DIGNIFYING PARTICIPATION

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ABSTRACT

Over the past three decades, social justice attorneys have increasingly adopted more "participatory" approaches to advocacy. Whether practicing rebellious lawyering, public dispute resolution, or community economic development, advocates have sought to create opportunities for marginalized communities to have greater voice and power in the decisions that impact their lives. Yet advocates continue to find dissonance between their intentions and results.

This article proposes using the concept of human dignity as a lens for exploring tensions within participatory advocacy. I define "participation" as a process for influencing decisions or policies that directly affect one's community, government, and life. Participation is one facet of societal and institutional inclusion, and its denial is one form of exclusion. Dignity has a notoriously ambiguous definition within the law, but here I rely on a broad, relational conception of dignity as a shared, equal social status. This interpretation captures dignity's intuitive gravitas and personal, interpersonal, and societal elements.

By exploring the role of participation in various lawyering strategies, I question whether participation has merely symbolic value, if taking a "seat at the table" risks affirming existing sources of oppression, and if words like "voice" and "the people" have become mere buzzwords and formalities. Finally, I offer a set of critical questions and reflections—tools for a "dignity consciousness"—to assist advocates in planning and executing more meaningful participatory processes.

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I.
INTRODUCTION

> Only forms of action which avoid mere speech-making and ineffective "blah" on the one hand, and mechanistic activism on the other, can also oppose the divisive action of the dominant elites and move towards the unity of the oppressed.
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> ~ Paulo Freire[1]

Over the past three decades, social justice attorneys have increasingly adopted more "participatory" approaches to advocacy.[2] Whether practicing rebellious lawyering, public dispute resolution, or community economic development, these advocates claim that traditional democratic and legal structures fail to engage or empower marginalized communities. Too often, advocates say, individuals or groups are silenced, denied power, or left out of the decisions that shape their lives and communities. The concern is *exclusion*, and many advocates have assumed that *inclusion*—greater participation in both lawyering efforts and the social structures those efforts may seek to challenge—offers a remedy.

1. PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 175 (Myra Bergman Ramos, trans., Bloomsbury Acad. 2000) (1968).

2. I will frequently refer to social justice attorneys, advocates, and activists throughout this article. Although that term has been defined in many ways (often in reference to a spectrum of public interest lawyering, social justice lawyering, regnant lawyering, and other lesser-defined images of "injustice lawyering"), I use it to refer to lawyers working toward transformative social change—toward a world that is, to quote an oft-cited description of participatory educator Paulo Freire's vision, "less ugly, more beautiful, less discriminatory, more democratic, less dehumanizing, and more humane." Donaldo Macedo, *Introduction* to *id*. at 25. *See also* William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 13–14 (2007) (defining social justice as "the commitment to act with and on behalf of those who are suffering because of social neglect, social decisions or social structures and institutions.").

Yet critics across the political spectrum challenge the simplicity of this assumption.[3] While some theorists have long derided widespread participation as unrealistic or as a threat to political stability,[4] even committed community-based lawyers have raised concerns about participatory efforts.[5] These advocates (and importantly, the communities they work with) question whether participation has merely symbolic value, or if taking a "seat at the table" risks affirming existing sources of oppression.[6] They feel uneasy as words like "voice" and "the people" become buzzwords and deliverables, and they recognize the practical challenges of implementing authentic participatory processes with limited time and resources.

In light of these concerns, how can social justice lawyers identify when our best efforts at *inclusion* could actually be as oppressive as *exclusion*? Adding to the scholarship addressing the inadequacies of participation,[7] this article

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3. Scott Cummings states a version of this longstanding dilemma in his recent article describing the emergence of "movement lawyering" as the most recent phase of progressive lawyering: "The important point is that the new scholarly interest in social movements generally and movement lawyering in particular must be understood as the current response to a longstanding problem in progressive legal scholarship: how to connect authentic bottom-up participation by marginalized groups to an accountable and effective strategy for structural reform that targets legal institutions as a critical site of social struggle." Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1657 (2017).

4. *See* Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 552–53 (2006) (describing the protective democratic theory outlined by Joseph Schumpeter, which narrowly circumscribes citizen participation).

5. *See, e.g.*, 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, 541 (1988) ("Given our limited resources for handling the technical aspects of the case, trying to activate clients through the litigation seemed a foolishly unfeasible idea. As the case inched higher in the appellate system, we felt the case making greater demands on our own energies and getting more remote from our clients' communities. Though we felt misgivings about what was happening, we could see no way to seize the opportunity that the case presented as *politics* and to engage the clients more personally in the underlying issues."). *See generally* PARTICIPATION: THE NEW TYRANNY? (Bill Cooke & Uma Kothari eds., 2001) (highlighting critiques of participatory development); PARTICIPATION: FROM TYRANNY TO TRANSFORMATION? (Samuel Hickey & Giles Mohan eds., 2004); Ute Bühler, *Participation "with Justice and Dignity": Beyond "the New Tyranny,"* 1 J. PEACE, CONFLICT & DEV., at 1 (2002), *available at* https://www.bradford.ac.uk/social-sciences/peace-conflict-and-development/issue-1/Participation.pdf [https://perma.cc/PZ3F-VQZT] (note that this article will refer to Bühler as Ute Kelly; Dr. Kelly changed her name after her 2002 article was published); Yuvraj Joshi, *The Trouble with Inclusion*, 21 VA. J. SOC. POL'Y & L. 207, 209 (2014) (arguing that when efforts to expand inclusion misconstrue injustice, maintain the status quo, decouple from justice, legitimize an oppressive institution, or rationalize injustice, they are not likely to achieve social justice).

6. A few examples of these advocates include: poverty lawyers who witnessed the participatory mandates of President Lyndon B. Johnson's Community Action Programs subsumed by top-down government programs; the class action litigators attempting to balance their goals for large-scale reform with their clients' immediate needs for money or finality; the community lawyers wondering how to involve their clients in preparing for a last-minute hearing; and the organizers who feel uneasy when a legislator tokenizes a community leader to advance a political cause.

7. Other scholars have proposed strategies for assessing participatory efforts within specific settings. *See, e.g.*, Cummings, *supra* note 3, at 1726–28 (discussing participation in the context of

proposes the concept of human dignity as a tool for exploring how various forms of participatory advocacy can provide meaningful opportunities for marginalized populations to create social and political change.[8] It asks how participatory lawyering strategies may affirm or deny human dignity, and it offers a list of critical questions and reflections—tools for a "dignity consciousness"—to assist advocates in choosing participatory strategies in the future.

But first, why human dignity? With its enigmatic definition and jurisprudence, dignity may be a surprising lens for a practical tool. Yet as I define the concept below, dignity captures the situated, relational nature of decisions about social justice. It addresses the personal, interpersonal, and societal layers of a given situation, including the impact of power, social status, and professional roles. And it recognizes the less tangible *feeling* of dignity without disregarding the material aspects of justice or a dignified life. Further, both the intuitively powerful nature of dignity and its unsettled definition encourage crucial dialogue. We must check our assumptions about participation and proceed with questions rather than answers. Even the exercise of defining dignity contributes to the goal of reflecting on what we value about people and why we want them to participate in the first place.

In Part II, I introduce the concepts of "dignity" and "participation." In Part III, I provide examples of lawyering experiences that have fueled my ambivalence towards participation. Part IV discusses several foundational theories that connect participation and human dignity, including theories of democracy, procedural justice, education, and community organizing. Part V explores three specific ways that social justice advocates can promote greater participation in decision-making and social change: litigation, multidimensional law and organizing strategies, and alternative dispute resolution and consensus-

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movement lawyering); Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405 (2013) (discussing "new governance" structures for participatory decision-making, and offering two baselines for assessing meaningful participation), Bühler, *supra* note 5 (assessing "participation" in international development work); Joshi, *supra* note 5 (examining "inclusion" in social institutions, including marriage and the workplace); Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861 (2001) (exploring meaningful participation in the context of urban community economic development); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981 (1993) (laying out a theory for the instrumental value of participation in the context of decrees for structural injunctions).

8. This goal recognizes that progressive lawyering has become an increasingly multidimensional enterprise. A lawyer's toolbox may include litigation, collaborative strategies, legislative advocacy, community organizing, community legal education, leadership training, or organizational capacity-building. *See* Scott L. Cummings, *Empirical Studies of Law and Social Change: What Is the Field? What Are the Questions?*, 2013 WIS. L. REV. 171, 179 (2013) ("[L]egal mobilization now encompasses strategically sophisticated efforts by lawyers and their allies across practice sites to advance political goals in multiple venues through coordinated tactics in the face of persistent opposition. This multidimensional approach to social problem solving has become, at least in some areas, the new convention.") (citation omitted).

building processes. In Part VI, I propose suggestions for how the framework of human dignity can improve participatory efforts going forward.

II.
INTRODUCING KEY CONCEPTS: HUMAN DIGNITY AND PARTICIPATION

A. Defining Human Dignity

When we ask how a particular means of participation is related to dignity, what exactly are we asking? And is a precise definition of dignity required to find the answer? The gravitas of dignity is often intuitive, but a single, succinct definition can be elusive.[9] For example, participation in the public sphere can be described as a product of human dignity, a generator or promoter of human dignity, or as a requirement of human dignity; we might also say that participation upholds, protects, or expresses dignity. Much of the concept's meaning comes from our inherent understanding of its weight, and I will not repeat others' efforts to isolate one definition or offer a comprehensive survey of human dignity here.[10] Instead, this article will rely on a relational conception of "human dignity" as a shared social status that confers an equal, high rank upon all people.[11] Jeremy Waldron offers a definition expansive enough to guide our discussion and capture the complexity of the term:

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9. *See* Jeremy Waldron, *Lecture 1: Dignity and Rank*, *in* DIGNITY, RANK, AND RIGHTS 13, 15–18 (Meir Dan-Cohen ed., 2012) (noting a variety of approaches to defining dignity). Legal ethicist David Luban also offers a guide which captures our inherent sense of the term, noting that dignity is "defined implicitly through the various relations that we describe as honoring human dignity, respecting human dignity, enhancing human dignity, violating human dignity, degrading human dignity, and so forth." David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1453–54 (2008); *see also* David Luban, *Human Rights Pragmatism and Human Dignity*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 276–77 (Rowan Cruft et al. eds., 2015) (describing how "human dignity, as defined by human rights practice, is context-dependent and may consist of a family of conceptions.").

10. There is no shortage of literature explaining the history of dignity, parsing its definitions, and tracing its use in international and domestic jurisprudence. *See, e.g.*, Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 189–90 (2011) (tracing five conceptions of dignity in the U.S. Supreme Court's jurisprudence, and suggesting that "dignity's primary judicial function is to give weight to substantive interests that are implicated in specific contexts"); *see generally, e.g.*, Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331 (2012); Robert K. Vischer, *How Do Lawyers Serve Human Dignity?*, 9 U. ST. THOMAS L.J. 222 (2011); J. Benton Heath, *Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law*, 44 GEO. WASH. INT'L L. REV. 317 (2012).

11. Jeremy Waldron, one of the architects of the notion of human dignity as rank or status, describes the philosophical foundations for this concept in Waldron, *supra* note 9. Importantly, Waldron's notion of dignity as status need not be tied to his historical description extending an aristocratic notion of rank to all people. For a critique of how this kind of "narrative of 'expansion[]' . . . valorizes and normativizes the positions of privilege within existing social hierarchies," see Ben A. McJunkin, *Rank Among Equals*, 113 MICH. L. REV. 855, 871 (2015) (internal citations omitted).

> Dignity is the status of a person predicated on the fact that she is recogni[z]ed as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organi[z]ing her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as a human being be taken seriously and accommodated in the lives of others, in others' attitudes and actions towards her, and in social life generally.[12]

Waldron's description highlights the personal, interpersonal, and societal layers of dignity that influence lawyering and participation. On a personal level, the definition speaks to an individual's capabilities and agency, as well as the substantive focus of those capabilities, such that each person is able to determine their own norms, reasons, and account of themselves. On the level of interpersonal relationships, the definition makes clear that dignity requires us to mutually respect and value each other. We must recognize and attend to one another, make demands of each other, and then take those demands seriously enough to accommodate each other in both thought and action. This implies not only a formal notion of dignified treatment (i.e., respect or politeness), but a need to proactively value others and participate in each other's lives—dignity includes not only *independence*, but *interdependence*.[13] Finally, the definition places dignity within a greater societal context, implying that certain relationships must exist between individuals and the state, as well as in "social life generally."[14] This aspect of the definition asks us to consider equality, social and professional roles (e.g., client, attorney, politician, or minority), power struggles, and the ways that social structures affect constructions of self-identity. As this definition makes clear, recognizing each person's dignified status is a demanding aspiration.

In addition to highlighting these three layers of dignity, Waldron's definition sparks specific questions for our discussion below. His notion of "giv[ing] an account" of oneself relates to telling one's story, airing "different" or "silenced" voices, and the value of being heard.[15] This raises additional questions about whose voice should speak for whom and whose language should be spoken. The idea that our assertions of control and agency must "be taken seriously and accommodated" relates to questions about self-determination and

12. Jeremy Waldron, *How Law Protects Dignity*, 71(1) CAMBRIDGE L.J. 200, 202 (2012) (emphasis added).

13. I am grateful to Rick Roe for our many conversations about the deeply democratic action of nonjudgmentally "valuing" other people.

14. Waldron, *supra* note 12, at 202.

15. *Id.*

power imbalances, as well as relationships between marginalized groups and outside advocates or experts.[16] The framework even helps us understand how to avoid the antithesis of dignity—humiliation—which relates to attorneys' concerns about paternalism, tokenism, subordination, and over-sentimentalizing disadvantaged populations.

Waldron's expansive definition also highlights how participatory forums can simultaneously affirm *and* deny the values associated with human dignity. For example, an attorney might skillfully express a litigant's story within the parameters of a courtroom, but the litigant might also lose a sense of self-determination (or even feel humiliated) when her story is re-crafted to fit legal frameworks. Alternatively, consider a legal aid client who tells her story at a legislative hearing, after she is reductively introduced as a "19-year-old homeless mother." And finally, how do advocates justify adversarial community organizing tactics that mobilize the powerless by humiliating the powerful? None of these scenarios have simple—or even satisfying—resolutions, but our broad definition of dignity allows us to more honestly engage the competing dignitary interests implicated by any answer or course of action.

B. Defining Participation

This article will discuss "participation" as a process for influencing decisions, plans, or policies that directly affect one's community, government, and personal or public life.[17] Participation is one facet of societal and institutional inclusion, and its denial is one form of exclusion.[18] We might imagine participation on a continuum, where different decision-making processes involve increasing levels of interaction with other decision-makers, influence over the outcome, and power to determine the outcome.[19] Democracy theorist Carole Pateman has described three points along this continuum: *pseudo*-participation, where one has no influence or power over the outcome;[20] *partial*-participation, where one has influence but no power;[21] and *full*-participation, where one has full power over the outcome.[22]

Like dignity, participation is highly relational. A simple framework captures many of the potential dynamics between the parties involved (e.g., decision-makers, people affected by a decision, and any third parties such as advocates or

16. *Id.*

17. This definition is based on Carole Pateman's definition of participation in the industrial sphere. *See* CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 68–69 (1970).

18. Although this article expresses concerns about participation in terms of inclusion and exclusion, both of those terms are broader than this article's participatory focus. For a discussion of institutional inclusion as a questionable strategy for achieving social justice, see Joshi, *supra* note 5.

19. Pateman, *supra* note 17, at 67–69.

20. *Id.* at 68–69.

21. *Id.* at 70.

22. *Id.* at 71.

facilitators): decisions can be made or implemented *with* people, *to* people, or *for* people.[23] While there are times when doing things *to* or *for* people might be appropriate and affirm dignity,[24] the *with* approach is often framed as the participatory ideal.

III.
INTRODUCING THE TENSIONS RELATED TO PARTICIPATION: COMPARING INTENTIONS AND RESULTS

This section provides a few initial examples of the tensions raised by participatory lawyering efforts. Drawing from my own experiences with the three lawyering approaches addressed in Part V, each example illustrates difficult questions faced by attorneys as they encounter both the allure and the challenge of participatory lawyering. I pay particular attention to the relationship between lawyers' intentions and results. Quite often, lawyers' intentions to empower a community yield inspiring outcomes for the community. Yet other times (or at the same time), the dissonance between intentions and results can be unsettling.

A. Litigation

Imagine a legal services attorney months into litigating several collective action lawsuits on behalf of low-wage workers. The attorney has spent two years developing relationships with the workers as they decided whether to risk confronting their employer. Their decision to participate in the suit collectively was empowering—the workers were actively engaged in the lawsuit by gathering evidence and encouraging other workers to stand up for their rights. Not only did the workers already express feeling like they were advancing justice, but they were hopeful that a settlement would eventually result in much-needed back-wages.

At the same time, the adversarial litigation was deteriorating the workplace environment. The employer seemed increasingly motivated to find other ways to make the workplace miserable, and a settlement would be unlikely to publically expose any wrongdoing. At the end of the suit, money would change hands, but the bitterness from the litigation could prevent other meaningful change from developing at the job site.

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23. This language is frequently used in service professions, community organizing, restorative practices, and participatory education. Very often, this conversation speaks more directly to power relationships—"power-with" versus "power-over." *See, e.g.*, JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 143 n.12 (2005); Michael Grinthal, *Power with: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 40 (2011).

24. *See* MYLES HORTON & PAULO FREIRE, WE MAKE THE ROAD BY WALKING 64 (Brenda Bell et al. eds., 1990) (participatory educator Myles Horton describes the importance of sometimes teaching things *to* people).

If that solution already seems unsatisfying, imagine the same legal aid attorney receiving a phone call from a colleague at a national law reform organization. The organization's lawsuits have consistently raised the public profile of crucial injustices and resulted in wide-scale changes to employment conditions. The caller describes his new endeavor—a class action lawsuit aimed at reforming employment practices across three states. The case sounds fantastic to the legal aid attorney—finally, broader systemic change. But then her colleague requests a favor. Can his friend recommend any clients he could use as his ideal lead plaintiff in the case? He lists the characteristics he needs.

The legal aid attorney bristles at the thought of one of her clients trading his current claims to become the name at the top of the organization's complaint. She knows her colleague has good intentions to make widespread change, and that the lawsuit has real potential to do so. But how could she let him *use* one of her clients to fulfill the organization's agenda?

B. Law and Organizing

A membership-based immigrants' rights organization in New York City has gathered over fifty of its members at a legislative hearing about providing funding for legal aid. The group arrived at the state capitol holding homemade signs and waiting to share their stories of how access to legal services had changed their lives. When the hearing starts, several of the organization's members join their attorneys in testifying before the legislators. Each time a member is introduced, the crowd buzzes with excitement. Everyone loves seeing their friends and neighbors have the opportunity to share their stories.

As one of the attorneys awaits her turn with her client, she hears a colleague introduce another member at the podium. "Meet Ana, a 19-year-old homeless mother." The attorney cringes. She knows that these words could appeal to the legislators' sympathies and benefit the cause. But how could the attorney reduce her client's life experiences to these labels and soundbites?

C. Alternative Dispute Resolution and Consensus-Building Processes

Several neighborhood organizations have planned a day-long event to involve the community in creating new legislation to improve police-community relations. The hope is to build greater consensus for solutions to propose to the City Council. During the day's events, community members are invited to watch short plays portraying several versions of police-community interactions, discuss any concerns raised by the plays, and talk in small groups about potential solutions. The small groups then write a few solutions on note cards and submit them to the organizations' attorneys, who are serving as the event's "policy advisors." The attorneys' role is to compile the notecards into workable solutions to present to the local legislators attending the event.

The attorneys all appreciate the sentiment of involving the community in creating new policies. But since there wasn't much time to educate participants

about the legal feasibility of their proposals, the attorneys find themselves trying to match the small groups' suggestions with ideas the attorneys knew could actually work. The organizations had already been promoting certain legislative solutions, and the few legislators present were similarly committed to those efforts.

The attorneys did not intend to be disingenuous about using the community's ideas. Wasn't it better for the community to at least *feel* like they were having some impact, and for the legislators to feel like they faced real pressure from the community to act?

Even based on these brief examples, it is not difficult to understand why social justice lawyers have spent decades struggling with difficult questions surrounding participation and mobilization. It is my hope that the framework below will provide attorneys with new tools to address those tensions and weigh whether the benefits of participation are worthwhile.

IV.
THEORETICAL FOUNDATIONS: THE RELATIONSHIP BETWEEN HUMAN DIGNITY AND PARTICIPATION

This section introduces several political and philosophical theories that demonstrate the deep-rooted connection between dignity and participation, and that provide theoretical context for the practical, lawyering-centered discussion in Part V. I place special focus on democracy-based theories because participatory efforts seek to respond to the inadequacies of existing democratic approaches while also making use of democratic structures. In addition, it is our democratic ideals that may lead us to seek participation as a solution to social problems in the first place.

A. Connecting Dignity and Participation

This article challenges the assumption that participation and dignity always have a mutually affirming relationship. While this analysis is the first to highlight human dignity as a framework for lawyers to examine participatory strategies, it builds on the work of other scholars actively debating the value of participation—or simply how to more effectively translate participation into meaningful social change. In order to engage in that conversation, I first introduce three key concepts: a definition of "dignified participation" in the context of international development, the role of power, and the role of "outside" expertise.

1. "Dignified Participation" in International Development

Responding to early critiques of international efforts to promote participation, Dr. Ute Kelly conceived an explicit framework for "dignified

participation" in the context of participatory international development.[25] Kelly's analysis builds on the "insistence on dignity" within the Mexican Zapatista movement.[26] She argues that the debate about inclusion and exclusion does not correlate to a simple dichotomy of participation and non-participation.[27] Rather, she claims that "[p]articipation is not good because and insofar as it is participation, but because and in so far [*sic*] as it is a way of affirming dignity and struggling for justice."[28]

Kelly asserts that "dignified participation" requires the following four conditions: "the 'right' degree of politici[z]ation, a commitment to serious engagement, the recognition of the dignity of all participants, and procedures that ensure that both participation itself and any outcomes reached are real and effective."[29] First, the degree of politicization concerns the balance between focusing on participants' local needs versus scaling up a local effort to confront wider social structures or power dynamics. Kelly cautions that scaling a participatory effort to either extreme can harm dignity.[30] She suggests that any larger political focus must be "rooted in the specific experiences of people who cannot live in dignity under the present system," and that people's dignity should not be sacrificed or instrumentalized for the sake of a larger mission.[31] Second, a commitment to serious engagement requires "outside" experts to deeply consider their intentions and potential contributions in working with an oppressed community. She argues that dignified engagement requires a dialogue that recognizes both inside and outside contributions. Because outside contributions may play an especially useful role in improving material conditions related to dignity, she also, and perhaps controversially, suggests that tradeoffs between "perfect participation" and effectiveness could be justified.[32] Third, Kelly argues

25. *See* Bühler, *supra* note 5 (suggesting that dignity offers an appropriate starting point for evaluating participatory development structures).

26. *Id.* at 4, 6–7. Kelly turned to the Zapatistas because of their success in opening up participatory spaces despite a history of severe marginalization; she also notes their theoretical roots combining revolutionary struggle, participation, and dialogue. For the Zapatista's beautiful explanation of dignity as "something that doesn't walk in the heads," but as "something that walks in the heart," see *id.* at 6–7.

27. *Id.* at 5, 16.

28. *Id.* at 16.

29. *Id.* at 15.

30. *Id.* at 7–9. *See also* Lucie E. White, *Facing South: Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L.J. 813, 827 (1998) (describing "scaling up" as "the most recurring theme" at an international conference of community-based practitioners in developing countries: "What connects community-based practices of empowerment, organizing, and institution-building to larger-scale processes of political, legal, social, cultural, and economic change? Practitioners of community-based work from all over the world came to the conference well aware that creating moments of empowered community at the local level does not necessarily have any impact on the wider societal trend toward increasing levels of social and economic inequality. Creating moments of community on the local level may not have any impact at all, in the long run, on the increasing levels of destitution, all over the planet, of the poor.").

31. Bühler, *supra* note 5, at 8.

32. *Id.* at 10.

that respecting the dignity of both the self and "the other" requires special attention to in-group dynamics that can lead to groupthink or rationalizations about harming others.[33] Finally, she asserts that participation must be meaningful to the lives and concerns of participants, and must be effective in fulfilling its stated purpose.[34] Without these four conditions, Kelly argues, "the *refusal* to participate might defend the ideal of genuine participation better than 'participation' itself."[35]

The discussion of specific lawyering strategies in Part V demonstrates the challenge of drawing the lines Kelly suggests—the "right" amount of politicization, the meaning of "effective" or "meaningful," and how to identify whether participants' dignity is sincerely acknowledged. Like Waldron's definition, Kelly's concerns outline the personal, interpersonal, and societal elements of dignity and participation. She also highlights the need to consider power and the role of professionals—two essential concepts underlying the relationship between dignity and participation in lawyering.

2. The Role of Power

Participatory efforts are situated within (and often framed in response to) dynamic social and political power structures. For our purposes, power is the ability to influence or create change in the world or in others.[36] Power dynamics impact how resources are distributed, whether people receive equal treatment and status, and who influences decision-making. While power analysis is central to movement work outside the legal profession, lawyers have been criticized for paying too little attention to the power dynamics that fuel the injustices they seek to address.[37] This article asserts that a dignity-based analysis can help lawyers better understand the role of power.

Theories of participation differ in whether and how to explicitly address power. The debate is not a simple dichotomy between whether to prioritize substantive justice or procedural justice,[38] but these concepts are often helpful.

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33. *Id.* at 15.

34. *Id.* at 12.

35. *Id.* at 15 (emphasis added).

36. *See generally* Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147 (2016) (defining power as "the ability to shape the world"); *Power*, OXFORD ENGLISH DICTIONARY (3d ed. 2013) (defining power as "the ability or capacity to do something or act in a particular way" and "the capacity and ability to direct or influence the behavior of others or the course of events").

37. *See* Freeman & Freeman, *supra* note 36, at 150 (describing how organizers and grassroots leaders "have learned through decades of harsh lessons that even the most progressive policies are little more than words on a page to their communities if the underlying power dynamics are not altered.") Freeman and Freeman propose a lawyer-specific "Social Change Power Meter" to help lawyers deconstruct power imbalances within four areas of influence: political, communications/media, grassroots support, and legal. *Id.* at 156–60.

38. The contrast between substantive and procedural justice generally concerns whether we are focused on outcomes or the processes used to achieve those outcomes. Definitions of

The most substantive-focused theories—which prioritize fair and just *results*—warn that participating in typical top-down decision-making processes may affirm existing power structures, thus risking an affront to dignity. Process-focused theories often view participation itself as a source of dignity. And hybrid theories see participation as one inroad towards justice, or as a pragmatic means to a more dignified end goal. By considering human dignity, lawyers can better decide which of these views may be most useful in a given situation.

On the one hand, focusing on power reveals a real concern that participatory processes are too often driven by idealistic beliefs in the "transformative force of truth and justice"—the idea that powerful institutions will change when confronted with the truth of marginalized peoples' stories, regardless of the group's actual social power.[39] According to lawyer and organizer Steve Jenkins, this belief wrongly assumes that "problems in our society occur because the ideas and experiences of oppressed people are excluded from democratic debate and not because of a struggle between groups of people with competing interests."[40] For Jenkins, there is an important difference between participatory efforts *to convince* existing power sources to correct injustices, and efforts where the participants have the power *to force* decision-makers to take action.[41] Jenkins claims that the authentic expression of "voice" is only possible in the latter setting; without the power of coercion, participants' voices conform to the language and desires of the elites they seek to convince.[42] Because these conformist expressions of voice do not threaten elites' positions of power, participatory structures that provide a "seat at the table" may simply be appeasing gifts from elites, rather than genuine opportunities to transform unjust

substantive justice vary, but generally focus on values-based outcomes such as fairness or consistency with the rule of law. *See* Nicholas Faso, *Civil Disobedience in the Supreme Court: Retroactivity and the Compromise Between Formal and Substantive Justice*, 75 ALB. L. REV. 1613, 1614 (2012); Nancy Ehrenreich, *Foreword: Conceptualizing Substantive Justice*, 13 J. GENDER RACE & JUST. 533, 535–36 (2010) (providing a broad, "critical and postmodernist" definition of "substantive justice"). Procedural justice concerns the processes used to arrive at outcomes. See Part IV(C) below for a discussion of procedural justice theory.

39. Steve Jenkins, *Organizing, Advocacy, & Member Power: A Critical Reflection*, 6 WORKINGUSA 56, 71–72 (2002). Jenkins defines social power as the ability to force decision-makers to accept one's demands. *Id.* at 62. *See also* Freeman & Freeman, *supra* note 36, at 148–51 (describing how understanding the role of power transformed their initial belief that "[t]he best ideas would inevitably win out and justice would naturally prevail.").

40. *Id.* at 71.

41. *Id.* at 62–64.

42. *Id.* at 79. As Jenkins clarifies, participants' voices may be symbolically representative of their community or a specific injustice, but they are largely representing the views of the elite power sources they are confronting. Jenkins also describes how a "representative" voice can make the community's voices appear identical rather than differentiated; in the context of workers' rights, he describes how "it is only when workers have the power to realize different interests that any worker can really represent one point of view or another." *Id.* at 78–79, 82 and Part V(C)(2) *infra*.

power structures.[43] As Jenkins states, "the table is a place where existing power relations are codified, not created anew."[44]

On the other hand, process-focused theories often focus on creating fair and just processes within or in spite of existing power structures. Goals might include seeking even-handed, well-intentioned treatment from people in positions of power (e.g., judges), or having the opportunity to share one's story with someone in power.

Hybrid approaches might include participatory efforts that challenge existing power dynamics by rejecting the adversarial nature of typical power struggles. These strategies seek to focus on people's mutual interests rather than on fights over opposing positions or rights. They look for common ground between powerful and less powerful groups and attempt to develop resolutions that improve conditions for all. Those approaches—most notably alternative dispute resolution, consensus-building processes, or deliberative democracy projects—attempt to create settings that mitigate power imbalances "at the table."[45] Through these collaborative decision-making processes, groups may build new power by having their voices heard or gain "network power" based on new relationships and shared understandings. However, because these settings are often tailored to a specific scenario or "table," other social movements or law reform efforts may be necessary to build substantial power in a broader context.[46]

So how do these divergent perspectives on power relate to human dignity? In terms of Kelly's definition of dignified participation, the debate involves the appropriate degree of politicization and our definitions of what makes participation meaningful and effective. Power-analysis reminds us that each participatory effort is situated in a larger social context. Within that context, participants must define specific goals and limits for their efforts. Are they seeking to create material change on a local level? Are they hoping to change a broader conversation regardless of any local impact or immediate shift in power? How will messaging represent participants' stories while being tailored to the recipient? It is when these parameters are ignored or misunderstood that dignity is threatened.

For example, participants in incremental power-building efforts can still assert their dignity by expressing their concerns to elite decision-makers, as long as the participants' role is recognized for what it is—a politically savvy means to an end. Without that caution, participants could be seen as mere "numbers" or

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43. *Id.* at 71. *See also* Harry Taylor, *Insights into Participation from Critical Management and Labour Process Perspectives*, *in* PARTICIPATION: THE NEW TYRANNY? 122, 138 (Bill Cooke & Uma Kothari eds., 2001).

44. Jenkins, *supra* note 39, at 71.

45. For a description of deliberative democracy, see *infra* Part IV(B)(3). Part V(C) discusses alternative dispute resolution and consensus-building processes.

46. *See* Judith E. Innes, *Consensus Building: Clarifications for the Critics*, 3 PLANNING THEORY 5, 12–13 (2004).

"stories" in service of a cause, or their identities might be reduced to tokenizing labels (e.g., the testimony of the "19-year-old homeless mother"). In the collaborative context, participants may feel patronized if the process is claimed to play an equalizing role outside the dialogue; rather, the power dynamics outside the table must be an integral part of the discussion and of the portrayal of the process in the wider community.[47]

3. The Role of "Outside" Expertise

Another central issue related to dignity and participation focuses on the relationship between "outside" expertise and local, community, or client expertise, especially in light of demands for efficiency or complicated, legalistic policy-making.[48] This debate largely relates to whether various holders of expertise are working *with* each other rather than doing things *to* or *for* each other. Much of the call for increased participation has been fueled by a rejection of centralized, top-down decision-making or "teaching" (the *to*/*for* approach) in favor of decentralized structures and listening (the *with* approach).[49] Yet listening exclusively to "the people" may also be oppressive. First, facilitators who "listen" or design highly participatory processes still hold an expertise in procedural strategy that puts them in positions of power and allows them to choose processes that influence how voices are heard.[50] Further, romanticizing (or simply failing to question) local, community, or client expertise can be as patronizing and ineffective as ignoring it.[51] Dignified dialogue demands having each voice taken seriously.

Similar to Kelly's critique, participatory educator Paulo Freire urges that liberatory processes—those aimed towards freedom from oppression—require synthesizing expertise from a community and outside facilitators. Neither can proceed alone. Freire's process "does not deny the differences between [community and outside] views; indeed, it is based on these differences. It does deny the invasion of one by the other, but affirms the undeniable support each

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47. *Id.* at 12 (noting that the facts and reality of existing power dynamics must be integral to the discussion).

48. *See* White, *supra* note 30, at 825 ("There is always going to be tension, in community-based work that aspires to be both participatory and emancipatory, between the directive role that an organizer, lawyer, leader, or teacher, must play to get the work going and keep it on track, and the teacher's aspiration to draw out, rather than dictate, the group's own voices. . . . You need powerful leadership to get a community-based group together and to help it undertake meaningful action. Yet with that leadership comes the obvious risks of domination and exploitation.").

49. In Part V, I consider approaches that emphasize the power of listening, such as community organizing and mediation.

50. *See* Bühler, *supra* note 5, at 13.

51. *See id.* at 10. *See also, generally*, 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, 1101–08, 1114 (1994) (critiquing "the preoccupation of the new poverty law scholars with professional domination" and claiming that the "Dark Secret of Progressive Lawyering is that effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments.").

gives to the other."[52] Both groups' views refine and enrich the other as they question long-held assumptions and cooperatively develop a more realistic, empirically sound analysis of the participants' world. Some advocates of participation may be hesitant to question an oppressed community's view of their world. Yet Freire warns that a crucial symptom of oppression is how it impacts the worldviews of the oppressed. He argues that oppression involves internalizing the oppressor's identity and ideals, which not only depreciates the oppressed's sense of self-worth, but leads them to idealize the oppressor as the antithesis of their current oppression.[53]

Finding a dignified way to honor and synthesize diverse expertise is not a simple undertaking. Replaying habitual roles of domination and acquiescence can be far easier than embracing dialogue and mutual learning. We will consider how a variety of advocates attempt to balance this dynamic in Part V below.

B. Democracy-Based Theories

In democratic theory, participation often serves either a protective or developmental purpose.[54] The protective vision, which frames our contemporary democracy in the United States, justifies citizen participation as a means for protecting the people from corrupt leaders and government encroachment on individual freedom.[55] Widespread or direct participation is considered unrealistic, and participation is achieved purely through voting and representation of expert leaders. As described by Judge Richard Posner,[56] excusing the public from active political participation best suits Americans' focus on private life and personal commercial activities.[57] Developmental theories, on the other hand, characterize democracy as thriving on the interrelationship between an active citizenry and their government.[58] These theories celebrate widespread public participation in decision-making as providing for good governance as well as for a more educated, virtuous

52. FREIRE, *supra* note 1, at 181 (original emphasis removed). "The more sophisticated knowledge of the leaders is remade in the empirical knowledge of the people, while the latter is refined by the former." *Id.*

53. FREIRE, *supra* note 1, at 46–47 ("[T]he one pole aspires not to liberation, but to identification with its opposite pole."). *See also* Peter M. Cicchino, *To Be a Political Lawyer*, 31 HARV. C.R.-C.L. L. REV. 311, 311–12 (1996) (challenging the popular perception that "our clients know what is best for them" and warning that oppressed people may not understand, or may even love, that oppression).

54. *See* Piomelli, *supra* note 4, at 548–49; PATEMAN, *supra* note 17, at 14.

55. *See* Piomelli, *supra* note 4, at 548–49; PATEMAN, *supra* note 17, at 4–5.

56. This theory was first raised by Joseph Schumpeter in 1943, *see* PATEMAN, *supra* note 17, at 3, but Judge Posner has been a vocal proponent of Schumpeter's work. *See* Piomelli, *supra* note 4, at 554–56, 549.

57. Judge Posner asserts that commercial and private activities are more peaceable and lead to greater wealth and happiness than involvement in politics. *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 172–73 (2003). He saves that work for the "wolves" or natural leaders, rather than the "sheep." *Id.* at 183–84.

58. *See* PATEMAN, *supra* note 17, at 103.

population. The character and development of citizens is thus dependent on the structure of public institutions. It is this vision of participatory democracy that most clearly outlines a relationship between political participation and human dignity.

Participatory democratic theory has largely been developed by the work of Jean Jacques Rousseau and John Stuart Mill, as well as modern thinkers like John Dewey, Benjamin Barber, and Carole Pateman. Nuanced explanations of their thinking are outside the scope of this article, but an introduction to their contributions is valuable.

1. Foundational Theories of Participatory Democracy: Rousseau, Mill, Dewey, Barber, and Pateman

Carole Pateman has described Rousseau as the "theorist *par excellence* of participation."[59] According to Pateman's interpretation of Rousseau's work, he emphasized the dual value of individual participation in political decision-making as not only protective of private interests and good governance,[60] but as also playing an educative role in the psychological development of participating citizens.[61] In this way, participatory democracy is self-sustaining because the personal qualities fostered by participation are the same qualities that citizens need to participate.[62] In terms relevant to human dignity, Pateman notes Rousseau's emphasis on freedom and control: participatory institutions promote freedom by giving individuals control over their lives and environments—citizens become their own masters.[63] Pateman also highlights some collective dignitary concepts in Rousseau's theory. First, he articulated equal dependence between citizens, such that each "master" had an equal status for decision-making and would thus accept collective decisions under this rule of law.[64] Second, Rousseau noted that participation relates directly to social inclusion and integration: individuals who participate in their community feel like they "belong."[65]

British philosopher John Stuart Mill elaborated on Rousseau's theory of the educative function of participation, emphasizing the value of participation in lower-level authority structures like local government or the workplace.[66] He

59. *See id.* at 22. While Rosseau developed his theory before the development of modern democratic institutions, Mill and G.D.H. Cole have carried the participatory elements of his theory into a more modern setting. *See id.* at 22, 27.

60. Rousseau largely focused on individuals, but he conceded that organized groups could function similarly if equal political power was ensured. *See* PATEMAN, *supra* note 17, at 24.

61. *See id.* at 24–25.

62. *See id.* at 25.

63. *See id.* at 26.

64. *See id.* at 27.

65. *See id.*

66. *See* PATEMAN, *supra* note 17, at 35. Mill's theories of local-level participation in civil society build from the work of Alexis de Tocqueville in *Democracy in America*. *Id.* at 30. In line

asserted that people's rights and interests are only secure from disregard when individuals have power to stand up for themselves,[67] and that general prosperity would be greater and more widespread in proportion to the amount of personal energies involved in the pursuit.[68] He warned that excluding some members of the community would harm the whole—individuals or classes of people have greater knowledge of their own interests, and prosperity requires more people to be self-dependent rather than relying on representative leaders or other people.[69] In turn, this widespread participation would promote an active, public-spirited character among citizens.[70]

In a distinctly American forum, John Dewey's multidisciplinary work in education, psychology, and democracy also hailed the value of increased citizen participation.[71] Of special note in relation to human dignity are Dewey's assertions about benevolent expertise and the relationship of ends and means. First, Dewey warned against paternalism, noting that "the vice of . . . the reformer, of the philanthropist, and the specialist . . . is to seek ends which promote the social welfare in ways which fail to engage the active interest and cooperation of others."[72] He also stressed the interdependence of ends and means—participatory structures were essential to reap the benefits of good social ends, and participatory structures should not be co-opted in the name of ends that do not serve the participants.[73]

Modern political theorist Benjamin Barber built on these earlier theories to propose a theory of "strong democracy" with the central aim of increasing popular participation.[74] Barber argued that participation not only serves an

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with Rousseau, Mill suggested that widespread participation, based on the continually developing faculties of its members, promotes the good management of government affairs. *See* JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 57–58 (1861).

67. MILL, *supra* note 66, at 58.

68. *See id.*

69. *See id.*

70. This active character involved intellectual superiority, the invigorating feeling of freedom, practical discipline and education, moral improvement, and greater concern for the public interest. *Id.* at 63, 71–73. While Mill stressed that the educative function was most relevant at the local level, he believed that even national voting could improve the intellect, and he asserted that it is a degrading injustice to be disregarded by rulers, to have no voice in regulating one's destiny, or to be a "nobody." *Id.* at 166–70, 177. However, Mill did not see equal participation as possible or essential, and he supported limiting the vote based on superior education and intellect. *See id.* at 179. As Pateman has noted, there seem to be inconsistencies in Mill's conception of an educative system without equal or more direct participation. *See* PATEMAN, *supra* note 17, at 33. Pateman notes that Mill's emphasis on participation in local institutions might be one source for the participation that his theory lacks on the national level.

71. *See* Piomelli, *supra* note 4, at 570–76. Dewey emphasized ideas of self-realization through an active community life, the intellectual capacity of all individuals to participate in decisions that affect them, and equality as respect for each member's distinct individuality.

72. *Id.* at 576 (quoting JOHN DEWEY & JAMES H. TUFTS, ETHICS 303–04 (1908), as quoted in ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 185 (1993)).

73. *Id.* at 576–78.

74. *See* BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); Piomelli, *supra* note 4, at 595–98. Barber asserted that consistent participation in local

educative function, but that such self-governance was necessary for human freedom. He critiqued modern representative democracy as a "thin" form of democracy where integrative values and public ties are lost to liberal individualism and decision-making through purely representative structures.[75] Another noteworthy element of Barber's scheme is his treatment of political judgment as a form of power. He dismissed the idea of democratic *choice*, which connotes the citizen's role in voting for a pre-determined list of options, in favor of *willing*—the ability to create or change reality—which he viewed in the domain of power and action.[76]

In her seminal book *Participation and Democratic Theory*, Carole Pateman elaborated on the foundations of participatory democracy to examine empirical studies of participation in the workplace.[77] Her findings about the benefits of participation again mirror dignitary values—the value of voice in giving and sharing information,[78] the effect of status and respect in supervisory styles,[79] and the expansion of workers' control and use of different abilities through job enlargement.[80] Her analysis also demonstrated empirical bases for the classical theory that participation produces individuals who respond to participation.[81]

2. *Deliberative Democracy*

Although a fair treatment of the complexities of deliberative democratic theory is not possible here,[82] it is worth noting the central role of participation in these theories. Most basically, deliberative democratic theorists aim to deepen public participation, dialogue, and deliberation in public decision-making processes. They emphasize collaboration, the exchange of viewpoints, and

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and national institutions will revitalize citizenship and lead citizens to acquire autonomy, equality, justice, and freedom. BARBER, at xv. He defined strong democracy as "a form of government in which all of the people govern themselves in at least some public matters at least some of the time." *Id.* at xiv. Barber more formally defined "strong democracy" as well: "strong democracy in the participatory mode resolves conflict in the absence of an independent ground through a participatory process of ongoing, proximate self-legislation and the creation of a political community capable of transforming dependent private individuals into free citizens and partial and private interests into public goods." *Id.* at 151.

75. Piomelli, *supra* note 4, at 595–96.

76. BARBER, *supra* note 74, at 200–01.

77. *See generally* PATEMAN, *supra* note 17. In addition to her own empirical studies, Pateman notes that G.D.H. Cole further developed Mill's theory on local forums for participation in relation to voluntary organizations formed by individuals in the workplace. Cole saw the object of social organizations, regulated through members' participation, as the "fullest self-expression" of the members, which involved self-government. *Id.* at 36 (quoting G.D.H. COLE, SOCIAL THEORY 208 (1920)). Pateman notes that Cole sought greater participation as a way to recognize humanity and equal control over one's labor. *Id.* at 39.

78. *Id.* at 65.

79. *Id.* at 63.

80. *Id.* at 58.

81. *Id.* at 64.

82. Deliberative theories go by many names, including discursive, collaborative, and participatory democracy.

mutual understanding rather than adversarial debate.[83] Working through a satisfying process is generally more important than reaching a substantive outcome or agreement (though some theories do require a final result). These theorists seek to articulate conditions for promoting procedural justice,[84] enhancing participation through technology, or designing new non-governmental institutions. In practice, examples of participatory experiments include town meetings, nonviolent communication, citizen juries, and compassionate listening.

In order to foster the open generation of ideas in a discursive democracy, some theories stress that participants should have an equal voice in decision-making or equal standing to determine the process itself.[85] Professor Martin Böhmer has explicitly described dignity as one of three moral principles behind ideal deliberation.[86] Alongside the principles of autonomy and inviolability, dignity is related to respect for the will of others so that all participants can be acknowledged and taken seriously as autonomous beings.[87]

C. *Procedural Justice Theories*

Procedural justice, or "procedural fairness," is "concerned with the fairness of the procedures and processes that are used to arrive at outcomes" in various decision-making and dispute resolution forums.[88] Discussions of procedural justice often focus on whether participants can control either the process (e.g., the ability to present evidence) or the outcome of the decision.[89] A number of studies have shown that participants' experiences of procedural justice are more affected by controlling the process than the outcome.[90] Overall, studies demonstrate that procedures matter, and that participants are less concerned with formal due process than they are with feeling treated in line with everyday social relations and norms.[91] When people feel treated well, they identify more closely with others and with the institutions or authorities that unite them.[92] This leads to "group supporting behaviors" like following rules, cooperating with

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83. Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 277–78 (2009).

84. *See infra* Part IV(C).

85. Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 354 (2004–05) (noting Jurgen Habermas' conceptions of equality in discourse theory).

86. Martin Böhmer, *Equalizers and Translators: Lawyers' Ethics in a Constitutional Democracy*, 77 FORDHAM L. REV. 1363, 1366 (2009).

87. *Id.*

88. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH U. L.Q. 787, 817 (2001).

89. *See id.* at 825–26 (describing characteristics of "process control" and "decision control").

90. *Id.*

91. *Id.* at 826.

92. Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. FORUM 525, 538 (2014).

authorities, and pursuing actions that benefit the group.[93] This framework offers valuable insight into the relationship between dignity and participants' experiences of various participatory processes.

Social science research has demonstrated four procedural (and dignity-related) elements that lead people to believe that a process is fair. Two elements relate to the quality of decision-making: (1) voice, or the idea that participants have an opportunity to express their story or views, and that the decision-maker expresses consideration of those views; and (2) neutrality, the idea that impartial, unbiased decision-makers make rule-based decisions that are applied evenly and transparently across people and cases. The other two elements relate to the quality of treatment: (3) treatment with dignity and respect for people and their rights; and (4) trust in the character and motivation of the decision-maker.[94]

Researchers have offered three main explanations for why people care about these procedural elements. "Social exchange theory" highlights that participants who have an opportunity to influence the outcome of the process are more likely to evaluate a process as fair—even when they do not like the outcome.[95] "Group value theory" asserts that participants care about their interaction with the third party as a signal that the governing institution views them as a valued or respected member of society.[96] Finally, researchers have proposed a "fairness heuristic theory," noting that a participant's perception of procedural fairness is a "mental shortcut" for outcome fairness.[97]

The first element, the "opportunity for voice," has proven valuable to participants in numerous settings, including courtrooms, arbitrations, and political decision-making.[98] How much voice is enough to provide an experience of procedural justice—or to affirm dignity—remains up for debate. For example, Carole Pateman and Steve Jenkins idealize circumstances where participants' voices can actually affect the outcome of a decision.[99] In contrast, some studies have shown that participants who have an opportunity to have their voices heard report feeling a sense of procedural justice, even when their voices will not affect

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93. *Id*.

94. *See* Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 52 (2004). *See also* Meares & Tyler, *supra* note 92, at 529–38.

95. *See* Welsh, *supra* note 94, at 53; Welsh, *supra* note 88, at 819, 826–27.

96. *See* Welsh, *supra* note 88, at 827; Welsh, *supra* note 94, at 53. This concern affects participants' faith in institutions, but here I am most interested in how this theory relates to a rank- or status-based conception of dignity. Governmental decision-making processes send messages about a person's standing as a full member of society. Welsh, *supra* note 88, at 828.

97. Welsh, *supra* note 94, at 53.

98. Welsh, *supra* note 88, at 821.

99. See *supra* Part II(B) for Pateman's definition of "full participation" and *supra* Part IV(A)(2) for Jenkins' link between voice and the power of coercion.

the outcome.[100] This leads us to question whether Pateman and Jenkins undervalue the benefits of "voice," or whether they correctly assume that opportunities for voice may placate people into accepting unfavorable outcomes.

The latter two elements are relational; they send key social messages that matter to people even more than the outcome of their case. According to procedural justice researchers Tracey Meares and Tom Tyler, these particular elements "send messages that people use to interpret their degree of inclusion within society and their social status/standing."[101] First, when people are treated with dignity and respect, it indicates that authorities acknowledge their inclusion in a community where everyone is an "equally entitled human being, with the same rights as others."[102] Second, when people are respected and taken seriously, that treatment communicates social respect and high standing in a community.[103] People feel valuable rather than marginal. And finally, people care deeply about trusting the intentions of decision-makers to do what is right and consider people's needs.[104]

Nancy Welsh has also noted that people strongly value "dignified" processes that emphasize a sense of dignified, respectful, or polite treatment.[105] For example, one study has shown that litigants perceive trial and arbitration proceedings as more dignified and careful—and thus more fair—than settlement negotiations, even though settlement processes typically give litigants more control over the decision.[106] In addition, some research has shown that minority group members particularly value dignified and respectful treatment by authorities, which indicates that they and their values are respected within larger society.[107] Like the research related to voice, this research indicates that we must

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100. Welsh, *supra* note 88, at 822 & nn.169–70. Welsh acknowledges, though, that in some situations, voice without decision control can lead to dissatisfaction and the "frustration effect." *Id.* at 822 n.170.

101. Meares & Tyler, *supra* note 92, at 535.

102. *Id.* at 536.

103. *Id.*

104. *Id.*

105. Welsh, *supra* note 88, at 820 n.163, 823–24.

106. *Id.* at 824 & nn.179–82 (describing results of a study comparing litigants' reactions to trial, arbitration, and judicial settlement conferences).

107. *See* Meares & Tyler, *supra* note 92, at 541 ("Social-psychological research on minorities shows that displays of subgroup respect promote identification with social institutions, along with social engagement and psychological well-being among minority groups.") (citing Yuen J. Huo & Ludwin E. Molina, *Is Pluralism a Viable Model of Diversity?: The Benefits and Limits of Subgroup Respect*, 9 GRP. PROCESSES & INTERGROUP RELATIONS 359 (2006); Yuen J. Huo, Ludwin E. Molina, Kevin R. Binning & Simon P. Funge, *Subgroup Respect, Social Engagement, and Well-Being: A Field Study of an Ethnically Diverse High School*, 16 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 427 (2010)). *See also* Tom Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 835 n.4 (1989) (noting that in his study regarding how different groups define procedural justice, "[m]inority group members were found to place significantly greater weight on evidence about their social standing than did White group members.").

be careful to determine whether decorum indicates justice or makes participants more vulnerable to manipulation.

D. Participatory Education

A final theoretical foundation draws from participatory education (also known as liberatory or popular education).[108] This educational theory seeks to engage people in liberating themselves from oppressive conditions by placing those conditions at the center of the learning process. Participants first recognize the causes of oppression, then seek to transform that oppressive situation through action and reflection. The key idea is that education is not neutral—it can either reinforce or seek to transform oppression. Rather than designing pedagogy *for* people, teachers or facilitators work *with* people by posing problems and initiating dialogue.[109] The people themselves create the content of their learning and discover the knowledge relevant to their situation.[110]

At first glance, popular education most obviously promotes dignity by encouraging people to give an authentic account of their lives, and to shape their education according to their own norms and reasons. For Freire, though, this "pedagogy of the oppressed" embraced an even more essential struggle of becoming more fully human, or "humanization."[111] Freire believed that oppressed people have internalized the guidelines and notions of self-identity imposed by the oppressor, such that people no longer have the freedom to live authentically, make their own choices, or pursue self-affirmation as responsible people.[112] Popular education, then, encourages people to take control over their personal decision-making as well as the decision-making that shapes power in society—people discover and re-create their voices as well as express them. Like ideal concepts of participation in classic democratic theory, participation in

108. This article will largely focus on this theory's roots in the work of Brazilian educator Paulo Freire, as well as the contributions of Myles Horton. Freire developed his famous "pedagogy of the oppressed" through work in adult education and literacy campaigns in South America. Myles Orton founded Highlander Folk School, an Appalachian institution that spawned the Citizenship Schools and became a training ground for many Southern leaders in the civil rights movement. *See* HORTON & FREIRE, *supra* note 24, at xv–xxix. These theories have been relevant in the legal context for decades. *See, e.g.*, Cummings, *supra* note 3, at 1677–78 (noting that in the 1980s, "[s]ome legal services groups, caught in the unresolved tension between their individual service roots and law reform aspirations, experimented with popular education models to rebuild movement consciousness among the disaggregated and disempowered poor, but their efforts were confined by the limits of scale.") (internal citations omitted).

109. See Part IV(A)(3) above for further discussion of Paulo Freire's vision of outside expertise and the "with" approach.

110. The model is a response to top-down teaching practices where teachers fill or "bank" students with knowledge that reinforces the status quo or systems of the oppressor. *See* HORTON & FREIRE, *supra* note 24, at 64; FREIRE, *supra* note 1, at 33.

111. *See* FREIRE, *supra* note 1, at 28.

112. *Id.* at 31–33, 40.

education is a continuous process of "becoming" and developing one's character.[113]

E. Community Organizing

"Community organizing"[114] can describe a number of community-based practices focusing on building local power, developing community leadership, and correcting deficiencies in majoritarian decision-making structures.[115] These efforts stress participatory processes and consciousness-building as a means to increase community members' efficacy, self-worth, power, and dignity.[116] The oft-cited maxim of "never do for others what they can do for themselves" highlights that participation can be an end in itself,[117] and also wards against humiliation. Participation in these processes is often driven by a critical perspective that generates polarization between the oppressed and oppressors, broadens political discourse, and "agitates" people into action.[118] The goal is for people to recognize adverse conditions and stand up for themselves—a clear act of dignity. This dignified sense of agency and control then grows as people are motivated to pursue power and achieve victories for community change. Outcomes might involve short-term campaign victories or long-term community-building. Practically, these activities also offer people diverse forms of self-expression. People might feel most dignified in a formal setting like a lobbying visit or legislative hearing, or they might embrace cathartic or confrontational demonstration tactics.

Some community organizing efforts promote participation as an end in itself, and others view participation as a means to increasing social power. Social power might be qualitative, referring to "the development of the membership in their individual capacities and in their ability to function democratically and

113. *Id.* at 72.

114. A helpful definition of community organizing: "[Community organizing (CO)] is a values-based process by which people—most often low- and moderate-income people previously absent from decision-making tables—are brought together in organizations to jointly act in the interest of their 'communities' and the common good. Ideally, in the participatory process of working for needed changes, people involved in CO organizations/groups learn how to take greater responsibility for the future of their communities, gain in mutual respect and achieve growth as individuals." LARRY PARACHINI & SALLY COVINGTON, NEIGHBORHOOD FUNDERS GROUP, COMMUNITY ORGANIZING TOOLBOX 11–12 (2001).

115. *See* Barbara L. Bezdek, *Alinsky's Prescription: Democracy Alongside Law*, 42 J. MARSHALL L. REV. 723, 748–49 (2009) (describing how "mobilization lawyering" is fueled by the democratic ideas of Saul Alinsky); *see also* Scott Cummings & Ingrid Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 462 (2001).

116. *See* Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643, 644 (2009) (describing that for Saul Alinsky, "fundamentally the organizer's goal was to create a setting in which victimized people could experience and express their self-worth, power, and dignity.").

117. PARACHINI & COVINGTON, *supra* note 114, at 13 (listing one of the key principles of community organizing as "a participative culture" as illustrated by this "iron rule").

118. *Id.* at 13–14 (listing "critical perspective" as another key principle of organizing).

assert their interests," or quantitative, focusing on the relative size and power of an oppressed group compared to the forces they are challenging.[119]

V.
A SURVEY OF PARTICIPATORY APPROACHES TO DECISION-MAKING AND SOCIAL CHANGE IN SOCIAL JUSTICE LAWYERING

Building from the theoretical insights above, this section explores practical ways that participatory lawyering can affirm and/or deny human dignity. It focuses on three forums within social justice lawyering: litigation, "law and organizing" or mobilization strategies, and alternative dispute resolution.[120] Each of these approaches has been proposed and critiqued as a solution for including marginalized voices in lawyering efforts and public decision-making. Here, the goal is not to evaluate or rank these approaches as effective forms of participation, but to (1) highlight the struggles, contradictions, and questions faced by lawyers seeking to promote meaningful participation; and (2) demonstrate how dignity offers a valuable lens for examining those struggles.

A. Litigation

A vast literature has developed on whether litigation is an adequate forum for vindicating the concerns of marginalized populations.[121] This section explores how litigation implicates the relationship between dignity and participation for individual litigants and larger social movements.

1. How Participation Can Affirm Human Dignity

Bringing a claim in court can serve a number of dignitary functions for individuals and social movements. First, lawsuits can increase a client's confidence by legitimizing her personal experiences or concerns in terms of justice[122] or constitutional rights.[123] Lawsuits can also provide a "measure" of

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119. Jenkins, *supra* note 39, at 84.

120. Notably, I will not address numerous other participatory processes, including ballot initiatives, political campaigns, juries or jury nullification, regulatory rulemaking procedures, cooperatives, participation in membership-based organizations, or the political impact of social media and internet technology.

121. For an explanation of the progressive critique of lawyering and litigation, as well as a long list of relevant literature, see Cummings & Eagly, *supra* note 115, at 451–60 & n.38 (2001), and Cummings, *supra* note 3, at 1660–81 (tracing the use of litigation and other progressive lawyering methods up to the current emphasis on movement lawyering).

122. Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109, 126 (2009); *see also* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 329 n.27 (1987) (explaining how Critical Legal Studies views law as a legitimation process).

123. *See* Matsuda, *supra* note 122, at 389–90 ("For those Americans [at the bottom], the constitutional promise of liberty holds special meaning. . . . Liberty has meant personhood and participation—the recognition of one's existence as a human being, free and equal, with power and control over the political processes that govern one's life.").

injustice by highlighting the discrepancy between legal ideals and the plaintiffs' lived experiences.[124] As noted in Part IV(C) above, official courtroom procedures may offer litigants a feeling of justice (even when they don't win), as well as an opportunity for voice. Lawsuits may also serve as an expression of self-governance:[125] by bringing disputes to a public forum, individuals can express their agency and autonomy to create or change the laws that affect their lives. Participants can even shape the public understanding of human dignity by litigating which values will enjoy the protection of the law.[126]

In terms of clients' experiences working with counsel, the lawyer-client relationship has received significant attention for providing a "mouthpiece" for clients' stories and shaping their experiences of voice and fairness.[127] While attorneys have often been criticized for failing to hear a client's voice[128] or for losing that voice in a maze of legalese,[129] procedural justice research has suggested that clients can still feel that their voice is being heard if they have a good relationship with their attorney and feel like their counsel communicated their story effectively.[130]

In the context of social movements, successful lawsuits can secure new legal rights, provide rhetorical resources, empower others to voice their own concerns, foster coalitions and a sense of community, create tactical delays that dramatize or advance public debate, and sanction efforts to seek dignity from the

124. *See* Cummings & Eagly, *supra* note 115, at 468 (citing Jennifer Gordon, Lecturer, Yale Law School, Address at the UCLA School of Law Conference on Law and Organizing (Feb. 25, 2000)) (explaining the concept of "measuring injustice" within a law and organizing campaign). Although Gordon describes the concept as a tool for planning a community campaign for political action or mobilization, the same principle can be applied to litigation.

125. *See* Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1391 (2008).

126. *Id.* at 1391–92 (discussing David Luban and Lon Fuller's discussions of adversarial methods in a decentralized legal system).

127. David Luban offers a thorough articulation of his "mouthpiece theory" and other aspects of the attorney-client relationship in David Luban, *Lawyers at Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 819–22. *See also* Simon, *supra* note 51.

128. *See* Part V(B)(2) *infra*; Welsh, *supra* note 88, at 840. *See also* Luban, *supra* note 127, at 827–28 (highlighting attorneys' problems with paternalism, as illustrated by the failure of defense attorneys for Theodore Kaczynski, the Unabomber, to listen to their client's wishes, leading to his attempted suicide and wish to proceed *pro se*).

129. *See, e.g.*, White, *supra* note 5, at 542–45; William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 477 (1994).

130. Welsh, *supra* note 88, at 841–43 & n.262 (discussing studies including Stephen LaTour, *Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. PERSONALITY & SOC. PSYCH. 1531 (1978); E. Allan Lind, Laurens Walker, Susan Kurtz, Linda Musante & John W. Thibaut, *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCH. 643 (1980); Laurens Walker, Stephen LaTour, E. Allan Lind & John Thibaut, *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. OF APPLIED SOC. PSYCH. 295 (1974)).

government on a broader scale.[131] Collective action litigation can empower underrepresented voices through group membership or by serving as a "community event."[132] In addition, trials can raise public consciousness over controversial issues,[133] and in some cases, provide information that demystifies or de-legitimizes oppressive governmental power structures.[134] Even losing a lawsuit can advance a social cause by spreading a sympathetic public narrative that can raise awareness and place pressure on policymakers and their constituents to demand change outside the courts.[135]

Rights-based litigation offers unique benefits (and unique problems) related to dignity. Martha Minow has described rights-based work as "enabl[ing] a devastating, if rhetorical, exposure of and challenge to hierarchies of power."[136] Minority populations and communities of color, whose rights have been consistently denied, may especially benefit from the use of rights discourse. As Patricia Williams notes,

> I by no means want to idealize the importance of rights in a legal system in which rights are so often selectively invoked to draw boundaries, to isolate, and to limit. At the same time, it is very hard to watch the idealistic or symbolic importance of rights being diminished with reference to the disenfranchised, who

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131. *See* Capulong, *supra* note 122, at 125–26 (in part, quoting Professor Lucie White's observations of *Goldberg v. Kelly*, 397 U.S. 254 (1970)); Charles Elsesser, *Community Lawyering—the Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L 375, 398 (2013) (highlighting the value of affirmative litigation for tactical advantage). *See generally*, White, *supra* note 5. In perhaps one of the most well-known critiques of litigation and legal liberalism as a source of community change, Professor Derrick Bell offers an eloquent summary of litigation's *potential* for social movements, noting that litigation "can and should serve lawyer and client as a community-organizing tool, an educational forum, a means of obtaining data, a method of exercising political leverage, and a rallying point for public support." Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 513 (1976).

132. *See* White, *supra* note 5, at 540. *See also* Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1143 (1992) (discussing the inevitable conflicts between individual and group interests in collective litigation, but stating that "I have defended the principle of group representation on the ground that, in addition to giving expression to the potential values of group connection, such representation also increases individuals' power over their lives and vindicates the exercises of individual autonomy entailed in group membership."); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1919 n.151 (2007) (noting that the labor law context showed the value of representing many powerless people rather than individuals). *But see* William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 24 WM. & MARY L. REV. 127, 139, 163 (2004) (noting critiques that class claims deny some class members their day in court and offer minimal contact with lawyers).

133. For a discussion of why courts are a forum for deliberation and democracy, see Böhmer, *supra* note 86, at 1370.

134. *See* Capulong, *supra* note 122, at 126.

135. *See* Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 854 (2013).

136. Ashar, *supra* note 132, at 1920 n.155 (quoting Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1910 (1987)).

> experience and express their disempowerment as nothing more or less than the denial of rights.[137]

Likewise, immigrant rights advocate Sameer Ashar has noted that rights-based campaigns benefit immigrants by building a sense of solidarity and membership in the American community that can compensate for a lack of legal status.[138]

2. *How Participation Can Deny Human Dignity*

Critiques of litigation often center on three main concerns: individuals' experiences of court and counsel, struggles to air minority voices within a discriminatory system, and the detrimental impact of law reform efforts on social movements. These critiques are a clear example of how participatory structures can simultaneously affirm and deny human dignity.

Despite the dignitary benefits described above, trials and court proceedings can be intensely alienating for non-lawyers. The legal arena can be a "hostile cultural setting" that silences lay voices through incomprehensible norms and rules, frequent interruptions, and the almost exclusive use of legalese.[139] While such legal structures can legitimize an individual's story and sense of agency, they can also reframe individuals' self-identities or personal experiences—or require a particular type of "performance"[140]—in order to fit legal constructions or institutional norms.[141] The need for litigants to demonstrate "respectability" is

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137. *See* Patricia J. Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 405 (1987) (she continues, "It is my belief that blacks and whites do differ in the degree to which rights-assertion is experienced as empowering or disempowering. The expression of these differing experiences creates a discourse boundary, reflecting complex and often contradictory societal understandings."). *See also* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method: A Talk Presented at the Yale Law School Conference on Women of Color and the Law, April 16, 1988*, 14 WOMEN'S RTS. L. REP. 297, 298 (1992) ("Unlike the post-modern critics of the left, however, outsiders, including feminists and people of color, have embraced legalism as a tool of necessity, making legal consciousness their own in order to attack injustice.").

138. Ashar, *supra* note 132, at 1921.

139. White, *supra* note 5, at 542–43. *See also* Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 953–54 (2007).

140. *See* Joshi, *supra* note 5, at 235–36 n.95 (regarding performance in compliance with institutional norms), 251–52 (citing Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002)) (describing Kenji Yoshino's well-known concept of "covering," or minimizing a characteristic or part of one's identity in order to fit into mainstream norms).

141. Lobel, *supra* note 139, at 956–57. Examples include labor laws that separate some workers as "professional employees" or civil rights laws that force each "identity group" into separate legal categories, tests, and burdens of proof. *Cf.* William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365, 1366 (2008) (noting that even literary examples like *The Brothers Karamazov* and *The Stranger* portray trials where clients no longer recognize themselves).

a key example often raised in debates about racial justice and LGBTQ rights.[142] This kind of respectability eviscerates the concept of dignity as a shared equal status by requiring litigants to demonstrate a "dignified" posture in line with the ideals of the majority or those in power.

In terms of the attorney-client relationship, although attorneys can act as their clients' legal "mouthpiece," they have been criticized for losing their clients' stories in translation, paternalistically choosing legal strategies that "ride roughshod over the commitments that make the client's life meaningful and so impart dignity to it,"[143] over-sentimentalizing or categorizing clients,[144] and undermining clients' power and agency.[145]

Racial inequalities within the legal system also significantly affect the dignity experienced by litigants and communities. Anthony Alfieri offers a poignant demonstration of identity-degrading and community-disempowering prosecutorial relationships in the 2006 case of the Jena Six in Jena, Louisiana.[146] Following a number of interracial conflicts on the campus of Jena High School, including the hanging of nooses from a tree to intimidate African-American students, a group of six African-American high school students were convicted of beating a white student.[147] The local prosecutor then humiliated the Black defendants by using a colorblind approach that robbed them of the opportunity to show how race-relations influenced their case.[148] Yet while the prosecutor decontextualized the assault by portraying it as a "race-neutral" incident, his prosecution was ripe with identity-degrading strategies.[149] Alfieri notes how prosecutors' identity-degrading stories—such as the postbellum portrayal of Blackness as "natural inferiority, innate immorality, and pathological violence"—can silence the voices of offenders *and* communities, especially "legally mute" minorities.[150] The effects of one humiliating or denigrating

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142. *See* Joshi, *supra* note 5, at 236 ("Respectability involves efforts made by lesbians and gay men to remake themselves as worthy of inclusion in marriage. But these efforts do not cease with advancing arguments to courts; lesbians and gay men are called upon to be performers in everyday life.").

143. Luban, *supra* note 127, at 827 (offering an example of Unabomber Theodore Kaczynski's attorneys proffering a mental defense against his will).

144. Oversentimental or categorical attitudes might include "my client, the victims, the hero." Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 303 (1996).

145. *See* Cummings & Eagly, *supra* note 115, at 457–58. This harsh critique of poverty lawyers' efficacy became especially prominent during the 1980s and 90s, leading to a significant change in the poverty law landscape. *See also* White, *supra* note 30, at 825; Simon, *supra* note 51, at 1099–100, 1102.

146. Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285 (2008). The case of the Jena Six has gained recognition as an example of racial injustice.

147. *Id.* at 1288–89.

148. *Id.* at 1286–87 (outlining the prosecutorial traditions and ethics rules underlying LaSalle Parish District Attorney Reed Walters' "colorblind" approach).

149. *Id.* at 1302–03.

150. *Id.* at 1303.

prosecution can "assign collective responsibility" for lawbreaking—and thus moral condemnation—to the community as a whole.[151] Alfieri concludes that race-conscious civic participation and the incorporation of minority voices and stories are the key to opening pathways to alternative theories of justice, enriching the current conversation, and restoring dignity in prosecutorial decisions.[152]

Finally, litigation has been widely criticized as a source of limited and symbolic change that can "co-opt" the power of social movements. This critique was largely developed by Critical Legal Studies scholars in response to the litigation and legislative "victories" achieved by the New Deal Labor Movement and the Civil Rights movement of the 1950s and 60s.[153] Some Critical scholars came to believe that litigation "discourage[d] client initiatives, divert[ed] resources away from more effective strategies, and [left] larger social change undone."[154] According to this critique, professional lawyers and lawmakers co-opt people's ability to account for their own experiences by framing the public debate in legal categories and "rights." This cooptation thus reinforces social exclusion, passivity, and powerlessness.[155] Rather than taking roles as active participants in their struggle, litigants serve as symbolic representatives of a social injustice, offering images of a "human impact" to powerful decision-makers and the public debate.[156]

Professor Orly Lobel's description of these "cooptation" critiques highlights how participation in litigation or law reform efforts may stunt participants' human dignity. She names six forms of cooptation: the focus on law as a diversion of resources and zero-sum energies from alternative strategies and

151. *Id.* at 1304. As further insult to the Black community, the Jena Six prosecutor denied Black participation in the jury and refused to prosecute the white "victims" for the act of hanging nooses in a tree. According to Alfieri, these decisions prohibited the Black community from having public space to air their narratives of indignity and inequality. *Id.* at 1306.

152. *Id.* at 1307–08.

153. *See* Lobel, *supra* note 139, at 942–48.

154. *See* Cummings & Eagly, *supra* note 115, at 451–58 (quoting Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 470–71 (1999)). This critique quickly spread beyond CLS scholars, and became a strong force in the movement towards "law and organizing" and other steps away from the legal arena.

155. *See* Lobel, *supra* note 139, at 947–48. According to Peter Gabel, "People don't realize that what they're doing is recasting the real existential feelings that led them to become political people into an ideological framework that co-opts them into adopting the very consciousness they want to transform. Without even knowing it, they start talking as if we were rights-bearing citizens who are 'allowed' to do this or that by something called 'the state,' which is a passivizing illusion—actually a hallucination which establishes the presumptive political legitimacy of the status quo." Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 26 (1984).

156. *See* Jenkins, *supra* note 39, at 62; *see also* Simon, *supra* note 132, at 164 (noting Derrick Bell's concerns about whether attorneys considered the needs of the class members they represented).

subgroups;[157] the way legal framing reduces a struggle into discrete sides and issues, requiring a narrow united front that flattens internal debate, thus obscuring members' voices and driving intragroup exclusion;[158] the professionalization of the movement by lawyers who speak for marginalized populations but are removed from the on-the-ground struggle;[159] the institutional limitations of law as corrective and favoring more powerful groups;[160] the crowding out of more radical voices and reform efforts in order to comply with new legal structures;[161] and the legitimizing force behind the law that shapes participants' self-identities and sense of dignified status such that "systematic losers come to understand themselves as part of the system, as self-governing, and as having willed their losses and their subordinate status."[162]

As a result of these critiques, many progressive lawyers moved to combine or replace litigation with political action through "lay lawyering" and "law and organizing." These strategies focus on building oppressed people's power through social movements, community organizations, and extralegal activism.[163]

B. Law and Organizing Strategies

In light of the critiques of traditional litigation efforts and the lack of outlets for minority voices in the political process, lawyers and community organizations have developed a plethora of non-litigation strategies aimed at fostering more direct client participation.[164] Initially, these strategies shunned the "myth of law," seeking to reverse traditional lawyer-client power dynamics by giving clients the primary role in determining a course of action.[165] More recent efforts, though, have broadened their focus beyond the lawyer-client relationship to recognize the role of communities, organizations, and a balance of legal and non-legal expertise. Much of this work involves non-profits, membership-based organizations, and worker centers rather than traditional legal aid offices or law reform groups like the NAACP or ACLU. Their "legal" work

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157. *See* Lobel, *supra* note 139, at 949–50. *See also* Elsesser, *supra* note 131, at 397–98 (describing how litigation can end outside discussions between community leaders and decision-makers, and that resources can be diverted to a defensive rather than affirmative struggle).

158. Lobel, *supra* note 139, at 950–51.

159. *Id.* at 952–54.

160. *Id.* at 954–55.

161. *Id.* at 955–56.

162. *Id.* at 956–58.

163. *Id.* at 959–62. *See also* Cummings & Eagly, *supra* note 115, at 459–61, 465–66.

164. These techniques, which largely stemmed from the "law and organizing" movement, include campaign-based lawyering, collaborative lawyering, mobilization lawyering, participatory lawyering, client-centered layering, community lawyering, rebellious lawyering, and integrative lawyering, amongst others. *See generally*, Aaron Samsel, *Toward a Synthesis: Law as Organizing*, 18 CUNY L. REV. 375 (2015) (discussing the development of the law and organizing movement, critiquing its tensions, and proposing a "law *as* organizing" model). For a full description of the progression of progressive lawyering before, throughout, and following the emergence of "law and organizing," see Cummings, *supra* note 3.

165. *See* Lobel, *supra* note 139, at 941.

is diverse, including lawsuits, policy or legislative campaigns, media advocacy, educational programs, direct social services, consciousness-building, economic development, and community organizing.[166] Lawyers may take on any of these roles, and organizations have experimented with different ways to effectively and ethically share responsibilities between lawyers and non-lawyers.[167] In this section, I will describe and critique how these new efforts are attempting to affirm clients' dignity through increased participation.

1. How Participation Can Affirm Human Dignity

We can start to analyze how these efforts affirm human dignity by considering their roots in community organizing, participatory education, and classical democratic theory.

A clear hallmark of both community organizing and participatory education is the importance of seeking to do things *with* people rather than *to* people or *for* people. These theories played a crucial role in how multi-disciplinary lawyering organizations re-framed lawyer-client relationships in response to the critiques of client-domination described above. By embracing this model of alliance, these organizations encourage shared decision-making and attempt to avoid humiliating over-sentimentalization.[168]

Law and organizing efforts also highlight the importance of local and community expertise, as well as multiple paths for creating change. In that light, many advocacy organizations now include combinations of organizers, policy specialists, community members, and other staff.[169] Community members often exercise democratic control over the organization and take various leadership roles, including serving on the board of directors, planning demonstrations or press events, facilitating meetings, raising funds, or strategizing for campaigns. Organizers build community and ensure that the voices of clients or members are heard within the organization. Lawyers may work in the courts to offer

166. Other models for increasing participation and promoting human dignity include offering clinics that teach people how to advocate for themselves, or simply increasing the adequacy of representation so that poor clients can expect the same quality of counsel as their wealthier adversaries. *See* Martha Minow, *Lawyering for Human Dignity*, 11 AM. U.J. GENDER SOC. POL'Y & L. 143, 155 (2002). In the community economic development (CED) movement, entrepreneurial advocacy is used to "enhance individual social mobility; it can promote neighborhood control and self-sufficiency; or it can emphasize citizen self-governance, using economic projects to strengthen community power and participation in politics." *Id.* at 163.

167. *See, e.g.*, E. Tammy Kim, *Lawyers as Resource Allies in Workers' Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 221–32 (2009) (comparing different models of community lawyering and advocating for a "resource-ally" model); Ashar, *supra* note 132; Cummings & Eagly, *supra* note 115, at 465–516; GORDON, *supra* note 23; Minow, *supra* note 166, at 162–65.

168. *See* Bellow, *supra* note 144, at 302–03.

169. *See* Jennifer Gordon, *The Lawyer is not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133, 2144 (2007) (describing that the existence of strong community organizations as protagonists has calmed fears of lawyer domination). For a description of ROC-NY's tripartite system of lawyers, organizers, and workers, see Ashar, *supra* note 132, at 1898.

legitimacy and a formalized account of members' concerns. Legal work can also secure rights that allow organizers and members to participate in more radical or oppositional campaign tactics (tactics which, as critics of litigation argue, may be more true to people's stories or needs to stand up for themselves).[170] In addition, lawyers mobilize support for campaigns by drawing new members and resources to organizations, offering legal services to members, fulfilling organizational legal needs, providing data to inform future organizing strategies, and simply highlighting the many tensions between individual, collective, legal, and extralegal goals.[171]

Finally, organizations also stress the educative and participatory values of classical democracy discussed in Part IV, such as expanding democratic visions into extra-political realms, fostering the interdependent growth of people and society, and supporting self-governance and equality.[172] These foundations relate to power and equal status, as well as to theories of procedural justice.

2. *How Participation Can Deny Human Dignity*

Many critiques of these strategies have come from advocates within the law and organizing movement.[173] As this new approach to lawyering developed, participants quickly recognized the struggle to navigate the challenges of shared decision-making, diverse expertise, race and class differences, funding needs, and efficiency. Jennifer Gordon, a key practitioner and scholar within the "law and organizing" and worker center movements, has discussed the temptation to overlook deficits of democracy and accountability within a strong community organization.[174] Gordon has also noted that organizing some parts of a community (such as workers, immigrants, or youth) can intensify feelings of exclusion and vulnerability for the unorganized parts of a community.[175] Other commentators warn of ways that lawyers' ethical obligations can limit clients'

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170. *See* Bellow, *supra* note 144, at 303.

171. *See* GORDON, *supra* note 23, at 8, 148, 188, 219, 235–36 (discussing the many lessons learned while integrating law and organizing—and specifically seeking to bridge individual representation and collective organizing—in a worker center model). *See also* Cummings & Eagly, *supra* note 115, at 467–68 (describing Gordon's vision).

172. *See, e.g.*, Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1392–93 (2009) (elaborating his theory of "democratic lawyering"). *See also* GORDON, *supra* note 23, at 144–45 (describing how creating an internally powerful democratic organizational structure can also foster resources for building external power and participation, including solidarity, leadership, and tactical resourcefulness).

173. *See generally*, GORDON, *supra* note 23 (explaining and critiquing her experiences with law and organizing in a workers' center). *See also* Kim, *supra* note 167, at 218–21.

174. Gordon, *supra* note 169, at 2145.

175. *Id. See also* Rebecca Sharpless, *More than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347, 395 (2012) ("Law and organizing visions expressly depend on working only with people who are, or who are open to becoming, politicized and active in organizing campaigns"); *cf.* Cummings & Eagly, *supra* note 115, at 498 (describing how certain client groups may be less capable of or interested in organizing).

options due to constraints on the attorney-client relationship, confidentiality, and restrictions on communications with represented parties.[176] In addition, there are still concerns that lawyers' legal expertise or social status may coerce clients or organizers into accepting certain positions or methods, or that making legal services contingent on membership in other organizing campaigns may lead to coercion and less meaningful participation. Finally, lawyers also face constant practical difficulties in how to involve client voices in actions that require professional expertise or efficiency. Deep participation takes time and resources that many strapped advocacy organizations do not have.

Steve Jenkins has expressed concern that these organizations too often lose sight of the goal of building members' social power in favor of campaigns most palatable to elite sources of power like politicians, funders, staff, and the media.[177] He claims that the result is advocacy campaigns that use the rhetoric of grassroots "member power" and "voice"—but that are actually rooted in the voice of elites.[178] While this kind of advocacy work can still effectively *build* power, it is not drawn from the authentic needs or goals of the community. He describes several ways that advocacy efforts affirm "outside" goals and voices. First, the construction of a membership base is often the product of an initial outreach process or campaign that reflects the concerns and political vision of staff and funders.[179] Funding sources continue to have strong impacts on whether and how organizations work.[180] Campaign choices, as well, are limited to options palatable to people holding power—for example, bills a councilmember will sponsor, issues the media will cover, and victories achievable through law reform.[181] Even within an advocacy organization, a campaign will be framed by people with the technical skills most necessary to the campaign.[182] While advocates may recognize and value the community's expertise about their lives and social conditions, non-professionals rarely have

176. See Cummings & Eagly, *supra* note 115, at 502–13 for a general description of these and other ethical concerns.

177. *See* Jenkins, *supra* note 39, at 63–64, 81. He argues that organizations often focus their work on shared injustices and powerless populations which have yet to build enough social power or momentum to be able to force leaders to make the changes they seek; instead, they rely on advocacy strategies to convince elites to act. *See also* Joshi, *supra* note 5, at 250 ("The problem with trying to justify social justice work through market-based logic is that a great deal of projects and goals will not fit. This creates a powerful incentive to prioritize the most 'acceptable' issues, not because those issues are most pressing, but precisely because they align with the status quo.").

178. Jenkins, *supra* note 39, at 58.

179. *Id.* at 80–81.

180. Jenkins notes that foundations are often more comfortable with activities that give "voice" to the oppressed without changing actual social conditions. Jenkins, *supra* note 39, at 71. Rebecca Sharpless also describes how advocates are pressured to narrow their work by funders seeking projects focused on systemic change and visionary or innovative approaches. This pressure is elevated when advocates must patch together funds from foundations with different goals. *See* Sharpless, *supra* note 175, at 398.

181. Jenkins, *supra* note 39, at 81.

182. *Id.* at 64, 75–76.

the knowledge or skills necessary to draft a bill or decide whether to write an amicus brief.

Dignitary concerns do not always arise simply because organizations cannot meet their participatory or power-building ideals. There are also concerns with the foundational theories of organizing or participatory education themselves. For example, participatory education promotes a process of "problem-posing" by leaders who draw out the discoveries of the oppressed. As participatory educator Miles Horton has said, "My system is to make him thirsty, so he'll volunteer to drink."[183] It is worth questioning whether "mak[ing] him thirsty" is a matter of subversion or a direct form of dialogue and idea-sharing.[184] Further, popular education's reliance on non-intervention and group discussion can lead to the perpetuation of prejudices held by the group.[185] Organizing theory's emphasis on polarization may also be problematic in terms of promoting human dignity—can the oppressed really gain their own dignity by humiliating, shaming, or denigrating their oppressors? For example, Saul Alinsky's bedrock *Rules for Radicals* instructs young activists that "[r]idicule is man's most potent weapon" against the opposition.[186] We might justify these ideas as coercion that supports dignity by upholding justice and the rule of law. Yet dignity may demand respect or compassion for the "other" as well.[187] For example, Paulo Freire warns that the oppressed must not cross the line into becoming oppressors; he states that the narrative of domination is taken from the oppressors themselves, and is thus antithetical to the idea of expressing one's authentic voice and humanity.[188]

C. Alternative Dispute Resolution and Consensus-Building Processes

Alternative dispute resolution processes such as mediation, negotiation, and consensus-building have gained recognition as forums for advancing democratic values[189] and fulfilling the social justice goals of empowering and organizing the powerless.[190] These processes generally allow participants to have significant control over both the process and the outcome. Mediation is typically used to resolve specific private or public disputes, while consensus-building techniques can be used for multi-party disputes or to engage a large number of stakeholders

183. HORTON & FREIRE, *supra* note 24, at 148.

184. *Id.* at 147–48.

185. *See* Cummings & Eagly, *supra* note 115, at 489–90 (raising concerns that group members could disseminate "regressive ideas" that will be unchallenged and woven into the educational process).

186. SAUL D. ALINSKY, RULES FOR RADICALS 128 (Vintage Books ed. 1989) (1971).

187. *See* Bühler, *supra* note 5, at 14–15.

188. FREIRE, *supra* note 1, at 29–30.

189. *See* Joseph B. Stulberg, *Mediation, Democracy, and Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 619, 621 (2000).

190. Welsh, *supra* note 94, at 57; *see generally* Carrie Menkel-Meadow, *When Litigation is not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37 (2002).

in public decision-making or policy-making. Here I will briefly illustrate the dignitary implications of mediation and consensus-building processes.

1. Mediation

In mediation, a neutral facilitator works with disputing parties to understand the conflict and develop a resolution that satisfies both parties' interests.[191] Mediators facilitate information-sharing, manage the rules of process and decision, and help parties identify their interests and possible solutions.[192] Participants are encouraged to focus on their underlying needs and interests rather than on specific legal positions or outcomes. Thus, mediation can be a forum for advancing a participant's "authentic voice."[193] As Tamara Relis has pointed out, mediation is "a place to treat human needs and preserve human dignity. It [is] a place for both verbal and non-verbal communication, information sharing, human interchange, and most importantly 'feeling better about their situations.'"[194]

a. How Participation Can Affirm Human Dignity

Dignity also relates to the key values underlying the mediation process, such as autonomy to define one's own reasonable choices,[195] participation in decision-making that affects one's range of life choices (and thus one's experience of personhood and integrity),[196] consent,[197] and dignity and respect in all interactions.[198] These values also relate to claims that mediation can be a tool for empowering the politically marginalized. Mediation can be framed as an instrument of self-determination, self-governance, and self-empowerment;[199] in

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191. *See* Stulberg, *supra* note 189, at 622.

192. *See* Carrie Menkel-Meadow, *supra* note 190, at 51. The role of mediators and participants vary within the three typical types of mediation. Facilitative mediators simply manage the process without attempting to influence the outcome or evaluate the merits of parties' positions; evaluative mediators take more control of the outcome by weighing in on parties' legal rights and claims; and transformative mediators use a process of empowerment and recognition to promote personal fortitude and empathy. *See also* Arby Aiwazian, *Transformative Mediation: Empowering the Oppressed Voices of a Multicultural City to Foster Strong Democracy*, 11 SCHOLAR 31, 33–34 (2008).

193. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 94 (1995) (discussing how mediation can serve social justice goals by providing a forum for "authentic voice," especially for disadvantaged people who may be especially in need of such forum).

194. Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 496 (2007).

195. *See* Stulberg, *supra* note 189, at 624–26.

196. *Id.* at 26–28.

197. See Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1251 (2009).

198. *See* Stulberg, *supra* note 189, at 628–32.

199. *See* Aiwazian, *supra* note 192, at 33, 49.

addition, the procedural focus on participants' common interests and the common good may promote inclusion.[200]

b. How Participation Can Deny Human Dignity

Concerns about mediation's impact on human dignity largely relate to threats of coercion and uncertainties about the connection between procedural and social justice values. First, court-connected or mandatory mediation processes can be especially problematic because they deprive participants of autonomy and consent, and worse, may result in coercion.[201] Procedural justice data show that participants in institutionalized mediations might not feel any greater sense of control or self-determination than in other adjudication processes.[202] Overbearing mediators who play evaluative roles may also contribute to paternalism[203] or coercion in the process.[204] Especially disconcerting is that people of color may receive worse mediated outcomes than white claimants, particularly when their case is mediated by a white mediator.[205] Further, social justice advocates are concerned that private mediation does not offer adequate safeguards against inequalities;[206] that informal, confidential processes are more likely to incorporate prejudice and discriminatory biases—especially when there is a significant power differential between the parties;[207] and that private processes do not spur the public participation and dialogue necessary to inspire greater social inclusion.[208]

2. Consensus-Building Processes

Consensus building processes are designed to offer opportunities for stakeholders to more fully participate in public decisions that affect them.[209]

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200. *Id.* at 46.

201. *See* Welsh, *supra* note 88, at 857. Welsh does note that many of the changes in the mediation model associated with court-connected mediation, including the reduced role of the disputants, the preference for evaluative techniques and the lack of creativity in settlements, are not necessarily inconsistent with the indicia of procedural justice, even though they "present the potential for violation of procedural justice considerations." *Id.*

202. Welsh, *supra* note 94, at 51.

203. *See* Stulberg, *supra* note 189, at 628 n.25.

204. *See* Aiwazian, *supra* note 192, at 41.

205. *See* Solomon Oliver, Jr., *Alternate Dispute Resolution (ADR) and Minorities in the Federal Courts*, 39 CAP. U. L. REV. 805, 805, 811–15 (2011). *See also* Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767, 789–90 (1996).

206. Welsh, *supra* note 94, at 57.

207. Oliver, *supra* note 205, at 811–15.

208. Welsh, *supra* note 94, at 57.

209. These processes are often proposed as a solution to the ways that current representative democracy falls short of classical democratic ideals. These theorists claim that general political representation may not adequately represent constituents' identities in relation to a particular dispute, and that too few people are meaningfully involved in decisions. In addition, an over-reliance on majority-rule may exclude the voices of minorities, and dualistic adversarial processes

Examples include public dialogues, community planning initiatives, formal negotiated rule-making, and complex multi-party dispute resolution procedures. These processes may be used to make a final decision or policy, or they may play any range of advisory roles in a larger decision-making process. Characteristics of these collaborative problem-solving processes include the inclusion and active involvement of all stakeholders in fact-finding and decision-making, dialogue and interest-based bargaining to maximize joint gains, and professional facilitation that ensures transparency and fair management of negotiation dynamics.[210]

a. How Participation Can Affirm Human Dignity

Proponents of consensus-building claim that the resulting solutions are fairer, more efficient, more stable over time, and wiser than decisions made through existing democratic forums (e.g., general political representatives, majority-rule decision-making, and adversarial public hearings).[211] The agreements that result from these collaborative processes may be enforceable by other decision-makers or government bodies, or they may play a role in influencing other decision-makers. To avoid experiences of "pseudo-participation," alienation, or disillusionment, the impact of the group's decision (and the process for implementing it) should be decided in advance. This ensures that voices are actually heard and accounted for in a meaningful way.

In relation to concerns about the participation of underrepresented groups, these processes are intended to include all voices affected by the decision at hand. Facilitators often use extensive outreach processes to determine which individuals and groups should be at the table. The interests of those voices are then protected at the table. Inclusive practices include shifting traditional notions of expertise and leadership, providing equal opportunities for information-sharing and deliberation, and developing near-unanimous agreements.[212] Finally, groups may build new power by having their voices heard by more powerful parties or gaining new "network power" based on new relationships and shared understanding of heuristics and systems.[213]

b. How Participation Can Deny Human Dignity

If consensus-building practices are explicitly designed to facilitate and safeguard meaningful participation of otherwise excluded stakeholders, what concerns might we have in relation to human dignity? First, we might question

too often force people to frame their perspectives as "for" or "against" a given proposal. Lawrence Susskind & Liora Zion, *Can America's Democracy Be Improved?* 2 (Draft Working Paper of the Consensus Building Institute and the MIT-Harvard Public Disputes Program, Aug. 2002).

210. *Id.* at 34.

211. *Id.* at 2.

212. *Id.* at 4.

213. *See* Innes, *supra* note 46, at 13.

whether these processes can overcome traditional barriers to minority participation. Facilitators may use initial "conflict assessments" to determine the affected stakeholders for a given situation, but participants' involvement may still be hindered by geographic, cultural, trust-related, language, or financial barriers to active participation (not to mention a facilitator's blind spots). In addition, some marginalized groups may avoid participation based on concerns that taking a "seat at the table" is conceding to powerful parties' demands, or that exposing their actual interests will put them in a more vulnerable position if the process dissolves.

Second, critics question whether a facilitator can effectively equalize power dynamics to prevent more powerful players from dominating the process.[214] Many consensus-building practitioners distinguish power "at the table" and "away from the table." While resources and power *at the table* can be managed by a skilled facilitator, that does not necessarily lead to redistribution outside that context.[215]

Another concern about cooptation arises when participants simply value the process—or place excessive trust in the "participatory" process—and are less prepared to "hold out" to meet their material interests.[216] This can be addressed to some extent by ensuring that participants frequently check in with their constituencies (or themselves) to reflect on their options or the need to exit the process.[217]

Finally, critics worry that seeking consensus will quash valuable tensions that might otherwise be an impetus for social justice movements or valid legal claims.[218] Ideally, consensus-building processes thrive from conflict and dialogue that can expand participants' visions of possible outcomes. Proponents argue that as long as participants recognize that exiting the process is always an option, the process retains a tension that forces higher-quality resolutions. In practice, however, it may be rare that a marginalized stakeholder group would actually have better options outside the formalized process, or that more powerful groups would actually see less-powerful stakeholders as a threat.

VI.
TOOLS FOR A DIGNITY CONSCIOUSNESS

The framework of human dignity does not offer easy answers for advocates seeking to design meaningful participatory processes. Instead, it asks questions. It highlights contradictions. It requires deep personal and community-wide investments. And it demands difficult conversations and decisions. Drawing themes and insights from the analysis above, I conclude with a list of questions

214. *Id.* at 12–13.
215. *Id.* at 12.
216. *Id.*
217. *Id.*
218. *Id.* at 13–14.

and suggestions—a type of "dignity consciousness"—directed to social justice lawyers seeking to promote participation in their work.[219]

A. Starting Out: Setting and Examining Goals for a Participatory Process

One of the clearest lessons from the analysis above is the value of being explicit and honest about the dignitary goals of a participatory process, especially when those goals might conflict with each other. Clear goals help dictate what kinds of processes to use, and they provide a touchstone for reflection and accountability. Further, the process of setting those goals demands that advocates and communities work together to critically discern and compare their various motivations.

1. Acknowledge the "aporia" of working for dignified participation as a social justice lawyer.

In her article *Teaching the Tensions*, Angela Harris discusses how to teach social justice-minded law students about the inherent aporia ("a logical contradiction beyond rational resolution") of progressive lawyering.[220] She describes the "fundamental tension":

> [H]ow does a person committed to social change live within the law, a set of institutions and ideologies committed to preserving the status quo? . . . Though as an institution, a set of practices and ideologies, law is designed to constantly point at justice, it is also designed to actually *do* something quite different, which is to preserve order and, even more importantly, cultivate the desire for order.[221]

I note Harris' article to recognize and affirm that our efforts to promote dignity and participation are going to face limits, tensions, and contradictions. It is my hope that being mindful of those tensions at the outset—and when

219. For a powerful example of how a list of challenging principles can guide social justice lawyering, see Angela Harris, Margaretta Lin & Jeff Selbin, *From "The Art of War" to "Being Peace": Mindfulness and Community Lawyering in A Neoliberal Age*, 95 CAL. L. REV. 2073 (2007).

220. Angela Harris, *Teaching the Tensions*, 54 ST. LOUIS U. L.J. 739, 739 (2010). Few pieces so eloquently capture this dilemma and provide guidance to social justice lawyers and teachers. Lucie White also names three tensions that "come up again and again in discussions of community-based lawyering work: the tension around the 'teacher' - or organizer, leader, facilitator, lawyer - and what defines and limits her power; the tension around the 'community' and what produces its cohesiveness and marks its boundaries; and the tension of 'emancipation' or what grounds the work's theory of, and path toward, positive change." White, *supra* note 30, at 824. She warns that these tensions "begin to cause trouble precisely at those times when practitioners become complacent that they no longer pose any problem. If we can learn to accept and study these tensions as a routine part of community-based social justice practice, we can gain access to a great source of insight and energy." *Id.*

221. *Harris*, *supra* note 220, at 740, 743.

possible, making them explicit—will help social justice lawyers stay motivated and better serve the dignity of their clients and communities.

2. Work with *the community to determine goals AND how to work together to achieve them.*

According to Freire, "[t]he radical, committed to human liberation . . . does not consider himself or herself the proprietor of history or of all people, or the liberator of the oppressed; but he or she does commit himself or herself, within history, to fight at their side."[222]

This presents an obvious question: does your work happen *with*, *for*, or *to* people? The clear answer here may be to work *with* people, side-by-side. That may be true in the majority of situations. Yet even more important is to work with people to *decide* whether to work with, to, or for people. Working in a deliberate, explicit partnership guards against many of the ills of domination or objectivism discussed above. This approach recognizes that each partner has a unique voice and area of expertise, and it keeps them from falling into a "default" mode of interaction. Even when lawyers set up their practice to involve as much side-by-side work as possible, they must be open to circumstances when either they or the community might agree to step forward or back (e.g., time-constraints, ethical obligations, or political strategy).[223]

Explicit conversations about collaboration also serve as touchstones when problems arise. Clients and communities need to know that they can and should question their lawyers, and that their lawyers will also question them. Lawyers must do their best to make this expectation clear from the beginning, and to create structures for accountability throughout the relationship. Of course, this type of open communication may be incredibly difficult, especially at the beginning of a relationship. The very premise of this article presupposes that lawyers face numerous barriers to establishing a partnership of mutual expertise and decision-making power. As discussed above, these obstacles may relate to power and privilege, cultural differences, communication styles, finding time to develop a relationship, fear, and assumptions about how lawyers and non-lawyers typically interact. Practitioners and clinicians have authored numerous resources addressing how lawyers can prepare for, address, and remain vigilant to those challenges. It is this article's goal to add additional motivation to address some of these obstacles in the midst of goal-setting, and to suggest that advocates make the dignitary implications of a relationship as clear as possible.

222. *See* FREIRE, *supra* note 1, at 39.

223. *Cf.* White, *supra* note 30, at 826–27 ("When a project begins with the dual goal of community improvement and participant empowerment, internal conflict will inevitably erupt within the group as the empowerment agenda begins to succeed. People will begin to put forth multiple visions of what they want for their community, and for their own lives.").

> 3. *Determine goals for participation and dignity: What are your goals as an advocate? What are the goals of the community? How can you address or align any differences?*

What kind of change are you hoping to make, and why? Why are you using a participatory process? Is participation your means or ends? Considering the definition of dignity above, which aspects of dignity are your priorities, and which are the community's? Are you prepared to weigh competing priorities and confront tradeoffs?

Some of these questions may arise as part of a representation agreement or initial client interview. Others will arise at strategic crossroads, and others may only arise as lawyers deepen their trustworthiness and knowledge within a community. Regardless, lawyers must create time for these conversations, even amidst deadline-intensive or quickly moving efforts. This may mean developing community relationships in advance of accepting clients or beginning a campaign, combining deadline-intensive work with efforts that allow lawyers to build a more collaborative rapport with their client, or scaling back one's practice to allow sufficient time for each effort.

> 4. *Once you recognize your goals, dig deeper—especially if you identify participation as an end in addition to a means.*

Participation itself will sometimes be a practical end goal—perhaps a community lawyer seeks to demonstrate that participatory budgeting is a feasible and popular alternative, or a government attorney must comply with a regulation requiring a participatory event or process, or a non-profit lawyer must demonstrate community participation to a funder. Lawyers must be explicit with community members and clients about these kinds of "practical" goals, and they must critically question their sources and value—as well as whether they can be met in a dignified manner. For example, does fulfilling a mandated participation requirement simply "rubber stamp" a decision outside of the community's control? Or is it a real opportunity for impacting a process or giving a true account of community perspectives? These questions help lawyers recognize when they need to make extra strides to make participation meaningful and authentic, as well as when a community may be better served by *not* participating, by refusing certain funds, or by finding an alternative approach to reach their goals.

B. Designing the Processes

Once you've identified your goals, how do you ensure that your practice and processes reflect your intentions? This may be the greatest challenge. Even the most careful planning may lead to conflicts between various dignitary goals. Time might be short and participation inefficient. An effective political strategy

might risk tokenizing a client's story. Or filing a class action lawsuit might risk losing sight of an individual client's needs.

1. Avoid focusing too narrowly on a single formula or philosophy for participation.

Overly formulaic participatory processes have garnered criticism outside the legal sphere,[224] and the U.S. legal system's emphasis on procedural rules (e.g., civil procedure, due process, and the model professional code) also requires special caution. Even participatory processes outside the courts, such as deliberative democracy or consensus-building efforts, often rely on a specific protocol or list of "best practices."

At times, following a set procedure can safeguard participatory efforts and provide valuable reminders for time-strapped lawyers. Yet advocates cannot rely on (or hide behind) the luster of a "fair process." Even when a process is even-handed and well intentioned, it may lead to unjust outcomes—either at the table or away from it. Because an appearance of procedural fairness legitimizes the law and leads people to feel stronger ties to authority, advocates must be especially careful that processes that convey a *feeling* of dignity are not merely creating a pleasing experience within the rules of a particular process. Instead of justifying a process because the law or other experts have declared it "fair," attorneys must ensure that their decisions about participation reflect the specific needs of a community or the internal dynamics of an organization or lawyer-client relationship.

2. Scale efforts to fit your personal or organizational capacity.

A commitment to dignified participation is time and resource intensive. While participation may be efficient in the long run (i.e., if widespread input and investment create more sustainable and widely-supported change), it is often very inefficient and time-consuming up front. Social justice work is filled with expected and unexpected deadlines and short windows of opportunity. Advocates must carefully scale their participatory efforts to be responsive to quickly changing political and social environments.

Considerations include the number of staff or community members available for outreach and collaboration, their relative expertise (e.g., organizers, lawyers, or social workers), their knowledge of and relationship with the community, their ability to speak the community's language, and their need for funds to support outreach and gatherings (e.g., transportation, translation, materials, or training). The key question is not whether advocates alone are able to support a campaign or lawsuit, but whether they can work with the community while doing so —including both community leaders *and* members

224. *See* Bühler, *supra* note 5, at 11 (noting critiques of formulaic approaches to participatory development).

who may be less vocal or easy to reach. If that kind of intensive relationship is not possible, then advocates must be ready to maintain a smaller practice or to partner with organizations that can provide additional resources or support.

3. Frame work in positive terms.

Are you working against something or for something? Often, the answer will be both—advocates seek to show resistance as well as promote a more just alternative. Yet being forced to articulate the proactive goals of participation provides a crucial safeguard for those goals. It is not difficult to frame the need for participation as a fight against imperialism, elite power, colonialism, racism, capitalism, or any specific exclusionary policy or bad actor. But our brief survey of participatory techniques shows that an exclusively "negative" focus can create dignitary risks. This happens when we value clients not only in themselves, but because they are not lawyers; when we accept humiliating opportunities for "voice" because it is not silence; or when lawyers fear advising a client because they worry about being seen as dominating. Instead, we must also emphasize the positive values of contribution, harking back to the character-building analysis of classical democratic theory.

4. Ensure that participatory efforts develop skills and resources for greater participation.

By promoting participation as a training ground for further participation, advocates can build community while also building the community's skills. Key questions for planning educative processes could include: Do all participants understand the reasons and goals behind a process? What kind of education can help everyone involved feel confident and skillful in their roles? How might skills transfer from one context to another?

Many training efforts suffer from two pitfalls: limiting training to community leaders, and teaching participants to present themselves in line with a certain "respectable" narrative. First, advocates must make special efforts to look beyond the most vocal community members to invite others who may be more difficult to reach. Second, whether preparing for a deposition, legislative hearing, or rally, participants must be trained to present the clearest version of their own voice and image, rather than one distorted for their audience. If participants are coached to use certain words or phrases, or to dress or act in a certain way, those strategies should be discussed, questioned, and agreed to by everyone involved.

5. Practice respect and compassion for participants on all sides of your dispute or problem.

According to Angela Harris, compassion is "not a thing you have or you don't, but is rather the ever-unfinished practice of trying to enlarge one's sympathies, trying to understand the history and prognosis of the varieties of suffering, and setting one's emotional and intellectual knowledges side by side

so that each can educate the other."[225] For social justice lawyers, it may be especially difficult to enlarge one's sympathies to include adversaries.[226] Yet human dignity reminds us that we are all interdependent. Humiliating or degrading an "other" not only destroys our conception of dignity as a shared, equal status, but it undermines the democratic value of participation, which requires the nonjudgmental valuing of others.

C. Ongoing Reflection (and Reflection-Responsive Action)

Re-visiting your goals and intentions is as important as determining them in the first place. As Charles Elsesser notes,

> The lawyer-client relationship is rife with power dynamics that do not evaporate simply because the long-term goals of the lawyer are aligned with that of the organizer or client. Therefore, we also believe that community lawyers must be engaged in a regular practice of self-scrutiny and self-reflection. If a lawyer wants to practice law in a respectful, responsible and accountable manner, we believe she has to be constantly evaluating her work to determine if it perpetuates the very systems of oppression that she is fighting.[227]

Adult learning theorists and law school clinicians have long taught that action must be accompanied by reflection. If the framework of dignity provides nothing else, it may be an additional tool for stepping back to question one's efforts, and a new language for understanding and responding to those reflections.

1. Look outside the "four corners" of your process.

The momentum of social justice work can make it easy to get stuck inside the artificial boundaries of a specific procedure or the rules of a certain legal setting (whether a courtroom, mediation, or organizing campaign). We might think of each setting as a game with its own set of rules and way to "win." For example, a courtroom is often described as its own universe of drama, rules, and language. A lawyer or a witness can successfully tell a story within the full bounds of those rules without even touching upon some of the most crucial, yet inadmissible, facts of a case. Or imagine negotiating an out-of-court settlement—how quickly can a conversation move to an argument about seemingly baseless numbers as pressure builds to find a resolution? Even within community organizing, a typical "one-on-one" conversation has a specific goal or "win"—to persuade someone to join a campaign or cause.

225. Harris, *supra* note 220, at 752.
226. *See* Harris, Lin & Selbin, *supra* note 219, at 2123–25.
227. Elsesser, *supra* note 131, at 400.

Because lawyers spend so much of their time complying with the rules of—and trying to win—whichever “game” they are playing, it is crucial to look outside those rules to gain perspective on the impact of the game. Does playing or winning promote dignity? How does the action inside that world affect outside resources, power dynamics, relationships, or motivations? Does the momentum of the process provide time to consult outside sources? Do you feel free to exit the process if it stops promoting your dignitary goals?

2. Consult a “miner’s canary” to provide early warning for when a process has gone awry.

Looking to “the bottom”—to the most marginalized or oppressed populations—can provide a fuller view of justice, as well as an early indicator of injustice.[228] The same may be true for participation and dignity. For example, do participants represent the quietest voices in a community as well as the loudest? How would the most disadvantaged members of a community frame their story? How would they prioritize the various aspects of dignity? As noted in the discussion of rights discourse and procedural justice above, the answers from the bottom may be unique and surprising. Advocates must listen carefully to those voices to evaluate and expand participatory efforts.

VII.
CONCLUSION

Most of the suggestions above will be familiar to social justice lawyers. These themes often represent our ideals when there is sufficient time and energy: determine your goals and processes in collaboration with the community, always be clear about why you’re doing what you’re doing, build in substantial time for reflection and planning, and focus on people rather than process. Yet the framework—and gravitas—of human dignity adds a valuable tool to the lawyer’s toolbox. It helps us reconsider why we value participation. It provides new language and cues to develop our awareness of dignitary priorities. And it keeps us, and the community we work with, focusing on questions even as we fight for more just answers.

228. *See generally* Matsuda, *supra* note 122.