A PARTICIPATORY APPROACH TO DAMAGES CLASS ACTIONS

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ABSTRACT

Although the 1966 amendments to Federal Rule of Civil Procedure 23 were originally designed to empower civil rights lawyers to advance systemic reform, the modern damages class has evolved into a primarily private, profit-driven enterprise. The resulting disconnect between plaintiffs' counsel and the constituencies they represent has raised enduring concerns about accountability, fairness, and legitimacy in aggregate litigation.

Drawing from the history of the injunctive class and the development of "movement lawyering," this Article contends that a participatory framework can reinvigorate the damages class action. Movement lawyering—an approach that emphasizes attorney accountability, collaboration with affected communities, and recognition of the limits of legal reform—offers a model through which plaintiffs' attorneys can more effectively engage class members, design fairer settlements, and strengthen broader social movements.

The Article further proposes that courts should incorporate class member participation into the adequacy-of-representation analysis under Rule 23(a)(4). By rewarding attorneys who foster class member "voice," partner with grassroots organizations, utilize digital organizing tools, and compensate class members for meaningful participation, courts can encourage practices that advance both procedural integrity and democratic participation.

Recasting the damages class action through a participatory lens realigns the device with Rule 23's original purpose: empowering collective action and facilitating social change. Movement-lawyering tactics thus offer a path to restore legitimacy, transparency, and democratic value to the modern class action.

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INTRODUCTION

In 1966, the Federal Rules Committee could not have foreseen the extent to which their amendments to Rule 23 would transform the American civil justice system.[1] Concerned about the limited reach of individual injunctions, the Committee's principle goal was to create an aggregation tool that civil rights attorneys could use to bring systemic challenges on behalf of entire groups of affected individuals, rather than proceeding plaintiff by plaintiff.[2]

But the Committee went further. In addition to the injunctive class, it created Rule 23(b)(3)—an aggregation mechanism for plaintiffs seeking monetary damages.[3] The drafters assumed the damages class action device would have "limited application" in fraud and antitrust cases.[4] Instead, over the next several decades, Rule 23(b)(3) would take center stage in courtrooms across the country, empowering plaintiffs with small claims that might not otherwise be economically viable to unite against corporate defendants and win landmark settlements that have impacted entire industries.[5]

With the rise of the damages class action came an increasingly powerful plaintiffs' bar. Unlike the civil rights lawyers who inspired the 1966 amendments, these for-profit firms often operated independently of the social movements the

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1. Arthur Miller, Samuel Issacharoff & Peter Zimroth, *An Oral History of Rule 23*, 74 N.Y.U. ANN. SURV. AM. L. 105, 111 (2018) [hereinafter *Oral History*]; *see also Amchem Prods. v. Windsor*, 521 U.S. 591 (1997) (explaining that Rule 23(b)(3) was the 'most adventuresome' innovation of the 1966 amendments) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INT'L. & COMPAR. L. REV. 497, 497 (1969)); David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1567 (2017) ("The possibility that Rule 23 would intersect with dispersed mass tort litigation—the litigation of personal injury claims arising from the diffuse exposure to injurious products or substances—seemed more remote. Even Rule 23's most ardent champions excluded it from their sense of the class action's domain"). *Cf.* David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy*, *1981-1994*, 86 FORDHAM L. REV. 1785, 1791 (2018) [hereinafter Marcus, *History Part II*] ("[W]hile the authors of the 1966 Rule did not fully anticipate the implications of the procedure they created, lawyers, judges, and others quickly understood that the recreated class action had major implications for a variety of substantive liability regimes.").

2. *Oral History*, *supra* note 1, at 109–10.

3. Fed. R. Civ. P. 23(b)(3).

4. *Oral History*, *supra* note 1, at 112, 115.

5. *E.g.*, Abbe R. Gluck, Elizabeth Chamblee Burch, & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J. FORUM 525 (2024) (discussing class actions against Johnson & Johnson, 3M, and Revlon that led the companies to seek bankruptcy protection). The creation of the modern class action device itself did not necessarily cause industries to face a "litigation explosion." Marcus, *supra* note 1, 1821 ("The mass tort class action did not catalyze but responded to the litigation explosion . . ."). In fact, corporate defendants "increasingly acquiesced in or moved for class certification" as a way to cap mass tort liability. *Id.* at 1824–25. *See also* David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1576, 1568–69 (2017) (discussing the deluge of mass tort asbestos litigation, which a "total institutional breakdown" and caused asbestos companies to file for bankruptcy).

Rule was designed to support. Their prominence has raised enduring concerns about the fairness, accountability, and legitimacy in aggregate litigation.[6]

Meanwhile, civil rights and public interest lawyers continue to rely on Rule 23(b)(2)—the injunctive class—as a vehicle to challenge institutional harm and push for systemic reform.[7] These lawyers have increasingly adopted a "movement lawyering" model, which emphasizes partnership with clients and social movements, rather than lawyer-driven litigation.

This Article explores the diverging evolution of the injunctive and damages class action devices and the distinct types of lawyering they foster. It argues that plaintiffs' attorneys litigating damages class actions should seek to recapture the spirit of Rule 23 and its historical roots in the Civil Rights movement by adopting "movement lawyering" principles. By working in collaboration with class members and affected communities, plaintiffs' attorneys can enhance class engagement, design fairer settlements, and strengthen the broader movements their cases implicate.

Part I traces the history of Rule 23 and the diverging development of the injunctive and damages classes. Part II explores how private plaintiffs' attorneys bringing damages claims can use movement lawyering strategies to better serve their classes and ultimately craft stronger settlements. These practices can ultimately democratize the class action and restore its original purpose as a tool for collective justice.

I.
A BRIEF HISTORY OF RULE 23

In the late nineteenth and early twentieth centuries, as the United States grappled with its discriminatory past and present amid rapid industrialization and the rise of national markets, courts faced increasingly complex cases.[8] In response to this growing complexity, the Supreme Court introduced the modern version of the class action rule in 1938, which provided that "[w]hen the question is one of common or general interest to many persons constituting a class so numerous as to

6. *See generally* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

7. *E.g.*, Thakur v. Trump, 2025 WL 1734471 (N.D. Cal. June 23, 2025) (putative class of university researchers alleged termination of grants constituted viewpoint discrimination); Pickett v. City of Cleveland, Ohio, 140 F.4th 300 (6th Cir. 2025) (class of Black homeowners certified in lawsuit alleging violations of the Fair Housing Act); Chicago Tchrs. Union, Loc. No. 1 v. Bd. of Educ. of City of Chicago, 797 F.3d 426 (7th Cir. 2015) (employment class action on behalf of Black teachers discriminated against based on race).

8. Stephen Yeazell, *Group Litigation & Social Context: Toward A History of the Class Action*, 77 COLUM. L. REV. 866, 867 (1977) (describing the "modern class action" as "a solution to the discrepancies that result from the imposition of a mass-production economy on an individualized system of litigation").

make it impracticable to bring them all before the court, one or more may sue or defend for the whole."[9]

The class action device quickly became a vital tool for civil rights litigators[10] at a time when Black Americans were largely excluded from political processes. Throughout the early twentieth century, lawyers pursued a "carefully planned [campaign] to secure decisions, rulings and public opinion on the broad principle" of racial desegregation in an attempt to dismantle the "separate but equal" doctrine established in *Plessy v. Ferguson*.[11] Led by Thurgood Marshall, lawyers at the NAACP selected cases strategically, viewing each lawsuit within the broader "context of jurisprudential development rather than as an isolated private lawsuit."[12] Marshall's strategy paid off in 1954 when the Civil Rights Movement achieved its momentous win in *Brown v. Board of Education*,[13] overturning *Plessy v. Ferguson*.[14]

Still, the 1938 class action proved too weak to fully support systemic change. Under its terms, favorable judgments bound only "named plaintiffs and class members who intervened."[15] This limitation undermined desegregation efforts. In order for the litigation strategy to be effective, desegregation orders needed to apply more broadly. A successful desegregation lawsuit on behalf of one plaintiff would be of little use if it did not protect all other affected individuals.[16]

Recognizing this problem, the Federal Rules Advisory Committee undertook major revisions to Rule 23 in 1966.[17] The Committee understood that, without some mechanism to aggregate desegregation cases, civil rights lawyers would be forced to proceed plaintiff by plaintiff, school by school, to enforce *Brown*.[18] Civil rights lawyers needed an aggregation tool that would allow them to represent all individuals affected by the discriminatory policy of an institution.[19]

The Federal Rules Committee sought to remedy this issue by allowing "absent class members"—individuals who were not parties to a litigation—to be bound by a judgment. The amended Rule 23 introduced several procedural safeguards to protect absent class members' interests. First, all classes had to satisfy

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9. John G. Harkins, Jr., *Federal Rule 23 - The Early Years*, 39 ARIZ. L. REV. 705, 705 (1997) (citing JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 231 (1930)).

10. Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 328–29 (2017).

11. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals & Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 472–73 (1976).

12. *Id.* at 473.

13. 347 U.S. 483 (1954).

14. 163 U.S. 537 (1896).

15. Malveaux, *supra* note 10, at 329–30.

16. *Oral History*, *supra* note 1, at 109.

17. *See id.* at 109–10,

18. *Id.* at 109.

19. *Id.* at 109–10; *See also* Malveaux, *supra* note 10, at 327 (explaining that Rule 23 "enable[d] structural reform and broad remedial relief").

four prerequisites: (1) numerosity—the class had to be "so numerous that joinder of all members [was] impracticable"; (2) commonality—the class's claims had to have "questions of law or fact" in common; (3) typicality—the class representative had to have claims that were "typical of the claims . . . of the class"; and (4) adequacy of representation—the class's interests had to be "fairly and adequately" protected by the class representative.[20]

Once these prerequisites were met, the Rule established three avenues through which to certify a class. The central avenue was the injunctive class, designed with civil rights litigants in mind.[21] It allowed groups to seek uniform injunctive or declaratory relief against misconduct and discriminatory practices that "appl[ied] generally to the [entire] class."[22] As the Committee explained, such actions included those "in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."[23]

The Committee also envisioned a separate application for the class action device: Rule 23(b)(3), the damages class.[24] This provision allows aggregation of individual monetary claims where (1) common issues of fact and law "predominate" and (2) the class action device is a "superior" method of adjudication.[25] The damages class was intended to make the courts accessible to individuals with small, negative-value claims that could not be litigated individually.[26]

Over time, however, Rule 23 has evolved far beyond its drafters' original intent.[27] The damages class, initially thought to have only "limited application,"[28] became the dominant form of class action litigation. Plaintiffs have used it to hold entire industries accountable, from tobacco and asbestos to oil and pharmaceuticals.[29] The following sections trace how the injunctive and damages classes developed along distinct paths, shaped by the attorneys who used them.

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20. *See* FED. R. CIV. P. 23(a).

21. *Oral History*, *supra* note 1, at 109.

22. *See* FED. R. CIV. P. 23(b)(2).

23. Malveaux, *supra* note 10, at 332 (citing FED. R. CIV. P. 23(b)(2) Advisory Committee's notes to 1966 amendment).

24. *Oral History*, *supra* note 1, at 111.

25. FED. R. CIV. P. 23(b)(3).

26. *Oral History*, *supra* note 1, at 115.

27. *Id.* at 122.

28. *Id.* at 112.

29. *See, e.g.*, Samuel Issacharoff & Adam Littlestone-Luria, *Remedy Becomes Regulation: State Making After the Fact*, 74 DEPAUL L. REV. 213, 215–17 (2025).

A. The Injunctive Class and the Development of Movement Lawyering

Civil rights litigation was the driving force behind the 1966 reforms to Rule 23.[30] The Committee's revisions succeeded in empowering lawyers to seek structural remedies through aggregation: federal courts began granting class certification in desegregation cases involving with "education, housing, public accommodations, and employment."[31] Beyond desegregation, class actions became a tool for achieving "systemic reform to major institutions such as prisons, foster care, and public welfare."[32] The lawyers leading these early class actions were central figures in the civil rights movement and the other movements it inspired—the women's, LGBTQ, and disability rights movements.[33]

While these judicial victories helped drive significant social and legislative change, they also provoked a conservative countermovement. The Republican Party "launched an explicit strategy to use race to attract white voters"[34] and invested in building a conservative legal infrastructure.[35] The 1970s and 1980s saw stasis and retrenchment,[36] and the Republican Party secured multiple decisive political victories.[37] In the decades after *Brown*, "residential segregation [] increased in nearly every American city," "de facto school segregation in all large urban areas [] intensified," racial economic inequality deepened, and Black political participation floundered.[38] The Supreme Court "reined in robust certification of civil rights cases."[39]

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30. *See* John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions, in 2 Working Papers of the Advisory Comm. on Civil Rules on Proposed Amendments to Civil Rule 23*, 260, 266 (Admin Office of the U.S. Courts ed., 1997), http://www.uscourts.gov/sites/default/files/workingpapers-vol2.pdf [https://perma.cc/8PD8-5XQ2]. ("If there was [a] single, undoubted goal of the [C]ommittee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation.").

31. Malveaux, *supra* note 10, at 359.

32. *Id.* at 360.

33. *See generally* Lenore Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization In The LGBT Rights Movement*, 17 U. Pa. J.L. & Soc. Change 107, 112 (2014) (discussing the role of lawyers in the LGBT Rights Movement); Sarah London, *Reproductive Justice: Developing A Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 71, 84 (2011) (discussing the role of lawyers in the reproductive rights movement); *see also* Bell, *supra* note 11 (discussing the role of lawyers involved in school desegregation and educational equity litigation).

34. Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1670–71 (2017).

35. *Id.* at 1678–79.

36. *Id.* at 1676–77; *see also* Malveaux, *supra* note 10, at 361.

37. Cummings, *supra* note 34, at 1676–77, 1678.

38. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 12 (1994).

39. Malveaux, *supra* note 10, at 361.

As legal institutions grew less receptive to civil rights claims, scholars began to reflect on the strategies of civil rights movements and the limits of Rule 23.[40] These scholars, members of the Critical Legal Studies ("CLS") movement, advanced two main critiques. First, they argued that class action lawyers were often insufficiently accountable to their clients and the communities they served more broadly.[41] Second, they questioned whether social movements should center litigation and the pursuit of formal legal rights, rather than collective political and social power.[42] These scholars suggested that movements should focus on a multifaceted approach to social change that decenters legal reform. This Section examines both critiques and introduces the framework that emerged in response: "movement lawyering."

1. Problem I: Constituent Accountability

CLS scholars first argued that the hierarchical, lawyer-driven model of the twentieth century social movements gave attorneys too much power and too little accountability. In his seminal work *Serving Two Masters: Integration Ideals & Client Interests in School Desegregation Litigation*, Derrick Bell contended that civil rights lawyers often unilaterally made decisions about the goals of the litigation without consulting their clients,[43] violating traditional legal ethics principles, which require lawyers to be "loyal to their individual client's interests."[44] According to Bell, many Black parents, for example, prioritized improving the quality of segregated schools over pursuing desegregation itself, a preference often disregarded by lawyers focused on busing remedies and test cases.[45] Bell questioned how civil rights lawyers could reconcile their dual roles as client advocates and movement leaders within the traditional model of legal ethics.[46]

Legal scholar and professor William B. Rubenstein similarly described how early civil rights attorneys treated litigation decisions.[47] He explained that early civil rights attorneys viewed litigation decisions not as ones to be made by the

40. *See* THE INT'L LIBR. OF ESSAYS IN L. & SOC'Y, LAW AND SOCIAL MOVEMENTS 4 (Michael McCann ed., 2004).

41. *See, e.g.*, Bell, *supra* note 11.

42. *See, e.g.*, Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 26 (1994) (suggesting that legal victories can sometimes actually "impede further progressive change"); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 463 (2004) ("Litigation is unlikely to help those most desperately in need. We have already seen that the justices, reflecting broader social mores, are unlikely to side with litigants who lack significant social standing. Even once litigants secure Court victories, they must have a certain amount of power in order to enforce them.").

43. Bell, *supra* note 11, at 471–72.

44. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623, 1652 (1997); *see also* MODEL RULES OF PRO. CONDUCT r. 1.2(a) & r. 1.2 cmt. (A.B.A. 1983).

45. *Id.* at 482.

46. *Id.* at 471.

47. Rubenstein, *supra* note 44, at 1633.

client as traditional legal ethics requires, but as "tactical questions" to be made by leaders of the civil rights movement.[48] Individual plaintiffs were viewed as "merely placeholders in their campaign."[49] This approach allowed lawyers to subordinate client interests in service of the broader movement, reinforcing a top-down structure that sidelined the very communities civil rights litigation purported to serve.

2. Problem II: Prioritizing Legal Reform

A second critique extended from the first: that civil rights lawyers' overreliance on litigation meant social movements focused too heavily on legal reform at the expense of broader movement building and political organizing.[50] CLS Scholars such as Mark Tushnet warned that pursuing formal legal rights could not only distract from substantive social change, but also constrain future reform.[51]

According to Tushnet, the articulation of legal rights could ultimately be weaponized against movements.[52] For example, while the Wagner Act of 1937, which codified the right of private sector employees to organize unions, was a success for workers, some critics have argued that the legislation ultimately "provided a strong ideological defense for the exercise of management prerogatives over a wide domain."[53] Critics also argue that, because rights are inherently individualistic, and not connected to specific groups or political movements, they can be co-opted by anyone.[54] Conservatives, for example, have coopted the individual

48. *Id*, at 1633–64.

49. *Id.*

50. *See generally* Joel F. Handler, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); Carpenter, *supra* note 33, at 112 ("As in other social justice movements, the expertise of lawyers has been given a position of special prominence in the LGBT rights movement and has contributed heavily to the shaping of litigation priorities within and across agencies.").

51. *See, e.g.*, Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2747 (2014) (arguing that that "the articulation of legal rights often proceeds without comparable attention to the development of remedies"); Tushnet, *supra* note 42, at 26 (purporting that a singular focus on legal rights ignores vital extralegal organizing and political efforts, which could bring about concrete social change); Tushnet, *supra* note 42, at 26. *Cf.* Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377–81 (1988) (arguing that "[c]asting racial issues in the moral and legal rights rhetoric of the prevailing ideology helped create a political controversy, without which the state's coercive function would not have been enlisted to aid Blacks").

52. Tushnet, *supra* note 42, at 26.

53. *Id.*

54. *Id.*

rights of free speech, due process, and equal protection to avoid regulation,[55] dismantle affirmative action,[56] and discriminate on the basis of "religious freedom."[57]

According to this critique, twentieth century litigation-focused movements often reinforced existing power structures rather than dismantling them, ultimately preventing more radical social change.[58] Although legal victories like *Brown* were momentous, they failed to address persistent material inequalities in housing, healthcare, and, economic opportunity.[59] By focusing on formal legal rights, the civil rights movement risked sidelining strategies that could have achieved deeper, structural societal transformation.[60]

These critiques extend beyond the civil rights movement. In the LGBTQ rights movement, scholars have similarly criticized the power wielded by attorneys in setting the movement's agenda.[61] Professor Leonare F. Carpenter described the "shift away" from "marches, protests, the AIDS crisis, and visibility campaigns to successful impact cases like *Lawrence v. Texas*, *Goodridge v. Department of Public Health*, and [] *United States v. Windsor*."[62] According to Carpenter, LGBT-rights litigators' "issue prioritization methods" have been described by activists as "exclusionary and elitist."[63]

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55. *E.g.*, John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24, 249 (2015) (finding that "corporations have increasingly displaced individuals as direct beneficiaries of First Amendment rights" and that the Court's "docket now [is] roughly split between business and individual cases"); Citizens United v. Fed. Election Comm'n., 558 U.S. 310, 316 (2010); Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n. of Cal., 475 U.S. 1 (1986).

56. *E.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

57. *E.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018).

58. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 56–74 (1987); Crenshaw, *supra* note 51, at 1352–56; Tushnet, *supra* note 42, at 26. Of course, this argument comes from within the legal community, which makes it somewhat circular. It is unclear how involved critical legal scholars are within the movements themselves. These arguments may fail to capture how activists and communities actually feel about legal reform. However, it seems reasonable to suggest that the more distant and unaccountable lawyers become from their clients, the less likely they are to pursue an agenda aligned with those clients. This Article generally accepts the argument that keeping lawyers accountable to movements is largely a good thing.

59. *See* Crenshaw, *supra* note 51, at 1377–79.

60. Klarman, *supra* note 38, at 12. Other scholars argue that the achievement of formal legal rights has been understated by the Critical Legal Studies movements. *See e.g.*, Crenshaw, *supra* note 51, at 1356 (arguing that the Critical Legal Studies critique of the Civil Rights movement failed to "appreciate fully the transformative significance of the civil rights movement in mobilizing Black Americans and generating new demands"); LAW AND SOCIAL MOVEMENTS, *supra* note 40, at 4 (recognizing that, while "litigation alone rarely advances significant social change," legal rights advocacy still "provide[s] a useful resource for social movement building and strategic political action").

61. Carpenter, *supra* note 33, at 107.

62. *Id.*

63. *Id.*

3. Movement Lawyering as a Solution

In response to these critiques, CLS scholars and practitioners have developed the concept of "movement lawyering," a model that seeks to make lawyers more accountable to their clients and the broader movements[64] they serve, while recognizing the inherent limits of legal reform as a tool for social change.[65]

The "movement lawyering" model asks impact lawyers to shift the way they view themselves within individual legal actions and broader movements to both center the voices of the least powerful and most impacted communities in the movement and to ensure accountability to the client.[66] It responds to the accountability problem raised by Bell by asking attorneys to view themselves not as leaders, but as servants of a movement, working in partnership with other stakeholders (e.g., politicians, activists, impacted community members).[67] Under this model, attorneys should not make strategic decisions that would affect the broader movement without engaging with these stakeholders.

Traditional legal ethics rules require attorneys to set aside their personal and political commitments or opinions in service of the client's goals.[68] Yet, as Bell observed, the top-down model of impact lawyering often subverted these principles by allowing the strategic priorities of attorneys to replace the objectives of their clients. At the same time, the traditional ethics framework offers little guidance for lawyers engaged in politically motivated or movement-based advocacy.

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64. Political scientist Charles Tilly defines a "movement" as comprising "(1) campaigns of collective claims on target authorities; (2) an array of claim-making performances including special-purpose associations, public meetings, media statements, and demonstrations and (3) public representations of the cause's worthiness, unity, numbers, and commitment." CHARLES TILLY, ERNESTO CASTAÑEDA & LESLEY J. WOOD, SOCIAL MOVEMENTS, 1768–2018, 10 (2019). However, as legal scholar Michael McCann observes, these social movements can be dynamic and diffuse, and can "often overlap with, grow out of, or transform into other forms of organization over time in complex, elusive ways." LAW AND SOCIAL MOVEMENTS, *supra* note 40, at xiv. As a result, the "communities" that impact litigators serve are not always easily identifiable or static. Rubenstein, *supra* note 44, at 1631. Accordingly, this Article defines "social movements" as political efforts that (1) seek systemic change; (2) employ a wide range of tactics including media campaigns, protests, strikes, political campaigns, and litigation; and (3) are made up of "non-elites whose social position reflects relatively low degrees of wealth, prestige, or political clout." LAW AND SOCIAL MOVEMENTS, *supra* note 40, at xiv. This Article also recognizes that movements often look radically different from one another, are constantly changing, and often face inter-movement conflict. Rubenstein, *supra* note 44, at 1631–32.

65. *E.g.*, Cummings, *supra* note 34, at 1648. *See* KLARMAN, *supra* note 42; GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992) (advocating for an equal partnership between lawyer and client).

66. *See, e.g.*, Cummings, *supra* note 34, at 1646–54; Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 452–59 (2018); Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 101–03 (2022).

67. Lobel, *supra* note 66, at 102.

68. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.2(a) & (b) (A.B.A. 1983); *See also* Rubenstein, *supra* note 44, at 1625 (explaining that the rules of professional ethics "require an attorney to be, above all else, loyal to her individual client's desires").

Should these lawyers, as members of social movements themselves, be expected to set aside their own political goals or motivations?

These tensions are amplified in the class action context. Class counsel often has minimal or no direct contact with the class members they represent. Attorneys usually develop the litigation independently, identifying claims, drafting the complaint, and, as a result, shaping the contours of the class itself.[69] Class members may not even learn they are represented in a lawsuit until they receive notice of settlement.[70]

Moreover, because the attorney represents a diffuse and often disconnected group of plaintiffs, she may face conflicting demands from her clients. The class action lawyer may also have to make difficult decisions on how to prioritize the immediate goals of class members versus the longer-term goals of the broader movement the litigation is intended to serve. Under the traditional model, it is unclear how class counsel can reconcile these competing obligations.

Rule 23 partially addresses this issue by requiring class counsel to represent the interests of the *entire* class, rather than any individual class member.[71] Courts have also recognized that traditional professional ethics rules must be altered in the class context.[72] The Third Circuit, for example, has held that class counsel does not need to be disqualified merely because a class member objects to a settlement, even though this would seem to create a conflict under normal circumstances and class counsel is now opposed to the interests of the objecting class member.[73] But these adjustments only partially respond to the accountability concerns issues raised by Bell.

The movement lawyering approach offers a more substantive solution. It seeks to preserve the spirit of traditional legal ethics—centering the clients' goals and interests—while granting lawyers flexibility to exercise leadership and strategic judgment. The movement lawyering model asks attorneys to reimagine their role not as leaders directing a movement or lawsuit, but as collaborators working alongside clients and movement stakeholders (e.g., politicians, activists, and

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69. *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341 ("Class actions almost invariably come into being through the actions of lawyers—in effect, it is the agents who create the principles.").

70. *See* John C. Coffee Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 425 (2000) ("Typically, [notice] will occur after preliminary judicial approval of the settlement.").

71. *See* FED. R. CIV. P. 23(g)(4) ("Class counsel must fairly and adequately represent the interests of *the class*.") (emphasis added).

72. *See* Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 587 (2003).

73. Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 589–90 (3d Cir. 1999) (recognizing that traditional rules on attorney-client relations and conflicts were not drafted with class action procedures in mind and should not "be mechanically applied" to problems arising in class action litigations); *see also* Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 127 (1996) ("[C]onflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying the class action rules.").

impacted individuals).[74] Under the movement lawyering model, attorneys and movement participants are equal partners, each with distinct expertise and experience.[75]

While engaging with and centering clients is more feasible in individual lawsuits, it is still possible in class actions where class members are more dispersed. Impact litigator Jules Lobel provides a compelling framework for engaging class members as partners in impact litigation.[76] In challenging California's solitary confinement policies, Lobel and his team worked directly with incarcerated plaintiffs to choose class representatives, identify claims, negotiate a settlement agreement, and monitor its implementation.[77] Lobel credits the class members' "legal and practical knowledge gained from years of challenging solitary confinement" as crucial to the case's success.[78] Working as partners with the class members also helped realize a broader movement goal of "creating a more egalitarian society" by "breaking down the hierarchy of expertise, in which the skills of professionals such as lawyers dominate and deny the expertise of the people those professionals seek to aid."[79] In addition, Lobel argues that class member participation gives clients a voice, which "affirms the plaintiffs' dignity and humanity."[80] In his view, lawyers and clients should have an "equal dialogic relationship, with each bringing skills and insights to their mutual struggle," even in complex litigation.[81]

Professor Rubenstein has also proposed alternative models to engage class member participation, suggesting that a democratic model for decision-making could lend legitimacy to impact litigation that affects group rights.[82] In his view, a democratic model, in which stakeholders in the movement vote on litigation goals, could also ensure community involvement and create a more unified movement strategy.[83] Although he acknowledges practical difficulties, such as identifying a coherent constituency and motivating broad participation,[84] Rubenstein's model underscores a central tenet of movement lawyering: that those most affected by legal action should have a voice in shaping it.[85] Ultimately, Lobel and Rubenstein's proposals both reflect the principle in movement lawyering that non-

74. Lobel, *supra* note 66, at 102.
75. *See id.*, at 129–30.
76. *Id.*
77. *Id.* at 87–88.
78. *Id.* at 92.
79. *Id.* at 93.
80. Lobel, *supra* note 66, at 96.
81. *Id.* at 93.
82. Rubenstein, *supra* note 44, at 1654–56.
83. *Id.* at 1656.
84. *Id.* at 1656–57.
85. *Id.* at 1659.

lawyers who have lived experiences of legal and social systems are just as indispensable to movements as legal expertise.[86]

The movement lawyering model also responds to the second CLS critique that social movements overprioritize legal reforms. Movement lawyers situate legal reform as just one of many interconnected movement strategies, including "building public support, strengthening grassroots participation, reinforcing the organizational capacity of the movement itself, and striving for lasting, long-term results."[87] The model instructs lawyers not only to pursue legal reform in court, but also to

> "educat[e] community members about their rights, advis[e] and defend[] protestors, research[] and draft[] policy language, writ[e] legal opinions to support policy positions, counsel[] movement organizations on legal levers that may be pulled to exert pressure on policy makers or private actors in negotiating contexts, and devis[e] mechanisms for monitoring the enforcement of policy."[88]

Movement lawyers view legal reform as powerful only insofar as it is motivated by and motivates political and popular reform. As Lani Guinier and Gerald Torres argue, "social movements are critical . . . to the cultural shifts that make durable legal change possible."[89] Mark Tushnet, similarly, asserts that "[i]t takes work . . . to connect ideological victories [in court] to material outcomes" in society.[90]

The injunctive class remains a vital tool for civil rights litigators. Yet, unlike the civil rights attorneys of the mid-twentieth century, many contemporary impact litigation attorneys have adopted the movement lawyering model, which provides a framework for using the injunctive class action not just as a procedural device, but as a participatory vehicle for advancing collective justice. The following Section will explore how the damages class action evolved along a markedly different path.

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86. *See* Cummings, *supra* note 34, at 1684 (describing how the National Day Labor Organizing Network and Black Movement Law Project relied on the expertise of community leaders and non-lawyer activists).

87. Carle & Cummings, *supra* note 66, at 457, 452–59. *See also* Lobel, *supra* note 66, at 92 (citing Cummings, *supra* note 34, at 1646–54; Guinier & Torres, *supra* note 51, at 2743–49; Deborah N. Archer, *Political Lawyering for the 21st Century*, 96 DENV. L. REV. 399, 401–02, 417 (2019).

88. Carle & Cummings, *supra* note 66, at 458.

89. Guinier & Torres, *supra* note 51, at 2743.

90. Tushnet, *supra* note 42, at 25.

B. The Alternative Path of the Damages Class Action

The creation of Rule 23 transformed the American civil justice system,[91] which until then, had largely consisted of small, bilateral disputes.[92] With the introduction of a strengthened class action device, large groups of individuals could now "legitimately seek transformative changes to social, economic, or political orders through lawsuits."[93] Some scholars have argued that the emergence of the class action created a "public law" model of litigation, which functioned as a quasi-"political or administrative process" through which groups could "mobilize claims" and "vindicate substantive policy."[94] Under this view, class members are not merely individuals asserting private legal rights, but a "single jural entity" collectively implementing a regulatory regime onto powerful industries or corporate actors.[95]

Despite its potential to hold corporate wrongdoers accountable, the damages class was not without problems. Members of the Rules Committee raised questions about the constitutional implications of binding absent class members to monetary judgments without their consent or day in court.[96] To address these due process concerns, the Committee introduced additional safeguards for the damages class beyond the four prerequisites in Rule 23(a). First, damages classes must clear two additional procedural hurdles to be certified: (1) common "questions of law or fact" must "predominate" over individual questions, and (2) the class action must be "superior to other available methods" of adjudication.[97] Second, damages class members must be given the right to opt out of the lawsuit. Third, class

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91. *See Oral History*, *supra* note 1, at 111; s*ee also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (explaining that Rule 23(b)(3) was the 'most adventuresome' innovation of the 1966 amendments) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 497 (1969)).

92. *See* Malveaux*, supra* note 10, at 360 (explaining that the "traditional model of 'bipolar litigation between two parties, in which the remedy is retrospective and self-contained' had to give way to a model that joined multiple parties with public and private interests, in which the remedy was forward-looking and extensive") (quoting Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (1997)). The class action and the contingency fee did exist before the 1966 overhaul but were much less utilized. *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 217 (1983).

93. Marcus, *History Part II*, *supra* note 1, at 1807.

94. *Id.*

95. *Id.* at 1808–09 (citing Abram Chayes, *The Supreme Court 1891 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 27 (1982)).

96. Malveaux, *supra* note 10, at 348 (2017) (citing Advisory Committee on Civil Rules Dissenting View of Committee Member John P. Frank (May 28, 1965), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-7107, 2, 2–3 (Cong. Info. Serv.)). *See also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846–47 (1999) (discussing the "inherent tension between representative suits and the day-in-court ideal").

97. FED. R. CIV. P. 23(b)(3).

members must be allowed to participate directly in the lawsuit.[98] These procedural rules act as safeguards to protect the interests of absent class members and to regulate plaintiffs' attorneys who have little contact with absent class members.[99]

Despite these additional safeguards, courts have expressed concerns about whether absent class members' rights are adequately protected—particularly in cases led by private, profit-driven plaintiffs' firms.[100] In *Amchem Products Inc. v. Windsor*, for example, the Supreme Court rejected a class action settlement that would have paid out a massive award to asbestos victims.[101] The Court held that common issues did not predominate[102] and that class members whose injuries had not yet manifested were not adequately represented in the litigation because their interest in slow payouts over time conflicted with the interests of current claimants who desired an immediate payout.[103] Although the Court acknowledged that plaintiffs had a "common interest in a fair compromise" and a prompt adjudication of their claims, it concluded that the legislature was better fit to respond to such a complex matter.[104] While the Court's concern about conflicts of interests was arguably justified, its formalistic approach has made it difficult for subsequent mass tort class actions to survive. Indeed, many commentators viewed *Amchem* as sounding the death knell for mass tort class actions.[105]

Congress further constrained Rule 23 in 2005 when it enacted the Class Action Fairness Act (CAFA).[106] CAFA redirected class actions with more than 100 class members seeking amounts over five million dollars to federal courts, which were generally regarded as more favorable to corporate defendants than state courts.[107]

However, since *Amchem* and the passage of CAFA, plaintiffs' lawyers have developed strategies to navigate these restrictions. Post-*Amchem*, practitioners have increasingly used subclassing, Rule 23(c)(4) issue classes, or other forms of

98. *Id.* 23(c)(2)(B)(iv).

99. *See* Issacharoff, *supra* note 69, at 341.

100. *See* Coffee, *supra* note 70, at 217–18, 231 (citing federal judges that have chastised class action attorneys for "exploit[ing]" the legal system and defendants' attorneys that have "long complained" that plaintiffs' attorneys tend to "file a large number of actions based on only a cursory familiarity with the underlying transactions"); Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting) (To plaintiffs' attorneys, "a juicy bird in the hand is worth more than the vision of a much larger one in the bush, attainable only after years of effort not currently compensated and possibly a mirage."); John Beisner & John Masslon, *The Camp Lejeune Plaintiffs' Bar Is Monetizing Tragedy*, BLOOMBERG LAW (Mar. 23, 2023), https://news.bloomberglaw.com/us-law-week/the-camp-lejeune-plaintiffs-bar-is-monetizing-tragedy [https://perma.cc/2RTD-9LMU].

101. 521 U.S. 591, 622 (1997).

102. *Id.* at 622–23.

103. *Id.* at 626–27.

104. *Id.* at 622–23.

105. *E.g.*, Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475–76 (2005).

106. Class Action Fairness Act of 2005, 28 U.S.C.A. §§ 1453, 1711–15 (West 2016).

107. Cabraser, *supra* note 105, at 1476 n. 3, 4.

aggregation like joinder or multi-district litigation ("MDL").[108] In some instances, these options better protect absent class members' interests by increasing class cohesion and participation.

Legal scholars and practitioners Samuel Issacharoff and Elizabeth Cabraser have argued that increased class member participation itself can serve as an independent safeguard for due process, beyond the procedural protections built into Rule 23.[109] They observe that, despite *Amchem*, courts continue to certify classes with high class member participation.[110] In *In re NFL Concussion*, *Deepwater Horizon*, and *Volkswagen*, for example, class members were "active, contact[ed] class counsel frequently, ma[de] demands for consumer service, [were] frequently represented by independent counsel, and ha[d] points of intermediate organization on Facebook or Twitter that allow them to function more like a group."[111] This participation made class certification more doctrinally acceptable than the class in *Amchem.*[112] In *NFL Concussion*, for example, the court concluded that the "principal concern" of adequacy of representation "driving *Amchem*" was "misplaced" in light of the active engagement by class members. [113]

Today, plaintiffs' attorneys continue to use damages class actions, MDLs, and other forms of aggregate litigation to redress societal injustices and hold corporations accountable for their misconduct.[114] While these lawsuits do important work,[115] they differ fundamentally from the movement-driven litigation that originally shaped Rule 23. Courts, recognizing the gap between plaintiffs' lawyers and the clients they serve, have responded by imposing stricter requirements on class

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108. *See id.* at 1478; Elizabeth Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 848 (2017).

109. *E.g.*, Cabraser & Issacharoff, *supra* note 108, at 849. As discussed above, Professor Lobel has also explored the benefits of a participatory framework in class actions, describing a class action brought on behalf of incarcerated individuals against California in which class members and lawyers worked together as partners throughout the litigation. *See generally* Lobel, *supra* note 66.

110. Cabraser & Issacharoff, *supra* note 108, at 859.

111. *Id.* at 865.

112. *Id.* at 866.

113. In re NFL Players' Concussion Injury Litig., 821 F.3d at 433.

114. *E.g.*, THE DAILY: *A Strategy to Treat Big Tech Like Big Tobacco* (N.Y. TIMES, Nov. 15, 2023) https://www.nytimes.com/2023/11/15/podcasts/the-daily/meta-lawsuit.html [https://perma.cc/D8TJ-V754]; Adam Gabbatt, *Wave of lawsuits against US gun makers raises hope of end to mass shootings*, THE GUARDIAN (May 27, 2023) https://www.theguardian.com/us-news/2023/may/27/gun-lawsuits-manufacturer-sellers-crimes [https://perma.cc/YSC8-ZWAJ]; Clark Mindock, *Exxon, Chevron ask US Supreme Court to toss ruling in Honolulu climate change suit*, REUTERS (Feb. 28, 2024) https://www.reuters.com/legal/government/exxon-chevron-ask-us-supreme-court-toss-ruling-honolulu-climate-change-suit-2024-02-28/ [https://perma.cc/CB4K-9HL7]; David Gelles, *Climate Change Was on Trial in Montana*, N.Y. TIMES (Aug. 15, 2023) https://www.nytimes.com/2023/08/15/climate/climate-change-was-on-trial-in-montana.html [https://perma.cc/TW9B-GPSH].

115. *See* Lee Hepner, *The Case for Ambulance Chasing Lawyers*, BIG BY MATT STOLLER (Nov. 29, 2023) https://www.thebignewsletter.com/p/the-case-for-ambulance-chasing-lawyers [https://perma.cc/H5R8-KE5Q].

certification in cases like *Amchem*. But *Amchem*'s formalism has also made class actions less accessible to plaintiffs.

The participatory model proposed by Issacharoff and Cabraser offers a path forward. By fostering class member participation and collaboration, the participatory model can bridge the gap between class counsel and the constituencies they represent. So far, this model has only been effective in cases involving well-resourced, more limited, and higher value classes, where class members are more incentivized to participate. The next Part argues that plaintiffs' attorneys should also attempt to increase participation in more dispersed lawsuits by using movement lawyering tactics.

II.
CENTERING MOVEMENTS IN DISPERSED DAMAGES CLASS ACTIONS

To replicate the participatory model in dispersed damages actions, plaintiffs' lawyers should emulate movement lawyers today, who have developed client-centric practices that better reflect the political and social roots of Rule 23. By adopting these approaches, plaintiffs' attorneys can not only better represent their clients' interests, but also create stronger settlements and ultimately better serve social movements. This Part expands on Issacharoff and Cabraser's participatory model by (1) advancing the normative claim that plaintiffs' attorneys should pursue class member participation in more cases, even if it is economically difficult, and (2) outlining practical strategies for fostering engagement among class members in more diffuse and disengaged class actions.

A. Substantive Benefits of Movement Lawyering in Damages Actions

A movement lawyering approach to damages class actions can substantively benefit both individual lawsuits and broader movements. First, by engaging directly with class members and movements more broadly, plaintiffs' attorneys can expand their understanding of the circumstances leading to a litigation.[116] This deeper perspective can enable lawyers to craft more compelling cases and negotiate better settlements. Collaboration with movement organizations and activists, particularly through digital and grassroots channels, can also help attorneys identify and engage class members post-settlement, ensuring that settlement funds are more effectively distributed.

Second, movement lawyering strategies can provide substantive benefits that extend beyond the scope of litigation. Engagement with class members can strengthen social movements and lay the groundwork for future advocacy. As legal scholar Lucie E. White observed, even unsuccessful litigation can provide an

116. *See* 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, 540 (1989) (discussing the benefits of "[i]nvolving poor people in the litigation process" because it can "give the plaintiffs new insights into the welfare system's inner workings [and] give their lawyers new respect for the acquired wisdom and skills of their clients").

opportunity for "participatory, educative experiences for the client," which can mobilize clients to be more politically engaged in a broader movement.[117] Movement lawyers thus view lawsuits not only as instruments for financial recovery, but also as opportunities for political engagement. As White explains, a "group lawsuit is a community event as well as a legal proceeding; it offers a medium for testimony and confrontation."[118] In this way, a class action can allow class members—often individuals with limited individual political power—to directly confront large, politically powerful corporate entities.

A participatory model of damages class actions can therefore create a space for political engagement. When damages class actions are linked to broader movements—consumer rights, economic justice, corporate accountability, or racial justice—they not only hold specific corporate defendants accountable, but also serve as opportunities to raise political consciousness and organize new communities. Jules Lobel's work in the California prison litigation illustrates this dynamic: the case not only achieved concrete legal reform, but also organized and empowered a community of incarcerated individuals.[119]

Engaging and educating class members ultimately benefits both social movements and future legal actions. In the consumer context, for example, attorneys who collaborate with individual consumers and consumer advocacy groups can raise awareness about corporate abuses and demystify the class action process. Many consumers or tort victims remain unaware of the collective power that class actions and other forms of aggregate litigation can provide, particularly in negative value lawsuits where individual claims are too small to litigate independently. A consumer who has previously been engaged by an attorney through movement lawyering tactics is more likely to participate in future actions, submit claims, or assist in organizing efforts, instead of ignoring a class notice she receives in the mail.

B. Procedural Benefits of Movement Lawyering in Damages Actions

Plaintiffs' attorneys should also adopt movement lawyering tactics to strengthen their settlements and ultimately make them more judicially acceptable. As discussed in Part I, one of the central procedural challenges in class action litigation is determining when non-parties may be bound by its outcome.[120] In *Hansberry v. Lee*, the Supreme Court held that the Due Process Clause of the Constitution requires that a nonparty may only be bound by a prior judgment if she was "adequately represented" in the earlier lawsuit.[121] The 1966 amendments to

117. *Id.* at 538.
118. *Id.* at 540.
119. *See supra* p. 112–13.
120. Cabraser & Issacharoff, *supra* note 108, at 847.
121. 311 U.S. 32, 40, 43 (1940).

Rule 23 codified this principle in Rule 23(a)(4), which requires that the "representative parties will fairly and adequately protect the interests of the class."[122]

Beyond subsection (a)(4), the entirety of Rule 23 functions as a procedural framework to safeguard the rights of absent class members. At various stages throughout the litigation, Rule 23 requires courts to protect absent class members' interests. Courts appoint class counsel;[123] at the class certification stage, they evaluate whether the class satisfies the Rule 23 prerequisites, including the adequacy of representation requirement;[124] they must approve any proposed settlement;[125] and finally, they review the reasonableness of the proposed attorneys' fees.[126] At each juncture, the court reviews whether the plaintiffs' attorney adequately protected the interests of absent class members who will be bound by the ultimate settlement or judgment.

These procedural protections can be mapped onto three mechanisms commonly used to describe how individuals exercise control and accountability within institutions more broadly:[127] exit, loyalty, and voice.[128] Although these concepts were originally developed in relation to corporate structures, they have also been applied to the class action context as methods for understanding how class members can exert control over the litigation and ensure accountability from class counsel.[129] For example, class members have a right to "exit" through their Rule 23 opt-out rights.[130] They can decide to forgo the class action and pursue their own, individual lawsuit. Class members also have "loyalty" rights, through the requirement that class counsel and the class representatives "adequately represent" their interests.[131] Finally, Rule 23 gives class members "voice," or the right to participate in the litigation process and be heard.[132]

Historically, courts have focused on "loyalty" rights of absent class members when evaluating whether their rights are adequately protected.[133] In *Hansberry*, the Court found that a previous judgment could not bind the Hansberrys because no party to the previous litigation was "loyal" to the Hansberrys' interests.[134] Decades later, the Supreme Court in *Amchem* again emphasized loyalty, holding that

122. Simona Grossi & Allan Ides, *The Modern Law of Class Actions and Due Process*, 98 OR. L. REV. 53, 64–65 (2020) (citing FED. R. CIV. P. 23(a)(4)).

123. Coffee, *supra*, note 70, at 236.

124. FED. R. CIV. P. 23(a)(4).

125. *Id.* 23(e).

126. *Id.* 23(h).

127. Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 288 (2003).

128. *See* Coffee, *supra* note 70, at 376; Cabraser & Issacharoff, *supra* note 108, at 862; Nagareda, *Administering Adequacy*, *supra* note 127, at 288.

129. *See* Coffee, *supra* note 70, at 422.

130. FED. R. CIV. P. 23.

131. *Id.*

132. *Id.*

133. Nagareda, *Administering Adequacy*, *supra* note 127, at 288, 290.

134. 311 U.S. 32, 43–44 (1940).

class counsel could not adequately represent the diverging interests of both future and present claimants.[135] However, focusing solely on loyalty might lead to endless subclassing, "risk[ing] easy balkanization of the class away from any workable entity that could litigate or settle claims effectively."[136]

Under a movement lawyering model, which requires attorneys to engage with their clients as partners in litigation, the central mechanism to exercise control as a class participant is "voice." Issacharoff and Cabraser explored the emergence of "voice" as the "critical element" to ensure "systemic legitimacy" in a number of cases which they term "participatory class actions."[137] These cases involve high levels of class member participation, facilitated both by the emergence of MDLs as a centralizing mechanism and by modern technology that has made communication "instantaneous and cheap."[138] Issacharoff and Cabraser argue that courts should take into account the exercise of "voice" when evaluating the fairness of class settlements. In a case with high class member participation, courts could justifiably relax their adequacy of representation analyses.[139]

In dispersed damages classes, the same logic should follow: when class counsel partners with movement organizations and actively engages with affected communities, courts should be less concerned about "lawyers dominating vulnerable clients because social movement groups are organized and sophisticated—able to assert power in collaborations with lawyers."[140] Furthermore, the more effort class counsel makes to connect with movements, center affected communities, and conduct outreach to class members, the more likely counsel has understood the goals and perspectives of the class, and therefore adequately represented them. If courts consider "voice" in their adequacy of representation analyses, increased class member participation could help achieve class settlement approval. This would ultimately reward plaintiffs' attorneys who dedicate additional time and resources engaging in movement lawyering and incentivize greater use of these tactics.

135. Cabraser & Issacharoff, *supra* note 108, at 847.
136. *Id*. at 861.
137. *Id*. at 846.
138. *Id.* at 854.
139. *See, e.g.*, *In re NFL Players' Concussion Injury Litig.*, 821 F.3d at 433.
140. Carle & Cummings, *supra* note 66, at 457.

C. Movement Lawyering Strategies in Damages Class Actions

It is true that class members in low- or negative-value lawsuits may simply not be motivated to participate in litigation.[141] Issacharoff and Cabraser argue that while the participatory framework can work in cases where class members are limited to a group of identifiable, well-resourced individuals motivated by large payouts, it is not well situated for more dispersed, low-value litigation.

While this critique highlights real structural constraints, movement lawyering offers strategies to overcome them. Even in diffuse, low-value cases, attorneys can encourage class member participation and foster broader movement engagement. This Section proposes two strategies for engaging class members and serving movements: working directly with grassroots organizations and compensating class members.

1. Partnering with Movement Organizations

Movement lawyers have long relied on partnerships with community and advocacy organizations to reach constituents, gather information, and build collective power. Plaintiffs' attorneys can adopt similar methods in damages class actions. In cases connected to clearly defined movements, plaintiffs' lawyers should seek out movement organizations and activists as co-counsel or advisors. These organizations and activists can serve as entry points to impacted communities and class members and ensure the litigation strategy is informed by their experiences.

Collaboration with movements will, of course, depend on how closely connected each case is with an existing movement. Some cases, or types of cases (e.g., securities fraud), may simply not have close enough ties to a movement. But many mass tort, consumer, and environmental cases may impact communities that are already served by movements. *In re Hair Relaxer Marketing Sales Practices & Products Liability Litigation* is a prime example of a dispersed mass tort case in which plaintiffs' attorneys tapped into existing movements to connect with class members.[142] The case was brought by both private plaintiffs' attorneys and the Equal Justice Society, a racial justice advocacy organization, on behalf of women

141. *See, e.g.*, Coffee, *supra* note 70, at 400 (Some class members may be "passive, apathetic, and unmotivated to fight for the class's common interests."); Cabraser & Issacharoff, *supra* note 108, at 859 ("In negative-value cases, one of the prime justifications for class aggregation, individual class members are deemed to be 'rationally apathetic' and cannot be expected to engage with whatever class counsel does.") (citations omitted). *See also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985) ("Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175–76 (1974) (class action dismissed because of "prohibitively high" cost of individual notice to class members that did not have a large enough incentive to bring their own claims).

142. 655 F. Supp. 3d 1374 (U.S. J.P.M.L. 2023).

who allege hair relaxers contain chemicals that cause uterine cancer.[143] Plaintiffs' attorneys sought to work with groups in the racial justice space because Black women and other women of color disproportionately use hair relaxer products.[144] By partnering with racial justice groups, plaintiffs' attorneys could collaborate with movement stakeholders to better inform their litigation strategy.

Additionally, attorneys can tap into movement organizations to revolutionize the notice process and class member communication. Rule 23 requires that notice be provided to all putative class members,[145] and the Supreme Court requires that notice be "reasonably calculated" to reach class members.[146] Historically, the notice process was limited to the formal requirements of Rule 23 and the Constitution.[147] However, with the advent of the internet and social media platforms, communication between class members and attorneys is much cheaper and easier.[148] "[C]lass action settlement websites" are "hub[s] of information, communication, and claims processing in major class action settlements."[149] Communication between class members and attorneys, particularly MDLs, reflect a trend toward greater collaboration and participation among plaintiffs.[150]

Plaintiffs can connect with movements to further this trend. Movement organizations generally have existing digital organizing apparatuses, including social media accounts with dedicated followers and email listservs. By tapping into these lines of communication, class counsel can reach more class members and do so by expending fewer resources than traditional forms of notice, such as email and snail mail.[151] Class members may also be more familiar with movement organizations and activists, and therefore more likely to engage with, and trust, their content.

These digital organizing strategies are already occurring both formally and organically. Several courts have approved plaintiffs' attorneys' plans to provide notice via social media, though the social media schemes often supplement other forms of communication.[152] Attorneys use class action settlement websites and social media platforms to notify class members about the development of the

143. *Uterine and Ovarian Cancer from Hair Relaxer Products*, LIEFF CABRASER HEIMANN & BERNSTEIN https://www.lieffcabraser.com/hair-relaxers/ [https://perma.cc/GYK3-F7P9] (last visited Jul. 20, 2025).

144. *See id.*

145. FED. R. CIV. P 23(b).

146. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950).

147. Cabraser & Issacharoff, *supra* note 108, at 853, 856.

148. *Id.* at 854.

149. *Id.* at 856.

150. *Id.* at 859.

151. *Id.* at 854.

152. *E.g.*, Mark v. Gawker Media LLC, No. 13-cv-4347, 2015 WL 2330274 (S.D.N.Y. Apr. 10, 2015) (order approving plaintiffs' social media plan); Evans v. Linden Rsch., Inc., No. C-11-01078, 2013 WL 5781284, at *3 (N.D. Cal. Oct. 25, 2013); Kelly v. Phiten USA Inc., 277 F.R.D. 564, 569–70 (S.D. Iowa 2011).

litigation.[153] Some lawsuits have even been initiated by social media posts.[154] In the *Hair Relaxers* case, attorneys publish a monthly online newsletter for their class members and the broader community affected by the lawsuit.[155] These newsletters explore systemic racism experienced by class members, publish interviews with doctors with valuable medical information, and include docket updates.[156]

Independent of formal communication within litigation, content creators are using their platforms to educate viewers about class action settlements and teach them how to submit claims. For example, one content creator on Instagram creates short videos informing her viewers about class action settlements and how they can file a claim.[157] Her videos have been viewed by hundreds of thousands of users on Instagram. Another social media user posted a video on TikTok[158] explaining how users could submit a claim in a data privacy class action litigation against Facebook.[159] This video received over one million views[160] and, by all accounts, cost no money to create.

2. Compensate Class Members

A second method for promoting engagement among class members would be to compensate class representatives and other class members who participate in the litigation for their time and expertise, just as experts, lawyers, and paralegals are compensated. Compensating putative class members could encourage participation, particularly among lower-income class members who might otherwise be unable to contribute. It also recognizes class members' expertise as valuable, which is a central tenet of movement lawyering.[161] This proposal could take several forms but would likely require plaintiffs' firms to advance payment to

153. For example, attorneys leading litigation against Revlon for selling hair relaxer products that cause cancer send out a regular online newsletter to putative class members. *E.g.*, Lisa Holder, *Health Equity Newsletter*, EQUAL JUSTICE SOCIETY & LIEFF CABRASER HEIMANN & BERNSTEIN (Jan. 2024) https://www.lieffcabraser.com/pdf/2024_Health_Equity_Newsletter_Volume_02_Issue_02.pdf [https://perma.cc/ZWL5-RM4K].

154. Cabraser & Issacharoff, *supra* note 108, at 854 n.36.

155. Holder, *supra* note 153.

156. *Id.*

157. *E.g.*, @TheLawyerAngela, INSTAGRAM, *Amazon Prime Class Action Lawsuit* (Feb. 14, 2024) https://www.instagram.com/p/C3WM5x6uJJm/ [https://perma.cc/M7EF-ZE44]; @TheLawyerAngela, INSTAGRAM, *Roblox Class Action Lawsuit* (Feb. 22, 2024) https://www.instagram.com/p/C3rHYedu6Vs/ [https://perma.cc/Q5ZF-7EZ4]; @TheLawyerAngela, INSTAGRAM, *Stanley Cups Class Action Lawsuit* (Feb. 6, 2024) https://www.instagram.com/p/C3Bw0dVuEc6/ [https://perma.cc/7TSE-9HFR].

158. @missbeifong, TIKTOK (Aug. 9, 2023) https://www.tiktok.com/@missbeifong/video/7265338772651560238 [https://perma.cc/UM6Q-RMLJ].

159. Order Granting Final Approval of Settlement, *In re* Facebook, Inc. Consumer Privacy User Profile Litigation, No. 3:18-md-02843 (N.D. Cal. Oct. 10, 2023) (No. 1182).

160. @missbeifong, *supra* note 158.

161. *See supra* Part I.A.

plaintiffs for their time, which the firms could then recover through payment of fees from the settlement or judgment.

Historically, courts prevented this type of financing scheme as a form of "champerty," a common law term that describes the practice of financing a lawsuit "by a person without an interest in it . . . in consideration for receiving a portion of the [litigation's] proceeds."[162] Common law courts were generally uncomfortable with the idea of the lawyer serving both as creditor and advocate for a client.[163]

However, over the last century, champerty rules have been relaxed[164] and even abolished in many jurisdictions.[165] The ability for plaintiffs' attorneys to advance their own legal services in exchange for a contingent fee, for example, was historically considered a form of champerty.[166] Today, contingent fees are commonplace.[167] Although the practice of attorneys providing cash advances to their clients is rare, proposals have been made to allow attorneys to send cash advances to their clients. The Model Rules of Professional Conduct, for example, recently relaxed their policy prohibiting attorney advances to their clients.[168] However, the rule only applies when the attorney is "representing an indigent client pro bono through a nonprofit legal services" organization, and the advance pays for "food, rent, transportation, medicine and other basic living expenses."[169] Few jurisdictions have adopted the rule so far.[170] Still, this relaxation of the strict prohibition against payment to clients suggests an openness to rethinking the rule.

In a recent paper, Lynn A. Baker and Anthony J. Sebok argued that if "more states permitted law firms to offer . . . funding to their clients," it would create more "competition within the consumer litigant funding market" and allow "tort claimants to decline low-ball settlement offers."[171] They challenge the traditional concern held by common law courts that conflicts of interest would arise if attorneys served as both creditors and advocates.[172] In their view, attorneys already

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162. Saladini v. Righellis, 426 Mass. 231, 233 (1997); *Cf.* Lynn A. Baker & Anthony J. Sebok, *Consumer Litigant Finance and Legal Ethics: Empirical Observations from Texas*, 25 THEORETICAL INQUIRIES IN L. 141, 144–52 (2024) (pointing to early cases and statutes allowing loans from attorneys to their clients).

163. Baker & Sebok, *supra* note 162, at 144–52.

164. *Id.* at 145.

165. *E.g.*, Mathewson v. Fitch, 22 Cal. 86, 95 (1863); *Saladini,* 426 Mass. at 233; Osprey, Inc. v. Cabana, L.P., 532 S.E.2d 269, 276 (S.C. 2000).

166. Baker & Sebok, *supra* note 162, at 145.

167. *See id.* (noting the rapid adoption of contingency fees at the turn of the 20th century).

168. *See* MODEL RULES OF PRO. CONDUCT r. 1.8(e) cmt. (ABA 2020) ("Paragraph (e)(3) was adopted in August 2020 to permit a lawyer representing an indigent client pro bono to make modest gifts to the client for basic living expenses.").

169. *Id.*

170. Baker & Sebok, *supra* note 162, at 143.

171. *Id.* at 141. One law firm that Baker and Sebok interviewed stated that "defendants don't like that we make these advances because they can't starve out our clients." *Id.* at 155.

172. *Id.* at 151, 158–60.

possess a financial interest in the outcome of litigation,[173] and providing modest advances to clients to cover living expenses does not meaningfully increase that risk.[174] Indeed, as Baker and Sebok observe, for plaintiffs in urgent financial need, receiving payment from their attorneys may be preferable to seeking loans from third parties.[175]

The firms discussed in Baker and Sebok's article treat these cash advances as loans, whereas this Article proposes providing cash advances as compensation for time and effort invested in the lawsuit. However, under either approach, such payments can level the playing field between plaintiffs and defendants, build trust between attorneys and their clients, and encourage greater class member participation.

In class actions, class representatives are sometimes granted additional compensation through "incentive" or "service" awards.[176] These awards are justified by courts by both the risk that lead plaintiffs take on by openly naming themselves in court records and the time and energy they spend on the case that absent plaintiffs do not.[177] However, historically, courts have expressed concern that such awards may create conflicts of interest between lead plaintiffs and the class.[178] A lead plaintiff, for instance, might be tempted to accept a larger incentive award in exchange for a lower overall payout for the rest of the class.[179] Some courts have questioned whether a lead plaintiff who receives an incentive award remains

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173. *Id.*

174. *Id.* at 159 ("The notion that there is some principled limit on the extent of the interest in the client's claim that an attorney may acquire without risk to the client has been subjected to skeptical analysis by scholars who have observed that MRPC Rule 1.8(e) is a deeply tendentious and formalistic application of the larger anti-investment principal expressed in MRPC 1.8(i).").

175. *Id.* (explaining that lawyers can provide better loan terms than third party investors because they do not need to invest in "additional advertising or marketing").

176. Charles R. Korsmo & Minor Myers, *Lead Plaintiff Incentives in Aggregate Litigation*, 72 VAND. L. REV. 1923, 1928 (2019).

177. *E.g.*, *id.* at 1930–31 (discussing the costs incurred by lead plaintiffs including "pecuniary outlays," "opportunity cost of time dedicated to the case," including time responding to discovery requests and attending depositions); Richard A. Nagareda, *Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards*, 53 UCLA L. REV. 1483, 1486, 1488 (2006) ("Discovery aside, the class representative may incur opportunity costs insofar as she must devote her time to communication with absent class members concerning the nature, progress, and handling of the lawsuit.").

178. *See, e.g.*, Radcliffe v. Experian Info. Sols., 715 F.3d 1157, 1164 (9th Cir. 2013) (noting that trial courts "must be vigilant in scrutinizing all incentive awards"); Sauby v. City of Fargo, No. 3:07-cv-10, 2009 WL 2168942, at *2 (D.N.D. July 16, 2009) ("Requests for incentive awards should be carefully scrutinized to ensure the named plaintiffs did not bring suit expecting a bounty or otherwise compromised the interest of the class for personal gain." (citing Hadix v. Johnson, 322 F.3d 895, 897 (6th Cir. 2003))); Chen v. Howard-Anderson, No. 5878-VCL, 2017 Del. Ch. LEXIS 734, at *10 (Del. Ch. June 30, 2017) ("Under Delaware law, there is an expectation that the compensation for creating a common fund goes to counsel, and hence a 'presumption against awarding a separate payment or bonus' to a named plaintiff." (quoting Raider v. Sunderland, No. Civ.A 19357 NC, 2006 Del. Ch. LEXIS, at *8 (Del. Ch. Jan. 4, 2006))).

179. Korsmo & Myers, *supra* note 176, at 1932.

"similarly situated" to absent class members, as required by Rule 23, or whether receiving what appears to be a "profit" from litigation is improper.[180]

But safeguards already exist to mitigate potential conflicts or abuses. Rule 23 already requires judicial approval of settlement agreements and service awards, and courts can reject settlements that appear unfair or suggest collusion.[181] Potential conflicts that may arise from compensating participating class members could also be reduced by requiring counsel to submit payment reports detailing the work being done by participating class members (e.g., attending meetings and depositions, collecting and reviewing documents, assisting attorneys, reviewing settlement agreements) and the corresponding payments made for these activities.

Partnering with grassroots organizations and compensating plaintiffs demand greater financial investment from class counsel, which may present challenges particularly for smaller law firms or costly litigation. Nevertheless, even modest measures, such as hosting meetings with movement organizations, maintaining communication channels with class members, and providing small stipends for participation, can meaningfully increase engagement and foster a stronger sense of shared ownership in the litigation.

CONCLUSION

Class actions can serve as a democratizing force in a society that is increasingly disconnected, dispersed, and riddled with inequality and corporate abuses. They offer a rare opportunity for individuals—often powerless alone—to unite and confront the institutions that harm them, to decide how they will seek justice, and to tell their stories to the court, to the jury, and to the broader public.[182] In this way, litigation can function not merely as a mechanism for dispute resolution, but as a tool for collective action and a political entry point to enact social change.[183]

But damages classes have too often fallen short of this promise. Plaintiffs' attorneys often keep class members at a distance from the judicial process, eroding both the legitimacy and the democratic potential of class actions. To reclaim that potential, plaintiffs' attorneys should reimagine their role not as intermediaries who speak for the class, but as partners who amplify its collective voice. By embracing the principles of movement lawyering—collaboration, accountability, and participation—plaintiffs' lawyers can restore fairness, transparency, and legitimacy to class actions. Centering the voices of class members does more than improve outcomes; it revitalizes Rule 23's original purpose as a tool for collective empowerment and social change.

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180. *Id.* at 1933.

181. Fed. R. Civ. P. 23(e)(2).

182. *See* Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5–6 (1982).

183. *Id.*