tenure. I agree that having a more diverse range of viewpoints on my faculty would be advantageous—to me, as well as to the students. I would like to have colleagues who will challenge my ideas, and I would like to have colleagues who will fill out the ideological spectrum so that I can worry less about providing students with views that will balance my own. And, so I could decide to take account of ideological viewpoint in my own appointments decisions—a kind of viewpoint diversity affirmative action. I have no problem with affirmative action in appropriate circumstances, but I wonder what conservatives who disapprove of affirmative action programs based on race or gender would have to say about viewpoint diversity affirmative action. It is easy enough for us all to agree that a law school should not refuse to hire excellent scholars/teachers *because of* their conservative viewpoints. But should a law school at this point go out of its way to hire a scholar/teacher whose credentials are less sterling than those of some other candidates in order to provide more balance on law school faculties? If their qualifications are equal, should the viewpoint of a conservative legal scholar be regarded as a plus?<sup>36</sup>

Of course, my individual role in constructing law school faculties is not great, and so increasing diversity on law school faculties, assuming that they are not now very diverse,<sup>37</sup> is an aspiration not within my control. The more immediate question for me is, given the current situation in legal academia, how should I be conducting myself in and beyond my classroom?<sup>38</sup>

To answer this question, I would need to have some sense of how students are actually affected by my views, whether I express them openly or not. As remarked above, I do not think that my grading discriminates against students whose political beliefs are different from mine. I do not call my students names. And I do not preach my views. If I do not discriminate in any of these ways, is there any reason to think that my students suffer from a lack of balance?

Responding to the recent articles declaring that law school faculties have a fairly consistent political bias, Peter Schuck questions whether that bias matters.<sup>39</sup>

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36. McGinnis and his co-authors are careful to distance themselves from any approval of affirmative action in discussing whether liberal law school faculties are inconsistent in not striving for viewpoint diversity. See McGinnis, Schwartz & Tisdell, *supra* n. 27, at 1198–1203.

37. Some have also argued that it is not necessary to provide viewpoint diversity within a particular law school because students can choose what law school to attend. Responding to a discussion of balance on law school faculties on a blog, Henry Manne described a law and economics oriented curriculum at George Mason Law School. Henry Manne, *Could We Get (and Do We Even Want) Intellectual Diversity Within Law Schools?* [http://busmovie.typepad.com/ideoblog/2005/12/could\\_we\\_get\\_an.html](http://busmovie.typepad.com/ideoblog/2005/12/could_we_get_an.html) (Dec. 6, 2005). He unapologetically described the program as not striving for any sort of ideological balance, saying “I think the best teaching, and therefore the best preparation for lawyering, is done by professors who are intellectually committed to the views they propound and who present their case as strongly as they can.” *Id.*

38. Law school clinics provide an especially fertile locus of controversy about whether left-wing faculty are indoctrinating students. See Heather MacDonald, *Clinical, Cynical: You'll Never Believe What Left-Wing Law Profs Consider "Mainstream,"* Wall St. J. A14 (Jan. 11, 2006).

39. Peter H. Schuck, *Leftward Leaning*, Am. Law. 77 (Dec. 2005).

First, Schuck asks, how do we know that faculty members, whatever their personal beliefs, teach in a biased fashion?<sup>40</sup> They may introduce diversity of perspectives into their classes, as I discussed above, by assigning reading by a variety of authors or engaging the opinions of a variety of students.<sup>41</sup> Second, how do we know that students will actually be influenced by even the visible biases of their law school professors, given that law students are more mature and formed in their worldviews than undergraduates?<sup>42</sup> Judge Richard Posner, no liberal apologist, remarked in response to the McGinnis study that he does not think the “liberal bias of law school faculties has much impact on the students.”<sup>43</sup> Judging by the products law schools turn out, if there is a liberal plot to indoctrinate law students, it has failed abysmally. The legal profession as a whole does not reflect the attitudes of law professors.<sup>44</sup>

I also want to raise a question about the current quest for balance—is it any more politically neutral than the quest for objectivity? Is this insistence on balance itself partisan—a platform of conservatives who have found an enclave they do not control and have cast their argument for enhancement of their role in that enclave in a form irresistible to liberals?<sup>45</sup> The idea that legal education is unbalanced if law faculties contain more liberals than conservatives again assumes that the law itself is neutral. If the law we teach in law school is, as Duncan Kennedy and others argue, inherently conservative, then the baseline itself is off center. If so, then perhaps law school faculties should be predominantly liberal, or even radical, to balance the bias of the law itself and introduce students to a complete range of viewpoints including critical accounts of the law. Is it possible that activists of the left are attracted to law school teaching because they feel impelled to try to balance the more conservative tilt of the law itself, the legal profession, or increasingly, the judiciary?

### C. Disclosure

As I have described above, disclosing my own views in the classroom has its pros and cons.<sup>46</sup> On the one hand, if I am frank about my own views, students will know to be on their guard and may be better able to spot places, even if I cannot, where my presentations are not wholly objective. On the other hand, the more I announce my own

40. *Id.* at 78.

41. *Id.* at 80.

42. *Id.*

43. Liptak, *supra* n. 28, at 4 (internal quotation marks omitted).

44. *Id.* One law professor, Nathaniel Persily, speculated that the profession itself, especially corporate law firms, might push graduating students back to more centrist positions, even if they had been influenced during law school. *Id.* John McGinnis was quoted in the same article as remarking that the market could supply other antidotes to a liberal bias in legal education, including conservative think tanks. *Id.*

45. A similar choice of argument strategy has occurred in Establishment Clause cases, where those advocating a greater presence of religion on campuses have made considerable headway by casting their arguments as grounded in principles of equality. The premise that students who advocate religious causes should not be discriminated against by universities that support other students' causes has proved attractive to courts. See *e.g. Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819 (1995) (invalidating prohibition of school funding of student activities primarily aimed to promote particular religious beliefs as viewpoint discrimination).

46. See *supra* nn. 15–25 and accompanying text.

bias, the more students with different points of view may feel unwelcome, or fear that I will not value their work (even though I do not believe that they have cause for alarm). If I consistently invite only ACLU activists to speak with my class, it probably does give students a message that I value those views more than others.<sup>47</sup> On balance, I have concluded that it is better to disclose my ACLU affiliation to my students at the beginning of a semester, because then, at least, students will have equal knowledge about me, whatever that knowledge is worth, and because I do not wish to send the message that my affiliation is something to be hidden. I invite students to discuss my ACLU work or viewpoints with me outside of class, either to find out more about what I do, or to challenge me. I try not to allow my disclosure to become a dominant theme. I continue to put other hats on top of my ACLU hat, even if I have invited the students to see, to the extent they want to, what the ACLU hat looks like.

In these days of Google, the easy availability of information about me makes the issue of disclosure much less loaded than it might be otherwise. Anyone who clicks on my biography on the Brooklyn Law School website will learn of my ACLU connection. My amicus briefs, law review articles, and quotes in the media are never more than a few clicks away. Concealment is not an option. But it is still difficult for me to decide how much and when to discuss my affiliations and viewpoints in the classroom.

#### D. *Non-discrimination*

I have already discussed one of the two precepts I freely acknowledge as limiting my own actions as an activist educator.<sup>48</sup> I do not intend to discriminate on the basis of viewpoint. Of course, it is not always easy to distinguish discrimination against someone's point of view from an objective evaluation of their analytical or argument skills. My skepticism about the myth of objectivity should also apply to my own attempts to grade students or select colleagues without regard to their own beliefs or activism. I face the danger that I might be biased in a manner I do not recognize, or, conversely, that I may be bending over backwards to credit an argument that I truly believe does not make sense.

It is also difficult to spot the point at which trying to follow some other precept may begin to function as a form of discrimination, by creating what some students or colleagues might regard as a hostile environment. I teach some classes that students may choose precisely because they want to learn more about my views. But, especially in courses where the students are not self-selected, I do everything within my power not to allow students to suffer because they are taking a course with me instead of a more conservative colleague. This may mean that some students who would enjoy hearing more about my ACLU activities in class than I am comfortable sharing will be disappointed, but I think that being an educator at an institution that does not advertise itself as having a political mission means that my desire to be fair to other students

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47. I can provide balance over time, to my own satisfaction, by inviting speakers with different views and backgrounds or by choosing different readings or hypotheticals in each semester, but students who take my course only one semester will not be able to share my own sense of balance.

48. *See supra* nn. 26–36 and accompanying text.



should constrain my activist impulses in my official contacts with students. Vowing not to discriminate does not make it easy to parse teaching from preaching, disclosure from influence, or evaluation of the skill with which an argument is made from my profound disagreement with the argument itself, but it does mean that I will try.

*E. The Open Mind*

My attempt to be fair to students who have different viewpoints will, I think, be condescending and unsuccessful if I only tolerate their expression of their views and do not entertain the possibility that they might be right, at least some of the time. I believe that my beliefs are right, which is why I believe them. There are places where I believe that reasonable people can differ; there are other places where I do not think reasonable disagreement is possible.<sup>49</sup> In asking why we should regard it as a problem if law students are indeed influenced by their (liberal) professors, Peter Schuck makes this comment:

Liberal faculty at these schools, like their (rare) conservative colleagues, believe what they teach, and there is no reason to label their liberal teachings as wrong just because conservatives often disagree with them. In a society that properly values viewpoint diversity and protects academic freedom, only positions that are demonstrably beyond the pale can amount to educational malpractice.<sup>50</sup>

Schuck balances his vision of a hundred flowers blooming in legal classrooms (even if most of the flowers are similar varieties) by insisting that legal educators, whatever their own views, have an obligation to remain open minded:

Professors have a sacred duty to their students and to each other to affirm—and also to exemplify—core academic and intellectual values. We should convey to our students an abiding respect, even awe, for the complexity of law in society, and we should exhibit the ideological humility that this complexity implies. Any professors worthy of the title have strong views, of course, but they should also have a keen sense that those views may be wrong, or based on incomplete evidence, or highly reductive. Even if we are utterly convinced of the correctness of our positions, we should teach as if we aren't—as if there are serious counterpositions to be entertained and explored, as if even the truth cannot be fully apprehended until it is challenged by the best arguments that can be marshaled against it.<sup>51</sup>

I find this a far more attractive vision than the illusory ideal of objectivity, or of numerical balance of viewpoints within a classroom, within an individual law school, or in legal academia as a whole.

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49. My belief that not all ideas are equal has an impact, of course, on my judgments about balance and even my judgments about what constitutes unfair viewpoint discrimination. I will invite people who argue that anti-abortion groups have a First Amendment right to protest outside abortion clinics to speak on a panel; I will not invite people who advocate burning down abortion clinics. I will invite scholars who disagree with my views about affirmative action or gay marriage; I will not invite people whom I think have crossed the line separating expression of ideas about the law from advocacy of racism or homophobia.

50. Schuck, *supra* n. 39, at 80.

51. *Id.* (emphasis omitted).

And now I will reveal the true nature of my own bias by asking another question about balance: I wonder if it is easier for me, with my liberal inclinations, to remain open minded and entertain the possibility that I might change my mind? The essence of liberalism, to me, is tolerance of a variety of viewpoints, an ideological pluralism that contrasts with any form of what, in its extreme form, manifests itself as fundamentalism. Can someone who is a fundamentalist, whether in religion, law, or politics, achieve the virtues of open-mindedness?

I do hope, nevertheless, that activists of all stripes will be willing and able to remain open minded, and I expect to participate in a free market of ideas in hiring law school faculty, in the classroom and beyond. My goals as a legal educator will be first, to try to prevent any discrimination (by me or by others) against people who disagree with me and, second, to listen when students or colleagues with different points of view try to persuade me that I am wrong about some issue or some action. I will consider disclosure, which needs to be indulged cautiously, but I will not try or pretend to remove all my hats, and I will step out into public without always conjoining myself with a representative of responsible opposing viewpoints.

### III. ACTIVIST SCHOLARSHIP

Nadine Strossen, whose scholarship is being honored by this symposium, has generated books<sup>52</sup> and any number of law review articles<sup>53</sup> espousing scholarly positions consistent with ACLU policies; she also sometimes writes articles on behalf of the ACLU.<sup>54</sup> Similarly, I write law review articles that often take approaches consistent with ACLU positions,<sup>55</sup> I sometimes explicitly advocate or defend ACLU positions,<sup>56</sup> and I sometimes write articles about issues on which the ACLU is agnostic.<sup>57</sup>

As legal academics, we expect to have the freedom to choose to write on any significant legal issue—whether pornography, double jeopardy, or the Patriot Act—from any point of view. We also expect to be able to choose our voice—writing as academics who happen to agree with various ACLU stances, as ACLU lay leaders who advocate positions the ACLU has taken, or even as defenders of ACLU decisions to take certain positions. What we legal academics should be doing as legal scholars is not, however, a subject that is free from controversy.

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52. See e.g. Henry Louis Gates, Jr., et al., *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (NYU Press 1994) (co-authored by Nadine Strossen); Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (Scribner 1995).

53. See e.g. Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 Va. L. Rev. 1099 (1993); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. Rev. 1173 (1988).

54. See e.g. Nadine Strossen, *Why the American Civil Liberties Union Opposes Campus Hate Speech Codes*, 10 Academic Questions 33 (1997).

55. See e.g. Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 Or. L. Rev. 1229 (1998); Susan N. Herman, *Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play on Double Jeopardy*, 95 Colum. L. Rev. 1090 (1995).

56. See e.g. Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609 (1994).

57. See e.g. Susan N. Herman, *Our New Federalism? National Authority and Local Autonomy in the War on Terror: Introduction*, 69 Brook. L. Rev. 1201 (2004).

Some critics have viewed legal academic scholarship as too divorced from practice. In a much discussed law review article, Judge Harry Edwards urged academics to write scholarship, like much of the scholarship that Nadine Strossen and I both write, that may be of interest and use to judges and practicing lawyers, rather than abstruse meta discussions that are of interest chiefly, or solely, to academics.<sup>58</sup> Another critic has challenged the assumption that legal teaching and scholarship are mutually supportive, noting that most academics teach material in class that is unlikely to be the subject of their scholarly efforts.<sup>59</sup> Others criticize activist scholarship, arguing that legal academics should take a more professorial tone in their writing as in their classroom teaching. Rebecca Eisenberg generated considerable discussion in the *Journal of Legal Education* when she argued that the autonomy of faculty scholarship is potentially compromised by faculty acting as practitioners or consultants outside the academy.<sup>60</sup> She argued that such advocacy could consume time that might otherwise be spent on educational activities and, more importantly, that a law professor's scholarly views might be distorted by financial self-interest, or by the "tendency of good advocates to believe their own arguments."<sup>61</sup> Eisenberg thought that even those working pro bono for a cause may "run the risk of distorting or overstating their academic views when they serve as advocates for clients."<sup>62</sup> Of course, one might disagree with her underlying point, at least with respect to activists, and argue that engagement outside the law school improves the quality of scholarship by dispensing with any pretense of objectivity and reflecting the passions of the author.<sup>63</sup>

Believing that there was a problem to solve, Eisenberg argued that one palliative would be to require scholars to "disclose prominently any clients whose interests might lurk behind their views whenever they publish books and articles that discuss issues they have been paid to think about."<sup>64</sup> The Association of American Law Schools ("AALS")

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58. See Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); see also David Hricik & Victoria S. Salzman, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 Suffolk U. L. Rev. 761 (2005).

59. Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 Am. U. L. Rev. 367, 368-71 (1990) (arguing that the dualist model may not promote the best in either teaching or scholarship).

60. Rebecca S. Eisenberg, *The Scholar as Advocate*, 43 J. Leg. Educ. 391 (1993) [hereinafter Eisenberg, *The Scholar as Advocate*]. In an earlier article, Eisenberg had argued that academic values are undermined when faculty members need to find external sponsors for their work. Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 Tex. L. Rev. 1363 (1988).

61. Eisenberg, *The Scholar as Advocate*, *supra* n. 60, at 393.

62. *Id.* at 395.

63. See Graham Brown, *Should Law Professors Practice What They Teach?* 42 S. Tex. L. Rev. 316, 331-43 (2001) (arguing that non-"objective" scholarship connected to a legal academic's practice is valuable to the professor's students); Angela P. Harris & Marjorie M. Shultz, "*A(n)other Critique of Pure Reason*": *Toward Civic Virtue in Legal Education*, 45 Stan. L. Rev. 1773, 1804 (1993) (arguing that the dangers of allowing emotions and politics to enter classroom discussion are outweighed by the benefits of engendering an engaged, passionate, and rich intellectual debate); John R. Kramer, *Comment on Rebecca Eisenberg's "The Scholar as Advocate"*, 43 J. Leg. Educ. 401 (1993) (acknowledging that his scholarly work outside the academy has not been disinterested, but has been directed more to the pursuit of social justice than to truth).

64. Eisenberg, *The Scholar as Advocate*, *supra* n. 60, at 399. Although Eisenberg thought that distortion of scholarship might also affect those working for a client on a pro bono basis, the remedies she considered and proposed, disgorgement of profits and disclosure of financial profit, did not cover those who, like me, are not paid for their advocacy efforts.

subsequently debated these issues and amended its *Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities*<sup>65</sup> to require disclosure if law professors are being compensated,<sup>66</sup> or are expressing views espoused or developed in the course of representing or consulting with a client “when a reasonable person would be likely to see that fact as having influenced the position taken.”<sup>67</sup>

I do not think it is possible to bleed out the impact of association with a particular client or organization on one’s scholarship. I also do not think it is desirable to try to do so, given that I do not believe that we can be any more neutral or objective as scholars than we can as classroom teachers. Our activism and scholarship may sometimes be at odds. Or sometimes, we may seem overly consistent. I have heard people argue that it is unseemly for Alan Dershowitz to write law review articles about issues raised in his pending litigation and then cite his own articles as authority for the positions he argues as a representative of a litigant. Although Eisenberg might, I do not see any problem with wearing those multiple hats if the author/advocate believes in the position taken both in the article and in the litigation. The first commandment discussed above, objectivity, is no more a categorical imperative in scholarship than in the classroom. Some scholarship, like treatises, purports to be objective. Other scholarship must be evaluated by the reader on its own terms. But if I acknowledge that my scholarship is not objective, how far should I go to warn the reader? Does the commandment of disclosure apply in scholarship in the same manner it applies in the classroom?

The question of when I should disclose my ACLU affiliation in my law review and other articles is not an easy one. The AALS injunction seems easier to apply when a lawyer is consulting for money rather than out of commitment to an organization’s or client’s mission. If a lawyer consciously articulates a position only because a client has hired her, it may be possible to say that position has been influenced by the representation. The problem Eisenberg identifies is that the individual might suppose that she would have developed that position in any event, because of “viewpoint transformation.”<sup>68</sup> The problem of identifying influences on an ACLU activist is considerably more difficult. Would a reasonable person conclude that I am critical of the Patriot Act because I am general counsel to the ACLU, or that I am active in the ACLU

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65. AALS, *Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities*, [http://aals.org.cnchost.com/about\\_handbook\\_sgp\\_eth.php](http://aals.org.cnchost.com/about_handbook_sgp_eth.php) (Nov. 17, 1989) (amended May 2003).

66. *Id.* “A law professor shall disclose the material facts relating to receipt of direct or indirect payment for, or any personal economic interest in, any covered activity that the professor undertakes in a professional capacity.” *Id.* at § II. This statement does not function as a disciplinary rule unless individual law schools decide to adopt it.

67. *Id.* The subsection of the AALS Handbook entitled “Responsibilities as Scholars” states:

A law professor shall also disclose the fact that views or analysis expressed in any covered activity were espoused or developed in the course of either paid or unpaid representation of or consultation with a client when a reasonable person would be likely to see that fact as having influenced the position taken by the professor.

*Id.*

68. Eisenberg, *The Scholar as Advocate*, *supra* n. 60, at 394 (describing the phenomenon of advocates coming to believe whatever they have argued).

because I believe that the Fourth Amendment should be broadly construed, and would believe that even if I were not affiliated with the ACLU?

The AALS Handbook might suggest that disclosure is always the safer and preferable option. But disclosure is not always an unmitigated good, even outside the classroom. In my latest article about the Patriot Act, for example, I argue that the chief problem with some of the Act's provisions is not so much that they are unconstitutional, but that the Constitution sets such a low bar that most of the controversial Patriot Act provisions are likely to be upheld by the courts.<sup>69</sup> In my initial draft, I identified myself in the first footnote as general counsel to the ACLU, since I thought the reader might like to know of my association in order to evaluate my arguments and the frequency of my citations to ACLU litigation. However, my article was not one that would necessarily please ACLU advocates because I was minimizing the strength and importance of constitutional arguments ACLU litigators might want to make. I debated whether to delete the ACLU reference, and whether writing that article with only my scholar hat visible was misleading. Then, a colleague was involuntarily identified by a newspaper reporter as an ACLU Board member in a story quoting a comment he had made in his personal capacity, taking a position that the ACLU had not taken.<sup>70</sup> Subsequent discussion among board members about this story highlighted an ACLU Board policy that urges board members to avoid identifying themselves with the ACLU when taking positions the ACLU would not approve.<sup>71</sup> To play it safe, I deleted the reference in my footnote. Perhaps in this instance it was not possible for me to please the ACLU and the AALS simultaneously. Reporters and publishers frequently have their own preferences about whether to identify me by my ACLU affiliation or as a law professor. Sometimes

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69. Herman, *supra* n. 14.

70. The issue concerned support of a Supreme Court nominee on whom the ACLU had not taken a position. My colleague had not mentioned his ACLU connection to the reporter during discussion of his views of the candidate, but the reporter had interviewed him on previous occasions and therefore knew of his affiliation. She decided to mention the affiliation in her story without asking permission, so the identification was not the board member's choice.

71. ACLU, *Policy Guide of the American Civil Liberties Union: Free Speech and Political Participation: Free Speech for ACLU Employees and Lay Leaders*, Policy #528, at 680 (copy on file with author and *Tulsa Law Review*). The policy states:

As an organization that is dedicated to protecting freedom of expression from government interference, the ACLU is particularly sensitive to the need to guard the free speech rights of members of its own governing board, staff and other lay leaders against unwarranted interference by the institution itself. The ACLU welcomes the expression of a diversity of views within the organization and supports the right of such persons to express their personal views on whatever topics they wish to discuss. However, when it is reasonably foreseeable that the public expression of individual views will be perceived as statements of ACLU policy, and when the views expressed diverge from those of the ACLU or deal with controversial matters not covered by ACLU policy, care should be exercised to distinguish that individual's views from those of the ACLU. Special care (such as an express disclaimer) is appropriate in instances where the expression of personal views might appear to commit the ACLU to positions on candidates for appointive or elective office. We expect the exercise of good judgment in recognizing such circumstances and in making distinctions between personal views and those of the ACLU.

*The care that this policy contemplates requires both Board and staff, in order to distinguish individual views from those of the ACLU, to avoid using the ACLU name if possible and utilize an express disclaimer if ACLU identification is unavoidable.*

*Id.* (emphasis added).

their preferences are different from mine, and I cannot always control which they select. A publisher may wish to identify Nadine Strossen on a book jacket or in advertising as "President of the ACLU," regardless of her own preference.

Although I do not agree with Eisenberg's implication that I can be neutral as a scholar, or that I can even identify how my activism influences my scholarship, I think that in the context of scholarship, like the context of classroom teaching, the concept of being open minded is a good proxy. One commentator defines objectivity as essentially meaning what I describe as open mindedness: "Like judges, law professors in their scholarship and teaching should strive to be 'objective' in the sense that they should form their views without regard to whether they or another party will profit by them."<sup>72</sup> According to the AALS, "[t]he scholar's commitment to truth requires intellectual honesty and open-mindedness."<sup>73</sup> Even though I cannot always extricate my ACLU ideas from my scholarly ideas, I want to continue to be willing to disagree with ACLU positions. Therefore, I do value sharing drafts with people who have different points of view. In the first footnote of that Patriot Act article, I acknowledged conversations I had about the Patriot Act with John Yoo and Paul Rosenzweig, both of whom are generally more approving of the Act than I am, because those conversations helped me to refine my own views (even if I was not won over to their positions).<sup>74</sup>

Many of the same issues arise when we activists speak instead of write. When I provide a biography to people who are to introduce me at public speeches, panels, or debates, I often leave it to them to choose how to introduce me. When I speak to reporters, or appear on television or radio programs, I sometimes choose how I wish to be identified, sometimes depending on whether an interview request came to me through the law school or the ACLU. But reporters and hosts sometimes override my choice of whether to be identified as a law professor, or an ACLU activist, or both. I can choose whether to speak in the voice of a law professor or of a proponent of ACLU positions, but outside the classroom, disclosure is not always within my control.

#### IV. LEGAL ACTIVISM

Throughout this article, I have expressed my skepticism about claims of objectivity. I do not believe that I can be objective as a teacher, scholar, or public intellectual, and I do not believe that should be my goal. I went to law school, a child of the '60s, not because I thought that law is objective, but because I wanted to learn to influence the law so that law would help to effect social change. Nadine Strossen and I do not spend time at the ACLU because we gain financial benefits. Our scholarship is more than just an intellectual pursuit or a means of improving our effectiveness in the classroom. We have made non-neutral choices about what we care about and what we want from the law. I do secretly hope, as I suspect Nadine does, to convince my students, my readers, and my listeners, to share my view of the law without preaching,

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72. Brown, *supra* n. 63, at 335.

73. AALS, *supra* n. 65, at § II.

74. See Herman, *supra* n. 14, at 67 n. \*.

because they consider my point of view and agree. My ACLU hat has such fabulous plumage and jewels that I do not think any of my other hats completely conceal it and, frankly, I do hope that students will admire and want to emulate my taste. But, even if they do not agree with ACLU positions about what the law should be, I hope that they will be inspired by how proudly I wear my hats. A wardrobe that contains only a law professor's hat seems to me to be impoverished. I do not think the law should be an arid intellectual exercise, or that lawyers and legal scholars should be content to manipulate concepts and doctrine only for the pleasure of the exercise. More than modeling my particular beliefs about how the law should be, I hope that I model my deep belief that legal practice should be coupled with some form of activism, whatever it is. This is one way in which I try, in all contexts, to reconcile my activism with my ideals of non-discrimination and open mindedness.

I hope that in this article, I am also modeling application of those two ideals. I have tried to be candid in discussing my own sense of the problems that I face, the answers I have worked out, and the areas in which I still have doubts about how to balance all my hats. I hope that I am opening a dialogue with other educators and scholars who share similar concerns, but perhaps have drawn different conclusions. I invite activists of all stripes to engage in this dialogue, not just ACLU activists like Nadine and myself. We have issues in common even if we practice very different forms of activism. In these days of Google, there is no need for me to disclose the address of the *Tulsa Law Review*, my own email address, or other possible venues in which to continue the dialogue.

## V. CONCLUSION

Having opened with a children's story about hats, I will unapologetically end with another. Children's stories, written to socialize the most impressionable, have a lot to tell us all, no matter how old we are, about what is expected of us.

In the traditional folktale *Caps for Sale*,<sup>75</sup> an itinerant cap salesman carries the caps he offers for sale by balancing them, a little like Bartholomew, in a tall stack on his head. Weary from his travels, he lies down under a tree to take a nap, still wearing all his caps. When he awakes, the caps are gone, except for his own checkered cap which he wore closest to his head. He soon discovers that monkeys have taken the caps, and are wearing them as they cavort around in the trees. The cap vendor tries pleading with the monkeys, yelling at the monkeys, and threatening the monkeys, but all to no avail. They will not take off the caps. Finally, in despair about getting the monkeys to return his merchandise, the cap vendor takes off his own cap and throws it on the ground in frustration and anger. The monkeys, in imitation, take off the purloined caps and throw them on the ground. The gratified cap vendor gathers up his caps, stacks them on his head, and sets off once again to seek paying customers.<sup>76</sup>

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75. For one telling of the story with illustrations, see Esphyr Slobodkina, *Caps for Sale: A Tale of a Peddler, Some Monkeys and Their Monkey Business* (Scholastic Inc. 1968).

76. *Id.*

I am not entirely sure what relevance this story might have for my conduct as an educator, scholar, or activist. I do know that law students are not monkeys. Unlike the monkeys, law students will not feel impelled to try on any hat they see me wearing. And, if they do, they will wear my hats only as long as they choose to do so.



