
SPECIFYING THE MECHANISM LINKING DISSENT TO ACTION

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Though Professor Lani Guinier's article does not explicitly specify the mechanisms by which grassroots political actors appropriate dissenting opinions, the idea that Supreme Court dissents can influence social movements has broad implications for understanding how viewpoints emanating from the Court have the capacity to engender grassroots activism.¹ In this Essay, I confine my comments primarily to one of the conditions Professor Guinier proposes for demosprudence through dissent: the possibility for a Justice's dissent to inspire non-judicial actors to participate in some form of "collective problem solving."² Oral dissents, which are likely to be spoken in non-technical and often emotional language, can assist social movement actors with crafting or framing grievances that lead to action.

In the social movement literature, framing is critical to converting abstract ideas and concepts into language that is familiar to activists and would-be activists.³ These frames are often conveyed through stories and other narratives that connect social movement ideas to ordinary people.⁴ Usually, movement leaders, rather than representatives of formal political institutions, are the actors constructing frames they hope will lead to collective action within their movements.

However, as Professor Guinier argues in her article, oral dissents can be teaching moments for activists who are directly affected by the majority's decision, or for those who are unaffected but sympathetic to the spirit of the dissent.⁵ Social movement scholars have identified various types of action

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¹ Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 12 (2008).

² *Id.* at 16.

³ David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 133, 136 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) (describing framing as the process by which movement organizations and actors produce, maintain, and create new meanings).

⁴ *Id.* at 136-37.

⁵ Guinier, *supra* note 1, at 47-52.

frames that can move ordinary people to form or join social movements.⁶ These action frames might guide us in understanding how oral dissents may help both activists and ordinary people in transforming their disappointments in the majority rulings into opportunities for collective problem solving. Social movement scholars David Snow and Robert Benford demonstrate that collective action frames – defined as “action-oriented sets of beliefs and meanings that inspire and legitimate the activities and campaigns of a social movement organization”⁷ – are the mechanisms that assist activists and would-be activists in crystallizing their grievances.⁸

In his influential book, *Talking Politics*, social movement scholar William Gamson identifies the three components of these collective action frames as injustice, agency, and identity.⁹ First, the injustice frames allow movement actors to construct – and ordinary people to make sense of – their grievances through a sense of moral indignation.¹⁰ As Gamson argues, injustice frames not only provide evaluations about what is fair, but they also provide activists and potential activists with a politicized consciousness to challenge whatever perceived harm or suffering they have encountered.¹¹ Second, the agency component of collective action frames allows ordinary people to believe their actions can lead to change.¹² As Gamson states, agency frames “empower people by defining them as potential agents of their own history. They suggest not merely that something can be done but that ‘we’ can do something” to address the problem.¹³ The identity component of collective action frames, on the other hand, assists movement activists and ordinary people who are affected by a grievance to develop an oppositional consciousness in which the “we” is defined against some “they,” whose values or interests are different.¹⁴ Without this adversarial dimension, “the potential target of collective action is likely to remain an abstraction.”¹⁵

⁶ See, e.g., Sidney Tarrow, *Mentalities, Political Cultures, and Collective Action Frames: Constructing Meanings Through Action*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY*, *supra* note 3, at 174, 186-87.

⁷ Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 *ANN. REV. SOC.* 611, 614 (2000).

⁸ Snow & Benford, *supra* note 3, at 137.

⁹ WILLIAM A. GAMSON, *TALKING POLITICS* 7 (1992).

¹⁰ *Id.*

¹¹ *Id.* “Oppositional consciousness,” the process by which members of a traditionally subordinated group claim their previous subordinate identity as a positive identification and begin to demand change for their group, is an example of how one can use injustice and identity frames. See generally *OPPOSITIONAL CONSCIOUSNESS: THE SUBJECTIVE ROOTS OF SOCIAL PROTEST* (Jane Mansbridge & Aldon Morris eds., 2001).

¹² GAMSON, *supra* note 9, at 7.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

How might demosprudence through dissent inform the construction of collective action frames? An obvious way is through injustice frames, and possibly, depending on the case, through agency and identity frames. Consider Justice Ginsburg's oral dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*,¹⁶ a case that highlights the inequities women face when they are paid less than men for similar work.¹⁷ Justice Ginsburg's dissent not only reinforced already-existing injustice frames regarding the fact that women are more likely to receive unequal pay than men; her oral dissent also reflected identity action frames. Justice Ginsburg's words were laced with the language of injustice. Speaking for the minority, she read from the bench: "In our view, this court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination."¹⁸ As Professor Guinier points out, Justice Ginsburg was speaking directly to women, relying on the personal pronoun "you" to express that the values and interests articulated in the majority opinion were contrary to the problems that women face in the workplace.¹⁹ Justice Ginsburg's oral dissent, as Professor Guinier explains, "enabled ordinary people to operate within the framework of our democratic system," and thereby authorized "women to push back on the dominant norms of the Court's conservative majority and to elaborate their own stories."²⁰

But there are limitations to the capacity of oral dissents to be appropriated on behalf of grassroots activism. One such limitation is caused by the dominant focus of legal activists on social change through the law rather than through a mix of legal and grassroots activism. While the messages in oral dissents may be directed toward the mass public, the observers whose ears are usually fixed on these messages are lawyers for the movement. These lawyers are listening for openings to help them craft new legal strategies to either circumvent the ruling, or provide strategies for the next test case. Building solidarity in social movements or constructing frames for mass action is not part of the legal profession's focus on individual advocacy for clients.

Another problem is the accessibility of the oral dissents to the mass public. Does the fact that oral dissents are only available through audio-recordings diminish their influence in building support for framing movement action for ordinary people? Since our culture is so saturated by media images, what impact would Justice Ginsburg's dissent have, for instance, if it was videotaped and widely circulated on television and via the internet? What drama would have been added to the identity and injustice frames developed in Justice Ginsburg's dissent by the image of her flanked by her eight male

¹⁶ 127 S. Ct. 2162 (2007).

¹⁷ *Id.* at 2165-66.

¹⁸ Oral Opinion of Justice Ginsburg at 4:00, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074), available at http://www.oyez.org/cases/2000-2009/2006/2006_05_1074/opinion/.

¹⁹ Guinier, *supra* note 1, at 40-41 (citing Oral Opinion of Justice Ginsburg, *supra* note 18, at 4:25).

²⁰ *Id.* at 42.

colleagues as she offered a teaching moment to the American people on gender inequities in compensation? Oral dissents have the capacity to speak directly to the public and to inspire collective problem solving, but it remains to be seen if movement entrepreneurs can effectively appropriate oral dissents as frames for action in a world dominated by media images.