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

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## I. INTRODUCTION

In the story *The 500 Hats of Bartholomew Cubbins*,[1] 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.[2] This is a happy ending to what could have been a horror story.

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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 some reason known only to Doctor Seuss, the hats res

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

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,[4] that organization may have its own views about when we should present ourselves as academics, scholars, or spokespersons for the organization.[5]

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 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

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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.

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.[10] 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.[11] 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.[12] 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[13] 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

introduction to the Patriot Act.[14] 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

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.

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.[16] Kennedy describes the law teacher's strategy of "pretending to be neutral"[17] as "letting the students think they think the conservative rules are perfectly all right."[18] 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.[19] 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[20] 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 it, knowing of my ACLU affiliation, and perhaps wanting to hear more about my views in order to substantiate their own skepticism.[21]

I agree with Kennedy's perception that "neutrality" is not always neutral, and with

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*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.

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?

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 foreswearing preaching means that I should conceal my own views in the classroo

academic discrimination against conservatives.[32] 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.[33]

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.[34]

ACLU liberals as well as conservatives should have no problem agreeing to the basic non-discrimination principles reflected in the Academic Bill of Rights.[35] Of course people should not be discriminated against in hiring or in grading on the basis of

much impact on the students."[43] 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.[44]

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?[45] 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.[46] 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 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 pro.6( c5(h)-.4(e2e1 onlb-17.7066 --do)1.6C66 25

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

disagreement is possible.[49] 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

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.[60] 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."[61] 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."[62] 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.[63]

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."[64] The Association of American Law Schools ("AALS") subsequently debated these issues and amended its *Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities*[65] to require disclosure if law professors are being compensated,[66] 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."[67]

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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(nother) 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.

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 (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 professorial 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

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).[74]

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

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*,[75] 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