



Q&A

Activist Law, Race and the Election

A Q&A with civil rights lawyer Lani Guinier

by Suzi Steffen

Out there on the front lines or up in the tops of trees, activists might not consider the ways their actions can make, break or change the laws of the land. After all, that great *Schoolhouse Rock* PSA “Just a Bill” doesn’t instruct us to head to the streets in order to set legal precedent.

But law professors Lani Guinier and Gerald Torres argue that, along with legislators churning out bills and judges setting precedents, ordinary folks can change the legal landscape.

Guinier, now a professor at Harvard Law School, worked for the U.S. Department of Justice in its Civil Rights Division. Torres, now a law professor at the University of Texas at Austin, also worked for the Department of Justice, as an assistant attorney general for the Environment and Natural Resources Division. The two co-authored the 2002 book *Minor’s Canary: Enlisting Race, Resisting Power, Transforming Democracy*. They speak at 7 pm Thursday, Oct. 23, at the UO’s Knight Law Center in room 175. *EW* had a chance to speak briefly with Guinier about activism, democracy and the law.

What’s the definition of your notion of *demospudence*?

The easiest definition is that it’s a democracy enhancing jurisprudence. It builds on the idea that lawmaking is a collaborative enterprise between formal elites, such as judges or legislators, and ordinary people.

Demosprudence is the effort to emphasize, reconnect and focus on the ways in which ordinary people can influence judges or legislators in making and interpreting law.

You use as an example the Mississippi Freedom Democratic Party in 1964?

That’s one example, but I just finished writing an article about dissenting justices on Supreme Court and the way in which, for example, Justice Scalia uses his dissents to rally people on the conservative side of the equation to mobilize, to fight back when they don’t like a Supreme Court majority decision. And what Gerald and I are urging people to think about is the way in which that interaction, that two-way conversation between legal elites and ordinary people, doesn’t have to be confined to Justice Scalia and the people that he is speaking to. It’s also a technique that the left can use.

The justices and the lawyers who have modeled their legal strategies on the NAACP’s strategy to challenge segregation are much more traditional, much more conventional in many of their lawyering strategies. The lawyers tend not to be only tacticians but to be strategists, and litigation becomes a key element rather than a tactic in a multidimensional strategy. ... Demospudence is an effort to get people to think about the range of ways a mobilized constituency can influence lawmaking.



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Would you say the 2000 Supreme Court decision in *Bush v. Gore*, with the right-wing organized riots outside of the vote-counting areas in Florida, is an example of demosprudence?

Yes, in the sense they were mobilizing to try to influence the ways that the courts viewed the constitutional culture, or the contemporary context, in which court was ruling. Demosprudence suggests that there's a relationship between constitutional law and constitutional culture. Those people who were mobilizing around trying to shut down the counting of ballots were trying to influence constitutional law by intervening in constitutional culture by suggesting that there was impatience with this long drawn-out process and that finality should trump representativeness.

But this idea of demosprudence goes both ways. It's not just that local people, mobilized, can influence national lawmaking, but it's also that the courts can influence social movements and citizen mobilization in ways that give the legal interpretation that court has rendered legs. The court's legal interpretation can be a rule shift, but it's not until that legal interpretation is narrated through the experience of local people that it becomes sustainable as a culture shift.

The example I'm thinking of is the Montgomery Bus Boycott where the Supreme Court's decision in *Brown* was an important text for Martin Luther King Jr. when he was trying to rally the citizens of Montgomery to continue their one-day boycott against buses. He specifically talked about, "If we are wrong, then the Supreme Court of the United States is wrong." He used the authority of the Supreme Court to help inspire 50,000 blacks in a single city to boycott the buses for more than a year.

OK, what about an example from the past 10 or 15 years?

It may seem funny, but one of my examples comes from a conservative case, the case that the court just decided in *D.C. v. Heller*, the Second Amendment case, where the Court in a majority opinion by Justice Scalia ruled that the Constitution protects the right of an individual to keep a loaded gun in his or her home.

The argument in terms of demosprudence is that the court's decision was made possible in part by the interaction between Scalia's originalism, as a jurisprudential approach, and the organization of the NRA and other social movement activists who built on the court's privacy cases to fuse the idea of privacy that the court had determined applied to married couples who wanted to use birth control in *Griswold v. Connecticut* and the rights of consenting adults in *Lawrence v. Texas* who were engaged in sexual intimacy — fused that line of cases in terms of protecting the rights of individuals to privacy in their home with the idea that the Second Amendment protects privacy in the home, including an individual's right to defend that home. That connection was made not simply by the courts but by the mobilization of the gun lobby.

Another example is the context of the ERA. Even though it never passed, [a legal scholar] makes a compelling argument that organizing by feminist activists and the conflict between Phyllis Schlafly on the right and feminists on the left changed the nature of the constitutional culture such that the expectation was that women had certain rights that had not yet been acknowledged. It didn't lead to the ratification of the ERA, but it did persuade the Supreme Court to begin interpreting a number of cases as if the ERA had been passed. The Court began to interpret cases involving the rights of pregnant women or the rights of men to receive benefits if their wife is working, cases that were cutting-edge. They were recognized as appropriate, not as controversial, in part because of the mobilization that created this ferment. It's not as if the women changed the law directly by passing the ERA, but they changed the law indirectly by influencing the Supreme Court.

So this can apply both to the left and the right wing. But what about the idea of a democracy-enhancing demosprudence? Are the right-wing examples also ways to enhance democracy?

It's interesting because I think that getting people to participate in collective decision making also enhances democracy even when I disagree with the ultimate decision. If you are committed to participation as a critical element that legitimates democracy, then you have to respect it. I feel that the positions that people on the right are taking, it's like free speech, it's part of their right to participate, and it's crucial to engage both sides in this deliberative process. This deliberative, what Jane Mansbridge calls deliberative accountability, is as important to democracy as going out and voting. Just as you would say people on the right should be able to vote just like people on the left, participating in this process is



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not ideologically determined.

On the other hand, you're asking is it enhancing democracy? It's not enhancing democracy in the way that I would ultimately want to expand the consent community, the number of people who are presently unrepresented, and encourage them to participate. But it is modeling a kind of mobilization that could then be used to expand the consent community.

In some ways, it's a sophisticated idea, but in other ways it's very plain.

It's sophisticated in the way that things take effect. Everyone should have this right, everyone should participate, but who gets to control that?

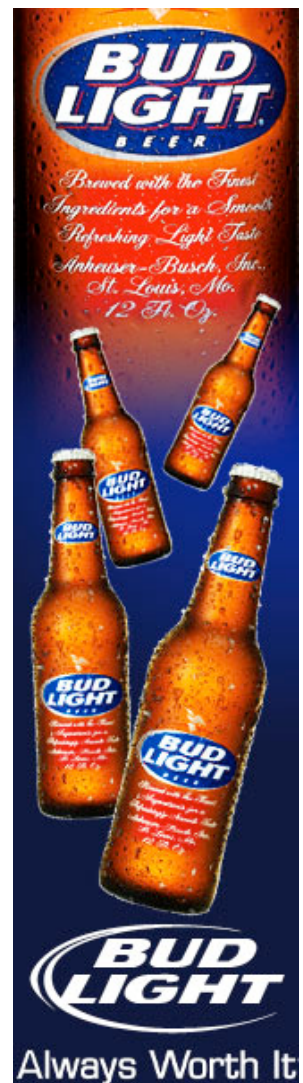
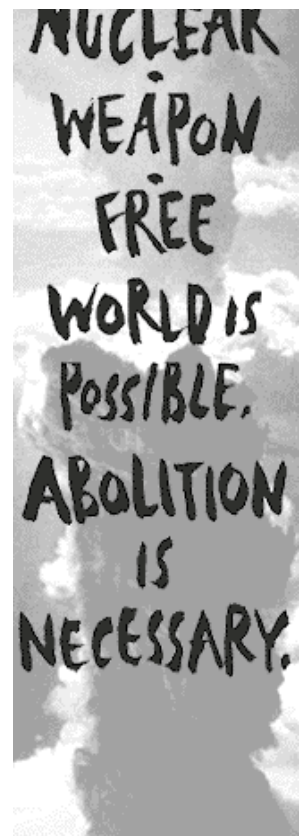
Part of the argument that Gerald Torres and I are making is that if you think just about the Supreme Court, the justices who have been most involved in the demosprudence include Justice Scalia. He has a very public persona, and he has a constituency of accountability. He admits that he's not speaking to his colleagues because he doesn't think he can persuade them; he's speaking to future law students and to a mobilized constituency. This is not to say it doesn't happen on the left also. For instance, Justice Ginsberg's oral dissent in a case called *Ledbetter v. Goodyear Tire & Rubber Co.*, she issued a very strong dissent from a decision by the majority of the court that Lily Ledbetter had waived her right to challenge her discriminatory treatment where she was paid less for doing the same work as men at the factory where she was employed in Alabama.

The argument that the majority made was that she had to file her complaint as soon as the discrimination took place, but she didn't know about it because she didn't know how much everyone else was getting paid. It was only when an anonymous person put a piece of paper in her mailbox that told her the salaries of three of her colleagues that she realized, "Wow, I'm getting cheated." So Justice Ginsberg wrote a very strong dissent in which she directly spoke to *you*, using the personal pronoun *you*, talking to women to say, you know when you've been discriminated against, and it may not be when you first start working. And it may be that when you learn of this, you don't want to say anything because you're the first woman in an all male environment. So she basically threw the ball back to Congress and said, you've got to fix the statute. At the same time, she authorized Lily Ledbetter to become an activist, and Lily Ledbetter was granted a key speaking spot at the Democratic National Convention. So that's this process where the law is still the law in the *Ledbetter* case as the majority in the Supreme Court determined it, but to change that law, it's not that Justice Ginsberg is going to convince colleagues they were wrong directly, it's that she's engaging Lily Ledbetter and members of Congress to change the law.

Thinking about your work on race and getting people represented in the legislatures, do you feel there's been any progress in legislative bodies and representation of racial minorities?

That's a really complicated question. What do you mean by progress? Are there more black people in state legislatures? Yes. But my critique of our electoral system is not focused simply or even primarily on the racial identity of the legislators, it's on the accountability of the legislature to all of the constituents.

My critique is that the way in which we elect members of a collective decision-making body, particularly from single-member districts, undermines the capacity of all legislators to be accountable to their constituents because it gives control of the districting process to members of the legislature, who become proprietors. Members become proprietors as if it's their own property, their own territory, and sometimes confuse their career objectives with the interests of constituents. Also, it demobilizes the constituents who think, "Oh, I have a legislator," especially if it's someone that they can identify with. So they then delegate the responsibility of representing them, of fighting for them, to the elected official. And if you have more robust view of democracy, where you want to see space for ordinary people to participate not just on election day but after the election in holding their representatives accountable and in deliberating at local level on issues of concern, then I would say we have a long way to go. I'm using a metric of participatory democracy as opposed to just who gets to vote and whom do they get to vote for. In terms of who gets to vote and whom do they get to vote for, we have made progress. In terms of moving to a more robust view of participatory democracy, we have a lot of work still to do.



That brings up the question of your thoughts on community organizing and where it is right now.

I think one of the most important aspects of this election — one is that it represents generational change. This is an opportunity for the next generation of leaders to assume responsibility and to really look to the future, not just look backwards. But the second, equally important, aspect of the election, in my view, is the fact that Barack Obama has a background as a community organizer and has structured his campaign in a way that not only uses the skills of community organizing to get elected himself but to fuel this generational change. These organizing efforts are identifying new leadership, and that's really important.

Do you have any thoughts on racism and the election or race and the depiction of the presidential candidates in the media? (I was thinking about race as a mask for class, or Joe the Plumber, etc.)

One thing I would say to try to keep this consistent with theme of our lecture is that one of the other potentially positive aspects of this election is that people are talking about race in conversations with their friends and their neighbors. I've been fascinated to read about some of the Obama canvassers who are white and who have confronted the racism of their white neighbors or white colleagues and have really been creative and self-reflective in terms of ways to talk to people about race.

There was a wonderful, wonderful in a pedagogical sense, interview on NPR with citizens from York, Penn. (available at <http://www.npr.org/templates/story/story.php?storyId=94523754>). Two NPR reporters went to York, and they created a focus group of approximately six people of color and seven whites. All of the people of color were supporting Obama, and six of the seven white people were supporting McCain. The question was, did race have to do with this breakdown [of numbers]? The whites in group denied that it had anything to do with it and were defensive about separating their choice of McCain from their own racial experience, but the reporters kept pressing them. And one woman told a story of growing up in York and not having any racist bones in her body. When she was growing up, a black guy in the town used to ride the bus with his shotgun on his way to shoot groundhogs, and he would then bring them back and sell them, and her mother used to buy these groundhogs and make groundhog stew. So the fact that she was willing to do business with this black guy showed that she was not a racist, or at least that's what I think was the message of the story. But then she went into this long description of why she was not voting for Barack Obama because he's a Muslim. The reporter said, "But he says he's a Christian," and she said, "No, I know he's a Muslim." She just knows in her gut. And if you're a Muslim, you can't stop being a Muslim until you die [according to her].

These people have very strongly held views that both reflect their own experience but also project their own experience. After this conversation of three or four hours, the whites in the group acknowledged that race *did* have something to do with this. It was this process of education through conversation with one's peers, grappling with an issue about which there is tremendous conflict and anxiety, at the local level, is something that's long overdue and that we have been avoiding.

I have always been pushing for a national conversation on race, and I think we may be finally having it. The national conversation on race is not taking place in the media; it's taking place in these conversations between neighbors and colleagues. I went to the dentist, and his dental hygienist was concerned because members of her family were not going to vote for Obama because he is black, and she was struggling with how to talk to them. It's a conversation happening around the dining room table and family gatherings, that's a source of much further conversation and growth.

It certainly is happening everywhere I've been.

Right, and see, that's participatory democracy, that's where you change constitutional culture. It's not that you decree from the august amphitheater of the Supreme Court what the law is. That's helpful, but it's when the law is interpreted through the experience of ordinary people in conversations with each other that you see sustainable change.

What would you say to law students interested in social movements?

I would say you need to know why you are in law school and be clear about the source of your passion and the source of your commitment, and to do things that are true to that passion and that commitment.

But at the same time, if you want to be effective, you need to be open to learning the source of other people's passion and commitment, especially people you think you are helping. You cannot be their voice — you can help them find their voice.

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