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The Democratic Roots of Collaborative Lawyering

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THE DEMOCRATIC ROOTS OF COLLABORATIVE LAWYERING

ASCANIO PIOMELLI*

This Article reinterprets collaborative lawyering – and its call for progressive lawyers to collaborate with clients and communities to jointly pursue social change – as part of a participatory democratic tradition of active self-government by engaged citizens. Rejecting conventional views that collaborative lawyering primarily grows out of postmodernist social theory, the Article details this lawyering approach's deep affinity with John Dewey's modern recasting of Athenian and Jeffersonian ideas and with the early 1960s' practice of Ella Baker, the Student Non-Violent Coordinating Committee, and New Left activists. It argues that a democratic lens reveals the distinctive values underlying collaborative lawyers' commitment to ordinary citizens' robust participation in collective efforts to reshape society – values that are at odds with competing visions of democracy and lawyering that place expert professionals at the center of such efforts.

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INTRODUCTION

In the past two decades, an extensive literature has urged lawyers

seeking progressive social change to fundamentally re-orient their practices.¹ Jerry López,² Lucie White,³ I,⁴ and many others,⁵ have ad-

¹ See works cited *infra* at notes 2-5.

² Professor of Law, New York University School of Law, and Director, Center for Community Problem Solving. For the defining work in this area, see GERALD P. LÓPEZ, *REBELLIOUS LAWYERING* (1992). See also Gerald P. López, *Living and Lawyering Rebelliously*, 73 *FORDHAM L. REV.* 2041 (2005); Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 *N.Y.U. L. REV.* 59 (2004) [hereinafter López, *Community Problem Solving*]; Gerald P. López, *An Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 *HARV. C.R.-C.L. L. REV.* 315 (1996); Gerald P. López, *Economic Development in the "Murder Capital of the Nation,"* 60 *TENN. L. REV.* 685 (1993); Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 *GEO. L.J.* 1603 (1989); Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 *W. VA. L. REV.* 305 (1989); Gerald P. López, *A Declaration of War by Other Means*, 98 *HARV. L. REV.* 1667 (1985) (reviewing RICHARD E. MORGAN, *DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME* (1984)).

³ Louis A. Horvitz Professor of Law, Harvard Law School. See Lucie E. White, *The Power Beyond Borders*, 70 *MISS. L.J.* 865, 874-76 (2001); Panel III, *Creating Models for Progressive Lawyering in the 21st Century*, 9 *J.L. & POL'Y* 297, 303-20 (2001) (comments of Lucie White) [hereinafter *Progressive Lawyering in the 21st Century*]; Lucie E. White, *Facing South: Lawyering for Poor Communities in the Twenty-First Century*, 25 *FORDHAM URB. L.J.* 813, 822-29 (1998); Lucie E. White, "Democracy" in Development Practice: *Essays on a Fugitive Theme*, 64 *TENN. L. REV.* 1073 (1997) [hereinafter White, *Fugitive Theme*]; Lucie E. White, *Collaborative Lawyering in the Field? On Mapping Paths from Rhetoric to Practice*, 1 *CLIN. L. REV.* 157 (1994) [hereinafter White, *Collaborative Lawyering*]; Lucie E. White, *Seeking "... The Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 *CORNELL L. REV.* 1499 (1992) [hereinafter White, *Faces of Otherness*]; Lucie E. White, *Paradox, Piece-Work, and Patience*, 43 *HASTINGS L.J.* 853 (1992); Lucie E. White, *Representing "The Real Deal,"* 45 *U. MIAMI L. REV.* 271 (1990-91); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 *BROOK. L. REV.* 861 (1990) [hereinafter White, *Paradox of Lawyering*]; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 *WIS. L. REV.* 699 [hereinafter White, *To Learn and Teach*]; Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 535 (1987-88) [hereinafter White, *Mobilization on the Margins*].

⁴ See Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 *CLIN. L. REV.* 427 (2000); Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 *UTAH L. REV.* 395 [hereinafter Piomelli, *Foucault's Approach to Power*].

⁵ Other contributions to this literature include Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619 (1992); Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 *VA. ENVTL. L.J.* 687 (1995); *Progressive Lawyering in the 21st Century*, *supra* note 3, at 320-27 (comments of Luke Cole); LUKE COLE & SHEILA FOSTER, *FROM THE GROUND UP - ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* (2001); JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005); Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, the Workplace Project and the Struggle for Social Change*, 30 *HARV. C.R.-C.L. L. REV.* 407 (1995); Shauna I. Marshall, *Mission Impossible? Ethical Community Lawyering*, 7 *CLIN. L. REV.* 147 (2000); Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66

vocated an approach to practice in which lawyers work collaboratively *with* lower-income, working-class, and of-color clients and communities in *joint* efforts to make social change. This vision of lawyering stresses the importance of clients' and communities' active participation in speaking and acting on their own behalf.⁶ Lawyers in this emerging tradition act not as saviors or champions, but rather as partners in collective ventures to change the world.

This approach to practice has been given many names: community lawyering,⁷ critical lawyering,⁸ law and organizing,⁹ mobilization lawyering,¹⁰ the new poverty law,¹¹ political lawyering,¹² rebellious

TENN. L. REV. 467 (1999); Laura Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043 (2004); Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996). Anthony Alfieri has also associated his work with this approach to lawyering. See Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88); Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) [hereinafter Alfieri, *Reconstructive Poverty Law*]; Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233 (1992); Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994) (reviewing LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 2). For reservations about how well Alfieri's views on civil practice mesh with my understanding of this approach to lawyering, see Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 469-70.

⁶ See, e.g., LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 2, at 30-82, 133-62, 275-329 (describing practices of "Sophie," immigration attorney in neighborhood legal services office, "Amos," director of non-profit organization seeking to coordinate efforts to assist children and families, "Helen," attorney in community law office, and "Dan," attorney striving to learn from practice of local tenant activist); Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 427-29, 492-513 (describing tenants' efforts to reverse packing of local rent stabilization board); White, *Mobilization on the Margins*, *supra* note 3, at 546-57 (describing "speak-outs" against Reagan administration's attack on social security disability programs); White, *To Learn and Teach*, *supra* note 3, at 719-45 (describing South African villagers' efforts to prevent Apartheid-mandated, forcible removal from their land).

⁷ See Marshall, *supra* note 5. See also Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 35 (2004/05); Christine Zuni Cruz, *[On The] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLIN. L. REV. 557 (1999).

⁸ See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 486 (1986); Trubek, *Critical Lawyering*, *supra* note 5.

⁹ See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447 (2001); Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2000/2001).

¹⁰ See Sameer M. Ashar, *The Pedagogy of Mobilization Lawyering: Contesting the Canonical Lawyer-Client Relationship* (unpublished manuscript on file with author); Scott Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart Scheingold eds., forthcoming 2006); Paul R. Tremblay, *Acting: "A Very Moral Type of God": Triage*

lawyering,¹³ and reconstructive poverty law.¹⁴ The label I find most descriptive is collaborative lawyering,¹⁵ because it captures the central prescription that lawyers work in active partnership with clients, communities, and other allies to jointly press for social change.¹⁶ This Article explores the intellectual and political roots of this approach to lawyering and the ways that those roots shape and inform its key values and practices.

Many scholarly reactions to collaborative lawyering interpret it as a product, and example, of postmodernist social theory.¹⁷ Even if at-

Among Poor Clients, 67 *FORDHAM L. REV.* 2475, 2502-04 (1999).

¹¹ See William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 *U. MIAMI L. REV.* 1099, 1101 (1994).

¹² See Symposium, *Political Lawyering: Conversations on Progressive Social Change*, 31 *HARV. C.R. – C.L. L. REV.* 285 (1986); White, *Fugitive Theme*, *supra* note 3, at 1073 n.2; Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 *MICH. L. REV.* 821, 831 n.36 (1997).

¹³ See LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 2.

¹⁴ See Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 5.

¹⁵ See Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 441; Piomelli, *Foucault's Approach to Power*, *supra* note 4, at 398. See also Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 *COLUM. HUM. RTS. L. REV.* 67, 82-90 (2000) (labeling López and White collaborative lawyers); Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for 'Facilitative' Lawyering?*, 1 *CLIN. L. REV.* 639, 654 (1995) (characterizing Alfieri, López, and White as advocates of collaborative lawyering); Rovner, *supra* note 5, at 1090-96 (characterizing Alfieri, López, Piomelli, and White as advocates of collaborative lawyering); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 *B.C. L. REV.* 255, 298 n.271 (2004) (characterizing López as major theorist of collaborative lawyering); White, *Collaborative Lawyering*, *supra* note 3, at 159.

¹⁶ See Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 439-40. Unfortunately, "collaborative lawyering" (or, more commonly, "collaborative law") is also used to describe an approach to family law practice that shuns antagonistic relationships and adversarial tactics in dissolution or custody issues. See, e.g., PAULINE H. TESSLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2001); James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 *OHIO ST. J. ON DISP. RESOL.* 431 (2002); Larry Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 *BAYLOR L. REV.* 141 (2004). For a comparison of this approach to family law practice and the approach to social-change lawyering I intend by "collaborative lawyering," see Piomelli, *Foucault's Approach to Power*, *supra* note 4, at 398-99 n.9. See also *infra* notes 417-19 and accompanying text.

¹⁷ See, e.g., Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 *U. MIAMI L. REV.* 1063 (1994) (critiquing "postmodern critical scholarship"); Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 *U. MIAMI L. REV.* 1000, 1025-48 (1994) (interpreting this scholarship as borrowing postmodernist and post-structuralist ideas); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 *STAN. L. REV.* 399, 429-37 (2001) (portraying Alfieri, White, and López as applying postmodern social theory to lawyering practice) [hereinafter Cummings, *Community Economic Development*]; Cummings & Eagly, *supra* note 9, at 457 (characterizing literature as "[d]rawing on postmodern social theory"); Simon, *supra* note 11, at 1111-14

taching a postmodernist label to this vision of lawyering were accurate,¹⁸ which it may not be,¹⁹ viewing this approach primarily through such a frame of reference is unhelpful, because it fails to accentuate the core values and vision driving this lawyering. Indeed, the link to postmodernism has contributed to widespread misunderstanding and under-appreciation of this approach to practice.²⁰

The association with postmodernism is likely to put off potential readers of this lawyering literature who are chiefly interested in making social change and have little patience for difficult, abstract theory. Skeptics have successfully portrayed postmodernist theory as excruciatingly hard to understand, pretentious, contentious, and of little or no use as a guide for action, dismissing it as an imported intellectual fad that has mesmerized many U.S. academics.²¹ Such a depiction is

(1994) (describing "influence of postmodernism" on these theorists).

For those seeking an overview of postmodernist thought, one of the more helpful starts remains Peter Schanck's suggestion that four interrelated concepts, each reinforcing the others, are central to postmodernism:

- (1) The self is not, and cannot be, an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation. (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is impossible. (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can only apply to the context within which it is asserted. (4) Because language is socially and culturally constituted, it is inherently incapable of representing or corresponding to reality; hence all propositions and all interpretations, even texts, are themselves social constructions.

Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Analysis*, 65 S. CAL L. REV. 2505, 2508-09 (1992). See also STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* (1991). For fuller discussion of the challenge of defining or summarizing postmodernist theory, see Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 442 n.68.

¹⁸ Among theorists associating their ideas with collaborative lawyering, Alfieri has most emphatically insisted the approach is "postmodernist" rather than "modernist." See, e.g., Alfieri, *Stances*, *supra* note 5. As I have explored in detail, aspects of French philosopher Michel Foucault's thought have been an important influence on collaborative lawyering. See Piomelli, *Foucault's Approach to Power*, *supra* note 4; see also White, *Faces of Otherness*, *supra* note 3, at 1501-09 (outlining Foucault's approach to power and its influence on collaborative lawyering theorists). Several commentators on this lawyering treat Foucault as a postmodernist. See, e.g., Simon, *supra* note 11, at 1111-14; Cummings, *Community Economic Development*, *supra* note 17, at 429-37.

¹⁹ Leading interpreters of postmodernist theory do not necessarily include Foucault as a postmodernist. See, e.g., BEST & KELLNER, *supra* note 17, at 30-31, 36 (casting Foucault as mixing premodernist, modernist, and postmodernist ideas). Avowed postmodernists are likely to use the term to encompass a broader spectrum of thinkers, including Jean Baudrillard, Jacques Derrida, Gilles Deleuze, and Francois Lyotard. Although an argument can be made that Derrida influences this lawyering (see, e.g., Simon, *supra* note 11, at 1111-14; Cummings, *Community Economic Development*, *supra* note 17, at 429-37), I do not consider him, or any of these thinkers other than Foucault, central influences on collaborative lawyering as I understand it.

²⁰ See Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 442-86.

²¹ For a depiction of postmodernist thought in the lawyering literature that explicitly or

crudely overdrawn and leads to overlooking potentially valuable insights.²² Nonetheless, at the risk of acceding to xenophobia and guilt by association, collaborative lawyers are more likely to connect with and inform their desired audience by “speaking American.”²³

Even more significantly, a postmodernist frame does not capture central aspects of this approach to lawyering. A postmodern lens ably reveals the power relations between lawyers and lower-income clients – even if, in some hands, it hyperbolically casts them as “interpretive violence” or lawyers’ “silencing” of clients.²⁴ But it does not highlight the positive benefits – for lawyers, clients, and communities – of clients’ active participation in identifying their problems, and developing, implementing, and assessing tactics and strategies for resolving them. Such a frame fails to reveal collaborative lawyers’ vision of the type of world they aim to build: a world of inter-connected individuals and groups actively working together to end their marginalization.

Collaborative lawyers have *two* key inter-related aims for their work with lower-income clients. One, highlighted through a postmodernist lens, is to avoid re-enacting the very sort of subordinating relations clients seek help in combating. The second goal, which is not as readily accentuated by a postmodernist frame, is to encourage collective action in which lawyers, clients, community groups, and other allies work together, in legal, political, social, and other spheres,

implicitly relies on many of these propositions, see Blasi, *supra* note 17, at 1074, n.29; for an example from mainstream U.S. culture, see Jonathan Kandell, *Jacques Derrida, Abstruse Theorist, Dies in Paris at 74*, N.Y. TIMES, Oct. 10, 2004, at 1, 33 (describing Derrida’s work as “notoriously difficult” and a “target of as much anger as admiration”).

Although I have tried to make ideas others label postmodernist accessible to audiences interested in social-change lawyering, I do not consider myself, or my ideas about lawyering, postmodernist. I find many aspects of Foucault’s approach to thinking about power and relationships helpful and also note limitations to his vision that force collaborative lawyers to look elsewhere for guidance and insight. See Piomelli, *Foucault’s Approach to Power*, *supra* note 4, at 467-80.

²² I prefer to seek helpful insights wherever I can, rather than being deterred by labels. The facile dismissal of postmodernism described in the text is disappointingly closed-minded when delivered by academics. I have found valuable analytical and methodological ideas from postmodernism – particularly for recognizing the social forces that (incompletely) shape and constrain us. Nonetheless, I empathize with critics’ annoyance at the inaccessible prose and abstruseness to which many postmodernists subject readers.

²³ I borrow the phrase “speaking American” from the early leaders of Students for a Democratic Society, who sought in the early 1960’s to root their ideas in U.S. political tradition, rather than a socialism that many saw as foreign. See JAMES MILLER, *DEMOCRACY IS IN THE STREETS: FROM PORT HURON TO THE SIEGE OF CHICAGO* 141-54 (Harv. U. Press ed. 1994) (1987).

²⁴ “Interpretive violence” and lawyers’ “silencing” of clients are dominant concerns of Alfieri’s works on civil poverty law practice. See, e.g., Alfieri, *Reconstructive Poverty Law*, *supra* note 5, at 2146-47 (arguing cost of traditional poverty lawyering is “the lawyer’s purchase of the client’s story, and with it, her voice and narrative. This is the historical price of poverty law, the image of the unspeaking client.”).

to change social conditions. Collaborative lawyers value broad participation in collective efforts for its potential – by deploying a wider array of persuasive tactics implemented by a broader array of actors – to change the material positions of clients and communities, and their standing in adversaries', third parties', and their own eyes.²⁵ Indeed, collaborative lawyers and their allies see such joint efforts as central to the world they aim to create.

The call for clients' and communities' active participation in collective efforts to make social change is thus better understood as a profound commitment to *democracy*. The central values and ethical allegiances of collaborative lawyering are deeply rooted in democratic participation. *At its core, collaborative lawyering is an effort to practice, promote, and deepen democracy* – more precisely, a participatory democracy in which individuals and communities flourish by unleashing their full energies and potential in joint public action. Collaborative lawyers aim not simply to avoid dominating clients; they strive to bring democracy to life by recognizing and building connections and capacities that can lead to effective collective action to combat societal subordination.

Collaborative lawyering draws upon, and may be consistent with postmodernist ideas, but postmodernist theory, which rarely announces normative goals, is not the generating source of this lawyering's key values. Postmodernism skillfully detects and analyzes subordination, but the commitment to broadly participatory means for eradicating it is best understood as stemming from democratic political values. Collaborative lawyers treat and interact with their clients and allies as *democratic citizens* capable of actively participating in collective efforts to govern and transform themselves and their communities.

As Part I of this Article recounts, political theorists commonly distinguish two basic understandings of democracy based upon their principal justifications, one labeled “protective” and the other “developmental.”²⁶ In *protective* visions, democracy is a device to ensure sound governance and wise decision-making. In this view, democracy entails selection of expert leaders by majority vote; its foundation is *popular consent*. Protective democrats laud democracy's effects upon those selected to rule; they value its deterrence of leaders' malfeasance, especially encroachment upon individual freedom, because of the need to secure and maintain popular consent. As Part I.A. out-

²⁵ For examples of this concept, see works cited *supra* note 6.

²⁶ See, e.g., DAVID HELD, *MODELS OF DEMOCRACY* (2d ed. 1996); C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* (1977); CAROL PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

lines, the dominant view of democracy in the United States is a protective vision – and has been since the Federalists framed the Constitution. Recently championed by Judge Richard Posner, this vision of democracy emphasizes the beneficial effects of competition between would-be leaders for the periodically expressed consent of those on whose behalf – and over whom – they will rule.²⁷ This model of expert professionals caring for the interests of largely disengaged constituents, who express only broad preferences or general assent, is one collaborative lawyers reject – especially when it is mapped onto the lawyering domain.²⁸

In *developmental* visions, democracy is valued for its impact on individual citizens and society as a whole. Democracy, so understood, is popular self-government by active, engaged citizens; its foundation is citizens' regular *participation in public life*. Although lawyering theorists have not explored the connection in depth, *the ideals of this developmental, participatory democratic tradition form the unarticulated normative underpinning of collaborative lawyering*. Part I.B. traces the roots of this vision of democracy as active self-governance to ancient Athens and to aspects of Thomas Jefferson's thought. Developmental democrats champion democracy's creation and encouragement of engaged, public-minded citizens – citizens who grow in confidence, knowledge, and skill by participating in decision-making and public action. They also value its fostering of an inclusive, egalitarian culture and a sense of community or connection. Democracy, in this view, produces not just better policies; it paves the way to a better society in which individuals and communities thrive – and a common culture supports ordinary citizens' resistance to subordination by those who deem themselves superior.

Part II details the recently rediscovered democratic ideas of John Dewey, perhaps the leading U.S. theorist of participatory democracy. Dewey's ideas grew out of the Athenian and Jeffersonian traditions, but were formulated to address the challenges and opportunities of mass industrial society. He urged the widespread application of democracy to all aspects of modern society. He understood democracy not as a political theory but as *a way of life* – grounded in a faith in human capacity and intelligence – *that nurtures human growth through collective action*. Dewey's expansive view of a democratic way of being in the world and his prescriptions for public action resonate deeply with collaborative lawyers' practices.

As Part III outlines, Dewey's ideas were embodied, if not ac-

²⁷ See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

²⁸ See, e.g., LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 13-17, 20-24 (criticizing fictionalized impact litigator and legal services attorney for practicing in such fashion).

knowledge, in the social movements of the early 1960's. Students for a Democratic Society (SDS) made "participatory democracy" its rallying cry and the centerpiece of its political manifesto, the Port Huron Statement.²⁹ The key inspiration and vital embodiment of the era's participatory democracy was the mobilization of Southern Black students and working people in the early 1960's. At the heart of that movement was the early work of SNCC (the Student Non-Violent Coordinating Committee) and its behind-the-scenes, animating spirit, Ella Baker. Baker and her colleagues at SNCC brought many of Dewey's key ideas about democracy to life and demonstrated the capacity of ordinary citizens to act collectively to challenge their subordination and change society. The affinity between SNCC's early practice and collaborative lawyers' highest aspirations is strong. Although the subsequent turbulence of the 1960's led SDS and SNCC to abandon their initial ideas and practices of participatory democracy, by the mid-1980's political theorist Benjamin Barber launched a new call for a renewal of Jeffersonian and Deweyan "strong democracy," emphasizing popular participation in common deliberation and action.³⁰

Part IV details how the strains of participatory democratic thought and practice described in Parts I.B., II, and III dovetail with collaborative lawyering and form its core values. These ideas and practices are not merely academic abstractions or historical trivia, they shape collaborative lawyers' practices and are the touchstone by which they and their partners plan actions and assess success. Understanding collaborative lawyering as an expression of these participatory democratic values differentiates it from approaches to lawyering 'in the public interest' or 'on behalf of the under-represented' that typically treat the struggle for social change as primarily waged by expert elite competitors, rather than by ordinary citizens. Indeed, this focus on democratic vision accentuates those aspects of professional socialization against which collaborative lawyers rebel (as too similar to the protective models described in Part I.A.) and the participatory values they aim instead to implement.³¹

²⁹ See Students for a Democratic Society, *The Port Huron Statement* (1962), reprinted in MILLER, *supra* note 23, at 329 [hereinafter *Port Huron Statement*].

³⁰ See BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (20th anniv. ed. 2003) (1984).

³¹ In distinguishing between democratic and postmodernist roots and between protective and developmental democracy, I aim to bring the underlying vision and values of collaborative lawyering to the foreground. Parts I.B., II, and III detail ideas and practices that lay the groundwork for Part IV's articulation of the affinities between collaborative lawyering and this participatory democratic tradition. Only once that tradition is understood can the values underlying collaborative lawyering be fully appreciated.

Exploring the democratic tradition from which collaborative lawyers' core values emerge serves several purposes. It raises the important, but heretofore largely ignored, issue of how social-change lawyering fits into larger political, intellectual, and ethical contexts. It refreshes current imagination and, potentially, legal practice, by reconnecting with visions and examples of democracy that emphasize ordinary people's active role in reshaping the world. It can spur future discussion of, and guidelines for measuring, how well these and other visions of democracy work. Finally, it encourages social-change lawyers to engage directly with the recent outpouring of suggestions for improving democratic politics.³²

I. TWO COMPETING DEMOCRATIC TRADITIONS

A. *The Protective Vision of Democracy as a Device to Authorize Experts to Act on One's Behalf*

For most people in the United States, democracy means a political system in which leaders are elected by majority vote. The media, major political parties, and individual politicians presume and perpet-

³² Many approaches to reinvigorating democratic politics in the U.S. have emerged in the past decades. One aims to enhance "civic engagement" and build "social capital." See, e.g., RICHARD A. COUTO, *MAKING DEMOCRACY WORK BETTER: MEDIATING STRUCTURES, SOCIAL CAPITAL, AND THE DEMOCRATIC PROSPECT* (1999); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993). Another approach focuses on enhancing the quality and quantity of democratic "deliberation," see works cited *infra* at note 346, and urges a renewal of "civic republicanism." See, e.g., Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN L. REV. 29 (1985); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). Others focus on emerging forms of broad-based, multi-racial, community organizing as training in the arts of democracy. See, e.g., EDWARD T. CHAMBERS, *ROOTS FOR RADICALS: ORGANIZING FOR POWER, ACTION, AND JUSTICE* (2003); MICHAEL GECAN, *GOING PUBLIC* (2002); PAUL OSTERMAN, *GATHERING POWER: THE FUTURE OF PROGRESSIVE POLITICS IN AMERICA* (2002); MARK R. WARREN, *DRY BONES RATTLING: COMMUNITY BUILDING TO REVITALIZE AMERICAN DEMOCRACY* (2001). Another school calls for "democratic experimentalism" or "empowered participation" to replace top-down, command-and-control forms of governmental regulation. See, e.g., Michel C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); ARCHON FUNG, DARA O'ROURKE, & CHARLES F. SABEL, *CAN WE PUT AN END TO SWEATSHOPS?* (2001); DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003).

To date, the literature on social-change lawyering has hardly engaged with these currents of thought. For two exceptions, see William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004); Symposium, *Lawyering for a New Democracy*, 2002 WIS. L. REV. 377. By highlighting the connections between visions of democracy and social-change lawyering, I hope to prod lawyering theorists into active dialogue with these emerging ideas of how to reshape our polity.

uate an image of democracy as primarily a method of selecting and authorizing leaders. Sometimes, the notion that democracy also entails organized interest groups that can pressure politicians is added to the mix. The idea that choosing leaders (and holding them accountable for misdeeds) is the essential hallmark of democracy is so firmly entrenched, it is difficult for some to imagine that democracy used to be understood as an ongoing activity in which ordinary people – not just professional politicians and organized interest groups – regularly engaged.

A chief intellectual architect of the now-reigning view of democracy was Joseph Schumpeter, an Austrian economist with extreme rightist sensibilities.³³ In his 1942 book *Capitalism, Socialism, and Democracy*,³⁴ Schumpeter rejected democracy's historic meaning as a prescriptive ideal of political equality and popular participation in governance. Instead, he redefined democracy as a value-neutral *method* that narrowly circumscribes that participation. He proffered what he cast as a "truer to life" definition of democracy as "an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."³⁵ The central actors in this view of democracy are the competing would-be decision-makers: the leaders, not the citizenry.³⁶ These competitors are an elite, an aristocracy of talent and expertise, who appreciate the complexity of issues and interests – unlike the mass of citizens who have little understanding of such matters. This view of democracy centers on the contest between political entrepreneurs who compete with each other to market themselves to the voting public to secure the right to make every-day decisions, *i.e.*, to govern. Citizens are essentially consumers who are allowed every few years to express their purchasing preference by voting to authorize one slate of leaders or another to govern.³⁷ Once they have selected

³³ A recent intellectual biography describes Schumpeter's political views as reactionary, monarchist, and, even after emigrating to the U.S., sympathetic to the Nazi regime. See JOHN MEDEARIS, *JOSEPH SCHUMPETER'S TWO THEORIES OF DEMOCRACY 19-77* (2001) (arguing Schumpeter recognized and sought to forestall socially transformative potential of democracy).

³⁴ JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942).

³⁵ *Id.* at 269.

³⁶ Schumpeter argued:

[D]emocracy does not mean and cannot mean that the people actually rule in an obvious sense of the terms 'people' and rule'. Democracy means only that the people have the opportunity of accepting or refusing the men who are to rule them. . . . [O]ne aspect of this may be expressed by saying that democracy is *the rule of the politician*.

Id. at 284-85 (emphasis added).

³⁷ As Posner notes, unlike economic markets, political markets do not provide a citizen the choice for which she opts, but rather the choice preferred by the majority of consumer-

their leaders, the citizens' role is complete and they must get out of the way so the winners can implement their ideas and deploy their decision-making expertise, until it is again time to secure popular endorsement.³⁸ In this model, elected elites are not representatives so much as they are rulers and democracy is simply a system for legitimating their rule.³⁹

Schumpeter's model of democracy strongly influenced the pluralist school of U.S. political scientists in the 1950's and 1960's, whose ideas, in turn, have shaped the views of contemporary politicians and the media.⁴⁰ Schumpeter tapped into intellectuals' aversion to widespread political participation by citizens of lower socioeconomic status, a stratum of society that social science research depicted as less committed to core liberal values.⁴¹ These intellectuals perceived greater political participation by lower-income and working-class citizens as a threat to the political stability of liberal democracy.⁴² Even as the pluralist thinkers who dominated mainstream U.S. political science broadened Schumpeter's model – adding the element of competing organized interest groups (such as unions, trade associations, and other advocacy organizations) to whom politicians respond – their vision of democracy shared several traits with his approach. Pluralists shared Schumpeter's interest in realistically describing existing practices in leading liberal democratic nations.⁴³ In this view, democracy is not what we aspire to, but whatever institutions now exist in countries

voters. See POSNER, *supra* note 27, at 192.

³⁸ Schumpeter's views here were extreme. He argued voters "must respect the division of labor between themselves and the politicians they elect. They must . . . understand that once they have elected an individual, political action is his business." SCHUMPETER, *supra* note 34, at 295. Thus, voters were not to be permitted to give instructions to those they elect, nor to "bombard[] them with letters and telegrams." *Id.*

³⁹ See HELD, *supra* note 26, at 182.

⁴⁰ The cabining of popular political participation in Schumpeter's redefinition of democracy did not go unchallenged. Peter Bachrach and Carol Pateman were two notable critics of this "elite theory" or "competitive elitist theory" of democracy. See PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* (1980) (1967); PATEMAN, *supra* note 26. For the influence on politicians, parties, and the media, see *infra* note 62.

⁴¹ See, e.g., Robert Lane, *Fear of Equality*, 53 AM. POL. SCI. REV. 35, 51 (1959) (concluding, from interviews with 15 working-class and lower-middle-class men, that U.S. professional classes, not working classes, are main defenders of ideals of freedom and equality); SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 97-130 (1960) (on "working-class authoritarianism"); DAVID TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 522 (1951).

⁴² See, e.g., BERNARD BERELSON ET AL., *VOTING* 314 (1954) (arguing widespread participation by large numbers of citizens with strong views "might culminate in rigid fanaticism that could destroy democratic processes"); LIPSET, *supra* note 41, at 98 ("studies suggest . . . lower-class way of life produces individuals with rigid and intolerant approaches to politics").

⁴³ See, e.g., ROBERT A DAHL, *A PREFACE TO DEMOCRATIC THEORY* 63 (1956), cited in HELD, *supra* note 26, at 201.

understood to be democracies. Pluralists too claimed to objectively report, rather than normatively exhort.⁴⁴ They also shared the notion that “the classical model” of democracy was infeasible in modern society.⁴⁵ Like Schumpeter, pluralists saw democracy as a protective device for ensuring stable government and channeling competition within the bounds of a general consensus – not a device for transforming people or fundamentally reshaping society.⁴⁶ Democracy functions well, even optimally, in this view, without participation (on other than a periodic basis) by everyday citizens.

Today, Schumpeter’s chief advocate is Judge Richard Posner.⁴⁷ Posner lauds the realism of Schumpeter’s descriptions of democracy,⁴⁸ human nature,⁴⁹ and the relative (un)importance of politics.⁵⁰ Posner appreciates the “everyday pragmatism” of a model of democracy that does not ask more of people than he deems feasible.⁵¹ For Posner, people are isolated individuals incapable of thinking effectively about what is good for society; all they can do is assess their own level of contentment.⁵² But as long as people register their contentment levels,

⁴⁴ Critics note, however, pluralists’ tendency to “to slide from a descriptive-explanatory account of democracy to a new normative theory.” HELD, *supra* note 26, at 209.

⁴⁵ Carol Pateman demonstrated the error of lumping into a single “classical model” of democracy the ideas of Jeremy Bentham and John Mill (focused on protective function threat of loss of office played in encouraging right behavior by elected officials) with those of Jean Jacques Rousseau and John Stuart Mill (focused on developmental value for citizens of their participation in governance). See PATEMAN, *supra* note 26, at 18-35.

⁴⁶ See HELD, *supra* note 26, at 200-08.

⁴⁷ See POSNER, *supra* note 27. Posner contrasts two competing visions of democracy. He derides “concept 1 democracy,” which he ascribes to John Dewey and other advocates of deliberative democracy, deeming it problematically “idealistic, theoretical, and top-down.” *Id.* at 130. He extols Schumpeterian “concept 2 democracy,” for being “realistic, cynical, and bottom-up.” *Id.*

⁴⁸ *Id.* at 147.

⁴⁹ Posner lauds Schumpeter for recognizing people are generally uninterested in politics and far more interested in (and knowledgeable about) their private commercial and familial lives than societal issues. See *infra* notes 50-52, 54-56.

⁵⁰ Posner refuses to consider “public concerns worthier than private ones,” views politics as “ancillary rather than ultimate,” and rejects the notion “that politics has intrinsic value or that political activity is ennobling.” POSNER, *supra* note 27, at 144. Attributing to Schumpeter, as Posner does, a view of politics as relatively unimportant is disingenuous. Schumpeter sought to limit democratic government to competing elites because he saw government as *too important* to allow uninformed masses significant say or control.

⁵¹ Posner uses “everyday pragmatism” to connote the sober, practical, realistic sense of pragmatism, not the American philosophical movement. See *id.* at 49-56. He summarizes this “pragmatic mood” as “the outlook of ordinary people under conditions, such as democracy and free markets, that push them to focus on their material concerns, personal interests, and opinions rather than on spiritual concerns, group interests, and the quest for truth” *Id.* at 387.

⁵² Posner contends “even well-educated and well-informed people find it difficult to reason accurately about matters remote from their immediate concerns. People who vote on the basis of their self-interest are at least voting about something they know firsthand, their own needs and preferences. Beware the high-minded voter.” *Id.* at 113.

the invisible hand of the political market, as in the economic market, will deliver socially optimal results – in terms of which sets of leaders are authorized to govern.⁵³ Posner shares Schumpeter's view that most people are uninterested in politics⁵⁴ and he finds this disinterest solicitous, because political discourse is an inherently polarizing activity that threatens the interpersonal harmony essential for commercial intercourse.⁵⁵ For Posner, most humans, certainly most Americans, are commercial, rather than political, animals.⁵⁶ The few who are political animals are "wolves" who will inevitably rise to the top⁵⁷ – and should, because they constitute a meritorious elite.⁵⁸ The beauty of Schumpeterian democracy for Posner is its creation of political institutions that channel the competition between the "wolves" and promote the moderate, incrementalist public policies that best facilitate commerce.⁵⁹ Posner views models of democracy that encourage greater popular participation as nightmarishly dystopian – because they foment "painful, divisive, time- and energy-consuming conflicts of worldviews and fundamental values, conflicts better left latent and inarticulate."⁶⁰ Leaving policy and governance to political experts is, for

⁵³ See *id.* at 193. To his credit, Posner concedes the democratic political marketplace is oligopolistic – and, in the U.S., duopolistic – and thus not as efficient as classical liberal economic theory assumes. See *id.* at 188-203. But Posner does not address C.B. Macpherson's powerful critiques that an oligopolistic political marketplace only responds to "effective demand, . . . the demands that have the purchasing power to back them," MACPHERSON, *supra* note 26, at 87, which, given the campaign finance system, is largely skewed toward "the demands of the higher socio-economic classes," *id.*, and that oligopolists "need not and do not" respond to buyers' demands as they must in a truly competitive market, but instead "can set prices and set the range of goods that will be offered" and "can, to a considerable extent, create the demand." *Id.* at 89.

⁵⁴ See POSNER, *supra* note 27, at 144.

⁵⁵ Excluding or excusing people from everyday political involvement leaves them "free to spend time on other, more productive activities, undistracted by the animosities, the polarization, and the endless inconclusive debates of an active political life." *Id.* at 172. Posner sees this as positive because "commercial activity and private life are not only more productive of wealth and happiness than the political life; they are also more peaceable, which in turn reinforces their positive effect on wealth and happiness." *Id.* at 173.

⁵⁶ Posner characterizes "the outlook of most Americans" as "rooted in the usages and attitudes of a brash, fast-moving, competitive, forward-looking, commercial, materialistic, philistine society" with an "emphasis on working hard and getting ahead." *Id.* at 50.

⁵⁷ See *id.* at 183-84 ("society is composed of wolves and sheep. The wolves are natural leaders. They rise to the top in every society. The challenge to politics is to provide routes to the top that deflect the wolves from resorting to violence, usurpation, conquest, and oppression . . .").

⁵⁸ Posner regards successful candidates as "smarter, better educated, more ambitious, and wealthier than the average person." *Id.* at 154. They "belong to an elite of intelligence, cunning, connections, charisma and other attributes . . ." *Id.* at 109.

⁵⁹ Democracy's genius, for Posner, is its ability to "divert[] the energies of dangerously ambitious men into socially harmless, even beneficial channels." *Id.* at 194.

⁶⁰ *Id.* at 112.

Posner, a rational allocation of resources and division of labor.⁶¹

My sense is few Americans share all of Posner's ideas, or couch them in economists' terms. But the notion of democracy as our current institutional structure for picking expert leaders and periodically holding them accountable does dominate current popular imagination. Candidates, parties, and the media reinforce this vision of democracy as an election-time phenomenon and a choice between competing brands of would-be leaders.⁶² They convey an image of democratic politics as a contest in which political elites engage on a daily basis, interacting with organized interest groups, but citizens merely watch (or more likely ignore) until it is time again to choose who shall govern. In this model, democracy plays an important protective function of keeping politicians honest, but it does not express any important yearning of citizens, nor does it transform citizens or society in any significant way.

Of course, viewing democracy as a device for protecting individuals and society from bad government was hardly an invention of Schumpeter or the pluralists. There is a long tradition in the U.S. of viewing democracy as *instrumentally* – rather than *inherently* – valuable, because of its effectiveness at protecting citizens' liberty from encroaching officials or majorities. Indeed, the framing and adoption of the U.S. Constitution reflected a strong antipathy for active popular participation in governing.⁶³ The people and the majority were seen as

⁶¹ See *id.* at 189.

⁶² See, e.g., Al Gore's speech at the New York Historical Society on June 13, 2000: No serious person can question the achievements of the 1990's. Now we must ask: Will we be better off still – in terms of our affluence and in terms of our spirit – four years from this day? I intend to win this election on behalf of the American people to see to it that the answer is yes.

IN THEIR OWN WORDS, A SOURCEBOOK FOR THE 2000 ELECTION 29 (Political Communication Laboratory Stanford University ed. 2002), available at <http://pcl.stanford.edu/campaigns/campaign2000/sourcebook> (last visited Jan. 27, 2006). Media contribute by focusing on the "horse race" aspects of campaigns, the insider view of how "messages" are performing, and the techniques used to "sell" candidates to the electorate. See, e.g., KATHLEEN HALL JAMIESON, *DIRTY POLITICS* 167 (1992) (describing "strategy schema," like that of sports and war, leading "reporters, candidates, and the public [to] ask, 'Who is winning and how?' The posture invited of the electorate by this schema is cynical and detached."); JOE MCGINNISS, *THE SELLING OF THE PRESIDENT* (Penguin Books 1988) (1969); THOMAS E. PATTERSON, *OUT OF ORDER* 58 (1993) (describing "game schema" through which press interprets politics as a strategic competition between competitors whose every move must be reported and analyzed, often instead of attending to issues of public policy).

⁶³ See, e.g., ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 24-25 (2d ed. 2003) (arguing many "Framers believed that they must erect constitutional barriers to popular rule because the people would prove to be an unruly mob, a standing danger to law, to orderly government, and to property rights"); RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT* 5-9 (1989) (1948) (characterizing Framers as distrustful of common man, hostile to democratic rule, but cognizant popular sentiment required at least some popular voice in government).

threats to liberty to be contained through devices (such as the electoral college, election of senators by state legislatures, an independent judiciary) that ensured government remained the domain of the “natural aristocracy.”⁶⁴

The Federalist framers of the Constitution sought to cabin popular participation in a mixed governmental system, filtering the people’s participation through the device of representation so that a more sober, expert elite would actually govern.⁶⁵ Federalists saw a pure democracy in which the people ruled directly as an evil to avoid; they were republicans, not democrats.⁶⁶ Having read Aristotle, they shared his critiques that democracy failed to account for inequality of talent and virtue, posed a serious danger of masses wresting control from elites, and threatened to degenerate into factions, demagoguery, and divisiveness.⁶⁷ Like Montesquieu, they saw grave danger in an all-powerful, unicameral legislature and noted the unfeasibility of democracy over a large territory.⁶⁸ To the extent they had a classical model of popular government in mind, it was the Roman Republic dominated by its august Senate of patrician legislators.⁶⁹

⁶⁴ The notion of a “natural aristocracy” was shared not only by Federalists such as John Adams, but also by his one-time rival Thomas Jefferson. See Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in 2 THE COMPLETE ADAMS-JEFFERSON LETTERS 387, 388 (Lester J. Cappon ed., 1959) [hereinafter Jefferson-Adams Letter].

⁶⁵ In *The Federalist No. 10*, Madison argued “the delegation of the government . . . to a small number of citizens elected by the rest” would “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.” THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961). He was confident a larger republic would prove “more favorable to the election of proper guardians of the public weal.” *Id.*

⁶⁶ Madison distinguished “a pure democracy,” *i.e.*, “a society consisting of a small number of citizens, who assemble and administer the government in person,” from a “republic,” *i.e.*, “a government in which the scheme of representation takes place.” *Id.* at 81-82. Because of their susceptibility to the evils of faction and unchecked majority will, Madison believed “democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.” *Id.* at 82.

⁶⁷ Compare the Federalists’ views, *supra* note 66, with those of Aristotle, see *infra* notes 94-95.

⁶⁸ See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. XI, ch. 6, at 152, 154 (Prometheus Books 2002) (1748).

⁶⁹ See, *e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 25 (1967) (Rome “gripped their minds, [it was] what they knew in detail, and what formed their view of the whole of the ancient world”). For a recitation of the classical authors and governmental examples forming the reference base of the founding generation of the United States, see Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 815-21 (2002).

B. The Developmental Vision of Democracy as Active Self-Government by Engaged Citizens that Transforms Individuals and Society

There is, of course, another, older tradition of democracy. To be sure, its ideas and practices applied to a world completely different from ours. Yet despite the vast contextual differences and the risk of trafficking in unverifiable myth, there is value in re-considering this tradition that understands democracy as the people actually governing themselves, rather than just deciding to whom they will delegate the task. Democracy in this view is more than a selection device for choosing rulers. It flows from the original Greek term *demokratia*, the joining of *demos*, “the people,” and *kratos* – usually translated as “rule,” but occasionally as “power,” as in “power of the people.”⁷⁰ According to one historian, for Athenians, *demokratia*, at the height of its practice, meant “the political power of ordinary people.”⁷¹

In this understanding of democracy as *self-government*, citizens are the central actors. It is citizens themselves who discuss, decide, and enact the law, resolve disputes, and implement decisions. Participation is not a burden or chore, but an opportunity to share in the common life of the community. Through direct participation in politics, citizens develop and use their skills, live their lives fully, and enable the community to reach its full potential by benefiting from the capacities of all its citizens.

1. Athenian Democracy and the Rejection of Subordination by Elites

Ancient Athens of the fifth to third centuries BCE is, of course, the leading historic example and inspiration for participatory democrats – at least those able to get past its exclusivity.⁷² To Athenians, democratic self-government entailed citizens meeting face-to-face to

⁷⁰ See ROBERT A. DAHL, ON DEMOCRACY 11 (1998). In Greek, *demos* could connote either “the citizen body as a whole” or “the common people, the many, the poor.” M.I. FINLEY, POLITICS IN THE ANCIENT WORLD 1-2 (1983) [hereinafter FINLEY, POLITICS IN ANCIENT WORLD].

⁷¹ JOSIAH OBER, POLITICAL DISSENT IN DEMOCRATIC ATHENS: INTELLECTUAL CRITICS OF POPULAR RULE 29 (2001) (regarding late-fifth and fourth-century BCE) [hereinafter OBER, CRITICS OF POPULAR RULE].

⁷² Athenian democracy is usually dated from the 508 BCE reforms of Cleisthenes to 321 BCE when Athens was conquered by Alexander the Great of Macedon. See, e.g., Simon Hornblower, *Creation and Development of Democratic Institutions in Ancient Greece*, in DEMOCRACY: THE UNFINISHED JOURNEY, 508 BC TO AD 1983 at 1-16 (John Dunn ed., 1993) [hereinafter DEMOCRACY: THE UNFINISHED JOURNEY]. As discussed *infra* at notes 96-97 and accompanying text, Athenian democracy extended only to free, male citizens, a distinct minority of its population.

deliberate and enact laws in the almost-all-powerful Assembly⁷³ and to resolve disputes by sitting as something akin to jurors in the popular law courts or “dicasteries.”⁷⁴

The touchstone of Athenian democracy was not election of representatives, but direct participation of citizens in reaching and implementing decisions. Voting to fill offices was deemed likely to reinstall an aristocracy of the best-known and well-to-do.⁷⁵ Even in the Assembly, efforts were made to reach decisions by acclamation rather than majority vote.⁷⁶ A commitment to maximize citizen participation in government meant most governmental positions were filled by lot rather than election,⁷⁷ terms of office were short,⁷⁸ there were limits on how often an individual could hold an office,⁷⁹ and citizens were paid for serving on the Council and sitting as jurors.⁸⁰ Behind this commitment to spreading participation and responsibility was an understanding of freedom as requiring each citizen both to govern and in turn be governed by his fellow citizens.⁸¹ A community of active citizens sharing in governance was considered the best protection against the re-institution of tyranny or oligarchy.⁸²

At the heart of this understanding of democracy was what Robert

⁷³ The Assembly met forty times a year and a quorum was 6,000 citizens. See HELD, *supra* note 26, at 21. It was not all-powerful because dicasteries could revisit its decisions. See *infra* note 74.

⁷⁴ Athenians used dicasteries (each comprised of hundreds of citizens) to resolve criminal and civil matters, review decisions of magistrates, and even to reconsider and overturn political decisions made by the Assembly. For brief descriptions, see M.I. FINLEY, *DEMOCRACY ANCIENT AND MODERN* 26-27, 117-19 (rev. ed. 1985); G.E.R. Lloyd, *Democracy, Philosophy, and Science in Ancient Greece*, in *DEMOCRACY: THE UNFINISHED JOURNEY*, *supra* note 72, at 41, 43.

⁷⁵ See ARISTOTLE, *THE POLITICS*, bk. II, 1273b40-41, bk. IV, 1294b7-10 (Trevor J. Saunders trans. 1981, Penguin rev. ed. 1992) (350 BCE); John Dunn, *Conclusion*, in *DEMOCRACY: THE UNFINISHED JOURNEY*, *supra* note 72, at 239, 242.

⁷⁶ JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 14 (rev. ed. 1983) (discussing Athenian Assembly's goal of *homonia*, i.e., “being of one mind”).

⁷⁷ Only generals, high financial officers, and ambassadors were exceptions to selection by lot. See FINLEY, *POLITICS IN ANCIENT WORLD*, *supra* note 70, at 71 n.7. The Council of 500, which set the Assembly's agenda, was selected by lot from all citizens over age thirty. See HELD, *supra* note 26, at 21-22.

⁷⁸ Terms of office were generally one year and non-renewable. *Id.* at 23.

⁷⁹ A citizen could only serve twice on the Council. *Id.* at 21-23.

⁸⁰ See FINLEY, *DEMOCRACY ANCIENT AND MODERN*, *supra* note 74, at 19.

⁸¹ I use the male pronoun deliberately, given Athenian women's exclusion from political citizenship. Aristotle characterized “ruling and being ruled in turn” as a central element of a democratic polity. See ARISTOTLE, *supra* note 75, bk. VI, 1317a40-b8. The goal was “to maximize opportunities for public service and to minimize the monopoly of power by any particular elite.” Phillip Brook Manville, *Ancient Greek Democracy and the Modern Knowledge-Based Organization: Reflections on the Ideology of the Two Revolutions*, in *DEMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN* 377, 381 (Josiah Ober & Charles Hedrick eds., 1996) [hereinafter *DEMOKRATIA*].

⁸² See *infra* notes 88-92.

Dahl calls a “logic of equality”: a notion that citizens were or could become “about equal in being well qualified to have a say in governing” and that no one was “so definitely better qualified” than others to be entrusted with the sole power to make decisions for his fellow citizens.⁸³ Emblematic of this political equality was the principle of *isegoria*, the equal right of any citizen to speak before the Assembly.⁸⁴ An integral aspect of this logic of equality was a drive to wrest power from elites who claimed a monopoly on the necessary knowledge, prowess, or values to govern wisely.⁸⁵ Democracy rejected birth, wealth, and military might as determinants of appropriate rulers; it instead insisted responsibility for government should be broadly shared among citizens. As Cornel West summarizes the Athenian and all subsequent forms:

Democracy is always a movement of an energized public to make elites responsible – it is at its core and most basic foundation the taking back of one’s powers in the face of the misuse of elite power. In this sense, democracy is more a verb than a noun – it is more a dynamic striving and collective movement than a static order or stationary status quo.⁸⁶

For Athenians, democracy connoted a polity in which the interests of “the many” were given significant weight – some would say favored outright over those of the wealthy few.⁸⁷ Democracy was a way of ensuring citizens, especially ordinary citizens, were free, in the sense of “not being under another.”⁸⁸ In this way, Athenian democracy reshaped not only government and public decision-making, it reshaped society by enhancing the status of ordinary citizens *vis-à-vis*

⁸³ DAHL, ON DEMOCRACY, *supra* note 70, at 10; ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 98 (1989). *See also id.* at 31-32 (labeling this view “Strong Principle of Equality”); Ian Morris, *The Strong Principle of Equality and the Archaic Origins of Greek Democracy*, in DEMOKRATIA, *supra* note 81, at 19, 20.

⁸⁴ *See, e.g.*, Mogens Herman Hansen, *The Ancient Athenian and the Modern Liberal View of Liberty as a Democratic Ideal*, in DEMOKRATIA, *supra* note 81, at 91, 92 (“the ideal is viewed as a kind of equality. It is every citizen’s *equal* right to speak that is stressed.”).

⁸⁵ Sheldon Wolin calls Athenian democracy a “transgressive action” that “disturb[ed] the power relations, interests, expectations, and taboos that . . . cluster[ed] around . . . laws and institutions.” Sheldon Wolin, *Transgression, Equality, and Voice*, in DEMOKRATIA, *supra* note 81, at 63, 79. This transgression “provoke[d] contestation because it . . . [was], in effect, a social invasion of a preserve from which the invaders had been previously excluded.” *Id.*

⁸⁶ CORNEL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 68 (2004).

⁸⁷ Aristotle defined democracy as “rule . . . to the advantage of the poor.” FINLEY, POLITICS IN ANCIENT WORLD, *supra* note 70, at 1, *citing* ARISTOTLE, *supra* note 75, at 1279b6-40. For Plato and Aristotle, this preference for the interest of the many (rather than of the entire *polis*, including the wealthy few) was one of democracy’s central flaws. *See infra* notes 93-95 and accompanying text.

⁸⁸ *See* OBER, CRITICS OF POPULAR RULE, *supra* note 71, at 28.

those purporting to be their superiors.⁸⁹ Democracy was a rejection of subservience; as a commentator summarizes Athenian democratic freedom, it was “the freedom of the *demos* from masters”⁹⁰ – be they tyrants, oligarchs, or aristocrats purporting to superiority. To another commentator, “Athens was a democracy, not just because the ordinary citizen had a vote, but because he was a participant in maintaining a political culture and a value system that constituted him a free agent and the political equal of his elite neighbor.”⁹¹ Recognizing the fundamental dignity and worth of all citizens checked the political and social power of elites, limiting (or even destroying) what elites considered “natural” relations of domination and subordination. Thus Demosthenes portrayed the Athenian democratic ethos as: “compassion for the weak, a prohibition against strong and powerful individuals acting violently toward other citizens, and a refusal to countenance either brutal treatment by the powerful of the mass of citizens or subservience by the masses to the powerful.”⁹²

Democracy was consequently denigrated by the wealthy and educated as a politics of the rabble. Plato persistently lamented shoemakers’ and shopkeepers’ participation in governmental decision-making, a realm he believed required the expertise of philosopher-guardians.⁹³ Aristotle, though more temperate, critiqued democracy as government conducted for the benefit of the poor majority rather than the interest of the entire public.⁹⁴ He labeled democracy a degenerate polity, arguing it resulted in the wrong people leading (for the masses would follow panderers) and encouraged lack of respect for authority and ultimately refusal to follow any law.⁹⁵

Even as it dramatically widened the circle of those who shared in governance, Athenian democracy excluded, as unworthy of citizenship, a substantial majority of its population. Women, slaves, residents whose ancestors were born outside Attica, and colonial subjects were

⁸⁹ The author of the fifth century BCE *Political Regime of the Athenians*, erroneously identified as Xenophon and now nicknamed “the Old Oligarch,” complained because Athenian law prohibited beating people in the street at will, no matter how poorly they were dressed or how insolently they refused to defer to their betters. See *id.* at 18.

⁹⁰ Ellen Meiskins Wood, *Demos vs. “We the People”: Freedom and Democracy Ancient and Modern*, in DEMOKRATIA, *supra* note 81, at 121, 135.

⁹¹ OBER, CRITICS OF POPULAR RULE, *supra* note 71, at 40.

⁹² JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE 4 (1989) (quoting Demosthenes).

⁹³ See FINLEY, DEMOCRACY ANCIENT AND MODERN, *supra* note 74, at 4. For a close look at contemporaneous critiques of democracy, see OBER, CRITICS OF POPULAR RULE, *supra* note 71.

⁹⁴ See ARISTOTLE, *supra* note 75, at bk. III, 1279b4-11.

⁹⁵ See, e.g., *id.* at bk. V, 1304b19-25 (detailing “unprincipled character of popular leaders” in democracies)

all denied citizenship.⁹⁶ As a historian notes, Athenian freedom “did not extend beyond the community [of citizens] itself: freedom for one’s own members implied neither legal (civil) freedom for all others resident within the community nor political freedom for members of other communities over whom one had power.”⁹⁷

Notwithstanding the magnitude of these exclusions from citizenship, Athenian democracy involved its 40,000 to 60,000 male citizens in political discourse, decision-making, and public action to an extent unprecedented in history. Despite its critics’ concerns, it did not self-destruct into factional infighting,⁹⁸ the many did not expropriate the wealth of the few,⁹⁹ nor did the culture degenerate into rampant lawlessness or licentiousness. Indeed, both supporters and opponents of democracy often note the intense activity and energy unleashed by Athenian democracy.¹⁰⁰ As Sheldon Wolin summarizes, Athenians “achieved a democracy in which ordinary human beings overcame the barriers to power represented by wealth, status, education, and tradition and succeeded in inventing the practice of collective action on a continuing basis.”¹⁰¹

It is this original sense of democracy, with its focus on the *widespread, active participation of ordinary citizens in public deliberation and action*, and its emphasis on the political equality and self-governing agency of the *demos*, to which collaborative lawyers, like other advocates of democratic participation, aspire.

2. *Jeffersonian Democracy and the Centrality of Local Participation*

Although protective democracy, or to use the historically more correct term, protective republicanism was (and has remained) the

⁹⁶ See HELD, *supra* note 26, at 23. The number of slaves was extensive, perhaps 80,000 to 100,000, or one and a half per citizen. See *id.* Finley suggests “adult male citizens comprised about one sixth of the total population . . .” FINLEY, DEMOCRACY ANCIENT AND MODERN, *supra* note 74, at 51. Indeed, slave labor freed citizens’ time to participate in politics, see Hornblower, *supra* note 72, at 4, and Athenian imperialism secured tribute from vanquished opponents that helped pay citizens for their participation. See *id.* at 9.

⁹⁷ FINLEY, DEMOCRACY ANCIENT AND MODERN, *supra* note 74, at 91.

⁹⁸ The two exceptions were the short-lived aristocratic coups that re-instituted oligarchies in 411 and 404 BCE. The latter was so bloody, in sharp contrast to the democratic restoration in 403 BCE, it led Plato to briefly retract his previous opprobrium and call the democratic constitution overturned by the “The Thirty” oligarchs “a precious thing.” See SANFORD LAKOFF, DEMOCRACY: HISTORY, THEORY, PRACTICE 1 & n.2 (1996). Athenian democracy ended when Alexander the Great conquered the city and Attica in 321 BCE.

⁹⁹ See Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415 (2003).

¹⁰⁰ The Old Oligarch, see *supra* note 89, for example, noted the “excessively energetic activity” of the Athenian citizen-masses. See OBER, CRITICS OF POPULAR RULE, *supra* note 71, at 16.

¹⁰¹ Sheldon Wolin, *Transgression, Equality, Voice*, *supra* note 85, at 85.

dominant strain in the U.S. political tradition, Thomas Jefferson stands out as the first major American advocate of the developmental benefits of democratic participation. Jefferson, towards the end of his life,¹⁰² routinely urged that counties be divided into wards (of five to six square miles and roughly one hundred families) in which citizens would directly govern themselves.¹⁰³ In his view:

Each ward would thus be a small republic within itself, and every man in the state would thus become an acting member of the common government, transacting in person a great portion of its rights and duties . . . entirely within his competence. The wit of man cannot devise a more solid basis for a free, durable, and well-administered republic.¹⁰⁴

Wards would be settings where citizens participated “not merely at an election one day in the year, but every day.”¹⁰⁵

He saw wards as “the key-stone of the arch of our government.”¹⁰⁶ They would encourage direct participation of citizens in decision-making and administration of public education, road construction and maintenance, care for the poor, policing, militia exercises, minor legal matters, and the like.¹⁰⁷ Through such local participation, Jefferson believed citizens would develop the skills, solidarity, and public virtue necessary to govern themselves on the local level and to become effective electors and watchdogs of their representatives at the county, state, and federal levels.¹⁰⁸ Direct democracy at the ward level would thus be the foundation, and “main strength,” upon which representative democracy would then firmly stand.¹⁰⁹

For Jefferson, active citizen participation was essential; without

¹⁰² John Diggins notes that Jefferson’s ideas about the ward system were chiefly outlined in private letters and represent more “Jefferson the philosopher than Jefferson the statesman.” John Patrick Diggins, *Class, Classical, and Consensus Views of the Constitution*, 55 U. CHI. L. REV. 555, 565 (1988) (reviewing CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1986) (1913), HANNAH ARENDT, *ON REVOLUTION* (1963), and LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955)).

¹⁰³ GARRET WARD SHELTON, *THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON* 13 (1992).

¹⁰⁴ Letter from Thomas Jefferson to Maj. John Cartwright (June 5, 1824), 16 *THE WRITINGS OF THOMAS JEFFERSON* 42, 46 (Albert Ellery Bergh ed., 1907), quoted in SHELTON, *supra* note 103, at 13.

¹⁰⁵ Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), 14 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 104, at 417, 421 [hereinafter Jefferson-Cabell Letter].

¹⁰⁶ SHELTON, *supra* note 103, at 71, quoting Jefferson-Adams Letter, *supra* note 64, at 390.

¹⁰⁷ See Letter from Thomas Jefferson to Gov. John Tyler (May 26, 1810), 12 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 104, at 392, 393 [hereinafter Jefferson-Tyler Letter].

¹⁰⁸ See SHELTON, *supra* note 103, at 78-79.

¹⁰⁹ See Jefferson-Tyler Letter, *supra* note 107, at 393-94.

popular attention to political affairs, elected leaders would become “wolves,” “devour[ing] their own kind” and allowing “the general prey of the rich on the poor.”¹¹⁰ While he often touted his ward system on protective grounds,¹¹¹ Jefferson saw direct ward democracy as essential to cultivating, in the words of a biographer, “citizens’ hearts and minds: by developing both their affectionate regard for the community and nation and their rational faculties requisite to wise public deliberation.”¹¹² Direct democracy at the ward level would *undergird* representative democracy – forming active, public-minded, inter-connected citizens – but would not replace it.

Of course, Jefferson’s ward system was never implemented. And although New England town meetings bore a resemblance to Athenian direct democracy, they were largely replaced by representative governments.¹¹³ For many, Jefferson’s proposed ward system and New England town meetings (let alone the Athenian democratic *polis*), even if they hold some appeal, are quaint examples from a simpler, agrarian past of face-to-face communities that will never return. And yet the promise of popular self-government by active citizens has continued to attract Americans interested in fostering social change. Political scientist James Morone, a skeptic of this allure, describes a recurring “democratic wish” for direct citizen participation that repeatedly reappears in American history as a “subordinate ideology” to the generally prevailing attachment to liberal representative de-

¹¹⁰ Letter from Thomas Jefferson to Col. Edward Carrington, (Jan.16, 1787), 6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 104, at 55, 58. Jefferson’s prescience is demonstrated by Posner’s reference, *see supra* note 57 and accompanying text, to politicians as the very animal Jefferson warned they would become if popular participation withered.

¹¹¹ A major protective theme involved creating staunch defenders of republican government itself:

Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; when there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte.

Jefferson-Cabell Letter, *supra* note 105, at 422.

¹¹² SHELDON, *supra* note 103, at 144. Jefferson believed the small size of ward assemblies would facilitate “full but orderly discussion” through which citizens would develop public reasoning skills. *See* Jefferson Letter to Samuel Kercheval, (July 12, 1816), 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 104, at 32, 36.

¹¹³ Typically New England town meetings occurred annually, while the Athenian Assembly met forty times a year. Although both settings sought to reach consensus on decisions through face-to-face discussion, town officers in New England were chosen by election, rather than lot, and often re-elected repeatedly. *See* MANSBRIDGE, *supra* note 76, at 39-135 (analysis of town meeting government in a Vermont town); JOSEPH F. ZIMMERMAN, THE NEW ENGLAND TOWN MEETING: DEMOCRACY IN ACTION (1999).

mocracy.¹¹⁴ Collaborative lawyers aim to bring this wish to fruition.

II. JOHN DEWEY'S VISION OF DEMOCRACY AS A WAY OF LIFE GROUNDED IN CONJOINT PARTICIPATORY ACTIVITY

In the first half of the twentieth century, John Dewey was the leading American intellectual voice proclaiming the desirability, indeed necessity, of ordinary citizens' broader and deeper participation in political and social life.¹¹⁵ Dewey issued his call for greater participation fully conscious that the industrial and mass-communication revolutions had irretrievably destroyed the agrarian, face-to-face communities in which democracy was born and first flourished.¹¹⁶

Although his star eclipsed quickly after World War II, Dewey was America's leading public intellectual of the 1920s, 30s, and early 40s.¹¹⁷ Despite his oft-maligned prose style,¹¹⁸ many Americans waited to hear what he had to say on an issue before making up their minds.¹¹⁹ In the past decades, Dewey's ideas – and those of his fellow

¹¹⁴ JAMES A. MORONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* 18 (rev. ed. 1998) (describing American history as alternating contest between baseline dread of government as threat to liberty and repeatedly recurring yearning for direct intervention by united people pursuing shared view of common good).

¹¹⁵ See *infra* notes 126-234 and accompanying text. Dewey had been issuing this call since the late Nineteenth Century. See John Dewey, *The Ethics of Democracy* (1888), in 1 *EARLY WORKS OF JOHN DEWEY* 228, reprinted in JOHN DEWEY, *THE POLITICAL WRITINGS* 59 (Debra Morris & Ian Shapiro eds., 1993) [hereinafter Dewey, *Ethics of Democracy* and DEWEY, *POLITICAL WRITINGS*].

¹¹⁶ See, e.g., JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 110-42 (Swallow Press 1991) (1927) [hereinafter DEWEY, *PUBLIC AND ITS PROBLEMS*].

¹¹⁷ See, e.g., SHELDON S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* 503 (expanded ed. 2004) (calling Dewey "perhaps the most outstanding American example of the public intellectual and indisputably the dominant voice in political theory during the inter-war years") [hereinafter, WOLIN, *POLITICS AND VISION*]. In the 1920s, Dewey began publishing in popular journals and writing for a broader audience. See ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* 195 [hereinafter WESTBROOK, *DEWEY AND DEMOCRACY*]. A contributing factor to his thought's eclipse was his repeatedly asserted confidence that proper application and diffusion of scientific methods to social situations would usher in a brighter future, see *infra* notes 145-47, 211-15 and accompanying text – a faith shaken for many by the atomic and other destruction wrought by the application of science to warfare.

¹¹⁸ Oliver Wendell Holmes believed Dewey wrote as "God would have spoken had He been inarticulate but keenly desirous to tell you how it was." HOLMES-POLLOCK LETTERS: *THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932*, at 287 (Mark DeWolf Howe, ed. 1941), cited in WESTBROOK, *DEWEY AND DEMOCRACY*, *supra* note 117, at xxii. A biographer, noting Lewis Mumford's likening Dewey's prose to "the clanking of a subway train," deemed the charge "unfair but not wholly unfair." See ALAN RYAN, *JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM* 38 (1995).

¹¹⁹ Henry Commager considered Dewey "the guide, the mentor, and the conscience of the American people; . . . for a generation no issue was clarified until Dewey had spoken." HENRY COMMAGER, *THE AMERICAN MIND* 100 (1950), quoted in RYAN, *supra* note 118,

philosophical Pragmatists¹²⁰ – have been rediscovered by political and social theorists¹²¹ and legal academics.¹²² Dewey's career spanned six decades and traversed the realms of philosophy, education, international relations, and political and social theory. Several analysts see democracy – in the broad sense in which he intended the term – as a central pre-occupation and prescription unifying his thought.¹²³

Many of Dewey's central ideas – but not all of them¹²⁴ – dovetail closely with collaborative approaches to lawyering. Although collaborative theorists rarely cite him,¹²⁵ an exploration of his vision of democracy reveals an important kindred thinker and intellectual forebear of this approach to social-change lawyering.

at 19.

¹²⁰ Dewey preferred the term “experimentalism” to “pragmatism,” because at the heart of his philosophy was a commitment to evaluate ideas and practices by the consequences, likely or observable, of their implementation. RYAN, *supra* note 118, at 20. He insisted ideas and practices should be recognized as “hypotheses . . . to be tested and confirmed – and altered – through consequences effected by acting upon them.” JOHN DEWEY, *THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION* 277 (Capricorn Books ed. 1960) (1929) [hereinafter DEWEY, *QUEST FOR CERTAINTY*].

¹²¹ Richard Rorty played a leading role in redirecting attention to pragmatist philosophy and social theory. See RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); RICHARD RORTY, *CONTINGENCY, IRONY, & SOLIDARITY* (1989); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979). Several Dewey scholars have noted Rorty's penchant for attributing views to Dewey that Dewey never held. See, e.g., James T. Kloppenberg, *Pragmatism: An Old Name for Some New Ways of Thinking?*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 83 (Morris Dickstein ed., 1999) [hereinafter Kloppenberg, *Pragmatism and Revival of Pragmatism*]; Robert B. Westbrook, *Pragmatism and Democracy: Reconstructing the Logic of John Dewey's Faith*, in *REVIVAL OF PRAGMATISM*, *supra* at 128. For a compendium of theorists' recent reactions to pragmatism, see *REVIVAL OF PRAGMATISM*, *supra*.

A biographer attributes Dewey's renewed appeal to his communitarian ideas, which have come back into fashion after the individualistic hedonism of the last three decades, and to the overlap between issues Dewey addressed and those the U.S. now faces: inner-city poverty, homelessness, unemployment, lack of medical care, social conflict, and “upper classes . . . indifferent to the fate of the poor and . . . the working near-poor.” See RYAN, *supra* note 118, at 23-24.

¹²² See Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996).

¹²³ See WESTBROOK, *DEWEY AND DEMOCRACY*, *supra* note 117, at x-xi. See also WILLIAM R. CASPARY, *DEWEY ON DEMOCRACY* 2 (2000).

¹²⁴ See *infra* notes 403-04, 415-19 and accompanying text.

¹²⁵ López is the lone exception. He includes Dewey's *The Quest for Certainty*, *supra* note 120, in the bibliography to *Rebellious Lawyering*. See REBELLIOUS LAWYERING, *supra* note 2, at 394. He cites *The Quest for Certainty* and Dewey's *Liberalism and Social Action*, JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* (1991) (1935), as important influences on his “rebellious” vision of lawyering. See López, *Community Problem Solving*, *supra* note 2, at 71 n.9.

A. *Democracy as Broader than Politics:
A Way of Living with Others*

Central to Dewey's vision is the idea that democracy is more than just a matter of political or governmental institutions. As early as 1888, he argued that saying democracy is "only a form of government is like saying home is a more or less geometrical arrangement of bricks and mortar[,] that the church is a building with pews, pulpit and spire."¹²⁶ For Dewey, democracy was far broader; it was "a form of moral and spiritual association."¹²⁷ As he expressed half a century later, democracy was an ethical or moral ideal,¹²⁸ by which he meant a deliberately chosen and implemented response to the question of how to interact with other people.¹²⁹ Government and politics was one realm in which democracy was expressed, but democracy for Dewey was an ideal to be realized in – and a spirit or approach to be infused into – *all* realms of life: schools, families, social relations, voluntary associations, and, perhaps most urgently, the workplace.¹³⁰

For Dewey, democracy could not "depend upon or be expressed in political institutions alone" because "democracy is expressed in the attitudes of human beings and is measured by the consequences produced in their lives."¹³¹ He believed democracy was best understood

¹²⁶ Dewey, *Ethics of Democracy*, *supra* note 115, at 59.

¹²⁷ *Id.*

¹²⁸ See, e.g., John Dewey, *Creative Democracy – The Task Before Us*, in JOHN DEWEY AND THE PROMISE OF AMERICA (1939), *reprinted in* DEWEY, POLITICAL WRITINGS, *supra* note 115, at 240, 243 [hereinafter Dewey, *Creative Democracy*] ("democracy is a moral ideal and . . . a reality only as it is a commonplace of living").

¹²⁹ For Dewey, "a moral term . . . refers to a choice about something to be done, a preference for living this sort of life rather than that. It refers . . . to a desired future . . ." John Dewey, *Philosophy and Democracy*, UNIVERSITY [OF CALIFORNIA] CHRONICLE 21 (1919), *reprinted in* DEWEY, POLITICAL WRITINGS, *supra* note 115, at 38, 38 [hereinafter Dewey, *Philosophy and Democracy*].

¹³⁰ See, e.g., John Dewey, *The Basic Values and Loyalties of Democracy*, AMERICAN TEACHER 25 (May 1941), *reprinted in* DEWEY, POLITICAL WRITINGS, *supra* note 115, at 207, 208 (democratic faith must be "put systematically into practice every day in all the relationships of living") [hereinafter Dewey, *Basic Values of Democracy*]; Dewey, *Creative Democracy*, *supra* note 128, at 242 (democracy must be "put in force in the attitudes which human beings display to one another in all the incidents and relations of daily life."). In 1888, Dewey wrote: "democracy is not in reality what it is in name until it is industrial." Dewey, *Ethics of Democracy*, *supra* note 115, at 63. He believed participatory democracy had to include the workplace, arguing:

The labor and employment problem . . . cannot be solved by mere changes in wages, hours of work and sanitary conditions. No permanent solution is possible save in a radical social alteration, which effects the degree and kind of participation the worker has in the production and social disposition of the wares he produces. . . .

JOHN DEWEY, ART AS EXPERIENCE (1934), *reprinted in* DEWEY, POLITICAL WRITINGS, *supra* note 115, at 89, 92.

¹³¹ JOHN DEWEY, FREEDOM AND CULTURE 97 (1989) (1939). For Dewey, political democracy was "not the most inspiring of the different meanings of democracy"; he viewed as

and embodied as “a way of life,”¹³² a way of being in the world to be practiced, to be lived out – paraphrased into our current vernacular, to be “walked,” not just “talked.”¹³³ He saw democracy as “primarily a mode of associated living, of conjoint communicated experience,” in which the extension of “the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own” leads to a “widening of the area of shared concerns” and the “liberation of a greater diversity of personal capacities.”¹³⁴ Dewey understood his philosophical work as an attempt to show a democratic way of life was compatible with the world,¹³⁵ even as he conceded democracy so understood still awaited implementation in the world.¹³⁶

Deweyan democracy was inclusive and interactive. For Dewey the “key-note of democracy as a way of life” was “the necessity for the participation of every mature human being in formation of the values that regulate the living of men together.”¹³⁷ At its heart was the practice of “day-by-day working together with others,”¹³⁸ based upon a deep-seated “faith in the capacity of human beings for intelligent judgment and action if proper conditions are furnished.”¹³⁹ As he elaborated:

more “important and even superior [the] claims of democracy as an ethical and social ideal.” DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 116, at 82-83.

¹³² *Id.* at 101.

¹³³ Dewey insisted democrats must be moved in their “daily walk and conversation” by “a generous belief in . . . [all others’] possibilities as human beings, a belief which brings with it the need for providing conditions which will enable these capacities to reach fulfillment.” Dewey, *Creative Democracy*, *supra* note 128, at 242. Wolin describes this conception of “democracy as a life-form and culture rather than a set of formal political institutions.” WOLIN, *POLITICS AND VISION*, *supra* note 117, at 504. *See also* Debra Morris & Ian Shapiro, *Editors’ Introduction*, in DEWEY, *POLITICAL WRITINGS*, *supra* note 115, at xvi [hereinafter Morris & Shapiro, *Introduction*] (characterizing Dewey’s “view of democracy as a way of being in the world, a way of experiencing the world *whatever* the domain”).

¹³⁴ JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 87 (The Free Press 1997) (1916) [hereinafter DEWEY, *DEMOCRACY AND EDUCATION*].

¹³⁵ Dewey sought “an intellectual warrant for our [democratic] endeavors, a reasonable persuasion that our undertaking is not contradicted by what science authorizes us to say about the structure of the world” Dewey, *Philosophy and Democracy*, *supra* note 129, at 42.

¹³⁶ *See* DEWEY, *FREEDOM AND CULTURE*, *supra* note 131, at 61 (“as yet the full conditions, economic and legal, for a completely democratic experience have not yet existed.”).

¹³⁷ John Dewey, *Democracy and Educational Administration* (Feb. 22, 1937), in AM. ASSOC. OF SCH. ADM’RS, NAT’L EDUC. ASSOC., *OFFICIAL REPORT: NEW ORLEANS CONVENTION* 48, 49 (1937), *reprinted in* 11 JOHN DEWEY: *THE LATER WORKS, 1925-1953*, at 217, 217 (Jo Ann Boydston ed., 1987) [hereinafter Dewey, *Democracy and Educational Administration* and DEWEY, *LATER WORKS*].

¹³⁸ Dewey, *Creative Democracy*, *supra* note 128, at 243.

¹³⁹ *Id.* at 242.

faith in the capacities of human nature, faith in human intelligence, and in the power of pooled and cooperative experience . . . is not belief that these things are complete[,] but that if given a show they will grow and be able to generate progressively the knowledge and wisdom needed to guide collective action.¹⁴⁰

Indeed, Dewey warned, “faith in the capacities of intelligence . . . is so deeply embedded in the methods which are intrinsic to democracy that when a professed democrat denies the faith he convicts himself of treachery to his profession.”¹⁴¹ As a biographer summarizes, Dewey’s view of democracy “call[ed] upon men and women to build communities in which the necessary opportunities and resources are available for every individual to realize his or her particular capacities and powers through participation in political, social, and cultural life.”¹⁴²

Dewey rarely spelled out exactly what he meant; he instead offered analogies.¹⁴³ As another biographer captures, Dewey’s work was more “a gospel for democrats than a handbook for institutional designers,” for he “had much to say about the ‘spirit’ of democracy and less to say about the ‘letter’ of its arrangements.”¹⁴⁴ He did, however, frequently refer to scientific communities as embodiments of democracy.¹⁴⁵ He saw scientists modeling a *community* to which members feel allegiance and responsibility, to which everyone contributes her or his unique ideas and skills, and in which knowledge and direction are continually readjusted by being shared, discussed, tested in practice, refined, and re-tested.¹⁴⁶ For Dewey, such interaction created “an

¹⁴⁰ Dewey, *Democracy and Educational Administration*, *supra* note 137, at 217, 219.

¹⁴¹ Dewey, *Creative Democracy*, *supra* note 128, at 243.

¹⁴² WESTBROOK, DEWEY AND DEMOCRACY, *supra* note 117, at xiv.

¹⁴³ In one of his most explicit statements, Dewey described democracy as a state of social life where there is a wide and varied distribution of opportunities; where there is social mobility or scope for change of position and station; where there is free circulation of experiences and ideas, making for a wide recognition of common interests and purposes, and where utility of social and political organization to its members is so obvious as to enlist their warm and constant support in its behalf.

John Dewey, *The Need of an Industrial Education in an Industrial Democracy*, in MANUAL TRAINING AND VOCATIONAL EDUCATION 17 (1916), *reprinted in* DEWEY, POLITICAL WRITINGS, *supra* note 115, at 121, 121-22 [hereinafter Dewey, *Need of an Industrial Education*].

¹⁴⁴ RYAN, *supra* note 118, at 31, 314. *See also* Morris & Shapiro, *Introduction*, *supra* note 133, at xii (“Dewey offers not a program, but rather a political morality”).

¹⁴⁵ *See, e.g.*, DEWEY, FREEDOM AND CULTURE, *supra* note 131, at 81 (“freedom of inquiry, toleration of diverse views, freedom of communication, the distribution of what is found out to every individual . . . , are involved in the democratic as in the scientific method”).

¹⁴⁶ A commentator explains: “Dewey valued the scientific method because it embodied an ethical commitment to open-ended inquiry wherein human values” – and, here I would add, community members – “shaped the selection of questions, the formulation of hypotheses, and the evaluation of results.” Kloppenberg, *Pragmatism*, *supra* note 121, at 83, 101.

expanding community of cooperative effort.”¹⁴⁷

B. *Individual Self-Realization through Communal Activity*

A central goal of Deweyan democracy was “self-realization through collective life.”¹⁴⁸ Rather than viewing individuals and collectives as opposed dualisms, Dewey believed one only becomes an individual through interaction with others.¹⁴⁹ He rejected the idea of the isolated individual and mocked notions of “rugged individualism” as self-interested obfuscations by the wealthy and powerful.¹⁵⁰ Instead of “a self-enclosed way of acting, independent of everything [and everyone] else,” he understood individualism as a “*distinctive* way of behaving in conjunction and *connection* with other distinctive ways of acting.”¹⁵¹ As a commentator explains, Dewey considered individuality “not a given but an *achievement* – and the type of individuality we can achieve is itself dependent on the type of communities we develop.”¹⁵² Dewey saw democracy as a form of “associated living,” an integrated, *interactive* way of life “foster[ing] the growth of all mem-

¹⁴⁷ John Dewey, *Individuality in Our Day*, NEW REPUBLIC 62 (Apr. 2, 1930), reprinted in DEWEY, POLITICAL WRITINGS, *supra* note 115, at 81, 82 [hereinafter Dewey, *Individuality in Our Day*]. This “expanding community” results because “[n]o scientific inquirer can keep what he finds to himself or turn merely to private account without losing his scientific standing. Everything discovered belongs to the community of workers. Every new idea and theory has to be submitted to this community for confirmation and test.” *Id.*

¹⁴⁸ Morris & Shapiro, *Introduction*, *supra* note 133, at xii.

¹⁴⁹ See, e.g., DEWEY, DEMOCRACY AND EDUCATION, *supra* note 134, at 312 (“There is no inherent opposition between working with others and working as an individual. On the contrary, certain capacities of an individual are not brought out except under the stimulus of associating with others.”); Dewey, *Individuality in Our Day*, *supra* note 147, at 86-87.

¹⁵⁰ Dewey called the notion of “really being able to stand and act alone” delusional; it was “an unnamed form of insanity . . . responsible for a large part of the remediable suffering of the world.” DEWEY, DEMOCRACY AND EDUCATION, *supra* note 134, at 44. Another formulation was even more emphatic:

the alleged *status quo* is summed up in the phrase “rugged individualism.” The assumption is . . . that we are living in a free economic society in which every individual has an equal chance to exercise his initiative and his other abilities, and that the legal and political order is designed and calculated to further this equal liberty on the part of all individuals. No grosser myth ever received general currency. Economic freedom has been either non-existent or precarious for large masses of the population. Because of its absence and its tenuousness for the majority, political and cultural freedom has been sapped; the legally constituted order has supported the ideal of *beati possidentes* [“blessed are the haves”].

John Dewey, *Can Education Share in Social Reconstruction?*, SOCIAL FRONTIER 1 (1934), reprinted in DEWEY, POLITICAL WRITINGS, *supra* note 115, at 125.

¹⁵¹ DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 188. He continued: “the human being whom we fasten upon as individual *par excellence* is moved and regulated by his associations with others; what he does and what the consequences of his behavior are, what his experience consists of, cannot even be described, much less accounted for, in isolation.” *Id.*

¹⁵² Richard J. Bernstein, *Community in the Pragmatic Tradition*, in REVIVAL OF PRAGMATISM, *supra* note 121, at 141, 155.

bers of the society” through “modes of behaving which make life richer and more worth living for everyone concerned.”¹⁵³ It is important to note, for Dewey is sometimes misunderstood in this regard, he did not assume interactions would be smooth and conflict-free.¹⁵⁴ But he was confident that free and public interchange of diverse experiences, in which new views challenge established patterns of thought and behavior, would cause people and society to grow.¹⁵⁵

Dewey saw the achievement of community as a central end of democracy.¹⁵⁶ For him, community existed

[w]herever there is conjoint activity whose consequences are appreciated as good by all singular persons who take part in it, and where the realization of the good is such to effect an energetic desire and effort to sustain it in being just because it is a good shared by all¹⁵⁷

As such, communal life had to be “emotionally, intellectually, consciously sustained.”¹⁵⁸ But Dewey promoted community and collective life because he saw it as a means for achieving *individual self-realization and growth*. For him, growth was a pre-eminent good.¹⁵⁹ A key value of democracy was drawing upon and including *all* members in society, utilizing their unique skills,¹⁶⁰ and, by encouraging their in-

¹⁵³ See WESTBROOK, DEWEY AND DEMOCRACY, *supra* note 117, at 247, quoting JOHN DEWEY: LECTURES IN CHINA, 1919-1920, at 90 (Robert W. Clopton & Tsuin-chen Ou eds., 1973).

¹⁵⁴ Dewey wrote:

Of course, there *are* conflicting interests; otherwise there would be no social problems. The problem . . . is precisely *how* conflicting claims are to be settled in the interest of the widest possible contribution to the interests of all – or at least of the great majority. The method of democracy – inasfar as it is that of organized intelligence – is to bring these conflicts out into the open where their special claims can be seen and appraised, where they can be discussed and judged in the light of more inclusive interests than are represented by either of them separately.

DEWEY, LIBERALISM AND SOCIAL ACTION, *supra* note 125, at 81.

¹⁵⁵ See DEWEY, DEMOCRACY AND EDUCATION, *supra* note 134, at 85 (“Diversity of stimulation means novelty, and novelty means challenge to thought.”).

¹⁵⁶ Democracy was “a name for a life of free and enriching communion.” DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 184.

¹⁵⁷ *Id.* at 149.

¹⁵⁸ *Id.* at 151.

¹⁵⁹ People were “not fixed entities, but a growth process occurring over an entire lifespan.” JOHN DEWEY, EXPERIENCE AND NATURE 224-25 (2d ed. 1929) (1925), *reprinted in* 1 DEWEY, LATER WORKS, *supra* note 137, at 210, quoted in Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 723 (2003) (reviewing POSNER, *supra* note 27).

¹⁶⁰ See, e.g., John Dewey, *Individuality, Equality and Superiority*, NEW REPUBLIC 33 (1922), *reprinted in* DEWEY, POLITICAL WRITINGS, *supra* note 115, at 59, 78. (“Democracy . . . is a claim that every human being as an individual may be the best for some particular purpose and hence be the most fitted to rule, to lead, in that specific respect.”); DEWEY, DEMOCRACY AND EDUCATION, *supra* note 134, at 90-91 (“in the degree in which a society has become democratic, social organization means utilization of the specific and variable

teraction with diverse others, enabling "their potentialities to come to realization."¹⁶¹ Deweyan democracy truly left no one behind.¹⁶² For Dewey, democracy meant not just removing barriers to individuals' exercise of their natural powers, but actively nurturing and sustaining those powers.¹⁶³ Such nurture and sustenance came from settings that encouraged and challenged individuals to grow through their interactions with a multiplicity of fellow community members.¹⁶⁴ Individual growth could not occur if relations of domination and subordination, or rigid class or caste distinctions, prevented full participation and interaction by any individual or class.¹⁶⁵

C. *Liberty and Equality Reconceived, Fraternity Re-Emphasized*

In discussing democracy, Dewey emphasized the centrality of liberty, equality, and fraternity, the slogan of the French Revolution, giving the first two of these concepts his own meanings, and the third a special emphasis.

Liberty, for Dewey, was "effective power to do specific things."¹⁶⁶

qualities of individuals").

¹⁶¹ Dewey, *Basic Values of Democracy*, *supra* note 130, at 208.

¹⁶² Dewey insisted

all social institutions have . . . a purpose . . . to set free and to develop the capacities of human individuals without respect to race, sex, class, or economic status [I]f [democracy] . . . has a moral meaning, it is found in resolving that the supreme test of all political institutions and industrial arrangements shall be the contribution they make to the all-around growth of every member of society.

JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 147 (1920), *quoted in* WOLIN, *POLITICS AND VISION*, *supra* note 117, at 507-08.

¹⁶³ See, e.g., DEWEY, *LIBERALISM AND SOCIAL ACTION*, *supra* note 125, at 40.

¹⁶⁴ Deweyan democracy demanded "a social return . . . from all" and afforded the "opportunity for development of distinctive capacities . . . [to] all." DEWEY, *DEMOCRACY AND EDUCATION*, *supra* note 134, at 122. He believed "democracy is concerned . . . with associated individuals in which each by intercourse with others somehow makes the life of each more distinctive." Dewey, *Philosophy and Democracy*, *supra* note 129, at 46-47.

¹⁶⁵ Dewey argued

all the members of the group must have an equable opportunity to receive and to take from others. There must be a large variety of shared undertakings and experiences. Otherwise, the influences which educate some into masters, educate others into slaves. And the experience of each party loses meaning, when the free interchange of varying modes of life-experience is arrested. A separation into a privileged and a subject-class prevents social endosmosis. . . . Diversity of stimulation means novelty, and novelty means challenge to thought. The more activity is restricted to a few definite lines – as it is when there are rigid class lines preventing adequate interplay of experiences – the more action tends to become routine on the part of the class at a disadvantage, and capricious, aimless, and explosive on the part of the class having the materially fortunate position.

DEWEY, *DEMOCRACY AND EDUCATION*, *supra* note 134, at 84-85.

¹⁶⁶ John Dewey, *Liberty and Social Control*, *SOCIAL FRONTIER* 2 (1935), *reprinted in* DEWEY, *POLITICAL WRITINGS*, *supra* note 115, at 158 [hereinafter Dewey, *Liberty and Social Control*].

It was not freedom from restraint by others; rather it was freedom to accomplish and flourish through interaction with others. It was closer to what Benjamin Constant labeled the liberty of the ancients rather than that of the moderns.¹⁶⁷ It was closer too to what Isaiah Berlin classified as positive rather than negative liberty.¹⁶⁸ Dewey's understanding had both an individualistic and a communal side. For Dewey, liberty – when instantiated in a truly democratic society – was “that secure release and fulfillment of personal potentialities which takes place only in rich and manifold association with others: the power to be an individualized self making a distinctive contribution and enjoying in its own way the fruits of association.”¹⁶⁹ A product of full and equal participation in society, liberty was a condition in which individuals “share in the discoveries and thoughts of others, to the liberation and enrichment of their own experience.”¹⁷⁰ Dewey was confident liberty would lead to social change.¹⁷¹

Equality, as Dewey understood it, was thoroughgoing societal respect for each member's individuality. It was *not* based on notions that people were quantitatively equal, that they possessed similar abilities and endowments – for Dewey emphatically rejected such ideas.¹⁷² As he wrote:

¹⁶⁷ See Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns: Address Before the Athenée Royal in Paris* (1819), in BENJAMIN CONSTANT, POLITICAL WRITINGS 297, 307 (Biancamaria Fontana ed. & trans., 1988) (contrasting ancient Greek and Roman understanding of liberty as active participation in collective self-government with modern, *i.e.*, Eighteenth and Nineteenth Century, idea of liberty as freedom from government interference).

¹⁶⁸ See ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118-72 (1968) (defining negative liberty as freedom from external constraints on opportunity to act as one wishes and positive liberty as individual or collective self-direction or self-mastery).

¹⁶⁹ DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 150.

¹⁷⁰ John Dewey, *Individuality in Our Day*, *supra* note 147, at 82. As he wrote in response to anti-New Deal agitation by the American Liberty League, “the demand for liberty is a demand for power, either for possession of powers of action not already possessed or for retention and expansion of powers already possessed.” Dewey, *Liberty and Social Control*, *supra* note 166, at 158. In a non-democratic society, which Dewey felt the U.S. was because of the oligarchic power of industrial capitalists, “wherever there is liberty at one place there is restraint at some other place. The system of liberties that exists at any time is always the system of restraints or controls that exists at that time.” *Id.* at 159. The goal of all “great movements for human liberation,” in his view, was “to bring about a changed distribution of power to do – and power to think and to express thought is power to do – such that there would be a more balanced, a more equal, even, and equitable system of human liberties.” *Id.*

¹⁷¹ As he explained, “democracy . . . denotes faith . . . in uniquely distinctive qualities in each normal human being; faith in corresponding unique modes of activity that create new ends, with willing acceptance of the modifications of the established order entailed by the release of individualized capacities.” Dewey, *Individuality, Equality and Superiority*, *supra* note 160, at 78.

¹⁷² In his words, even the “most ardent of the early advocates of equality never fell into

In social and moral matters, equality does not mean mathematical equivalence. It means rather the inapplicability of considerations of greater and less, superior and inferior. It means that no matter how great the quantitative differences of ability, strength, position, wealth, such differences are negligible in comparison with . . . the fact of individuality, the manifestation of something irreplaceable.¹⁷³

At the heart of equality was individual incommensurability,¹⁷⁴ the idea that “every existence . . . has something unique and irreplaceable about it.”¹⁷⁵ Equality for Dewey meant “effective regard for whatever is distinctive and unique” in each individual.¹⁷⁶ It was grounded in the conviction “that every human being, independent of the quantity or range of his personal endowment, has the right to equal opportunity with every other person for development of whatever gifts he has.”¹⁷⁷ Democratic equality entailed the full “utilization of the specific and variable qualities of individuals.”¹⁷⁸

Fraternity was for Dewey the forgotten third leg of the democratic stool. It represented a valuing of communal ties, a felt appreciation for “goods which accrue from an association in which all share.”¹⁷⁹ Fraternity was “the *will* to work together,” which he saw as “the essence of cooperation.”¹⁸⁰ It was the transformation from merely tolerating fellow members of society to genuinely desiring to cooperate with them.¹⁸¹ Dewey believed affective solidarity – “the satisfaction derived from a sense of sharing in creative activities” – had not been properly valued as a democratic necessity;¹⁸² but without it,

the stupidity of alleging that all persons are qualitatively alike.” *Id.* See also DEWEY, *FREEDOM AND CULTURE*, *supra* note 131, at 54 (“The doctrine of equality . . . never asserted equality of natural gifts. It was a moral, a political and legal principle, not a psychological one.”).

¹⁷³ Dewey, *Philosophy and Democracy*, *supra* note 129, at 46.

¹⁷⁴ See Dewey, *Individuality, Equality and Superiority*, *supra* note 160, at 79 (“Moral equality means incommensurability, the inapplicability of common and quantitative standards. It means intrinsic qualities which require unique opportunities and differential manifestation.”).

¹⁷⁵ Dewey, *Philosophy and Democracy*, *supra* note 129, at 46. Dewey saw “as many modes of superiority and inferiority as there are consequences to be attained and works to be accomplished,” consequently “the idea of abstract, universal superiority and inferiority” was “an absurdity” suggestive of “overcompensation on the part of those who assume that they belong to a superior class.” Dewey, *Individuality, Equality and Superiority*, *supra* note 160, at 77.

¹⁷⁶ DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 116, at 150-51.

¹⁷⁷ Dewey, *Creative Democracy*, *supra* note 128, at 242.

¹⁷⁸ DEWEY, *DEMOCRACY AND EDUCATION*, *supra* note 134, at 90-91.

¹⁷⁹ DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 116, at 150.

¹⁸⁰ Dewey, *Basic Values of Democracy*, *supra* note 130, at 209 (emphasis added).

¹⁸¹ *Id.*

¹⁸² DEWEY, *FREEDOM AND CULTURE*, *supra* note 131, at 34.

both liberty and equality were inevitably diminished.¹⁸³ Only strong connections to fellow society members could counterbalance rampant individualism and encourage people to recognize the experiences and interests of others and to willingly make compromises in order to secure the common good.¹⁸⁴

D. *The Broad Distribution of Intelligence*

Underpinning Dewey's faith in democracy as a way of life was his conviction that knowledge and intelligence were broadly distributed throughout society. Indeed, rather than seeing knowledge as an individual trait, he saw it as a societal possession. In his view "knowledge is a function of association and communication; it depends upon tradition; upon tools and methods socially transmitted, developed and sanctioned. Faculties of . . . observation, reflection and desire are habits acquired under the influence of the culture and institutions of society, not ready-made inherent powers."¹⁸⁵ Knowledge, in his view, was a social aggregate. For example, while there might be a "few individuals who have the native capacity that was required to invent the stationary steam-engine, locomotive, dynamo or telephone[,] . . . there are none so mean that they cannot intelligently utilize these embodiments of intelligence once they are a part of the organized means of associated living."¹⁸⁶ Indeed, he considered the "notion that intelligence is a personal endowment or personal attainment, . . . the great conceit of the intellectual class, as that of the commercial class is that wealth is something which they personally have wrought and possess."¹⁸⁷

Dewey rejected claims that people were not knowledgeable or wise enough to participate to the degree his ideas demanded. As he wrote, "[d]enial of reasonable freedom and attendant responsibility to any group produces conditions which can be cited as reasons why such group cannot be entrusted with freedom or given responsibility"¹⁸⁸ –

¹⁸³ See *id.* at 24 ("That cultural conditions were allowed to develop (markedly so in the economic phase) which subordinated cooperativeness to liberty and equality serves to explain the decline in the two latter.").

¹⁸⁴ "In a complex society," Dewey believed "the ability to understand and sympathize with the operations and lot of others" was crucial. Dewey, *Need of an Industrial Education*, *supra* note 143, at 122. He was convinced

men will not see across and through the walls that separate them, unless they have been trained to do so. And without this lively and ardent sense of common life, it is hopeless to secure in individuals that loyalty to the organized group which needs to be the animating motive of conduct.

Id.

¹⁸⁵ DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 158.

¹⁸⁶ DEWEY, LIBERALISM AND SOCIAL ACTION, *supra* note 125, at 58.

¹⁸⁷ DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 211.

¹⁸⁸ John Dewey, *Anti-Naturalism In Extremis*, PARTISAN REVIEW 10 (1943), reprinted in DEWEY, POLITICAL WRITINGS, *supra* note 115, at 25-26.

the appropriate response to which was to change those conditions. Deweyan democracy meant "a working faith in the . . . potentialities of human nature as that nature is exhibited in every human being irrespective of race, color, sex, birth and family, of material or cultural wealth."¹⁸⁹

E. Critique of Benevolent Expertise and Insistence upon the Interconnection of Means and Ends

Dewey harbored an intense antipathy for purportedly benevolent efforts by social reformers "committed to doing good *for* rather than *with* others."¹⁹⁰ As he elaborated:

the vice of . . . the reformer, of the philanthropist, and the specialist in every worthy cause of science, or art, or politics, is to seek ends which promote the social welfare in ways which fail to engage the active interest and cooperation of others. The conception of conferring the good upon others, or at least attaining it for them, which is our inheritance from the aristocratic civilization of the past[,] . . . dies hard. Many a man, feeling himself justified by the social character of his ultimate aim . . . is genuinely confused or exasperated by the increasing antagonism and resentment which he evokes, because he has not enlisted in his pursuit of the "common" end the freely coöperative activities of others. This coöperation must be the root principle of the morals of democracy.¹⁹¹

Neither liberty, nor equality, nor happiness could be bestowed upon others; efforts to do so smacked of paternalistic egotism. Self-realization required an individual's active and voluntary participation.¹⁹² In Dewey's words, "[h]umanity cannot be content with a good which is procured from without, however high and otherwise complete that good."¹⁹³

Consequently, Dewey rejected the view of democratic realists, such as Walter Lippman, that the masses' inability to truly know the world (in its modern industrial complexity) meant, for the good of all,

¹⁸⁹ Dewey, *Creative Democracy*, *supra* note 128, at 242.

¹⁹⁰ WESTBROOK, DEWEY AND DEMOCRACY, *supra* note 117, at 164.

¹⁹¹ JOHN DEWEY & JAMES H. TUFTS, ETHICS 303-04 (1908), *quoted in* WESTBROOK, DEWEY AND DEMOCRACY, *supra* note 117, at 185. *See also* Dewey, *Ethics of Democracy*, *supra* note 115, at 62.

¹⁹² Westbrook traces the origins of this conviction to the influence of T.H. Green's idealism:

[I]dealists insisted that self-realization was a do-it-yourself project; it was not an end that one individual could give to or force on another. . . . [A] true interest in others lay in a desire to expand their autonomous activity, not in the desire to render them the dependent objects of charitable benevolence.

WESTBROOK, DEWEY AND DEMOCRACY, *supra* note 117, at 46-47.

¹⁹³ Dewey, *Ethics of Democracy*, *supra* note 115, at 61.

disinterested experts should advise 'men of action' how to govern.¹⁹⁴ Dewey warned:

[I]n the absence of an articulate voice on the part of the masses, the best do not and cannot remain the best, the wise cease to be wise. It is impossible for high-brows to secure a monopoly of such knowledge as must be used for the regulation of common affairs. In the degree in which they become a specialized class, they are shut off from knowledge of the ends which they are supposed to serve.¹⁹⁵

For all his admiration for science and scientists, Dewey remained deeply skeptical of devolving *decision-making* authority to experts. Unless experts consciously made an effort to ground and constantly update themselves in the needs of ordinary people, they would remain "inevitably so removed from common interests as to become a class with private interests and private knowledge, which in social matters is not knowledge at all."¹⁹⁶ Experts should stick to conducting social inquiries and spreading their results.¹⁹⁷ For Dewey, the truly democratic expert or professional would not presume to make decisions without facilitating ordinary people's participation and encouraging their reflection and organized social action.¹⁹⁸

Dewey believed ends and means were vitally interconnected. His "*fundamental principle of democracy*" insisted "*the ends of freedom and individuality for all can be attained only by means that accord with those ends.*"¹⁹⁹ Dewey rejected all philosophies using desirable ends

¹⁹⁴ See WALTER LIPPMAN, PUBLIC OPINION (1922); WALTER LIPPMAN, THE PHANTOM PUBLIC (1925).

¹⁹⁵ DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 206.

¹⁹⁶ *Id.* at 207. Isolated experts would be nothing but "an oligarchy managed in the interests of the few." *Id.* at 208. It was a point he made in 1888: "the practical consequence of giving the few wise and good power is that they cease to remain wise and good. They become ignorant of the needs and requirements of the many; they leave the many outside the pale with no real share in the commonwealth." Dewey, *Ethics of Democracy*, *supra* note 115, at 60.

¹⁹⁷ It was up to ordinary people to decide how to act upon that information, as he explained:

Inquiry, indeed, is a work which devolves upon experts. But their expertness is not shown in framing and executing policies, but in discovering and making known the facts upon which the former depend. . . . It is not necessary that the many should have the knowledge and skill to carry on the needed investigations; what is required is that they have the ability to judge of the bearing of the knowledge supplied by others upon common concerns.

DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 208-09.

¹⁹⁸ See Susan M. Olson & Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 LAW & SOC'Y REV. 139, 149-52 (2004) (discussing Dewey's views as theoretical foundation for "democratic professionalism" – a call for professionals to facilitate greater democratic popular participation in public affairs).

¹⁹⁹ John Dewey, *Democracy Is Radical*, 6 COMMON SENSE 10 (1937), *reprinted in* 11 DEWEY, LATER WORKS, *supra* note 137, at 296, 298. See also DEWEY, FREEDOM AND CULTURE, *supra* note 131, at 133.

(be they democratic realists' visions of wise government or Marxist-Leninists' promise of communist bliss) to justify non-democratic means.²⁰⁰

For him, ends and means were interdependent: "the end is dependent on the means . . . and [the] means are . . . derived from the end."²⁰¹ As he elaborated:

[W]hat has given the maxim (and the practice it formulates) that the end justifies the means a bad name is that the end-in-view, the end professed and entertained (perhaps quite sincerely) justifies the use of certain means, and so justifies the latter that it is not necessary to examine what the actual consequences of the use of chosen means will be.²⁰²

Ends and means, Dewey urged, should be "on exactly the same level with respect to the attention and care they demand."²⁰³ It was essential to assess every idea or practice by its likely or observed consequences;²⁰⁴ means, regardless of ends, were no exception. Indeed attention to means was particularly important for advocates of social change.²⁰⁵ He insisted "democracy can be served only by the slow day by day adoption and contagious diffusion in every phase of our common life of methods . . . identical with the ends to be reached."²⁰⁶

F. Democratic Deliberation Infused with Scientific Temperament

Dewey viewed dialogue and public deliberation as central components of democracy.²⁰⁷ For him, the most valuable aspect of political democracy was not the "counting of heads" entailed in voting, but rather its necessary "prior recourse to methods of discussion, consul-

²⁰⁰ Indifference to means led to "paralysis of effort" and the separation of ends and means bore "corrupt and poisonous fruits." DEWEY, *QUEST FOR CERTAINTY*, *supra* note 120, at 279-80.

²⁰¹ John Dewey, *Means and Ends: Their Interdependence, and Leon Trotsky's Essay on "Their Morals and Ours,"* NEW INTERNATIONAL 4 (Aug. 1938), reprinted in DEWEY, *POLITICAL WRITINGS*, *supra* note 115, at 230 [hereinafter Dewey, *Means and Ends*].

²⁰² *Id.* at 231.

²⁰³ DEWEY, *QUEST FOR CERTAINTY*, *supra* note 120, at 279.

²⁰⁴ See *supra* note 120.

²⁰⁵ See DEWEY, *FREEDOM AND CULTURE*, *supra* note 131, at 129 ("the problem of production of change is one of infinite attention to means").

²⁰⁶ *Id.* at 133.

²⁰⁷ Dewey wrote:

Expression of ideas in communication is one of the indispensable conditions of the awakening of thought not only in others, but in ourselves. If ideas when aroused cannot be communicated they either fade away or become warped and morbid. The open air of public discussion and communication is an indispensable condition of the birth of ideas and knowledge and of other growth into health and vigor.

John Dewey, *Philosophies of Freedom*, in *FREEDOM IN THE MODERN WORLD* (Horace M. Kallen ed., 1928), reprinted in DEWEY, *POLITICAL WRITINGS*, *supra* note 115, at 133, 141.

tation and persuasion.”²⁰⁸ He had confidence people of good will, reasoning together, would arrive at sound decisions – decisions assessed, and revised if necessary, by sober analysis of their consequences.

As he watched the global events of the 1920’s and 1930’s, he urged careful modulation of the passions political differences inspire – always keeping them out of the realm of violence or force. Disagreements were to be resolved by discussion in which adversaries were respected and valued as partners from whom one could learn.²⁰⁹ “Intolerance, abuse, calling of names because of differences of opinion about religion or politics or business, as well as because of differences of race, color, wealth or degree of culture” were “treason to the democratic way of life.”²¹⁰

The key to deliberating well and modulating passions was infusing the democratic process with a scientific temperament. That temperament entailed a “willingness to hold belief in suspense; ability to doubt until evidence is obtained; willingness to go where evidence points instead of putting first a personally preferred conclusion; [and] ability to . . . use [ideas] . . . as hypotheses to be tested rather than dogmas to be asserted.”²¹¹ Dewey insisted “all tenets and creeds” be treated not as unassailable certainties, but as working hypotheses “to be tested and confirmed – and altered – through consequences effected by acting upon them.”²¹² He believed failure to adopt a scientist’s willingness to see even one’s most cherished ideas proven wrong would lead to potentially paralyzing strife.²¹³ He aimed to take disputes out of the realm of opinion and belief and to place them instead in a sphere of rational deliberation where newly discovered facts could lead to changed positions and thus reasoned consensus or compromise.²¹⁴ To do so, a scientific temperament and approach had to be

²⁰⁸ DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 207.

²⁰⁹ He urged moving conflict “out of the atmosphere and medium of force, of violence as a means of settlement into that of discussion and intelligence,” so as to “treat those who disagree – even profoundly – with us as those from whom we may learn, and in so far, as friends.” Dewey, *Creative Democracy*, *supra* note 128, at 243.

²¹⁰ *Id.*

²¹¹ DEWEY, FREEDOM AND CULTURE, *supra* note 131, at 112.

²¹² DEWEY, QUEST FOR CERTAINTY, *supra* note 120, at 277.

²¹³ In his words:

It is theoretically conceivable that strife of interests might bring to clearer recognition the different interests that are involved and that have to be harmonized in any enduring solution. As long, however, as conflict is conducted on the assumption, upon each side, that there is already possession of the truth, a position that amounts to denial for the need of any scientific examination of conditions in order to determine the policies that should be undertaken, the rivalry of parties will be a source of division and confusion.

DEWEY, FREEDOM AND CULTURE, *supra* note 131, at 61.

²¹⁴ As he elaborated:

broadly internalized by all.²¹⁵

G. *Organization of the Public and Face-to-Face Association*

Dewey believed solving social problems required “organized social effort.”²¹⁶ His *Liberalism and Social Action*²¹⁷ insisted the central aims of liberalism – the autonomy and self-realization of individuals, which were also key ends of his vision of democracy – necessitated concerted social action to achieve.²¹⁸ Individuals could not achieve these aims without joining with others to understand, confront, and ultimately control the indirect forces constraining them. He called such an informed, organized group of individuals a “public.”²¹⁹ Because “the machine age ha[d] so enormously expanded, multiplied, intensified, and complicated the scope of the indirect consequences” of economic and technological activities, “the resultant public” could not identify or organize itself.²²⁰ That failure to identify and organize itself, was “the outstanding problem of the Public.”²²¹ A key role of social inquiry was therefore to enable a public to recognize and organize itself.

Dewey saw the primary threats to individual autonomy coming not from government, but from concentrated capitalist economic power, because capitalism deprived the masses of the material security necessary for sharing in cultural resources and because capitalists appropriated to themselves the benefits of scientific and technological invention.²²² The nascent liberalism Dewey championed depended upon “socially organized intelligence,”²²³ a process of “thinking,

When general ideas are not capable of being continuously checked and revised by observation of what actually takes place, they are . . . in the field of opinion. Clash of opinions is in that case the occasion for controversy . . . [T]he reign of opinion, and of controversial conflicts, is a function of absence of methods of inquiry which bring new facts to light and by so doing establish the basis for consensus of beliefs.

Id. at 91.

²¹⁵ See *id.* at 116 (calling for “democratic extension of the scientific morale till it is part of the ordinary equipment of the ordinary individual” to substitute “for pride and prejudice, for class and personal interest, for beliefs made clear by custom and early emotional associations”).

²¹⁶ DEWEY, *LIBERALISM AND SOCIAL ACTION*, *supra* note 125, at 90.

²¹⁷ DEWEY, *LIBERALISM AND SOCIAL ACTION*, *supra* note 125.

²¹⁸ *Id.* at 61-93.

²¹⁹ Dewey defined a “public” as “all those who are affected by the indirect consequences of transactions” engaged in by others “to such an extent that it is deemed necessary to have those consequences systematically” controlled. See DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 116, at 15-16.

²²⁰ *Id.* at 126.

²²¹ *Id.* at 185 (emphasis added).

²²² DEWEY, *LIBERALISM AND SOCIAL ACTION*, *supra* note 125, at 53-54, 77-78.

²²³ *Id.* at 88.

working, and pursuing . . . social and political ideals together.”²²⁴

While large-scale concerted activity was necessary, Dewey believed face-to-face interaction in relatively small settings was the essential means of fostering democracy.²²⁵ He admired Jefferson’s proposed ward system.²²⁶ The interaction and affective bonds his democracy sought could only be achieved in face-to-face settings; for him, “[d]emocracy must begin at home, and its home is the neighborly community.”²²⁷ In large part, this was because of the centrality of dialogue in his vision of democracy. For Dewey, the true dissemination of actionable social intelligence could only be “accomplished in face-to-face relationships by means of direct give and take,” because ideas not “communicated, shared, and reborn in expression” were “but soliloquy.”²²⁸

H. The Necessity of Plural, Experimental Efforts to Improve Society

Dewey’s experimentalism committed him to a pluralism of ideas and practices, each competing for temporary, tentative acceptance based upon the consequences its adoption or implementation brought. His thought shunned single causes of events,²²⁹ timeless truths,²³⁰ or one-true-paths.²³¹ Indeed, he stressed that “history in being a process of change generates change not only in details but also in the method of directing social change.”²³² Dewey’s penultimate comments in *Free-*

²²⁴ Morris & Shapiro, *Introduction*, *supra* note 133, at xiii.

²²⁵ See DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 211.

²²⁶ See, e.g., DEWEY, FREEDOM AND CULTURE, *supra* note 131, at 115-24; THE LIVING THOUGHTS OF THOMAS JEFFERSON 18-23 (John Dewey ed., 1940).

²²⁷ DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 213.

²²⁸ *Id.* at 218.

²²⁹ He urged the need to “get away from the influence of belief in bald single forces.” See DEWEY, FREEDOM AND CULTURE, *supra* note 131, at 36-37.

²³⁰ Dewey rejected timeless truths as unscientific dogma, a relic of a surpassed era. He wrote:

A moral law, like a law in physics, is not something to swear by and stick to at all hazards; it is a formula of the way to respond when specified conditions present themselves. Its soundness and pertinence are tested by what happens when it is acted upon. . . . The test of consequences . . . secures constant development, for when new acts are tried new results are experienced, while the lauded immutability of eternal . . . norms is in itself a denial of the possibility of development and improvement.

DEWEY, QUEST FOR CERTAINTY, *supra* note 120, at 278.

²³¹ One could counter that his vision of democracy as a better way of life, *see supra* notes 126-42 and accompanying text, or of the necessity of diffusing scientific methods and temperament into social affairs, *see supra* notes 207-15 and accompanying text, were his one-true-paths. Dewey would likely respond that dispassionate assessment of the consequences of adopting those ideals would vindicate them and him.

²³² DEWEY, LIBERALISM AND SOCIAL ACTION, *supra* note 125, at 84 (emphasis removed).

*dom and Culture*²³³ encapsulate much of his vision: “democracy,” he wrote, must demonstrate “in the conduct of its own life the efficacy of *plural, partial, and experimental methods* in securing and maintaining an ever-increasing release of the powers of human nature, in service of a freedom which is cooperative and a cooperation which is voluntary.”²³⁴

III. PARTICIPATORY DEMOCRACY EMBODIED AND CHAMPIONED

Dewey’s democratic vision was embodied (even if his name and works were rarely invoked) in the ideas and practices of the early New Left and the movement for Black liberation and equal civil rights that triggered the activism associated with the 1960’s. Those social movements demonstrated the applicability of Dewey’s ideas and serve as vital examples of the sort of collective action collaborative lawyers aim to foster. In the past two decades, renewed calls for a stronger, more participatory and deliberative democracy, have explicitly recognized their debt to Dewey.

A. *The Port Huron Statement and Early New Left*

In one of the most famous written passages of the 1960’s, the members of Students for a Democratic Society²³⁵ (SDS) summarized their chief political aspiration:

As a *social system*, we seek the establishment of a democracy of individual participation, governed by two central aims: that the individual share in those social decisions determining the quality and direction of his life; that society be organized to encourage independence in men and provide the media for their common participation.²³⁶

The prospect of people participating in decisions that affected their lives became a central rallying vision of SDS²³⁷ and succeeding gener-

²³³ DEWEY, *FREEDOM AND CULTURE*, *supra* note 131.

²³⁴ *Id.* at 133 (emphasis added).

²³⁵ SDS was originally the Student League for Industrial Democracy, a student arm of the League for Industrial Democracy. Among the members of its parent League for Industrial Democracy were Jack London, Upton Sinclair, and John Dewey. See MILLER, *supra* note 23, at 66.

²³⁶ *Port Huron Statement*, *supra* note 29, at 333. For thorough discussion of the drafting and ratification of the Statement and biographical sketches of SDS’s original president, Al Haber, and the Statement’s principal author, Tom Hayden, see MILLER, *supra* note 23, at 13-154.

²³⁷ Miller notes: “participatory democracy . . . came to capture the spirit of the [Port Huron] convention, the soul of the . . . [Port Huron Statement], the essence of the New Left. It became, literally, a catchword – used, over and over again, to recruit, to convert, to convince.” *Id.* at 142.

ations of community organizers.²³⁸ According to the Port Huron Statement, in a participatory democracy: decision-making on issues of social consequence would be made “by public groupings”; politics would be “the art of collectively creating an acceptable pattern of social relations”; and such a politics would bring “people out of isolation and into community.”²³⁹ Although they did not coin it, the term “participatory democracy” became forever associated with the students of SDS and the New Left they formed.²⁴⁰

Dewey’s influence is evident in the second articulated aim: the fostering of independence through common participation. For many, independence and collective activity are incompatible; but for SDS students, as for Dewey, there was no contradiction.²⁴¹ In declaring human independence the ultimate goal of “man and society,” the Port Huron Statement defined independence as “a concern . . . with finding a meaning in life that is personally authentic.”²⁴² Rather than an “egotistical individualism” in which one seeks to “have one’s way,” SDS students sought a society in which one could have “a way that is one’s own.”²⁴³ For students who came of age in an era later renowned for its conformism, authenticity meant “a quality of mind” that rejects powerlessness and mindless adoption of status values, questions habits, is aware of possibilities, actively curious, and able and willing to learn.²⁴⁴ Independence, for the students who formed the New Left,

²³⁸ See, e.g., LEE STAPLES, *ROOTS TO POWER: A MANUAL FOR GRASSROOTS ORGANIZING* 3 (1984); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organization*, 21 OHIO N.U.L. REV. 455, 455-56 (1994).

²³⁹ *Port Huron Statement*, *supra* note 29, at 333.

²⁴⁰ The term was first used by Arnold Kaufman, Hayden’s professor at Michigan. See Arnold S. Kaufman, *Human Nature and Participatory Democracy*, in *NOMOS III: RESPONSIBILITY* (Carl J. Freidreich ed., 1960). Kaufman and SDS were not the only theorists of participatory democracy in the 1960s and 1970s. Carol Pateman contributed the most theoretically and historically astute analysis in her 1970 work, *Participation and Democratic Theory*. See PATEMAN, *supra* note 26. See also MACPHERSON, *supra* note 26, at 93-115. Some of these New Left ideas were briefly institutionalized, in modified form, in the Community Action Program (CAP), a component of Lyndon Johnson’s War on Poverty, which required “maximum feasible participation” by local residents through their election to local governing boards of CAP agencies.

²⁴¹ Dewey believed independence, or liberty, could only be achieved through collective action and, once achieved, only expressed in interaction with others. See *supra* notes 148-52, 166-71 and accompanying text.

²⁴² *Port Huron Statement*, *supra* note 29, at 332. For an important work arguing the search for authenticity was at least as central a preoccupation for SDS members as participatory democracy, see DOUG ROSSINOW, *THE POLITICS OF AUTHENTICITY: LIBERALISM, CHRISTIANITY, AND THE NEW LEFT IN AMERICA* (1998) (describing roots of SDS student activists at University of Texas in existentialist student Christian movement of YMCA/YWCA).

²⁴³ *Port Huron Statement*, *supra* note 29, at 332.

²⁴⁴ *Id.* See also *id.* at 331 (“The search for truly democratic alternatives to the present, and a commitment to social experimentation with them, . . . moves us and, we hope, others

thus meant a conscious decision, realized through concerted action, to create a more just, more engaging, society. As we have seen, Dewey too sought to foster a willingness to challenge habit and to experiment.²⁴⁵

The affinity with Dewey is also apparent in the Port Huron Statement's faith in human potential,²⁴⁶ its emphasis on human interdependence,²⁴⁷ its commitment to fraternity and its understanding that such connection must be consciously created.²⁴⁸ It is evident too in the insistence that "means and ends are intimately related"²⁴⁹ and in its abhorrence of violence.²⁵⁰ But Dewey's influence is perhaps strongest in the students' yearning to be part of "a public with common values and commitments," a public acting together as a community to implement those values.²⁵¹ With Dewey, they considered American society's lack of such publics as its fundamental weakness.²⁵²

today.").

²⁴⁵ See, e.g., DEWEY, *QUEST FOR CERTAINTY*, *supra* note 120, at 273 ("What is needed is intelligent examination of the consequences that are actually effected by inherited institutions and customs, in order that there may be intelligent consideration of the ways in which they are to be intentionally modified in behalf of generation of different consequences.").

²⁴⁶ The students opposed "the doctrine of human incompetence because it rests essentially on the modern fact that men have been 'competently' manipulated into incompetence." *Port Huron Statement*, *supra* note 29, at 332. They saw "little reason why men cannot meet with increasing skill the complexities and responsibilities of their situation, if society is organized not for minority, but for majority, participation in decision-making." *Id.* For Dewey's view, see *supra* note 188 and accompanying text.

²⁴⁷ The Statement proclaimed "[h]uman interdependence is contemporary fact. . . ." *Id.* For Dewey: "Associated activity needs no explanation; things are made that way. . . . We are born organic beings associated with others" DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 116, at 151-54.

²⁴⁸ It stated: "Human relationships should involve fraternity and honesty [H]uman brotherhood must be willed." *Port Huron Statement*, *supra* note 29, at 332 (emphasis removed). For Dewey's similar views, see *supra* notes 179-84 and accompanying text.

²⁴⁹ *Port Huron Statement*, *supra* note 29, at 332.

²⁵⁰ The students wrote:

[W]e find violence . . . abhorrent because it requires generally the transformation of the target, be it a human being or a community of people, into a depersonalized object of hate. It is imperative that the means of violence be abolished and the institutions – local, national, international – that encourage non-violence as a condition of conflict be developed.

Id. at 333. For Dewey's similar views, see *supra* notes 209-10 and accompanying text.

²⁵¹ See MILLER, *supra* note 23, at 77. Before the Port Huron conference, Haber wrote: "[D]emocracy is based on the idea of a 'political' public – a body that shares a range of common values and commitments, an institutional pattern of interaction and an image of themselves as a functioning community. *We do not now have such a public in America.*" *Id.* at 69. Almost contemporaneously, Hayden wrote: "I am primarily concerned about *the complete absence of an active and creative set of publics, people working in union to conform the structures and direction of events to their interests.*" *Id.* at 90. This emphasis on "publics" echoes Dewey's *THE PUBLIC AND ITS PROBLEMS*, *supra* note 116.

²⁵² Compare *supra* note 251 (Hayden and Haber on absence of publics) and *supra* notes 219-21 and accompanying text (Dewey on absence of organized public).

This commitment to creating conscious communities that *act* to forge a world more consistent with their values, was at the heart of the New Left's early vision of participatory democracy. That initial idea of participatory democracy prefigures collaborative lawyering. As the 1960's progressed, participatory democracy took on very different meanings. For many it came to signify internal processes of running organizations or collectives by consensus without leaders, in what admirers and detractors call democracy as an "endless meeting."²⁵³ For some, it became a vision of a radically new society where decentralized, face-to-face institutions completely replace representative ones.²⁵⁴

Some commentators interpret the New Left's initial vision of participatory democracy as a fusion of Deweyan ideas and an existentialist attraction to bold, cutting-edge action.²⁵⁵ Such a formulation ignores the call to action already contained in Dewey's vision.²⁵⁶ But there can be no doubt that action – novel, exhilarating, limit-testing, transformative action – was a core commitment of New Left activists.²⁵⁷ As an early SDS member recalls, the New Left came to understand politics not as an issue of opinions and attitudes, of "what you

²⁵³ See, e.g., FRANCESCA POLLETTA, *FREEDOM IS AN ENDLESS MEETING: DEMOCRACY IN AMERICAN SOCIAL MOVEMENTS* (2002). A participant at SDS's Port Huron conference recalls, in 1962: "Participatory democracy did not mean abandoning organizational structures of the usual sort, like elected officers and parliamentary procedure. We were thinking of participatory democracy at that time as a concept of social change, not as a set of principles for guiding the internal organizational life of SDS." MILLER, *supra* note 23, at 142-43.

²⁵⁴ See, e.g., DANIEL C. KRAMER, *PARTICIPATORY DEMOCRACY: DEVELOPING IDEALS OF THE POLITICAL LEFT* (1972) (describing visions of anti-bureaucratic, anti-statist decentralism).

²⁵⁵ See MILLER, *supra* note 23, at 100, 145-46. In this regard, Miller views sociologist C. Wright Mills as the central influence on early SDS theorists. *Id.* at 78-91.

²⁵⁶ Dewey abhorred Greek philosophy's dichotomy between thought and action – and especially its preference for isolated contemplation over engaged activity. He insisted "no knowledge, as long as it remains just knowledge, just apprehension of fact and truth, is complete or satisfying." Dewey, *Philosophy and Democracy*, *supra* note 129, at 41. Knowledge had to be directed toward "the dimension of action." *Id.* at 42.

²⁵⁷ Hayden reminisced two decades later:

On a theoretical level . . . we believed in wanting to make history and achieve civil rights. But there was something else: the middle-class emptiness of alienation that people talk about, and then suddenly confronting commitment. The whole emotion of defining not only yourself, but also your life, by risking your life and testing whether you're willing to die for your beliefs, was *the* powerful motive, I believe.

MILLER, *supra* note 23, at 59 (quoting 1985 interview with Hayden).

For some New Leftists, the combination of this attraction to action and to transformative experience derailed goals of social change as they turned to violence (e.g., the Weather Underground faction that broke off from SDS) or retreated into small communities of like-minded peers who felt too estranged from mainstream society to work to change it. On the former, see RON JACOBS, *THE WAY THE WIND BLEW: A HISTORY OF THE WEATHER UNDERGROUND* (1997); *THE WEATHER UNDERGROUND* (New Video Group 2003); on the latter, see ROSSINOW, *supra* note 242, at 18-19.

were for and against,” but as a matter of “what you *did*” to live out your values.²⁵⁸

Living one’s values and trying to embody the future society one sought to create were central to New Left ideas and practice.²⁵⁹ The Port Huron Statement expressed a strong aversion to using people instrumentally, prioritizing instead honest interpersonal relationships.²⁶⁰ Flowing from their critique of what they deemed the Old Left’s tendencies toward rigid bureaucratic political forms, New Leftists were skeptical of formal organization because of its potential to ossify and to produce leaders who exploited their rank and file followers.²⁶¹ New Leftists were attracted instead to a politics of uncoerced mobilization in which people chose to join actions that felt right for them.²⁶²

The primary catalyst for the early New Left’s initial vision of participatory democracy was what is commonly referred to as the Southern civil rights movement,²⁶³ particularly the sit-ins by college and high school students at lunch counters and other segregated facilities that erupted across the region in the spring of 1960.²⁶⁴

²⁵⁸ MILLER, *supra* note 23, at 36 (quoting Bob Ross).

²⁵⁹ Many commentators interpret this insistence on pursuing social change without adopting the values and structures being opposed as utopian, non-strategic, or non-instrumental. See, e.g., WINI BREINES, *COMMUNITY AND ORGANIZATION IN THE NEW LEFT, 1962-1968: THE GREAT REFUSAL* 6 (1989) (sympathetically characterizing New Left politics as “prefigurative” for seeking to “create and sustain within the live practice of the movement, relationships and political forms that ‘prefigured’ and embodied the desired society”). Francesca Polletta, however, argues minimal hierarchy, decentralized authority, and egalitarian, participatory decision-making had important *strategic* benefits of encouraging tactical flexibility and innovation, building solidarity and commitment to the cause, and developing participants’ political effectiveness. See POLLETTA, *supra* note 253, at 2, 8-12, 209-12.

²⁶⁰ The students wrote: “[W]e are aware of countering perhaps the dominant conceptions of man in the twentieth century: that he is a thing to be manipulated, and that he is inherently incapable of directing his own affairs. We oppose the depersonalization that reduces human beings to things.” *Port Huron Statement*, *supra* note 29, at 332. “Human relationships,” they urged, “should involve fraternity and honesty.” *Id.*

²⁶¹ They were familiar with Robert Michels’ “iron law of oligarchy.” See ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 70 (Eden Paul & Cedar Paul trans., 1962) (1915) (“organization implies the tendency to oligarchy”).

²⁶² Wini Breines quotes a 1966 letter to a New Left periodical as illustrative: Movements have spirit, life, energy, motion. They have no defined form. They grow spontaneously and creatively. They die when people in them try to channel them instead of participate in them. . . . People do things because they want to. It is best for people to do things when they have thought about a problem and decide freely what to do about it. In fact, if people don’t decide freely . . . they probably won’t act. BREINES, *supra* note 259, at 74.

²⁶³ The term “civil rights” puts more emphasis on law and formal rights than seems appropriate to capture the broad tactics and goals of the movement; Black “liberation” or “freedom” better convey Southern participants’ overarching goals.

²⁶⁴ On February 1, 1960, four Black students from North Carolina Agricultural and Technical College, after shopping at the Greensboro, North Carolina, F.W. Woolworth

B. *The Inspirational Practice of Ella Baker and SNCC*

Within two months of the sit-ins' launch of a new phase of the Southern Black freedom struggle,²⁶⁵ the students who led that insurgency against segregation and white supremacy formed what became the Student Non-Violent Coordinating Committee, an organization primarily known by its acronym, SNCC (pronounced "snick").²⁶⁶ The driving force behind SNCC's formation as an independent body, and its behind-the-scenes, essential early mentor was Ella Baker.²⁶⁷ For its first five years, SNCC's practice embodied Baker's central ideas about democracy and social change.²⁶⁸ Those ideas and practices vividly brought to life much of Dewey's vision of democracy, providing a brilliant illustration of a "democratic way of life" and "expanding community of cooperative effort."²⁶⁹ The work Baker encouraged SNCC activists to undertake from 1960 to 1964 catalyzed the New Left's ideas of participatory democracy²⁷⁰ and, decades later, inspires collab-

store, sat down at its "whites only" lunch counter and refused to leave until served. The following day they were joined by many more students. Within a week, sit-ins spread to five other North Carolina cities; by the end of the month, to more than thirty communities in seven states; by mid-April, more than fifty thousand students had participated in this movement to desegregate Southern retail establishments – despite the school expulsions, criminal trespass prosecutions, and violent retribution they faced. See CLAYBORNE CARSON, IN STRUGGLE : SNCC AND THE BLACK AWAKENING OF THE 1960s, at 9-18 (1995); WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 79-101 (1980).

²⁶⁵ A commentator explains: "The sit-in was a more dramatic and confrontational tactic than the [Montgomery] bus boycott of five years before. By doing something, instead of withholding participation, young people put their bodies on the line in order to challenge segregation and second-class citizenship[.] . . . steadfastly endur[ing] hostility and violence." BARBARA RANSBY, ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION 237 (1998).

²⁶⁶ For histories of SNCC, see CARSON, *supra* note 264; POLLETTA, *supra* note 253, at 55-119; HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS (2002) (1965).

²⁶⁷ For biographies or extended sketches of Baker, see JOANNE GRANT, ELLA BAKER: FREEDOM BOUND (1998); CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE 67-102 (1995); RANSBY, *supra* note 265.

²⁶⁸ See, e.g., PAYNE, *supra* note 267, at 95-96 ("In its organizational structure, its programs, its ideology, early SNCC would be almost exactly the kind of organization Ella Baker had been trying to create for almost three decades."); RANSBY, *supra* note 265, at 271 ("Ella Baker earned the incontestable position of resident elder and intellectual mentor of SNCC during its first six years of existence.").

²⁶⁹ See *supra* notes 127-42, 147 and accompanying text.

²⁷⁰ See, e.g., CARSON, *supra* note 264, at 175-80; Carol Mueller, *Ella Baker and the Origins of "Participatory Democracy,"* in WOMEN IN THE CIVIL RIGHTS MOVEMENT 51, 53 (Vicki L. Crawford et al. eds., 1990); POLLETTA, *supra* note 253, at 124-29; ROSSINOW, *supra* note 242, at 116. The Port Huron Statement notes: "[T]he Southern struggle against racial bigotry . . . compelled most of us from silence to activism." *Port Huron Statement*, *supra* note 29, at 329. Hayden, SDS's liaison to SNCC, sent effusive written dispatches of its efforts and began his manifesto soon after being beaten while observing SNCC's work. MILLER, *supra* note 23, at 55-61.

orative lawyers' approach to social change. As recent scholars have paid greater attention to the popular, grassroots component of the Southern Black struggle, Ella Baker's contributions have increasingly, if belatedly, been recognized.²⁷¹

At the heart of Baker's ideas was a developmental democrat's commitment to nurturing grassroots leaders who would act individually and collectively to reject second-class citizenship.²⁷² As she stated, "[o]ne of the major emphases of SNCC, from the beginning, was that of working *with* indigenous people, not working *for* them, but trying to develop their capacity for leadership."²⁷³ She was convinced "strong people don't need strong leaders."²⁷⁴ What *was* needed was "the development of people who are interested not in being leaders as much as in developing leadership in others."²⁷⁵ She sought to convince ordinary people – and the young people of SNCC – that, "in the long run," regular people "themselves are the only protection they have against violence or injustice [T]hey cannot look for salvation anywhere but to themselves."²⁷⁶

Baker shared Dewey's emphatic rejection of benevolent paternalism and aversion to experts' making decisions for others.²⁷⁷ Her ideas sprang from her insider's view of leading civil rights organizations.²⁷⁸

²⁷¹ See, e.g., JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* (1994); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984); PAYNE, *supra* note 267; BELINDA ROBBETT, *HOW LONG? HOW LONG? AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR CIVIL RIGHTS* (1997).

²⁷² See, e.g., GRANT, *supra* note 267, at 38; RANSBY, *supra* note 265, at 6 ("her emphasis on . . . group-centered, grassroots leadership set her apart from most of her political contemporaries").

²⁷³ RANSBY, *supra* note 265, at 273 (quote from Ella Baker in 1967) (emphasis added).

²⁷⁴ ELLEN CANTAROW ET AL., *MOVING THE MOUNTAIN: WOMEN WORKING FOR SOCIAL CHANGE* 53 (1970) (quoting Baker), quoted in PAYNE, *supra* note 267, at 93.

²⁷⁵ Ella Baker, *Developing Community Leadership*, in *BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY* 347, 352 (Gerda Lerner ed., 1973) [hereinafter Baker, *Developing Community Leadership*], quoted in PAYNE, *supra* note 267, at 93.

²⁷⁶ Baker, *Developing Community Leadership*, *supra* note 275, at 347, quoted in PAYNE, *supra* note 267, at 93. See also GRANT, *supra* note 267, at 91 (quoting Baker's 1947 speech to Atlanta NAACP: "The Negro must quit looking for a savior and work to save himself and wake up others. There is no salvation except through yourselves.").

²⁷⁷ See *supra* notes 190-98 and accompanying text.

²⁷⁸ Baker worked for the NAACP from 1940-46, as a field secretary and then national director of branches, where she concentrated on building its individual chapters. See GRANT, *supra* note 265, at 45-83; RANSBY, *supra* note 265, at 104-47. She was instrumental in founding the Southern Christian Leadership Conference (SCLC) in 1957. See GRANT, *supra* note 267, at 100-124; RANSBY, *supra* note 265, at 170-95. She held high positions in both these male-dominated organizations, but a biographer describes Baker as "an outsider within," not truly trusted in their inner circles – due both to her gender and the fact that she "criticized unchecked egos, objected to undemocratic structures, protested unilateral decision making, condemned elitism, and refused to nod in loyal deference to everything 'the leader' had to say." *Id.* at 4.

She came to detest such “leader-centered groups,” and urged instead the creation of “group-centered leadership.”²⁷⁹ She saw those organizations as manifestations of an elitist sense of privilege and destiny that led better-educated, middle-class Blacks to believe they could and should use their superior knowledge to act *for* the entire race.²⁸⁰ In addition to their presumptuousness, she saw such Black elites as timid and prone to co-optation – afraid to jeopardize the recognition the white power structure afforded them as negotiating partners.²⁸¹ Part of Baker’s attraction to the students who formed SNCC was their risk-taking, rebellious spirit and willingness to confront racism in ways “respectable” adult leaders failed to do.²⁸²

She also viewed purportedly expert leadership by Black elites – their self-appointed representation of the entire race – as an impediment to the individual growth and flourishing she felt a democratically organized movement would foster. Like Dewey, she saw such growth and development as the primary goal of democracy.²⁸³ She sought to create “the kind of society . . . that permits people to grow and develop according to their capacity, that gives them a sense of value, not only for themselves, but a sense of value for other human beings.”²⁸⁴ As a historian observes, Baker and SNCC “pushed the proposition that merely bettering the living conditions of the oppressed was insuf-

²⁷⁹ See GRANT, *supra* note 267, at 5-6. Indeed, she characterized the SCLC as creating a “cult of personality” around Martin Luther King, Jr. See *id.* at 107.

²⁸⁰ Baker saw two flawed assumptions at the root of this stance by Black elites:

[First,] that those who were trained were not trained to be *part* of the community, but to be *leaders* of the community . . . [and second,] that being a leader meant that you were separate and apart from the masses, and, to a large extent, people were to look up to you, and that your responsibility to the people was to *represent* them. This means that the people were never given a sense of their own values.

Id. at 215 (quoting Baker in 1969 speech). Baker was rejecting W.E.B. DuBois’ vision of a “talented tenth” leading the uplift of the race. See Aprele Elliott, *Ella Baker: Free Agent in the Civil Rights Movement*, 26 J. BLACK STUDIES 593, 595 (1996). For the original formulation of that concept, see W.E.B. DuBois, *The Talented Tenth*, in THE NEGRO PROBLEM: A SERIES OF ARTICLES BY REPRESENTATIVE AMERICAN NEGROES OF TODAY 75 (1903), reprinted in HENRY LOUIS GATES, JR. & CORNEL WEST, THE FUTURE OF THE RACE 133 (1996).

²⁸¹ It was a dynamic she first observed in the labor movement, as it “succumbed, to a large extent to . . . the American weakness of being recognized and of having arrived and taking on the characteristics and the values even, of the foe.” PAYNE, *supra* note 267, at 83 (quoting Baker). Regarding Black elites, she warned “those who are well-heeled don’t want to get un-well-heeled.” See RANSBY, *supra* note 265, at 305 (quoting Baker in 1968 interview). An insightful commentator notes this danger of leaders’ co-optation was in part why Baker urged the constant development of new leaders. See POLETTA, *supra* note 253, at 73.

²⁸² See POLETTA, *supra* note 253, at 244.

²⁸³ See *supra* notes 153, 159-65 and accompanying text (Dewey on growth and development).

²⁸⁴ GRANT, *supra* note 267, at 216 (quoting Baker in 1969 speech).

ficient; that has to be done in conjunction with giving those people a voice in the decisions that shape their lives.”²⁸⁵ Without such participation, Baker believed a key aspect of the struggle would be lost: the development of individuals’ appreciation of “their own value and *their* strengths.”²⁸⁶ As a biographer summarizes her view: the “process of building a movement for social transformation had to allow for, encourage, and nurture the transformation of the human beings involved.”²⁸⁷

Like Dewey, Baker believed in the need for organization and collective action.²⁸⁸ She was convinced “the people, in large numbers, must act.”²⁸⁹ Indeed, another way she differed from Martin Luther King, Jr., and the New Left activists she would inspire, was her insistence on the superiority of slow, long-term *organizing* over more fleeting, less institutionalized *mobilization*.²⁹⁰ She believed an organization must be built in particular locales from the bottom up and must involve ordinary people in collective decision-making and action.²⁹¹

She saw racism and white supremacy as structural issues, and insisted they had to be confronted by ordinary people wherever they manifested themselves in daily life.²⁹² Gains from litigation would ultimately be realized “only if people make use of every right won, and continue a determined battle against segregation wherever and whenever it exists.”²⁹³ Local initiatives had to be driven by those who

²⁸⁵ PAYNE, *supra* note 267, at 100.

²⁸⁶ CANTAROW, *supra* note 274, at 61 (quoting Baker).

²⁸⁷ RANSBY, *supra* note 265, at 369. The fundamental transformation Baker sought was to counter internalized oppression that denied individual and collective capacity.

²⁸⁸ See *supra* notes 216-24 and accompanying text (Dewey’s commitment to organized “social action”).

²⁸⁹ GRANT, *supra* note 267, at 115 (quoting Baker in 1959 newsletter column).

²⁹⁰ SNCC activists saw organizing and mobilizing almost as opposites. Organizing meant working closely, for the long haul, with local communities, to identify, train, and develop local leaders, and create democratic, participatory, accountable organizations that would continue to press for social change after initial waves of publicity dissipated. They saw mobilizing as a “one-shot” phenomenon in which well-known outsiders (of whom King was prototypical in their eyes) descended on a locale, encouraged masses to join them in a public event, spoke for the community there, and then left once media attention waned, leaving no organization or local leaders experienced in public deliberation and action to carry on. See, e.g., STOKELY CARMICHAEL ET AL., *READY FOR REVOLUTION: THE LIFE AND STRUGGLES OF STOKELY CARMICHAEL* (Kwame Ture) 302 (2003).

Also unlike New Left activists, Baker insisted on clear lines of responsibility and authority within organizations. See GRANT, *supra* note 267, at 142 (“Baker felt that an organization should have regular procedures, a clear vision of who was responsible for what and whom: in other words, a chain of command.”).

²⁹¹ See RANSBY, *supra* note 265, at 270.

²⁹² See *id.* at 285 (“Although she knew full well that racial inequality was structural, to her it was not an abstract system to be tackled indirectly. People themselves had to make a change by challenging inequality concretely, as they experienced it in their daily lives.”).

²⁹³ GRANT, *supra* note 267, at 113 (quoting Baker in 1959 speech). As Ransby

would live with the consequences of success or failure, not by outsiders seeking to dictate strategy.²⁹⁴ As she later recalled, “I believed very firmly in the right of the people who were under the heel to be the ones to decide what action they were going to take to get from under their oppression.”²⁹⁵ Local projects needed autonomy to innovate, as well as mechanisms for sharing experiences with, and learning from, others’ successes and failures.²⁹⁶

Baker modeled, and sought to instill in SNCC members, an insistently democratic way of living, being, and interacting with others.²⁹⁷ She shared with her frequent collaborators and kindred spirits at the Highlander Folk School a commitment to “broadening the scope of democracy to include everyone and deepening the concept to include every relationship.”²⁹⁸ Echoing Dewey’s recognition of the interconnection between ends and means,²⁹⁹ she saw success hinging on both “one’s vision of the future and . . . how one interacted with others on a daily basis.”³⁰⁰ She insisted on listening to and respecting the local communities in which SNCC worked. A biographer reports Baker “urged SNCC organizers to suppress their own egos and personal . . .

summarizes:

Baker . . . did not have much faith in lawyers, judges, or legislators. In order to shift the political climate and effect real changes, the masses had to push against and even disrupt the status quo, and the pressure they applied had to be steady and sustained, not sporadic. In Baker’s view, if people did not feel they had taken an active part in their own emancipation, but believed it had been won for them, then half the battle had already been lost; ordinary people’s sense of their own power would be compromised.

RANSBY, *supra* note 265, at 285.

²⁹⁴ See, e.g., *id.* at 242. She thus structured the April 1960 convocation of students who started the sit-ins to limit the roles of SCLC ministers and of the many Northern students, predominantly white, politically more experienced, and, in her view, theoretically more sophisticated, who came to the conference. Baker ensured the Southern students were allowed to meet solely among themselves to exchange information and plot strategy, for as they were the ones who were acting, they should be the ones to make crucial decisions. See *id.* at 239-47.

²⁹⁵ CANTAROW, *supra* note 274, at 84.

²⁹⁶ This aim led Baker to convene the meeting of original sit-in students. *Id.* at 83-84. Although SNCC’s configuration constantly evolved, it was, through 1964, loosely structured and gave much autonomy to local projects. Even in organization-wide meetings, little pressure was exerted to assure uniform application of centrally determined or agreed-upon policy. The emphasis was on understanding the rationales behind differing viewpoints and identifying a range of acceptable positions. See POLLETTA, *supra* note 253, at 86.

²⁹⁷ See RANSBY, *supra* note 265, at 258 (describing Baker as modeling for SNCC members “a different way of being in the world”).

²⁹⁸ The phrase is from the statement of purpose of the Highlander Folk School. See PAYNE, *supra* note 267, at 68.

²⁹⁹ See *supra* notes 199-206 and accompanying text (Dewey on ends and means).

³⁰⁰ RANSBY, *supra* note 265, at 251. Morris quotes a 1960 SNCC document he believes bears Baker’s strong imprint: “If we forget the importance of means, then we shall not obtain the goals.” MORRIS, *supra* note 271, at 220.

ambitions as much as possible and to approach local communities with deference and humility.”³⁰¹ Wide-ranging discussions, in which all voices were encouraged (and even cajoled) to join, and participants strove for consensus, or at least a full understanding of why individuals took the positions they did, were the hallmark of early SNCC – both internally and in meetings with local community members.³⁰² This commitment to participatory discussion and decision-making had instrumental, developmental goals: it educated and nurtured new members and leaders of the movement and gave them a stake in its success – for without a sense of control over decision-making, participants were unlikely to put their bodies and families at risk by taking public actions that white supremacists responded to with physical, emotional, and economic violence.³⁰³

Baker stressed, again like Dewey, the need for plural, experimental efforts to press for social change.³⁰⁴ As a SNCC member reminisced, Baker taught: “[t]here are many legitimate and effective avenues for social change and . . . no single right way . . . [T]he profound changes we were seeking in the social order could not be won without multiple strategies.”³⁰⁵

Like Dewey, she had a deep faith in ordinary people³⁰⁶ and she saw intelligence broadly distributed throughout society, rather than concentrated only among the formally educated.³⁰⁷ As a biographer summarizes, “Baker had enormous confidence in the knowledge base of poor and oppressed communities and the intellectual and analytic

³⁰¹ RANSBY, *supra* note 265, at 273-74. Describing her own organizing approach with NAACP branches, Baker observed: “[Y]our success depended on both your disposition and your capacity to sort of stimulate people – and how you carried yourself, in terms of not being above people.” CANTAROW, *supra* note 274, at 71. She also noted, “you have to have a certain sense of your own value, and a sense of security on your part, to be able to forgo the glamor of what the leadership role offers.” Baker, *Developing Community Leadership*, *supra* note 275, at 352.

³⁰² See, e.g., POLLETTA, *supra* note 253, at 55-87. As Baker later reminisced, SNCC’s internal meetings “would last from six in the evening through early morning, or maybe all day. The first time I ever remember having a charley horse in my leg was after thirty hours that I had more or less been sitting in the same sort of cramped position.” CANTAROW, *supra* note 274, at 86 (quoting Baker). If “someone remained quiet for too long,” a commentator reports, “Baker would engage the person in conversation and then announce to the group that he or she had something to say.” Elliott, *supra* note 280, at 600.

³⁰³ See POLLETTA, *supra* note 253, at 69-74.

³⁰⁴ See *supra* notes 229-34 and accompanying text (on Dewey’s commitment to multiple, experimental paths).

³⁰⁵ PAYNE, *supra* note 267, at 97.

³⁰⁶ See *supra* notes 139-41 and accompanying text (Dewey’s grounding democracy in faith in fellow human beings). As a biographer notes, Baker “urged SNCC organizers to look first to the bottom of the class hierarchy in the black community, not the top, for their inspiration, insights, and constituency.” RANSBY, *supra* note 265, at 274.

³⁰⁷ See *supra* notes 185-89 and accompanying text (Dewey’s notion of broadly distributed intelligence). For Baker’s views, see *infra* notes 308-12 and accompanying text.

capacities of people without formal academic training.”³⁰⁸ She was convinced “oppressed people, whatever their level of formal education, had the ability to understand and interpret the world around them, to see that world for what it was and to move to transform it.”³⁰⁹ She encouraged SNCC to act on this belief by going into isolated, rural communities, finding indigenous leaders, and deciding upon actions (and assessing their success) through democratic deliberation and action in which all participated.³¹⁰ While the mandate to “let the people decide” eventually became a cliché, it expressed the essence of early SNCC.³¹¹ Baker encouraged SNCC workers to seek out, humbly and respectfully, local Black people in Mississippi and other parts of the rural South who were willing to stand up for dignity and equality – even if they were sharecroppers, domestic workers, or other formally unschooled members of the working poor.³¹²

Baker is described as “fe[eling] strongly that a movement could not be based simply on oratory and action, but must be grounded in knowledge.”³¹³ She had faith in the courage, strength, wisdom, and decision-making abilities of ordinary folks – including the rural Black poor. She was confident they could provide key information and teach vital lessons to SNCC staff. But she did not think they were perfect or should be left exactly as found, without engaging in a mutual process of two-way learning. Baker believed there was a point at which everyone’s knowledge “ran out” and they needed to be educated by others with helpful information or ideas to share.³¹⁴ The focal point of that education, for her, was that it not be “education simply for its own sake, but education that leads to self-directed action.”³¹⁵

³⁰⁸ RANSBY, *supra* note 265, at 271.

³⁰⁹ *Id.* at 7. As Baker put it, with significant understatement, “I have never been diploma conscious.” *Id.* at 363 (quoting Baker).

³¹⁰ *Id.* at 280.

³¹¹ See POLLETTA, *supra* note 253, at 96-101.

³¹² Ransby artfully conveys this central aspect of Baker’s vision and practice:

The patchwork quilt reminds me of how Baker served the movement: identifying the value of people who were raggedy, worn, and a little bit tattered – people who were seen by some as the scraps, the remnants, the discarded ones. In each one, as in each strip of fabric, Ella Baker saw enormous beauty and potential. And, like the quilting tradition itself, her life’s work was collective work. She understood the labor-intensive process required to stitch together all the tiny pieces and hold them in place. She knew it could not be done alone and required the skill, trust, and commitment of a team. . . .

RANSBY, *supra* note 265, at 373-74.

³¹³ GRANT, *supra* note 267, at 143.

³¹⁴ As Highlander’s Myles Horton, a frequent colleague of Baker’s in organizing workshops for activists, explained: “There’s a time when people’s experience runs out” and they need expertise; but the people must identify that need themselves, rather than have experts determine their agendas for them. See POLLETTA, *supra* note 253, at 65 (quoting Horton).

³¹⁵ GRANT, *supra* note 267, at 38 (quoting Baker’s written self-description of her work in

As SNCC moved from sit-ins and freedom rides, involving primarily students, to voter registration in rural counties and to organizing the Mississippi Freedom Democratic Party, working-class Black people took on public roles and visibility they had not previously been afforded, as they individually and collectively stood up to racist registrars, sheriffs, politicians, and vigilantes.³¹⁶ Witnessing the courage of SNCC workers and the Black working people they helped organize – people who social scientists insisted were apathetic and uninterested in democracy³¹⁷ – had a decisive impact on early leaders of the New Left. To use the terminology of the sixties, it “blew their minds.” Tom Hayden recalled: “I began to unlearn everything I had been taught at college. Mechanics, maids, unemployed people taking things into their own hands. I kept wondering, ‘where did these people come from? Really, where have I been?’”³¹⁸

A number of factors ultimately led SNCC to abandon key elements of Baker’s model of a participatory democratic way of being in the world, as young activists became frustrated by the intransigence of Southern power structures and what they saw as the complicity of the federal response.³¹⁹ One commentator argues that as white New Leftists came to embrace “participatory democracy” as their slogan, the approach came to be portrayed by some Black SNCC activists as a “white style” to be rejected in favor of a more militant, and directive, approach.³²⁰ Another analyst suggests predominantly male leaders defaulted to a more traditionally masculine approach.³²¹ Notwithstand-

1930s).

³¹⁶ Perhaps the highest profile example was Fannie Lou Hamer, a former sharecropper and plantation timekeeper, who became a leader of the Mississippi Freedom Democratic Party, captivating the 1964 Democratic National Convention and, much to President Lyndon Johnson’s chagrin, its television-viewing public. See KAY MILLS, *THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER* 1-171 (1993).

³¹⁷ See works cited *supra* at notes 41-42.

³¹⁸ MILLER, *supra* note 23, at 57 (quoting Hayden from 1968 interview). Describing the decade after World War II, Ellen Cantarow quips: “There was a cold war on . . . against the idea that ordinary people might change the course of history.” CANTAROW, *supra* note 274, at 75.

³¹⁹ In late 1964 and 1965, SNCC’s internal divisions intensified as advocates of “tight structure” prevailed over those of “looser structure” and racial tensions within the organization escalated. In 1966, Stokely Carmichael won a heated and, for some, tainted, election over John Lewis for chair of SNCC and steered it towards a “Black power” and Black-consciousness agenda that downplayed issues of class and soon led to the departure (or expulsion) of SNCC’s remaining whites. For a range of interpretations of these events, see CARSON, *supra* note 264, at 133-243; POLLETTA, *supra* note 253, at 88-117; RANSBY, *supra* note 265, at 344-52.

³²⁰ See POLLETTA, *supra* note 253, at 88-117.

³²¹ Charles Payne suggests:

Many of the developments that came to bedevil some movement organizations after the mid-sixties – the loss of emphasis on developing others, the inability to maintain effective human relationships, the romanticizing of violence and confrontation, the

ing SNCC's later shift in ideology and tactics, its work from 1960 through 1964, when it most embodied Baker's ideas, stands as a shining example of a participatory democratic way of life in which the energies of ordinary people, individually and collectively, were fully included in a broad-scale, public effort to reject subordination and overturn injustice.

C. Benjamin Barber's "Strong Democracy"

In the past two decades, political theorist Benjamin Barber has renewed the call to reinvigorate U.S. democracy through greater popular political participation. In *Strong Democracy*,³²² Barber draws heavily on the ideas of Jefferson³²³ and Dewey³²⁴ to urge the rejuvenation of our prevailing "thin democracy" through a strong infusion of citizen participation in public deliberation and action.³²⁵ He identifies two key "impulses" or forces in the U.S. political tradition: one "towards liberty, property, and privacy" that he labels "rights-thinking" or liberal individualism and another "towards equality, participation, and communal citizenship" that he labels "civic-thinking" or democratic populism.³²⁶ He calls for a "rebalancing" of those forces: "a reinforcing of Jeffersonian populism to redress the effects of the Hamiltonian privatism" that has so disproportionately dominated recent decades.³²⁷ The measure of the "strong democracy" Barber champions is that "all of the people . . . participate some of the time in some of the responsibilities of governing."³²⁸

Barber identifies two key forces that produce problematically "thin" democracy. The first is the predominant strain of liberal individualism that places so much emphasis on protecting individuals' lib-

shift from movement-as-community to movement-as-political-party, the development of more self-aggrandizing, self-publicizing leadership styles – could all be thought of as shifts from behavior patterns that in this society are socially coded as feminine and toward patterns socially coded as masculine, expressed most vividly by those nationalist organizations that as a matter of policy expected women to take a step back.

PAYNE, *supra* note 267, at 426.

³²² See BARBER, *supra* note 30.

³²³ Barber opens with this quote from Jefferson: "I know of no safe depository of the ultimate power of the society but the people themselves, and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."

³²⁴ Besides quoting Dewey often, Barber notes he has been "much helped by the tradition of American pragmatism," *id.* at xxxii, and describes strong democracy as "pragmatism translated into politics in the participatory mode." *Id.* at 178.

³²⁵ *Id.* at xvi.

³²⁶ *Id.* at 4.

³²⁷ *Id.* at xxvii.

³²⁸ *Id.* at 267.

erty³²⁹ and on individuals' protecting their own interests that it undermines democratic concern for securing public justice, creating public goods, and bringing citizens fruitfully together.³³⁰ As Dewey dismissed "rugged individualism,"³³¹ Barber rejects the "inertial" or "preconceptual" frame of liberal individualism: the notion that "humans are separate, integral, self-contained, unitary particles or atoms; that . . . the human perspective is first of all the perspective of . . . the isolated individual One" ³³² The second force Barber identifies as democracy-thinning is representative government itself, when it is the primary means through which political decisions are made.³³³ As he elaborates:

One of the mischiefs of representative government, which insists on governing for a citizenry to which it promises to be accountable, is that it robs individuals of common activities that could form a citizenry into a community. Even if a representative regime governs on behalf of its clients with efficiency, equitability, and due respect for popular liberty, it will impair rather than enhance the people's capacity for lateral public ties and community affection.³³⁴

Consequently, at the center of Barber's "strong democracy" is a substantial dose of direct democracy.³³⁵ The "first and most important" plank in his "strong democratic platform" calls for "a national system of neighborhood assemblies in every rural, suburban, and urban district in America"³³⁶ – an updated Jeffersonian ward system.³³⁷ He also proposes to fill some local positions by lot (with compensatory pay), as the Athenians did.³³⁸ While these reforms focus on the local level, his proposals as a whole aim to create "a continuum of activity . . . from the neighborhood to the nation . . . along which the

³²⁹ Barber intends the negative sense of the term. *See supra* notes 167-68 and accompanying text (on negative liberty).

³³⁰ BARBER, *supra* note 30, at 4. Barber uses "liberal" in the classical sense that Jeremy Bentham and John Mill were liberals because of their commitment to (negative) individual liberty.

³³¹ *See supra* note 150.

³³² BARBER, *supra* note 30, at 33.

³³³ "When the public yields its basic governing functions to representatives," Barber asserts, "it has begun a process of alienation that in the end taints the very idea of public goods and common ground." *Id.* at xiii.

³³⁴ *Id.* at 244.

³³⁵ By direct democracy, Barber does not mean plebiscites such as ballot initiatives or referenda. He deems voting "the weakest rather than the strongest expression of the spirit of democracy." *Id.* at 202.

³³⁶ *Id.* at 269.

³³⁷ *See supra* notes 102-12 and accompanying text. Instead of Jefferson's wards of a hundred families, Barber proposes neighborhoods of one thousand to five thousand citizens. *See BARBER, supra* note 30, at 397.

³³⁸ *See id.* at 290-93.

consciousness of participating citizens can expand.”³³⁹

The central purpose of Barber’s proposals is to add an institutional framework to the U.S. polity to foster more thorough deliberation and common action. In Barber’s view, individuals are born, but citizens must be created.³⁴⁰ Individuals are only transformed into citizens through “civic education and political engagement” – that is, through common deliberation, common decision-making, and common work.³⁴¹ He thus puts his faith “not in what men are but in what democracy makes them.”³⁴²

Common deliberation and decision-making do not mean thinking alike, but rather thinking together.³⁴³ Their objective is to transform participants from focusing on what they personally want to what would best accommodate the conflicting interests of everyone involved.³⁴⁴ Instead of denying, assuming away, or minimizing conflict, Barber argues democracy is about using conflict to transform individuals into citizens.³⁴⁵ His strong democracy seeks to replace the naked clash of interests by partisans seeking only to secure the best attainable

³³⁹ *Id.* at 235. *See also id.* at 267 (“strong democracy entails both the intimacy and feasibility of local participation and the power and responsibility of regional and national participation”).

³⁴⁰ As Barber distinguishes them, “the individual is a solitary rights-bearing being unconnected to a social nexus, while the citizen is someone embedded in a set of relations that comprise the self and its interests.” *Id.* at xxvii. He continues:

When individuals become citizens . . . they have found an expression of self that encompasses both individuality and sociability. Citizens are not altruists: they are people who define their interests in terms of the communities (family, local, national, global) to which they belong. Nor are they self-abnegating slaves of some higher good or greater collectivity; they . . . perceive that the liberty by which they define themselves and for which they live is forged in and can only flourish in a self-governing community.”

Id.

³⁴¹ *Id.* at xxix. In his view, “citizens . . . are united less by homogenous interests than by civic education and . . . are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions rather than their altruism or their good nature.” *Id.* at 117.

³⁴² *Id.* at 237.

³⁴³ Barber’s strong democracy aims to forge a community out of people with radically different identities, experiences, and values. *See, e.g., id.* at xv (arguing that democracy seeks to “compel an encounter among strangers with hostile interests who nonetheless must learn to live and govern together”). In this way, Barber’s vision is markedly different from those of SNCC and the New Left, which primarily sought to mobilize like-minded and like-situated people (the oppressed and the alienated) to develop and act upon an agenda of social change.

³⁴⁴ Barber suggests: “In place of ‘I want Y,’ the strong democrat must say ‘Y will be good for us,’ a locution that is tested . . . by the assent it finds in the community that must live with it.” *Id.* at 200.

³⁴⁵ As Barber notes, strong democracy “acknowledges (and indeed uses) the centrality of conflict in the political process . . . [by] develop[ing] a politics that can transform conflict into cooperation through citizen participation, public deliberation, and civic education.” *Id.* at 135.

ble outcome for their side with a patient, rational, fair-minded exploration of the common ground that is best for the greater public.³⁴⁶ Barber therefore emphasizes the centrality of patient talk,³⁴⁷ listening,³⁴⁸ and thoughtful forging of a common will.³⁴⁹ His strong democracy calls for, and aims to foster, something akin to a Deweyan scientific temperament.³⁵⁰ Common work – “a community doing together what it has envisioned and willed together”³⁵¹ – is the third key element of strong democracy’s civic education of citizens. Acting in concert upon decisions reached through common deliberation builds solidarity and a sense of community and is, for Barber, the essence of democracy; it is citizen self-government.³⁵²

IV. COLLABORATIVE LAWYERING AS AN EXPRESSION OF PARTICIPATORY DEMOCRATIC VALUES

The ideas and practices of the Athenians, Jefferson, and Dewey, of Ella Baker, SNCC, the New Left, and Barber form the intellectual and moral tradition collaborative lawyering builds on and continues.³⁵³ While some insights and elements of this approach to law-

³⁴⁶ Barber’s emphasis on the centrality of deliberation and his antipathy for interest-group bargaining has been joined by a sizeable movement of “deliberative democrats” in the past two decades. *See generally* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (James Bowman & William Rehg eds., 1998); DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998); JOHN S. DRYZEK, DISCURSIVE DEMOCRACY: POLITICS, POLICY, AND POLITICAL SCIENCE (1990); JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM (1991); JAMES S. FISHKIN, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY (1995); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

³⁴⁷ For Barber, strong democratic talk “always involves listening as well as speaking, feeling as well as thinking, and acting as well as reflecting.” BARBER, *supra* note 30, at 178. Such talk “is not talk *about* the world; it is talk that makes and remakes the world.” *Id.* at 177.

³⁴⁸ Barber describes strong democracy’s “mutualistic art of listening”:

“I will listen” means . . . not that I will scan my adversary’s position for weaknesses and potential trade-offs, nor even . . . that I will tolerantly permit him to say whatever he chooses. It means, rather, “I will put myself in his place, I will try to understand, I will strain to hear what makes us alike, I will listen for a common rhetoric evocative of a common purpose or a common good.”

Id. at 175.

³⁴⁹ *See id.* at 199-202.

³⁵⁰ *See supra* notes 207-15 and accompanying text.

³⁵¹ BARBER, *supra* note 30, at 209.

³⁵² In his words: “Action in common is the unique province of citizens. Democracy is neither government by the majority nor representative rule: it is citizen self-government.” *Id.* at 211.

³⁵³ *See supra* Parts I.B, II, and III. Other important theorists in this tradition include Jean Jacques Rousseau, John Stuart Mill, and English guild socialist G.D.H. Cole. For a summary of their views, see PATEMAN, *supra* note 26, at 22-44.

ying can be expressed in the framework of postmodern social theory, the fundamental normative direction – the political/ethical compass pointing the way – originates in this democratic tradition.³⁵⁴ The following enumeration of the values I consider fundamental to collaborative lawyering reveals the depth of the connection between this approach to social-change lawyering and the participatory democratic ideas and practices explored in Parts I.B., II and III. Collaborative lawyers – some consciously, some not – follow in the footsteps of these earlier democrats.

A. A Democratic Way of Life Extended to All Relationships

Collaborative lawyers are committed to the ideals of the participatory, developmental visions of democracy explored above.³⁵⁵ Sharing Dewey's commitment to democracy as "a way of life" infusing all interactions,³⁵⁶ they see their lawyering as part of a "radically democratic idea of a life well-led."³⁵⁷ Like Ella Baker, they believe in the central importance of how one treats people³⁵⁸ and they share the New Left's goals of living one's values and interacting honestly, rather

³⁵⁴ This article is the most detailed exploration of these democratic roots, but it is not the first to suggest democracy might be a key value of this approach to lawyering. *See, e.g.,* Susan D. Bennett, *Little Engines that Could: Community Clients, Their Lawyers, and Training in the Arts of Democracy*, 2002 WIS. L. REV. 469 (discussing whether community economic development lawyers should act as "democracy coaches"); López, *Living and Lawyering Rebelliously*, *supra* note 2 (casting collaborative lawyering as one facet of broader pursuit of "radically democratic vision of a life well-led"); Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 486 (collaborative lawyers seek to create "egalitarian, participatory democracy . . . by means of egalitarian participatory democracy"); Piomelli, *Foucault's Approach to Power*, *supra* note 4, at 464 (collaborative lawyers see in their efforts "the possibility of restructuring and reinvigorating what we mean by democratic politics"); William A. Shutkin, *The Origins of Environmental Justice: The Concept of Environmental Justice and a Reconception of Democracy*, 14 VA. ENVTL L.J. 579 (1995) (viewing environmental justice movement as redemption of democratic aspirations for "self-realized individuals and self-regulating communities"); White, *Fugitive Theme*, *supra* note 3 (vignettes depicting democracy as "fugitive theme" in better instances of community economic development practice).

³⁵⁵ *See supra* Parts I.B, II, and III. Collaborative lawyering is not monolithic, as the diversity of labels describing it portends. *See supra* notes 7-15. But work falling under its broad tent does share a set of values and aspirations that this Part outlines. Although I shall refer to collaborative lawyers or collaborative lawyering without each time qualifying my comments with a reminder that I am describing my own understanding of these commitments and the breadth of their endorsement, that qualification is always intended.

³⁵⁶ *See supra* notes 126-42 and accompanying text.

³⁵⁷ *See* López, *Living and Lawyering Rebelliously*, *supra* note 2, at 2042. Lucie White states: "[W]hat progressive lawyers have to learn how to do, in order to address the great justice challenge . . . and opportunity of the new millennium," is to "mov[e] our lawyering practices closer to our strongest theoretical visions of democracy." *Progressive Lawyering in the 21st Century*, *supra* note 3, at 304-05.

³⁵⁸ *See supra* notes 297-303 and accompanying text.

than instrumentally, with everyone with whom they work.³⁵⁹ They embrace, with trepidation and excitement, the challenge of bringing to life in their practices, and fostering in the world, the values of equality, human development, and community at the heart of these democratic visions.

Collaborative lawyering is, in part, a call to hold on to ambitious political ideals, to see the connections between “everyday routines and our future trajectories,”³⁶⁰ to recognize and act upon the political and social ramifications of *how* one practices, not simply for which *interests* or clients one advocates.³⁶¹ As Gerald López notes, collaborative lawyers strive to answer the question: “What’s the next step in actually trying to live out what we dream for ourselves, for our families and friends, and for the world we aim to make fundamentally a better place?”³⁶²

Rather than assuming they know best how to solve problems, these lawyers aim to facilitate collective strategizing that voices and applies what everyone knows and can contribute.³⁶³ Their approach embodies Dahl’s “strong principle of equality,” in its presumptions that participants are about equally qualified to have a say in how disputes are framed and resolved and that no single person should have sole responsibility for making and implementing such decisions.³⁶⁴ Such collaboration is a form of “common work” by active citizens that Barber sees as the very definition of democracy, for it entails lawyers, clients, communities, and allies deliberating together to frame problems *and then acting together* to implement agreed-upon tactics and strategies.³⁶⁵ It is this focus on clients’ not only *deciding upon* strategies and tactics their lawyers will pursue but also *engaging in*

³⁵⁹ See *supra* note 260 and accompanying text.

³⁶⁰ López, *Living and Lawyering Rebelliously*, *supra* note 2, at 2042.

³⁶¹ See Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 486 (“challenges to institutional or structural power are fundamentally political. Consequently, the level of participation we as lawyers allow our clients should reflect our political visions, particularly our visions of democracy and the sort of society we seek to create.”) (footnote omitted).

³⁶² López, *Living and Lawyering Rebelliously*, *supra* note 2, at 2053.

³⁶³ As López elaborates, a collaborative lawyer aims to carry through systematically on her impulse to regard subordinated people and their other allies as co-eminent problem-solvers: She must learn to work with and not just for them, and she must learn to make space, in more than just her thoughts, for what they bring to the collaboration in the way of experience, know-how, and strategic sense.

LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 2, at 213.

³⁶⁴ See *supra* note 83 and accompanying text.

³⁶⁵ See *supra* notes 351-52 and accompanying text. Collaborative lawyers see clients and communities as the active agents that participatory democratic theory values in citizens. But they do not limit this view to those with the legal status of citizens; immigrants too are deemed valuable participants in the common work of social change.

some of those tactics and *implementing* some of the strategies that takes collaborative lawyering a step beyond client-centered lawyering in terms of the scope of clients' participation.³⁶⁶ Collaborative lawyering moves from the client-centered question "what would you like me to do for you?" to the participatory democratic question "what shall we do together?" and the developmental democratic question "who shall we become as a result?"

Collaborative lawyers also embody the "group-centered leadership" Ella Baker and SNCC sought to model, in their continual efforts to develop and mobilize grassroots leaders.³⁶⁷ This collective, cooperative approach to problem-solving treats clients and communities as fully human partners – in New Left terminology, treats them "authentically" – rather than as "objects to fix, or instruments to play upon."³⁶⁸

Part of both the challenge and allure is that a democratic way of being, as Ella Baker knew, cannot be faked and takes intense work to sustain.³⁶⁹ It certainly runs counter to the traditional model of lawyers as pre-eminent problem-solvers who primarily work alone (or among fellow lawyers) and deploy their expert knowledge in the legal arena to deliver results for clients.³⁷⁰ Nonetheless, collaborative lawyers seek to integrate democratic values into the details of their everyday practice – recognizing the unlikelihood of manifesting them constantly and perfectly, given their difficulty and the powerful pull of professional socialization.³⁷¹ These lawyers, like Dewey, appreciate the dem-

³⁶⁶ Client-centered lawyering is the dominant model taught in U.S. clinical legal education. See, e.g., DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS* 2-13 (2d ed. 2004) (summary and justification of model by its initial formulators).

³⁶⁷ See *supra* notes 272-79 and accompanying text. White suggests collaborative lawyers "always seek[] to activate political action, and thus build the capacity for more powerful political intervention." She identifies six "dimensions of political capacity" a collaborative lawyer "wants to draw forth and thus build up, through every move that she makes" *Progressive Lawyering in the 21st Century*, *supra* note 3, at 309. These include:

(1) every person's capacities for voice, for relating and caring for others, for maintaining well-being, for moral imagination; (2) the people's capacities for forming and working effectively in action groups; (3) for forming effective coalitions; (4) for staging cultural performances and kicking off social movement; (5) for critical deliberation and astute strategic planning; and (6) for democratically constituted leadership.

Id. at 309-10.

³⁶⁸ See White, *Fugitive Theme*, *supra* note 3, at 1074. For a similar commitment by non-lawyers, see JOHN P. KRETZMANN & JOHN L. MCKNIGHT, *BUILDING COMMUNITIES FROM THE INSIDE OUT: A PATH TOWARD FINDING AND MOBILIZING A COMMUNITY'S ASSETS* (1993).

³⁶⁹ See *supra* note 301.

³⁷⁰ See Piomelli, *Foucault's Approach to Power*, *supra* note 4, at 402 (describing conventional lawyer's role conception).

³⁷¹ White summarizes López's *Rebellious Lawyering*, LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 2, as a warning to lawyers pursuing social change

ocratic road can be “supremely difficult” to follow.³⁷² When things get messy, as they invariably do, or seem to be moving at a glacial pace, if at all, the temptation to dictate terms or take matters into one’s own hands are strong. But these lawyers strive to resist that siren call.

Truly inviting and maximally integrating the participation of clients and other allies requires a thorough reorientation of almost every aspect of traditional legal practice. This reconfiguration includes: intake, referral, and evaluation routines; how one interviews clients, investigates facts, develops strategy, implements solutions, and assesses success or failure; whom one works with; where one spends time and energy; the sorts of skills, contacts, and knowledge one aims to develop and refine.³⁷³ In each of these facets of practice, collaborative lawyers strive to invite and make room for interactive partnerships with individual clients, community groups, and professionals from other disciplines.

B. Rejection of Domination, Subservience, and Inferiority

Demosthenes’ summary of the Athenian democratic ethos as a rejection of domination by elites and subservience by the masses is an apt description of another central value of collaborative lawyers.³⁷⁴ So too is Dewey’s insistence that equality means rejecting generalized notions of human inferiority and superiority.³⁷⁵ It is for these reasons that collaborative lawyers rebuff Schumpeter’s and Posner’s visions, which strip democracy of its egalitarian aspirations and reduce it to a contest between skilled elites who only periodically seek assent from otherwise passive constituents.³⁷⁶ These lawyers reject the legitimacy of any division of the world into active elites and passive masses – or placing learned guardians in charge of tending to the interests of others without their active participation.

Rather than describing their objective simply as lawyering for so-

that their work is not without danger. Because they are of the world that they wish to change, they run the constant risk of repeating its patterns of injustice through their efforts to do good. Indeed, this is not the kind of risk that they can get around. Rather, the best that they can do is to work their way through it, seeking to improve their practice in the future by casting a critical eye on what they have already done.

White, *Fugitive Theme*, *supra* note 3, at 1073.

³⁷² John Dewey, *The Democratic Faith and Education*, 4 ANTIOCH REV. 274 (1944), reprinted in 15 DEWEY, LATER WORKS, *supra* note 137, at 251, 259.

³⁷³ See LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 83-165 (analysis of community law office striving toward more collaborative practice); Piomelli, *Foucault’s Approach to Power*, *supra* note 4, at 455-56 (summarizing aspects of practice to which collaborative lawyers attend).

³⁷⁴ See *supra* note 92 and accompanying text.

³⁷⁵ See *supra* notes 172-78 and accompanying text.

³⁷⁶ See *supra* notes 33-61 and accompanying text.

cial change, or lawyering in the public interest, collaborative lawyering theorists frame their goal as “lawyering against subordination.”³⁷⁷ By this they mean a commitment to joining with others to eradicate relationships based on domination and subservience.³⁷⁸ Like their democratic forebears, collaborative lawyers view would-be elites with pretensions to superiority – be they employers, landlords, politicians, developers, bureaucrats, businesses, relatives, or religious leaders – as significant threats to the clients and communities with whom they work.³⁷⁹ Of course these lawyers aim to enhance clients’ and communities’ economic well-being and to increase their other resources as well. Indeed, the constant search for outside allies – such as researchers, funders, journalists, public officials, and advocacy groups – is a drive to enlist additional resources.³⁸⁰ But collaborative lawyers view gains in material well being as an aspect and a result of a broader struggle to challenge and root out subordination.³⁸¹

Their commitment is to confront and defeat – anywhere and everywhere they arise, as Ella Baker urged³⁸² – ideas and practices that treat people as if some count and contribute and others don’t. These lawyers aim to avoid such relationships in interactions with clients and communities and they strive to enhance and ally themselves with the “domination-fighting capacity” of individuals and collectives.³⁸³ They do so by working with clients and communities in joint efforts to solve problems and by constantly looking to expand the circle of potential collaborators, believing isolated individuals make far easier prey for societal wolves than does a united flock guarding each other’s backs.

³⁷⁷ See LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 11, 37, 53 (outlining “rebellious idea of lawyering against subordination”); White, *Paradox of Lawyering*, *supra* note 3, at 861.

³⁷⁸ White defines domination as “disproportionate control over economic resources, a presumptive privilege in social relations, and a virtual monopoly on access to the state” and subordination as marked by “constrained economic resources and . . . little standing in social or political matters.” White, *To Learn and Teach*, *supra* note 3, at 700 n.6 (quoting STANLEY B. GREENBERG, RACE AND STATE IN CAPITALIST DEVELOPMENT: COMPARATIVE PERSPECTIVES 30 (1980)).

³⁷⁹ See *supra* notes 85-92 (Athenians), 110 (Jefferson) and accompanying text.

³⁸⁰ For lists of the sorts of allies collaborative lawyers seek, see LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 54; Piomelli, *Foucault’s Approach to Power*, *supra* note 4, at 450.

³⁸¹ For an argument that community economic development lawyers must choose between promoting distributive justice or community empowerment, see Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131 (2004).

³⁸² See *supra* notes 292-93 and accompanying text.

³⁸³ See LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 8. Like Foucault, collaborative lawyers believe resistance to domination is widespread (albeit often covert) and that every subordinated person or community has domination-fighting capacity. See Piomelli, *Foucault’s Approach to Power*, *supra* note 4, at 425-27, 446-50.

C. *The Broad Distribution of Intelligence and the Insight of Clients*

Like Dewey, collaborative lawyers believe intelligence and problem-solving competence are broadly distributed throughout society, rather than concentrated in the ranks of the well-educated or well-to-do.³⁸⁴ Like Baker, these lawyers are not “diploma conscious”; they believe people without formal educational credentials have important contributions to make to efforts to change the world.³⁸⁵ They reject any presumption, explicit or implicit, that individuals’ or communities’ subordinated positions signal they are dumb, lazy, or too beaten down to helpfully diagnose their situation and develop and implement strategies to change it.³⁸⁶

Indeed, one way in which collaborative lawyers may differ slightly from Dewey in this regard is that they believe people in subordinate positions often have knowledge and insights that those in superior positions or outsiders may lack.³⁸⁷ People in lower-level positions may, for example, have a fuller understanding of their purported superiors and what really moves them, of how day-to-day operations actually work (rather than how superiors assume they work), of the weak spots in a position that seems impregnable, of which changes in institutions or procedures would most meaningfully impact their lives.³⁸⁸ Such knowledge can be invaluable in crafting and assessing strategies; but it will only be tapped and acted on if lawyers view clients and communities as potentially savvy analysts and tacticians. Collaborative lawyers’ stance is, at root, openness to exploring the thoughts and insights of clients and communities. It neither assumes

³⁸⁴ See *supra* notes 185-89 and accompanying text. Although collaborative lawyering theorists have not referred to it, their ideas are consistent with Howard Gardner’s theory of multiple intelligences, which understands intelligence not as a single faculty, but as numerous different abilities. See HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (10th Anniversary ed., 1993) (1983) (describing seven intelligences). See also Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 CLIN. L. REV. 15 (2004) (describing linguistic, categorizing, logical-mathematical, narrative, intrapersonal, interpersonal, and strategic intelligences as key capacities for lawyering).

³⁸⁵ See *supra* notes 306-12 and accompanying text.

³⁸⁶ Although progressive lawyers rarely endorse these views explicitly, collaborative theorists detect such assumptions, akin to “culture of poverty” notions, in some progressive law practices. See, e.g., LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 2, at 20-23, 49; Piomelli, *Foucault’s Approach to Power*, *supra* note 4, at 454-55 n.277 (with citations to “culture of poverty” views).

³⁸⁷ López discusses the knowledge of their bosses that enables secretaries, janitors, and farm workers to create breathing space for themselves in day-to-day work without explicitly contesting the job’s formal terms. See LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 2, at 57-60.

³⁸⁸ López labels such insights a distinctive “feel” for situations that people in subordinated positions often develop. See *id.*

clients or communities will always be on the money nor diminishes the value or importance of what lawyers know and contribute.³⁸⁹ But it is grounded in a firm conviction that lower-income and working-class people are fully capable of understanding and analyzing their situation and envisioning and implementing responsive tactics and strategies.

D. Rejection of Benevolent Paternalism and Exclusive Reliance on Formal Representation

Like Dewey and Baker, collaborative lawyers reject benevolent paternalism that bestows beneficial outcomes upon others.³⁹⁰ They share Dewey's view that such an approach is problematically aristocratic in not including the active participation of intended beneficiaries.³⁹¹ They believe lawyer-initiated and lawyer-driven efforts – including much traditionally-conducted impact litigation – are prone to delivering results that lawyers deem attainable, meaningful, and desirable, but that clients and communities may not desire or value as highly.³⁹² Collaborative lawyers concur with Baker's warning that such efforts rarely foster a democratic growth in people's sense of agency and effectiveness.³⁹³ These lawyers consequently also share Baker's and Dewey's insistence on working *with*, rather than *for*, people.³⁹⁴

Like Dewey and Baker, collaborative lawyers are convinced one must pay careful attention to the consequences of the means employed to make social change.³⁹⁵ Like the New Left,³⁹⁶ they insist the means used must prefigure or “usher in” the change one seeks.³⁹⁷ A world where everyone counts, contributes, interacts, and is en-

³⁸⁹ See, e.g., *id.* at 50 (“A lawyer need not romanticize subordinated people, nor treat them all as transcendently clever or immune to hoodwinking or resignation, nor downplay her or his own ability to help with certain sorts of problems in order to respect and trust their resourcefulness.”).

³⁹⁰ See *supra* notes 190-98 (Dewey), 277-81 (Baker) and accompanying text.

³⁹¹ See *supra* note 191 and accompanying text.

³⁹² See LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 13-17. For a condemnation of such lawyer-driven impact litigation, see Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, 85 YALE L.J. 470 (1975). For a defense of lawyers' designing litigation without client participation, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 317-40 (1988).

³⁹³ See *supra* notes 284-87 and accompanying text.

³⁹⁴ Baker used exactly this phrase, see *supra* note 273 and accompanying text, as did Dewey's biographer, see *supra* note 190 and accompanying text. For collaborative lawyers using almost identical formulations, see LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 37; Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 440; Piomelli, *Foucault's Approach to Power*, *supra* note 4, at 446.

³⁹⁵ See *supra* notes 199-206 (Dewey), 300 (Baker) and accompanying text.

³⁹⁶ See *supra* note 259 and accompanying text.

³⁹⁷ See LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 382 (“lawyering . . . must itself reflect and occasionally even usher in the world we hope to create.”).

couraged to flourish must be pursued through strategies and tactics embodying those very values. Lawyer-dominated remedial efforts not only reinforce societal stereotypes of subordinated clients and communities as unable to act effectively on their own behalf,³⁹⁸ they preclude joint problem-solving that might lead to better solutions and enhance the skills, effectiveness, and development of *everyone* involved.³⁹⁹

Collaborative lawyers share with Baker and Barber an aversion to representation,⁴⁰⁰ if it is the exclusive means through which people's and communities' interests are advanced. The problem is not being represented, but *always* being represented – *never* being actively involved in speaking or acting directly on one's behalf or with others.⁴⁰¹ Most collaborative lawyers view litigation and other contexts in which lawyers formally represent – *i.e.*, speak and act for – clients as at least potentially appropriate and effective, so long as clients are meaningfully involved in framing the remedies sought, stories told, and arguments made.⁴⁰² But these lawyers also encourage joint exploration of other arenas or avenues where clients and allies can engage in their own persuasive efforts so they are not always in the position of being spoken for by others.⁴⁰³

In a sense, collaborative lawyers seek to reinstitute the Athenian tradition of *isegoria*, the equal right of all to speak.⁴⁰⁴ But they treat

³⁹⁸ See Piomelli, *Foucault's Approach to Power*, *supra* note 4, at 448.

³⁹⁹ See Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 508-12 (describing benefits of collaboration for clients, lawyers, and outcomes). See also *infra* note 433 and accompanying text.

⁴⁰⁰ See *supra* notes 280-87 (Baker), 333-34 (Barber) and accompanying text.

⁴⁰¹ López has not explicitly stated that his discomfort with formal representation is limited to when it is the exclusive mode in which lawyers work with clients and communities. But the qualification is implicit in his work, which is not a blanket rejection of all litigation. There is certainly one passage in Lucie White's work – where she writes that in speaking for another person, an advocate “inevitably replays the drama of subordination in her own work,” see White, *Paradox of Lawyering*, *supra* note 3, at 861 – from which readers might infer she is opposed to all instances of lawyers speaking or acting for clients. But again, her entire body of work makes plain that she does not view representation as an evil always to be shunned.

⁴⁰² See Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 512.

⁴⁰³ White frequently suggests seeking or creating “spaces,” such as communal legal clinics in which problems and solutions are publicly discussed (see White, *To Learn and Teach*, *supra* note 3, at 730-32, 745), public “speakouts” (see White, *Mobilization on the Margins*, *supra* note 3, at 547-57), public theater works (see *id.* at 557-63), and other settings, where clients and communities can bear witness to and speak out against injustice in their own words and forms. I have discussed the powerful persuasive impact on local decision-makers that clients' and other allies' advocacy (in formal public meetings and informal settings such as churches and coffee shops frequented by politicians) played in what could have been framed as a purely legal struggle over the validity of appointments to a local rent board. See Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 503-13.

⁴⁰⁴ See *supra* note 84 and accompanying text.

its absence – people spoken for, rather than speaking – not simply as an individual loss of voice, but also as a communal lost opportunity for collective action that might successfully resolve the problem at hand and enhance communal effectiveness in resolving other problems in the future.⁴⁰⁵

E. Collective Action, Grassroots Pressure, and the Limits of Litigation

Cornel West's vision of democracy – as “a movement of an energized public,” as “more a verb than a noun,” as “a dynamic striving” – captures well the mobilization of collective energies at the heart of both participatory democracy and collaborative lawyering.⁴⁰⁶ Collaborative lawyers, and the clients, communities, and allies with whom they join, strive to form the self-aware, informed, engaged “publics” whose absence Dewey and SDS lamented.⁴⁰⁷ Rejecting Posner and Schumpeter's protective democratic vision of ordinary people as isolated, apolitical consumers,⁴⁰⁸ these lawyers view their clients as interconnected members of communities, whose connections are essential resources to be used, nurtured, and strengthened. Like Dewey, Baker, and the early New Left, collaborative lawyers make the formation of engaged publics a central priority. Where they may differ from Dewey is that they expect such publics to work actively on their own behalf, rather than delegating the task to representatives.⁴⁰⁹

Facilitating collective action, as collaborative lawyers and their allies recognize, requires solidifying the affective bonds between people and groups that Dewey called fraternity.⁴¹⁰ It entails fostering connections and deepening horizontal ties that create a sense of community – of shared, or at least overlapping, interests, stakes, commitment, and values.⁴¹¹ Indeed, this strengthening of communal ties is a key function that participation in collective action plays in what Barber calls “common work.”⁴¹²

Collaborative lawyers also share Baker's conviction that litigation

⁴⁰⁵ See Piomelli, *Foucault's Approach to Power*, *supra* note 4, at 479-80 (on goal of building collective capacity to win current and future struggles).

⁴⁰⁶ See *supra* note 86 and accompanying text.

⁴⁰⁷ See *supra* notes 219-21 (Dewey), 251-52 (SDS) and accompanying text.

⁴⁰⁸ See *supra* notes 37 (Schumpeter), 52-56 (Posner) and accompanying text.

⁴⁰⁹ Because he used the concept as a building block of his model of the state, Dewey believed a public ultimately organized itself by designating officials to oversee its interests. See DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 116, at 16, 27-28.

⁴¹⁰ See *supra* notes 179-84 and accompanying text.

⁴¹¹ See, e.g., White, *To Learn and Teach*, *supra* note 3, at 723-45 (describing efforts to create emotional bonds and working connections between villagers as prerequisite to effective united front against Apartheid government's relocation plan).

⁴¹² See *supra* note 351 and accompanying text.

on its own is unlikely to achieve meaningful, lasting change.⁴¹³ They believe ongoing pressure from a popular base is necessary to keep court decisions and regulatory or statutory gains in force – and concerted public action upon those rights is necessary to ensure they enduringly penetrate people's everyday lives.⁴¹⁴

This emphasis on bringing collective pressure to bear rejects Barber's dichotomy between making governmental decisions through a rational, deliberative process or through the naked clash of interests – and his preference for the former.⁴¹⁵ On this point, collaborative lawyers depart from Dewey as well, where he urged a scientific dispassion that prohibits an adversarial approach to those with opposing views or interests.⁴¹⁶ These lawyers certainly value careful deliberation and sober-minded questioning of their (and their partners') assumptions, assessments, tactics, and strategies.⁴¹⁷ But they do not purport to be anything other than forceful advocates, battling – side-by-side with clients, communities, and allies – against those who seek to maintain relations of superiority-subservience. While they strive to understand the interests, thoughts, and practices of their adversaries, and to develop stories and arguments to persuade them,⁴¹⁸ collaborative lawyers and their allies are not ready to renounce pressure tactics. Indeed a key goal is to enhance the amount and effectiveness of pressure subordinated people, communities, and their allies can bring to bear on adversaries and politicians.⁴¹⁹

⁴¹³ See *supra* note 293 and accompanying text.

⁴¹⁴ Collaborative lawyers are not alone in this regard. Over the past thirty years, many political scientists have criticized as a “myth of rights” the notion that litigation, *without broader political mobilization*, can deliver *lasting* social change. See, e.g., JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978); MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY AND THE POLITICS OF LEGAL MOBILIZATION* (1994); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

For example, Michael Klarman notes that in 1960, the year the sit-ins began and six years after the landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), only 0.15% of Black schoolchildren in the South attended integrated schools. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994). In his analysis, significant educational integration only occurred after Southern Black popular mobilization (and Southern whites' violent reaction to it) pressured Congress to enact the Civil Rights Act of 1964 and the Johnson Administration to issue strict enforcement guidelines in 1966. *Id.* at 10.

⁴¹⁵ See *supra* note 346 and accompanying text.

⁴¹⁶ See *supra* notes 209-10 and accompanying text.

⁴¹⁷ See *infra* notes 431-32 and accompanying text.

⁴¹⁸ For a rich exploration of the necessity of understanding the audiences one seeks to persuade, see Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984).

⁴¹⁹ Luke Cole describes a goal of “changing the power dynamics in a particular community or neighborhood so that the people with whom we are working have more power collectively, as a group, at the end of the struggle than they did going into the struggle.”

F. *The Developmental Benefits of Participation*

Collaborative lawyers, like all the democratic theorists and practitioners discussed in Parts I.B., II, and III above, emphasize the developmental benefits of participation in joint efforts to make social change. They value its role in improving participants' abilities to deliberate, strategize, and act together, and in building solidarity, commitment to a cause, and willingness to take risks and bear burdens.⁴²⁰ They also value its role in fostering the sense of personal and collective effectiveness that fuels further action.

As several collaborative theorists emphasize, the benefits of collaboration run two ways.⁴²¹ Participation benefits clients, enhancing their knowledge, skills, self-confidence, and ability to work with others. But it is not a one-way teaching of skills or bestowal of information on clients and communities; it is a two-way process in which everyone learns and everyone teaches.⁴²² Collaboration benefits lawyers too, enhancing *their* knowledge, skills, and ability to work with others.⁴²³ Successful outcomes from joint efforts, and the experience and camaraderie built through them, boost lawyers' confidence too (in the value of collaboration and in their capacity to envision and bring to life a more democratic approach to practice). Collaboration brings everyone – clients, lawyers, communities, and allies – “out of isolation and into community,” as the Port Huron Statement urged.⁴²⁴ Dewey's insight that growth occurs from being challenged by others' ideas and experiences⁴²⁵ dovetails with collaborative lawyers' insistence on sometimes challenging clients and allies, rather than always silently deferring to their initial formulations or inclinations.⁴²⁶

G. *The Local Sphere as a Springboard for Activism*

Like Jefferson, Dewey, and Barber, collaborative lawyers see the

Progressive Lawyering in the 21st Century, *supra* note 3, at 321-22.

⁴²⁰ These are advantages Polletta identifies in her study of Twentieth and Twenty-First Century social movements in the U.S. See POLLETTA, *supra* note 253.

⁴²¹ See works cited *infra* at notes 422-23.

⁴²² See LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 52-53; Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 446; White, *To Learn and Teach*, *supra* note 3.

⁴²³ See Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 509-14 (recounting lessons lawyer learned from collaboration with clients and community allies in collective effort to challenge packing of local rent control board).

⁴²⁴ See *supra* note 239 and accompanying text.

⁴²⁵ See *supra* note 155 and accompanying text.

⁴²⁶ See, e.g., Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 479; LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 53. Alfieri's works, see *supra* note 5, have not shared this insistence on sometimes challenging clients, rather than always deferring to them.

local realm as the important *starting point* for collective action.⁴²⁷ They view face-to-face settings and manageably sized groups in which people talk, listen, think, and act together, as key sites for building collective efforts to challenge the status quo. But these lawyers also search for opportunities to connect local initiatives and emerging leaders and groups to larger regional, statewide, national, or international efforts.⁴²⁸ Collaborative lawyers agree with Dewey: “[d]emocracy must begin at home, and its home is the neighborly community;” but they also agree that attention and action must extend beyond the neighborhood to address the larger macro-economic and macro-political forces shaping it.⁴²⁹

Collaborative lawyers and those with whom they work share Baker’s view⁴³⁰ that these structural issues – *e.g.*, racism, sexism, class domination, militarism, homophobia, religious bigotry, environmental degradation, gentrification, de-industrialization, *etc.* – generally manifest themselves in numerous locales, where they present opportunities for local people and groups to identify and challenge them. These lawyers view national and international movements (such as struggles over wars, globalization, or climate change) as aggregations of countless local actions. To be sure, local confrontations must be informed and improved by knowledge from contests in other locales; and larger-scale strategies need to be planned and coordinated. But collaborative lawyers and their allies believe such efforts typically require a base of ground troops and local leaders born out of struggles in which they have actively participated – experiences that hone abilities to analyze, strategize, advocate, improvise, and reassess and that provide the sense of political effectiveness to encourage forays against larger targets.

Collaborative lawyers and their allies believe these “big” issues are unlikely to be successfully contested for long by progressive experts *alone* – be they impact litigators, lobbyists, think tanks, foundations, or other would-be social engineers. To succeed in the long run, experts must be connected to, informed by, and allied with active, energized publics, who can alter adversaries’ and decision-makers’ assessments of the correlation of forces (*i.e.*, the relative strengths of the opposing sides). Without altering those assessments, legal or administrative victories are likely soon to be eroded or overturned.

⁴²⁷ See *supra* notes 106-09 (Jefferson), 225-28 (Dewey), 336-39 (Barber) and accompanying text.

⁴²⁸ See LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 38.

⁴²⁹ See DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 116, at 213.

⁴³⁰ See *supra* note 292 and accompanying text.

H. Experimentation, Flexibility, and Constant Reassessment

Collaborative lawyers also share with Dewey and Baker a commitment to experimenting with multiple approaches to making social change and an insistence on continually reassessing and revising – with clients and allies – their tactics and strategies.⁴³¹ As a collaborative theorist expresses: “Effective lawyering, like good living, demands an openness to new insights and a willingness to scrutinize even those solutions that seem to work consistently.”⁴³² A core advantage of collaboration – *i.e.*, of sharing responsibility for solving problems and effecting change – is that it often makes possible multiple approaches by multiple actors to persuading adversaries or third parties.⁴³³ Rather than relying exclusively on lawyers’ ability to litigate, lobby, negotiate, or use the media, collaborative lawyers and their allies seek to increase the number of potential lobbyists, negotiators, and media spokespeople, and to expand the range of tactics they can use.

A key principle of collaborative lawyering is that law (and litigation within it) is one potentially effective means of making social change, but it is rarely the only available tool.⁴³⁴ Collaborative lawyers believe choices of which tools to use, augment, revise, or abandon are best made contextually, after thorough deliberation informed by the insights of multiple participants.⁴³⁵

CONCLUSION

This Article has detailed collaborative lawyering’s deep historical roots in political and social thought that dates back to the Athenians and has guided and shaped social movements over the past several centuries.⁴³⁶ Exploring the democratic traditions from which this law-

⁴³¹ See *supra* notes 229-34 and accompanying text for Dewey’s views and *supra* notes 304-05 and accompanying text for Baker’s.

⁴³² LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 66. See also *id.* at 69 (these lawyers “refuse to privilege any particular strategy or category of strategies. They focus on what might work – through assessments that regularly feel ad hoc, concrete and provisional”).

⁴³³ See Piomelli, *Foucault’s Approach to Power*, *supra* note 4, at 451.

⁴³⁴ See LÓPEZ, REBELLIOUS LAWYERING, *supra* note 2, at 55-56.

⁴³⁵ See Piomelli, *Appreciating Collaborative Lawyering*, *supra* note 4, at 488, 512.

⁴³⁶ This tracing of the roots of collaborative lawyering to particular readings or interpretations of ancient Athens and to aspects of Thomas Jefferson’s thought should not be interpreted as an effort to authoritatively validate this approach to lawyering. Nor should it be read as a claim that the Athenians or Jefferson, if transported to our very different world, would necessarily endorse collaborative lawyering. (Indeed Jefferson’s antipathy for urban masses and his and the Athenians’ dismissal of economically dependent people – and thus all women of their day – makes it quite likely that they would not view most of collaborative lawyers’ clients as competent potential partners.) Instead, my aim has been to highlight the affinity between these lawyers and those democratic predecessors – to show that collaborative lawyers are striving to implement and refine ideas and practices with which

ying emerges serves more than merely academic purposes. It clarifies collaborative lawyers' goals and reveals the moral/political compass guiding their practice – which may have been obscured by the postmodernist label many have attached to this lawyering. A focus on underlying visions of democracy highlights these lawyers' central commitments to participation, political and social equality, consistency of means and ends, and the pursuit of individual and collective growth through self-government and concerted public action.

Casting collaborative lawyering as a fundamentally democratic endeavor also serves to reconnect these lawyers with understandings and examples of what democracy can look like and accomplish that differ radically from currently prevailing images. Collaborative lawyers have much to learn from Athenian, Jeffersonian, and Deweyan democracy, as well as from Ella Baker and SNCC, the Highlander Folk School, early SDS, and the many social movements that have sought to put participatory visions of democracy into practice. I hope this Article will encourage collaborative lawyers to delve deeper into these histories. These lawyers also have much to contribute, by discussing their work in the context of ideas and practices of democracy, to the manifold current conversations about how best to reshape and reinvigorate U.S. public life.⁴³⁷

Attention to these democratic roots and concerns can also help collaborative lawyers implement these core aspirations into their practice. Collaborative lawyers and their allies can, and often do, turn to these fundamental political values to plan, implement, and assess alternative courses of action. Understanding collaborative lawyering as an effort to bring democracy to life facilitates such efforts, for what we call ourselves – how we understand ourselves and our calling – plays a pivotal role in determining what we do. How we conceptualize our aims fundamentally shapes our practice and the range of options we consider – what we do and don't do, how and with whom we work, what we consider appropriate and successful. Thinking of ourselves as client-centered lawyers,⁴³⁸ as translators,⁴³⁹ as therapeutic agents,⁴⁴⁰

many people and groups who have gone before us have also grappled.

⁴³⁷ See *supra* note 32 and accompanying text.

⁴³⁸ See *supra* note 366. For an outstanding recent discussion of the assumptions, values, and critiques of client-centered lawyering, see Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLIN. L. REV. 369 (2006).

⁴³⁹ See Clark Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

⁴⁴⁰ See generally ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); Symposium, *Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 PSYCHOL. PUB. POL'Y & L. 793 (1999); PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELP-

as lawyers for the Bill of Rights,⁴⁴¹ or as participatory democrats impacts how we practice in almost every way, large and small. In all the ways outlined in Part IV, understanding collaborative lawyering as a participatory democratic endeavor, as a pervasive way of being and mode of interacting with others, as an effort to “broaden[] the scope of democracy to include everyone and deepen[] the concept to include every relationship,”⁴⁴² helps to assure that these fundamental values are consulted when tactics and strategies are considered, alternatives weighed, and decisions made about who shall participate in such efforts.

Highlighting collaborative lawyers’ commitment to participatory and developmental democratic values – and to integrating those values into everyday practice – also helps to more clearly differentiate these lawyers from other social-change lawyers. A democratic lens highlights how collaborative lawyers differ from professional colleagues whose approach to practice is closer to protective democratic understandings of the appropriate roles of lay people and expert professionals. Collaborative lawyers strive to avoid, some would say to rebel against, the standard professional model in which legal experts act on behalf of clients who set broad parameters and express general assent, but are not otherwise central to the actual resolution of their problems. That reigning model of lawyering has much in common with Posner’s and Schumpeter’s protective vision of democracy.

Collaborative lawyers dismiss such a model – of democracy or lawyering – as insufficiently participatory or, to use Barber’s terminology, problematically “thin.”⁴⁴³ Collaborative lawyers reject the implicit assumptions in orthodox approaches to lawyering for social change that lower-income clients and communities have little interest in, or insight or skill to contribute to, *how* their individual and collective problems are resolved. They dispute notions that all clients care about (and perhaps are even entitled to expect) are beneficial results procured by their attorneys. Collaborative lawyers are troubled by traditional public interest lawyers who, in advocating *for* the under-represented, treat the struggle for social justice as a competition between dueling sets of legal experts striving to convince decision-makers to adopt their arguments. Collaborative lawyers are troubled that

ING PROFESSION (Dennis P. Stolle et al. eds., 2000).

⁴⁴¹ David Luban attributes to its former director, Melvin Wulf, the ACLU’s famous dictum: “Our real client is the Bill of Rights.” David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1009 n.18 (1990), citing Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1092 (1970).

⁴⁴² See *supra* note 298 (statement of purpose of Highlander Folk School).

⁴⁴³ See *supra* note 325 and accompanying text.

these public interest attorneys wage such a battle (whether in courts, administrative agencies, the media, or even the legislature) largely above the heads of clients. Collaborative lawyers also hear echoes of Schumpeter and Posner in objections that a collaborative approach demands more than it is feasible to expect from clients, that it calls for an inefficient or sub-optimal allocation of resources and talents, that the process need only deliver results and need not encourage client participation, let alone aspire to transforming participants.

Collaborative lawyers seek more than just their clients' consent to act on their behalf and in their interests. They aim to join with clients, communities, and any other allies they can enlist, in collective efforts to change the world (and, through that process, each other). Rather than advocating primarily on their own *in the public interest*, these lawyers strive to form or join *publics that act in their own collective interest*. Collaborative lawyers' vision – of both their legal practice and the type of society they unite with others to build – follows in the footsteps of the democratic tradition linking ancient Athens, Thomas Jefferson, John Dewey, Ella Baker, and countless social-change activists. This democratic tradition, not postmodernist social theory, most fully articulates and illuminates collaborative lawyers' core values.

In Dewey's clanking but prophetic words, consistent with the ideas of Jefferson and the practices of Baker and those she inspired, collaborative lawyers believe democracy is not "something static," it is not "like an inheritance that can be bequeathed, a kind of lump sum that we could live off or upon."⁴⁴⁴ Instead, "every generation has to accomplish democracy over again for itself; that is its very nature, its essence, . . . [it] has to be embodied by active effort in the social relations which we as human beings bear to each other"⁴⁴⁵ Collaborative lawyers aspire to embody that very effort.

⁴⁴⁴ John Dewey, *Democracy and Education in the World Today* (1938), reprinted in 13 DEWEY, LATER WORKS, *supra* note 137, at 294, 298-99.

⁴⁴⁵ *Id.* at 299.