

# Chicago-Kent Law Review

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Volume 89  
Issue 2 *Symposium on Intragroup Dissent and  
Its Legal Implications*

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Article 3

April 2014

## How Lawyers Manage Intragroup Dissent

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### Recommended Citation

Scott L. Cummings, *How Lawyers Manage Intragroup Dissent*, 89 Chi.-Kent L. Rev. 547 (2014).  
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol89/iss2/3>

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## HOW LAWYERS MANAGE INTRAGROUP DISSENT

SCOTT L. CUMMINGS\*

### INTRODUCTION

The title of my talk is *How Lawyers Manage Intragroup Dissent*. Its content is focused on a recurrent and at times seemingly intractable problem facing lawyers seeking to advance social change: the problem of how to gauge and respond to dissenting views within affected communities—both about the goals of social change efforts and about the means of pursuing them. In exploring this theme, I focus on a subset of lawyers—public interest lawyers—whose engagement with intragroup dissent is a defining feature of their legal work, which ultimately is judged based on how well their advocacy advances the aims of the community members they purport to represent. Indeed, it is precisely because the communities on whose behalf public interest lawyers work are already politically marginalized that those lawyers must vigorously guard against silencing dissent within them—and thus reinforcing the very exclusion they seek to contest.

I was motivated to explore this issue with you today by the opportunity this conference afforded to consider the role of dissent against the backdrop of the increasing scholarly interest in law and social movements. Research on this topic has grown from its roots in social science—dating back over thirty years to Joel Handler’s seminal book, *Social Movements and the Legal System*<sup>1</sup>—to its current robust form, in which it has achieved

\* This keynote speech was delivered at the Chicago-Kent Law Review’s 2013 symposium on “Intragroup Dissent.” The speech is based on my writings in Scott L. Cummings, *The Accountability Problem in Public Interest Practice: Old Paradigms and New Directions*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 340 (Leslie C. Levin & Lynn Mather eds., 2012); Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 *UCLA L. REV.* 1235 (2010); and Scott L. Cummings, *Law in the Labor Movement’s Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 *CALIF. L. REV.* 1927 (2007). I was incredibly honored to speak at the symposium and deeply humbled, since it contained so many participants whose works have profoundly influenced me. I am also incredibly grateful to Holning Lau for inviting me, and to Rebecca Sundin for her extraordinary efforts in putting together such a wonderful and stimulating day.

1. JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

an eminent place as part of mainstream scholarly conversations about constitutional law, legal history, the legal profession, and other fields.<sup>2</sup>

A key insight of this research is the inevitability of dissent in efforts to change the status quo. In a prominent and aptly titled example, Tomiko Brown-Nagin's Bancroft Prize-winning book on the civil rights movement, *Courage to Dissent*,<sup>3</sup> examines the role of movement lawyers in Atlanta who, long before Derrick Bell's classic critique,<sup>4</sup> challenged the NAACP Legal Defense Fund (LDF) national school desegregation strategy by bringing omnibus civil rights cases designed to support local direct action.<sup>5</sup> Brown-Nagin's argument is that local lawyers who rejected LDF's top-down litigation style and emphasis on racial balance helped the movement, by gaining significant leverage over city politics that promoted desegregation in other social spheres and helped build the power of the black middle-class in Atlanta.<sup>6</sup> She thus draws positive lessons about dissent for lawyers, concluding that, "Movements should listen to dissenters and should be transformed by thoughtful critiques, particularly those derived from on-the-ground experiences."<sup>7</sup>

As this conclusion suggests, the concept of dissent is deeply linked to the legitimacy of lawyers' efforts to mobilize law for social change. When public interest lawyers are seen as inadequately addressing intragroup dissent, their efforts tend to be viewed—both by allies and adversaries—as legally and politically suspect. Allies sympathetic to a lawyer's cause may point to the existence of intragroup dissent to challenge and redirect movement strategy, as the Atlanta lawyers Brown-Nagin examines sought to do in their critique of LDF's school integration litigation.<sup>8</sup> Likewise, adversaries hostile to a lawyer's cause may invoke dissent as a tactic to thwart a movement challenge altogether, as happens in the context of defendants' resistance to class action certification.<sup>9</sup>

2. For recent examples of such scholarship, see, e.g., Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 302, 326-27 (Austin Sarat & Stuart A. Scheingold eds., 2006); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663 (2012).

3. TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011).

4. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

5. See generally, BROWN-NAGIN, *supra* note 3.

6. *Id.* at 431-41.

7. *Id.* at 440.

8. *Id.* at 431-41.

9. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555-57 (2011) (denying class certification in an employment discrimination lawsuit).

The challenge, as social movement history teaches, is that some dissent must be sacrificed for collective action to occur and have an impact. No communities are monolithic and those that lack power have to guard against internal fragmentation as well as external domination. In this way, how intragroup dissent is understood and managed within movements becomes an important terrain upon which the struggle for social change plays out and is ultimately judged.

It is onto that terrain that my talk tentatively steps by asking how this new research—and the practice upon which it is based—should inform our view of the contemporary public interest lawyer’s role in social movements. Generally, scholars have viewed lawyers as special threats to movements precisely because of the power they can wield to marginalize or even ignore dissent in the pursuit of goals that they define.<sup>10</sup> This is a real and significant risk. But there is another—often less remarked upon—risk, which is that lawyering for movements is itself marginalized in the name of romanticized democratic grassroots alternatives that may not in fact exist. This risk is a significant one in political contexts in which movement adversaries turn consistently and effectively to law and courts to pursue their ends. If movements for the less powerful are reluctant to turn to law on the grounds that lawyers may divert movement goals or produce unintended negative consequences, they may widen the space in which their adversaries can set the agenda. For this reason, critics of lawyers ought to be confident that their concerns are warranted.

My talk proceeds against this backdrop. It begins by describing how a particular version of public interest lawyering—that associated with the “top-down” impact litigation campaign—has come to be viewed as a threat to dissent within social movements, and it then turns to explore how an alternative version—one which resonates with “bottom-up” visions of social change—has been proposed as a potential alternative more consistent with democratic norms. I suggest that commentary on both versions simplifies what is in practice a complex set of movement dynamics in which lawyers are continuously negotiating their relationship to dissent—sometimes productively, sometimes not. My point is that how, and how well, public interest lawyers manage dissent may be less a function of their relative location within movements—at the top or bottom—and more one of how thickly the field is developed with other types of movement actors and how lawyers choose to engage with them. Drawing upon cases from the California LGBT and labor movements, I suggest that there are contexts in

10. For a classic account of such dynamics, see generally Bell, *supra* note 4 (discussing lawyers at the NAACP-LDF).

which top-down lawyering may be quite responsive to dissent and may help to prevent dissent from undermining movement goals. Conversely, I suggest that lawyer deference to community organizing at the grassroots level may reinforce power dynamics embedded in the underlying community politics that may risk marginalizing dissenting views. In each case, my goal is to explore the complexity and challenge of managing dissent in social movements, and also, hopefully, to illuminate new paths forward.

### I. THE DILEMMA OF DOUBLE REPRESENTATION

Let me begin by exploring in a bit more depth the relation of intragroup dissent to public interest lawyering. For public interest lawyers, the challenge of managing intragroup dissent stems from the dilemma of double representation, or what David Luban famously called the “double agent problem.”<sup>11</sup> For lawyers generally, the idea of “representation” refers to acting on behalf of one’s client, and is thus associated with strong duties of loyalty and competence that run exclusively to the client.

Public interest law both depends on and challenges this traditional notion of representation. Public interest lawyers do represent clients in the traditional sense. But they also do more than that. In the classic formulation by Gordon Harrison and Sanford Jaffe, the program officers at the Ford Foundation who in the 1970s helped launch the field, public interest law involves the “representation of the underrepresented in American society.”<sup>12</sup> This definition has always had two dimensions. One is market-based and consistent with traditional notions of client loyalty; as the Council for Public Interest Law in its famous 1976 report put it, public interest law is supposed to provide lawyers to those without access to them, “in recognition that the ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests.”<sup>13</sup> Once “those without access” to lawyers get them, traditional ideas of loyalty attach, and through this redistribution of legal services, the adversarial system is presumed to function more effectively and fairly.

Yet representation through public interest law has also been associated with legal efforts that go beyond merely providing access to lawyers. The use of test case litigation to challenge and ultimately change unjust laws—

11. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 319 (1988).

12. Gordon Harrison & Sanford M. Jaffe, *Public Interest Law Firms: New Voices for New Constituencies*, 58 A.B.A. J. 459, 459 (1972).

13. COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* 6-7 (1976).

pioneered by LDF in *Brown v. Board of Education*<sup>14</sup>—rests upon an idea of representation that relates directly to the quality and fairness of political decision-making. For groups that lack meaningful political power in the policy-making arena—because of small numbers, systemic oppression, or the absence of mechanisms for collective action—public interest law may serve as a substitute for conventional politics. This substitute leverages the courts as a counter-majoritarian institution and asserts individual rights as a bulwark against the “tyranny of the majority.”<sup>15</sup> The goal of deploying law in this way is to enhance pluralism, correcting the bias of the democratic system.<sup>16</sup> This element of public interest law resonates with the famous footnote four of *U.S. v. Carolene Products*, which justified searching judicial review to counteract “prejudice against discrete and insular minorities.”<sup>17</sup>

Seeking to advance the interests of “discrete and insular minorities,”<sup>18</sup> however, also magnifies the dilemma of double representation that has confronted public interest lawyers throughout the movement’s history. The dilemma is that in attempting to represent the interests of both client and community, the lawyer will do neither well. Focusing on the community’s interests may compromise client loyalty; remaining loyal to clients may disserve the broader community. That is the tension captured in Austin Sarat and Stuart Scheingold’s concept of “cause lawyers”—those committed not just to serving clients, but also to advancing a moral, political, or social cause that transcends their interests.<sup>19</sup> It is, of course, possible that a client’s interests perfectly match those of the community she represents; but in the real world, there are often, even inevitably, differences.

Critics of top-down lawyering focus squarely on these differences. The political critique of public interest lawyers is that they anoint themselves leaders and advance a self-defined policy agenda, contrary to the rules of democratic politics. There are other critiques—for example—focused on how litigation, in particular, forces lawyers to minimize dissent in order to fit complex group experiences into singular legal arguments cognizable by courts. Summarizing this view, Orly Lobel writes that

14. 347 U.S. 483 (1954).

15. See generally THE FEDERALIST NO. 10 (James Madison) (discussing the tyranny of the majority).

16. For an elaboration on this point, see generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). See also Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 MINN. L. REV. 897, 930-39 (2010) (elaborating on Ely’s theory of rights protections).

17. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

18. *Id.*

19. STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 9 (2004).

“[g]roups are faced with the dilemma of defining mutual goals and assuming a ‘coherentist’ viewpoint in a reality of multiple experiences and voices, which inevitably leads to intragroup exclusion.”<sup>20</sup>

The turn to bottom-up approaches to lawyering—in which lawyers help to form or represent preexisting grassroots groups seeking to build local power—tend to be presented as alternatives more likely to represent the full range of group interests—and thus less likely to stifle dissent. As the quote from Brown-Nagin earlier suggests, anchoring legal work in strong grassroots organizations may counteract the tendency of top-down lawyers to define their own class in order to advance an abstract principle divorced from the lived reality of affected people—the counterweight to the view often ascribed to former ACLU director Melvin Wulf who was once quoted as saying: “Our real client is the Bill of Rights.”<sup>21</sup> Grassroots lawyers might respond that their real client is building community power.

How should we assess these claims? As Bill Rubenstein has usefully pointed out, dissent within movements occurs at two levels.<sup>22</sup> First, there are fundamental normative conflicts about movement goals. Should, for instance, the LGBT rights movement pursue marriage or non-marital recognition? Should African Americans in the Jim Crow South pursue desegregated schools or equal funding for segregated schools? Second, once the movement goal has been identified, there is disagreement over the best *means* to achieve it. These disagreements may be about threshold choices, such as whether to pursue change through legal or political channels. This type of disagreement may be informed by predictions about the likelihood of backlash. Indeed, a key point of historical debate about the wisdom of *Roe v. Wade*<sup>23</sup> centers on whether going to the Supreme Court undermined what would have been potentially more productive state-level political efforts to expand access to abortion.<sup>24</sup>

Even if law is chosen as a preferred strategy to pursue movement goals because politics are blocked, there may be disagreements over case selection and strategy. Thurgood Marshall was reportedly furious when George Vaughn, a small-time St. Louis lawyer who Marshall viewed as an inferior talent with a problematic case, beat the NAACP LDF to the punch

20. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 951 (2007).

21. Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1092 (1970) (quoting Melvin Wulf).

22. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1633 (1997).

23. 410 U.S. 113 (1973).

24. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 173-79 (2d ed. 2008).



by filing the suit that led to the Supreme Court decision in *Shelley v. Kraemer*.<sup>25</sup> Finally, even if the so-called “right case” is pursued, disagreements may emerge over how to resolve it. As Deborah Rhode notes, classes may have consistent views about the wrongs suffered at the outset of a case, but fragment when hard choices have to be made about how to best remedy those wrongs.<sup>26</sup> The classic articulation of the view was made by Derrick Bell in his famous broadside against NAACP LDF lawyers litigating second-wave desegregation efforts, mostly outside of the deep South, which he charged were guided by the lawyers’ unwavering commitment to integration—read as racial balance—despite a “shift of black parental priorities” toward promoting educational improvement.<sup>27</sup> Martha Davis noted a similar problem in her account of the welfare rights movement, in which she quotes Lee Albert, who took over the Center on Social Welfare Policy and Law from founder Ed Sparer in 1967.<sup>28</sup> Albert’s view was this: “I believed in using lawyer’s expertise to provide a leadership role in the movement of cases through higher courts.”<sup>29</sup>

## II. MANAGING DISSENT FROM THE TOP-DOWN AND BOTTOM-UP

As this suggests, the major criticisms of top-down lawyering are directly connected to fundamental concerns about intragroup dissent, which may be threatened by public interest lawyers filing and pursuing cases that short-circuit debate over movement goals and contravene or misguide movement strategy. There is strong, though not uniform, evidence that some lawyers during the civil rights period—buoyed by the heady example of *Brown*, Ford Foundation funding, and receptive signals from the Warren Court—became entranced by what Stuart Scheingold famously called the “myth of rights” and over-invested in court strategies that inevitably disappointed.<sup>30</sup> Yet there is also evidence that the current generation of public interest lawyers have, at least to some degree, learned from past mistakes. Recent studies of public interest lawyers—even those at nationally prominent impact organizations—suggest that they litigate less frequently than

25. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that racially restrictive covenants were unconstitutional).

26. Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186-91 (1982) (providing a “taxonomy of conflicts” that arise within classes).

27. See Bell, *supra* note 4, at 514-16.

28. MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* 74 (1993).

29. *Id.* (quoting Lee Albert).

30. See Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* 13-79 (2d ed., Univ. of Mich. Press 2004) (1974).



their counterparts did thirty years ago, with one survey finding that lawyers from prominent organizations generally believe that it is “impossible to ‘create policy,’ ‘change attitudes,’ or ‘build a movement’ solely through litigation.”<sup>31</sup> How do these lawyers manage dissent within complex contemporary social change movements?

I want to respond to this question by looking carefully at two recent nationally prominent legal campaigns—one from the top-down and one from the bottom-up.

### *A. Law Reform from the Top-Down: Marriage Equality*

The top-down case comes from the movement for same-sex marriage in California—and draws on research I did with Doug NeJaime at UC Irvine.<sup>32</sup> You are all no doubt familiar with the recent decision in *Hollingsworth v. Perry*, in which the Supreme Court rejected an appeal by marriage opponents of a trial court decision, affirmed by the Ninth Circuit, striking down the California initiative banning same-sex marriage—known as Proposition 8—on 14th Amendment grounds.<sup>33</sup> The effect of that decision has been to permit same-sex marriages in California and has been rightly praised for doing so. Some of you may be less aware of the litigation dynamics that produced the case, and I want to recount some of them here, precisely because they provide a fascinating window into movement lawyers’ response to dissent over the pursuit of marriage as an end goal and the use of litigation to get there.

Much like the paradigmatic civil rights legal campaign, the California marriage equality case was characterized by a stable team of movement lawyers involved in the long-term planning and execution of strategy. These lawyers were affiliated with the key LGBT legal organizations—Lambda Legal, the National Center for Lesbian Rights, and the ACLU’s Lesbian and Gay Rights Project—and combined elite academic credentials with deep experience in the LGBT rights movement. Also like its civil rights counterpart, the marriage campaign was marked by deep divisions over the ultimate policy objective and how best to achieve it; as well as vigorous contests over appropriate strategy and, in particular, the question of whether and when to file a lawsuit challenging the denial of marriage

31. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2043 (2008).

32. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010).

33. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

rights. Yet how movement lawyers managed these challenges looked a lot different.

First, the debate over whether to pursue marriage as a movement goal was dynamic; movement lawyers did not assert marriage as a goal and then mobilize in its pursuit. Rather, the increasing salience of marriage grew out of complex intra-movement processes and was also fueled by strenuous counter-movement opposition.

From the beginning, the question of who got to decide whether marriage should be the central movement goal was deeply contested—and, of course, still is. In a well-known exchange in the late 1980s, Lambda Legal's executive director, Tom Stoddard, and legal director, Paula Ettelbrick, debated the merits of the marriage question in a series of articles in a prominent LGBT publication.<sup>34</sup>

The debate around the first domestic partnership legislation in California in the late 1990s—a registry bill known as AB 26—reflected the two poles of this disagreement.<sup>35</sup> One side viewed domestic partnership as a way to move the legal status of same-sex couples incrementally closer to marriage, eventually setting the stage for marriage equality. The second, expressed by some lawyers within Lambda and the ACLU, viewed domestic partnership as a true alternative to marriage. In their view, the goal was “to have a world in which marriage would be open to everyone, and something that provided a less highly defined but still significant safety net—like domestic partnership—would also be available to everyone.”<sup>36</sup>

This view, however, gradually lost sway as the focus on marriage as the ultimate goal became ascendant within the LGBT rights community. Yet one reason for this was the vigor with which opponents of marriage equality pursued their agenda—which had the effect of heightening the political significance of marriage within movement circles and drawing more resources to its defense. In 2000, marriage equality opponents succeeded in the passage of a statewide law prohibiting California from recognizing marriage by same-sex couples. This provoked LGBT community dissatisfaction with the absence of a strong pro-marriage political group and thus sparked the development of Equality California as the public edu-

34. See Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9, reprinted in LESBIANS, GAY MEN, AND THE LAW 398-401 (William B. Rubenstein ed., 1993); Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 14, reprinted in LESBIANS, GAY MEN, AND THE LAW 401-05 (William B. Rubenstein ed., 1993).

35. See Act of Oct. 2, 1999, ch. 588, 1999 Cal. Legis. Serv. 3372 (West) (codified as amended at CAL. FAM. CODE §§ 297-299.6 (West 2004)).

36. See Cummings & NeJaime, *supra* note 32, at 1258 (quoting Matt Coles, Director, ACLU LGBT Rights Project).

cation and legislative advocacy arm of the marriage equality movement. The emergence of a powerful pro-marriage political organization began to focus the movement's agenda more directly on marriage equality as a principal objective. Toward this end, Equality California spearheaded the drive for comprehensive domestic partner benefits—not simply as a goal in its own right but as a “stepping stone” for moving incrementally closer to marriage.

Over time, calls for marriage became more univocal, but this occurred against the backdrop of complex political dynamics. Within movement circles, a key development was the success of marriage proponents in pushing their agenda in the face of broader disagreement about alternative family structures. In the view of one lawyer from the ACLU, while the “leadership was divided” about whether to pursue marriage to the exclusion of other statuses, “there was a deeply motivated minority who wanted marriage, and so their view became the more important view.”<sup>37</sup> This view gained strength as philanthropic foundations began directing increasing resources for marriage-related advocacy and there was a broad sense that the majority of gay and lesbian couples wanted it. In California, a key moment came with the passage of a comprehensive domestic partnership law in 2003, which incorporated legislative findings designed to “set up suspect class arguments” in an eventual marriage case.<sup>38</sup> Domestic partnership had, in this sense, become a stepping-stone. Yet for those who were uneasy with giving priority to marriage, the merger of domestic partnership and marriage was less a strategic innovation than a cause for concern. From this point of view, domestic partnership “was hijacked by marriage folks.”<sup>39</sup> Even so, the point is that the focus on the right to marry for same-sex couples was simply not imposed by lawyers from above, but rather evolved from within the movement in a complex and dynamic way.

Control of the tactical agenda was similarly contested throughout the marriage equality movement—but in ways that were the reverse of the classic test-case paradigm and ultimately showed the limits of movement lawyer control. Unlike the LDF lawyers in *Brown*, LGBT rights lawyers did not drive litigation efforts around same-sex marriage—and, in fact, actively sought to avoid litigation; however, once litigation was commenced, they became involved out of necessity and deployed a range of tools to shape the results.

37. *Id.* at 1306 (quoting Matt Coles, Director, ACLU LGBT Rights Project).

38. *Id.* (quoting Geoff Kors, Executive Director, Equality California).

39. *Id.* (quoting Matt Coles, Director, ACLU LGBT Rights Project).

After the US Supreme Court's decision in *Bowers v. Hardwick* upholding state sodomy laws,<sup>40</sup> movement lawyers reached a consensus in the late 1990s that the marriage campaign had to proceed state by state. They concluded, in particular, that "California would not be the place" where marriage litigation was launched.<sup>41</sup> By far the most important factor militating against litigation was the ease with which California's constitution could be amended to erase any gain won through the courts. The key question, according to one Lambda lawyer, was this: "If we were to win in the [California] supreme court, what would we need to do to hold on to it?"<sup>42</sup> The answer was clear: Marriage equality supporters would have to be able to mobilize enough voters to thwart the initiative to bar same-sex couples from marriage that would surely come. This, they decided, they could not yet do.

Early on, the movement lawyers were relatively successful in dissuading other lawyers from litigating what they viewed as ill-advised marriage cases. As the co-director of the ACLU LGBT Project, put it, "[We] spent a lot of time talking people down from that particular ledge."<sup>43</sup> Movement lawyers did not simply assert, but rather they persuaded with argument and evidence. Indeed, they could not simply assert, since—as the case of George Vaughn and *Shelly v. Kraemer* forty years earlier revealed—the openness of the legal system to challengers meant that remonstrance was the only way to stop ill-advised lawsuits from being filed.

In general, movement lawyers succeeded in talking down others in the LGBT rights field from filing suits. In the face of interest among some junior lawyers in filing a federal challenge in California, movement lawyers deftly convened a 2003 meeting at the UCLA School of Law to debate the merits of an affirmative marriage challenge. The meeting was attended by all of the major LGBT rights lawyers and leading legal academics whose work touched on LGBT themes. Lambda's legal director circulated a persuasive memo on the ballot initiative process in California, which warned that "failure to consider [whether an anti-marriage initiative could be defeated at the polls] could make affirmative marriage litigation not only futile, but . . . set back future attempts to obtain both judicial and legislative reform to the marriage laws."<sup>44</sup> Marriage litigation was again deferred. As

40. 478 U.S. 186, 196 (1986).

41. Cummings & NeJaime, *supra* note 32, at 1255 (quoting Jennifer Pizer, Director, Marriage Project, Lambda Legal).

42. *Id.*

43. *Id.* at 1298 (quoting James Esseks, Co-Director, ACLU LGBT Rights Project).

44. Memorandum on Amendment of the California Constitution from Jon W. Davidson, Legal

another Lambda lawyer put it: “Smart people had thought about it. We had a plan.”<sup>45</sup>

Yet ultimately, movement lawyers could not implement that plan in the face of dissenters outside of movement leadership. In early 2004, newly elected San Francisco Mayor Gavin Newsom decided to start issuing marriage licenses to same-sex couples—dismayed by President George Bush’s State of the Union speech vowing to “protect” marriage from “activist judges” and emboldened by the Massachusetts Supreme Judicial Court’s decision in *Goodridge* affirming the right of same-sex couples to marry.<sup>46</sup> Despite warnings from movement lawyers, who “initially tried to talk [him] out of it,” Newsom proceeded with his plan, which was immediately challenged in court by Christian Right legal groups.<sup>47</sup> For the lawyers who had labored so carefully to control the timing and nature of any marriage challenge, the Newsom decision immediately transformed the political landscape. Overnight, as Lambda’s Jenny Pizer recalled, the question for the lawyers became: “What part of our strategy can we salvage?”<sup>48</sup>

Mayor Newsom’s decision to issue marriage licenses provoked legal challenges that ultimately led to a favorable California Supreme Court decision—which, as movement lawyers had predicted, was swiftly reversed by Proposition 8, which amended the California Constitution to prohibit same-sex marriage.

After a state suit to challenge Proposition 8 failed, a federal lawsuit was announced—not by movement lawyers, but by legal elites and ideological opposites: Ted Olson, who represented George W. Bush in the 2000 recount and then served as his solicitor general, and David Boies, a prominent trial lawyer who represented Al Gore in the 2000 election recount. The case was orchestrated by Los Angeles political strategist Chad Griffin, who had worked on Bill Clinton’s 1992 presidential campaign and then ran a foundation for Rob Reiner.<sup>49</sup> A mutual friend put Olson in touch with Griffin, who selected the plaintiffs and set up the American Foundation for Equal Rights to fund the litigation. Olson’s firm, Gibson Dunn & Crutcher, agreed to take the case on a hybrid-fee arrangement in which it would do-

Counsel, Lambda Legal, for California Marriage Litigation Roundtable (Dec. 16, 2002) (on file with author).

45. Cummings & NeJaime, *supra* note 32, at 1271 (quoting Jennifer Pizer, Director, Marriage Project, Lambda Legal).

46. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

47. Cummings & NeJaime, *supra* note 32, at 1277 (quoting Shannon Minter, Legal Director, National Center for Lesbian Rights).

48. *Id.* at 1281 (quoting Jennifer Pizer, Director, Marriage Project, Lambda Legal).

49. See Margaret Talbot, *A Risky Proposal*, NEW YORKER (Jan. 18, 2010), [http://www.newyorker.com/reporting/2010/01/18/100118fa\\_fact\\_talbot](http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot).

nate the first \$100,000 worth of services and then collect “flat fees for the various phases,” ultimately amounting to millions of dollars.<sup>50</sup> Olson then brought in Boies.

Movement lawyers tried to manage this dramatic display of dissent. LGBT rights lawyers issued a joint statement called “Why the Ballot Box and Not the Courts Should Be the Next Step on Marriage in California,” arguing that “we need to go back to the voters.”<sup>51</sup> This did not deter Olson and Boies. So, in May 2009, Lambda Legal and ACLU lawyers met to dissuade Olson and his colleagues from filing a federal challenge—but to no avail. Olson decided to proceed with the lawsuit, then titled *Perry v. Schwarzenegger*, and movement lawyers were confronted with a stark decision about how to respond to the federal suit they had fought for so long to prevent.<sup>52</sup>

Their initial strategy was to cooperate with Olson and Boies, but not to intervene or file a parallel suit. They asked themselves: “Would our participation make a difference?”<sup>53</sup> Based on their assessment of the risks of the lawsuit, coupled with their respect for the litigation skills of Olson and Boies, they determined that the answer was no. Instead, they decided to play an amicus role. This posture changed when district court judge Vaughn Walker called for evidence that it seemed that Olson and Boies were not prepared to offer, yet the district court ultimately rejected the movement lawyers’ motion to intervene, though it permitted intervention by a close ally, the City Attorney of San Francisco (since the city had an interest in legal enforcement).<sup>54</sup> The movement lawyers thus worked closely with the city to build the evidentiary case for discrimination at the trial court level. And in their amicus capacity, the movement lawyers in their Perry amicus brief sought to emphasize “the singular nature of the case

50. Chuleenan Svetvilas, *Challenging Prop 8: The Hidden Story*, CAL. LAW. Jan. 2010, available at <http://www.callawyer.com/Clstory.cfm?eid=906575>.

51. ACLU ET AL., WHY THE BALLOT BOX AND NOT THE COURTS SHOULD BE THE NEXT STEP ON MARRIAGE IN CALIFORNIA (2009), available at [http://www.aclu.org/pdfs/lgbt/ballot\\_box\\_20090527.pdf](http://www.aclu.org/pdfs/lgbt/ballot_box_20090527.pdf).

52. *Perry v. Schwarzenegger* ultimately became known as *Hollingsworth v. Perry*. 133 S. Ct. 2652 (2013).

53. Cummings & NeJaime, *supra* note 32, at 1300 (quoting Jennifer Pizer, Director, Marriage Project, Lambda Legal).

54. See Notice of Motion and Motion to Intervene as Party Plaintiffs; Memorandum of Points and Authorities at 1, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. July 8, 2009); Bob Egelko, *Judge Sets January Trial for Prop. 8 Lawsuit*, S.F. CHRON. (Aug. 20, 2009), <http://www.sfgate.com/news/article/Judge-sets-January-trial-for-Prop-8-lawsuit-3220955.php>.

presented by Proposition 8, and the California-focused analysis that accordingly is warranted.”<sup>55</sup>

By asking the court to rule in favor of the plaintiffs on narrow state-specific grounds, the lawyers sought to frame the issues in a way that had the greatest chance of being upheld by the U.S. Supreme Court on review. Their strategy seemed to work: After trial, Judge Walker struck down Proposition 8 on due process and equal protection grounds in an opinion that emphasized the unique nature of the California case.<sup>56</sup> The Ninth Circuit, in affirming, emphasized the specific context of California, where Proposition 8 had withdrawn marital recognition after it had already provided all of the rights and privileges of marriage through domestic partnership (and then through a state Supreme Court ruling)—a move that could only be explained, in the court’s view, by animus.<sup>57</sup> The U.S. Supreme Court ruled even more narrowly, rejecting marriage opponents’ appeal on standing grounds, but effectively permitting same-sex marriage in California under the “one-state-solution”—and thus achieving the hard-fought movement goal.<sup>58</sup>

In the end, this case can be viewed as an illustration of the constant and often productive role dissent can play in a top-down legal campaign to establish rights in the contemporary political environment. Instead of muscling a case through courts over dissent, movement lawyers in the California same-sex marriage campaign muscled through important non-marital recognition legislation in collaboration with political allies, and helped to reshape a legal challenge they did not think wise into a movement victory—partial as it may be. Battles with movement allies and opponents limited the LGBT rights lawyers’ ability to set the agenda by forcing them to defend the rights of same-sex couples against legal attack. In this way, movement lawyers were enlisted in legal fights not of their choosing. Negotiations with outside lawyers to stop (or reshape) rival litigation efforts forced them to continuously reassess their no-litigation position and ask themselves whether the time was finally ripe for a marriage challenge. These forces contributed to a decision-making context in which the lawyers were constantly pushed to be accountable to the broader LGBT community—which of course throughout remained divided.

55. Brief of *Amici Curiae* American Civil Liberties Union, Lambda Legal Defense and Education Fund, Inc., and National Center for Lesbian Rights at 1, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. June 25, 2009).

56. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

57. *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012).

58. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).



*B. Law Reform from the Bottom-Up: The Anti-Big-Box Campaign*

What I have suggested so far, then, is that top-down public interest lawyering may sometimes productively engage intragroup dissent and ultimately produce outcomes that are informed by vigorous intra-movement debate over means and ends. What about bottom-up lawyering, which is often suggested as more accountable to broad community interests?

To address this question, I again look close to home to the emergence of the so-called “accountable development” movement in Los Angeles, in which community-labor coalitions have sought to change city redevelopment practices through grassroots campaigns. These campaigns are aimed at increasing community participation in the planning process and forcing local developers and governmental officials to commit to redevelopment projects that are responsive to the needs of low-income residents. In these campaigns, as Jennifer Gordon has aptly noted, “the lawyer is not the protagonist.”<sup>59</sup> Instead, the lawyer is enlisted to represent a coalition of organizations in situations in which grassroots organizing and community-building have already occurred and objectives have been defined. How do these kinds of projects engage intragroup dissent?

To explore this issue, I want to set a different sort of stage, drawing upon research for a book I am doing on the role of lawyers in the L.A. labor movement, part of which focuses on the campaign to block Walmart from opening a Supercenter in Inglewood, California—a separately incorporated, and historically middle class African American city, in Los Angeles county. That campaign was developed and led by the Los Angeles Alliance for a New Economy (also known as LAANE), a community organization formed in 1993 by the Hotel Employees and Restaurant Union Local 11 to move beyond conventional union organizing to more effectively address the growth of low-wage work in LA.<sup>60</sup> The group, which was financially supported by labor unions and philanthropic sources, scored its first major success spearheading the enactment of the Los Angeles living wage law in 1997.<sup>61</sup> It was directed by a public interest lawyer with substantial advocacy and policy experience, and staffed by researchers and organizers who developed what they called “comprehensive campaigns”—which combined organizing, policy advocacy, research, communications,

59. Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133 (2007).

60. For more information on LAANE, see my previous writing in Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927, 1945-51 (2007).

61. See L.A. ADMIN. CODE art. 11 (2007).

fundraising, and legal advocacy—to advance local policy reforms to improve conditions in geographically stable low-wage sectors, such as the hospitality, transportation, and grocery industries.

Beginning in 2003, LAANE collaborated with the United Food and Commercial Workers Union (UFCW) Local 770 to stop the development of what would have been the first Walmart Supercenter in metropolitan Los Angeles.<sup>62</sup> This “site fight” campaign was advanced by the Coalition for a Better Inglewood, an alliance of groups organized by LAANE (which played the key leadership role in the coalition) that included the UFCW and ACORN, in addition to several other community-based and progressive faith-based groups.<sup>63</sup> The campaign was framed by the threat that Walmart’s Supercenter format—which housed a nonunionized grocery department—posed to the unionized grocery sector in Southern California, which Walmart was targeting for expansion. Inglewood was the line in the sand drawn by the UFCW and its allies, which believed that Walmart’s entry into the Los Angeles area would weaken union bargaining power in negotiating with local grocery chains (that could invoke Supercenter competition as a reason to cut wages and benefits). To defend Inglewood against Walmart’s entry, the coalition deployed a strategy that combined grassroots organizing and litigation to mobilize Inglewood voters to defeat a Walmart-sponsored ballot initiative, which was called “Measure 04-A,”<sup>64</sup> which would have circumvented the normal environmental and land use review process to automatically authorize the proposed Supercenter—taking the decision away from a city council that was in fact hostile to the development.<sup>65</sup>

I want to focus on the lawyering role, which was to advance objectives clearly set by the coalition: to thwart the initiative and block the Walmart store. To do so, the UFCW and LAANE jointly retained an environmental and land use lawyer, whose practice background was deemed critical to challenging an initiative that sought to circumvent conventional environmental and land use processes. This lawyer ran a small private public interest law firm that championed progressive causes, and in this case formally represented both LAANE and the coalition, although client communications were generally with LAANE representatives, and LAANE paid for the legal work on a reduced-fee basis. The coalition also assembled a larger

62. See Cummings, *supra* note 60, at 1951.

63. See TRACY GRAY-BARKAN, *WAL-MART AND BEYOND: THE BATTLE FOR GOOD JOBS AND STRONG COMMUNITIES IN URBAN AMERICA* vii (2007).

64. See *Initiative Measure to Be Submitted to the Voters*, Proposed Inglewood, Cal., Initiative Measure 04-A, available at <http://www.cityofinglewood.org/pdfs/Home%20Page/doc.pdf>.

65. For more information on this mobilization, see Cummings, *supra* note 60, at 1951-78.

team of lawyers to consult on the case. This team consisted of a well-known labor lawyer and a partner in a small commercial litigation firm, who was a land use specialist and joined the Inglewood team as pro bono counsel to LAANE. It also included Dean Erwin Chemerinsky, who is now dean of the law school at UC Irvine.<sup>66</sup>

A key question faced by the legal team at the outset was whether to file a pre-election challenge to block the initiative or to wait until after the election to sue in the event that Measure 04-A passed. Though the lawyers were confident about winning a post-election challenge, they were “less sanguine about the prospects of prevailing on pre-election review, given the strong judicial bias against preempting the electoral process absent a clear showing of an initiative’s invalidity.”<sup>67</sup> Nonetheless, the legal team agreed to pursue a pre-election challenge to block the initiative based on two considerations. First, the team, in consultation with LAANE organizers, agreed that they should take advantage of the outside chance to succeed on the merits to halt the initiative. In fact, LAANE was concerned about its ability to win the ballot initiative outright and thus viewed litigation as perhaps its best chance of gaining victory in Inglewood. Second, LAANE believed that even if the pre-election lawsuit proved unsuccessful, it would still put Walmart on notice that, if it won the ballot initiative, it would face a strong legal challenge that would at the very least tie up the plan in court. In addition, even if the lawsuit did not stop the ballot initiative, the coalition believed that the publicity it created would amplify its central argument: that Walmart was attempting to place itself “above the law.”

The court, in what came as no surprise, rejected the pre-election challenge, holding that “the petitioners had not made a ‘clear/compelling showing of invalidity’ that would warrant interfering with ‘the people’s constitutional right of initiative.’”<sup>68</sup> The legal team then turned to prepare for a post-election lawsuit to invalidate Measure 04-A if it passed. In the end, however, the success of the grassroots campaign rendered a post-election lawsuit moot as Inglewood voters sent Measure 04-A to defeat by a decisive margin.<sup>69</sup> It was Walmart’s first ballot-box defeat and an embarrassing setback in the company’s Southern California expansion plans,

66. For more information on this litigation team, see *id.* at 1964-67.

67. *Id.* at 1967. The views of LAANE and their lawyers, which I discuss on this page and the following few pages, were expressed to me through a series of interviews. I documented these interviews in my previous article. See *id.* at 1951-78.

68. *Id.* at 1968-69 (quoting Tentative Decision, *Coalition for a Better Inglewood v. City of Inglewood*, No. BS087433 (Cal. Super. Ct. Feb. 27, 2004)).

69. See Sara Lin & Monte Morin, *Voters in Inglewood Turn Away Wal-Mart*, L.A. TIMES (Apr. 7, 2004), <http://articles.latimes.com/2004/apr/07/local/me-walmart7>.

particularly in light of the fact that Walmart had spent over \$1 million to secure the initiative's passage.

The momentum from the campaign carried over to the enactment of innovative citywide Superstore Ordinances—first in Los Angeles, then in Inglewood—that made any future effort by Walmart to open a Supercenter more difficult.<sup>70</sup> The labor lawyer working with UFCW and LAANE on the Inglewood challenge drafted this law. Despite early hostility, Walmart eventually accepted the ordinance once it became clear that it had the overwhelming support of the city council. In August 2004, after roughly three months of negotiations, Los Angeles passed the nation's first Superstores Ordinance, which requires an economic impact analysis demonstrating the absence of adverse economic impacts prior to big-box approval.<sup>71</sup> A similar ordinance, also drafted by LAANE's lawyer, was enacted in Inglewood two years later.<sup>72</sup>

With that context, let me focus on the issue of intragroup dissent with the coalition and how it was managed—or not—by the lawyers involved. In this bottom-up context, key features of the campaign were: (1) the presence of organizationally complex clients, allied in a coalition, with relatively stronger and weaker members; (2) the assembly of legal teams based on expertise, but not (necessarily) long-term commitment to an overarching (in this case, anti-Walmart) cause; and (3) the clients' formulation and execution of a discrete policy objective targeted at the local policy arena. As the case study suggests, this structure mitigates the problem of lawyer domination of clients, but potentially aggravates the problem of the more powerful and vocal client constituency (here, organized labor) disproportionately influencing the agenda setting and tactical aspects of the campaign.

On the client end, LAANE was a relatively powerful community organization, drawing political clout and resources from its labor affiliation, and governed by politically savvy and influential leaders. The strength and coherence of LAANE's leadership structure tended to insulate it from undue influence from outside lawyers. Because LAANE approached the lawyers as empowered political actors, the lawyering itself focused on achieving a result defined by the coalition rather than on promoting goals envisioned by the lawyers who represented them.

70. See L.A. MUN. CODE § 12.24(U)(14) (2004); Josh Grossberg, *Inglewood Law Scrutinizes Superstores*, DAILY BREEZE (July 13, 2006), <http://web.archive.org/web/20060716062612/http://www.dailybreeze.com/news/articles/3342321.html> (discussing the Inglewood ordinance).

71. L.A. MUN. CODE § 12.24(U)(14).

72. Grossberg, *supra* note 70.

For their part, the lawyers who worked on the campaign approached their engagement with LAANE and the broader coalition from a perspective that mitigated concerns about client domination. For one, they were generally private sector lawyers retained by the clients to achieve a well-specified result. Their role conception, informed by their position in the market, was quite conventional. David Pettit, the small firm lawyer retained by LAANE to be part of the legal team, adopted what he termed the “David Binder method” of client representation,<sup>73</sup> referring to his UCLA Law School professor and one of the founders of clinical legal education—famous for his seminal text in client counseling that advocates a “client-centered” approach designed to protect client autonomy in all aspects of representation.<sup>74</sup> Thus, Pettit approached his ongoing relationship with LAANE from a very deferential counseling perspective, talking to its representatives about their short- and long-term objectives and basing his approach in any particular campaign on their articulated goals.

The conventional nature of the lawyer-client relationship, however, raised its own questions about how much dissenting voices were engaged in the campaign. Even within the confines of the lawyer-client relationship as constructed by the parties, the potential for conflicts was ripe. On the one hand, the coalition included representatives from LAANE and the UFCW, who brought critical financial and organizational resources; on the other, the coalition contained more loosely constituted resident and faith-based groups that lent credibility and authenticity, but did not have the same decision-making clout. This created inherent questions of governance and authority to make decisions on behalf of the entire coalition—made more difficult by the fact that LAANE was also named as a separate party to the litigation and was paying for the legal representation. In one example of how this played out, civil rights groups, including the NAACP and Urban League, broke ranks with labor to support Walmart on the ground that the Inglewood community had for so long been deprived of access to a local grocery store—and the jobs that went with it.<sup>75</sup>

As this suggests, the existence of multiple attorneys representing relatively powerful client groups may have mitigated the potential for client domination, but it also underscored the possible divisions between those

73. Cummings, *supra* note 60, at 1993 (quoting David Pettit).

74. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 3 (2d ed. 2004); Cummings, *supra* note 60, at 1993-94.

75. See GRAY-BARKAN, *supra* note 63, at viii (describing a similar wedge dynamic in various anti-Wal-Mart campaigns across the country); Earl Ofari Hutchinson, *Inglewood Opens the Wal-Mart Wars*, L.A. TIMES (Apr. 8, 2004), <http://articles.latimes.com/2004/apr/08/opinion/oe-hutchinson8> (discussing Wal-Mart’s outreach to the NAACP).

clients and the broader “community” represented by the coalition, suggesting how difficult it is for public interest lawyers to be accountable to the community at large, rather than a particular interest group within it. Indeed, an important division revealed in the anti-Walmart campaign was between class- and race-based conceptions of community. In Inglewood, Walmart was able to drive a wedge between the labor-backed CBI and traditional African American groups, like the Urban League and NAACP, which supported the Supercenter development. As a result, coalition lawyers could not claim to represent an entire working-class community of color in its fight against Walmart—but rather simply one faction within it. In this way, the lawyers could be viewed as choosing sides in an intra-community dispute in a similar fashion to the LDF desegregation lawyers criticized by Derrick Bell.<sup>76</sup>

One crucial difference is that in this type of bottom-up campaign, it is the power of non-legal client groups—such as LAANE—that drives the policy choice, rather than the lawyers themselves. But this also highlights the central trade-off of the bottom-up model: As client groups take the lead in shaping and executing the policy objective, the more powerful among them wield disproportionate influence in the process of defining what constitutes the authentic “community” interest. The lawyers then facilitate the groups’ exercise of power. In this sense, bottom-up strategies do not avoid accountability problems, but rather transfer the central locus of conflict from the relationship between lawyers and clients to that between clients and the broader communities they purport to represent.

#### CONCLUSION

In the end, I offer these cases to you in the spirit of intragroup dissent—not to suggest that top-down is better than bottom-up, but to dissent against the view that the reverse is necessarily true. What I think both cases demonstrate is that social change is difficult and complex, and that to achieve it, some dissent must give way, whether to lawyer initiative or community power. What I want to leave you with is the idea that what we should ultimately care about are the multiple and context specific ways that dissent is aired and respected in social movement environments. Lawyers, for reasons of professional role, and litigation, for reasons of technical adjudication, may do a better or worse job in managing dissent, but in judging their effectiveness we should always ask: as compared to what? That is, we

76. See generally Bell, *supra* note 4.

should not presume that lawyers will be structurally worse managing dissent than non-lawyer movement leaders.

What these studies show is that, in both top-down and bottom-up lawyering contexts, whether client interests are served (and whether we should care if they are) depends on factors such as the degree and power of client organizations, whether clients pay fees (and how much), the extent to which multiple clients and client groups are involved (and how they interact), and the nature and scope of the policy reforms at stake. Yet, if we ultimately care about lawyers advancing policy claims that actually reflect the interests of the communities they purport to serve, the approach described in both cases—so far as they suggest that advocacy embedded in politics deepens community ties—may be a step in the right direction, even though it is imperfect—as everything is. In this sense, I hope that they are not only stories of the challenges lawyers confront managing dissent in the post-civil rights political context, but also stories that guide the way toward deeper engagement with dissent that advances democratic social change.