Articles

Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns

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> Should political processes control the kinds of litigation a private attorney general can institute?[1]

Groups are messy. They are, by definition, comprised of many individuals and thus encompass a range of desires and agendas. Any group must generate ways to reach decisions among these competing possibilities. Typically, groups develop formal and informal mechanisms to define their goals and strategies. Consider a law school faculty. The faculty is an identifiable group of individuals that has a set of formal decisionmaking processes for the various types of choices it must make. A faculty votes on whom to admit to the school, what courses will be offered, who will teach these courses, and upon whom degrees will be conferred. Most faculties accomplish these decisions by some form of democratic process (majority or supermajority votes following participatory, dialogic meetings) or by some form of expertise (delegation to committees that study issues in depth and provide recommendations to, or simply make decisions for, the group). It would be rare to find a faculty

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1. Stephen C. Yeazell, *Collective Litigation as Collection Action*, 1989 U. ILL. L. REV 43, 55.

employing a decisionmaking process that empowered any member of the faculty to bind the group at that individual's will, for example, by unilaterally offering admission to an applicant or conferring a degree upon a student.

But consider litigation. If the faculty became disgruntled by a university decision—say salaries were cut in half and tenure revoked—some would surely want to commence a lawsuit. Other faculty members might caution against it, saying that it would undermine negotiating efforts. Some faculty members might not want to litigate for other reasons, believing, for example, that the faculty had been overpaid or that tenure should be periodically reconsidered. How would the group decide to proceed? Unlike all of the other decisions discussed above, the litigation decision *could* be made by one member of the faculty alone. She could appoint herself the group's representative and file a lawsuit for the group.[2]

The faculty example is too easy, as it simply underscores the distinction between an identifiable group's formal decisionmaking processes and the ad hoc litigation decision.[3] It nonetheless helps highlight two questions that lie at the heart of more informal groups' decisionmaking about litigation: Why is any individual group member able to step forward in the litigation arena and unilaterally claim to represent, and indeed bind, all similarly situated group members to a particular legal position? Further, why can any single attorney litigating one of many cases brought on behalf of a group decide alone what tactics and strategies to employ in pursuing that case? There is one immediate answer to both of these questions: Group decisions about litigation are structured by the rules of litigation, that is, by the rules of civil procedure and professional ethics,[4] and those rules currently adhere to an individualist model.

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2. Filing a class action would obviously have such a formal effect, but an individual lawsuit might be similarly dispositive of the rights of the other group members. *See infra* text accompanying notes 110–15.

3. Indeed, a formal group like a faculty might actually have a decisionmaking process that would precede its filing a lawsuit as a faculty. Of course, whether the legal system will accept the group's legal representative is ultimately a decision for the legal system to make. *See, e.g.*, FED. R. CIV. P. 17(b) (defining capacity to sue in federal courts); STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 3 (1987) ("If the courts refused to recognize a corporation's agents as its litigative representatives, many of its functions would be rendered difficult or impossible; the same is true for other organizations.").

4. In this sense, disputes about litigation take place in the "shadow" of the litigation system. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); *see also* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982). Although Mnookin and Kornhauser purport to "consider how the rules and *procedures* used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples outside the courtroom," Mnookin & Kornhauser, *supra*, at 951 (emphasis added), the emphasis of their work is on how "the *outcome* that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts," *id.* at 968 (emphasis added); *see also id.* at 977–80 (applying bargaining framework to custody standards). Similarly, economists study the extent to which changes in the *substance* of legal norms affect settlements (as opposed to outcomes) by altering bargaining advantages. *See, e.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). Thus to "bargain in the law's shadow" has come to mean "to settle disputes in light of the costs and likely outcome of litigation if settlement efforts fail." Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 494 (1995).

The rules of procedure structure group member disputes about litigation because they dictate who can represent the group in court, and how. They generally enable any individual to appoint herself the representative of the group's litigative desires. Similarly, the rules of professional ethics dictate the professional responsibilities of lawyers pursuing a group's cases; they generally require the attorney to be, above all else, loyal to her individual client's desires. Decisions about litigation are currently not made through more formal political processes because our rules of civil procedure and professional ethics promote individualist decisionmaking, even where the consequences of litigative decisions affect entire groups of people.

The primary purpose of this Article is to examine other ways procedural and ethical rules could structure group decisions about litigation.[5] The Article undertakes this exploration by focusing on two particular types of group decisionmaking: decisionmaking by groups of plaintiffs in civil rights cases about their litigative goals and decisionmaking by groups of civil rights attorneys about how to achieve those goals.[6] Part I presents a series of examples of group dissension concerning the goals and means of civil rights litigation, with a special emphasis on examples drawn from the emerging field of lesbian/gay civil rights.[7] Parts II–IV then analyze three distinct ways these

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This Article employs the "shadow of the law" concept in a related but distinct fashion. The content of procedural and ethical norms determine *who* can litigate and thus structure intracommunity bargaining about whether and how to litigate. While competing visions of the *substance* of the applicable legal rules might affect how groups within the community assess their chances in litigation, that difference of opinion is not the center of this inquiry. Rather, this Article focuses on how the rules of civil procedure and the codes of professional conduct that define who may litigate thereby shape intracommunity litigation conflicts.

5. So framed, this is a classic question about group dynamics. No social science discipline is immune from exerting its particular wisdom to help explain how people act in groups. This subject has been explored within the disciplines of game theory, *see, e.g.*, DREW FUDENBERG & JEAN TIROLE, GAME THEORY (1991); ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY (1989); education, *see, e.g.*, GROUP DYNAMICS: RESEARCH AND THEORY 9 (Dorwin Cartwright & Alvin Zander eds., 3d ed. 1968); economics, *see, e.g.*, ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970); sociology, *see, e.g.*, LOUIS KRIESBERG, THE SOCIOLOGY OF SOCIAL CONFLICTS (1973); and organizational behavior, *see, e.g.*, KENWYN K. SMITH & DAVID N. BERG, PARADOXES OF GROUP LIFE: UNDERSTANDING CONFLICT, PARALYSIS, AND MOVEMENT IN GROUP DYNAMICS (1987). This Article emphasizes the political theorist's models of the relationships between individuals, communities, and the state that are most familiar to a legal audience. *See infra* Parts II–IV.

6. The Article focuses separately on disputes among community members about goals and disputes among lawyers about the means of achieving those goals; these two types of horizontal disputes are addressed as distinct problems of group decisionmaking. There is a methodological purpose for this choice: I assume that initially separating group member disputes from lawyer disputes will ultimately assist in illuminating the tensions in lawyer-client relationships. Part V returns to this task.

7. The Article focuses on the lesbian/gay examples in part because, from 1987–1995, I was an attorney with, and for four and a half of those years the Director of, the ACLU's National Lesbian and Gay Rights Project. This focus has other benefits. The disputes described are exemplary of similar disputes from other social movements; thus lesbian/gay civil rights serve well as a representative case. At the same time, juxtaposition of the lesbian/gay examples with those from other social movements enables a consideration of the differences, as well as similarities, across these divides. Finally, use of these examples contributes new illustrations to the existing descriptive literature, *see infra* notes 11, 12, 64, 81 & 84, demonstrating the continuing pertinence of the larger project.

decisions might be addressed by the groups at issue: according to an individualist model, a democratic model, or an expertise model.[8] Through this exploration, the Article demonstrates that while all three models have advantages and disadvantages, our current procedural and ethical rules too heavily favor individualism alone. Community member disputes concerning the goals of litigation are inherently political in nature and therefore call for more democratic forms of decisionmaking;[9] attorney disputes about the methods of litigation are often technical disputes and therefore call for more expertise-reliant forms of decisionmaking. Part V initiates a discussion about how rules of procedure and ethics might be changed to embody the values of these alternative methods of collective decisionmaking.[10]

Scholars have, of course, written about the challenges that groups pose to our adjudicatory system. Derrick Bell's pathbreaking article, *Serving Two Masters*,[11] introduced a consideration of these issues that many scholars have since joined.[12] As is evident from the title of Professor Bell's article,

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8. These inquiries are limited to civil rights litigation, though the basic models developed are useful in considering intragroup relations in other forms of group litigation, such as mass tort cases and shareholder derivative suits. The Article identifies relevant parallels, *infra* notes 129, 144, 162–64, 211–12, 222, 243 & 247–51 and accompanying text. The Article limits its primary inquiry to the civil rights context, however, because the motivations of both attorneys and clients and thus the relationships among them are distinct. Civil rights cases concern preexisting social groups, not groups brought into being by a legal harm. *See* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 19 (1978) (distinguishing plaintiffs in structural reform cases from plaintiffs in private law litigation). These groups have existing relationships between and among their members and political processes for working through collective activities like litigation; this distinguishes these groups from many "classes" in class actions, *see* Yeazell, *supra* note 1, at 56–64, and thus makes the political models developed here particularly relevant. Additionally, one purpose of this Article is to demonstrate how procedural and ethical rules might promote values outside the litigation system; the values to be promoted in the civil rights context (democracy, expertise) might not be analogous to values that would be promoted in other contexts, or might not be similarly promoted. *Cf.* Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1 (1993) (describing competing theories of "fairness" in consumer class actions).

9. The Supreme Court has acknowledged the political nature of the group activity that gives rise to civil rights litigation. *See In re* Primus, 436 U.S. 412, 423–26 (1978); NAACP v. Button, 371 U.S. 415, 429 (1963). Community member disputes about such litigation are political not only because the litigation is itself political, but also because the community discourse about whether and how to proceed is central to the community's own self-definition process. *See generally* Carol McClurg Mueller, *Building Social Movement Theory*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 3, 10–11 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) (discussing essays that "identify conflict or struggle as a critical dynamic in reconstruction of cultural meanings and group loyalties"). The most in-depth description and analysis of the social processes of civil rights litigation is found in MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 138–66 (1987). *See also* STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY (1995).

10. Because this Article considers only group disputes in civil rights campaigns, its procedural and ethical proposals must be separately assessed for their impact on other types of cases. If rule changes proposed through this endeavor would create negative consequences in other situations, the costs and benefits would have to be balanced, and the proposals would have to be weighed against the independent value of maintaining a transsubstantive procedural system. *See* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732–39 (1975) (discussing values of transsubstantive structure of the Federal Rules of Civil Procedure). Part V begins this task.

11. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (exploring ethical dilemmas caused by divergence of goals between class members and attorneys in desegregation class action litigation).

12. While the initial study of the subject was Derrick Bell's, *see id.*, the classic, and most

however, the exploration he inaugurated has largely focused on the ethical conflict of interest problem that arises when a single attorney (or law firm) attempts to represent a divided group. While considering similar examples, this Article seeks to reconceptualize the way in which the problem is presented. Rather than considering how groups challenge traditional notions of lawyering, This Article examines how litigation challenges conventional ways that groups make political decisions. Why do we promote, vis-à-vis litigation, methods of group decisionmaking that would never be tolerated for other type of political decisions?

I. THE PROBLEM: DISPUTES AMONG GROUP MEMBERS AND AMONG LAWYERS IN CIVIL RIGHTS CAMPAIGNS

A. *The Story of* Shelley v. Kraemer

In the spring of 1947, Thurgood Marshall was annoyed. The source of his frustration was an attorney from St. Louis named George Vaughn.[13] Vaughn had just done something Marshall did not want him to do: He had filed a petition for certiorari with the United States Supreme Court in a case called *Shelley v. Kraemer*,[14] one of the many cases pending throughout the country in which the constitutionality of racially restrictive housing covenants was at issue.[15] Marshall did not want Vaughn to file this petition because he did not

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comprehensive, is Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) (surveying pluralist and majoritarian responses in procedural rules and proposing procedural solutions). *See also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 341–57 (1988) (discussing various ethical problems in class representation faced by lawyers litigating class actions); TUSHNET, *supra* note 9, at 156–58 (recognizing "political" solution to conflicts dilemma in 1930–50 NAACP efforts); Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U. L. REV. 492, 499–504 (1982) (advocating approach to class actions that balances concerns of class members and public interest in law enforcement); Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709, 712–13, 775–81 (1989) (proposing integration of informed consent and client-centered decisionmaking principles into class actions through new ethics rule); Shauna I. Marshall, *Class Actions as Instruments of Change: Reflections on* Davis v. City and County of San Francisco, 29 U.S.F. L. REV 911 (1995) (examining ethical issues presented by conflicts between various plaintiff groups in discrimination suit against San Francisco Fire Department); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) (exploring lawyer-client relationships from critical perspective); Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE L.J. 590, 604–08 (1982) (arguing for relaxation of attorney solicitation prohibitions to facilitate information exchange between attorneys and potential class members in class action suits); *cf.* Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV 296 (1996) (documenting analogous debates in mass tort litigation).

13. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 90 (1994).

14. 331 U.S. 803 (1947) (granting petition of certiorari from Supreme Court of Missouri).

15. Marshall had written Vaughn in the hopes of heading off the filing of the certiorari petition. *See* Letter from Thurgood Marshall to George Vaughn (Feb. 5, 1947), *in* NAACP Papers, Box II-B-133, File Restrictive Covenants, Shelley v. Kraemer, St. Louis, Missouri, 1946–48 (Library of Congress, Washington, D.C.) [hereinafter NAACP *Shelley* Papers] ("We hope that you will cooperate with us in withholding any future action on your case in regard to the U.S. Supreme Court until we can all get together on it because we are more than anxious to work together."). Marshall's letter may have been prompted by a letter from

think that the black community's legal position in the many restrictive covenant cases was sufficiently developed to be heard by the Supreme Court; Marshall and his NAACP colleagues had been working on developing that position for many years.[16] Marshall also did not believe Vaughn's factual record in the *Shelley* case was the best that could be brought before the Court; he and the NAACP attorneys had been working closely with social scientists to generate a compelling policy analysis of the effects of these covenants.[17]

Marshall was also worried about Vaughn's legal abilities. Vaughn was not a constitutional scholar. He was an able municipal court lawyer in St. Louis, and, in part because of his political influence within the Democratic party,[18] had prevailed in the *Shelley* case in municipal court.[19] But Vaughn's 1945 victory was shortlived; by the end of 1946, the Missouri Supreme Court had overturned it.[20] What may have worried Marshall most of all was that Vaughn thought that he had a good Thirteenth Amendment argument in his restrictive covenant case.[21] The antislavery amendment was, of course, not unknown to Marshall, but it may have been more immediate to Vaughn. Vaughn was proud of telling people that he was the son of a slave. Born in Kentucky, Vaughn had graduated from Lane College in Jackson, Tennessee,

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the NAACP's California counsel Loren Miller, who had been conducting covenant cases in Los Angeles. When the state supreme court decided *Shelley* in December 1946, *see* Kraemer v. Shelley, 198 S.W.2d 679 (Mo. 1946), *rev'd*, 334 U.S. 1 (1948), Miller wrote to Marshall's office urging the NAACP to head off Vaughn's certiorari petition:

> I notice that [Vaughn] is quoted in the papers as saying that he will seek Supreme Court review. . . . I think you will agree with me that any attempt to get Supreme Court review should be thoroughly discussed by those who are interested. Obviously, you are in a better position to approach Vaughn on the matter . . . .

Letter from Loren Miller to Marian Wynn Perry (Dec. 20, 1946), *in* NAACP *Shelley* Papers, *supra*.

16. Two of the NAACP's first lawsuits, before it had its own legal staff, involved challenges to restrictive housing policies. *See* Corrigan v. Buckley, 271 U.S. 323 (1926) (declining to strike down private restrictive covenants); Buchanan v. Warley, 245 U.S. 60 (1917) (striking down municipal ordinance requiring racially segregated neighborhoods). Both cases were argued by NAACP President Moorfield Storey. *See* TUSHNET, *supra* note 9, at 20. Half of the NAACP's 1931 legal plan (the "Margold Report") was devoted to the issue of residential segregation. *See id.* After the creation of its legal staff in the 1930s, the organization had prioritized the housing issue and attempted to coordinate legal strategies on this issue throughout the country. As of 1947, the NAACP attorneys were concerned that a majority of the Supreme Court was still not prepared to hold that court enforcement of private restrictive covenants amounted to state action that violated the Fourteenth Amendment. This explains why the attorneys felt that Vaughn's certiorari petition was "prematur[e]." *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 249 (1975); *see also* TUSHNET, *supra* note 13, at 87 ("Marshall insisted on having a fully developed legal theory in place before a full-scale challenge to the restrictive covenants could begin.").

17. *See* TUSHNET, *supra* note 13, at 89–90 (Marshall "preferred to delay presenting the issue to the Supreme Court until a case was developed . . . in which the full evidence about housing conditions would be in the trial record. . . . Vaughn . . . referred to the material about housing conditions only in passing . . . . "); *see also* Letter from Loren Miller to Marian Wynn Perry (Dec. 20, 1946), *in* NAACP *Shelley* Papers, *supra* note 15 ("I was in St. Louis and Kansas City last week, and my information is that the record in [Vaughn's] case is not altogether satisfactory.").

18. *See* PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 67–69 (1988).

19. *See id.* at 69.

20. *See* Kraemer v. Shelley, 198 S.W.2d 679 (Mo. 1946), *rev'd*, 334 U.S. 1 (1948).

21. *See* KLUGER, *supra* note 16, at 249.

and received his law degree from Nashville's Walden University. He had worked his way into the local ranks of the Missouri Democratic Party and the local NAACP.[22] In the latter capacity, he attended a conference that the NAACP held in Chicago in 1945 to help coordinate the many restrictive covenant cases that were percolating throughout the country.[23]

Marshall's intent in convening this conference was to try to develop the right theory and case for Supreme Court review.[24] In the following year, however, the cases reached uniformly bad outcomes in the lower courts.[25] Marshall grew worried and called a second conference in January of 1947.[26] By the end of the conference, Marshall was convinced that the ideal case had not yet been developed and that the time was still not right.[27] Vaughn did not attend Marshall's second conference; he was busy preparing his petition for certiorari in *Shelley* at the time.[28] Vaughn's filing of the petition that spring forced Marshall's hand.[29] He and other NAACP staff took over the appeal of a case pending in Michigan,[30] which Marshall had deemed not the right test case at the January conference,[31] and filed a petition for certiorari.[32] Better to argue a less than perfect Michigan case than to have Vaughn argue the issue alone in the Supreme Court.[33]

To Marshall's relief, the Court consolidated the cases when it granted

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22. The facts about George Vaughn's life in this paragraph are from CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 121 (1959).

23. *See* TUSHNET, *supra* note 13, at 90.

24. *See id.* at 88.

25. *See* KLUGER, *supra* note 16, at 248.

26. *See id.*, at 249; TUSHNET, *supra* note 13, at 90.

27. *See* TUSHNET, *supra* note 13, at 89 ("None of the NAACP's cases seemed to have everything in them that Marshall wanted, and he preferred to delay presenting the issue to the Supreme Court until a case was developed . . . in which the full evidence about housing conditions would be in the trial record.")

28. *See id.* at 90.

29. Vaughn filed his petition for certiorari on April 21, 1947. For a description of the events that followed, see VOSE, *supra* note 22, at 157.

30. *See* Sipes v. McGhee, 25 N.W.2d 638 (Mich.), *cert. granted*, 331 U.S. 804 (1947)

31. *See* KLUGER, *supra* note 16, at 249.

32. *See* TUSHNET, *supra* note 13, at 90. Vaughn probably welcomed the filing of the petitions in these other cases. He had written to Marshall in January of 1947:

> [I]f several of these cases are carried to the Supreme Court from various sections of the country, it will go a long way in convincing that body that the federal questions raised are not only substantial, but that they involve matters of grave public concern that ought to be settled by the Supreme Court. I understand this latter to be a frequent reason why certiorari is granted. Being a writ of grace, I believe this kind of concerted action from all over the country ought to obtain, in order to force that conclusion upon the Supreme Court.

Letter from Geo. L. Vaughn to Thurgood Marshall 2 (Jan. 30, 1947), *in* NAACP Papers, Box II-B-134, File: Restrictive Covenants, Sipes v. McGhee, Detroit, Michigan, 1947, Jan.-Aug. (Library of Congress, Washington, D.C.).

33. This sentiment was shared by other legal experts. The American Civil Liberties Union, for example, would not support the petition for certiorari in *Shelley*. The ACLU's Acting Director explained this decision to the group's St. Louis branch: "The issues raised [in the covenant cases] should be handled by experts in the field. The cases must be meticulously prepared and require a wealth of knowledge and expert handling." Letter from Clifford Forster, Acting Director, to Eugene Buder (Apr. 10, 1947), *in* NAACP *Shelley* Papers, *supra* note 15.

certiorari in June of 1947.[34] Marshall convened a third conference that summer to coordinate the briefing and amicus strategies for the covenant cases, but with little more success than he had achieved in heading off the cases. "Vaughn, who attended this conference, was somewhat obstructionist in his objections to the lines of argument Marshall wanted developed. . . . No entirely satisfactory resolution of the doctrinal question came out of the New York conference."[35] Similarly, the large number of interested amici also defied coordination: The briefs "ended up being rather repetitious."[36] The one significant boost Marshall received that summer came from the government, which filed an amicus brief in support of the civil rights position.[37]

The restrictive covenant cases were argued for seven hours in the Supreme Court. Philip Elman, an attorney in the Solicitor General's office who helped produce the government's brief in *Shelley v. Kraemer*[38]—and who would write the government's brief in *Brown v. Board of Education*[39]—was present for the argument. He tells this story of George Vaughn's argument:

> [H]e made an argument that as a professional piece of advocacy was not particularly distinguished. You might even say it was poor. He mainly argued the thirteenth amendment, which wasn't before the Court. He tried to distinguish cases when it was clear that the cases were indistinguishable and the only way to deal with them was to ignore or overrule them. He didn't cut through all the underbrush; he got caught in it. And the Justices didn't ask many questions. It was a dull argument until he came to the very end. He concluded his argument by saying . . . "Now I've finished my legal argument, but I want to say this before I sit down. In this Court, this house of law, the Negro today stands outside, and he knocks on the door, over and over again, he knocks on the door and cries out, 'Let me in, let me in, for I too have helped build this house.'"
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> All of a sudden there was drama in the courtroom, a sense of what the case was really all about rather than the technical legal arguments. . . . [It was] the most moving plea in the Court I've ever heard.[40]

Vaughn's speech was so compelling that he was invited to repeat it at the 1948 Democratic National Convention.[41]

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34. The Court ultimately consolidated two additional covenant cases from the District of Columbia—*Hurd v. Hodge*, 332 U.S. 789 (1947), and *Urciolo v. Hodge*, 332 U.S. 789 (1947)—that Marshall's mentor, Charles Hamilton Houston, had been litigating. *See* KLUGER, *supra* note 16, at 249.

35. TUSHNET, *supra* note 13, at 90–91.

36. *Id.* at 91.

37. *See* KLUGER, *supra* note 16, at 249–53.

38. 334 U.S. 1 (1948).

39. 347 U.S. 483 (1954).

40. Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 819 (1987).

41. *See* VOSE, *supra* note 22, at 201.

In May 1948, the Supreme Court ruled in the black litigants' favor, holding in *Shelley v. Kraemer* that court enforcement of racially restrictive covenants would violate the Equal Protection Clause of the Constitution.[42] Legend has it that Thurgood Marshall argued *Shelley*.[43] Legend does not say much about George Vaughn.[44]

B. *The Lessons of* Shelley v. Kraemer

The story of the litigation campaign that culminated with *Shelley* exemplifies the central concerns that motivate this Article: the difficulty the NAACP attorneys had "controlling" civil rights litigation even at a time when so few lawyers were involved that control seemed plausible, and, more importantly, the intriguing question of what values are furthered by such control. Before turning to the exploration of these themes, it is necessary to state several key premises, each of which also flows from the *Shelley* story. First, this Article talks of "communities" pursuing "goals," despite the fact that civil rights campaigns are not waged by easily identifiable "communities" pursuing settled, concrete goals. The restrictive covenant cases reflected the interests of a particular segment of the African-American community, the black middle-class home-buyers, and the extent to which such cases represented an important element of the civil rights struggle was contested among the various factions struggling to define that movement. Similarly, there is not a fixed "lesbian and gay 'community.'"[45] Indeed, if anything, the fact that lesbians,

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42. *See Shelley*, 334 U.S. at 20.

43. *See, e.g.*, MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 12 (1992) ("In 1948 [Marshall] argued and won *Shelley v. Kraemer*, a Supreme Court decision striking down the legality of racially restrictive residential housing covenants . . . ."); *id.* at 145 ("In 1948 [Chief Justice Fred] Vinson wrote the opinion of the Court in *Shelley v. Kraemer*, argued by Thurgood Marshall . . . ."); *id.* at 297 ("Marshall won the case that struck down restrictive covenants.").

44. *But see* VOSE, *supra* note 22, at 121 ("In April, 1957, eight years after his death, the City of St. Louis named a 1350-unit public-housing project The George L. Vaughn Apartments and School in his memory.").

45. Many individuals harbor same-sex desire but have not taken on a lesbian, gay, or bisexual "identity." *See, e.g.*, EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 287–301 (1994). *See generally* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) (describing social construction of gay identity). Even among those who would identify themselves as lesbian, gay, or bisexual, many would not consider themselves members of a "community," and it would be impossible to claim a coherent collective identity for such a "community." *See* Steven Seidman, *Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes*, *in* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 105, 105–42 (Michael Warner ed., 1993). The boundaries and interests of any "community" are always contested. *See* Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 260 (1993) ("Defining what the group has in common and what distinguishes it from outsiders is always a contestable matter of interpretation."). The very types of disputes discussed in this Article are important processes by which a "community" defines its very essence. *See* Verta Taylor & Nancy E. Whittier, *Collective Identity in Social Movement Communities: Lesbian Feminist Mobilization*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY, *supra* note 9, at 104–29; *see also* BARBARA JOHNSON, A WORLD OF DIFFERENCE 178 (1987) ("Difference disliked is identity affirmed.")

gay men, and bisexuals are generally not visually identifiable makes the boundaries of this "community" especially amorphous.[46] This limitation does not, however, frustrate this Article's central purpose. Without insisting on coherent notions of "identity" and "community," this Article simply aims to examine the disputes that arise among individuals and groups pursuing legal rights.[47]

Second, this Article employs the term "litigation campaigns" because its concern is the relationships among cases, clients, and lawyers that emerge in the course of a social enterprise. The piecemeal litigations that constituted the restrictive covenant campaign demonstrate that the disputes at issue here are not confined to the class action context nor to single cases. The significant unifying factor of the cases discussed in this Article is that they are brought with the intention of establishing a legal precedent that will improve a group's social situation and thus they aim to have an effect on other pending cases or on future cases. They constitute "impact" litigation or "test" cases brought over time as part of larger litigation "campaigns."

Third, this Article speaks generally of "lawyer-lawyer" disputes in litigation campaigns, but assumes that the lawyers waging these campaigns fall roughly into two distinct categories: professional public interest litigators like Thurgood Marshall and the occasional pro bono attorneys like George Vaughn. Within the lesbian/gay community,[48] the primary public interest law firm is Lambda Legal Defense and Education Fund, Inc. (Lambda), based in New York.[49] The American Civil Liberties Union (ACLU), through its affiliate offices and its national Lesbian and Gay Rights Project in New York, is the other largest provider of legal representation for lesbian/gay impact litigation.[50] The National Center for Lesbian Rights in San Francisco also employs several impact litigators, as does a regional gay legal group, Gay and

46. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 728–31 (1985).

47. The subset of "community" members involved in *legal* disputes are defined by a set of socioeconomic variables that constrains their universality in additional ways. Among those harboring same-sex desire, it is more likely that white Americans, and particularly white males, will identify with a "gay" community. *See* Lisa Duggan, *Making It Perfectly Queer*, *in* LISA DUGGAN & NAN D. HUNTER, SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 155, 162 (1995). Similarly, those involved in test-case litigation, and members of the groups that bring such cases, are typically drawn from middle-class and upper-middle-class environments. This does not reflect the random distribution throughout the larger populace, across lines of race, gender, and class, of those with same-sex desire. *Cf.* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing relationship of persons with multiple "identities" to single-issue identity politics).

48. For an overview of lesbians and gay men in the legal profession, see generally LEGAL ETHICS 97–100 (Deborah L. Rhode & David Luban eds., 2d ed. 1995).

49. As of 1997, Lambda has offices in New York, Chicago, Los Angeles, and Atlanta, and employs approximately 15 full-time attorneys.

50. Since the beginning of the 1990s, the ACLU's national project and local offices have regularly employed between five and ten attorneys who work on lesbian/gay issues full time. *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1583–87 (1993) (providing historical background on Lambda and ACLU).

Lesbian Advocates and Defenders, based in Boston. The professional pro-gay advocates attempt to coordinate their work through biannual meetings known as the "Lesbian/Gay Litigators Roundtable."[51] Like their predecessors in other social movements,[52] these litigators typically (though not invariably) conduct litigation in conjunction with pro bono counsel, who are usually lawyers drawn from private law firms.[53] Private attorneys like George Vaughn may also litigate pro-gay impact cases without the assistance of public interest firms (either for money or on a pro bono basis). I refer to these nonprofessional impact litigators as "occasional civil rights lawyers" to distinguish them from lawyers in professional civil rights organizations. While disputes occur among professional attorneys or among occasional pro bono attorneys, this Article is particularly concerned with disputes like the Marshall/Vaughn interaction that are between professional civil rights litigators on the one hand and occasional pro bono attorneys on the other. Such disputes provide an opportunity for considering the extent to which professional civil rights litigators have "expertise" that should be valued in particular ways in litigation campaigns at the expense of attorney individualism or group decisionmaking.

Finally, this Article is constructed around a sharp divide between "goals" (controlled by clients) and "means" (controlled by lawyers), though the goals/means distinction is significantly more indefinite. The ABA's Model Rules of Professional Conduct could be read to suggest that the decision to file a petition for certiorari in the *Shelley* case concerns the goal of that litigation and thus was a decision for the Shelleys to make.[54] Marshall and the other

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51. At these meetings, the litigators update one another on their dockets and discuss legal strategies and approaches to pending and proposed cases.

52. For an overview of the characteristics of public interest groups generally, see WASBY, *supra* note 9, *passim*; and Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976).

53. Pro-gay test cases have often been litigated by solo practitioners involved in providing regular legal services to lesbians and gay men locally, or by attorneys drawn from the general plaintiffs' employment discrimination or family law bar. Increasingly, lesbian and gay impact cases are being litigated by pro bono counsel drawn from large corporate law firms. *See* CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW at vii–viii (William B. Rubenstein ed., 2d ed. 1997).

54. The ABA's Model Rules of Professional Conduct distinguish goals from means to provide guidance for attorneys on how to interact with clients. The Rules mandate that: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995). The official comment on the Rule concedes the difficulty of the distinction: "A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking." *Id.* at Rule 1.2 cmt. Nonetheless, the Rule's Comment advises that "[t]he client has ultimate authority to determine the purposes to be served by legal representation," and that "the lawyer should assume responsibility for technical and *legal tactical* issues." *Id.* (emphasis added).

This distinction has been variously stated as "ends-means, substance-procedure, strategy-tactics, or objective-means." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.3, at 156 (1986). As Wolfram correctly notes, "Any one of the divisions has problems." *Id.* Such divisions are typically justified in terms of paternalism, professionalism, or efficiency. *See* Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 321–24 (1987). Simple efficiency concerns appear to be the most compelling:

> Considerations of procedural efficiency require, for example, that in the course of a trial there be but one captain per ship. An attorney must be able to make such tactical decisions as

covenant attorneys, however, saw that decision as a legal tactical question about getting the "right" case to the Court at the "right" time. In their view, such questions would not be ceded to the clients, who were merely placeholders in their campaign, but would be decided by lawyers.[55] How one draws the goals/means distinction reflects a vision of the distribution of power between attorneys and clients. Like the client-centered lawyering literature that argues for greater client control of litigation goals,[56] this Article articulates a vision of group member involvement in civil rights campaigns and argues for more democratic means of such involvement. However, some aspects of civil rights practice will be uniquely within the province of the attorneys; these lawyers control, and will continue to control, the more technical decisions about litigation tactics. Accordingly, while conceding the ambiguity of these terms and the political nature of the following choice, this Article employs the terms in the manner suggested by the ABA Model Rules: Goals are the objectives of the litigation over which social groups hold "ultimate authority"; means are the "technical and *legal tactical* issues" to be controlled by attorneys.[57] As noted above,[58] the initial separation of ends from means will ultimately assist in considering the extent to which the two are distinct.

> whether to call a particular witness, and the court and opposing counsel must be able to rely upon the decisions he makes, even when the client voices opposition in open court.

Blanton v. Womancare, Inc., 696 P.2d 645, 650 (Cal. 1985) (en banc); *see also* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 266–70 (1991) (arguing that "the client makes all the decisions position is unworkable and, in fact, inconsistent with client-centeredness").

55. In fact, the Shelleys were scarcely involved in the decision to file for certiorari, *see* IRONS, *supra* note 18, at 77–78 ("'After the first time we went to court, the lawyers took the case up to the Supreme Court.'") (quoting J.D. Shelley); rather, it was made by Vaughn and the organization paying him to undertake the litigation (his "real" client), the St. Louis Real Estate Brokers' Association, *see* Letter from Jas. T. Bush to Thurgood Marshall (Sept. 19, 1947), *in* NAACP *Shelley* Papers, *supra* note 15 ("Mr. Vaughn is employed by the Association as counsel and consequently is subject to [our] instruction . . . ."). Thus Marshall attempted to intercede with Vaughn not only because he was the Shelleys' agent, but more realistically, because it was obvious that he, and not the Shelley family, would be making the decision about whether to file the petition for certiorari.

56. Client-centered lawyering promotes the idea that lawyers should serve, rather than construct, their clients' interests. *See* Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 720 (1987) ("[C]lient-centered practice takes the principle of client decisionmaking seriously, and derives from this premise the prescription that a central responsibility of the lawyer is to enable the client to exercise his right to choose."). *See generally* DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977) (describing objectives and techniques of legal interviewing and counseling). Proponents of client-centered lawyering primarily argue against paternalism in legal practice, against practitioners who dictate agendas and approaches to their clients (especially to public interest clients), and for client "empowerment." For a streamlined, though helpful, description of this strand of client-centered lawyering, see William H. Simon, *The Dark Secret of Progressive Lawyering*, 48 U. MIAMI L. REV. 1099, 1101–02 (1994).

57. It could be argued that a client with strong opinions about traditionally "tactical" matters should be able to assert such autonomy in attorney-client relations. Because such clients are rare, however, they do not undermine this working definition. *See infra* note 142.

58. *See supra* note 6.

C. *Disputes About Goals: Lessons from the Same-Sex Marriage Debate*

In the fall of 1989, a lesbian/gay intellectual journal called *Out/Look* published a debate concerning same-sex marriage. On one side of the debate was Tom Stoddard, then the executive director of Lambda; on the other side of the debate was Paula Ettelbrick, then Lambda's legal director. Stoddard's contribution, entitled *Why Gay People Should Seek the Right to Marry*,[59] set forth a practical, political, and philosophical argument for gay marriage and urged the gay community to give marriage priority as an issue: "I believe very strongly," Stoddard wrote, "that every lesbian and gay man should have the right to marry the same-sex partner of his or her choice, and that the gay rights movement should aggressively seek full legal recognition for same-sex marriages."[60] Ettelbrick dissented. In her article, entitled, *Since When Is Marriage a Path to Liberation?*,[61] Ettelbrick stated that:

> [M]arriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream and undermine the goals of gay liberation. . . . Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture; and the validation of many forms of relationships.
>
> . . . .
>
> The moment we argue, as some among us insist on doing, that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices.
>
> . . . .
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> We will be liberated only when we are respected and accepted for our differences and the diversity we provide to this society. Marriage is not a path to that liberation.[62]

The Stoddard/Ettelbrick exchange was a "marriage announcement" of sorts, a declaration that the issue of marriage was moving from the margin to the

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59. Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9, *reprinted in* CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW, *supra* note 53, at 716 *Out/Look* is no longer published

60. *Id.* at 717.

61. Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, *reprinted in* CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW, *supra* note 53, at 721

62. *Id.*; *see also* Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31 (1991) (expressing wariness about quest for same-sex marriage), Nancy D Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV 1535, 1536 (1993) ("I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.").

center of the lesbian/gay movement.[63] Yet from the moment of its reintroduction, the marriage issue produced controversy among community members.[64] The Stoddard/Ettelbrick debate exposed one fissure, whether the community ought to prioritize and pursue marriage at all,[65] and reflected a discussion within Lambda about how the organization should respond to increasing demands that it file a same-sex marriage case. This was not the only contentious issue. The community also disputed when such cases ought to be filed, where such filings might be made, and on whose behalf.[66] The

63. Marriage had been in the closet for nearly two decades. In the burst of gay activism that followed the Stonewall uprising in New York City in the summer of 1969, gay men and lesbians brought cases challenging the bans on same-sex marriage in Washington, *see* Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974); Minnesota, *see* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); and Kentucky, *see* Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973). The courts soundly rejected these cases and there the situation rested for nearly 20 years. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 52–58 (1996) (describing developments during this dormant period). The Stoddard/Ettelbrick debate was probably less of a catalyst in the reemergence of marriage as a central issue in the gay rights movement than a reflection of other developments. *See* William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & POL. 89 (1991) (arguing that AIDS and Sharon Kowalski case focused increased attention on family law issues); *see also* ESKRIDGE, *supra*, at 58–59 (analyzing revival of marriage issue as product of several cultural and legal factors); *cf.* Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 543–46 (1992) (discussing central developments in post-*Hardwick* debate).

64. The controversy over goals in the marriage debate parallels goal disputes in other communities. Ettelbrick's critique of marriage resembles criticism feminists have leveled at women's rights litigators who prioritized cases challenging the exclusion of women from combat positions and from the draft. *See* DEBORAH L. RHODE, JUSTICE AND GENDER 98–101 (1989) (noting that "[m]any feminists have seen little to be gained from inclusion in a national defense system so dominated by male values and male decisionmakers"); Kathleen Jones, *Dividing the Ranks: Women and the Draft*, *in* WOMEN, MILITARISM, AND WAR 125, 125–36 (Jean Bethke Elshtain & Sheila Tobias eds., 1990).

More generally, members of African-American communities have long disputed whether integration or school quality should be the goal of race discrimination law suits. *See, e.g.*, W.E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328 (1935) (discussing costs due to unequal treatment in integrated schools); Chas. H. Thompson, *Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School*, 4 J. NEGRO EDUC. 419 (1935) (acknowledging integrated schools as best solution but exploring methods of improving segregated schools). *See generally* Bell, *supra* note 11, at 470 (discussing diverging client interests in school desegregation cases); James S. Kunen, *The End of Integration*, TIME, Apr. 29, 1996, at 39 (discussing conflicting views within African-American community on continued integration plans). Advocates for the disabled have split over the question of whether to seek better conditions in institutions for those with mental health problems, or to seek deinstitutionalization. *See* SUSAN M. OLSON, CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS 29 (1984) (distinguishing "right to treatment" suits from "least restrictive alternative" suits). *See generally* Robert A. Burt, *A Parable*, *in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 265, 265–363 (Robert H. Mnookin ed., 1985) (exploring conflicts among plaintiffs concerning deinstitutionalization in Pennsylvania action brought to improve conditions at an institution for mentally ill).

65. Such controversy had been present in the earlier discussions of gay marriage as well. *See* DONN TEAL, THE GAY MILITANTS 282–93 (1971); Carl Wittman, *A Gay Manifesto*, *in* OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 330, 333–34 (Karla Jay & Allen Young eds., 1977) (noting that "[t]raditional marriage is a rotten, oppressive institution" and "[l]iberation for gay people is defining for ourselves how and with whom we live, instead of measuring our relationship [sic] in comparison to straight ones, with straight values"). The Stoddard/Ettelbrick exchange not only reignited this debate, but it flared beyond their writings. *See, e.g.*, Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994–95) (examining intracommunity debate over marriage rights).

66. Some of these disagreements appear more tactical than goal-oriented, but, as noted above, the distinction is often elusive. *See supra* text accompanying notes 54–58.

community generally, and the lawyers at Lambda specifically, were confronted by a significant conundrum: What constituted a satisfactory response to these divisions?

Stoddard and Ettelbrick's response was to air their debate publicly, first in the pages of *Out/Look* and then "on the road." The two leaders traveled around the United States to debate in front of community audiences.[67] By taking their debate to the community, Stoddard and Ettelbrick apparently envisioned that some resolution of their disagreement would emerge from the community discussion, perhaps that some consensus would evolve to guide their actions.

A similar attempt to gauge community consensus occurred at the outset of a marriage challenge in Hawaii. In 1990, some individuals in Hawaii approached the ACLU affiliate in that state, asking the organization to file a challenge to Hawaii's marriage laws on their behalf. The local ACLU affiliate contacted the ACLU's National Lesbian and Gay Rights Project in New York seeking guidance. Nan Hunter, then Director of the Project, suggested that the Hawaii affiliate measure support for the case within the lesbian and gay community in Hawaii before pursuing the issue.[68] The ACLU's Hawaii affiliate translated Hunter's advice into an informal poll of gay community leaders. By letter, the Hawaii affiliate attorney sought input from the community about whether there was "broadly based support for such litigation" in Hawaii, writing that the "ACLU would not want to act in a manner inconsistent with the opinion of a substantial number of gays and gay rights activists."[69] The ACLU was attacked for taking this approach: A community activist in Hawaii wrote that "[i]ndividuals or civil rights should never be construed as a popular opinion issue, but rather a right of each human being."[70]

The internal community debate largely subsided after lesbians and gay men, without support from the legal experts, proceeded with their own legal actions. In late 1990, Craig Dean, a gay lawyer, filed his own case challenging the District of Columbia's marriage law on behalf of himself and his lover. In

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67. Similar "mini-debates" sprang up locally. *See* ESKRIDGE, *supra* note 63, at 61 ("The Ettelbrick-Stoddard exchange . . . provoked considerable discussion and further commentary within gay communities all over the United States."). Eskridge reports that he and law professor Nancy Polikoff "are the District of Columbia touring company for the Ettelbrick-Stoddard debate." *Id.* at 62.

68. Hunter subsequently stated that she "was concerned that the ACLU, because it is not a gay organization, could be drawn into an intracommunity debate without really knowing it" and whether the ACLU affiliate supported the case or not, she thought "it was important that the gay community understand that it had been a thoughtful process, respectful of whatever differences existed within the community." Letter from Nan Hunter, former Director, ACLU National Lesbian and Gay Rights Project, to William B Rubenstein (Aug. 18, 1996) (on file with author).

69. Letter of Carl M. Varady, Staff Attorney, ACLU of Hawaii, to Community Leaders (June 20, 1990) (on file with author); *see also* Walter Wright, *Same-Sex Marriage Ban May Be Tested*, HONOLULU STAR-BULL. & ADVERTISER, Nov. 25, 1990, at A1 (on file with author).

70. *Hawaii Horror Story!: Hawaii's ACLU Takes Public Opinion Poll to Determine If They Will Support Gay Civil Rights*, GAY COMMUNITY NEWS (Hawaii), July 1990, at 1.

May 1991, three lesbian and gay male couples in Hawaii filed an action in Hawaii state court without the support of the ACLU; they were represented by a former staff attorney at the ACLU of Hawaii.[71] After the cases were filed, the community legal organizations ultimately provided support for them,[72] thus quelling the internal community drama.[73] All of the actors had different perspectives on how this resolution was accomplished: The professionals viewed it as a rebuke of their expertise, or of some community consensus, by rogue individuals;[74] the individuals defended their actions either as in the best tradition of courageous individuals,[75] or as capturing a community consensus[76] while their leaders fiddled.[77] Notwithstanding these differing

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71. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

72. The pro se D.C. plaintiffs were most significantly aided by Georgetown University law professor William Eskridge, who argued their case in the trial court and the District's high court. Both Lambda and the ACLU of the National Capital Area filed amicus briefs in support of the case when it reached the District's high court. That court rejected Dean's arguments in 1995. *See* Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995).

After the Hawaii case was dismissed by the state trial court, both Lambda and the ACLU (local chapter and national project) filed amicus briefs in support of the case at the Hawaii Supreme Court, which reinstated the case in 1993 and remanded it for trial. *See Baehr*, 852 P.2d at 44. The Hawaii Supreme Court ruled that the state's prohibition on same-sex marriage constituted "sex discrimination." *Id.* at 60. Under the Hawaii *state* constitution, the court further ruled, sex discrimination triggers the highest level of judicial review. *See id.* at 67. The Hawaii high court thus sent the case back to the Hawaii trial court for the lower court to determine whether the state could demonstrate that its ban on same-sex coupling served a compelling state interest. *See id.* at 68. Following that decision, Lambda became co-counsel and assisted in the September 1996 trial. In December 1996, the Hawaii trial judge ruled that the state did not demonstrate a compelling interest for its prohibition on same-sex marriage. The court accordingly entered judgment for the plaintiffs, and then stayed its decision pending the state's appeal. *See* Baehr v. Miike, No. CIV.A. 91-1394, 1996 WL 694235 (Haw. Dec. 3, 1996).

73. *See, e.g.*, ESKRIDGE, *supra* note 63, at 62 ("The gay marriage debate is now focused on Hawaii and the forthcoming trial . . . ."); Wolfson, *supra* note 65, at 570–71 ("[T]he time for a debate over whether lesbians and gay men should seek our equal marriage rights has passed. Because lesbians and gay men are on the verge of winning our equal marriage rights . . . we must now unite in preparing to protect and build on that victory."); David W. Dunlap, *Some Gay Rights Advocates Question Drive to Defend Same-Sex Marriage*, N.Y. TIMES, June 7, 1996, at A12 ("'We have lost—if, in fact, we ever had—the luxury of deliberation and reflection . . . . We are now fighting for our political life.'") (quoting Kathryn D. Kendell, Legal Director of the National Center for Lesbian Rights).

74. As Stoddard commented on Dean's case: "'What happens to these two men will affect every other gay man and lesbian in the United States. They therefore have a responsibility to confer with their colleagues.'" Elizabeth Kastor, *The Marriage Proposal; Two Men and Their Crusade for the Right to a Legal Union*, WASH. POST., Jan. 28, 1991, at B1. Similarly, Thomas F. Coleman, a longtime attorney for the gay community, said of the Hawaii plaintiffs: "'Why should three couples in Hawaii drive the entire gay rights movement?'" Dunlap, *supra* note 73, at A1.

75. *See* Andrew Miller, *DC Marriage Lawsuit Irks Gay Attorneys*, OUTWEEK, Dec. 12, 1990, at 16 ("'I'm not going to degrade my relationship by not trying to avail myself of everything I believe we're entitled to,' [stated] Dean. 'What if 30 years ago, someone had said, No, Rosa [Parks], don't ride in the front of the bus?'") (internal quotations omitted).

76. *See, e.g.*, Deb Price, *Gay Couple Sues for Legal Marriage*, GANNETT NEWS SERVICE, Feb. 12, 1992, *available in* LEXIS, News Library, GNS File ("The couple's lawsuit illustrates an emerging consensus in the gay and lesbian community that marriage should be included in the push for legal recognition and benefits for gay individuals, couples and their children.").

77. Dean insisted that the gay leaders felt that marriage was "'too radical,'" Matthew Canton, *Love and Marriage: Craig Dean and Patrick Gill Struggle for Recognition and Equal Protection Under Law*, DAILY TEXAN, Feb. 7, 1991, *available in* 1991 WL 5212716 ("'[T]hey think gay marriage is too much for them to litigate and will be detrimental to their position.'") (quoting Patrick Gill); and he expressed anger that they attempted to discourage his filing: "'I think it's outrageous that people who call themselves

perspectives, what seems clear is that the legal capacity of any individual, or group of individuals, within the community to end the debate *about* litigation by resorting *to* litigation proved to be an important factor in concluding the community's marriage debate. Once filed, such litigation changed the terms of the debate from an intracommunity struggle of self-definition to an intercommunity struggle of self-preservation.

D. *Disputes About Means: Lessons from "Litigating Around* Hardwick*"*

Debate about and interest in the nature of sexual orientation is nothing new. Several factors collided, coincidentally or not, in the late 1980s and early 1990s to bring these questions to the center of discourse within the lesbian/gay community. One was the increasing search for biological evidence of homosexuality.[78] Simultaneously, the central dispute in the emerging field of lesbian/gay (or queer) studies was the essentialist/social constructionist argument. Essentialists argue that the categories of sexual orientation are descriptive of "real" human behavior anterior to culture. The social constructionist position holds that the process of creating and defining categories itself establishes the ways in which humans behave.[79] Beyond its scientific and academic bases, this debate about the nature of sexual orientation has had an important foothold in law. Since the Supreme Court's 1986 decision in *Bowers v. Hardwick*[80] that homosexual sodomy could be constitutionally criminalized, pro-gay litigators have struggled to "litigate around *Hardwick*."[81] The primary strategy for doing so has been to rely on

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activists and leaders are acting like a gay mafia to shut us out.'" Kastor, *supra* note 74, at B1. A similar sense was expressed by some in Hawaii. To these individuals, the community's legal experts were seen as entrenched conservatives, or "self-appointed gay legal czars." Craig R. Dean, *Demanding Gay Marriage*, GAY COMMUNITY NEWS, Aug. 25–31, 1991, at 8.

78. Three studies were heralded by the popular media as supporting a biological basis for homosexuality: J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089 (1991) (concerning gay twins); Dean H Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (1993) (concerning genetic research); and Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991) (concerning brains of gay men). For a summary of these studies, see David Gelman, *Born or Bred?*, NEWSWEEK, Feb. 24, 1992, at 46.

79. The historian John Boswell summarized the debate in this way:

> Do categories exist because human beings recognize real distinctions in the world around them, or are categories arbitrary conventions, simply names for things that have categorical force because humans agree to use them in certain ways? . . . [Essentialists] consider categories to be the footprints of reality ("universals"): They exist because humans perceive a real order in the universe and name it. . . . On the other hand, [social constructionists believe] that categories are only the names . . . of things agreed upon by humans, and that the "order" people see is their creation rather than their perception.

John Boswell, *Revolutions, Universals, and Social Categories*, *in* HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 17, 18–19 (Martin Bauml Duberman et al. eds., 1989). *See generally* FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY (Edward Stein ed., 1990) (presenting essays on debate over social construction of sexuality).

80. 478 U.S. 186, 196 (1986).

81. Cain, *supra* note 50, at 1617. These litigators' struggles with the *Hardwick* precedent resemble a

equality, rather than liberty, arguments.[82] In turning to equal protection jurisprudence, pro-gay litigators have argued that government classifications disadvantaging persons on the basis of their sexual orientation are suspect and should trigger heightened judicial scrutiny. Two important problems have developed: First, the litigators have had to demonstrate why *Hardwick*'s ruling about sodomy does not preclude heightened constitutional protection for groups of persons allegedly defined by the fact that they engage in criminalizable conduct;[83] second, the litigators have had to struggle with whether to argue that sexual orientation is an "immutable" characteristic.[84]

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recent debate among women's rights litigators about how to argue around *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Traditionally, gender discrimination has been accorded intermediate scrutiny. Women's rights attorneys have sought to secure a Supreme Court ruling that such distinctions warrant full heightened scrutiny. However, in light of these recent Supreme Court rulings that race-based affirmative action programs are to be analyzed using the same level of scrutiny as nonbenign racially discriminatory programs, the highest level of scrutiny has become less attractive to some advocates. They argue that affirmative action programs promoting women's opportunities might survive intermediate, but not strict, judicial review. *See* Rebecca Grey, Dress Blues: Virginia Military Institute and the Case for Coalition 19–38 (Fall 1995) (unpublished manuscript, on file with author) (comparing amicus briefs of different women's organizations filed in *United States v. Virginia*, 116 S. Ct. 2264 (1996)).

82. *See* Hunter, *supra* note 63, at 531–32.

83. This is the way the question has been framed by many courts. *See, e.g.*, Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious."). For one response, see Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) (arguing that failed due process claims can help equal protection claims succeed).

84. *See, e.g.*, Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507–16 (1994). In theory, the dispute over immutability is similar to some aspects of the debate between "sameness" and "difference" feminists. Some women's rights theorists and litigators contend that women are exactly like men and should thus be treated equally. Other feminists have rejected this model, arguing instead that women are different from men in important ways that should be recognized by the law and other social systems. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE 24–38, 173–74 (1982) (arguing that women have unique perspective on morality and justice which should be taken into account when studying legal problems). While some believe women's "differences" are the result of socialization, others assert that they are biological in origin and that the law should take them into account as fixed. *See, e.g.*, Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 541–44 (1983) (discussing negative consequences for feminist jurisprudence of refusing to acknowledge biological differences between men and women).

In practice, aspects of the immutability question parallel concerns civil rights litigators had about introducing social science evidence into the cases that culminated in *Brown v. Board of Education*, 347 U.S. 483 (1954). In helping to prepare those cases, Robert Carter, a lawyer on Thurgood Marshall's staff at the NAACP Legal Defense Fund's national office in New York, initially proposed using the work of psychologists Kenneth and Mamie Clark that attempted to demonstrate the effects of segregation on black school children's self-esteem. *See* KLUGER, *supra* note 16, at 321. Carter's suggestion was "the source of considerable derision, and the social-science approach itself was viewed as unlikely to sway the [Supreme Court] Justices." *Id.*; *see also id.* ("'Jesus Christ, those damned dolls! I thought it was a joke.'") (quoting William Coleman, NAACP attorney). There were significant problems with Clark's methodology, as well, and real doubts about whether his studies proved what he claimed. *See, e.g.*, Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157–68 (1955) (critiquing basis of social science evidence in *Brown*). The evidence was nonetheless made part of the cases and the Court relied upon it in *Brown*. *See Brown*, 347 U.S. at 494 & n.11.

From the moment of their appearance in legal discourse, these identity issues produced controversy among pro-gay litigators. On the one hand, distinguishing status from conduct seemed like the best way around *Hardwick*, and the growing body of biological materials clearly mattered to judges.[85] On the other hand, some expressed apprehension about the artificiality of the status/conduct distinction, anxiety about the fact that only celibate homosexuals would be protected by such rulings, and hesitation about introducing preliminary and problematic biological evidence.[86]

Two of the key cases challenging the military's "don't ask, don't tell" policy exemplify the conflict.[87] In *Able v. Perry*,[88] Lambda and the ACLU's Lesbian and Gay Rights Project represent a group of six servicemembers drawn from each of the services and from across the country. In framing the issues, the plaintiffs and their counsel have not argued that their clients' acknowledgement of their sexual identities is unrelated to their sexual conduct, but rather have attacked the "acts" portions of the military's policy as itself discriminating on the basis of sexual orientation.[89] The second case was

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85. For example, in the Hawaii marriage case, a concurring state supreme court judge felt that the legal question of whether the ban on same-sex marriages was *sex* discrimination required factfinding as to the nature of homosexuality:

> [T]he questions whether heterosexuality, homosexuality, bisexuality, and asexuality are "biologically fated" are relevant questions of fact which must be determined before the issue presented in this case can be answered. . . . If the answers are no, then each person's "sex" does not include the sexual orientation difference, and the Hawaii constitution may permit the State to encourage heterosexuality and discourage homosexuality, bisexuality, and asexuality by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages.

Baehr v. Lewin, 852 P.2d 44, 70 (Haw. 1993) (Burns, J., concurring).

Similarly, in the District of Columbia marriage case, one judge (dissenting on this point) wrote that a properly conducted mini-trial on the nature of sexual orientation would assist the court in determining both the level of judicial scrutiny and whether the government's articulated interest in deterring homosexuality was in fact achievable:

> Despite familiarity with a substantial body of scientific literature . . . I am not comfortable opining about a subject so elusive, and so controversial, as the nature, causes, preventability, and immutability of homosexuality without benefit of a trial record with the right kind of expert testimony, subject to cross-examination. Such expert testimony would have to include—and this is important—examination and cross-examination about the most probative, up-to-date literature.

Dean v. District of Columbia, 653 A.2d 307, 356 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part).

86. *See, e.g.*, Halley, *supra* note 84, at 511–12.

87. Another military case is the *locus classicus* of the status/conduct debate. *See* Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988), *vacated en banc*, 875 F.2d 699 (9th Cir 1989). Halley provides details of the positions taken on these issues in the military cases. *See* Halley, *supra* note 84, at 514–16. The military's current "don't ask, don't tell" policy is codified at 10 U.S.C.A. § 654 (West Supp. 1996).

88. 88 F.3d 1280 (2d Cir. 1996).

89. *See* Brief of Appellees/Cross-Appellants at 41, Able v. United States, 88 F.3d 1280 (2d Cir. 1996) (No. 95-6111(L)) (responding to government "homosexual acts" rationale by stating that "the 'homosexual acts' rationale is not a rationale at all, because the government never answers the only question posed: what is the explanation for the decision to treat lesbians and gay men differently, and far more harshly, when they engage in the same acts as heterosexuals?"). Because it could not, therefore, rule on the constitutionality of the regulations as applied to homosexual status alone, the Second Circuit remanded the case for the district court to determine the constitutionality of the military's approach to same-sex sexual conduct. *See Able*, 88 F.3d at 1300.

brought by an individual servicemember, Paul Thomasson, represented by attorneys at a large corporate law firm.[90] In Thomasson's case, the litigators utilized the status/conduct distinction.[91] The different approaches in these two cases can be seen in the way each deals with the precedent of *Steffan v. Perry*.[92] In *Steffan*, the D.C. Circuit reasoned that because homosexual sodomy was criminalizable, regulations that discriminated against persons because they were apt to engage in such conduct were not unconstitutional. The *Thomasson* brief in the Fourth Circuit distinguished *Steffan* as concerned with conduct, and thus inapplicable to Thomasson's status-based challenge. Thomasson argued that:

> Whether a classification on the basis of sexual orientation alone, *irrespective of conduct*, is constitutionally suspect remains an open question in this and every other circuit. The D.C. Circuit, for example, has approached this issue on a number of occasions, including in its recent *Steffan* decision, but it has always ultimately declined to address it and, like a number of other courts, has held only that classifications predicated on homosexual *conduct* are not inherently suspect.[93]

Rather than frame their case as being about status, as opposed to conduct, appellees' brief in *Able* challenged the underlying assumption in *Steffan*—that homosexual conduct could be criminalized in the manner the military did so. The plaintiffs thus wrote of *Steffan*:

> The court deemed the plaintiff to have conceded that "homosexual conduct" could be constitutionally punished by the then-applicable Directives. Here, in contrast, plaintiffs challenge the entire Act, including the constitutionality of the gay-only, more severe "acts" regulation . . . .[94]

The "immutability" issue has been similarly divisive,[95] most critically creating

90. *See* Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 358 (1996). The firm's lawyers represented Thomasson directly, not as cooperating attorneys with any civil rights organization. *See id.* at 919.

91. Brief for Appellant at 13, 28, Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (No. 95-2185) ("[T]he record here indisputably establishes that the Navy discharged Lt. Thomasson not for any form of proscribed 'conduct' . . . but for his sexual orientation *per se* and, more specifically, for simply *stating* that he is gay."). For an in-depth discussion of the different approaches, see Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 298 n.277 (1996) ("[T]he brief submitted on behalf of the plaintiff in . . . *Thomasson* . . . and the oral argument in the case, continued to rely on a status/conduct distinction.").

92. 41 F.3d 677 (D.C. Cir. 1994) (en banc).

93. Brief for Appellant at 34, *Thomasson* (No. 95-2185) (citations omitted).

94. Brief of Appellees/Cross-Appellants at 40 n.27, Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995) (Nos. 95-6111, 95-6141).

95. *Compare, e.g.*, Brief for Appellant at 35, *Thomasson* (No. 95-2185) ("there can be no doubt that gay and lesbian Americans . . . are defined by 'an immutable characteristic'"); Brief of Plaintiff-Appellant at 13 n.8, Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc) (No. 91-5409) (arguing that "[t]he

discord about the wisdom of introducing expert testimony to demonstrate that homosexuality is genetic in origin.[96] Given the conflicting opinions on these subjects among the litigators, they face a dilemma: How are they to decide which depictions of gay identity to present in the cases that they litigate?

Several possibilities are evident. One approach would be to yield decisionmaking to the individual clients, allowing those persons to determine how to present homosexuality to the courts in their own cases. By contrast, the professional litigators have largely approached the issue as appropriate for debate, consultation, and consensus among themselves; for example, the Lesbian/Gay Litigators Roundtable regularly discussed the issue throughout the late 1980s and early 1990s, reaching a formal consensus—embodied by the approach to the *Able* case—in 1994.[97] A third approach, espoused by many attorneys not involved in the professional meetings, has been to view the decision as one requiring the application of their own technical "expertise." The different approaches in the *Able* and *Thomasson* cases may therefore reflect not only different tactics, but also different theories about how these tactical disputes should be addressed. Just as the procedural rules enabled any individual to opt out of community goal debates about filing, the professional capacity of each attorney to frame her own tactics as she desires similarly

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evidentiary record likewise compels the conclusion that heightened scrutiny should be applied since gay men and lesbians as a group have all of the characteristics of a suspect class" and pointing to evidentiary record of immutability), *with* Plaintiffs' Memorandum of Law on the Level of Scrutiny Applicable to Plaintiffs' Equal Protection Claim at 26, *Able* (No. 94 Civ. 0974) ("the trait that defines a particular group need not be 'immutable' in order for classifications which disadvantage that group to deserve heightened equal protection scrutiny"); Brief of Amicus Curiae American Civil Liberties Union of Northern California, Inc., at 11 n.1, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (No 87-2987) ("Immutability is evidence that a trait is being used without regard to individual merit or responsibility, but immutability by itself is not significant."). *See generally* Halley, *supra* note 84 (criticizing use of immutability argument).

96. Such testimony was, for example, used at the trial challenging the constitutionality of Colorado's Amendment 2, a ballot initiative enacted by the citizens of Colorado in November of 1992. For a summary of the witnesses in the Colorado trial, see the trial court decision, Evans v. Romer, 63 Fair Empl. Prac Cas. (BNA) 753 (Colo. Dist. Ct. 1993). The Amendment prohibited any arm of the state from entertaining claims of discrimination by lesbians, gay men, and bisexuals, and thus repealed existing antidiscrimination laws in Denver, Boulder, and Aspen. The Supreme Court ultimately held Amendment 2 unconstitutional on equal protection grounds without directly addressing either of the questions about gay identity discussed here. *See* Romer v. Evans, 116 S. Ct. 1620 (1996); *see also* Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1064–70 (1994). For a biting analysis of the Colorado plaintiffs' trial strategy, see Jeffrey Rosen, *Sodom and Demurrer: Should the Courts Deliver Gay Civil Rights?*, NEW REPUBLIC, Nov. 29, 1993, at 16:

> The spectacle in Colorado, in which experts who were hardly expert lectured a judge who was scarcely qualified to judge, tends to rattle one's faith in the competence of the courts to second-guess the rationality of the state. . . . [The trial judge] should never have set out to resolve the historical, ethical and scientific mysteries of homosexuality.

Id. at 19; *see also* Donna Minkowitz, *Trial by Science*, VILLAGE VOICE, Nov. 30, 1993, at 27 (describing disputes among attorneys concerning use of immutability evidence).

97. *See* Feldblum, *supra* note 91, at 298 n.277 ("Lawyers from the national groups had been grappling, for a number of years, with the adverse ramifications of advocating a status/conduct distinction in the courts and had collectively agreed to stop advancing such a distinction as a means of prevailing in court."); *cf.* Halley, *supra* note 84, at 529 ("Pro-gay essentialists and pro-gay constructivists should stop treating their conflict over legal strategy as a winner-take-all contest, and seek common ground.").

provides the definitive norm for disputes among attorneys. Such individual authority grants each attorney the right to end the internal strategy debate at any moment simply by pursuing her own tactics regardless of the recommendations of her fellow attorneys.

II. THE INDIVIDUALIST MODEL

Current procedural and ethical rules encourage group members and attorneys to pursue their own individual paths in filing, pursuing, and constructing test cases. As it is responsible for the very tensions to which this Article responds, the individualist model is a good starting point.

A. *Individualism in the Pursuit of Goals*

Civil procedure's private law orientation[98] conceptualizes litigation decisions as individual "rights" to be protected from governmental or centralized community control. The guarantee of litigative autonomy is recognized by the "day in court" ideal[99] and realized through the procedural rules that define parties to, and the preclusive effects of, litigation. Because an individual enjoys litigative liberty, it would deprive her of due process to bind her to the results of a case in which she was not heard,[100] or over which she did not have control.[101] If Dean or the Hawaii plaintiffs[102] litigate their marriage cases and lose, future plaintiffs are not barred from litigating theirs.[103] These plaintiffs can pursue their self-interest now, others can pursue

98. For a description of this traditional model of adjudication, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285–88 (1976); and Yeazell, *supra* note 1, at 47–55.

99. *See* Martin v. Wilks, 490 U.S. 755, 762 (1989) (emphasizing that it is part of "[o]ur 'deep-rooted historic tradition that everyone should have his own day in court'") (quoting 18 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)). For a critical analysis of the "day in court" ideal, see Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992).

100. *See* Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); Bone, *supra* note 99, at 204 ("[A]n absentee today can be bound to a judgment on the ground that she participated in the suit only if she exercises actual control over the lawsuit and thus enjoys a *de facto* day in court.").

101. As the general rule explains:

> To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain review. . . . It is not sufficient, however, that the person merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as *amicus curiae*.

RESTATEMENT (SECOND) OF JUDGMENTS § 39 cmt. c (1982).

102. This Article uses these plaintiffs as placeholders for the individualist position, though it is important to note that they may well have represented a majority of their communities in filing their cases. *See supra* note 76; *infra* note 150.

103. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.13, at 683 (2d ed. 1993) ("[O]nly persons who were parties or who are in privity with persons who were parties in the first action may be

theirs in the future.

The benefits of the individualist model are several. By safeguarding the day in court ideal, the procedural rules guarantee that each individual can control the legal decisions that govern her life. She can exercise this control as she sees fit and cannot be coerced into a case that she does not want to join.[104] Litigation therefore represents a valuable means of self-definition: Individuals can express themselves through the conflicts that they formalize into litigation and through the manner in which they wage these conflicts.[105] By fostering this self-definition, individualism promotes engagement and avoids the alienation that can result when decisions are yielded to experts.[106] The aggregate result of ensuring these individual litigative freedoms may also be more productive for the community than a single collective litigation; through a multiplicity of cases, the community's common good will be served.[107] The Hawaii marriage plaintiffs, for example, might argue that they were successful in the Hawaii Supreme Court as a consequence of their autonomy to pursue their actions contrary to the gay leaders' decision not to do so.

The primary problem with the individualist model is the central downside of liberalism generally: a satisfactory account of its limits. For John Stuart

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bound.") (citation omitted).

104. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) ("[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not [sic] others nor to society as a whole.'") (quoting Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288–89 (1977)); *see also* Yeazell, *supra* note 1, at 45.

105. That this autonomy contributed to Dean's self-definition is evident in reviewing his personal narrative: He identified himself as an innovative individualist, explicitly linking his actions to those of Rosa Parks, *see* Miller, *supra* note 75, at 17, and emphasized his dissent from the gay community's leadership, *see* Kastor, *supra* note 74, at B4 ("I think it's outrageous that people who call themselves activists and leaders are acting like a gay mafia to shut us out."). *Cf.* IRONS, *supra* note 18, at 73–79 (reproducing interview with J.D. Shelley describing his role as test case plaintiff).

106. Ethicists have voiced this concern in terms of a moral tragedy:

> There is a moral tragedy inherent in efforts to further the common good which prevent the result from being either good or common—not good, because it is at the expense of the active growth of those to be helped, and not common because these have no share in bringing the result about.

JOHN DEWEY & JAMES H. TUFTS, ETHICS 385 (rev. ed. 1936); *see also* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 55 ("[The client's] only strategy of survival requires that he see himself as the lawyers and the officials see him, as . . . a hypothetical person with only a few crude, discrete ends. He must assume that his subtler ends, his long-range plans, and his social relationships are irrelevant to the situation at hand."). *See generally* PAOLO FREIRE, PEDAGOGY OF THE OPPRESSED (Myra B. Ramos trans., 1970) (arguing that true human progress is not advanced by dynamic in which one elite group makes decisions for alienated populace)

107. As Isaiah Berlin noted,

> Philosophers with an optimistic view of human nature and a belief in the possibility of harmonizing human interests, such as Locke or Adam Smith and, in some moods, Mill, believed that social harmony and progress were compatible with reserving a large area for private life over which neither the state nor any other authority must be allowed to trespass.

ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 126 (1969). Thus one definition of the common good is "the aggregate outcome of individuals pursuing their private interests." Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, *in* DEMOCRACY: THEORY AND PRACTICE 144, 145 (John Arthur ed., 1992).

Mill, this rested upon the ability to delineate between self-referring (protected) acts and other-harming (not protected) acts.[108] A strong critique of liberty challenges this line as ultimately incoherent.[109] This critique is powerful when applied to the litigation context. Because preclusion rules bind only the named parties to a lawsuit, the system assures itself that these individuals are only litigating their individual cases and thus are causing no "harm" to anyone else. The plaintiffs' fists have stopped before reaching the other group members' noses. Yet procedural rules actually do not envision present and future litigants to be fully disconnected: The outcome of the initial action, though not preclusive of future litigations, will be authoritative precedent governing them.[110] Hence each initial lawsuit will infringe upon the freedom of other community members to litigate their own individual cases (or to choose *not* to litigate).[111] The outcome of the first marriage cases may, figuratively if not literally, bind those who would have litigated for a different result, or at a different time, or not at all.[112] While the individualist model guarantees the litigant her day in court, that day in court may well deny other community members *their* days in court.[113]

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108. *See* JOHN STUART MILL, ON LIBERTY 11 (David Spitz ed., 1975) (1859) ("The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.").

109. *See* 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 12 (1984) (examining and critiquing harm principle in context of criminal law); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 754–61 (1989) (critiquing notion that harm principle provides coherent limitation on individual liberty).

110. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 11.6 (4th ed. 1992) ("The doctrine of *stare decisis* . . . holds that an already established point of law should be followed without reconsideration, provided that the earlier decision was authoritative.").

111. *Cf.* Garth, *supra* note 12, at 499 ("Any injunction action challenging employment discrimination, for example, is a class action, in effect if not in form, that does not take account of the views and perceived interests of all concerned employees."); Yeazell, *supra* note 1, at 60 (stating that in FED. R. CIV. P. 23(b)(2) injunctive class actions the "kidnapped rider is a substantial problem").

112. It could be argued that the precedential effect of the marriage cases are more bounded than, for example, the covenant and military cases, because they are primarily based on state, not federal, law (Dean's case mixed state and federal claims). Yet even these local cases' collateral consequences exceed the state border. The Hawaii marriage victory touched off a nationwide response, resulting in the enactment of legislation throughout the country condemning same-sex couples. *See* Victoria Slind-Flor, *Same-Sex Case Poses Many Questions*, NAT'L L.J., Dec. 16, 1996, at A8 (discussing 16 state laws enacted in response to Hawaii litigation to prohibit recognition of same-sex marriages). The decision also has consequences on many pending and future cases in other states. One example is a case that has been pending in the federal courts in Georgia since 1991. Robin Shahar challenged the constitutionality of her dismissal by the attorney general of Georgia when he learned that she and her partner had been wedded in a Jewish ceremony. After losing in federal district court, *see* Shahar v. Bowers, 836 F. Supp. 859 (N.D. Ga. 1993), Shahar prevailed before a panel of the Eleventh Circuit, *see* Shahar v. Bowers, 70 F.3d 1218 (11th Cir. 1995). The full circuit vacated that decision, however, and set the case for rehearing en banc. *See* Shahar v. Bowers, 78 F.3d 499 (11th Cir. 1996) (en banc). In so doing, the Eleventh Circuit requested argument concerning the effect of the Georgia statute banning same-sex marriages, which was enacted following the Hawaii decision, on Shahar's case. *See* GA. CODE ANN. § 19-3-3.1 (1996); Shahar v. Bowers, Civ. Action No. 93-9345, Notice to All Counsel of Record (11th Cir., July 17, 1996) (en banc) ("The court anticipates that the parties will discuss . . . O.C.G.A. § 19-3-3.1 . . . .") (on file with author).

113. Nonetheless, the current plaintiff would not be required by Rule 19(a) of the Federal Rules of Civil Procedure to join the absent group members, nor would such absent group members be considered

Defenders of the individualist model might point to several aspects of the procedural rules in response. First, the individualist might argue that the preceding account exaggerates the impact of a lawsuit on later cases and thus on other litigants' autonomy; the earlier case may be precedent in later cases, but it would not preclude the filing of such cases. Yet, generally speaking, "the doctrine of *stare decisis* is a *mandate* that courts should give due weight to precedent. It holds that an already established point of law should be followed without reconsideration, provided that the earlier decision was authoritative."[114] Thus the application of this conventional doctrine requires that an authoritative legal ruling in a marriage case will be followed in subsequent cases within that state, and can create persuasive precedent beyond that state's boundaries. The only difference between this precedential effect and pure preclusion is that the later plaintiffs can literally have their day—albeit a short one[115]—in court. The individualists are correct that they have left a scrap of litigative autonomy on the table for future litigants after the resolution of their lawsuits, but it is only a scrap. In practice, the outcome of their lawsuits did harm (or benefit) others within their community. These were therefore not purely self-regarding acts with no externalities.

Beyond invoking the distinction between stare decisis and preclusion, defenders of the individualist model could argue that it enables a "pluralistic" solution[116] to the problem that cases inevitably affect non-parties: Those persons can intervene and add their voices to the action.[117] For those in the

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indispensable parties under Rule 19(b). *See* FED. R. CIV. P. 19. The federal joinder provisions construe a lawsuit's externalities much more narrowly, mandating that a plaintiff join those affected by the outcome of her lawsuit only in certain rare circumstances. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109–11 (1968) (discussing compulsory joinder); *see also* Geoffrey Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1288 n.183 (1961) (stating that "an absent party may be prejudiced by the stare decisis effect of a decision, but surely no one will urge that all persons must be joined in a suit the decision of which may someday serve as adverse precedent"). *But see* Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. REV. 745, 777 (1987) (arguing that stare decisis effect of judgment in public rights litigation, "such as suits that adjudicate the applicability of national legislation," can affect interests of absentees so significantly that joinder might be required).

114. JAMES ET AL., *supra* note 110, § 11.6, at 585 (emphasis added). The quality of the presentation in the first case is irrelevant to that holding's precedential value, *see* EEOC v. Trabucco, 791 F.2d 1, 4 (1st Cir. 1986) ("We have found no case . . . that supports [the] contention that a weak or ineffective presentation in a prior case deprives the ruling of precedential effect."), and precedents will be ignored only when "seriously out of keeping with the development of the law or . . . [proven] to be unworkable." JAMES ET AL., *supra* note 110, § 11.6, at 585.

115. The later plaintiffs will have a brief day in court because the likelihood a court will abandon precedent, particularly recent precedent, is low. *See* JAMES ET AL., *supra* note 110, § 11.6, at 585 ("Departure from precedent is said to require special justification, and a still greater burden must be borne by a party seeking to overrule a point of statutory construction.") (citing Arizona v. Rumsey, 467 U.S. 203 (1984); Patterson v. McLean Credit Union, 491 U.S. 164 (1989)).

116. In an analogous setting, Deborah Rhode refers to "pluralist approaches" to the conflict of interest problem of representation in class actions; Rhode's pluralist approaches involve providing separate representation for divergent class members. *See* Rhode, *supra* note 12, at 1221–32.

117. *See* FED. R. CIV. P. 24. To intervene by right, the intervenor must claim an "interest" in the action that will be impaired in her absence. *See* FED. R. CIV. P. 24(a). Some courts have held that the adverse impact of stare decisis is sufficient to support the right of intervention. *See* Oneida Indian Nation

gay community who do not want to argue for same-sex marriage, or do not want to do so now, merely allowing intervention in the pending marriage cases hardly protects their autonomy. Such measures may enable them to let the court know of their views, but, of critical importance, their intervention will not enable them to have the underlying claim dismissed. So long as the plaintiffs have standing and a case or controversy, they are proper parties and cannot be foreclosed from litigating. There is no manner in which the intervention rules, or pluralist approaches generally, will satisfy everyone's autonomous choices.

Finally, defenders of the individualist model might argue that the nonlitigants' interests could be safeguarded through utilization of the class action device. Although they chose not to do so,[118] the litigating plaintiffs could have acknowledged the consequences that their cases would necessarily have for others not present by litigating as "representatives" intending to bind absent parties under Rule 23.[119] Of course, this is no defense of autonomy at all, only a recognition that the exercise of the plaintiffs' autonomy forecloses the autonomous choices of others, unless the class device can protect the autonomy of the noninterested class members. In this circumstance it cannot. In certifying the class, the court would entertain the argument that the proposed representative was not in fact representative,[120] but it is unlikely that a community division about filing the case would bar appointment of the individual to represent this divided class.[121] (Even if this division did prevent

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v. New York, 732 F.2d 261, 266 (2d Cir. 1984) (granting motion of Iroquois Confederacy to intervene as matter of right since there was substantial likelihood of adverse impact of stare decisis); Corby Recreation, Inc. v. General Elec. Co., 581 F.2d 175, 177 (8th Cir. 1978) (holding that inhibiting effect of stare decisis supports right of intervention); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 829 (5th Cir. 1967) (same). *See generally* FRIEDENTHAL ET AL., *supra* note 103, § 6.10, at 366–77 (discussing scope of intervention). Permissive intervention under Rule 24(b) is liberally granted and would probably be available even if a right to intervention were denied. *See id.* § 6.10, at 373. However, intervention is generally "not permitted at all when the applicant's presence would serve no useful purpose, as, for example, when the common question is being presented effectively by the parties." *Id.* If all the intervenor claimed was that she wanted the case not to be adjudicated, this principle could be applied to deny the motion for intervention.

118. None of the exemplary cases at issue—*Shelley v. Kraemer*, 331 U.S. 803 (1947); *Able v. Perry*, 88 F.3d 1280 (2d Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)—were filed as class actions.

119. FED. R. CIV. P. 23. The procedural rules are so constructed by the individual autonomy model that the decision to step outside that model and to trigger the class device is completely within the control of the individual litigants. Their autonomy extends to the decision about whether or not to consider the externalities of their cases. Even if litigation is understood as having effects beyond the individual, neither the court nor the opposing parties can force an individual litigant into the class device.

120. *See* FED. R. CIV. P. 23(a)(4).

121. Courts have not adopted a general approach to this problem. *Compare* Probe v. State Teachers Retirement Sys., 780 F.2d 776, 781 (9th Cir. 1986) (explaining fact that some employees prefer retirement plan to remain in operation will not bar certification of class challenging it under Title VII), *and* International Molders & Allied Workers' Local Union No. 104 v. Nelson, 102 F.R.D. 457, 464 (N.D. Cal. 1983) (explaining that political and economic conflict within class will not preclude certification), *and* Martino v. McDonald's Sys., 81 F.R.D. 81, 85 (N.D. Ill. 1979) ("[A] judge may not refuse to certify a class simply because some class members may prefer to leave the violation of their rights unremedied."), *and*

the class from attaining certification, this would simply put the case back in the situation of having stare decisis, rather than preclusive, effects on those not present.)[122] Once the case is certified as a class action, the opportunities for the uninterested litigants to safeguard their autonomy are also not meaningful in these circumstances. The classic means of dealing with conflicting class interests is to split the class into subclasses.[123] Yet it does the opposing group members little good to be entitled to representation in a case they wish had not been brought, because (as with the intervention rule) they will not thereby be empowered to have the action dismissed. The class device might also enable the nonlitigating community members to be involved in proposed settlements or remedies,[124] but, once again, in this type of litigation with this type of dispute, these are not particularly meaningful opportunities.[125] To the extent that pluralist solutions achieved through the class action device turn litigation into a "town meeting,"[126] this is a town meeting in precisely the

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Koger v. Guarino, 412 F. Supp. 1375, 1379 (E.D. Pa. 1976) ("[T]he fact that the class may contain individuals who are indifferent or even opposed to the class relief sought by the named plaintiffs does not mean that the claims of the named plaintiffs are not typical . . . or that they will not fairly and adequately protect the interests of the class."), *aff'd*, 549 F.2d 795 (3d Cir. 1977), *and* Housing Auth. v. United States Hous. Auth., 54 F.R.D. 402, 404 (D. Neb. 1972) ("[T]he fact that some of the members of the class are satisfied with the action complained of is irrelevant."), *with* East Texas Motor Freight Sys Inc v Rodriguez, 431 U.S. 395, 405 (1977) (noting that conflict between named plaintiffs' desired remedy and prior vote by class members rejecting such remedy suggested they were not adequate class representatives), *and* Ihrke v. Northern States Power Co., 459 F.2d 566, 572–73 (8th Cir. 1972) (holding that class division renders representative untypical and bars certification), *vacated as moot*, 409 U.S. 815 (1972), *and* Doe v Renfrew, 475 F. Supp. 1012, 1028 (N.D. Ind. 1979) (finding lack of group cohesion as to filing of case reason to deny certification). *Cf.* Pagan v. DuBois, 884 F. Supp. 25, 28 (D. Mass. 1995) (declining to certify class of inmates of Latino ethnic derivation seeking special cultural programs because different meanings of "Latino" created significant conflicts among class members). Most commentators, however, believe that class dissension alone should not bar certification. *See generally* Garth, *supra* note 12, at 507–15 (collecting cases and noting views of commentators); Rhode, *supra* note 12, at 1194–95 nn.43–44 (collecting cases and noting that "[r]arely do these paths [of contradictory] precedent cross").

122. *See supra* text accompanying notes 108–15; *see also* Rhode, *supra* note 12, at 1195 ("To withhold certification in structural relief cases will not preempt opposition, whether animated by financial or ideological motives. . . . Denying certification would often introduce all the inefficiencies attending individual suits, without necessarily restricting the scope of the ultimate decree.").

123. *See* FED. R. CIV. P. 23(c)(4)(B).

124. Rule 23(e) has consistently been read to require a "fairness" hearing before a settlement is approved. *See, e.g.*, Bronson v. Board of Educ., 604 F. Supp. 68, 71 (S.D. Ohio 1984) (holding that convening hearing is essential step in court approval of class action settlement). Courts split on the extent to which class conflict about settlements precludes their entry. *Compare* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1182 (5th Cir. 1978) (granting subclass of class members right to challenge class action settlement), *with* Officers for Justice v. Civil Serv. Comm'n, 473 F. Supp. 801, 805–09 (N D Cal. 1979) (denying class members' challenge of settled decree).

125. *See* 1 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS 208 (1977) ("[T]he class member who wishes to remain a victim of unlawful conduct does not have a legally cognizable conflict with the class representative."); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 893 (1978) ("[Dissenting class members'] interest in the status quo is legally irrelevant if in fact the defendant has been acting in an illegal manner: the court will require that the status quo be modified to conform to the law regardless of the class membership's wishes.").

126. *See* Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244, 244 (1977).

wrong town.[127] Far from according meaningful opportunities for the group members who would rather not have the case in court, the class action device simply binds those persons more closely to the outcome of a case to which they object.

The individualist procedural rules thus create the very situation that gives rise to the group member disputes at issue in this Article. Through rigid adherence to litigative autonomy, they entitle *any* individual to litigate cases with groupwide effects regardless of the rest of the group's desires.[128] In so doing, the procedural rules exalt the autonomy of the present plaintiff at the expense of the autonomy of nonlitigating parties.[129] This procedural system also rewards those within the group who have access to attorneys and thus to courts:[130] These players, often the community's legal experts themselves, have the power to opt out of the group debate *about* filing simply *by* filing at any time they want. The effect of the legal system's preference for the liberal model of adjudication is to pit community members against one another as competitive individualists. In the shadow of this legal regime, group disputes are exacerbated and constituencies are disharmonized. Although the individualist model embodies important principles, it fails to provide a satisfactory framework for addressing group disputes.

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127. What is even more coercive about the class action mechanism than the recognition of the individual plaintiff as representative of her (nonconsenting) class is that it is highly unlikely that the nonconsenters would be entitled to opt out of her class, *see* FED. R. CIV. P. 23(c)(3), 23(d), 23(e), to evade the binding effect of her precedent. In civil rights class actions brought under FED. R. CIV. P. 23(b)(2), courts usually will not permit class members to opt out. *See generally* 3B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.72, at 23-460 (2d ed. 1996) (highlighting limited notice requirements for 23(b)(2) class actions). Given the system's totemic devotion to the "day in court" ideal outside the class device, its uncompromising devotion to keeping the class together when the device is used is peculiar. For a thoughtful defense of why this might be useful, see Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 YALE L.J. 745 (1990) (discussing how all group members' absolute individualism cannot be simultaneously safeguarded in group litigation). *Cf.* Maximilian A. Grant, Comment, *The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 U. CHI. L. REV. 239 (1996) (arguing that right to opt out of class actions should be protected by First Amendment).

128. *See* Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 25 (1996) ("The class action . . . employs a peculiar concept of representation: self-appointment. . . . [I]n the class action the named plaintiff appoints himself or herself as the representative of the class.").

129. This situation is not unlike the problem courts confront in cases that will foreclose the rights of unknown "future" plaintiffs. In such cases, courts will sometimes permit representative litigation for reasons of expediency and the need for finality, *see, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), though in others they emphasize the potential conflicts between present and future parties and deny certification, *see, e.g.*, Georgine v. Amchem Prods., Inc., 83 F.3d 610, 630–31 (3d Cir. 1996), *cert. granted sub nom.* Amchem Prods. v. Windsor, 117 S. Ct. 379 (1996) (decertifying class of persons injured by asbestos because, inter alia, conflicts between those presently harmed and future victims precluded adequate representation of interests of both); *see also* LUBAN, *supra* note 12, at 347–51 (discussing "futures" problem in civil rights class conflicts).

130. *Cf.* Rhode, *supra* note 12, at 1231 n.194 ("[T]he pluralist approach biases decisionmaking in favor of those with the organizational acumen and financial resources to make themselves heard.") (citing, inter alia, THE BIAS OF PLURALISM (William E. Connolly ed., 1969); HENRY S. KARIEL, THE DECLINE OF AMERICAN PLURALISM (1961); THEODORE J. LOWI, THE END OF LIBERALISM (1969)).

B. *Individualism in the Choice of Means*

Disagreements among attorneys over the tactics and strategies employed to further the social group's legal goals could also be addressed by individualist decisionmaking. When pro-gay advocates disagree about how to frame equal protection claims, the individual autonomy model authorizes each private attorney to select the course of action she believes is best, unrestrained by Lambda's, or anyone else's, recommendation or opinion. Like her client, the attorney enjoys complete liberty within her realm: liberty to frame the "technical and legal tactical issues."[131] Those who espouse the "every lawyer for herself" approach find support for such unilateral action in the traditional vision of lawyering championed by the bar and embodied in the rules of professional responsibility.[132]

The benefits of the individualist model flow from this approach. Because the attorney is entitled to define her own approach to litigation, the manner in which she litigates reflects her individuality; she defines herself through her litigative choices.[133] Individualism induces creativity and permits the attorney a sense of self-definition and connection to, as opposed to alienation from, her work. The model of individual autonomy also creates a diverse set of approaches in test cases, out of which some "best" way of litigating, or ultimate litigation strategy, will emerge. By encouraging each attorney to pursue her own "self-interested" way of framing a case, the individualist model leads to better outcomes for the entire community.

The problems with individualism in litigation-framing parallel the problems with individualism in litigation-filing: litigation is not a "self-regarding" act and thus the framing, as much as the filing, can seriously impair the autonomy of other framers. When Vaughn spent the better part of his Supreme Court argument pursuing his Thirteenth Amendment theory, the lawyers framing the covenant cases as Fourteenth Amendment violations were harmed; they had to amend their approaches to account for Vaughn's idiosyncratic method. Similarly, when a pro-gay advocate argues that sexual identity and sexual conduct are unrelated to one another, or that homosexuality is immutable, her argument inevitably has an effect on the manner in which other pro-gay advocates must argue their cases, and vice versa.

When confronted with the externalities of her professional judgment, the individualist retreats to a central norm of legal ethics: She insists that she may

131. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 1 (1995).

132. *Cf.* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085–89 (1988) (describing "libertarian" model of lawyers' discussions of ethical decisionmaking)

133. This comports with the freedom the attorney enjoys to select the type of practice in which she will engage, the workplace in which she will pursue her practice, and the clients she chooses to represent. Her professional identity is hers to create, and how she handles the decisions delegated to her by her clients constitutes a critical element of this professionalized self.

exercise her autonomy unilaterally because she must be loyal to her individual client's interests.[134] She argues that her client's "day in court" envisions the client having "control" of the litigation. These principles are said to support the notion that, for instance, Vaughn's loyalty is to the Shelleys, not to other attorneys or clients; that Vaughn's clients are the Shelleys, not the larger African-American community; and that Vaughn must pursue his own view of what is best for the Shelleys (perhaps developed in concert with the Shelleys), without regard to the consequences for other litigants.

For several reasons, this defense of individualism as an approach to disputes among lawyers in litigation campaigns is unsatisfying. First, the more technical the lawyering decision, the less likely it is that the lawyer has in fact consulted with her client on how to make it. Second, even if the individualist attorney did consult with her individual client, it is not clear that technical decisions are within the client's sphere of control.[135] There is nothing magic about the client's desires on questions of tactics.[136] Indeed, the third problem with the individualist's strict reliance on client loyalty is: Why only that individual client? The individualist attorney knows her case is a test case meant to make law for the entire community.[137] She pursues it for that reason. When her tactics are questioned as possibly harming the entire community for which she hopes to set a precedent, it is inconsistent to defend them on the grounds that they comport with the desires of her individual

134. Defense of this position is typically rooted in several sections of the codes of professional conduct. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . ."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 1 (1995) ("Loyalty is an essential element in the lawyer's relationship to a client."). The "classic" statement of the position may be Lord Brougham's quip that the advocate "knows in the discharge of that office but one person in the world, that client and no other." ELLIOTT E. CHEATHAM, CASES AND MATERIALS IN THE LEGAL PROFESSION 227 (1938), *quoted in* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985). For an excellent overview and critique of the individualist bias of current professional conduct norms, see generally Rhode, *supra*, at 605–16.

135. *See, e.g.*, Valley Line Co. v. Ryan, 771 F.2d 366, 376 (8th Cir. 1985) (holding client bound by attorney's action because attorney has "the implied power to take all action with reference to procedural matters"); Admiral Merchants Motor Freight, Inc., v. O'Connor & Hannan, 494 N.W.2d 261, 267 (Minn. 1992) (affirming summary judgment dismissing one claim in legal malpractice case that attempted to challenge law firm's professional judgment and choice of legal strategy); *cf.* Jones v. Barnes, 463 U.S. 745 (1983) (holding that constitutional right to counsel in criminal case encompasses fundamental decisions such as whether to plead guilty, waive jury trial, testify in one's own behalf, or take appeal, but does not empower client to compel appointed counsel to press all nonfrivolous points requested).

136. Of course, this merely reemphasizes the importance of the ambiguous distinction between goals and tactics. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995); *supra* notes 54–58 and accompanying text.

137. Speaking the year after *Shelley* was decided, Chief Justice Vinson stated:

> To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. *Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country.*

Hon. Fred M. Vinson, *Work of the Federal Courts*, 69 S. Ct. v, vi (1949) (speech made to the American Bar Association, Sept. 7, 1949) (emphasis added).

named client.[138] A more robust vision of client loyalty in this circumstance would ask the litigator to acknowledge the larger client—the community—and thus to consider the consequences of her tactics on the community's interests.[139]

That individualists defend unilateral tactical decisionmaking in terms of client loyalty is understandable,[140] but it flows out of a central area of confusion about professional responsibilities. A challenge to the attorney's tactical decisions made by other attorneys is *not* inevitably a "conflicts" problem calling for a "loyalty" response:[141] The other attorneys are typically *not* saying that the attorney should follow the "interests" of someone other than that attorney's client. Rather, the challenging attorneys maintain that the individual attorney should make the tactical decisions, for which the client relies on her, differently. What is ultimately at issue in disputes among attorneys are not conflicts of interest[142] but much more sensitive concerns about competence.[143] When Marshall questions Vaughn's Thirteenth Amendment argument, he is not suggesting Vaughn pursue the interests of

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138. *See* Simon, *supra* note 132, at 1125 ("[T]he appeal to individual autonomy or right is not a sufficient basis for client loyalty because it begs the question of why the client's autonomy or right should be preferred to that of the person whose autonomy or right is frustrated by the client's activities.") In fact, the attorney might well have had the opportunity to select a different framing of her "client" at the outset of her action, choosing to represent more than one individual, bringing the case on behalf of a group, filing as a class action, etc. *See* Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1111–22 (1992).

139. For example, in the class action context, the adequate (but not conflicted) attorney must act in the interests of the entire class, even if that requires overriding the interests of some class members. *See* Parker v. Anderson, 667 F.2d 1204, 1210–11 (5th Cir. Unit A 1982); *see also* Ellmann, *supra* note 138, at 1118–19 (discussing disempowerment of some class members in landlord-tenant class action); Brian J. Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct*, 27 LOY. L. REV. 1047, 1074–78 (1981) (proposing addition to Model Rules of Professional Conduct that would provide guidance to attorneys in negotiating ethical issues in class actions); Yeazell, *supra* note 1, at 51 (describing move from "client-based" vision of legal practice to "case-based" vision as collective action in which "lawyer, having identified the case, organizes the group of collective litigants"); *cf.* Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987) (arguing for broad definition of "client" so as to encompass entire family affected by will).

140. This defense is the simplest response for most attorneys; not having to look beyond one's own client seems to streamline ethical duties, and it typically *does* comport with the attorney's self-image and understanding of her professional role. The point of this exploration is not to impugn the attorney's motives and dedication, but to suggest a broader understanding of her role.

141. Most courts and commentators have attempted to keep the focus on "loyalty," but have shifted the meaning of loyalty from loyalty to the individual client to loyalty to the group or cause. *See* Yeazell, *supra* note 1, at 53–55; *supra* note 139.

142. It is possible, of course, that a client will insist, over her attorney's objections, on a legal but problematic technical approach. If the attorney is urged by other lawyers to ignore her client's suggestion, she is in fact urged to go against her individual client's desires in the interests of others. This would possibly create a conflicts problem, though the Model Rules appear to evade the issue by suggesting that tactical decisions are the attorney's to make, not the client's. Moreover, as noted in the text, this is rarely the framing of a dispute among attorneys because clients infrequently have strong desires on technical matters. *Cf.* Jones v. Barnes, 463 U.S. 745 (1983) (denying habeas corpus petition claiming ineffective assistance).

143. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995).

persons other than the Shelleys; he is suggesting that the Shelleys are not being well served by Vaughn. For Vaughn to defend himself by saying that he is doing what the Shelleys want is not responsive. The Shelleys probably have no opinion about the relative strengths of the Thirteenth and Fourteenth Amendment arguments; and if they did, their opinions would be only one of several that Vaughn might consider. Vaughn's retreat to client loyalty is a strategy of deflection, a way of refusing to engage Marshall in a discussion about the soundness of his litigation tactics.

When a lawyer's strategic decisions are recast as matters of competence, not conflict, it becomes clearer that blind devotion to individual autonomy may not be the ultimate goal, nor individualist decisionmaking the only available model. Collective processes are one alternative,[144] models of expertise another.[145]

III. THE DEMOCRATIC MODEL

Group members and attorneys could address disputes concerning the conduct of impact litigation by employing more democratic means of decisionmaking. Democratic values would lend significant legitimacy to goal-based decisions, but would have less applicability to the more technical decisions about legal strategies.

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144. Lawyers frequently use group processes to reach decisions. A firm will vote, for example, on whether to take on a new client and may well canvass its litigators about whether they think a particular approach will be effective in a given case. The possibility of resolving attorney disputes through more democratic means is explored in Part III. *Cf.* John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 831–40 (1992) (discussing how single client may be represented by many attorneys). Collective decisionmaking processes that may require attorneys to look beyond their own individual client's immediate interests are utilized in other types of group litigation as well. For instance, one attorney has written of antitrust class actions:

> Even when the court does not formally appoint liaison counsel or lead counsel, everything in an antitrust class action is handled by committee, anyway. Those of you who have participated in meetings of counsel in such cases know that your experience in the courtroom does you precious little good; what you would need, ideally, is experience in a state legislature. In fact, it is often the best trial lawyers who have the hardest time adapting to what have become the accepted procedures for handling antitrust class actions. A good trial lawyer's tenacious pursuit of his own theory of the case and his unwillingness to compromise his own client's interests in the slightest respect for the good of the majority are almost immediately taken as signs of pigheadedness on the part of his fellow counsel. The result is that he is quickly ostracized from the decision-making inner circle of lawyers on his side of the case, thereby further diminishing his ability to influence the course of the proceedings.

Dando B. Cellini, *An Overview of Antitrust Class Actions*, 49 ANTITRUST L.J. 1501, 1505 (1980).

145. The legal profession envisions certain types of cases as requiring expertise beyond that available to the general practitioner; such cases are routinely referred to specialists. Further, a firm's junior attorneys regularly take orders from more senior attorneys, and advice from nearly everyone. The bar's own rules governing professional competence encourage attorneys to seek advice and counsel from other attorneys, and in certain circumstances to associate with other attorneys to ensure that the client receives competent counsel. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. (1995). These "expertise" notions of decisionmaking are explored in Part IV.

A. *Democracy in the Pursuit of Goals*

Our procedural system could assign litigation decisions concerning group rights to those groups, rather than to any individual within the group, and could promote group-based decisionmaking about litigation.[146] Under such a regime, individuals would not be authorized to litigate the group's rights on their own; instead, their role would be to participate in the group's decisionmaking about its litigation options. The question of whether to file a marriage case would be decided by the group collectively. Such a group decision could be achieved either through a formal vote or according to a more informal democratic process, and could be practically implemented by any number of possible procedural innovations.[147]

Democratic decisionmaking quickly cures the downsides of the individualist and expertise models; rather than one, indeed any, individual or elite group of experts deciding for the entire group when and how to proceed in the litigation arena, democracy ensures that litigations undertaken for groups have the assent of those whose rights are at issue. Those individuals governed by the outcome of the case each possess an opportunity to participate in the decisionmaking that sets the community's goals.[148] Litigants representing groups thereby have a stronger claim to legitimacy,[149] and their litigative

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146. *Cf.* Chayes, *supra* note 98, at 1291 ("[T]he class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests, at least in very important aspects.").

147. For a discussion of the benefits and costs of several such possibilities, see *infra* Part V Organizational or associational standing is one procedural mechanism that resembles the democratic model set forth here. According to this doctrine, in appropriate cases, a group is authorized to represent the interests of its members. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-20 (1988) (describing standing of organizations). Although the Supreme Court has severely restricted associational standing, *see, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Sierra Club v. Morton, 405 U.S 727 (1972), many commentators have called for more liberal rules that would entitle groups to bring suits in their members' interests more often, *see Sierra Club*, 405 U.S. at 755 (Blackmun, J., dissenting); Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415 (discussing intervention of right, under Rule 24(a)(2), for public interest groups such as Sierra Club and NAACP); Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279 (1990); Heidi L. Feldman, Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733, 734–35 (1988) ("[C]urrent doctrine weakens the ability of associations to litigate effectively by forcing them to filter their claims through the traditional, atomistic model of interest."). What distinguishes these concepts from the model set forth here, however, is that associational standing in the traditional literature is not thought to *replace* the standing of individual group members. Indeed, in the current jurisprudence, a prerequisite for group standing is that the group's members "would otherwise have standing to sue in their own right." Hunt v Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). The democratic model described here envisions *substituting* democratic decisionmaking for individual decisionmaking and thus supplanting individual standing with some notion of collective standing. Only one commentator on group standing has gone this far. *See* Feldman, *supra*. For a further discussion of Feldman, specifically, and the standing issue generally, see *infra* note 214.

148. *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.")

149. The idea that agents gain legitimacy when they represent consenting groups is deeply embedded in traditional American political theory. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed.").

activities evoke more confidence from their communities and from other legal actors.[150] Further, whereas individual filings promote competition among plaintiffs and cases in the legal arena, democratic decisionmaking envisions community discord before filing and ideally constructs it as a meaningful, not competitive, discourse. Democracy thus promotes more constructive group relationships and a more unified approach within the legal arena. It enables litigants to focus their energy on the opposition, not one another. Perhaps most importantly, the process of democratic decisionmaking involves the community more closely in the decisions affecting its life.[151] If the community members actually controlled the filing and pursuit of litigation, they would be forced into a more active engagement with one another about these issues.[152] This obligation could counter the alienation that results from dependence on lawyer-experts, increase the individuals' sense of belonging to the community,[153] and could further the civic republican's much-idealized community discourse.[154] The community members would also be forced into a more intelligent engagement with the law, and their advocate-experts would be compelled to engage the community members more actively. The enhanced relationships that could result from democratic decisionmaking would counter one of the central complaints about social movements: overreliance on "experts" (lawyers).[155]

Limited to a strict voting approach, however, the democracy model confronts several significant hurdles. Given the ambiguous contours of the "communities" at issue and the often complicated and fluid nature of litigation decisionmaking, it would be nearly impossible to identify a meaningful voting

150. The Hawaii marriage plaintiffs could arguably claim such community legitimacy following the ACLU poll; the poll demonstrated no local opposition to their case. *See* Wright, *supra* note 69. Similarly, some of Craig Dean's statements suggest that he saw himself speaking for a majority of the community in bringing his marriage action.

151. *See generally* CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970) (arguing for vitality of participation ideal in modern theories of democracy).

152. It may seem that there is an asymmetry between the individualist model's disdain of coercion and the democratic model's embrace of it. Individualism was disparaged for binding nonparticipants to the results of another person's autonomous litigative choices. *See supra* Part II. Democracy, too, may bind one to others' (collective) choices, and it coerces the individualist litigant to consult with her community. The problem with coercion in the individualist model, however, was not coercion per se, but the pretense that such coercion did not exist, that each individual remained an autonomous actor. The democratic model does not rely philosophically on the absence of coercion, but rather envisions it as an appropriate cost of collective action.

153. *See* PATEMAN, *supra* note 151, at 27.

154. *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988) ("In the strongest versions of republicanism, citizenship—participation as an equal in public affairs, in pursuit of a common good—appears as a primary, indeed constitutive, interest of the person."); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541, 1548–51 (1988) (elaborating first principle of "liberal republicanism" as "deliberation in politics").

155. *See, e.g.*, OLSON, *supra* note 64, at 21–39. *See generally* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978) (analyzing, inter alia, relationships between law-reforming attorneys and client constituencies in series of different social movements).

constituency[156] and to conduct a worthwhile vote.[157] Moreover, only an insignificant percentage of the "electorate" may be interested or informed enough to involve itself in the "election."[158] Permitting filing only after a community vote also limits some individuals' autonomy[159] and threatens to disenfranchise permanent minorities within the community.[160] These types of problems with voting mechanisms have largely constrained their application to problem-solving in the related context of complex class action jurisprudence.[161] In determining whether a proposed representative will adequately represent the interests of a class, courts generally have *not* relied on community sentiment in support of or against certification, but have engaged in an independent (albeit cursory) analysis of the quality of the proposed representative.[162] Similarly, in determining whether to approve a proposed settlement, courts rarely rely on voting devices like surveys of class members, nor weigh majority sentiment heavily.[163] Relatively few class

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156. By what majority would the gay marriage filing decisions be made? A majority of persons who have experienced same-sex desires? A majority of persons who would marry someone of the same-sex if the opportunity were available? A majority of some community within the given jurisdiction of the case (say, Hawaii) even if the case will have nationwide effects? A majority of members of organized lesbian/gay institutions? *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 105 (1960) ("The current theory of democracy suffers from the fact that it is usually developed with some ideal homogenous community in view and then applied to the very imperfect and often arbitrary units which the existing states constitute."). Further, what if a small minority of the community is intensely interested in seeking marriage while the majority is indifferent? *See* Peter Jones, *Political Equality and Majority Rule*, *in* DEMOCRACY: THEORY AND PRACTICE, *supra* note 107, at 208, 212–13 (discussing problems arising when apathetic majorities confront intense minorities).

157. When could the vote be "called"? Who would have the authority to call it? How would the ballot questions be framed to avoid skewed results? How would the ballots be distributed and returned? Who would do the counting? Who would pay? How would information and voting opportunities be equalized?

158. This is Deborah Rhode's conclusion about the use of "majoritarian" devices to cure conflict of interest problems in complex class action representations. *See* Rhode, *supra* note 12, at 1232–42.

159. Stephen Yeazell makes a similar argument:

> Collective litigation . . . involves some compromise of the autonomy of the individual litigant, some reduction in the freedom of choice she would have if separately represented. The lawsuit is no longer tailor-made to the litigant's (or to the lawyer's conception of the litigant's) interests; it represents instead an amalgamation of the litigant's interest with that of others.

Yeazell, *supra* note 1, at 45.

160. *See* Julius L. Chambers, *Class Action Litigation: Representing Divergent Interests of Class Members*, 4 U. DAYTON L. REV. 353, 357 (1979) (arguing that minority class members must be accorded counsel where wishes diverge from majority lest they be oppressed by majority rule).

161. *See* Rhode, *supra* note 12, at 1233 (calling majoritarian notice and hearing procedures "unrepresentative, uninformed, and unresponsive to a range of concerns particularly significant in institutional reform litigation").

162. *See id.* at 1218–21. *But see* Davis v. Roadway Express, Inc., 590 F.2d 140 (5th Cir. 1979) (decertifying class when 17 of 23 members showed desire to not participate), *aff'd on rehearing*, 621 F.2d 775 (5th Cir. 1980); Bailey v. Ryan Stevedoring Co., 528 F.2d 551 (5th Cir. 1976) (holding that opposition of 204 of 230 class members precluded certification); Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971) (noting poll demonstrating that over 80% of class supported action as reason for certification).

163. A classic test used by many courts in assessing the fairness of settlements acknowledges the "reaction of the class to the settlement" as one of nine factors. *See* City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). Nonetheless, in the rare instances in which large numbers of class members object to settlements, courts have generally not found such objection decisive. *See, e.g.*, Reed v. General Motors Corp., 703 F.2d 170, 174–75 (5th Cir. 1983) (approving settlement over objections of 23 of 27 named plaintiffs and 40% of class); TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462–63 (2d Cir. 1982); Cotton v. Hinton, 559 F.2d 1326, 1333–34 (5th Cir. 1977) (approving settlement over objections

members respond to court mailings and those who do are not representative.[164] Even more disturbing, few class members attend meetings convened by their attorneys in civil rights cases.[165] Those who do respond or attend are often neither knowledgeable nor unbiased observers, and their views are typically shaped by the attorneys presenting the issues to them.[166] These shortcomings of community decisionmaking in class actions led Rhode to conclude, in the context of (complex) institutional reform litigation, that "public discussion is of limited use in eliciting informed preferences"[167] because "as political theorists remind us, the more technical the issue, the less the point in counting noses."[168]

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of counsel purporting to represent nearly 50% of class); *see also* MANUAL FOR COMPLEX LITIGATION § 30.42 (3d ed. 1995) (listing as one of seven factors in assessing settlement that "many class members object to the settlement"). *But see In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 813 (3d Cir.) (relying, inter alia, on poll showing that 63% of class members would not use settlement award coupon as reason for rejecting settlement), *cert. denied sub nom.* General Motors Corp. v. French, 116 S. Ct. 88 (1995); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1217–18 (5th Cir. 1978) (disapproving settlement opposed by 70% of subclass); *In re* California Micro Devices Sec. Litig., 168 F.R.D. 257 (N.D. Cal. 1996) (requiring majority shareholders to represent class and approve of settlement).

164. *See* Rhode, *supra* note 12, at 1233 & n.204. Courts have split on how much to infer from the silence of absent class members. Often, courts will infer that few objections to the proposed settlement indicates support for it. *See, e.g.*, Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1313–14 (3d Cir. 1993) (holding that small proportion of objectors—less than 30 of 1.1 million shareholders—does not favor derailing settlement); Stoetzner v. United States Steel Corp., 897 F.2d 115, 118–19 (3d Cir. 1990) (holding that 29 objections in class of 281 "strongly favors settlement"). Yet in other cases, courts discount the absence of objection to the proposed settlement. For example, when only .03% of a subclass objected or opted out of a proposed settlement against General Motors, the Seventh Circuit wrote that it was "not as willing as GM to infer support from silence." *In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1137 (7th Cir. 1979) (citing Note, *Factors Considered in Determining the Fairness of a Settlement*, 68 NW. U. L. REV. 1146, 1153 (1974)). The court stated that, "even if a majority of the subclass did favor the settlement, we do not believe that the preferences of the majority can justify the substantial injustice to the individual rights of the minority that the form of settlement proposed here would work." *Id.* In a later case, the Third Circuit held that the lack of representativeness of objectors may argue in favor of considering their views more, not less:

> Although the absolute number of objectors was relatively low [of 5.7 million class members, 6,450 objected and 5,203 opted out], there are other indications that the class reaction to the suit was quite negative: The seemingly low number of objectors includes some fleet owners who each own as many as 1,000 trucks, and those who did object did so quite vociferously.

In re General Motors, 55 F.3d at 813; *accord In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 217–18 (5th Cir. 1981) (holding that mere fact of few objections is not dispositive because "a low level of vociferous objection is not necessarily synonymous with jubilant support"). These examples demonstrate that courts are generally more interested in making their own assessments of the *quality* of the proposed settlement than they are in counting the quantity of supporters and opponents. *See generally* MANUAL FOR COMPLEX LITIGATION, *supra* note 163, § 30.42, at 239 ("The settlement cannot be evaluated simply by reference to a mathematical yardstick.").

165. *See* Rhode, *supra* note 12, at 1234 nn.207 & 209.

166. *See id.* at 1234–37.

167. *Id.* at 1237.

168. *Id.* at 1237–38 (citing ROBERT DAHL, AFTER THE REVOLUTION 72 (1990); Hannah Pitkin, *The Concept of Representation*, *in* REPRESENTATION 1, 20 (Hannah Pitkin ed., 1969)). For similar reasons, Luban, writing about the class-conflicted lawyer's ethics, also rejects community decisionmaking. *See* LUBAN, *supra* note 12, at 346. In rejecting voting solutions to the class conflict problem, Luban specifically points to the impracticality problem, the problem of the unmobilized and uninformed electorate, and the problem presented by the uncountable votes of affected future generations. *See id.* at 346–47. Luban therefore would free the NAACP lawyers in the scenario discussed in Bell, *supra* note 11, to do what they

Several important distinctions weaken these objections and salvage aspects of democratic decisionmaking, however. The issues at the heart of the prefiling goal disputes are neither complicated nor beyond intelligent community discourse. Indeed, one of the initial premises of this inquiry is that an informed and intelligent community debate exists on the issue of whether to litigate, a debate which is then subverted either by the decision of individual, self-appointed representatives to litigate or by overreliance on lawyer-experts. The very importance of these debates in defining the community cuts in favor of the utilization of democratic devices. Moreover, these debates concern the goals and nature of the community itself, not the remedial phases of institutional reform litigation. It is understandable that individuals might be intimidated by the legal system and hesitant to involve themselves, even if invited, in such a foreboding setting. Yet ask them generally whether they believe gay people should file lawsuits seeking the right to marry, or blacks to integrate their local schools, or women to enter the Citadel, and chances are they will have opinions.[169] Most importantly, democratic values can be embodied in procedural rules without requiring reliance on formal voting mechanisms. For instance, rules that enhance community dialogue,[170] increase individual participation,[171] or "rectify the antidemocratic exclusion of chronically disadvantaged groups from the theatre of politics,"[172] serve democratic values.[173] Rules of procedure could be constructed around these values of democracy without requiring formal voting processes. Rules that required individuals or experts filing group-based cases to demonstrate that some level of community dialogue preceded the decision to file, or to show some level of community participation in the filing, or to establish approval for their filings from democratically elected representatives, could capture some of the benefits of democracy without falling prey to the unworkability of elections about litigation.

With these qualifications in mind, it is evident that some aspects of democratic decisionmaking can and should be employed in litigation campaigns to address goal-based decisions. Democratic decisionmaking is an attractive alternative to unrestrained liberty because it provides a means for reining in the self-appointed community representative; it also checks the

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consider the best thing. *See* LUBAN, *supra* note 12, at 348.

169. For one example of how a group strived to reach a consensus through democratic dialogue and consensus building during a lawsuit, see Marshall, *supra* note 12.

170. *See* Sunstein, *supra* note 154, at 1567.

171. *See* PATEMAN, *supra* note 151, at 22–44.

172. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 619 (1995). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (advocating theory of judicial review that focuses on adequate participation by minorities rather than on substantive merits of disputes).

173. *See* Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1, 7 (articulating vision of participatory democracy based on group action, in which "the individual gains stature and voice in community with other like-minded individuals").

alienation and disempowerment that result from overreliance on lawyers. Properly structured, democracy can ensure some accountability (and hence legitimacy) of individuals and experts who purport to represent the community, provide some finality to the community dispute, and, ideally, create important participatory opportunities. Group disputes in the shadow of a democratic legal system would be significantly altered; individuals would be forced into dialogue with one another and pressed to justify their positions to their communities. The critical task is how to construct rules of procedure that capture these values; I return to this assignment in Part V.

B. *Democracy in the Choice of Means*

Disagreements among attorneys concerning the tactics and strategies employed to further the social group's legal goals could also be addressed by more democratic means of decisionmaking. Changes in procedural[174] and ethical[175] rules could mandate that litigators obey democratically adopted tactics and strategies. Alternatively, some form of democratic decisionmaking could be voluntarily adopted: All of the covenant litigators could have agreed

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174. To the extent that civil rights cases are filed as class actions, courts could reconceptualize the notion of adequacy of representation to ensure that the legal representatives utilized democratic decisionmaking processes in adopting their strategies and tactics. *See* 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1769.1, at 375 (1986) ("[W]hen the court reviews the quality of the representation, it will inquire not only into the character and quality of the named representative party, but also it will consider the quality and experience of the attorneys for the class."). A critical qualification in the treatise's statement is the clause, "when the court reviews the quality of representation." Currently, courts generally do not do so unless it is alleged that the class attorney has a conflict of interest. *See id.* at 383 ("By far the greatest difficulty for the courts in assessing whether attorneys are adequate representatives has been in dealing with potential conflict of interest problems."). Thus this procedural suggestion would require *both* increased surveillance by the courts *and* a particular notion of what constitutes adequacy.

175. The Model Rules already state: "Competent representation requires the legal knowledge, skill, thoroughness and preparation *reasonably* necessary for the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1, at 1 (1995) (emphasis added). The Rule's Comment on "Thoroughness and Preparation" provides: "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, *and use of methods and procedures meeting the standards of competent practitioners.*" *Id.* Rule 1.1 cmt. (emphasis added). Competence could be defined to require an attorney to take the approach that the "rational" civil rights litigator would employ in these circumstances. In adhering to that standard, the attorney would be forced to take into account the views of her peers and, if she were to deviate from them, to have some good explanation for doing so. A similar outcome could be accomplished by formulating the notion of legal malpractice in civil rights litigation along the same lines. The "rational civil rights litigator" standard would create enormous pressure on the individual litigator to conform to the approach of a majority of lawyers in her field. *See, e.g.*, Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark, 39 F.3d 812, 815 (7th Cir. 1994) (stating that attorney who holds self out as specialist or as having unusual qualities must meet standard of care of specialists), *cert. denied sub nom.* Transcraft Corp. v. Liberty Mut. Ins. Co., 115 S. Ct. 1990 (1995); Walker v. Bangs, 601 P.2d 1279, 1283 (Wash. 1979) (stating that "one who holds himself out as specializing and as possessing greater than ordinary knowledge and skill in a particular field, will be held to the standard of performance of those who hold themselves out as specialists in that area"); Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 428 (Cal. 1971) (holding that if lawyer "specializes within the profession, he must meet the standards of knowledge and skill of such specialists"). *See generally* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 18.4 (4th ed. 1996) (collecting cases).

that none would file a certiorari petition until a majority concurred that the time and case were right; similarly, litigators making equal protection claims in lesbian/gay cases could agree to follow the tactical decisions favored by a majority. Beyond strict majoritarianism, lawyers could agree to consider approaches adopted after dialogue and participation by each interested attorney.[176]

The values of proceeding in this manner are, again, the values of democracy generally. No individual attorney (novice or expert) could unilaterally purport to speak for the entire community; no single attorney could bind all other strategists to her particular vision of how to litigate. Vaughn's opinion that the Thirteenth Amendment would carry the day in *Shelley* would have to yield to the group's insistence on the Fourteenth Amendment; one attorney's belief that homosexuality is "immutable" could not bind the community to such a strategy absent support among other legal strategists. Democracy is also a fairer means of proceeding than relying solely on expertise. The wider a right to participate in strategy is distributed, the more expert litigators have to consult with and seek support from others interested in civil rights work. Their backroom decision to avoid immutability arguments[177] might be overruled in the democratic process. The democratic approach could level the playing field among the strategists by according each an equal vote in an outcome to be decided by all. Moreover, by involving all interested persons in the process, a democratic approach encourages participation and can claim the advantages that follow from such opportunities: The attorneys representing the community will be more in tune with the strategic debates, will have had to consider the pros and cons of both sides, will have sharpened their arguments in the democratic forum, and will not be alienated from the critical, strategic issues at the heart of their cases.

The democratic approach applied to lawyering disputes suffers from several flaws, however. The cost of reining in the individual litigator is that the imaginative litigator has her creativity stifled. To the extent that she has to sell her approach to the group, the individual litigator might avoid new and interesting arguments, innovative approaches, or unique framings. A primary value of the individualist model, that truth will win out through a range of approaches, is lost. The democratic model also suffers from the lack of expertise. There is no guarantee that a popular approach will be a wise approach. Finally, democracy by voting is truly impractical in this context. If voting is limited to professional civil rights litigators, democracy quickly looks more like an expertise approach than a democratic approach. Voting on legal strategy decisions could therefore be opened up to all members of the social

176. This was Marshall's approach in convening lawyer conferences about the covenant cases *See supra* text accompanying notes 23–33. Implicit in Marshall's attempt to reach consensus about a good test case is the assumption that other cases or approaches are not the ideal and should not be pursued.

177. *See* Feldblum, *supra* note 91, at 275–82.

group's bar association,[178] but only a small percentage of them may have civil rights experience or detailed knowledge about the particular case. Beyond defining the correct constituency, it would be nearly impossible to envision a formal voting mechanism. Ballots could not be sent out stating: "We have a brief due next week and seek your vote on the following strategic decisions." Less formal methods of democracy, such as forcing litigators to adhere to a professional standard of what a "reasonable" litigator would do in such circumstances, are only slightly more practicable. Lawyers would not know what portions of their work accorded with the norm, and, even if they did, it would be nearly impossible for them to surmise in any meaningful way how such a "reasonable litigator" would proceed and thus how to comply with the group's dictates. Moreover, such aspirational norms are largely unenforceable.

Although more democratic approaches to litigation strategies may be unwise as well as unworkable, Marshall's conferences in the covenant cases provide a compelling alternative to both rampant individualism and elitist isolation. They emerge from a vision of coordinated expertise, combining elements of group decisionmaking with elements of the expertise model, and thus provide a bridge to consideration of such an "expertise" model.

IV. THE EXPERTISE MODEL

Group members and attorneys could address disputes over the conduct of impact litigation by delegating decisionmaking authority to experts. Legal expertise is of limited relevance (yet wields undue power) in the political debates concerning a community's goals, but ought to be valued (yet is not) in attorney disagreements about legal strategies.

A. *Expertise in the Pursuit of Goals*

Our procedural system could assign litigation decisions concerning group rights to specialists and require that decisionmaking about litigation goals be the outcome of expert deliberation. The experts would not necessarily be attorneys,[179] but rather those most skilled in determining the community's

178. Just as many African-American attorneys are members of the National Bar Association, so are many lesbian and gay attorneys members of the National Gay and Lesbian Lawyers Association. The former was formed in reaction to the American Bar Association's Jim Crow policies; the latter, in reaction, in part, to the marginalization of gay persons in the bar. *See generally* LEGAL ETHICS, *supra* note 48, at 79–100 (discussing minorities at the bar).

179. As the specific types of disputes at issue are quasi-legal in nature, selecting attorneys to be the community's experts seems an obvious approach. Yet the ABA's Model Rules remind attorneys that they are their clients' agents, that the *goals* of the litigation are to be set by the client and followed by the lawyer. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995). Further, in considering the types of decisions at issue—e.g., should marriage be a goal of gay liberation?—it is not immediately obvious that attorneys would enjoy any special expertise. Robert Gordon writes that according to

goals. Assuming goal experts could be identified (a question to which this Section returns below), the expertise model would authorize them to initiate, pursue, and settle group-based litigation. As with the democratic approach, the expertise approach could be accomplished through any number of possible procedural innovations that would restrict filings (or settlements) absent expert approval.[180]

The expertise model would eradicate the current emphasis on individualism, with numerous individual plaintiffs purporting to speak, all in a different voice, on behalf of the community. Goal experts would centralize and unify decisionmaking. Supporters of decisionmaking by experts might also contend that it ensures better quality decisions than random individuals and uninformed majorities might make.[181] A majority of the gay community might think it wants the right to marry, but the experts would "know" that domestic partnership is really the wiser goal for the community's interests.[182] Decisionmaking by experts is also efficient: In barring individual lawsuits, it assures that the community's resources are allocated to the correct cases and goals.[183] Finally, expertise liberates the many nonexpert individuals to devote their energies to endeavors within their own fields of knowledge.

Of course, the central problem of the expertise model generally, its elitist subversion of democratic equality[184] and its infringement on individual

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> the most pompously inflated view of political independence [of lawyers] . . . expressed in the nineteenth century, lawyers belong to a distinct elevated estate uniquely endowed with political wisdom and insight into everybody's long-term best interests. That was always ridiculous, and has become more so with the specialization of the profession. We are bright technicians, for the most part, not philosopher-kings (or queens).

Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 74 (1988) (footnote omitted)

180. Such a "client expertise" model could be established by adjusting procedural rules concerning "real party" status, *see* FED. R. CIV. P. 17, or "standing" so as to allow only certain designated individuals to file cases that would impact the entire community's rights, or to permit such filings only with the approval of those designated goal experts, *cf.* FED. R. CIV. P. 23.1 (requiring shareholder to make efforts to obtain desired action from corporation before filing derivative suit).

181. In a humorous passage, Duncan Kennedy describes why individuals in the securities market need regulation by experts in these terms:

> [E]veryone knew that what was really at work was greed, gullibility, incurable optimism, the gambler's itch, the allure for something for nothing, all followed by addiction to the ticker, the secret diversion of the family's savings, the mortgaging of a small business, and then, when things turned down, increasing margin requirements, a desperate scramble to stay in the game just a little longer . . . ruin and a swan dive from a high window. . . . People are idiots.

Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 632–33 (1982). *See generally* Gerald Dworkin, *Paternalism*, *in* MORALITY AND THE LAW 107, 120 (Richard A. Wasserstrom ed., 1971) (criticizing Mill's objections to paternalism).

182. *Cf.* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1518 (1992) ("Successful solutions to regulatory problems require the application of knowledge and experience that only agencies involved in the day-to-day regulation of an industry can acquire, as well as insulation from political and legal constraints that only get in the way of good government.").

183. *Cf.* Garth, *supra* note 12, at 497–98 (discussing two traditional justifications for private attorney general class actions: that public interests outweigh individual interests and that class actions overcome structural barriers that inhibit enforcement of individual rights).

184. *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS 1, 16 (1975) ("[A] relationship of inequality is intrinsic to the experience of professionalism.")

liberty,[185] ultimately undermines its utility as a means of resolving goal disputes. The expertise model cannot be applied to group member disputes in civil rights campaigns because these disputes concern the very subject matter that by definition cannot be delegated to experts: the political ends of the community.[186] Because goal decisions are inherently political in nature, it would also be difficult, if not impossible, to identify "experts" in community goal-setting. Even if such experts were identifiable, concentrating case-filing authority in their hands would threaten the community with the possibility that the few case-filers would be coopted more easily,[187] or grow conservative.[188] The community would lose the vigorous discourse about its

185. *See* Dennis F. Thompson, *Paternalism in Medicine, Law, and Public Policy*, *in* ETHICS TEACHING IN HIGHER EDUCATION 245, 247 (Daniel Callahan & Sissela Bok eds., 1980) ("[P]aternalism needs justification because it is a restriction of liberty.").

186. Expertise models are typically defended as applying only to the "technical" (as opposed to "political") components of the decisionmaking process. Indeed, some argue that a legislature actually lacks authority to delegate *legislative* functions:

> The doctrine against delegation appears ultimately to be bottomed on contractarian political theory running back to Hobbes and Locke, under which consent is the only legitimate basis for the exercise of the coercive power of government. . . . These principles would, however, be deprived of all practical significance were the legislature permitted to delegate its lawmaking power in gross.

Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1672 (1975) (footnotes omitted). In the standard expertise model, the legislature sets the community's values, the experts are mere "machines" of implementation:

> Captivated by theories of instrumental rationality and notions of technocratic efficiency, formalist thinkers have attempted to understand bureaucracy by likening it to a machine. This machine imagery evokes a number of different ideas. First, a machine is a means employed to achieve others' ends. These ends may be controversial, but the machine itself takes no part in resolving the controversy. The machine is a neutral device; all value judgments take place outside of its operation. The machine itself does not exercise "discretion" in any sense. The machine is also a highly technical and complex device, one that would be damaged by a mere layman's tinkering. . . . Once the machine is functioning in accordance with an adequate blueprint, all problems relating to its operation can safely be entrusted to a technician. . . . There is no reason to think that the operation of a machine will pose threats that should be checked by an outside force . . . . Finally, machines are so powerful and efficient that life without them is inconceivable. Only a fool would suggest that a return to handmade products would be desirable or even possible.

Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1297–98 (1984) (footnotes omitted); *see also* Stewart, *supra*, at 1675–76 (describing "transmission belt" conception of administrative decisionmaking). The legitimacy of attorney-client relations similarly depends on the model of the goals-means division. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995).

187. When the NAACP controlled much of the litigation brought on behalf of the African-American community, some argued that the organization was beholden to its funders at the expense of group members' interests. *See, e.g.*, Bell, *supra* note 11, at 489–92; *see also* Ronald R. Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176, 178–79 (1974) (explaining adverse effects of client-constituent distinction in civil rights litigation); Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 REC. ASS'N B. CITY N.Y. 320, 349 (1974) (noting influence of financial contributors in minority and public interest law efforts but concluding that contributors' influence on lawyers is minimal). Similarly, where the filing of mass tort class actions is controlled by a small groups of attorneys, some have argued that these attorneys have incentives to settle that potentially conflict with the interests of the class. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (discussing how defendants in mass tort cases increasingly welcome class actions as opportunities to settle entire sets of claims with rogue plaintiff attorneys).

188. Thurgood Marshall, after all, was the authority who did not want to pursue *Shelley*, while George Vaughn did. Kluger writes:

goals through which it constitutes itself, and individuals would find themselves alienated from the decisionmaking that is central to their lives. When it comes to setting the community's goals, those possessing technical expertise, including lawyers, can and should be involved in the decisionmaking,[189] but should not be seen as possessing any special wisdom. This represents the message of the client-centered lawyering literature, and constitutes the most powerful critique of civil rights litigators.

B. *Expertise in the Choice of Means*

The expertise model has a more acceptable, and currently undervalued, application to disagreements among attorneys concerning the tactics and strategies employed to further the social group's legal goals. In its strongest form, the expertise model would authorize a small group of civil rights specialists to control all decisions about how to pursue the community's legal goals. Vaughn could not file his petition for certiorari without the NAACP's approval; pro bono attorneys could not employ status/conduct arguments in military cases without Lambda's approval. A version of this system could be effectuated if the bar were to require those who practice civil rights litigation to be certified specialists;[190] those not certified as specialists would be forbidden to hold themselves out as such[191] and would be ethically, if not legally, discouraged from taking on civil rights cases.[192]

> "Thurgood was very reluctant to push the restrictive-covenant cases at the Supreme Court level," recalls Franklin Williams, who was a junior lawyer at the Fund in those days and believes Marshall was less than bold in his leadership. "If the initiative had not come from outside the Fund office . . . Marshall might have let it go then."

KLUGER, *supra* note 16, at 249; *see also* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 856 (1944) ("Negroes should attempt to develop that type of political culture which is ideal in any democratic nation. There must be radicals, liberals and conservatives. Viewed as a going system of collective action all three factions and many others have their 'functions' in the concert.") (explaining division of responsibility among NAACP and other African-American organizations). *See generally* Seidenfeld, *supra* note 182, at 1563–65 ("History has shown that all too often regulators shirk their responsibilities; they prefer the leisure and security that accompanies the continuation of what is routine.").

189. *See* Gordon, *supra* note 179, at 75 (arguing that although "lawyering is not a club for superhumans," it would be "absurd . . . to argue that because of this lawyers are uniquely *disqualified* as citizens or moral and political actors—the one group of individuals in the world who should conscientiously attempt to reduce themselves to ciphers, pure media of transmission").

190. This could be accomplished utilizing either a certification or a self-designation plan. Attorneys could be certified as civil rights specialists by the bar itself, after board testing, and with requirements for continuing education and significant time devotion to this practice area. Alternatively, attorneys could become self-designated specialists by devoting a specific amount of practice time and continuing education to the area. *Cf.* Warren Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973) (arguing for certification of trial attorneys). *See generally* REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 673–74 (Stephen Gillers ed., 4th ed. 1995) (outlining different approaches to specialization).

191. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 (1995) (forbidding lawyers from holding themselves out as specialists except in patents, admiralty, or specialties of particular state).

192. This type of screening for expertise is accomplished in the class context because in assessing the adequacy of the class representatives, courts will typically inquire into the adequacy of class counsel as

As applied to more technical lawyering decisions, the expertise model has significant value. Experts are arguably more competent attorneys.[193] They generally will have a larger base of legal knowledge in the substantive area, greater skills in the practice of civil rights,[194] more depth of experience,[195]

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well. *See* 7A WRIGHT ET AL., *supra* note 174, § 1769.1. However, as noted above, courts' adequacy analysis is rarely more than cursory. *See supra* note 174.

193. The competent representative possesses the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995). The rule's comment provides equivocal statements about the meaning of the broad rule, insisting both that, "[e]xpertise in a particular field of law may be required in some circumstances," and that, "[a] lawyer need not necessarily have special training or prior experience to handle legal problems of the type with which the lawyer is unfamiliar." *Id.* at Rule 1.1 cmt. Several themes do emerge from the comment, however. First, experience alone is neither necessary nor sufficient to competent representation: "A newly admitted lawyer can be as competent as a practitioner with long experience. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study." *Id.* Nonetheless, the rule envisions some special cases in which expertise may be required. In special circumstances, "[c]ompetent representation can also be provided through the association of a lawyer of established competence in the field in question." *Id.*

194. Many occasional public interest litigators are firm attorneys who generally represent defendants, as opposed to plaintiffs. *See* William O. Flannery, *Corporate Law Department Pro Bono Programs*, 37 BOSTON B.J. 12 (1993) ("Most in-house lawyers are not litigators and are not trained or experienced in the substantive areas of the law usually addressed by legal aid providers . . . ."); Edwin L. Noel et al., *Community Service as Pro Bono Work*, *in* THE LAW FIRM AND THE PUBLIC GOOD 138, 144 (Robert A. Katzmann ed., 1995) ("[T]o the extent that law firms have had experience in these areas [involving poor people], it is more likely that they have represented clients whose positions were adverse to those of the poor."). *See generally* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 36–38 (1982) (using empirical techniques to analyze patterns of joint practice). Though in some ways the distinction can be exaggerated, *see, e.g.*, THOMAS EHRLICH, RATIONING JUSTICE 26 (1979) ("[M]any legal aid programs have found that, with relatively modest amounts of training, even bond indenture lawyers can re-emerge from their specialist shells."); Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1127 (1991) (arguing that competency problems can be addressed by use of existing knowledge and advice of more experienced lawyers), Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 60–62 (1990) (attacking incompetency argument against mandatory pro bono), in others ways it might be meaningful. A plaintiff's attorney pushes ahead, fishes for information, sets the pace of the lawsuit, seeks adjudication in her client's favor. A civil rights litigator, in particular, wants to move a case to a court decision. She may want to minimize factual disputes and obtain a quick ruling on the law for the purpose of appeal. She surely does not want to settle. *Cf.* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–87 (1984) (arguing that settlement deprives courts of ability to explicate law). A defendant's attorney is trained to do the opposite: She wants to stall, to hide, to prevaricate, to extend, to wear down the opposition. She has the resources and time. If push comes to shove, she can buy off the opposition with money. Anything but a legal ruling is generally in her client's interests. These are obviously caricatures, but they resonate because we recognize differences in the manner in which attorneys prosecute and defend civil lawsuits. The switch in orientation is not made overnight. The skills developed by the firm attorney are sound, indeed often masterful, but they are sometimes better suited for a different task than civil rights litigation.

195. Firms often encourage their younger attorneys to cut their teeth with a public interest case. Yet if a firm allows an attorney to have responsibilities in pro bono cases that she would not have in paying cases, such action would violate the spirit, if not the letter, of the Model Rules. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1995). The ABA Committee Report on the 1993 Amendments to the Rule states:

> Although neither the Rule nor the comment explicitly so states, it should be self evident that every lawyer is expected to provide the same quality of legal services to pro bono clients as he or she would provide to paying clients. Thus, the ethical standard [of competent representation] applies whether that client pays a fee or is represented on a pro bono basis. Therefore, to the extent that an attorney is unfamiliar with a given area of the law, he or she is expected to seek advice or training in that area before advising a client, either for a fee or on a pro bono basis . . . .

and closer familiarity to the goals of the (real) client at issue in test cases, the community.[196] Beyond competency, the professional civil rights expert may enjoy just the sort of professional detachment and absence of conflicts idealized in the expertise model. Individual attorneys are more likely to have clients whose interests conflict with those of the pro bono client,[197] or independent responsibilities to their firms' partners, and may have the same misplaced sense of idealism that, in Derrick Bell's view, can compromise public interest attorneys.[198] Centralizing public interest decisionmaking in the hands of experts would also be efficient. To disperse legal competence for civil rights actions beyond the expert litigators, society would need to invest resources to ensure the competence of the occasional public interest attorney.[199]

Several arguments can be raised against concentrating decisionmaking over civil rights practice in the hands of expert litigators. A threshold problem is that there is no easily definable group of persons who possess the expertise at issue. The argument for expertise has assumed that professional civil rights lawyers are the experts, but that is not always the case.[200] It is true that not *all* professional civil rights attorneys are better situated to represent their communities than *all* occasional attorneys. Nonetheless, for the reasons discussed above,[201] it is fair to presume that professional civil rights litigators (depending on their experience) have developed unique skills and methods. A

ABA Comm. Report Supporting Amendment to Rule 6.1, *reprinted in* REGULATION OF LAWYERS: STATUTES AND STANDARDS 308, 311 (Stephen Gillers & Roy D. Simon, Jr. eds., 1995).

196. The Model Rules envision the attorney as an advisor on "moral, economic, social and *political* factors, that may be relevant to the client's situation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1995) (emphasis added). An occasional public interest attorney might well lack the competence to provide this advice. *See supra* at Section II.B.

197. *See* Noel et al., *supra* note 194, at 144–46.

198. *See* Bell, *supra* note 11, *passim*. The ABA Model Rule concerning pro bono service somewhat encourages such idealism by assuring the volunteer attorney that "personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer." MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. (1995).

199. Other commentators have shown an appreciation for these resource constraints.

> The competence of corporate attorneys to handle "poverty" law questions has also been raised as a potential problem. Training by experts in this area, usually, staff attorneys from [Legal Services Corporation] grantees, is mandatory for a successful program. It is important that a program of continuing legal education be established to keep participants in the program abreast of the sometimes rapidly changing rules and regulations of the federal poverty law agencies.

Robert L. Hill & Thomas J. Calvocoressi, *The Corporate Counsel and Pro Bono Service*, 42 BUS LAW. 675, 694 (1987)

200. Many professional civil rights lawyers do not even litigate, devoting their time instead to other necessary tasks like community organizing and public education. Despite their full-time work for a public interest law firm, they may not possess any special expertise in civil rights practice. Moreover, many occasional civil rights practitioners are excellent litigators. Indeed, it may be their "occasionalness" that enables them to see strategies or opportunities the professionals cannot. Furthermore, the occasional civil rights practitioners, situated outside the day-to-day workings of the social movement, could argue that they are more "objectively" situated; they might be more in tune, for example, with the attitudes of the judges to be persuaded in the lawsuits. Perhaps this context gives them a better, not worse, perspective on legal strategies.

201. *See supra* notes 190–96 and accompanying text.

stronger critique of the expertise model emphasizes its antidemocratic potential. A client's delegation of decisionmaking authority to her attorney creates enormous risks of paternalism, but such concerns are at least muted when they are dispersed throughout the bar. The expertise model's concentration of lawyering in the hands of the few multiplies the opportunities for those few attorneys to encroach on the decisionmaking meant to be left to the client—a traditional critique of civil rights practice.[202] This criticism's bark may be stronger than its bite, however, because professional civil rights attorneys are often the only attorneys who are actually appointed by and answerable to their communities.[203] If they infringe on their clients' interests, they alone (unlike volunteer attorneys) can be disciplined by their organizations' board and membership, both of which are typically comprised of community members. It is their very relationship to their communities that makes them less, not more, likely to undermine the political processes of those communities. A third criticism of the expertise model stresses its anti-individualist bias: Literal reliance on a few experts for civil rights litigation could thwart the creativity of individual litigators and undermine the participatory involvement of a broader community of volunteers in the civil rights effort. How one responds to this critique depends in significant part on what one sees as a larger problem: uncoordinated and quasi-competent individual efforts or sluggish and bureaucratic centralized efforts. For the reasons outlined above, this Article has argued that too little emphasis has been placed on the competence of professional public interest litigators. Nonetheless, the threat of discouraging innovation and attorney involvement in civil rights actions is real and thus argues against a forced expertise regime (such as actual specialization).

The critical task remains how to fashion voluntary ethical norms to capture the values of professional competence that lie, unappreciated, at the heart of the expertise model; Part V turns to this task.

V. THE INTEGRATED MODEL: BEYOND INDIVIDUALISM

In establishing the conceptual framework set forth above, I have argued that procedural and ethical rules should promote more democratic means of client goal-setting and more expertise-driven norms of attorney decisionmaking in group litigation. This Part provides some initial suggestions for how these recommendations could be embodied in new procedural and ethical rules.

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202. *See generally* OLSON, *supra* note 64 (applauding development among disability rights attorneys of integrated style of "social policy litigation," which minimizes disempowering effects of lawyer-expert mindset); Bell, *supra* note 11 (arguing that professional civil rights attorneys have become increasingly unresponsive to needs and wishes of black community in school desegregation litigation).

203. It may well be that their appointment and accountability runs to a particular segment of that community, *see* Bell, *supra* note 11, at 472, but this still exceeds the accountability of a pro bono attorney from a law firm undertaking a single case. *See, e.g.*, Garth, *supra* note 12, at 498, 525, 530 (arguing for presumption in favor of NAACP-type organizations as adequate representatives in class actions).

A. *Democracy in the Pursuit of Goals: Promote Participation*

This Section first considers how procedural devices might promote greater democracy in groups and then considers how ethical norms might do so.[204] The idea that procedural rules should be concerned with the relationships among persons affected by a lawsuit is not foreign; it is already a part of class action jurisprudence.[205] Rule 23 involves the court in an assessment of group relationships at the points of certification (when the court must determine whether the representative will fairly protect the interests of the group),[206] settlement (at which time the court must appraise the fairness of the proposal to all members of the group),[207] and judgment.[208] In promoting notice and an opportunity for class members to be involved in the action,[209] the rule envisions that class members dissatisfied with the proposed representative or settlement will make their voices heard and that through such participatory events, a more just groupwide solution will be achieved. What this Article has made clear is that this rule has at least three significant shortcomings. The first is temporal: The class action rule's protection of nonpresent group members kicks in only after a case has been filed and thus the rule does not speak to group dissatisfaction about filing itself. The second problem with the current rule is that the decision to invoke it, and thus to engender scrutiny of the individual's relationship with the group, is entirely left to the individual plaintiff. Finally, even where the rule is invoked and a court does act to investigate the litigant's relationship to the group, the investigation is rarely more than cursory in nature. To address *all* of these concerns, a rule would have to: (1) require that certain cases be filed in a class action-like form;[210]

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204. Jane Schacter describes a trend in judicial statutory interpretation, whereby

> the court assigns meaning to a contested statutory term by using interpretive rules that are self-consciously designed to produce "democratizing" effects—that is, institutional or social effects that correspond to a particular image of democracy. [This approach] recasts statutory interpretation as directed not only at assigning meaning in a particular case, but also at advancing a larger democratic project.

Schacter, *supra* note 172, at 595. The discussion that follows parallels the trend Schacter describes in that it assigns values to procedural and ethical approaches according to their contributions to a larger, intracommunity, democratic project.

205. This same notion also lies at the heart of the less rigorous rules of party joinder, *see* FED. R. CIV P. 19, and intervention, *see* FED. R. CIV. P. 24.

206. *See* FED. R. CIV. P. 23(a)(4).

207. *See* FED. R. CIV. P. 23(e). *See generally* MANUAL FOR COMPLEX LITIGATION, *supra* note 163, § 30.41 (describing process for court assessment of class action settlement proposals).

208. *See* FED. R. CIV. P. 23(d)(2).

209. *See* FED. R. CIV. P. 23(d).

210. "Forcing" a plaintiff into the class action form would parallel, in some respects, the ways in which the federal rules envision litigation involving unincorporated associations. *See* FED R. CIV. P. 23.2 When individuals sue, or are sued, as representatives of an unincorporated association, Rule 23.2 authorizes the court to ensure that the representatives will fairly and adequately represent the interests of the entity Thus no single member of such a group can bind the group without a court assessing her relationship to the rest of the association. Yet once it is established that the named representatives are adequate, a court need not undertake the remaining Rule 23 requirements. *See, e.g.*, Curley v. Brignoli, Curley & Roberts Assoc., 915 F.2d 81, 86 n.4 (2d Cir. 1990). *See generally* 7C WRIGHT ET AL., *supra* note 174, § 1861

(2) involve the court in ascertaining whether the filing decision itself was fair to those not involved; and (3) make such court determinations less perfunctory than they currently are.

The procedural mechanism that currently comes closest to accomplishing these tasks is the special pleading rule concerning shareholder derivative suits.[211] The shareholder derivative model embodies each of these three facets. When an individual shareholder seeks to file a case on behalf of the corporation, she must utilize the derivative form, she must communicate with the corporation prior to filing, and the court must determine whether she is an adequate class representative (or dismiss the suit). Courts have tended to undertake this analysis more closely than the standard Rule 23(a)(4) determination.[212] By analogy to the shareholder derivative suit, a "community derivative suit" could be established with its own pleading requirement. The individual or expert plaintiff seeking to represent the group would have to utilize this special pleading form;[213] she would be required to demonstrate

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(arguing that the explicit inclusion in Rule 23.2 of some aspects of Rule 23 "suggests that the other provisions in that rule . . . do not apply to actions involving an unincorporated association"). *But see* Note, *Capacity and Class Actions Under Federal Rule 23.2*, 61 B.U. L. REV. 713 (1981) (suggesting same prerequisites should apply to class actions under Rule 23.2 as under Rule 23). Thus by asking only whether the present representatives will adequately represent the association's interests, Rule 23.2 appears to assume that members of unincorporated associations inherently have interests in common that would satisfy the remaining requirements of Rule 23(a) and one of the forms of Rule 23(b). The suggestion here that litigants be forced into a class form derives from a similar intuition.

211. *See* FED. R. CIV. P. 23.1. While this may seem like an odd analogy, it should not, as a corporation merely reflects, like the unincorporated social group, a set of relationships between individuals and groups. For a history of the relationship between "corporate" litigation and social group actions, see generally YEAZELL, *supra* note 3.

212. Most courts and commentators view the "adequacy" analyses required by Rules 23(a)(4) and 23.1 as substantially similar. *See* 7C WRIGHT ET AL., *supra* note 174, § 1833 n.5. However, in a standard class action, courts tend to pursue the analysis with rigor only when the defendant (or some other person) actually challenges the adequacy of the proposed representative. *See id.* § 1765 & n.35. By contrast, in a shareholder derivative suit, the adequacy of the proposed plaintiff is, by definition, already contested by the corporation; accordingly, this analysis is generally undertaken more routinely and more thoroughly. *See, e.g.*, Mary Elizabeth Matthews, *Derivative Suits and the Similarly Situated Shareholder Requirement*, 8 DEPAUL BUS. L.J. 1, 7–9 (1995) (discussing application of both 23(a)(4) requirements and additional requirements in shareholder derivative cases).

213. Once the decision to announce herself as the group's representative is taken away from the proposed representative herself, the procedural system would have to define the set of cases that would be conceptualized as representative in nature, like the shareholder derivative action. Two approaches seem possible: one procedural, the other substantive. The procedural approach would track the language of Rule 23(b)(2). *See* FED. R. CIV. P. 23(b)(2). If a plaintiff sought a remedy, like a structural injunction, that would inevitably affect the rights of persons who were similarly treated by the defendant, the case would fall with the new procedural form. The substantive approach would identify the relevant cases by their content. The simplest set of cases to deem representative would be discrimination cases, particularly those brought under the Equal Protection Clause or statutes like Title VII. In such cases, a plaintiff is, by definition, contending that she has been treated unequally on the basis of some group-based characteristic. It is therefore likely that her action will have important consequences for identifiable, similarly situated group members, and, according to the argument forwarded here, those group members should be entitled to some involvement with the decision to file in the first place. If in particular discrimination cases, the named plaintiffs were not articulating such group-based claims, the procedural rule could simply empower the court to forgive their noninvolvement with other group members. Both the procedural and substantive approaches to capturing the "right" set of cases for the community derivative suit have problems of underinclusion and overbreadth and are therefore not perfect, but neither is the current system of unchecked filings. Even with

to the court that the case grew out of some prefiling democratic processes (e.g., dialogue, participation, voting, consultation) and hence that she could fairly represent the group's interests; and the rule could authorize the court to dismiss the action if it did not flow from a democratically produced group decision.[214] Such a rule envisions individuals and experts in relationships with communities and community groups, and posits that either the group may assert its rights collectively, or that an individual or expert may do so for the group after democratic interchange. This mechanism may discourage, but it does not undermine, the initiative value of individualism and the expertise

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its shortcomings, this proposal helps further illuminate some of the failings of the current individualist regime.

214. So codified, such a pleading requirement would be distinct from the judge-made heightened pleading requirement for civil rights cases that was rejected by the Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

The same end could be reached by simply defining cases that failed these requirements to be nonjusticiable, either because of the absence of the "real party in interest," *see* FED. R. CIV. P. 17(a), or or of an "indispensable" party, *see* FED. R. CIV. P. 19(b), or for lack of standing, *see* FRIEDENTHAL ET AL., *supra* note 103, at 327–29. *See generally* TRIBE, *supra* note 147, at 107–56 (summarizing criteria for justiciability). The standing option authorizes the judiciary to determine whether to adjudicate. *See, e.g.*, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99–100 (1979) (discussing standing as prudential principle by which judiciary seeks to "limit access to the federal courts to those litigants best suited to assert a particular claim"). As a mechanism for promoting democracy, however, it is unattractive because it empowers a judiciary that might be disposed to discourage civil rights cases to avoid adjudicating such cases.

Use of the "real party" concept would be a significant stretch since Rule 17 is generally concerned with much more formal legal relationships such as that between a guardian and ward. *See* FRIEDENTHAL ET AL., *supra* note 103, at 322–23. Moreover, the individual plaintiff is *a* real party in interest, in that she possesses some interest in the right sought to be enforced. *See* Ellis Canning Co. v. International Harvester Co., 255 P.2d 658 (Kan. 1953). The rule does not require that she be all (or most) of some larger real party. *See* FRIEDENTHAL ET AL., *supra* note 103, at 320 ("[The rule] does not speak to what parties must be joined to the action; it merely ensures that those present are proper parties."). Finally, the trend in modern procedure is toward the abolition, not expansion, of the real party concept. *See, e.g.*, June F. Entman, *More Reasons for Abolishing Federal Rule of Civil Procedure 17(a): The Problem of the Proper Plaintiff and Insurance Subrogation*, 68 N.C. L. REV. 893 (1990).

The "indispensable party" rule is also inapposite. The rule envisions joinder of parties with an interest in the outcome of a lawsuit if that interest would be impaired in their absence. *See* FED. R. CIV. P. 19(a). The "rest of the community" not interested in the individual's lawsuit may fall into this category. If those persons, assuming they were literally identifiable, refuse to join, Rule 19(a) envisions them being made involuntary plaintiffs; this, of course, provides them no platform for arguing against litigation of the case itself and literally binds them to the outcome of the case. If such persons cannot be made parties, Rule 19(b) empowers the federal judge to dismiss the action. This rarely happens. *See* FRIEDENTHAL ET AL., *supra* note 103, at 338 ("[T]he practice of dismissing actions when indispensable parties cannot be joined is at odds with the natural desire of judges to resolve disputes brought before them—especially if dismissal leaves a party without a remedy."). Rule 19(b) has long been criticized on the ground that the missing party's absence should not literally extinguish the present party's rights. *See* Geoffrey C. Hazard, Jr., *Indispensable Party: The Historic Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961).

The central conceptual problem with all of these justiciability approaches is that they each start from the assumption that the underlying right at issue is individual, rather than collective, in nature. Given that assumption, it is difficult to argue that the case is nonjusticiable so long as some individual wants to litigate it. For an interesting argument that rights such as those at issue here should be viewed as more collective in nature, see Feldman, *supra* note 147. While Feldman's argument is primarily meant to provide theoretical support for the notion of associational standing, she correspondingly argues that in cases involving collective interests, no single individual should have standing to assert such interests absent the group. *See id.* at 749 ("Because associations possess unique identities related to the protection of collective interests, and because isolated individuals are insufficiently related to such issues, courts should award and limit collective standing to associations.").

value of specialists: It permits individuals and experts to file their own cases but simply requires them to demonstrate the democratic process that has preceded the filing.[215]

While the "community derivative" idea thus has the potential to promote the types of community involvement that democracy values, it is less than perfect. The relationship between an individual and her "community" is not like that between a shareholder and a corporation.[216] There is no literal "community" with a principal place of business, executive officers, and a board of directors.[217] Further, to the extent that a procedural solution would promote the idea that communities were like corporations, it could lead to less, not more, democracy. If certain groups were identified as being those with whom one *had* to interact before filing, such groups might wield undue power. Which groups? Why those?[218] And how much power would the community have over the individual filer? How much consultation and participation would

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215. Requiring individuals to interact with affected group members prior to filing might be seen to infringe on their autonomous free expression; such an argument has strong roots in Supreme Court cases recognizing that litigation is expression. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 429 (1963) (stating that litigation is "a form of political expression"). The irony of relying on the *Button* precedent for this argument, however, is telling. The Court in *Button* actually stated:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government . . . for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

Id. at 429–30 (citations omitted). The Court expressed the belief that "the litigation [the NAACP] assists . . . makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association." *Id.* at 431. *Button* therefore acknowledges that civil rights cases are "group" litigations; that the decisions to file them are, in essence, political decisions of the group. Indeed, later in its opinion, the *Button* Court specifically criticized Virginia's law for "smothering all discussion looking to the eventual institution of litigation." *Id.* at 434. The Court declared that it could not tolerate "curtailing *group activity* leading to litigation." *Id.* at 436 (emphasis added); *see also In re* Primus, 436 U.S. 412 (1978) (affirming litigation as "a form of political expression" for ACLU). Because *Button* frames the "right to litigate" in these terms, it actually supports the argument propounded here, namely, that the filing right should be seen as less analogous to filing a standard piece of private litigation and more to the collective processes of group decisionmaking in the political arena. *Cf.* Grant, *supra* note 127 (arguing for more individualistic notion of "right to litigate").

216. *Cf.* Claus Offe, *Two Logics of Collective Action*, *in* DISORGANIZED CAPITALISM 170, 175–206 (John Keane ed., 1985) (arguing that collective action problems among workers are different than those faced by employers).

217. Of course, Rule 23.1's notion of what constitutes a corporation similarly reflects only one of many possible constructions of such an entity. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) (describing nexus of contracts theory of corporation); FOUNDATIONS OF CORPORATE LAW (Roberta Romano ed., 1993). The shareholder derivative plaintiff could, for example, be required to notify the corporation's employees, or creditors, or customers, of her proposed derivative suit.

218. Geographical boundaries of "communities" also elude easy definition: It was obvious at the outset that the Hawaii case was going to have an important effect on the lesbian/gay community throughout the United States. Should the Hawaii plaintiffs have had to demonstrate the participation of the nationwide community?

be enough?[219] Finally, this approach—like all procedural barrier approaches—threatens to undermine the pursuit of civil rights generally. While too much individualism or too much control by elitist groups may each have negative consequences, more technical requirements for the filing of civil rights cases may set an even worse precedent. In sum, although the "community derivative suit" has shortcomings in practice, its theoretical compass points in the right direction and offers an intriguing point of departure for considering procedural rules that could promote more democratic involvement.

A less ambitious rule change that might accomplish some similar positive results would require plaintiffs filing group-based cases to provide notice *prior to filing* to those who would be significantly affected by the outcome of the lawsuit. Prefiling notice would accomplish vis-à-vis the filing decision what notice generally accomplishes in class actions: It would enable dissident class members to have their views heard. Unlike the derivative model, notice places the burden on the community members to object, rather than on the litigant to seek their approval. Such a rule would force self-appointed class representatives and experts into a dialogue with other interested group members without granting objectors any veto power[220] and thus without subverting the values of individual initiative or expertise. Requiring notice to members of a social group is also not a novel idea; courts do it all the time in class actions.[221] Given these attributes of the notice model, the only significant downsides are the financial costs of notice and the possibility that this additional hurdle would curtail certain valuable filings. Such costs may, however, outweigh the social costs of rampant individualism and excessive control by elite experts.

Beyond procedural rule changes, the other means for achieving democratic values within communities is to encourage the attorneys who might file such cases to promote democracy.[222] Attorneys representing individual clients can

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219. Craig Dean claimed that he had consulted with "a number of other gay organizations before filing the suit," and posed an important question: "'Are we supposed to call every gay organization in the country?'" Kastor, *supra* note 74, at B4.

220. While Rule 23 requires notice and opportunities for class members to be heard at various points in class actions, the rule does not mandate how the court should assess intragroup disputes, even where a majority of the group favors one outcome or another. *See supra* notes 121, 163–64.

221. *See, e.g.*, Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980) (providing notice to Mexican-American community by, inter alia, publication in Spanish-speaking newspapers), Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341, 1372 (D.S.C. 1995) (providing notice of school desegregation litigation by publication and other means). *See generally* 7A WRIGHT ET AL., *supra* note 174, § 1793 (providing collection of cases involving notice to social groups).

222. The notion that attorneys for groups shoulder special obligations beyond their own individual gain parallels recommendations scholars have set forth concerning the conduct of class action lawyers outside of the civil rights context. The common complaint about such attorneys is that they have little relationship to their client community and seek only personal financial gain. *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883–89 (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*,

provide a check on the extent to which the client's interests further those of the group; attorneys working for professional civil rights groups (and the boards that monitor them) can examine the democratic bases of their own filings. The ACLU's response to the Hawaii case, though perhaps effectuated clumsily, demonstrates the approach in practice: Hunter suggested that the local lawyers hesitate and consult with community members before filing to ensure that the case would promote the community's interests. The democracy-promoting approach also finds theoretical support in at least three sets of arguments about a lawyer's professional responsibility: in some versions of "client-centered lawyering"; in interpretations of the attorney's duty to her "client" that read "client" broadly; and finally, in broadly construed notions of "competence."

In the framework suggested here, client-centered lawyers would oppose most strongly any proposal that "lawyer-experts" make goal decisions for clients, a conclusion with which I concur. But client-centered lawyering could be seen as opposed to the other conclusion of this Article: that lawyers should not blindly follow their individual client's interests when doing so would undermine the client community's democratic values. Thus the activists' objection to the Hawaii ACLU's "poll" of the lesbian/gay community is made on client-centered grounds: When one aggrieved individual articulated a harm to the ACLU, the lawyer's obligation was to serve the client's interest, not to dictate to the client that she interact with the rest of her community implicated by the prosecution of her case.[223] In this version of client-centeredness, the Hawaii ACLU's poll is perceived as disfavored client manipulation and paternalism. A more elaborate version of client-centered lawyering acknowledges this deficiency of the absolutist view[224] and encourages attorneys to seek democratic solutions to group-based problems.[225] That vision of client-centered lawyering comports with this Article's conclusion that individual attorneys can, and should, have democratizing influences on their communities. Similarly, some legal ethicists have promoted a concept of good lawyering that encourages the attorney to consider the broad consequences of her actions (to "do justice"), rather than to focus solely on promotion of her client's interests.[226] While such a norm threatens to undermine the simplicity

86 COLUM. L. REV. 669, 684–90 (1986); Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 395–96 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 41–44 (1991). Implicit, and often explicit, in this literature is the sense that these attorneys have responsibilities beyond their own financial gain.

223. *See supra* text accompanying note 70.

224. *See* Simon, *supra* note 132, *passim*.

225. *See, e.g.*, Ellmann, *supra* note 138, at 1135–70.

226. *See, e.g.*, Rhode, *supra* note 134, at 644 ("That clients may have a 'legal right' to engage in certain conduct or to invoke a particular procedure is conclusive neither of their moral right, nor of the appropriateness of counsel's aid. Lawyers cannot simply retreat to role in the face of larger normative questions."); Simon, *supra* note 132, at 1090 (encouraging lawyers to follow maxim to "do justice").

of client loyalty, it eliminates the strict "role professionalism" argument that has encouraged lawyers to ignore negative consequences flowing from their work. These visions of the breadth of a lawyer's ethical obligations seem especially applicable to the cases at issue in this Article, as each is intended by those attorneys to have an impact on broad constituencies. An attorney seeking to "do justice" for the community she purports to represent in a civil rights case would surely want to promote democratic decisionmaking processes among the affected constituents. Finally, this Article has introduced the argument that such client-centered and broadly focused ethical norms should also inform conceptions of competence. An attorney who brings a case that will bind an entire community should have some schooling in and sensitivity to that community's history, structure, and divisions. If she does not, she may lack the competence to advise her client on the "moral, economic, social, and political factors . . . relevant to the client's situation."[227] If she does, she should want to act to promote democratic participation by community members in establishing the community's goals.

B. *Expertise in the Choice of Means: Promote Consultation*

A nonindividualist model for addressing disputes among lawyers concerning the means for pursuing community objectives begins from the premise that civil rights practice is a specialty and that expertise in it—quality lawyering—should be preserved and promoted as the baseline.[228] At least

227. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1995).

228. Such an orientation has important advantages over the current system of lawyer individualism and over a model that would imagine tactical decisionmaking by strict majoritarianism. First, positing that lawyering for social groups is a specialty suggests that engaging in it by undertaking a civil rights case requires special knowledge. The individual lawyer who takes on one such case and develops her own tactics and strategies is, at least, thereby encouraged to check those ideas against the opinions of specialists and to appreciate the consequences of her individual actions on a community of strategists and other lawsuits. Second, resolution of tactical decisions by experts improves on the notion that these decisions should be made by broad groups of attorneys or lay persons; it emphasizes the particular skills and attributes that are required to assess, for example, the best test case to take to the Supreme Court. It also eschews reliance on popular methods alone: Biology may be a "hot" area of interest in sexual orientation, but it does not mean that putting a geneticist on the witness stand to demonstrate immutability is necessarily a wise approach to an equal protection claim. Third, decisionmaking by experts imagines consultation among experts, a deliberative process drawing on mutual skills and shared experiences.

One study of group litigation has contended that:

> Lawyer ties . . . lay the groundwork for lawyer dominance [of clients] . . . .
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> . . . .
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> Lack of ties among the lawyers in no way guarantees active clients, of course, but decentralized litigation may be conducive to client participation by leaving more decisions open to be shared with the clients in individual suits. The more closely that lawyers work together, the more they may be inclined to rely on each other for advice and consultation rather than on their clients.

OLSON, *supra* note 64, at 150. This view provides an important reminder of the oppressive potential of lawyer-lawyer consultations, but is not entirely convincing in its conclusions. It conflates decentralized litigation with uncoordinated litigation; litigation can be decentralized, yet the lawyers doing it can share strategies with one another. Further, if one of the purposes of lawyer meetings is to discuss client empowerment, such meetings might further rather than impede that possibility.

three sets of professional norms are implicated by this contention and require reevaluation: rules governing the scope of representation that, by distinguishing objectives from means, set forth the realm within which expertise is the appropriate norm;[229] rules governing competence that attempt to define what is meant by expertise;[230] and rules governing client loyalty that attempt to mediate between the present client's interest and other possible concerns of the attorney.[231]

As this Article argues that different models of decisionmaking should be employed to establish a community's legal goals and to determine the best ways to achieve those goals, it requires a satisfactory definition of the distinction between goals and means. Some scholars have challenged the concept of the distinction altogether[232] while others, without rejecting the distinction outright, have complained that civil rights lawyers too often dictate their clients' goals.[233] Splitting the goals and means discussions, as advocated by this Article, helps to clarify the circumstances where this criticism of civil rights litigators is valid (within the realm of goal-setting), without requiring that these litigators' expertise be ignored altogether. The employment of this expertise must instead be relegated to the realm of tactics; thus crafting a solid rule for doing so is an important endeavor.[234] Unfortunately, the current ABA Model Rule[235] falls short in ways that go directly to the heart of this Article. First, while intending to provide guidance to the attorney, the Rule shies away from authorizing an attorney to *make* tactical decisions; only in the Rule's Comment does the critical phrase appear: "In questions of means, the lawyer should assume responsibility for technical and legal tactical issues."[236] Even there, no examples are provided to give meaning to this phrase. The phrase itself should be elevated to the text of the Rule, and the Comment should provide more detailed guidance through the use of examples.[237] Second, the Rule misses the opportunity to reemphasize that once a decision

229. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995) (Scope of Representation); *id.* Rule 2.1 (Advisor) (encouraging attorney to provide advice "not only [as] to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation").

230. *See, e.g.*, *id.* Rule 1.1 (Competence).

231. *See, e.g.*, *id.* Rule 1.7 (Conflicts of Interest: General Rule).

232. *See, e.g.*, GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 79 (1992) ("The collaboration envisioned by those within the rebellious idea can relocate and blur the lines between self-help, lay lawyering, and professional lawyering.").

233. *See* OLSON, *supra* note 64, at 21–39 (discussing perils of lawyer domination of client goals in public interest cases); Bell, *supra* note 11, at 472–93.

234. As noted above, my argument does not pretend that this distinction is anything but socially constructed and political in nature. *See supra* text accompanying notes 54–58.

235. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995).

236. *Id.* cmt. 1.

237. For instance, the decision to base Supreme Court arguments in the *Shelley* case on the Thirteenth or Fourteenth Amendment is a classic tactical decision. The Rule should say so. The decision concerning whether or not the Shelleys should have filed a petition for certiorari is more complicated, and I return to it below. *See infra* text accompanying notes 246–52.

is within the realm of lawyer decisionmaking, competence is the critical criteria for the decision and thus consultation with other attorneys might be required.[238] This would give further meaning to the definition of "technical and legal tactical issues" and could be achieved simply by adding a phrase in the Rule or Comment referring back to Rule 1.1. Third, the Rule's Comment delegates to the client "concern for third persons who might be adversely affected."[239] It is not exactly clear what the Rule means by this phrase, but it undermines the distinction between objectives and means to suggest that the lawyer is absolved of all responsibility for the full consequences of her (tactical) decisions. Once such decisions are delegated to the attorney, she should shoulder responsibility for identifying and considering their consequences. These changes would not—indeed, could not—render the distinction between objectives and means clear, but they could help attorneys have a richer appreciation of the *limits* of their role and of the values that should inform that role.[240]

The lost value in the group litigation literature is the value of competence. Competence is underappreciated for two reasons: So much of the literature focuses on conflicts among group members that it has tended to emphasize client loyalty as the ultimate value; and, because the groups at issue are so underrepresented generally, any legal work on their behalf is considered a blessing and rarely, therefore, scrutinized for quality control. Model Rule 1.1 could be improved by recognition of the types of situations set forth here. A good beginning would be for Rule 1.1 to acknowledge the existence of Rule 2.1, which recognizes that a lawyer's area of expertise may exceed the law itself and that an attorney may be called upon to provide advice on "moral, economic, social and political factors, that may be relevant to the client's situation."[241] If an attorney has a responsibility to provide such advice, surely she has a concomitant responsibility to do so competently. Rule 1.1's definition of competence should crossreference Rule 2.1 and state categorically that an attorney taking on public law litigation should be prepared and competent to render the types of advice Rule 2.1 envisions. In addition to expanding the definition of competence, Rule 1.1 should work to ensure the presence of competence in pro bono matters; the Rule or Comment should explicitly embody the statement of the 1993 ABA Committee concerning pro bono work:

238. Model Rule 1.1, which defines competence, envisions that in some instances consultation or association with experts will be necessary. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995).

239. *Id.* cmt. 1.

240. Leaving regulation of the goals/means distinction to the professional ethics of these very litigators is of course decidedly unsatisfying, but so are proposals for outside regulation. One benefit of civil rights *organizations*, in this regard, is that these institutions embody other, albeit imperfect, checks on the litigators' overreaching.

241. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1995).

> [I]t should be self-evident that every lawyer is expected to provide the same quality of legal services to pro bono clients as he or she would provide to paying clients. Thus, the ethical standard set forth in Model Rule 1.1 . . . applies whether [the] client pays a fee or is represented on a pro bono basis.[242]

While the Model Rule should retain the concept (embodied in its second comment) that an attorney undertaking her first case in a novel field can provide competent representation, it should emphasize the Comment's encouragement of "association" with established experts; advising occasional public interest attorneys *and* consulting with other experts are considered primary elements of professional civil rights attorneys' jobs.[243] Finally, in calling for thoroughness and preparation, Rule 1.1's Comment states that "major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence."[244] The Comment should explicitly state that cases whose outcomes affect many third parties fall within this admonition.

The third-party effects of an individual client's case implicate the final ethical hurdle blocking fuller effectuation of an expertise model of attorney decisionmaking: client loyalty. I have attempted to demonstrate throughout this Article that "client loyalty" is often a categorically wrong response to disagreements among attorneys about litigation tactics.[245] This point could be brought home, as argued previously in this Part, if Model Rule 1.2 were to emphasize the attorney's authority to make tactical decisions separate from her client's desires and if Model Rule 1.1 were to emphasize the attorney's consultation responsibilities. The attorney seeking advice from third parties (other attorneys) in such circumstances would not be seen as violating client loyalty but, on the contrary, as ensuring that she was making a competent decision for her client. Many of the traditional "conflict" situations would be resolved through this approach. The question about whether the community

242. ABA Comm. Report Supporting Amendment to Rule 6.1, *supra* note 195, at 311.

243. *See generally* WASBY, *supra* note 9, at 252–80 (analyzing civil rights organizations' use of "cooperating attorneys"). The relationships between professional and occasional public interest attorneys are somewhat similar to the relationships between the different types of attorneys who represent plaintiffs in mass tort cases, and thus the literature about mass tort attorneys is informative in developing rules of interaction in this context. For a discussion of the relations between lawyers in tort class actions, see Resnik et al., *supra* note 12, at 300. Lawyers in such actions are either Individually-Retained Plaintiffs' Attorneys (IRPAs) or court-appointed lead lawyers, the latter jointly comprising a Plaintiffs' Steering Committee (PSC) or Plaintiffs' Management Committee (PMC). *See id.* The former are gatekeepers, with individual client relations; the latter generally fund the actions and do most of the legal work, including court appearances. *See id.* at 309–26. Professional public interest lawyers could be seen as managers, and occasional pro bono attorneys as gatekeepers, but the relationships do not truly function in this way. More often than not, the professional lawyers are both gatekeepers and funders. Moreover, the occasional attorneys tend to have less, not more, contact with client communities, notwithstanding perhaps intense contact with one individual client. The two situations do not map onto one another in any dispositive way; nevertheless, the experience of mass tort lawyer relationships is instructive.

244. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. 5 (1995).

245. *See supra* text accompanying notes 140–43.

wanted integrated or quality schools, marriage or domestic partnership, is taken out of the attorneys' realm and addressed democratically by the clients; questions about what constitutional or statutory argument to construct in a particular case, and how to do so, are decided not by reference to client loyalty but with greater emphasis on competence and expertise.

Some decisions nonetheless present hard cases. The decision to petition the Court for certiorari in *Shelley* may be paradigmatic in this respect. Vaughn was arguably caught between loyalty to his immediate client's immediate interest and loyalty to the larger community's broader, long-term interest. In Part II, I echoed the arguments of other scholars who have contended that there is no obvious reason that "client loyalty" in these circumstances should be to the Shelleys and not to the larger black community's greater interests.[246] Model Rule 1.13, which envisions an attorney representing a group rather than an individual, is helpful in this regard.[247] Though addressed primarily to counsel for corporations,[248] the Rule identifies the organization itself as the attorney's client and supports her in protecting the best interest of the organization, even if such action comes at the expense of some constituents.[249] Indeed, the Rule's Comment requires that when the interests of an individual within the group diverges from the interests of the group, the group's lawyer must cease representing the individual.[250] While that individual is to be directed to her own attorney, what the structure of this Rule makes clear is that an attorney who would represent the group cannot simultaneously be loyal to all of its constituents; if she sees herself as representing the group—if she has, for example, undertaken a test case to make law for the group—she must be prepared to sever her ties with individual constituents. Were the public interest attorney analogously conceptualized as representing the interests of the social group, Rule 1.13 would reorient her professional responsibilities away from loyalty to the interests of individual clients and towards loyalty to the interests of the group itself.[251] For many of the reasons discussed with regard to the

246. *See supra* text accompanying notes 138–39.

247. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995) (discussing organizations as clients).

248. The Rule's Comment states: "The duties defined in this Comment apply equally to unincorporated associations." *Id.* cmt. 1. Yet the Comment primarily concerns corporate situations. For a good collection of articles about recent ethical issues in corporate lawyering, see *Symposium: The Role of Counsel in Corporate Acquisitions and Takeovers: Conflicts and Complications*, 39 HASTINGS L.J. 573 (1988).

249. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

250. The Comment states that:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest he finds adverse to that of the organization of the conflict or potential conflict or interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.

Id. Rule 1.13 cmt. 7.

251. This would not necessarily mean that individuals within the group were not entitled to their own, individual, counsel. It would simply require a lawyer undertaking a group-based test case to identify the

shareholder derivative analogy,[252] this corporate-based Rule does not perfectly fit the social group representation situation. Nevertheless, it does provide a model of an attorney-client rule that is struggling with the complicated relationships between groups, constituents, and attorneys. Rule 1.7, the basic conflict of interest rule, should enumerate the group litigation situation as a defined example under "other conflict situations," and should recognize the analogy to Rule 1.13. Such an acknowledgement might help further the process of developing a richer understanding of the professional obligations of attorneys in cases that affect entire groups of people, in addition to individual, named clients.

These suggested modifications in the Model Rules concerning the scope of representation, competence, and client loyalty would loosen the individualist hold on professional ethics and enhance a vision of expertise-based professionalism. Reliance on the expertise model for strategic decisionmaking could be misread as paternalistic or elitist, and has potential to be implemented in such fashion. Expertise threatens to undermine not only the democracy of client goal-setting, but also the creativity and self-sacrifice of individual attorney efforts. Recognition of expertise is not meant to exalt all civil rights litigators, nor to disparage the abilities of litigators doing civil rights cases for the first time, nor to suggest that attorneys set community goals. The emphasis on professional expertise is ultimately meant to provide a simple check on *anyone* who would bring a lawsuit with serious, groupwide effects: She should assure herself that she has the requisite, if not complete, competence to undertake that task, that she, and her client, do speak for the group.

VI. CONCLUSION

Within social groups that are striving for their civil rights, disputes are inevitable. Community members disagree about which goals should be pursued, lawyers about the strategies that should be employed. Such disagreements can be constructively undertaken and productive for the community, or can be destructively waged and become bitterly divisive. This Article argued that more attention needs to be paid to the ways that disputes are conducted in the shadow of the law, so as to ensure, as much as possible, their productivity. To that end, this Article has developed a conceptual framework for considering how these disputes might be mediated and has evaluated the three models of this framework: individualism, democracy, and expertise. From this exploration, it is clear that each approach embodies important values, but that prevailing civil procedure and ethics doctrine rely too heavily on the individualist model alone. Procedural and ethical innovations that would make

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client as the group, not the individual.

252. *See supra* text accompanying notes 216–17.

the resolution of group member disputes more democratic and would value expertise more in the resolution of lawyer disagreements would improve on existing rules. Such changes would help promote more productive decisionmaking within social groups pursuing their civil rights. Procedural and ethical suggestions should, in the future, attend to these possibilities.

Some readers might ask why the legal system should care how social groups make decisions about litigation, why the system has any interest in such nontraditional ramifications of procedural and ethical rules. The easiest answer to that question is that the legal system already cares—a lot. When the system acknowledges that a case has groupwide effects—that is, when it is litigated as a class action—courts routinely consider whether the present litigant is an adequate representative of the group and whether settlements are fair to the absent group members. More generally, the individualist nature of the American civil justice system is not a neutral default position. It is already an expression of how the system envisions relationships among people and within groups. The innovations proposed here are not radical, but merely evolve out of an increased and self-conscious attention to the ways in which legal rules create and structure human relationships outside the adjudicatory system.