
Speaking Truth and Power

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It is, I suspect, no accident that it was a breakthrough in physics that caused Kitty Calavita (2002) to reflect on the need for law and society scholars to engage in acts of public discourse and aspire to become public intellectuals. Substantively, physics may be an unlikely source of theoretical help to law and society scholarship, but no discipline better epitomizes the role of science as a practical aspect of power and governance since the mid-20th century. I would suggest that we follow Calavita's meditation not to develop our envy of the methods and theories of physics, but to develop our reflexivity concerning the dangerous role of physicists as "enablers" of power. (Think J. Robert Oppenheimer and the Manhattan Project, not Einstein and the General Theory of Relativity.)

Perhaps the earliest example of a public intellectual who was also a law and society scholar in our contemporary sense was the legendary lawyer and social reform activist Crystal Eastman. One of the most innovative and influential socialists, feminists, and civil libertarians, Eastman was also a pioneer in using state-of-the-art social science techniques to mobilize public demand for legal reform. Eastman became involved with social scientists at the Russell Sage Foundation shortly after graduation from NYU Law School, where she studied law while working to organize women workers in the garment industry only blocks from the law school. Her study of work accidents in industrial Pittsburgh, published in 1910 by the Russell Sage Foundation as *Work-Accidents and the Law*, combined some of the very first statistics ever collected documenting the casualty rate in American factories and railyards, with vivid case studies of particular workers injured or killed and the social fate of their families. The book helped change the tenor of the legal debate about work accidents, permanently undermining the notion that they were primarily a function of indi-

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vidual carelessness. It greatly strengthened the growing national movement to adopt workers' compensation laws and eliminate common law employer defenses. On the strength of the book, Eastman was invited to write a workers' compensation statute for New York. The law was struck down by the New York Court of Appeals, citing classic Lochnerian interpretations of due process and liberty of contract. Supporters of the law, however, amended the state constitution, and the Court of Appeals grudgingly approved a predecessor bill a few years later.

To Eastman, statistics were the "stuff of revolution." Describing the real costs of industrial success in terms of mutilated bodies and impoverished families, Eastman guaranteed that legal doctrines such as the "fellow servant rule" or "liberty of contract" would have to confront this human carnage within a common narrative of public discourse. Within two decades after *Work-Accidents and the Law*, workers' compensation had triumphed almost completely; only the most retrogressive states retained any semblance of the common law tort liability system for work accidents. Yet her other goals—sexual and general liberation, power as well as compensation for workers, protection for civil liberties—proved harder to accomplish and far less amenable to revolution by statistics.

If we shift half a century to the 1960s and to the emergence of the modern law and society movement, one of the best examples of the law and society scholar as a public intellectual is Jerome Skolnick. Just out of graduate school, where he had written a thesis on alcoholism and religious background, Skolnick was hired in a non-tenured position to teach at the Yale Law School, which was just renewing a much older interest in law and the social sciences. Criminal procedure scholar Abraham Goldstein encouraged Skolnick to undertake a sociological examination of how police understand and implement the law on arrests, seizures, searches, and interrogations. Skolnick undertook an observational study of policing in two medium-sized cities, one on the West Coast and one on the East Coast.

The resulting book, *Justice Without Trial*, published by John Wiley and Sons in 1966 (Skolnick 1975 [2d ed.]), coincided with growing public interest in police and police violence. Crime rates and conflict between minorities and police were both becoming national concerns in the mid-1960s. The Warren Court was at the high point of its efforts to reform state and local law enforcement through adopting strong "bright line" rules to regulate police in their interactions with citizens and suspects. Skolnick's observations destroyed the fiction that police were abiding by existing limits on their powers, and he analyzed the real incentives in police departments that encouraged police officers to achieve high rates of arresting suspects, with little attention to whether those arrests successfully ripened into convictions.

Skolnick's ethnographic description of the police was widely read beyond the confines of college campuses and, in a sense, helped model the realist documentary style of police narrative that has dominated both academic writing and prime time television ever since. But if his descriptive ethnography portrayed a relatively lawless police, it was his optimistic vision that law could become part of the vocation of policing that seemed most promising in the 1960s, at a time when the national project of modernizing the police was not yet totally dominated by the War On Crime as it would come to be less than a decade later. In contrast with other sociologists (e.g., Egon Bittner) who saw policing more purely in terms of power, Skolnick saw the identification with the rule of law as the defining aspect of the police and a way to reconcile their fundamentally authoritarian character with the democratic society they were policing.

Skolnick's influence as a public intellectual reached a peak when he was hired in 1968 to direct the Task Force on Violent Aspects of Protest for the National Commission on the Causes and Prevention of Violence, popularly known as the Kerner Commission. The Task Force commissioned papers by a number of sociolegal scholars and sociologists and conducted hearings under the direction of law professor (and later Berkeley Chancellor) Ira Michael Heyman. The resulting report portrayed the violent aspects of contemporary protest movements as predictable responses to failures in American institutions and the inability of political leadership to stay ahead of rapidly escalating demands for social change. The report was strongly critical of American police forces for misunderstanding and mishandling the nature of protests and the challenge to law and order they pose.

The report of the Skolnick Task Force, published separately under the title *The Politics of Protest*, offered a reading of violent protests quite different from that summarized in the phrase then being popularized, "law and order." Violence was a complex product of protest and reaction; a product of miscalculation by marginalized populations, misconduct by authorities, and entrenched resistance from those with the most to lose from social change. As a document directed toward government and public discourse, *The Politics of Protest* represented a programmatic vision of how social science could construct a circuitry of power and knowledge for knowing and acting on the subjects of violent protests, especially African-American youth and student antiwar protestors.

Serious analysis of the connections between protest and violence cannot focus solely on the character or culture of those who protest the current state of the American political and social order. Rather, our research finds that mass protest is an essentially political phenomenon engaged in by normal people; that demonstrations are increasingly being employed by a

variety of groups, ranging from students and blacks to middle-class professionals, public employees, and policemen; that violence, when it occurs, is usually not planned, but arises out of an interaction between protesters and responding authorities; that violence frequently accompanied the efforts of deprived groups to achieve status in American society; and that recommendations concerning the prevention of violence which do not address the issue of fundamental social and political change are fated to be largely irrelevant and frequently self-defeating. (Skolnick 1969, xix–xx)

The Politics of Protest, like *Work-Accidents and the Law*, represented neither pure social scientific analysis nor policy evaluation. While they bring to bear social science research on certain very specific problems, work accidents and violence, they argue for a whole program of knowing and acting on these problems; they represent a strategy for governing a particular social problem, but also a way of thinking about governing.

Skolnick's work was self-consciously concerned with governance as reflected in the very subtitle of *Justice Without Trial*, that is, *Law Enforcement in Democratic Society*.¹ In retrospect we can see the contribution of Skolnick and his collaborators to the Kerner Commission as providing the knowledge pathways that would be required for a broad recasting of American governance in response to the disruptive social change of the 1960s. In this program, the study of violence was crucial to mapping the institutional blockages threatening American democracy.

Although the Kerner Commission report is often quoted for its chilling lines about racial division in America, its logics as a strategy of governing, and the role of law and society scholarship in producing it, it has largely been covered over by the success of an alternative program, that of crime. The contract for the Skolnick Task Force research was signed in August 1968, only two months after the “law and order” discourse it would criticize was established at the center of a major new piece of federal legislation, the Omnibus Crime Control and Safe Streets Act of 1968, which committed federal investment to improving state and local criminal justice agencies, especially police. At the heart of the Safe Streets Act was a vision of crime and individual acts of violence as the central domestic problem in America. Unlike *Justice Without Trial*, which had envisioned modernizing the police through legal skills and ideology, law and order called for a rollback of legal efforts to regulate the police in favor of direct fiscal aid for weapons, technology, and personnel.

In a sense, *The Politics of Protest* represented a serious, if perhaps already doomed, effort to keep the issue of protest and vio-

¹ The phrase anticipates by a year the title of the Report of the President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society*. (President's Commission 1967)

lence from being defined through the problem of crime. Homicide and robbery reports to the police were rising precipitously in the mid-1960s. The discourse of law and order increasingly linked this increase to the spectacle of violence associated with protests. The 1968 Crime Control Act would be only the first of a long chain of federal legislation in the 1970s, 1980s, and 1990s, that has increasingly structured the investment of both capital and expertise into a framework defined around crime.

Skolnick's plea not to focus solely on "character and culture" would be inverted a few years later in a book by a social scientist of the same generation who had also established himself writing about the police, James Q. Wilson. Wilson's 1975 book, *Thinking About Crime*, offered the mirror image of *The Politics of Protest*. The book forcefully criticized the whole effort to suppress destructive social behavior by reforming institutions. Instead, the focus of governmental efforts and social science research should be on controlling the deviant individual responsible for social problems. The age of imagining the tasks of government through the lens of crime had begun. Wilson implicitly ridiculed Skolnick's evocation of democracy by invoking the strong voter response to tough-on-crime messages that had become undeniable in the 1970s, but his own analysis had little to say about the collateral damage to democratic institutions of unleashing a harsh War On Crime on the streets of American cities.

Elsewhere I have tried to reflect more explicitly on the current configurations of knowledge and power that confront those of us working in the legacy of the law and society project (Simon 1999; Sarat & Simon 2001). Here I want to offer reflections on Calavita's call for public intellectuals based on the examples of Eastman and Skolnick.

First, it is a mistake to treat this as a proxy for the issue of methods. Law and society research has not become less effective as a source of public discourse because it is somehow less scientific or less quantitative. Eastman was able to help transform the debate about workplace accidents by presenting hard numbers for the first time on what was actually happening in American factories. Remarkably, despite the fact that what Ian Hacking (1990:2) called "an avalanche of printed numbers," referring to 18th- and 19th-century statistics, has become a "whiteout" of numbers at the turn of the 21st century, there are still remarkable opportunities for law and society scholars to intervene in public discourse simply by counting. A powerful recent example is the quantitative study of error in the death penalty produced by sociolegal scholars at Columbia University (Liebman et al. 2002). The study, part of which was released in 2001, has generated a storm of media attention to the issue of error in the death penalty and—combined with recent attention to prisoners released by new DNA evidence after years on death row—has contributed

to a growing public skepticism about the death penalty that few experts expected. At the same time, it is abundantly clear that the enormous expansion of government-provided statistics on criminal justice and other topics presents a powerful temptation to researchers looking for low-cost data sets on which to unleash their rigor. These statistics, however, contribute little to public discourse because they build on and presume the very categorization of social problems that needs to be challenged. Likewise, Skolnick's *Justice Without Trial* would have contributed little to public debate if it had merely analyzed existing police statistics. Indeed, the participation-observation methodology of Skolnick's study, based on actual ride-alongs with the police, became part of its influence on how we know and act on the police today.

Second, we should avoid conflating public intellectuals with political ideology. It is tempting to read both the success and limitations of the contributions of Eastman and Skolnick as reflecting the limited appeal of the American political left. Yet the success of both Eastman and Skolnick as public intellectuals rested in part on the fact that such books as *Work-Accidents and the Law* and *Justice Without Trial* were not read as reflecting a particular political ideology but as the opening up of new pathways to knowing and acting on certain social problems whose time had come. I would suggest that it is not vicissitudes of political ideology, but transformations in governmental rationalities that help shape the relative success or failure of scholarship in influencing public discourse. Had "violence" rather than "crime" emerged from the 1970s as the privileged focus of governmental reform efforts, *The Politics of Protest* might have become as influential on conservative politicians as Wilson's *Thinking About Crime* and more recently "Broken Windows" work has been on liberals.

I share Calavita's sense that law and society scholars should not abandon the aspiration to speak to public discourse and to become public intellectuals. I would caution against two assumptions that often follow from that call. First, it is not primarily a question of how much a scholar is actually engaged with social movements. Crystal Eastman and Jerome Skolnick became, in varying degrees, involved in the real political struggles of their day, including anti-war and civil rights movements. Their influence, however, came not from their personal commitments, but from the fact that their work created real pathways of knowledge and power that social movements found purchase in. Second, it is not a question of reaching for grand theory. Books like *Work-Accidents and the Law* and *Justice Without Trial* are actually quite "middle-range" in their theoretical aspirations. Their importance stems not from changing how we view the universe, but from changing how we know and act on specific subjects.

Thus, rather than search for "God particles" or their sociolegal studies equivalent, law and society scholars should continue

to focus on how power and knowledge are configured in our existing institutions of legal authority. As Foucault noted before his untimely death in 1984, the people do not need intellectuals to explain their motivations or predict their future, but to help them understand what is actually at stake in the present: “People know what they do; they frequently know why they do what they do; but what they don’t know is what what they do does” (Dreyfus & Rabinow 1982:187). Becoming a public intellectual from this perspective is not a matter of adopting common rhetoric or wielding grand theories, but of making visible the crucial but often mundane choices we have made—whose traces are often covered over by the very productivity of knowledge and power.

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