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# Wearing Two Hats: Life as a Scholar and Activist Legal Scholarship Symposium: The Scholarship of Nadine Strossen

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# LEGAL SCHOLARSHIP SYMPOSIUM: THE SCHOLARSHIP OF NADINE STROSSEN

## WEARING TWO HATS: LIFE AS A SCHOLAR AND ACTIVIST

Nadine Strossen\*

### I. INTRODUCTION

Let me start by again thanking Dean Robert Butkin and Professor Paul Finkelman for their graciousness toward me and my husband, Eli Noam, in hosting us here. I also am so grateful to Paul Finkelman, Rita Langford, *Tulsa Law Review*, and everyone else here at The University of Tulsa College of Law for their wonderful efforts in organizing this symposium, bringing together so many old friends and colleagues, and giving me the chance to meet some new ones.

Among Paul's many kindnesses toward me in connection with this conference, he gave me lots of hand-holding during the summer, as I was thinking about my own remarks, which I found to be an unusually daunting prospect. Since becoming the American Civil Liberties Union ("ACLU") president, I have been making about two hundred public presentations per year, which adds up to several thousand by now, so I cannot use the excuse of being "unaccustomed to public speaking"! I am, though, very unaccustomed to public speaking about myself, especially among such an outstanding group.

The participants in this symposium comprise people whose scholarship and activism I admire so much, and whose work has contributed such invaluable information and inspiration to my own, that I would far rather be talking about their work than my own! I have had the honor of participating in a couple of events that paid tribute to one of our symposium speakers, Norman Dorsen, who has been the most wonderful role

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\* Professor of Law, New York Law School; President, American Civil Liberties Union. This article is an edited version of the oral presentation by Nadine Strossen at the September 19-20, 2005 Fifth Annual Tulsa Legal Scholarship Symposium honoring her work as a scholar and activist. She gives credit and responsibility for most of the research and drafting most of the footnotes to her Chief Aide, Steven C. Cunningham (NYLS '99), along with her Research Assistants Jennifer Rogers (NYLS '08) and Trisha Olson (NYLS '08).

model and mentor, in both the scholarly and activist phases of my career.<sup>1</sup> And I look forward to doing likewise for everyone else attending this symposium at some point—speaking at future symposiums that honor their impressive work!

Paul encouraged me to share some personal reflections that bear on the symposium's general theme: the interconnection between scholarship and activism. This is apparently quite a "hot" topic, as indicated by the fact that it is featured in a cover story in the current issue of *Academe*, the bulletin of the American Association of University Professors.<sup>2</sup> Paul thought that law students might find these reflections helpful as they are planning their own careers, and I concur with Paul that this would be better than burdening them with anything more ponderous at the end of two intense days of this symposium. Therefore, I will now record some of my musings on the vital interrelationship between activism and scholarship in both my work and the ACLU's.

## II. A LIFELONG PATTERN: ADVOCATING CIVIL LIBERTIES PRINCIPLES THROUGH BOTH WRITING AND ACTION

By temperament, I have always considered myself more of an activist than a scholar. However, by the time I decided to go into teaching, in 1984, I realized that this was a false dichotomy, or at least an exaggerated one. I now strongly believe that there is no bright-line between these two important undertakings, and that scholarship and activism are at least mutually reinforcing if not, indeed, interdependent. Nevertheless, I arrived at this understanding only relatively late in my life and career, when my commitment to scholarship developed as an off-shoot of my lifelong commitment to activism. Since becoming ACLU president, I, of course, have had to de-emphasize my scholarly work. While I have been honored to do this in the service of such a great organization, at the forefront of such a great cause, I look forward to the post-presidency phase of my life, and a renewed emphasis on scholarship in the service of activism.

My lifelong pattern of doing research and writing to promote civil liberties is evident in my very first publications, back when I was a seventeen-year-old high school senior. These pieces hardly reflected deep scholarship, but they did reflect a deep commitment to civil liberties and constitutional principles long before I had any formal education in these areas, and they also reflected a commitment to studying and teaching, as well as activism. In fact, now that I have re-examined these early efforts, prompted by this symposium, I feel that I have not really progressed very much in my understanding of and commitment to civil liberties principles since I wrote these pieces back in 1968.

Even more disturbing, these pieces underscore that our government has not progressed very much in its commitment to civil liberties principles since then. So, please indulge me while I share a few excerpts from this juvenilia, not only to shed some light on myself, as Paul asked me to do, but also, far more importantly, to shed

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1. See Nadine Strossen, *Tribute to Norman Dorsen*, 58 N.Y.U. Annual Survey Am. L. 35 (2001); Nadine Strossen, *Tribute to Norman Dorsen, ACLU Leader*, 27 Harv. Civ. Rights-Civ. Libs. L. Rev. 325 (1992).

2. Donald Earl Collins, *The Ivory Tower and Scholar-Activism*, 91 *Academe* 26 (Sept.-Oct. 2005); see Patrick Brantlinger, *Utopian Universities and International Activism*, 91 *Academe* 28 (Sept.-Oct. 2005).

light on some core civil liberties issues that have remained all too constant from 1968 through 2005. In the words of the ACLU's principal founder, Roger Baldwin: "[N]o fight for civil liberty ever stays won."<sup>3</sup>

A. *1968 Glamour Magazine Column about Government Punishment of Campus Protests*

My very first piece in a national publication was in—of all the seemingly unlikely places!—*Glamour* magazine in September 1968. As a real bellwether of those turbulent times, *Glamour* magazine actually had a column called—in big, solid, all-caps letters—“PROTEST.” The magazine invited readers to submit essays advocating their “cause[s]” and “air[ing]” their “grievance[s].”<sup>4</sup> I was thrilled when *Glamour* accepted the column that I submitted during my last semester in high school, when I was an active volunteer in Senator Eugene McCarthy’s anti-war presidential campaign.

I recently re-read this piece for the first time in decades, when a *Glamour* staff member, who was interviewing me for a current article, reminded me of it. I was amazed to see the uncanny resemblance between the issues I had discussed way back then and a very current controversy that is especially significant to all of us in the law school community right now: the Solomon Amendment,<sup>5</sup> and the First Amendment challenge to it that is now pending before the United States Supreme Court.<sup>6</sup> Many of us who are participating in this symposium also are participating in this lawsuit in various ways. My law school, New York Law School, is one of the institutional plaintiffs, as a member of the Forum for Academic and Institutional Rights (“FAIR”).<sup>7</sup> Symposium participant Erwin Chemerinsky is one of the individual plaintiffs.<sup>8</sup> For anyone who might not have been following this litigation closely, let me provide a brief overview.

The Solomon Amendment cuts off all federal aid to any campus on which military recruiters are not given equal access.<sup>9</sup> Many law schools had denied equal access to

3. See Lindsey Gruson, *Some Second Thoughts on Moments of Silence in the Schools*, 133 N.Y. Times E6, E6 (Mar. 4, 1984) (internal quotation marks omitted).

4. Nadine Strossen, *A Radcliffe Undergraduate Protests Cutbacks in Federal Aid to Students and Teachers Involved in Demonstrations—A Threat, She Says, to Our Basic Right of Freedom of Speech*, *Glamour* 32 (Sept. 1968).

5. 10 U.S.C.A. § 983 (West Supp. 2005).

6. Since these remarks were delivered, the Supreme Court has decided the case. See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

7. See *Forum for Academic & Institutional Rights*, 390 F.3d 219, 219 (3d Cir. 2004); Richard A. Matasar, Dean & Pres., N.Y. L. Sch., *Policies: Dean's Statement on Military Recruiting*, <http://www.nyls.edu/pages/3781.asp> (accessed Feb. 17, 2006).

8. *Forum for Academic & Institutional Rights*, 390 F.3d at 220.

9. 10 U.S.C.A. § 983(b)(1). The statute, *id.*, states:

No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents . . . the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer . . .

military recruiters, consistent with longstanding bans on any employers who violate our non-discrimination policies, including on the basis of sexual orientation.<sup>10</sup> Therefore, these law schools, as well as other schools within the same universities, were threatened with losing all federal funding, including funding for student scholarships.<sup>11</sup> In the case the United States Supreme Court will hear argued in December, *Rumsfeld v. Forum for Academic and Institutional Rights*,<sup>12</sup> the United States Court of Appeals for the Third Circuit accepted the arguments of the challenging law schools and professors that the Solomon Amendment violates our First Amendment freedoms, including our academic freedom and our freedom of speech, by silencing and punishing those who oppose the military's discriminatory policies.<sup>13</sup>

Until I re-read the *Glamour* column I wrote as a high school student, I frankly had not remembered that Congress had adopted similar campus aid cut-offs during the Vietnam era to punish campuses that denied equal access to military recruiters and campus critics of government policies. I certainly did not remember that my column denounced this 1960s legislation, the precursor of the Solomon Amendment, and that I had raised the same kinds of First Amendment concerns that the FAIR plaintiffs are now raising. Let me now share a couple paragraphs from my 1968 "PROTEST" column in *Glamour* magazine:

Among the essential liberties for the preservation of which our nation was founded... is the basic right guaranteed... in the First Amendment to our Constitution: the right to freedom of speech. This freedom is extended not only to those who uphold existing government policies and traditional ideas but [also] to those who oppose and seek to change the status quo—the dissenters—as well. How... contrary to democratic precepts... then, that our Congress... has recently passed measures [that] discourage and even punish certain dissenters in our society—namely, [campus] activists.

As a result of student activism for causes such as academic freedom, civil rights and peace in Vietnam, the nation's colleges face... severe restraints on Federal aid... [C]ongressional displeasure with campus [protests] has already produced legislative cutbacks on college aid, and more such restrictions seem imminent. [For example, the] Senate has unanimously approved an amendment to the National Aeronautics and Space Administration appropriation bill [that] denies NASA grants to any college [that] bars military recruiters from its campus... .

[Such legislation] exploit[s] the "power of the Federal purse"... . If the American university is to be an autonomous institution dedicated to the independent pursuit of higher education, it must be protected from Federal intervention that could lead to dangerous forms of government domination and control. Congress's silencing of certain segments of

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10. *Forum for Academic & Institutional Rights*, 390 F.3d at 224.

11. See *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 279 (D.N.J. 2003) ("As of 1997, [targeted] funding also included 'any grant of funds to be available for student aid.'" (quoting *Omnibus Consolidated Appropriations Act of 1997*, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-270, 3009-271 (1996) (formerly 10 U.S.C. § 503 (repealed by Pub. L. No. 106-65, 113 Stat. 512 (1999))). The latter 1999 amendment cancelled the application of the Solomon Amendment to direct student aid.).

12. 125 S. Ct. 1977 (2005).

13. *Forum for Academic & Institutional Rights*, 390 F.3d at 230.

the student and faculty populations on a campus through financial pressures is tantamount to congressional dictation of what ideas can be expressed and taught at that university.<sup>14</sup>

Moving from 1968 to 2004, the Third Circuit has now phrased essentially the same conclusion, in terms of current constitutional law doctrine, in the *Forum for Academic and Institutional Rights* case: “[This kind of legislation] violates the First Amendment by impeding the . . . schools’ rights of expressive association and by compelling them to assist in the expressive act of recruiting.”<sup>15</sup>

On re-reading my teenage writing to prepare for this symposium, I was happy to see that I was equally concerned then with equality rights, along with free speech rights, since a major theme in my more recent writings has been what I see as the mutually reinforcing relationship between these rights.<sup>16</sup> I reject the argument, which has been popular in recent decades, that we have to choose between free speech and equality rights in contexts ranging from hate speech,<sup>17</sup> to pornography,<sup>18</sup> to campaign finance.<sup>19</sup> In that vein, my 1968 *Glamour* column stressed that withdrawing federal student aid would have a discriminatory adverse impact on the poorer students who relied on such aid.<sup>20</sup>

#### B. 1968 Letter to the Editor in Local Newspaper about Free Speech Rights of High School Students and Teachers

I would also like to share a few paragraphs from my very first publication, shortly before the *Glamour* piece. It was a letter to the editor that I wrote in the spring of

14. Strossen, *supra* n. 4, at 32.

15. 390 F.3d at 230.

16. See e.g. Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?* 46 Case W. Res. L. Rev. 449 (1996); Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 Chi.-Kent L. Rev. 701 (1995); Nadine Strossen, *In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future*, 29 Harv. Civ. Rights-Civ. Libs. L. Rev. 143 (1994); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 Vill. L. Rev. 757 (1992).

17. See e.g. Mari J. Matsuda et al., *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press 1993); but see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* in Henry Louis Gates, Jr., et al., *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* 181 (NYU Press 1994); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* 1990 Duke L.J. 484 (1990).

18. See e.g. Andrea Dworkin, *Pornography: Men Possessing Women* (E.P. Dutton 1989); Andrea Dworkin & Catharine MacKinnon, *Pornography and Civil Rights: A New Day for Women’s Equality* (Organizing Against Pornography 1988); Catharine MacKinnon, *Pornography as Defamation and Discrimination*, in *Group Defamation and Freedom of Speech: The Relationship between Language and Violence* 253 (Monroe H. Freedman & Eric H. Freedman eds., Greenwood Press 1995); Catharine A. MacKinnon, *Speech, Equality, and Harm: The Case Against Pornography*, in *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* 301 (Laura J. Lederer & Richard Delgado eds., Hill & Wang 1995); but see Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights* (new ed., NYU Press 2000).

19. See e.g. John C. Bonifaz, Gregory G. Luke & Brenda Wright, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 Akron L. Rev. 39, 39 (1999); Kristen Kay Sheils, *Landell Bodes Well for Campaign Finance Reform: A Compelling Case for Limiting Campaign Expenditures*, 26 Vt. L. Rev. 471 (2002); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy*, 94 Colum. L. Rev. 1126 (1994); but see Nadine Strossen, *A Comment on Redish and Kaludis’s The Right of Expressive Access in First Amendment Theory*, 93 Nw. U. L. Rev. 1135 (1999).

20. Strossen, *supra* n. 4, at 32.

1968.<sup>21</sup> Along with the *Glamour* column, it too is, sadly, still relevant to so many issues that we continue to confront today.

I was a senior at the public high school in Hopkins, Minnesota, a suburb of Minneapolis. The local newspaper had run an opinion piece denouncing one of my teachers, Dan Conrad, for showing his students some slides that, without any narrative, simply displayed anti-Vietnam War protesters. This was part of a series of presentations he made, which exposed us, the students, to a range of perspectives on the war, including those of the pro-war “Hawks.” Despite this overall balanced context, the op-ed singled out the anti-war images and attacked Conrad for making a “travesty of patriotism and the American flag.”<sup>22</sup> It also accused him of violating sound educational principles.<sup>23</sup> Among other things, I was very concerned about Dan Conrad’s future teaching career at my school. Therefore, I wrote a response and circulated it as a petition at my school, quickly gathering the signatures of 238 students. I then sent it to the editor, who did publish it, but only with a caustic rejoinder. Both the anti-war and the pro-free-speech positions were distinctly unpopular in that community at that time.

As with the *Glamour* column, this letter to the editor had long fallen out of my memory. However, last year I got a letter from someone I did not know, who enclosed an old yellowed copy of this letter to the editor. She told me that she had come across it when she was going through some old papers, in a box labeled “student activists.” Her cover note said: “You were brave in your letter, and I clipped it all those years ago.”<sup>24</sup>

Throughout the United States today, the ACLU is actively defending the rights of students, teachers, and others who protest and question various aspects of our current wars, the war in Iraq and the war on terrorism.<sup>25</sup> It still takes courage to espouse those positions in many communities, where they, as well as free speech, are still unpopular. Thus, as with the *Glamour* column, the words I wrote thirty-seven years ago were sadly prescient. Here is a brief excerpt:

To The Editor:

Mrs. Virginia Moll wrote in an opinion special about Mr. Dan Conrad’s presentation on Vietnam: “I was thoroughly incensed by the show and really question if. . . [it] is in the interests of good education.”

To paraphrase Mrs. Moll, we [I was referring not only to myself, but also to the students who had signed my letter in the form of a petition] were thoroughly incensed by

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21. Ltr. from Nadine Strossen to the Editor (May 9, 1968) (copy on file with author).

22. *Id.*

23. *Id.*

24. Cover note from Marge Romero to Nadine Strossen (Dec. 7, 2004) (copy on file with author).

25. See ACLU, *Freedom Under Fire: Dissent in Post-9/11 America*, [http://www.aclu.org/FilesPDFs/dissent\\_report.pdf](http://www.aclu.org/FilesPDFs/dissent_report.pdf) (May 2003); New York Civil Liberties Union, *Rights and Wrongs at the RNC: A Special Report about Police and Protest at the Republican National Convention*, [http://www.nyclu.org/pdfs/mc\\_report\\_083005.pdf](http://www.nyclu.org/pdfs/mc_report_083005.pdf) (2005); New York Civil Liberties Union, *Arresting Protest: A Special Report of the New York Civil Liberties Union on New York City's Protest Policies at the February 15, 2003 Antiwar Demonstration in New York City*, [http://www.nyclu.org/pdfs/nyclu\\_arresting\\_protest.pdf](http://www.nyclu.org/pdfs/nyclu_arresting_protest.pdf) (Apr. 2003); see also Nadine Strossen, Panel, *Free Speech in Wartime Conference: Presentation by Nadine Strossen* (Rutgers-Camden L. Sch., Jan. 17, 2005), in 36 Rutgers L.J. 927 (2005).

her article, and seriously question if the objections she raises are in the interests of good education. . . .

Her basic objection is that Mr. Conrad's presentation assumed a controversial position on Vietnam. . . . And yet, what is "good education" but the process of instilling in students an awareness of diverse ideas and opinions, as well as the ability to detect the bias in material with which they're confronted? How can we gain that awareness, and use it to formulate opinions of our own, unless we're presented with a wide spectrum of ideas and positions to consider and compare?

In expressing our dissent, Mrs. Moll, we are not being unpatriotic as you contend; we are exercising the paramount right and responsibility of citizens in a democracy, working through legitimate channels to influence our government to act in what we believe is the . . . the only way . . . to further the ideals of liberty. . . .

True, . . . we may not "change the whole world," as Mrs. Moll so astutely observes, but [w]e've already seen impressive indications that the dissenters have been heard and heeded: the peace candidate, Senator Eugene McCarthy has won significant victories in [several] primaries, and President Johnson has moved to cut down on the bombing of North Vietnam, as well as to establish the way for peace negotiations with Hanoi.

Yes, Mrs. Moll, our discontent with what is going on in Vietnam does, as you point out, "frustrate" us. However, unlike many of our parents, members of the "Silent Generation" of the 1950's, we're not keeping our frustrations to ourselves—we're thinking, speaking, and acting to remove the causes of those frustrations.

As Mrs. Moll observed when she concluded her article, "Mr. Conrad's slide essay is not just an innocent presentation to make students think." And she's right. The goal of that presentation—and its effect, I think—was not only to make students think, but also to help us formulate and articulate our own opinions and to act in accordance with them.

That, Mrs. Moll, is what we consider to be the epitome of "good education" in a democratic society.

Nadine Strossen  
Hopkins High School Senior<sup>26</sup>

### III. PURSUING BOTH SCHOLARSHIP AND ACTIVISM THROUGH TEACHING

Re-reading my spring 1968 letter to the editor, all these years later, has brought me one satisfying realization: that Nadine Strossen the professor has always tried very hard to be the kind of teacher that Nadine Strossen the student said she wanted to have, in a couple of ways. For that, my students and I owe an unending debt of gratitude to Dan Conrad, and all of my other teachers along the way who were such outstanding role models. My favorite quote about our profession—I say "our" since each of this symposium's speakers is in the teaching profession—is from Henry Adams. He said:

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26. Ltr., *supra* n. 21.

“[T]eachers [affect] eternity; [they] can never tell where [their] influence stops.”<sup>27</sup> In this spirit, Dan Conrad and my other teachers are certainly reaching way beyond their public school classrooms in Hopkins, Minnesota and affecting my students—and my students’ students—through their profound influence on me.

I emulate my own admired and influential teachers in two major ways. First, I always expose my students to the full range of perspectives on every issue we study. My students know that they have no hope of doing well in my courses unless they can effectively advocate all plausible perspectives on all issues. In this vein, I feel the greatest sense of satisfaction when students tell me that I have helped them to open their minds and to question their preconceptions. On occasion, I wonder if maybe I am doing even more of this than I should. Consider, for example, the following e-mail I got from a law student a couple years ago, after she had completed my basic Constitutional Law course:

I did not want to tell you this until finals were over, but I really learned a lot from you and enjoyed your class. My eyes opened up to things that I never knew possible. For example, before your class I never thought I would see eye to eye with Justice Scalia on any issue. You taught the class in a very balanced and fair manner. Thank you very much for that.<sup>28</sup>

The second way in which I emulate my own outstanding teachers, such as Dan Conrad, also embodies the principle that we lawyers call “viewpoint neutrality.”<sup>29</sup> I always encourage my students to pursue their own concepts of constitutional rights, whatever those views might be, through various forms of activism. The Constitution and our constitutional rights are always works in progress, and that is dramatically clear now, with the ideological balance on the Supreme Court poised to change with new Justices replacing William Rehnquist and Sandra Day O’Connor. Given the deep divisions that marked the Rehnquist Court, with five-to-four splits on many key issues, the trend of the law is now so uncertain that Harvard Law Professor Laurence Tribe announced last spring that he would not finish his planned revision of his constitutional law treatise.<sup>30</sup> One benefit of that dramatic decision is that Erwin Chemerinsky’s constitutional law

27. Henry Adams, *The Education of Henry Adams* 300 (Houghton Mifflin Co. 1918).

28. E-mail from Anonymous to Nadine Strossen, *Constitutional Law Class* (copy on file with author).

29. See e.g. *Cornelius v. NAACP Leg. Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” (citing *Perry Educ. Assn. v. Perry Loc. Educators’ Assn.*, 460 U.S. 37 (1983))).

30. See Ltr. from Laurence H. Tribe to the Hon. Stephen G. Breyer (Apr. 29, 2005), in Laurence H. Tribe, *The Treatise Power*, 8 Green Bag 3, 292–93 (2005). Professor Tribe wrote:

Dear Steve:

I appreciate your asking about the projected second volume of the third edition of *American Constitutional Law*. After considerable thought, I recently concluded . . . that I should suspend work on the balance of that volume . . . .

I’ve suspended work on a revision because, in area after area, we find ourselves at a fork in the road—a point at which it’s fair to say things could go in any of several directions—and because conflict over basic constitutional premises is today at a fever pitch . . . with little common ground from which to build agreement.

*Id.*

treatise<sup>31</sup> will become even more prominent, as it so richly deserves! Another benefit of Tribe's decision is that it underscores to our students that they can play a role in determining the future course of all the many crucial issues that are not now firmly settled.

#### IV. STUDENT LEGAL SCHOLARSHIP: A POSITIVE ACCIDENT IN MY ACTIVIST CAREER

Let me now resume my musings about scholarship and activism, going back to my own student days. Thanks to the inspiration of teachers such as Dan Conrad, I assumed that I would use my education to increase my effectiveness as an activist. I certainly went to law school, as well as college, with the goal of changing the world, and in particular to help protect free speech, equality, and other fundamental rights. Such core civil liberties had always been my deepest commitment, as indicated by those two early pieces I authored.<sup>32</sup>

Throughout law school, my major priority was to use every opportunity to develop the kinds of practice skills that were, in those days, hard to develop through the formal curriculum. Harvard Law School had only one clinical course, which was perennially over-subscribed and hence very hard to get into. Likewise, more generally available programs, such as the Lawyering course that Tony Amsterdam pioneered at Stanford University and New York University ("NYU"), were quite far in the future. Therefore, I did the next best thing, and became involved in a whole host of student organizations that provided legal services with the aim of enhancing the liberty and equality of poor people and others: the Legal Aid Bureau, the Voluntary Defenders, and the Prison Legal Assistance Project.

There was no academic incentive to participate in any of these groups; we got absolutely no academic credit and no support from professors. Accordingly, when I decided to invest my time in these activities, necessarily reducing my study time, I assumed I was giving up any realistic chance of making it onto the *Harvard Law Review*. That did not matter to me, though, since I certainly was not seeking an academic career. To the contrary, law school was something I wanted to get through as quickly as possible, and then leave forever, so I could start practicing law and changing the world! Consequently, I did not participate in the writing competition for the *Law Review* or for the other student-edited journals.

For these reasons, when the Editor-in-Chief of the *Harvard Law Review* called me to invite me to join its staff, I thought he was joking! It turned out, though, that I had inadvertently made the cut on the basis of grades. And I am so happy about that, since my experience on the *Law Review* turned out to be a great preparation not only for my later scholarly work, but also for all my civil liberties work, by helping hone my analytical skills far beyond what was possible through classes. Thus, all of the students of the *Tulsa Law Review* are fortunate to have this special, intense opportunity. Even the

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31. See Erwin Chemerinsky, *Constitutional Law* (2d ed., Aspen 2005).

32. *Supra* pt. II.

seemingly least glamorous aspects of it, such as cite-checking, will have lifelong professional benefits, no matter what your professional path.

V. BECOMING A LAW PROFESSOR/LEGAL SCHOLAR:  
ANOTHER POSITIVE ACCIDENT IN MY ACTIVIST CAREER

In my own law student days, if you had told me that, less than ten years later, I would be back at a law school in a teaching capacity, I would have told you, you were crazy! In fact, though, I did end up in a law school teaching position in the very same unplanned, unexpected way that I had ended up on the *Harvard Law Review*. A friend of mine from law school, who had affirmatively chosen to pursue an academic career, was then teaching at NYU Law School. Many of you know him: Jeff Gordon, who has been teaching at Columbia Law School for many years now. In 1984, Jeff called to urge me to apply for an opening for a Supervising Attorney at the Civil Rights Clinic in NYU's famed clinical program, directed by the legendary Tony Amsterdam. I was eager to provide law students with the very kind of lawyering skills that had been neglected in the Harvard Law School curriculum during my own student days. I was also eager to work full-time on the kinds of human rights cases that I had been handling part-time, as a volunteer ACLU lawyer. (Until that point, I had been earning my living as a litigator in private practice.)

What I was far less certain about was how much I would enjoy the scholarly aspects of the NYU position. My husband, Eli Noam, who had always been bent on and pursued an academic career himself, gets the major credit for encouraging me to do likewise, and for helping me understand there is no bright-line between the activism that was my passion and the scholarly work that was his. In particular, he persuaded me that scholarly work could potentially have at least as much influence in shaping public policy as more direct advocacy.

The other person to whom I owe an enduring debt of gratitude in this context is NYU Law Professor James Jacobs, a prominent expert in criminal justice policy. No sooner had I joined the NYU law faculty, and was just beginning to break into teaching and supervising the Civil Rights Clinic's course load, when Jim invited me to join him as the co-author of a law review article he had already written, and which had already been accepted for publication in the *University of California at Davis Law Review*.<sup>33</sup> The article concerned the then-new phenomenon of "drunk-driving roadblocks," which were spreading around the country, as the first type of mass, suspicionless searches that have been proliferating ever since, especially in the wake of 9/11. Jim had critically analyzed these roadblocks from his perspective as a sociologist and criminologist, concluding that they were an ineffective deployment of law enforcement resources for combating drunk driving.<sup>34</sup> He knew that I had studied the constitutional law and civil liberties problems that these roadblocks presented in my

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33. See James B. Jacobs & Nadine Strossen, *Mass Investigations without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U. Cal. Davis L. Rev. 595 (1985).

34. *Id.* at 601, 632-49.

capacity as Chair of the ACLU's Due Process Committee, a position to which I had been appointed by Norman Dorsen, then the ACLU's president.

Back in that auspicious year, 1984, Jim enlisted me to write the Fourth Amendment portion of our joint article, in which we concluded that such mass surveillance programs as drunk-driving roadblocks were both unconstitutional and ineffective.<sup>35</sup> George Orwell<sup>36</sup> would have approved of our conclusions! Unfortunately, the U.S. Supreme Court ultimately rejected that constitutional analysis,<sup>37</sup> but it has been adopted by a number of state supreme courts in enforcing their own state constitutional protections against unjustified searches.<sup>38</sup> Moreover, that constitutional analysis, as further developed in my subsequent writings,<sup>39</sup> continues to be cited, as the government continues to implement increasingly pervasive and invasive forms of mass suspicionless searches and seizures, which the ACLU continues to challenge.<sup>40</sup> A recent prominent example is the New York City policy instituted during the summer of 2005, of conducting random searches of subway passengers' personal belongings,<sup>41</sup> which was promptly challenged by the ACLU's New York affiliate.<sup>42</sup>

For my own career, the most enduring legacy of that first law review article is that it so vividly demonstrated the seamless interconnection that could exist between scholarship and activism. It also showed me that I could—and should—devote time to academic research and writing, as an essential part of my overall mission to promote civil liberties. Therefore, I am just as grateful to Jim Jacobs and others at NYU Law School, who helped me at that critical early stage in my scholarly career, as I am to Norman Dorsen and others who have helped so much in my activist career. In an effort to carry on in the footsteps of my own scholarly mentors, I am now serving as an “academic mentor” for junior faculty members at New York Law School, an official role, in which I assist and encourage their scholarly endeavors.

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35. *Id.* at 679–80.

36. See generally George Orwell, *Nineteen Eighty-Four* (Harcourt, Brace & Co., Inc. 1949).

37. See *Mich. Dept. of St. Police v. Sitz*, 496 U.S. 444 (1990).

38. See e.g. *State v. McCulloch*, 2004 WL 1102410 (Tenn. Crim. App. May 18, 2004); *State v. Church*, 538 So. 2d 993 (La. 1989); *Nelson v. Lane County*, 743 P.2d 692 (Or. 1987); *Pimental v. Dept. of Transp.*, 561 A.2d 1348 (R.I. 1989).

39. See e.g. Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 *Hastings L.J.* 285 (1991); 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).

40. See Jay Stanley, *The Surveillance-Industrial Complex: How the American Government is Conscripting Businesses and Individuals in the Construction of a Surveillance Society*, [http://www.aclu.org/FilesPDFs/surveillance\\_report.pdf](http://www.aclu.org/FilesPDFs/surveillance_report.pdf) (Aug. 2004); Jay Stanley & Barry Steinhardt, *Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society*, [http://www.aclu.org/FilesPDFs/aclu\\_report\\_bigger\\_monster\\_weaker\\_chains.pdf](http://www.aclu.org/FilesPDFs/aclu_report_bigger_monster_weaker_chains.pdf) (Jan. 2003).

41. See Sewell Chan & Kareem Fahim, *New York Starts to Inspect Bags on the Subways*, 154 *N.Y. Times* A1 (July 22, 2005); Kareem Fahim, *After London, Time is Right for Bag Searches in New York, Police Commissioner Says*, 154 *N.Y. Times* 27 (July 24, 2005).

42. *MacWade v. Kelly*, 230 F.R.D. 379 (S.D.N.Y. 2005).

## VI. THE VALUE OF LEGAL SCHOLARSHIP THAT ADDRESSES ACTIVIST CONCERNS

In my prior remarks, I have been careful to say that scholarship can *potentially* influence public policy. I recognize that some scholarship does not have this aspiration, and also that some critics have contended that any scholarship that does have this aspiration is not worthy of the name. During the period that I have been a law professor, there have been many debates about the relative importance of various kinds of scholarly endeavors that we could, or should, pursue.

Some prominent judges, as well as practicing lawyers, have urged more law professors to devote more attention to writing about legal doctrine or other matters that could provide insight into issues they have to decide.<sup>43</sup> Last month, as I was preparing for this symposium, I asked a leading civil liberties lawyer what kind of legal scholarship would be most helpful from his perspective. Here is what he said:

The greatest need I now feel is for innovative scholarship that addresses the doctrinal obstacles we face in so many fields and that does not regard any discussion of practical impacts as an intellectual distraction. There are several reasons why I think that is missing. One is the fact that it is not well rewarded within the academy. The second has to do with what remains an imperfect dialogue between scholars and practitioners.<sup>44</sup>

Without at all disparaging any other kind of scholarship, I am happy to continue to focus my own scholarly efforts on projects that are indeed expressly designed to guide judges and other policymakers, including by influencing public opinion, which in turn affects lawmakers.

In 1996, I had the honor of delivering the keynote address for another special event, which explored the same general theme as our present forum, about the inter-relationship between scholarship and activism. This earlier forum was particularly pertinent for the *Tulsa Law Review* students who are involved in this symposium. It was the First Annual Academic Convocation for Law Students,<sup>45</sup> which was hosted by Suffolk University Law School in Boston.<sup>46</sup>

It brought together law students from all over the country who were seriously committed to legal scholarship and to law reform. The organizers had invited me to give the keynote address, so I could draw upon my ACLU experience to help the student participants appreciate how legal scholarship can influence public policy. Coincidentally, just a few days before I addressed that convocation, I had the opportunity

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43. See e.g. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 39–52 (1992); see also Nadine Strossen, *Pro Bono Legal Work: For the Good of Not Only the Public, But Also the Lawyer and the Legal Profession*, 91 Mich. L. Rev. 2122, 2124–26 (1993) (endorsing Judge Edwards's concept of "applied" or "practical" legal scholarship).

44. E-mail from Anonymous to Nadine Strossen, *Needs in Legal Scholarship* (Aug. 2005) (copy on file with author).

45. See Nadine Strossen, Keynote Address, *Law in a Changing Society* (First Annual Academic Convocation for Law Students, *Legal Scholarship as a Vehicle for Social Change*, Suffolk U. L. Sch., Boston, Mass., Mar. 10, 1996) (copy on file with author).

46. See Nadine Strossen, Speech, *Maintaining Human Rights in a Time of Terrorism: A Case Study in the Value of Legal Scholarship in Shaping Law and Public Policy* (N.Y. L. Sch., N.Y.C., N.Y., Apr. 3, 2002) (reprinted in 46 N.Y.L. Sch. L. Rev. 373 (2002–2003)).

to discuss these issues with a Justice on the U.S. Supreme Court, who strongly endorsed my plans to encourage law students to pursue legal scholarship that could guide policymakers. In that Justice's words: "You're preaching to the choir. When I'm trying to decide a tough case, Habermas isn't much help."<sup>47</sup> In contrast, the same Justice enthusiastically praised a particular law review article about a thorny issue of constitutional doctrine that had provided helpful analysis in the preparation of a recent important opinion.

Consistent with both scholarly and civil liberty precepts, I must of course acknowledge an alternative view on this issue, as on all issues. Coincidentally, a diametrically different perspective on the relationship between scholarship and policy was most famously laid out by another judge, namely, Learned Hand. I am referring to Judge Hand's often quoted remarks upon receiving an honorary Doctor of Laws degree from Harvard University in 1939.

He praised scholarly independence, a goal that is as essential now as it was in 1939. However, as a means for preserving this independence, Hand advocated a strategy that all of us symposium participants have rejected in our own lives. Specifically, he called upon scholars to maintain "an aloofness from burning issues . . . without which,"<sup>48</sup> he believed, we would "almost inevitably become advocates, agitators, crusaders, and propagandists"<sup>49</sup>—groups that he apparently held in much lower esteem than what he considered true scholars. As he explained:

You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar's gown, or lead flaming causes from a cloister. . . . You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt. [A] scholar who tries to combine these parts sells his birthright for a mess of pottage; . . . the impairment of his powers far outweighs any possible contribution to the causes he has espoused.<sup>50</sup>

I recently came across a persuasive response to Judge Hand in a work written by someone whose own career belies Hand's rigid dichotomy: University of Texas Law Professor Douglas Laycock. Doug is one of the country's leading scholars on issues of religious liberty, and he is also one of the country's leading advocates on these issues—among other things, having written briefs and argued in the Supreme Court on behalf of the ACLU, and also having testified in Congress along with ACLU spokespersons, including, yours truly.<sup>51</sup> Indeed, in one of Doug's most recent Supreme Court

47. *See id.* at 389–90.

48. Learned Hand, *On Receiving an Honorary Degree*, in *The Spirit of Liberty: Papers and Addresses of Learned Hand* 134, 137–38 (Irving Dilliard ed., 3d ed., U. Chi. Press 1960).

49. *Id.* at 138.

50. *Id.*

51. *See* H.R. Subcomm. on Civ. and Constitutional Rights of the Jud. Comm., *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797*, 102d Cong. 63, 326 (May 13–14, 1992) (statements of Nadine Strossen & Douglas Laycock); Sen. Jud. Comm., *A Bill to Protect the Free Exercise of Religion: Hearings on Sen. 2969*, 102d Cong. 63, 171 (Sept. 18, 1992) (statements of Nadine Strossen & Douglas Laycock).

appearances, it is noteworthy that his counterpart, who advocated the opposing position, was yet another law professor who is both a leading scholar and a leading advocate: Cardozo Law Professor Marci Hamilton. (I am referring to the case of *City of Boerne v. Flores*,<sup>52</sup> which is of great importance concerning not only religious freedom, which was directly at stake, but also congressional power and individual rights more broadly.)

Doug Laycock's response to Learned Hand's metaphor about Luther and Erasmus was in a 1986 law review article that, notably, has been cited in significant Supreme Court opinions.<sup>53</sup>

In short, that very article itself illustrated Doug's point, since his scholarly work had a notable activist influence. Doug's answer to Learned Hand applies to the work of so many of the participants in this symposium, who are distinguished both as advocates and as scholars. Their scholarly work informs and enriches their activist undertakings, and vice versa. So, here is how Doug Laycock responded to Judge Hand's metaphor about Martin Luther and Erasmus:

The dangers are real, but the point is overstated. The force of the metaphor derives from the fallacy of the excluded middle. Scholars may contribute their knowledge or insight to public debate on important issues. They may contribute it in a form that is understandable to a policymaker, or even to the public, consistently with their duty of rigorous intellectual honesty. Scholars should not feel constrained to publish only turgid prose in obscure journals. They should not leave the public debate to those who feel no scruples whatever to conform their claims to the evidence. Even an Erasmus may speak to the press, testify to a congressional committee, or state a carefully considered claim in forceful language.<sup>54</sup>

## VII. CONCLUSION

In conclusion, I will simply thank again all of you who have been involved in this memorable event, for being such wonderful scholars and activists, teachers and students, colleagues and friends.

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52. 521 U.S. 507 (1997).

53. Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim about Original Intent, 27 Wm. & Mary L. Rev. 875 (1986) (cited in *Rosenberger v. Rector & Visitors of the U. of Va.*, 515 U.S. 819, 855 (1995); *Lee v. Weisman*, 505 U.S. 577, 614 n. 2, 615, 616, 616 n. 3, 621 (1992) (Souter, Stevens & O'Connor, JJ., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 590 n. 39, 605 (1989)).

54. *Id.* at 877.