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AMY KAPCZYNSKI

Linking Ideas to Outcomes: A Response

It is a distinct pleasure to have the chance to respond to the insightful commentaries of Peter Drahos, Ruth Okediji, and Tomiko Brown-Nagin. I find much to agree with in each, but I will focus on a few areas of divergence in the hope of clarifying our differences.

Drahos's work on the role of ideas in the field of international intellectual property (IP) has been essential to my own thinking, and we agree on two critical points: that frame mobilization matters to political outcomes, and that frame mobilization is not *all* that matters.¹ But Drahos and I disagree on *how* framing matters, because we employ slightly different conceptions of the term. As Drahos's reference to Cicero suggests, he treats framing as primarily a form of rhetorical intervention, one that can usually yield only symbolic or interim victories.² I intend the concept in a more constitutive way, as it has been developed in the social movements literature. Framing here marks acts of dialogic, emergent interpretation that instigate, legitimate, and sustain collective action.³ Conceived of in this way, frames are not only rhetorical devices. They are also fundamental to the dynamics of collective action—to the very possibility and nature of “the environmental movement” or the “access to knowledge movement,” or even, I contend, the “IP industries.”⁴

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1. Peter Drahos, *Does Dialogue Make a Difference? Structural Change and the Limits of Framing*, 117 YALE L.J. POCKET PART 268, 270, 272 (2008), <http://yalelawjournal.org/2008/06/01/drahos.html>; Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 815 (2008). We even agree that one could retrofit public choice accounts of the field of IP to better explain the A2K mobilization. *Id.* at 841 n.174. But as I have noted, I am skeptical of the attempt to include ideational elements in public choice accounts. *Id.* at 811 n.6.
 2. Drahos, *supra* note 1, at 268, 272.
 3. Kapczynski, *supra* note 1, at 813-16.
 4. Kapczynski, *supra* note 1, at 842-51.

According to Drahos's more rhetorical conception of framing, frames are derivative and instrumental, and so rely heavily on external forces such as crises and already-existing mass publics to gain traction.⁵ I would say instead that there is a complex and mutually constitutive relationship between crises, mass publics, collective action, and framing. Take an example offered by Drahos, that of the nuclear accident at Three Mile Island. The near meltdown of this Pennsylvania reactor did serve as a rallying point for the public, but, as social movement scholars have demonstrated, only because the decade-old anti-nuclear movement and several local anti-nuclear organizations provided the frameworks, expertise, and organizing capacity needed to turn the event into a "crisis."⁶ Alternative frames were available. The event could have been fit (though not easily) into the competing "progress" frame of nuclear power, by arguing that it demonstrated the reliability of nuclear safety systems because a major accident was averted.⁷ Activists also had to work against arguments from experts that the accident posed no detectable health risks for the average person; in retrospect there is no consensus that it did.⁸ Compare this to the spill of 100 million gallons of toxic uranium sludge in New Mexico that occurred a few months later. That accident (which occurred on Navajo land) and the Three Mile Island incident were of "comparable magnitude," but the New Mexico spill never was perceived as the same kind of crisis.⁹ The point is not that events and existing publics do not matter, but that they do not carry with them their own meanings or necessary forms of organization.

The constitutive account of collective action framing is appealing precisely because it provides an account of the link between acts of interpretation and political mobilization, and thus between ideas and political outcomes. My claim is not that "webs of dialogue are more important than webs of coercion,"¹⁰ but rather that it is not easy to neatly separate the two—

5. Drahos, *supra* note 1, at 271, 272.

6. Edward J. Walsh, *Resource Mobilization and Citizen Protest in Communities Around Three Mile Island*, 29 SOC. PROBS. 1, 18 (1981).

7. William A. Gamson & Andre Modigliani, *Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach*, 95 AMER. J. SOC. 1, 4, 21 (1989).

8. Evelyn O. Talbott et al., *Long-Term Follow-Up of the Residents of the Three Mile Island Accident Area: 1979-1998*, 111 ENVTL. HEALTH PERSP. 341, 341 (2003); Steve Wing et al., *A Reevaluation of Cancer Incidence Near the Three Mile Island Nuclear Plant: The Collision of Evidence and Assumptions*, 105 ENVIR. HEALTH PERSP. 52, 52 (1997).

9. Doug Brugge, Jamie L. deLemos & Cat Bui, *The Sequoyah Corporation Fuels Release and the Church Rock Spill: Unpublicized Nuclear Releases in American Indian Communities*, 97 AMER. J. PUB. HEALTH 1595, 1595 (2007). See also ROBERT GOTTLIEB, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT* 325 (rev. & updated ed. 2005).

10. Drahos, *supra* note 1, at 272.

particularly in the field of law. For all of these reasons, I take acts of interpretation to be of profound importance to politics. But that does not mean that ideas or frames are easily wielded as political tools. Frames are difficult to control not only because utterances can misfire, in the Austinian sense,¹¹ but also because frames cannot be “abstracted from the relational actions, networks, and group processes in which they occur.”¹² Frames cannot be exclusively controlled the way other resources can be, because they rely on preexisting cultural repertoires and resources, and are always open to redeployment by others.

Actors seeking to reinterpret their circumstances to instigate and legitimate collective action are thus “bounded by the field and the genres within which they struggle.”¹³ They are not fully bounded, however, because they also “have the creative capacity to detect contradictions or gaps in meaning, as well as silences where they can produce new (and possibly oppositional) meanings.”¹⁴ This brings me to a point of difference with Okediji. We agree that A2K derives some of its power from its willingness to operate within the terms of the dominant IP discourse.¹⁵ Okediji sees this discourse as a trap, suggesting that it can only “legitimize the role of IP in the supply of public goods,” and that, in adopting it, A2K can only serve as a “counterpart” and not countermovement to the expansion of IP.¹⁶ I agree that these are risks, and that many countermovements are also counterparts, in part because of how dialogic framing works, especially in the field of law. A2K actors do not, however, simply inhabit arguments that legitimate IP. They also undermine them from within, for example by offering competing accounts of how creativity works, and of alternative mechanisms of innovation that can do better than IP to produce public goods.¹⁷ Although A2K often speaks in the dominant terms of IP law, that does not mean that it cannot also reinterpret those terms in a way that embodies and instigates a shift towards “cultural norms that differ in form and operation from those that have long characterized global IP lawmaking.”¹⁸

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11. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 16 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975); Drahos, *supra* note 1, at 271.
 12. Marc W. Steinberg, *Toward a More Dialogic Analysis of Social Movement Culture*, in *SOCIAL MOVEMENTS: IDENTITY, CULTURE, AND THE STATE* 208, 210 (David S. Meyer, Nancy Whittier & Belinda Robnett eds., 2002).
 13. Steinberg, *supra* note 12, at 213.
 14. Steinberg, *supra* note 12, at 212.
 15. Ruth L. Okediji, *IP Essentialism and the Authority of the Firm*, 117 *YALE L.J. POCKET PART* 274, 277 (2008), <http://thepocketpart.org/2008/06/01/okediji.html>.
 16. Okediji, *supra* note 15, at 277.
 17. Kapczynski, *supra* note 1, at 851-59.
 18. Okediji, *supra* note 15, at 279.

Whether it will is a different question, and one of significant importance to A2K.

This is not to say that the gravitational pull of law does not have effects. As Okediji notes, for example, A2K is oriented more towards the terms of IP law than to discourses of development.¹⁹ I take this to be, in part, a sign of the pull that law has exerted on this emerging mobilization.²⁰ This leads, in turn, to some of the questions raised by Brown-Nagin. I share her sense that we could learn much from a close analysis of the participants and methods of engagement of the emerging A2K mobilization. I chose to set aside the issue of whether A2K meets one or another definition of a social movement not because debates over how to define social movements are inconsequential, but because they open into a series of questions different than those that animated my project. I also wished to avoid the implication that A2K is “a cohesive and coherent force.”²¹ But to accept Brown-Nagin’s invitation for a moment, I wonder: must it be, in order to be considered a social movement? Social movements in our pervasively networked age may not take the same form as the social movements of the 1960s and 70s (which themselves were arguably full of contradictions and fractious coalitions). One of the more interesting possibilities posed by A2K, and contemporaneous mobilizations such as the “anti-globalization movement,” is that the nature of social mobilization may be changing, and the requirements of successful mobilization along with it.²²

So I fully agree that studying the contours of A2K might provide us with insight into many important questions. As Brown-Nagin and Okediji both rightly point out, we should attend to the role of elites and groups from the North in A2K, in part to address important questions about the nature and limits of organizing around technocratic and transnational issues. Moreover, I would urge special attention to the role that technology plays in the strategies and mobilization of A2K, and in who comes to constitute the center of A2K, especially because, as Brown-Nagin notes, most people in the world have little or no access to many of the technologies through and about which A2K is organizing.²³ Just as interesting are questions about the role that law might

19. Okediji, *supra* note 15, at 274.

20. Kapczynski, *supra* note 1, at 865-66.

21. Tomiko Brown-Nagin, “One of These Things Does Not Belong”: *Intellectual Property and Collective Action Across Boundaries*, 117 YALE L.J. POCKET PART 280, 282 (2008), <http://thepocketpart.org/2008/06/01/brown-nagin.html>.

22. For an argument along these lines, that urges A2K not to seek convergence or “grand theories,” but instead engage in a “lively process of social hybridisation,” see *Convergence Zone?*, SEEDLING, Oct. 2005, at 3, 9, available at http://www.grain.org/seedling_files/seed-05-10.pdf.

23. Brown-Nagin, *supra* note 21, at 286.

play in mediating the structure and dynamics of the movement.²⁴ These issues matter, as Brown-Nagin suggests, in determining who has “strategic priority” in A2K, and which issues and tactics become central to A2K.²⁵ Part of my motivation for mapping out the role that law has played in this mobilization is to lay the groundwork for precisely these kinds of inquiries, and to facilitate a critical assessment of the likely consequences of the mobilization’s current architecture, discourse, and strategies. Brown-Nagin is very much right that A2K activists are in the process of making choices about who they represent and what they want. These choices will necessarily be informed by theoretical understandings of the nature of freedom and justice in the digital age. It is critical engagement with these questions that I hope to facilitate in future work.

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24. Kapczynski, *supra* note 1, at 876.

25. Brown-Nagin, *supra* note 21, at 285.