# Activist Scholarship

Richard O. Lempert

This comment responds to Frank Munger's Law and Society Association Presidential Address on scholars as activists. It argues that scholarly research can both constitute and fuel activism. Activist scholarship is, however, not confined to scholars in any one part of the political spectrum. Deeply held values can motivate exceptional work but also raise the danger that political commitments will unduly influence purportedly "objective" findings. Value-infused research should be true to research values even if inspired by political ones.

Recently I had the opportunity, indeed the privilege, to speak for my colleagues David Chambers and Terry Adams and to present the results of our research concerning University of Michigan Law School alumni (Lempert et al. 2000) to the Federal District Court, which was hearing a lawsuit brought to invalidate the Law School's affirmative action admissions program. As a witness, I was able to tell the trial court that as Michigan Law School's student body grew more diverse, (1) white males came to value diversity more, (2) that, far from getting free rides, minority law students were more likely than white students to graduate with substantial educational debts, (3) that Michigan's minority graduates earned as much as its white graduates, (4) that they were as satisfied with their careers as the school's white graduates, and (5) that minority alumni did more service than white alumni. I also testified to our finding that LSAT scores and undergraduate gradepoint averages, the "credentials" supposedly showing that affirmative action programs disregard merit, did *nothing* to predict the future income, career satisfaction, or ser-

Richard O. Lempert is the Francis A. Allen Professor of Law and Professor of Sociology at the University of Michigan. He is a winner of the Law and Society Association's biennial Harry Kalven, Jr. Award and a former editor of the *Law and Society Review*. He co-edited (with Jacques Normand and Charles O'Brien) *Under the Influence: Drugs and The American Work Force* and is the author (with Joseph Sanders) of *An Invitation to Law and Social Science* and (with Sam Gross and James Liebman) of *A Modern Approach to Evidence*, 3rd edition. He has most recently been working with Terry Adams and David Chambers examining data relating to the careers of Michigan Law School's alumni. He is also currently directing the University of Michigan's Life Sciences, Values and Society Program.

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vice of the University of Michigan's white or minority law graduates. Nothing I have done in my career has given me as much satisfaction as my research with David and Terry and the opportunity to testify to our results.

Our research was not the activism of a Neelan Tiruchelvam; we were not risking our lives. Nor did it involve the political engagement of a Joyce Ladner, Upendra Baxi, Setsuo Miyazawa, or Alda Facio. Like Frank Munger in his Presidential Address (Munger 2001), I admire their activism, but I also feel that activism need not be an activity complementing scholarship; it can inhere in scholarship itself. Although ideas are not self-implementing, they do matter, and scholarship can be a mechanism for resisting unjust change and advancing justice.

This is no secret, for the law and society literature is replete with what I think of as activist scholarship—socially engaged studies aimed at increasing justice. My own research interests bring immediately to mind work by Baldus et al. (1990) and Gross and Mauro (1989), concerning discrimination and the death penalty; articles by Ellsworth and her co-authors, regarding death qualified juries (in Cowan et al. [1984] and Fitzpatrick and Ellsworth [1984]); work by Vidmar (1995) and Hans (2000), repudiating stereotypes about jury behavior in malpractice cases and cases involving business defendants, respectively; and work by Galanter (1983, 1998), Saks (1992), Eisenberg and Henderson (1990), and Eisenberg et al. (1997), investigating aspects of the so-called litigation crisis and questioning its political construction.

There is considerable reason to work on problems that one feels deeply about, and although we approach problems as social scientists, the goals of changing how people perceive problems and suggesting solutions are legitimate. My own views on this matter were shaped when I first joined the Michigan Law School faculty and came to admire my then-colleague Joe Sax. One of the lessons I learned from Joe, a pioneer in environmental law, is that caring deeply about a problem is a great stimulus to doing one's best work. The energy one gains from working on a problem that personally matters can separate exceptional from ordinary work. I do not deny the concomitant danger that caring deeply may distort the conduct of investigation or the interpretation of results. This happens, but it need not. Working on a problem that personally matters does not mean using inappropriate methods, ignoring uncongenial results, or seeing only desired implications in data. It should and can mean taking extra care to ensure results are reliable enough to guide policy. The prospect of presenting research in court and being cross-examined can be particularly felicitous. In the study I testified to, it motivated greater attention to questions of sample bias and more extensive sensitivity checking than academic publication demands.

It is easy to subscribe to the canons of social science when the work that follows them yields politically congenial results. In working with the Michigan alumni data, I could not have been more gratified by what we found, for, by almost all our measures, affirmative action was a resounding success. Moreover, our results were robust; no matter how we tested them, the basic patterns held. But suppose this had not happened. Suppose that controlling for certain variables or using different plausible model specifications painted pictures less favorable to affirmative action than what we found. How then would we have resolved the tension between our political values and those of social science? This question is easy for me. I would not have published politically congenial findings without also indicating why our findings might not hold or might hold only in certain contexts. Indeed, we emphasize in our report that our results may not generalize to schools less selective than Michigan.

Far more difficult for me would have been results unequivocally showing that many of Michigan's minority students were not succeeding in practice, both absolutely and relative to white students. I am not sure what I would have done with such results. I value affirmative action not only because those admitted with its aid do well afterward, but also for reasons of justice that have little to do with the career success of its beneficiaries. Hence, I would have been torn between, on the one hand, wanting to suppress results that might sway public opinion against affirmative action and, on the other, taking professional pride in careful work and desiring to share results that I and my co-authors had labored so long to ascertain. I am glad we never faced this conflict, for I do not know how I would have resolved it. I expect I would have been attracted to the compromise of publishing the study, but only after the case brought against the Law School and appeals from it had concluded.

Even though I did not face the problem of researching something I cared deeply about only to find that I did not like what I learned, the possibility that research results will conflict with deeply held values always exists. It is easy to subscribe in the abstract to canons of social science that disassociate publication decisions from the policy implications of research, but if the abstract becomes real, painful conflicts may result. It is not irrational to maintain one's values in the face of evidence that undercuts arguments for them because values seldom rest entirely on empirical arguments and may not rest on them at all, nor is it necessarily wrong to withhold research results because of moral concerns for the consequences of their dissemination. But it is, in my view, wrong to deny what data show and to offer empirically false justifications for beliefs. Supporters of the death penalty, for example, cannot be faulted for resorting to retributive arguments for capital punishment when empirical evidence

consistently fails to find a substantial deterrent effect, but they are wrong to suggest that deterrence is an important reason for the death penalty, given the overwhelmingly negative findings of numerous empirical studies.

A particularly gratifying aspect of my preparation for testifying in the University of Michigan affirmative action lawsuit was the full and immediate cooperation I received from everyone I called on for assistance. David Chambers, Terry Adams, and our since-graduated research associate, Katherine Barnes, produced statistical analyses I had no time to do myself. Jack Heinz and Rebecca Sandefur sent me published and unpublished papers from their Chicago bar study so that I had a basis for discussing the advantages provided by graduating from a Law School such as Michigan's, should the question arise on cross-examination, as it had when I was deposed. Gita Wilder, who heads the research division of the Law School Admissions Council, sent me LSAT data I thought I would need, and Michigan Law School reference librarian Nancy Vettorello made it a priority to get me data and articles I wanted to review. Everyone I sought help from responded immediately and seemed happy to be part of the effort to defend affirmative action. With support like this, it is easy to think that all academics or all members of the law and society community think alike. We do not.

I expect that opinion polling would show that the political views of the Law and Society Association's members are to the left not only of the general population but also of the disciplinary communities to which most members also belong. But there would be variance, for people of all political persuasions study law and society. Yet, Frank Munger's examples of activist scholars and my examples of activist scholarship all involve efforts to promote liberal or Left visions of justice. It is, however, not only those on the Left who are politically engaged and care passionately about what they study. Those on the Right do as well.

Hence, the call for engaged scholarship cannot be limited to those of any particular political stripe. Nor should it be. Public policy should be informed by facts, and facts have no particular political allegiance. Problems arise, however, when the factual basis of scholarship is suspect, but the scholarship still moves policymakers. This, too, is not confined to work on any particular side of the political spectrum, but in recent years it appears that scholarship by those on the Right, despite serious criticism, has had more profound effects on social policy than has scholarship by those on the Left. Consider, for example, the influence of Richard Epstein's *Takings* (1985), Charles Murray's *Losing Ground* (1984), and Peter Huber's *Galileo's Revenge* (1991).

Moreover, well-done scholarship that conflicts with public opinion or political interests often does little, especially in the short run, to bring about change. Consider some of the scholar-

ship I previously mentioned. The work on the death penalty, although it figured importantly in the legal assault on capital punishment, was ignored by a Supreme Court majority intent on retaining the death penalty, whatever social science revealed (*Lockhart v. McCree* [1986], *McCleskey v. Kemp* [1987]). The research on juries and litigation rates, if it has not been ignored, is reactive. It serves primarily to correct false impressions (e.g., juries are biased against businesses, America is sue happy) that anecdotes, and a common sense shaped by them, support. Moreover, it may turn out to be as unsuccessful as the death penalty research in carrying the day. Insurance companies and big businesses do not seem to care greatly whether they are being unfairly or fairly sued or whether punitive damages are justified. They care about a bottom line, which is aided by fewer and smaller tort judgments, regardless of whether judgments stem from fair assessments of the damages they cause or from juries ignoring instructions and playing Robin Hood. To this end, verdicts like that in the McDonald's coffee-spill case are deployed as examples of juries run amok, even if most citizens might find them justified, if they knew the case facts (Gerlin 1994).

It is not news that politicians and interest groups welcome studies that are politically congenial, regardless of their flaws, and ignore information that is not. Nor is the tendency confined to big business or the Right. Weitzman's *Divorce Revolution* (1985) had a profound effect on views of how men and women fare financially after no-fault divorces, despite considerable reason to be skeptical of her most highly publicized result (Jacob 1989; Peterson 1996). Similarly, Sherman and Berk's (1984) report of the Minnesota experiment with mandatory arrest for spouse abuse led many police departments to change their spousal abuse arrest policies despite the authors' own caveats and limitations on generalization, which were obvious from the start (Lempert 1989), and despite later work by Sherman and colleagues (1992), among others, that revealed important contingencies in the deterrent effects of arrest.

To move policy, activist scholarship must tell a convincing story. Where scholarship conflicts, we have a contest between stories, the resolution of which does not necessarily depend on the relative soundness of the competing work. More important may be how scholarship is publicized and how it resonates with what people want to hear and with their preexisting stock of stories. Charles Murray's *Losing Ground* (1984) and his book with Hernstein, *The Bell Curve* (1994), were each shown by critics to contain serious flaws. Yet *Losing Ground* shaped the welfare debate in the years following its publication, while *The Bell Curve* has, so far, had little discernible political influence. In part, I think this is because *The Bell Curve* was so controversial that work refuting it was disseminated as widely as was the book itself. But more im-

portant in my view is that, for the most part, both the public and the political elite were, in the late 20th century United States, not prepared to accept a story suggesting that some racial groups were doomed by genetic inferiority to be less successful than others. They were, however, familiar with stories about failures of the welfare system, so a general indictment of the system, purportedly based on a fair assessment of the social science evidence, made sense.

If activist scholarship must tell convincing stories to be influential, the question arises of how best to tell such stories and, in particular, whether quantitative or qualitative methods enjoy an advantage. Qualitative methods seem particularly effective in rallying natural allies who share the author's taken-for-granted assumptions and will not dismiss qualitative work for its arguable subjectivity. The general public, too, best understands and is moved by specific examples and narrative explanation. Michael Harrington's *Other America* (1962) is an example of an effective story told by a Left-leaning author, while Peter Huber's *Galileo's Revenge* (1991) is an example from the Right. Murray's *Losing Ground* (1984) and Rachel Carson's *Silent Spring* (1962) illustrate the power of narratives built on summaries of scientific research or scientific prediction.

But when it comes to speaking "truth to power," rather than building a popular movement, I think careful quantitative research has an advantage. Qualitative work can too easily be dismissed as anecdotal by those who find its results uncongenial, and its implication can thus be avoided. Reliable quantitative work is harder to dismiss out of hand. However, power need not listen to truth, and often does not. In the extreme case, as in *McCleskey v. Kemp* (1987), the powerful can simply redefine the issue—changing it, for example, from whether a system of capital punishment is racially discriminatory to whether a death sentence was due to racial discrimination in a particular case—a question social science cannot answer. Even when the powerful cannot dismiss social science findings as irrelevant, it is often easy to ignore them. As Harry Kalven (1968) suggested at about the time the Law and Society Association was born, social science knowledge usually must become popular learning if it is to affect public policy.

This brings me back to Frank Munger's Presidential Address and the people he mentions. There is a close connection between scholarly activists and activist scholarship. Scholarly activists not only do activist scholarship, but they rely on the activist scholarship of others. And activist scholarship is most likely to effect change when it fuels the broader activism of its authors and of people such as those Frank praises. We, as an association, should be proud of the activist scholarship of our members and grateful to Frank for raising the topic for discussion.

## Postscript

After this article was written the district judge rendered his verdict in *Gruter v. Bollinger,* the law school admission case, finding for the plaintiff on almost all issues. The decision felt like a kick in the gut, but it did not change my feelings about the importance of the research that David, Terry, and I did nor did it destroy the pleasure I had taken in presenting our data. Nevertheless, I took no pleasure from the fact that in his opinion the trial judge quoted some of our conclusions without disputing them. I had also testified in this case as a fact witness because I had chaired the committee that had written the admissions policy that was at issue in the lawsuit. Here I was disappointed and angry because my remarks were taken out of context to support the judge's finding that the use of the term "critical mass" in the admissions policy was designed to establish a quota. This finding turned my testimony, including the specific portions the judge referred to, on its head. I had liked being in this judge's court because he attended to the evidence and seemed open to learning. But after reading the decision, I can only conclude that he had effectively made up his mind before he had even heard a word of testimony. I hope the appellate courts and the Supreme Court, should the case reach this level, will not similarly ignore the evidence.

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