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Recommended Citation

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**SUPREME COURT JUSTICES, EMPATHY, AND SOCIAL
CHANGE: A COMMENT ON LANI GUINIER'S
DEMOSPRUDENCE THROUGH DISSENT**

Boston University School of Law Working Paper No. 09-23
(April 30, 2009)

Linda C. McClain

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**SUPREME COURT JUSTICES, EMPATHY, AND SOCIAL
CHANGE: A COMMENT ON LANI GUINIER'S
DEMOSPRUDENCE THROUGH DISSENT**

LINDA C. McCLAIN*

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INTRODUCTION

That controversial decisions by the United States Supreme Court can spur dissenting citizens to action is, by now, a familiar idea. The primary recent example remains the intense and sustained efforts to prohibit or substantially restrict access to legal abortion spurred by *Roe v. Wade*,¹ in which the Court recognized a woman's right to decide whether or not to continue her pregnancy.² Conversely, the Court's failure to recognize a constitutional right – for example, its controversial five-to-four *Bowers v. Hardwick* holding that the constitutional right of privacy did not extend to private, consensual conduct by homosexuals³ – may provoke citizens to seek social change and to turn to other fora, such as state and federal legislatures or state courts.⁴

* Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law. This Essay expands on my remarks delivered as a participant of the panel, "Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence," at the symposium, "The Most Disparaged Branch: The Role of Congress in the 21st Century," held at Boston University School of Law, November 14-15, 2008. Thanks to Lani Guinier for her catalytic work and to my other co-panelists, Fred Harris, Robert Post, and Gerald Rosenberg, for their stimulating engagement with that work. This Essay benefitted from that discussion. Thanks also to my research assistant, Jennifer Dixon, and to Boston University Head of Reference Services at Pappas Law Library, Stefanie Weigmann, for valuable research assistance.

¹ 410 U.S. 113 (1973).

² *Id.* at 153.

³ *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴ For a history of such post-*Hardwick* efforts, see WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003*, at 250-52, 269-98 (2008).

In a recent article, Professor Lani Guinier takes up an intriguing variation on this idea, asserting that dissenting justices, both through written, but particularly through oral, dissents, may spur “ordinary people” to action.⁵ In stressing the role of dissents in expanding the range of democratic action, Guinier is not merely reiterating the point that well-written dissenting opinions serve important functions because they may provide the foundation for majority opinions “twenty years from now,” or “broaden the jurisprudential range . . . of the next generation of law students” by capturing their imaginations.⁶ Rather, in stressing that “Justices teach by their opinions,”⁷ she contends that “[i]n a contemporary context, . . . dissenting Justices may educate, inspire, and mobilize citizens to serve the present as well as the future goals of our democracy.”⁸ Guinier offers concrete examples in which oral dissents apparently mobilized citizens and lent authority to their efforts at social change and law reform:⁹ Justice Breyer’s oral dissent from the Court’s holding striking down Seattle’s and Louisville’s voluntary school integration plans in *Parents Involved in Community Schools v. Seattle School District No. 1*,¹⁰ and Justice Ginsburg’s oral dissent from the Court’s narrow reading of the statute of limitations for filing a sex discrimination claim under Title VII in *Ledbetter v. Goodyear Tire & Rubber Co.*¹¹ Observing that this tool is not the sole province of one “side” of the Court, Guinier contends that a particularly talented dissenter is Justice Scalia, who self-consciously uses both his oral and written dissents as a means of “advocating for the future . . . for the next generation and for law students.”¹² Guinier (along with Gerald Torres, her co-author elsewhere) coins the term “demosprudence” to refer to “lawmaking or

⁵ See Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 12 (2008).

⁶ *Id.* at 14. Of course, judicial dissents may play this foundational role outside the context of federal constitutional law as well. See, e.g., KIMBERLY D. RICHMAN, *COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW* 123-151 (2009) (arguing that dissents by state court judges in family law cases have played a foreshadowing and catalytic role in instructing lawyers about how to craft future legal challenges and in paving the way for later majority opinions recognizing the parental rights of gay men and lesbians).

⁷ Guinier, *supra* note 5, at 14. In describing demosprudential dissenters “at their best,” as “teachers in a vital national seminar,” Guinier draws on scholarship concerning the educative role of Supreme Court opinions. *Id.* at 49 (quoting Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 962 (1992)).

⁸ *Id.*

⁹ *Id.* at 6-13, 35-45.

¹⁰ 127 S. Ct. 2738, 2768 (2007).

¹¹ 127 S. Ct. 2162 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

¹² Guinier, *supra* note 5, at 45 (quoting Posting of Dan Slater to WSJ Law Blog, <http://blogs.wsj.com/law/2008/05/30/law-blog-chats-with-scalia-part-ii-master-of-the-dissent/> (May 30, 2008, 21:04 EST)).

legal practices that inform and are informed by the wisdom of the people.”¹³ Because dissents have “democracy-enhancing potential,”¹⁴ she urges the Supreme Court to “see beyond academics to the people themselves as a source of democratic authority and accountability.”¹⁵

In this Essay, I will offer three observations about Professor Guinier’s intriguing project of encouraging the use of dissent to catalyze democratic action. First, I examine the connection that Guinier sees between a dissenting Justice’s life experience and his or her capacity to be moved by a litigant’s plight.¹⁶ I look back to Lynne Henderson’s exploration, more than twenty years ago, of empathy’s role in shaping Justices’ opinions.¹⁷ Second, I discuss the emphasis on life experience and the capacity for empathy in President Obama’s public statements about judicial qualifications, criticized by some for stressing empathy to the detriment of justice and the rule of law.¹⁸ Third, I contrast Guinier’s call for Supreme Court Justices to be more mindful of the democratic potential of their dissents with political scientist Rogers Smith’s proposal that judicial rulings, particularly those by the Supreme Court, can further social transformation by “usefully highlight[ing] the way existing arrangements appear to be working against constitutional goals and values,” and identifying “the most important tasks of civic restructuring that confront the rest of us.”¹⁹ Smith’s comparative modesty about the institutional capacity of courts to bring about needed social transformation offers an instructive contrast to Guinier’s aspirations for dissenters.²⁰

I. REVISITING THE ROLE OF JUDICIAL BIOGRAPHY AND EMPATHY

What moves a Supreme Court Justice to issue an oral dissent? This question spurs further questions, including one to which numerous academics, jurists, and politicians have offered answers: what qualities are foundational for good

¹³ *Id.* at 15. Guinier and Torres expound this idea of “demosprudence” in their forthcoming book, LANI GUINIER & GERALD TORRES, *CHANGING THE WIND: THE DEMOSPRUDENCE OF LAW AND SOCIAL MOVEMENTS* (forthcoming 2010).

¹⁴ Guinier, *supra* note 5, at 15.

¹⁵ *Id.* at 131.

¹⁶ *Id.* at 32-45 (examining the biographies of Justices Thurgood Marshall, Stephen Breyer, and Ruth Bader Ginsburg in relation to their most memorable dissents).

¹⁷ Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576 (1987) (arguing that “empathy enables the decisionmaker to have an appreciation of the human meanings of a given legal situation”).

¹⁸ See, e.g., Steven G. Calabresi, *Obama’s ‘Redistribution’ Constitution*, WALL ST. J., Oct. 28, 2008, at A17 (criticizing then-Senator Obama’s remarks about looking at a judge’s empathy when deciding judicial appointments).

¹⁹ Rogers M. Smith, *Gender at the Margins of Contemporary Constitutional Citizenship*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP* (Linda C. McClain & Joanna L. Grossman eds., forthcoming Oct. 2009) (manuscript at 5, on file with author).

²⁰ *Id.* (manuscript at 4).

judging?²¹ Professor Guinier proposes that something in the biography of particular Justices leads them to identify with the losing litigant and with the constituencies who will bear the impact of the majority's opinion and to speak directly to those people in their oral dissents.²² For example, Justice Breyer, who issued an oral dissent in *Parents Involved*, "taught administrative law, and his father was the lawyer for the Superintendents of Schools in San Francisco."²³ She posits that his dissent is "speaking to school boards" and that his "experience" connects him to those school board members whose efforts were halted by the majority's ruling.²⁴ Guinier contends that Breyer exhorts school board members to keep trying, telling them: "[D]o not feel paralyzed by the majority because the law is on your side and the Court is acting as a renegade."²⁵ Indeed, she argues that Pat Todd, a Louisville school board member, took Justice Breyer's exhortation "seriously," persisting in her endeavors by always reading his dissent at the beginning of her public presentations around the county.²⁶

Guinier argues that biography is also relevant to understanding Justice Ginsburg's impassioned oral dissent in *Ledbetter*, in which Ginsburg spoke directly to working women whose pay discrimination claims would be barred by the Court's ruling (using the formulation "you"), and to Congress, urging it to correct the Court's ruling.²⁷ Ginsburg's role as a pioneer of the litigation strategy that led to key equal protection rulings by the Court in the 1970s is a relevant biographical fact that might have moved Ginsburg to speak to the female workers suffering pay inequity.²⁸ Guinier suggests that Ginsburg also "found her own voice," and had a "transformational moment" in issuing the oral dissent, helping to convert Lilly Ledbetter's loss into a "legislative crusade" to change the law.²⁹ This dissent expressed Ginsburg's belief that "legislative and political strategies for reform are more sustainable" than

²¹ See, e.g., Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1943 (1988) (arguing for a "revision of the conception of the task of judging").

²² See Guinier, *supra* note 5, at 32 (suggesting that Justice Thurgood Marshall's "most memorable dissents came in the areas in which he was most influential as an advocate").

²³ *Id.* at 37.

²⁴ *Id.* ("That Justice Breyer is speaking to school boards, rather than directly to the people . . . suggests a distinctive avenue for democratic engagement.").

²⁵ *Id.*

²⁶ *Id.* at 38.

²⁷ *Id.* at 39 ("Often relying on the personal pronoun, Justice Ginsburg spoke directly to 'you' – the women who had been paid less but had no redress.").

²⁸ *Id.* at 38-39; see, e.g., Kenneth L. Karst, "The Way Women Are": *Some Notes in the Margin for Ruth Bader Ginsburg*, 20 U. HAW. L. REV. 619, 619 (1998) (describing Justice Ginsburg's role as an advocate for "equal treatment" under the law).

²⁹ Guinier, *supra* note 5, at 40.

judicial rulings.³⁰ Guinier argues that Ginsburg also modeled, for working women, how to participate in the public sphere and “helped authorize women to push back on the dominant norms of the Court’s conservative majority and to elaborate their own stories.”³¹

Guinier’s attending to the ways in which their biographies may have led Supreme Court Justices to reach out to litigants and to ordinary citizens brings to mind work done some years ago concerning the relationship between legality and empathy, or how a judge’s capacity for empathy may shape his or her ruling.³² In her article, *Legality and Empathy*, Lynne Henderson began by quoting Justice Thurgood Marshall: “It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.”³³

Henderson’s project challenges the assumption that “legality,” or “the dominant belief system about the Rule and role of Law,” and “empathy,” are “mutually exclusive concepts,” such that emotion and feeling should be kept separate from the work of judges.³⁴ Empathy, she writes, entails: “(1) feeling the emotion of another; (2) understanding the experience or situation of another, . . . often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another”; the first two elements are “ways of knowing,” while the third is a “catalyst for action.”³⁵ Henderson argues that empathy is a valuable “way of knowing” that can aid judges in appreciating “the human meanings of a given legal situation,” and in the processes of reaching decisions and justifying conclusions.³⁶

³⁰ *Id.* at 41 (citing Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985)).

³¹ *Id.* Guinier also notes that Justice Ginsburg issued an impassioned written and oral dissent in *Gonzales v. Carhart*, 127 S. Ct. 1610, 1640 (2007) (Ginsburg, J., dissenting). Here, too, Ginsburg’s pioneering role in litigating sex-equality cases that challenged “archaic” stereotypes about women’s capacities likely informed her critique of the majority’s denial of women’s decisional autonomy for a “way of thinking” that “reflects ancient notions about women’s place in the family and under the Constitution – ideas that have long since been discredited.” *Id.* at 1649. Thus, Guinier observes: “In *Carhart*, Justice Ginsburg showed she well understands how expressive harms that demean women based on nineteenth-century stereotypes discourage their active participation in democracy.” Guinier, *supra* note 5, at 50.

³² Henderson, *supra* note 17, at 1576 (observing the tendency “to deny a role to empathetic responses in . . . approaches to legal problems” and arguing that allowing such a role will lead to improved decision-making).

³³ *Id.* at 1574.

³⁴ *Id.* at 1576.

³⁵ *Id.* at 1579.

³⁶ *Id.* at 1576.

To illustrate, she contends that certain Justices' empathy for the narratives presented to them best explains the decisions in *Brown v. Board of Education*³⁷ and *Shapiro v. Thompson*.³⁸ By contrast, *Roe v. Wade*³⁹ and its progeny reflect a selective empathy, a "failure to hear certain empathic narratives," while *Bowers v. Hardwick*⁴⁰ reflects a "complete failure of empathy."⁴¹ There have been dramatic changes to the constitutional law landscape in these areas since Henderson wrote. Notably, in contrast to *Hardwick's* lack of empathy for homosexuals, *Lawrence v. Texas*, in overruling *Hardwick*, spoke of the "dignity" to which homosexuals were entitled and spoke respectfully of their intimate association.⁴² Nonetheless, Henderson's plea to look at emotion as a component of judging is still timely, as the recent outpouring of scholarship about law and emotion suggests.⁴³ Moreover, legal scholars continue to study the role of narrative and storytelling in key Supreme Court cases and how stories can change the law as well as a society's self-understanding.⁴⁴

It is helpful to situate Guinier's project of demosprudence through dissent in the context of Henderson's plea and these ongoing strands of legal inquiry. But doing so also suggests the new ground opened up by Guinier's project. For example, Henderson illuminates how either the presence or absence of empathy shaped various Supreme Court opinions.⁴⁵ By contrast, Guinier looks to biography as a partial explanation for why a particular Justice would choose the form of an oral dissent and speak directly to "ordinary citizens."⁴⁶ Seeking to explain the role of empathy in *Brown*, Henderson points to the Court's

³⁷ 347 U.S. 483, 495 (1954).

³⁸ 394 U.S. 618, 627 (1969) (invalidating state laws which required denying welfare benefits to new residents for a full year); see Henderson, *supra* note 17, at 1577 (discussing the impact of empathy in *Brown* and *Shapiro*).

³⁹ 410 U.S. 113, 153 (1973).

⁴⁰ 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴¹ Henderson, *supra* note 17, at 1577.

⁴² See *Lawrence*, 539 U.S. at 578. Further, Henderson concludes her article with a reference to empathy, reminding us of our "common humanity and responsibility to one another." Henderson, *supra* note 17, at 1653. Indeed, in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Supreme Judicial Court appealed to the "common humanity" of same-sex and opposite-sex couples. *Id.* at 955. Common humanity or shared human aspirations to marriage are themes in that opinion and other state high court opinions receptive to constitutional challenges by same-sex couples to state marriage laws, as is the notion that gay men and lesbians are neighbors, not strangers. See, e.g., *Lewis v. Harris*, 908 A.2d 196, 218 (N.J. 2006) (explaining that same-sex couples "are our neighbors, our co-workers, and our friends").

⁴³ For a helpful introduction to the literature, see generally *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999).

⁴⁴ See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110-64 (2000).

⁴⁵ Henderson, *supra* note 17, at 1577, 1649-50 (discussing empathy's role in Supreme Court cases dealing with segregation, poverty, abortion, and homosexuality).

⁴⁶ Guinier, *supra* note 5, at 59.

recognition of human emotion in *Brown*'s famous language regarding how racial school segregation creates in black children a "feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁴⁷ How did the Court come to that understanding? In part, through then-attorney Thurgood Marshall's arguments and the expert testimony presented by Dr. Kenneth Clark;⁴⁸ but the Court's receptivity to these arguments may have had roots in the experiences of particular members of the Court. Thus, Henderson recounts how Justice Frankfurter struggled to reconcile his commitment to legality – his view of the proper constitutional result – with his conviction that segregation was repugnant.⁴⁹ Henderson recounts Frankfurter's experience as a Jew who had only partially succeeded at assimilating and posits that as "a member of a group subjected to the worst forms of racism, prejudice, and torture throughout history . . . [t]he pain of the experience of being Jewish could not help but resonate even if only slightly to the pain of another oppressed minority."⁵⁰ Frankfurter had also been advisory counsel to the NAACP.⁵¹ Biographer H.N. Hirsch further suggests that Frankfurter's willingness to go along with the Court's decision may have stemmed from "the personal value [he] attached to the importance of public schools as a means of integration into American society."⁵²

A common aspect of both Henderson's and Guinier's projects is the emphasis on taking action.⁵³ The third element of empathy, noted above, is "action brought about by experiencing the distress of another."⁵⁴ Empathy is a

⁴⁷ Henderson, *supra* note 17, at 1594 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

⁴⁸ See *id.* at 1596-1603 (discussing Thurgood Marshall's arguments in *Brown* and the role played by Dr. Kenneth Clark's expert testimony on the social science research). Henderson notes that some members of the Court were not persuaded by this resort to social science. *Id.* at 1603-04 (examining the responses of Justices Jackson and Frankfurter to the sociological narrative used by the NAACP). It lies beyond the scope of this Essay to discuss the subsequent debates about this strategy and controversy over Dr. Clark's testimony. But for a sampling of that debate, see, for example, *Grutter v. Bollinger*, 539 U.S. 306, 264-65 (2003) (Thomas, J., dissenting) (deriding the majority's heavy reliance on one-sided social science evidence when other social science evidence shows different conclusions); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 153-54 (1955) (considering the dilemma of using "the Brandeis brief, filled with sociological and economic data for the judges' information" to overturn legislation).

⁴⁹ See Henderson, *supra* note 17, at 1604-05.

⁵⁰ *Id.* at 1604.

⁵¹ See *id.*

⁵² H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 195 n.* (1981).

⁵³ See Guinier, *supra* note 5, at 50 ("[D]emosprudential dissents summon the public – through their representatives or their own marching feet – to act in the name of democracy."); Henderson, *supra* note 17, at 1579.

⁵⁴ See *supra* note 35 and accompanying text.

way of knowing that is a “catalyst for action.”⁵⁵ The relevant action, in Henderson’s analysis, is reaching a legal conclusion that will address the harm that another is suffering, whether ordering the desegregation of schools or, as in *Shapiro v. Thompson*, affording poor people their constitutional right to travel to another state to be with family or to improve their lot.⁵⁶ The third element of Guinier’s definition of a demosprudential dissent is “facilitative,” or, in effect, catalytic.⁵⁷ Guinier explains: “[T]he dissenting opinion speaks to non-judicial actors, whether legislators, local thought leaders, or ordinary people, and encourages them to step in or step up to revisit the majority’s conclusions.”⁵⁸ While Henderson introduces greater attention to empathy to encourage better judging and opinions informed by appreciation for “our common humanity,”⁵⁹ Guinier urges dissenting Justices to view their dissents as an opportunity to expand the arena of democratic action and accountability.⁶⁰ Guinier, in her concluding pages, turns to majority opinions as a form of demosprudence.⁶¹ Although legal academics criticized *Brown* for its lack of “well-developed legal reasoning,” they fail to see its “demosprudential quality”; its very “accessibility and forcefulness were the inspiration for a social movement that gave the opinion its legs.”⁶²

In this brief Essay, I cannot offer a thorough discussion of the costs and benefits of Guinier’s demosprudential dissent strategy. This may be due in part to the temptation to bring a results-oriented approach to assessing such dissents. Thus, because I disagree with the *Ledbetter* ruling, I like that Justice Ginsburg’s oral dissent spurred Lily Ledbetter and Congress to take up the cause of “fixing” the Court’s ruling through legislative change.⁶³ Indeed, Congress has already taken action, endorsed first by President Obama as a

⁵⁵ See Henderson, *supra* note 17, at 1579.

⁵⁶ *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (“An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance.”); see also Henderson, *supra* note 17, at 1615-17 (describing the majority opinion in *Shapiro* as focused on the individual indigents whose constitutional right to travel had been impeded by the states’ one-year residency requirement for welfare benefits).

⁵⁷ Guinier, *supra* note 5, at 48. The other two elements are (1) “on a substantive level, the dissent probes or tests a particular understanding of democracy,” and (2) “its style likely deviates from the conventional point-by-point refutation of the majority’s logical flaws,” and instead “may tell a good ‘public story,’ built upon shared experiences and common concerns” or use other dramatic methods. *Id.* at 47-48.

⁵⁸ *Id.* at 48.

⁵⁹ Henderson, *supra* note 17, at 1653.

⁶⁰ Guinier, *supra* note 5, at 131 (urging that “[t]he time is ripe . . . for the Court to see beyond academics to the people themselves as a source of democratic authority and accountability”).

⁶¹ See *id.* at 130-31.

⁶² *Id.* at 131.

⁶³ *Id.* at 41.

Senator and candidate, and subsequently, as President, when he signed the Lilly Ledbetter Fair Pay Act.⁶⁴ By contrast, because I agree with the result reached by the majority in *Lawrence* and also support opening up civil marriage to same-sex couples, I dislike Justice Scalia's warning to "ordinary people" – "[d]o not believe it" (that is, the majority's disclaimer that the case does not involve formally recognizing homosexual relationships) – when he contends that soon the nation will have same-sex marriage foisted upon it by the federal judiciary and that the majority signals the death knell of all "morals" legislation.⁶⁵ I dislike it both as a misreading of *Lawrence*, but also because there is reason to believe that his dissent did catalyze opponents of same-sex marriage to renew efforts to pass state "defense of marriage" laws and amend state constitutions to forbid same-sex couples from marrying, as well as to amend the U.S. Constitution to bar such marriages.⁶⁶

Putting this results-oriented reaction aside, I am drawn to Guinier's emphasis on the educative role of Supreme Court opinions generally, of dissents in particular, and of her call for an expanded sphere of democratic action.⁶⁷ Finally, her examination of how biography may shape judicial decision-making⁶⁸ is a timely one as a new President faces the prospect of making a number of judicial nominations. To return to Henderson, how biography shapes the capacity for empathy may well prove an important theme in that process.⁶⁹

II. PRESIDENT OBAMA, EMPATHY, AND JUDICIAL APPOINTMENTS

Shortly before the 2008 presidential election, Professor Steven Calabresi, in an editorial in the *Wall Street Journal*, drew attention to then-candidate Barack Obama's statement about how he would select judges:

[W]e need somebody who's got the heart, the *empathy*, to recognize what it's like to be a young teenage mom. The empathy to understand what it's

⁶⁴ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified at 42 U.S.C. §2000a). For President Obama's remarks on signing this bill, see Remarks on Signing the Lilly Ledbetter Fair Pay Act of 2009, DAILY COMP. PRES. DOC. No. 33 (Jan. 29, 2009) [hereinafter Remarks on Signing the Lilly Ledbetter Fair Pay Act].

⁶⁵ *Lawrence v. Texas*, 539 U.S. 558, 599-605 (2003) (Scalia, J., dissenting).

⁶⁶ See Guinier, *supra* note 5, at 98 (describing the response to Justice Scalia's dissent in *Lawrence*). Having criticized Scalia's dissent in part for its catalytic effect, I should acknowledge that the majority opinion itself offended some proponents of traditional marriage and of a proper state role in using the criminal law to instill moral values; they probably did not need Justice Scalia's opinion to motivate them. It is also likely that even without Justice Ginsburg's exhortation, those committed to pay equity for women would likely have acted to rectify the Court's ruling.

⁶⁷ *Id.* at 134 ("In this tradition, Justices teach the public to identify with the constitutional values at stake and invite them to speak back in a voice that is all their own.").

⁶⁸ See *id.* at 32-45.

⁶⁹ See *supra* note 17 and accompanying text.

like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges.⁷⁰

Calabresi warned that this means “[e]mpathy, not justice, ought to be the mission of the federal courts, and the redistribution of wealth should be their mantra” – a dangerous departure from the traditional image of justice, or *Justitia*, as blind-folded.⁷¹ This recent editorial suggests the continuing relevance of a perceived dichotomy between legality and empathy.⁷² Calabresi expresses the contrast as between justice and empathy: “To the traditional view of justice as a blindfolded person weighing legal claims fairly on a scale, [Obama] wants to tear the blindfold off, so the judge can rule for the party he empathizes with most.”⁷³ Calabresi warns that “[n]othing less than the very idea of liberty and the rule of law are at stake in this election,” concluding that “[w]e should not let Mr. Obama replace justice with empathy in our nation’s courtrooms.”⁷⁴

Now that Senator Obama is President Obama, we will have the opportunity to learn more about his understanding of empathy and, presumably, his critics’ fears of the antithesis between justice and empathy. Why does President Obama believe empathy is important to judging and how does he think it should shape judicial reasoning? Some answers appear in his remarks about why he voted against confirming John Roberts as Chief Justice of the Supreme Court.⁷⁵ Then-Senator Obama explained that he was “sorely tempted to vote for Judge Roberts” based on, among other things, his conversations with then-Judge Roberts, Roberts’s resume, comportment, temperament, humility, personal decency, and love for the law.⁷⁶ Moreover, he believed that Judge Roberts had deep respect for the “basic precepts that go into deciding 95 percent of the cases that come before the Federal court – adherence to precedence [sic], a certain modesty in reading statutes and constitutional text, a respect for procedural regularity, and an impartiality in presiding over the

⁷⁰ Calabresi, *supra* note 18 (emphasis added) (quoting Senator Barack Obama, Speech to the Planned Parenthood Action Fund (July 17, 2007), available at <http://lauraetch.googlepages.com/barackobamabeforeplannedparenthoodaction>).

⁷¹ *Id.* Although I am not taking up here Calabresi’s attack on redistribution, Sotirios A. Barber (a contributor to this symposium), in a letter to the *Wall Street Journal*, pointed out the problems with Calabresi’s dichotomy: courts have a role in ensuring that government fulfill its object of securing the “general Welfare, and . . . the Blessings of Liberty.” Sotirios A. Barber, Letter to the Editor, *Any Big Change to the Courts Will Take a Long Time*, WALL ST. J., Nov. 7, 2008, at A16 (quoting U.S. CONST. pmbl.).

⁷² See Calabresi, *supra* note 18.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See 151 CONG. REC. S10,365-66 (daily ed. Sept. 22, 2005).

⁷⁶ *Id.* at S10,366 (statement of Sen. Obama).

adversarial system.”⁷⁷ The problem, Obama explained, was the other five percent of cases:

The problem I face . . . is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases – what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.⁷⁸

Thus, Obama explicitly identifies empathy as an important personal quality that is not antagonistic to justice, but is an important supplement when “rule of law” values alone do not supply an answer.⁷⁹ In “hard cases,” he continues, where constitutional text is not “directly on point,” and statutory language not perfectly clear, “the critical ingredient is supplied by what is in the judge’s heart.”⁸⁰ Specific case examples Obama provides are whether a right of privacy encompasses a woman’s right to terminate a pregnancy or whether a person with disabilities has a right to accommodation so that “they can work alongside those who are nondisabled.”⁸¹ He notes that in their conversations, Judge Roberts said it was “not easy for him to talk about his values and his deeper feelings,” but that “he doesn’t like bullies and has always viewed the law as a way of evening out the playing field between the strong and the weak.”⁸² Senator Obama, while “impressed with that statement” because it mirrored his own view of law, found Judge Roberts’s record to the contrary: “[I]t is my personal estimation that he has far more often used his formidable skills on behalf of the strong in opposition to the weak,” for example, siding with “those who were dismissive of efforts to eradicate the remnants of racial discrimination in our political process” and of those who dismiss “the concerns that it is harder to make it in this world and in this economy when you are a woman rather than a man.”⁸³ Obama concluded that because he had to “give more weight to his deeds” than his words, he must vote against Judge Roberts, although he hoped that Judge Roberts would prove to have a “jurisprudence . . . that stands up to the bullies of all ideological stripes.”⁸⁴

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Obama's remarks opposing the confirmation of Samuel Alito to the Supreme Court and Janice Rogers Brown to the D.C. Circuit Court of Appeals reiterate his concerns about appointing a judge who consistently sides with the powerful over the powerless.⁸⁵ Does this concern evidence a disregard for justice or the rule of law? To the contrary, Obama appeals to the idea – voiced by Roberts – that the law should afford a chance to even an unequal playing field.⁸⁶ To return to the speech Calabresi criticized, Obama related the need for “heart” or “empathy” to the need for judges to be able to understand the experience of being part of a marginalized or disadvantaged group.⁸⁷ Calabresi correctly observes that Obama's vision is not a model of judicial blindness.⁸⁸ However, removing the blindfold does not suggest an abandonment of the rule of law or justice. As a burgeoning literature on the image of Justitia suggests, the very isolation of Justitia from the litigants before her may contribute to a failure to secure justice.⁸⁹ Thus, feminist, Critical Race, and other legal scholars invite reflection on whether removing the blindfold might be an appropriate updating of Justitia which would allow for a useful transcending of overly sharp dichotomies between justice and care, legality and empathy, or even judgment and mercy.⁹⁰ President Obama's election squarely puts the issue of the qualities sought in adjudication and the role of judges on the table in perhaps new and fruitful ways. We may also see more embodiment of

⁸⁵ See 152 CONG. REC. S190 (daily ed. Jan. 26, 2006) (statement of Sen. Obama) (“[W]hen I examine the philosophy, ideology, and record of Samuel Alito, I'm deeply troubled.”). In opposing Janice Rogers Brown's nomination to the D.C. Circuit Court of Appeals, Obama referred to her as a “political activist who happens to be a judge,” who used her position on the bench to further “social Darwinism, a view of America that says there is not a problem that cannot be solved by making sure that the rich get richer and the poor get poorer.” 151 CONG. REC. S6178 (daily ed. June 8, 2005) (statement of Sen. Obama).

⁸⁶ See 151 CONG. REC. S10,366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

⁸⁷ See Calabresi, *supra* note 18.

⁸⁸ See *id.*

⁸⁹ See, e.g., ROBIN WEST, *CARING FOR JUSTICE* 27-60 (1997) (discussing the limitations of viewing justice as blindfolded in order to be impartial and universal).

⁹⁰ For feminist critiques, see *id.* at 50, 51-52 (arguing for the integration of care and justice and a relational ethic on which judges should recognize the “particular claims of the particular litigants on the court's legal and moral imagination and resources”); Judith Resnik & Dennis E. Curtis, *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses*, 151 PROC. AM. PHIL. SOC'Y 139, 160-64 (2007) (discussing the meaning of the blindfold on the image of Justice from a historical perspective); see also Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 396, 419 (2002) (discussing the “irony of the longstanding association of the female body with Justice,” given historic forms of sex inequality and contemporary failures to prevent violence against women). For a Critical Race Theory perspective, see Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 MICH. J. RACE & L. 203, 206-07 (2006) (questioning the blindness of Justice when race plays such an important role in society).

Justice Thurgood Marshall's ideal of judges understanding "how people live."⁹¹

III. THE ROLE OF THE SUPREME COURT IN SPURRING SOCIAL TRANSFORMATION

My third comment on Professor Guinier's article concerns the relationship between her project and the broader issue of "the constitution outside the courts," that is, the idea that courts alone cannot – and should not – bring about the full realization of constitutional ideals.⁹² The literature on this topic is too vast to engage in any detail in this brief Essay, but I will focus on one recent contribution by political scientist Rogers Smith.⁹³ Guinier contemplates demosprudential dissents as appropriate catalysts when the dissenter believes the majority is wrong and seeks to educate and mobilize the public either to have a critical discourse about the law or to make efforts to bring about law reform.⁹⁴ In contrast, Smith posits that courts necessarily have a relatively limited role to play in bringing about the fundamental structural institutional change that is needed to bring about full, equal citizenship – substantive equality – for minorities and for women.⁹⁵ He refers to the marginality of the Supreme Court because "the most important tasks in restructuring American institutions to remove barriers to meaningfully equal citizenship for women and men now go far beyond the capacities and the legitimate authority of the judiciary when engaged in constitutional interpretation."⁹⁶ For example, laws explicitly disadvantaging women are rare and "women have far greater formal opportunities than in the past"; however, "overall public policies and social practices still structure the lives of most women so that they carry disproportionate responsibilities for family and household care and face greater difficulties acquiring economic resources."⁹⁷ Compounding this with other factors like sexual harassment in the workplace, welfare policies affecting low-income women, and continuing bias in criminal justice systems, leads to the result that "overall, women do not really have meaningfully equal chances to gain and exercise political influence, or to have 'full citizenship stature . . . [defined by Justice Ginsburg as] equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."⁹⁸

⁹¹ *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting).

⁹² *See, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181-82 (1999) (defining "populist constitutional law" as "treat[ing] constitutional law not as something in the hands of lawyers and judges but in the hands of the people themselves").

⁹³ Smith, *supra* note 19.

⁹⁴ *See* Guinier, *supra* note 5.

⁹⁵ *See* Smith, *supra* note 19 (manuscript at 4).

⁹⁶ *Id.* (manuscript at 18).

⁹⁷ *Id.*

⁹⁸ *Id.* (manuscript at 19) (quoting *United States v. Virginia*, 518 U.S. 515, 532 (1996)).

What can courts, and the Supreme Court in particular, do to bring about the structural transformation needed to secure equal citizenship? While Smith cautions against looking to the Court for such structural change, he argues that it can – and should – play a helpful, perhaps catalytic role by pointing out the need for such transformation:

The courts do have a constitutional duty to pursue gender equality and civic equality to the very margins of their institutional competence. Even when it would be wrong for them to devise and mandate sweeping remedies, they should scrutinize more closely public policies and institutional arrangements that foster conditions in which women do not on balance have equal practical opportunities to be politically active citizens. Their rulings can then help highlight the most important tasks of civic restructuring that confront the rest of us.⁹⁹

For example, Smith applauds the Court's decision in *Nevada Department of Human Resources v. Hibbs*¹⁰⁰ for upholding a private right of action under the Family and Medical Leave Act.¹⁰¹ At the same time, he faults Chief Justice Rehnquist's majority opinion for not linking work/family conflict – and the continuing problem of how mutually reinforcing stereotypes about women and men hinder their ability to be parents and workers – to women's equal citizenship.¹⁰²

CONCLUSION: PURSUING JUSTICE IN EVERYDAY LIFE

Professor Guinier's invitation to consider the potential of Supreme Court dissents to spur "ordinary people" to action encourages her readers in the legal academy to reflect on the role of courts in catalyzing citizens to engage in social and constitutional change. Her specific examples of Lilly Ledbetter and Pat Todd suggest that sometimes an impassioned oral dissent can strike a resonant chord with a listener who, like the dissenter, believes the Court has failed to do justice and uphold constitutional values in the case before it. It seems a propitious time, with the election of President Obama, to consider the potential for such oral dissents. As noted above, President Obama identifies empathy and the ability to appreciate the stories of the lives of the marginalized and the powerless as an important judicial quality.

But beyond the executive's role in the judicial appointment process, the executive may also play a role in inspiring activism. After all, the Obama campaign and the Democratic Convention made much of Lilly Ledbetter's

⁹⁹ *Id.* (manuscript at 4-5).

¹⁰⁰ 538 U.S. 721 (2003).

¹⁰¹ *Id.* at 724-25; see Smith, *supra* note 19 (manuscript at 3).

¹⁰² Smith, *supra* note 19 (manuscript at 4) (“[T]he problem[] presented [in *Hibbs*] [was a] crucial one[] for the well-being of women. But none of the Justices who wrote opinions gave any substantial, explicit attention to issues of gender and equal constitutional citizenship.”).

fight for justice.¹⁰³ Obama often links such struggles to a quest to honor core American principles. Thus, upon signing the Lilly Ledbetter Fair Pay Restoration Act, President Obama described her as deciding “that there was a principle at stake, something worth fighting for,” noting that her long journey culminated in a law “which will help others get the justice that she was denied.”¹⁰⁴ First Lady Michelle Obama described “Lilly’s story and the broader issue of equal pay” as a concern “voiced over and over and over” during the campaign; at the signing, she praised Ledbetter as an “extraordinary woman” who “knew unfairness when she saw it, and was willing to do something about it because it was the right thing to do.”¹⁰⁵ At the signing of the Act, Ledbetter herself said that even though she would “never see a cent from my case,” her “richer reward” is that “my daughters and granddaughters, and your daughters and granddaughters, will have a better deal.”¹⁰⁶ In lofty rhetoric, President Obama’s signing statement linked the specific legislation to a vindication of fundamental national principles: “It is fitting that the very first bill that I sign . . . is upholding one of this nation’s founding principles: that we are all created equal and each deserve a chance to pursue our own version of happiness.”¹⁰⁷ Moreover, his populist rhetoric links justice to everyday life: “Justice isn’t about some abstract legal theory, or footnote in a casebook. It’s about how our laws affect the daily lives and the daily realities of people: their ability to make a living and care for their families and achieve their goals.”¹⁰⁸

The political theater of President Obama signing the bill while surrounded by Ledbetter, First Lady Michelle Obama, and female lawmakers all adorned in a bold blaze of red (the color of pay equity) was inspired and inspiring.¹⁰⁹ Moreover, his praise of Ledbetter and of other “advocates” who worked hard to “stand[] for what’s right” may itself inspire further social activism, as ordinary people see what can result from such efforts.¹¹⁰ Thus, even as Professor Guinier invites the Court to open up new possibilities of democratic

¹⁰³ Ledbetter spoke at the Democratic Convention, *see* Lilly Ledbetter, Address to the Democratic National Convention (Aug. 26, 2008), <http://www.demconvention.com/lilly-ledbetter/>, and Obama pledged during his campaign to sign a law to overturn the Court’s decision. *See* CHANGE WE CAN BELIEVE IN: BARACK OBAMA’S PLAN TO RENEW AMERICA’S PROMISE 165 (2008) (“As President, Barack Obama will . . . [s]ign into law the Fair Pay Restoration Act that Barack Obama co-introduced to overturn last year’s Supreme Court decision that made it harder for women to file pay-discrimination claims after they become victims of discriminatory compensation.”); Robert Pear, *Justices’ Ruling in Discrimination Case May Draw Quick Action by Obama*, N.Y. TIMES, Jan. 5, 2009, at A13.

¹⁰⁴ Remarks on Signing the Lilly Ledbetter Fair Pay Act, *supra* note 64, at 1.

¹⁰⁵ The White House Blog, http://www.whitehouse.gov/blog_post/AWonderfulDay/ (Jan. 29, 2009, 12:00 EST).

¹⁰⁶ *Id.*

¹⁰⁷ Remarks on Signing the Lilly Ledbetter Fair Pay Act, *supra* note 64, at 1.

¹⁰⁸ *Id.*

¹⁰⁹ *See* The White House Blog, *supra* note 105.

¹¹⁰ Remarks on Signing the Lilly Ledbetter Fair Pay Act, *supra* note 64, at 2.

engagement through demosprudential dissent, it is worth directing attention to the potential of the executive, in this “new era of responsibility,”¹¹¹ to serve as an even more powerful catalyst to democratic engagement and vindication of core constitutional principles and national values.

¹¹¹ Inaugural Address, DAILY COMP. PRES. DOC. No 1, at 4 (Jan. 20, 2009).