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Cover Page Footnote

Associate Professor of Law, Case Western Reserve University. Thanks to my colleagues, Robert Lawry and Kevin McMunigal, whose fine questions about an earlier draft deserve better answers than the ones provided here.

COLLECTIVE REPRESENTATION FOR THE DISADVANTAGED: VARIATIONS IN PROBLEMS OF ACCOUNTABILITY

*Ann Southworth**

INTRODUCTION

CRITICS of civil rights and poverty lawyers sometimes suggest that lawyers who venture away from individual representation to pursue collective ends for disadvantaged clients risk betraying members of the groups they purport to serve.¹ Inherent in collective work, some say, is the opportunity and temptation for lawyers to gloss over deep conflicts within represented groups and to substitute their own understanding of the collective good for the client's actual preferences.² This Article draws on an empirical study of civil rights and poverty lawyers to identify variations in accountability problems that lawyers confront in representing groups and to suggest that these problems are much less pressing in some types of collective representation than in others. It examines structural factors that may help predict accountability problems in collective projects. Other scholars have offered theoretical justifications for tailoring lawyers' ethics to the particular practice contexts in which lawyers work and the circumstances of their relationships with clients.³ This Article presents em-

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1. See Charles K. Rowley, *The Right to Justice: The Political Economy of Legal Services in the United States* 246 (1992) (asserting that legal services for the poor "should be orientated to individual clients, concerned with individual cases, and focused on the routine disorders of daily life" and should eschew all work directed toward law reform); Marshall J. Breger, *Accountability and the Adjudication of the Public Interest*, 8 Harv. J.L. & Pub. Pol'y 349, 353 (1985) (criticizing a view he attributes to some public interest lawyers: "[L]ook, we can't expect client consent in a large group case, whether it be a Rule 23 case or some other kind of group action. We can't expect to accommodate the needs and concerns of all the individuals we are representing . . ."); see also Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 Ariz. L. Rev. 805, 811 (1971) (asserting that the attorney's role "is to help others not as interests, but as individuals").

2. David Luban has described these as the "two distinct representation relations at work in public interest law practice": (1) the representation of groups by their spokespersons in consultations with lawyers; and (2) lawyers' representation of groups in interactions with third parties. David Luban, *Lawyers and Justice: An Ethical Study* 344-45 (1988).

3. See, e.g., John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 Cornell L. Rev. 825, 841 (1992) (arguing for "a functional or balancing approach, in which each situation, or small class of situations, would be separately considered in light of the relevant interests and policies"); James Gray Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 Or. L. Rev. 1, 54 (1989) (asserting that lawyers for labor unions should adhere to different rules than lawyers for corporations and endorsing a multi-factor test for determining the duties

pirical support for such a differentiated approach with respect to collective practice for disadvantaged clients.

Lawyers serving poor people have been attracted to collective approaches to stretch resources, to increase their clients' leverage with third-parties, and to help clients build alliances. Aggregating claims sometimes increases access to the legal system for individuals who otherwise would be unable to find representation.⁴ Achieving systemic change benefiting large numbers of people often is more efficient than seeking redress for each of many aggrieved individuals.⁵ Moreover, claims that might alone seem trivial to a defendant or a policymaker acquire greater significance when asserted on behalf of groups.⁶ In projects not involving litigation, groups sometimes can obtain collective goods that they would be unable to secure individually.⁷ Helping groups of people form and sustain organizations and pursue collective projects through those organizations enables disadvantaged clients to achieve common ends and build political power.⁸

Collective representation takes various forms. A lawyer representing one person may pursue a precedent or an injunction affecting many people. In such actions, the client is the individual, but the lawyer may regard her work as directed toward social change for a constituency.⁹ Lawyers may represent individuals who together pursue a

of lawyers for different types of organizations); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. Cal. L. Rev. 1145, 1218-20 (1993) (arguing in favor of "middle-level" rules that take into account differences among lawyers and the contexts in which they practice).

4. See Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 Ohio St. L.J. 1, 28 (1984); Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 Nw. U.L. Rev. 492, 526 (1982); Stephen C. Yeazell, *From Group Litigation to Class Action: Part II: Interest, Class, and Representation*, 27 UCLA L. Rev. 1067, 1089 (1980) [hereinafter Yeazell, *From Group Litigation*].

5. See Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1186 (1982).

6. See John T. Holmstrom, Comment, *Allocation of Initial Notice Costs Under Federal Rule 23(c)(2)*, 1973 U. Ill. L.F. 723, 723-24.

7. See Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* 7 (1965).

8. See Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103, 1106 (1992) ("The success of [legal] strategies . . . may depend on the extent to which [public interest lawyers] empower clients outside as well as inside the courts, and so may hinge on the degree to which they transform this multiplicity of people into a group."); Alan W. Houseman, *Community Group Action: Legal Services, Poor People and Community Groups*, 19 Clearinghouse Rev. 392, 400 (1985) ("[N]ew relationships must be forged with poor people's groups—both existing groups and those that are newly emerging."); Stephen Wexler, *Practicing Law for Poor People*, 79 Yale L.J. 1049, 1053 (1970) ("[T]he lawyer must seek to strengthen existing organizations of poor people and to help poor people start organizations where none exist.").

9. See Hegland, *supra* note 1, at 806 ("[T]he public interest practitioner, to increase his effectiveness, attempts to assert generalized interests rather than specific

common objective in litigation or legislative advocacy without identifying themselves as a group for any other purpose. Clients and their lawyers may seek remedies on behalf of a plaintiff class. Groups also may form organizations which themselves launch projects, including litigation, on behalf of the organization itself or its members.¹⁰

Lawyers in all types of collective representation face ethical dilemmas regarding their clients' identities and conflicts within the groups they represent,¹¹ but civil rights and poverty lawyers' ethical predicaments in collective practice have received particularly critical scrutiny.¹² When public interest lawyers pursue law reform litigation on behalf of individuals, do they owe exclusive fealty to the individual client or may they properly seek to benefit third parties as well?¹³ If lawyers seek to represent a constituency or a cause rather than just an

interests."); Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 *Hastings L.J.* 779, 783 (1996) (describing how the lawyer who represented Jane Roe in *Roe v. Wade* regarded herself as a representative of a large constituency of American women); Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 *U. Ill. L. Rev.* 43, 55 [hereinafter Yeazell, *Collective Litigation*] (asserting that "[e]ven when the NAACP's litigation did not take the form of class actions, the organization served less the interest of particular black plaintiffs than those of black Americans generally"); cf. John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 *Harv. L. Rev.* 849, 888-907 (1975) (challenging the practice of awarding attorneys' fees in public interest litigation where the award is based on the rationale that members of the public, rather than the individual clients, are the beneficiaries).

10. An organization may represent itself in an organization *qua* organization suit or it may represent its members in an organizational representation or associational standing suit, in which the organization stands in the shoes of its members. See Dale Gronemeier, *From Net to Sword: Organizational Representatives Litigating Their Members' Claims*, 1974 *U. Ill. L.F.* 663, 663-64.

11. For scholarship examining such conflicts in corporate practice, see generally Charles A. Wolfram, *Modern Legal Ethics* § 8.3, at 421-28 (1986); Ralph Jonas, *Who Is the Client?: The Corporate Lawyer's Dilemma*, 39 *Hastings L.J.* 617 (1988); Stanley A. Kaplan, *Some Ruminations on the Role of Counsel for a Corporation*, 56 *Notre Dame L. Rev.* 873 (1980); and George D. Reycraft, *Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel*, 39 *Hastings L.J.* 605 (1988). For an analysis of conflicts in the representation of unions, see generally Pope, *supra* note 3.

12. The most influential of these was Derrick Bell's critique of the NAACP's role in desegregation litigation and its response to conflicts among black parents in the plaintiff classes about how to improve educational opportunity for their children. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *Yale L.J.* 470 (1976). For other examples of articles highlighting problems of conflicts and lawyer accountability in public interest representation, see generally Breger, *supra* note 1; Garth, *supra* note 4; Hegland, *supra* note 1; and Rhode, *supra* note 5.

For an argument that conflicts in groups of disadvantaged individuals have received far more critical attention than conflicts within corporate entities, see William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 *U. Miami L. Rev.* 1099, 1103-04, 1114 (1994) [hereinafter Simon, *Progressive Lawyering*].

13. See Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 267-69 (1976) (describing how civil rights lawyers wrestled with "whether their client was, as traditional professional precepts dictated, a solitary party to a discrete case—or . . . a cause larger than any client"); Breger, *supra* note 1, at 349 (as-

individual client, who speaks for that constituency or cause? How should conflicts between the individual and the constituency, or within that constituency, be resolved?¹⁴ When law reform litigation produces precedents affecting persons who are not parties, does the lawyer owe any duty to those affected nonparties?¹⁵ When asked to represent a group, how should a lawyer discern the interests and preferences of that group when it lacks formal decisionmaking procedures?¹⁶ In injunctive class actions, how should the lawyer discern the interests of class members¹⁷ and how should she respond to conflicts within the class?¹⁸

Current ethics doctrine does not adequately address how lawyers should manage these issues of client autonomy and conflicts of interests in representing groups. Most provisions of the Model Rules of Professional Conduct and the Model Code of Professional Responsibility simply assume that the client is an individual. The rules of ethics require loyalty to individual clients and prohibit lawyers from allowing other interests, including their own, to interfere with their duties to those individuals.¹⁹ A lawyer may represent multiple individuals if

serting that in public interest practice "it is the attorney's understanding of an ideological cause or his position that becomes his client").

14. See McMunigal, *supra* note 9, at 800-01 (criticizing Jane Roe's lawyer's pursuit of abortion rights for women at the expense of her client's interest in obtaining an abortion).

15. See Failing & May, *supra* note 4, at 29 (stating that "the precedential impact of an individual lawsuit may affect the interests of other poor persons who are not heard in the suit" and that overly narrow definitions of the plaintiff class "may exclude participation of people who have legitimate interests in the outcome of the suit"); Garth, *supra* note 4, at 499-500 (asserting that the accountability problems in class actions also plague individual actions in which plaintiffs seek broad injunctive relief); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L.J. 1623, 1625 (1997) (arguing that "our rules of civil procedure and professional ethics promote individualist decisionmaking, even where the consequences of litigative decisions affect entire groups of people"); see also Rhode, *supra* note 5, at 1195-97 (noting that those who disagree with a remedial request may be better off if the claim proceeds as a class action rather than an individual claim because they will receive slightly better opportunities for notice and participation).

16. See Ellmann, *supra* note 8, at 1110-11.

17. See Bell, *supra* note 12, at 470-72; Rhode, *supra* note 5, at 1232-42; Yeazell, *From Group Litigation*, *supra* note 4, at 1115-16; see also Luban, *supra* note 2, at 341-57 (arguing that lawyers are obliged to resort to their own values when clients' wishes are impossible to discern, either because the class is too large, because class members are not mobilized and informed, or because the project affects future generations' interests).

18. See Wolfram, *supra* note 11, § 8.14, at 492-93; Rhode, *supra* note 5, at 1183-86; Yeazell, *Collective Litigation*, *supra* note 9, at 43.

19. Rule 1.7(b) of the Model Rules of Professional Conduct provides:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

she reasonably believes that the representation of those individuals will not be adversely affected and the clients consent to her representing them all,²⁰ but the clients in such representation remain the individuals rather than the group and the rules generally discourage joint representation.²¹ The rules allow lawyers to represent individuals with conflicting interests as an intermediary only in certain narrow circumstances.²² Where the client is an organization, the Model Rules of Professional Conduct, adopted by most states, squeeze organizations into the individual representation model by adopting the "entity theory" of representation,²³ whereby lawyers are to treat the entity, rather than any of its particular members or constituencies, as the client.²⁴ Under this approach, lawyers generally look to the officers of an organization for guidance about the client's interests and wishes.²⁵

(2) the client consents after consultation

Model Rules of Professional Conduct Rule 1.7(b) (1998). The American Bar Association's Model Code of Professional Responsibility provides: "Neither [a lawyer's] personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." Model Code of Professional Responsibility EC 5-1 (1980). The Model Code also provides that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer." *Id.* EC 7-7.

20. See Model Code of Professional Responsibility DR 5-105(c); Model Rules of Professional Conduct Rule 1.7. For a comprehensive discussion of the loyalty and confidentiality provisions that apply to the representation of several individuals, see Ellmann, *supra* note 8, at 1113-15.

21. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 224 (1941); ABA Comm. on Professional Ethics and Grievances, Formal Op. 40 (1931); *supra* notes 19-20.

22. The rules allow a lawyer to represent groups of individuals with conflicting interests as an "intermediary" if the lawyer has each client's consent and if she reasonably believes that

the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful.

Model Rules of Professional Conduct Rule 2.2(a)(2). For a discussion of the many ambiguities in Model Rule 2.2, see John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. Ill. L. Rev. 741, 741-48.

23. See Wolfram, *supra* note 11, § 13.7, at 735 ("The entity-as-client concept of corporate representation can be understood as an attempt to fit corporate clients into molds originally cast for individual clients.").

24. See Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.13:102, at 387 (2d ed. 1995) ("The basic precept of Rule 1.13 is that a lawyer representing an entity client does *not* thereby (and without more) become the lawyer for any of the entity's members, agents, officers, or other 'constituents,' as they are referred to in the rule; the lawyer instead represents the entity itself.").

25. See Leubsdorf, *supra* note 3, at 827-28.

The Model Rules do not differentiate among types of organizations,²⁶ and they hardly even mention class actions.²⁷

This Article argues for an approach to defining lawyers' ethical obligations when representing groups that recognizes differences, not only between individual and collective representation, but also among different types of collective representation. Although there may be certain common benefits in all forms of collective representation, these types of lawyering differ in important respects—particularly in terms of lawyers' power vis-à-vis clients, the reliability of the decisionmaking methods employed by groups, and members' opportunities to exit. While injunctive class action litigation almost always raises difficult problems of accountability,²⁸ and while law reform litigation on behalf of individuals frequently does as well,²⁹ these issues are far less prominent in the representation of organizations whose internal governance structures generate decisions on behalf of the group. The more individual clients are able to hold accountable the groups in which they participate and the lawyers who represent them, the less we need to worry about lawyers' power to suppress conflict and to speak for those groups.

This Article also urges attention to attractive aspects of lawyers' roles in building institutions serving disadvantaged people and cautions against treating all collective work as threatening to individual client autonomy. In this study, lawyering for organizations was more common than class action litigation, and lawyers for organizations generally said that their clients participated more actively in setting goals and strategy than did clients who were individuals or plaintiff classes. Lawyers who represented organizations also often reported that they facilitated the groups' organizing efforts and improved orga-

26. The Comment to Model Rule 1.13 states that "[t]he duties defined in this Comment apply equally to unincorporated associations." Model Rules of Professional Conduct Rule 1.13 cmt. Some influential commentators have concluded that the term "organization" includes even very informal groups who come together only for the purpose of pursuing a lawsuit. See Hazard & Hodes, *supra* note 24, § 1.13:203, at 407.

27. For a few unenlightening references, see Model Code of Professional Responsibility DR 2-104(A)(5); and Model Rules of Professional Conduct Rule 7.2 cmt. Similarly, Rule 23 of the Federal Rules of Civil Procedure does not offer much guidance. It requires that "the claims or defenses of the representative parties" be "typical" of those of the class, and that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(3), (4).

28. Some have argued that the representativeness problems in injunctive class actions are inescapable. See, e.g., Rhode, *supra* note 5, at 1242-43 ("[T]he problem of class action conflicts is . . . to a considerable extent, intractable.").

29. For arguments that law reform litigation on behalf of individuals is often problematic, see Breger, *supra* note 1, at 349 ("[I]n many instances in public interest law cases, the client is more fictional than real. . . . In those instances, there are no constraints on an attorney's behavior except those which he chooses to impose upon himself."); Rubenstein, *supra* note 15, at 1645-46 (criticizing as incoherent our individualistic civil litigation model, which allows any individual to pursue law reform litigation on behalf of herself alone while at the same time binding all similarly situated individuals to a particular legal position through the doctrine of stare decisis).

nizational operations. Far from threatening poor people's capacities to organize, the lawyers in this study who represented organizations appeared to contribute toward that end. The data described here suggest that lawyers sometimes can help poor clients build and sustain institutions (and thereby build and consolidate power) without usurping the client group's prerogative to define goals.³⁰

I. COMPARING FORMS OF COLLECTIVE REPRESENTATION

In 1993 and 1994, I conducted interviews with sixty-nine lawyers who worked on civil rights and poverty issues in Chicago to learn about their work and relationships with clients.³¹ Many of the clients described by lawyers in this study were groups rather than individuals, and, therefore, this study invites attention to differences among these types of group representation.

The definition of collective representation is problematic here. Are individuals who pursue litigation together individuals or groups? How should we characterize married couples, families, coalitions, and constituencies? When, if ever, is the lawyer who pursues law reform work on behalf of an individual plaintiff or plaintiffs engaged in collective work?

With one exception, this Article adopts the characterizations that lawyers themselves selected to describe the type of client for whom they worked.³² It generally does not treat the representation of individuals as collective litigation except where lawyers indicated that the tasks they performed for their clients included "working on litigation

30. See Richard L. Abel, *Lawyers and the Power to Change*, 7 *Law & Pol'y* 5, 8 (1985) (asserting that "lawyers can help organizations to act autonomously by providing technical skills and training organization staff and members—a role reversal that is difficult to attain with individual clients, no matter how well-intentioned the lawyer").

31. The study included lawyers in several different practice settings, including legal services, grass-roots clinics, civil rights firms, law firms not primarily devoted to civil rights, law school clinics, and advocacy organizations.

To maintain confidentiality, citations to interviews refer to interview numbers rather than attorneys' names. All interviews were conducted in Chicago, Illinois between June 18, 1993 and October 11, 1994. A second number is used in some citations to the interviews to refer to the topic discussed.

32. With respect to each matter, lawyers were asked to fill out the following "response sheet" indicating the type of client served:

TYPE OF CLIENT

1. Individual(s)
2. Plaintiff class
3. Defendant class
4. Service or advocacy organization
5. Religious organization
6. Non-profit corporation
7. For-profit corporation
8. Partnership
9. Other (specify)

to change the law.” In some matters in the latter category, lawyers may have worked to change the law solely for the benefit of their individual clients.³³ Many of the lawyers in this category, however, indicated that they pursued individual claims with an eye toward systemic effects—that they viewed their work as “impact litigation.” Therefore, this Article presents such matters as a type of collective work.

Defined in this broad way, collective work constituted over two-thirds of the 197 matters described by lawyers in this study. In thirty-seven matters on behalf of individuals, lawyers said that law reform was one of the purposes of the representation. Lawyers reported that plaintiff classes were their clients in thirty-six matters.³⁴ In sixty-four matters, lawyers described the client as an organization.³⁵ This latter category comprised primarily formal organizations but also several groups whose structure and processes were just beginning to take shape.³⁶

Even if the composition of collective representation in this study differs from the makeup of civil rights and poverty practice elsewhere in the United States, it calls into question the view that collective work in civil rights and poverty practice proceeds primarily through class action litigation, and it allows comparison among different types of group representation. In this study, work on behalf of organizations formed a much more prominent part of the collective dimension of civil rights lawyering than class actions did.³⁷ The class actions described here were almost exclusively injunctive class actions rather than small-claims damages actions,³⁸ and the classes were mostly un-

33. For an analysis of why class actions often benefit individual clients more than individual suits would, see Failing & May, *supra* note 4, at 17-18 (stating that lawyers who file or threaten to file class actions often have more clout in negotiations with defendants than they would if they pursued litigation on behalf of individual clients, and that class actions are more likely to result in institutional reform, which sometimes may be necessary to serve the individual client's interests).

34. In three of these class actions, there also was an organizational client. For purposes of comparison, I have included these three matters in the category for plaintiff classes rather than organizations.

35. These organizations included 16 advocacy organizations, 10 service organizations, 20 economic development organizations, 2 church-related organizations, 5 for-profit entities, 4 tenant organizations, and 7 coalitions, committees, and councils.

36. See, e.g., Interview 4,1 (explaining that tenant organization sought to change “from a huge detached mass of residents to an organization that has a single voice and a voting body and the ability to manage a building”); Interview 67,2 (representing schools' councils often included advising about “how to run a meeting, [and how to] draft by-laws”).

37. Cf. Yeazell, *Collective Litigation*, *supra* note 9, at 62 (arguing that litigation on behalf of organizations “far exceeds, both in number and importance, the number of suits formally certified as class actions”).

38. *But see* Interview 51,1 (lawyer represented in a damages class action 1400 African-American and Hispanic students who enrolled in a beauty school that never delivered any program).

organized groups.³⁹ Lawyers' reports about their roles in setting strategy and about what their work achieved also indicate significant differences in clients' decisionmaking functions and benefits achieved by types of collective representation.⁴⁰ They suggest that organizations generally may be better able than plaintiff classes and individuals to work with lawyers without surrendering control over their purposes. They also show that organizations often pursue objectives as to which the class action and law reform types of collective representation are irrelevant.

A. *Client Autonomy*

Where the clients were organizations, lawyers were more likely to report that the client controlled the decisions about strategy than they were in any other type of client representation. In only five percent of matters in which the client was an organization did lawyers report making strategy decisions alone or with little participation from the client, as compared with ten percent of matters for individuals where there was no law reform component, twenty-two percent of matters for individuals where law reform litigation was part of the work, and thirty-five percent of matters for plaintiff classes. Lawyers representing individuals in law reform litigation and lawyers handling class actions generally reported that they played more significant roles than did lawyers representing organizations or individuals where there was no law reform component.⁴¹ On a four-point scale, with "one" indi-

39. *But see* Interview 30,2 (parent advocacy organization participated in a class action challenging the school system's right to test children for psychological problems without parental consent); Interview 45,1 (tenant organization participated in a class suit to improve conditions in a section 8 housing project); Interview 54,1 (tenant organization and a class of tenants in public housing challenged public housing conditions).

This finding is consistent with Yeazell's view that "[t]he class action is reserved for collectivities that have not achieved organization; for them the class action offers the possibility of achieving temporary, litigative organization." Yeazell, *Collective Litigation*, *supra* note 9, at 64.

40. Lawyers' own reports about their roles in setting strategy are not entirely reliable evidence of how they actually interacted with their clients. One can reasonably assume that many lawyers would underestimate how much they directed strategy to avoid seeming to transgress professional norms favoring client-centered decisionmaking. However, one would expect such a bias to appear across types of clients served.

41. The interview questions about clients' roles in setting strategy included the following:

Which best describes your role in the decision about what strategies to pursue in this matter?

1. I did not participate; the client came to me with a clear strategy and asked me to help implement it.
2. The client came to me with several alternative strategies and I helped the client choose among them.
3. I played a significant role in helping the client identify options and select among them.

cating that the client made all decisions and “four” indicating that the lawyers made all strategy choices without participation by the client, the average roles reported by lawyers were 2.6 where the client was an organization, 3.0 where the client was an individual and there was no law reform component, 3.2 where the client was an individual and the project involved law reform, and 3.2 in plaintiff class actions.

These differences in lawyers’ accounts of their roles in setting strategy were consistent with these lawyers’ narrative observations. Lawyers for individuals often indicated that their clients looked to them as experts who would tell them what to do,⁴² and lawyers who represented individuals in law reform cases sometimes indicated that their strategy choices were influenced by law reform implications.⁴³ Lawyers for plaintiff classes typically reported that they set strategy largely on their own.⁴⁴ Lawyers for organizations generally described their roles more narrowly. One lawyer observed, in characteristic fashion, “my job is to define the parameters.”⁴⁵ As to another matter, this lawyer stated, “I don’t think I played a significant role at all; I was a sounding board, not a catalyst.”⁴⁶ Lawyers who represented established organizations commonly reported that their clients had formulated their essential strategy before coming to the lawyer and that the lawyer helped them refine and execute their plans.⁴⁷

4. I made all decisions about strategy without participation by the client.

5. Other (specify) _____.

42. See, e.g., Interview 19,2 (“[M]y client doesn’t know much about how the system works. By and large, [my clients] are pretty unsophisticated.”); Interview 22,1 (“Clients in large measure rely on you” because they are not experts and do not know the system); Interview 47,1 (“She really didn’t know what her options were.”); Interview 55,1 (“The client had no idea what to do.”); Interview 63,3 (the client knew what he wanted, “but he had no idea what was needed to achieve that”); Interview 64,3 (“[F]or most clients, we’re telling them about things they didn’t know about before.”).

43. See, e.g., Interview 33,3 (“I had no contact with the client here. . . . [S]ince we thought it was a worthwhile case, we appealed.”); Interview 35,1 (lawyer who represented individuals in hate crimes prosecutions said, “We handle individual cases, but we operate under the presumption that each is an impact case. We try to get benefits for individual clients by getting the legal system to work for them, but we are also interested in publicizing successes and deterring hate crimes by showing the price that one can pay for committing them”); Interview 44,3 (lawyer never actually talked with client about whether to appeal, but conferred with other lawyers); Interview 45,3 (in explaining why he made all decisions about strategy, lawyer observed that the issue on appeal was a pure question of law).

44. See, e.g., Interview 19,1 (“[T]here weren’t many decisions [for the client class to make]”); Interview 19,3 (“We told [the class representatives], ‘these are your options, and these are the ones we’re willing to pursue.’”); Interview 20,2 (“Our team made virtually all the decisions.”); Interview 60,1 (“The client played no role.”).

45. Interview 26,1.

46. Interview 26,3.

47. See, e.g., Interview 31,1 (“Usually the deal [is] structured before it comes to me.”); Interview 41,1 (“They knew what they wanted to do. They had done a couple of years of research and planning before they came to me.”); Interview 52,1 (“With respect to the client’s overall strategy, the answer [to the question about their roles in setting strategy] was 1; with respect to the plans for executing it, the answer was 3.”);

This study did not gather information necessary to explain these reported differences in lawyers' roles by client type, but one might reasonably conclude that structural attributes of these different types of representation help explain those variations. The prominent role in setting strategy described by lawyers in class actions is consistent with scholarship analyzing accountability problems in class actions. Plaintiff classes ordinarily are unorganized groups who do not exist before or after the suit. In this study, for example, plaintiff classes included inmates confined to segregation in the Illinois prisons, mothers of children on AFDC, and children in Illinois state mental institutions. Class representatives typically lack any direct accountability to the class members they represent. Moreover, class actions lack formal procedural mechanisms for assessing preferences of class members⁴⁸ or for holding accountable the attorneys who represent them.⁴⁹ All but one of the class actions in this study were injunctive class actions, in which members of the class are not even entitled to notice of the action.⁵⁰ Although courts are required to monitor the representation at the class certification and settlement phases of the litigation, they often exercise little independent scrutiny.⁵¹ As one lawyer in my study noted, "the court never says, '[W]hat does your client think about that, Mr. [X]?'"⁵²

Interview 57,3 ("I handled legal strategy, but they resolved huge issues regarding whether to take risks on liability to serve inner city youth.").

48. See Ellmann, *supra* note 8, at 1118.

49. See *id.* ("The result of class action status may well be to empower groups of people by facilitating their access to court, but the people so empowered are not empowered as against their lawyer."); Yeazell, *Collective Litigation*, *supra* note 9, at 45 ("In many class actions the represented class member surrenders virtually all autonomy over the litigation."); cf. Yeazell, *From Group Litigation*, *supra* note 4, at 1114-15 (noting that while lawyers in successful injunctive class actions sometimes recover statutory attorney fees, injunctive class actions by definition do not involve damages claims and therefore entrepreneurial lawyers do not compete aggressively to represent these classes).

50. Most class actions in this study were brought under Federal Rule of Civil Procedure Rule 23(b)(2), which allows for a class when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Class actions brought under Rule 23(b)(1) and (2) do not require notice to class members, although the court must order notice before approving any pretrial settlement. *Id.* Rule 23(b)(1), (b)(2), (e). Damages class actions brought under Rule 23(b)(3) require individual notice to identifiable class members. *Id.* Rule 23(b)(3).

For an argument that Rule 23 has it backwards, see Yeazell, *From Group Litigation*, *supra* note 4, at 1110 ("Rule 23 seems to stand the world on its head, requiring assent when one would be most confident that there was no arguable question about interest, and dispensing with it just when the coincidence of interests is most debatable.").

51. See Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 Ohio St. L.J. 1, 7-8 (1993); see also Yeazell, *From Group Litigation*, *supra* note 4, at 1114-15 (1980) (noting that institutional reform litigators hold "the power to define the 'interest' of the groups they represent; so long as their articulation of that interest does not strike the court as entirely bizarre, it is likely to be sanctioned by class certification").

52. Interview 48.

The influential roles of lawyers for individuals in this study is consistent with other empirical evidence demonstrating that lawyers typically exercise substantial control in service to poor individuals and in "personal plight" practice.⁵³ Those who have tried to account for these relatively high levels of control by lawyers representing poor individuals have cited, on the one hand, clients' lack of confidence, sophistication, and financial leverage and, on the other, lawyers' interest in using scarce resources efficiently,⁵⁴ their perception that clients rely on them to set strategy,⁵⁵ and, sometimes, their sense that poor pay and working conditions entitle them to depart from conventional client-centered norms.⁵⁶

A variety of reasons might explain why lawyers in this study reported that organizations played more significant roles in setting strategy than plaintiff classes did. Most obviously, organizations, unlike plaintiff classes, are capable of resolving internal disputes and generating strategy choices. Whereas classes ordinarily do not endure beyond the suit, organizations exist before and after the representation and they have extra-litigation mechanisms for ensuring that the organizations' leaders represent the interests of members.⁵⁷ Unlike individual members of a class, who generally are stuck with the position taken on behalf of the class in injunctive class actions,⁵⁸ individuals who are

53. See generally Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (1974) (examining the experiences of 60 personal injury plaintiffs and their lawyers); Austin Sarat & William L.F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (1995) (examining lawyer-client relations in divorce work); Carl J. Hosticka, *We Don't Care What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 Soc. Probs. 599 (1979) (studying initial interviews with legal services clients and concluding that lawyers exercised considerable control).

54. See Eve Spangler, *Lawyers for Hire: Salaried Professionals at Work* 167 (1986) (concluding that the legal services lawyers she studied were "overworked, underpaid, and harried" and that these pressures helped explain why these lawyers often "cut short the consultative process in favor of simply giving orders to clients").

55. See Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 Geo. J. Legal Ethics 1101, 1109 (1996) ("Legal services lawyers reported that they played substantial roles in defining clients' interests and selecting strategies, and that they did so because their clients had no idea what to do and because clients had few or no alternatives to the ones their lawyers recommended.").

56. See Spangler, *supra* note 54, at 166-70. Two lawyers in my study indicated that they felt less constrained to defer to their clients when their clients did not pay. See Interviews 26, 29.

57. Gronemeier writes:

The existence of an associational nexus between the members and their organizational *representative* gives the members a structural means to influence and determine the representative's behavior. The availability of nonlegal structural controls on the representatives suggests that the organizational representation suit is more likely to further the interests of the members than the class action suit.

Gronemeier, *supra* note 10, at 670 (emphasis added).

58. Dissenting class members are entitled under Rule 23 to challenge the adequacy of the named plaintiffs' representation. Dissenting plaintiffs, however, often do

disgruntled by the collective stance selected by an organization ordinarily may leave the group.⁵⁹ Organizations that fail to adequately represent the views and interests of their members risk losing their members' support.⁶⁰ Thus, lawyers generally may defer to the group's decisionmaking procedures because they ordinarily reflect choices by individual members to commit themselves to the group. Moreover, groups that are sufficiently well-organized to present themselves as organizations may be better positioned than poor individuals to insist on calling the shots vis-à-vis their lawyers.⁶¹

The much more circumscribed role for lawyers representing organizations and the substantial roles played by lawyers representing individuals, particularly in law reform litigation, illustrate that there is nothing inherent in collective projects to give lawyers excessive power in their relationships with clients.⁶² Other structural factors, including the clients' sophistication, capacity to make decisions, and control over lawyers' compensation, may better predict whether clients will play significant roles in setting strategy than whether they proceed collectively. These differences in lawyer-client relationships reported by lawyers in this study also suggest that any reforms directed toward remedying perceived abuses in plaintiff class actions or law reform work on behalf of individuals should not necessarily reach other types of collective representation where lawyer control may be less pervasive.

B. *Strategies Pursued and Benefits Achieved*

Lawyers in this study reported differences in the types of strategies pursued and benefits achieved in different types of collective practice. Individual clients and their lawyers were more likely than plaintiff classes or organizations to pursue simple litigation rather than multi-

not have sufficient information or incentives to challenge their representation. See Rhode, *supra* note 5, at 1215-16.

59. Yeazell comments:

Unlike the class, the organization has a system for bargaining over the group's collective stance. Charters and bylaws, elections, steering committees, and organizational politics all provide forums to thrash out intra group differences. In the extreme case, the individual member may part company; exit is always possible in voluntary organizations.

Yeazell, *Collective Litigation*, *supra* note 9, at 63.

60. See Gronemeier, *supra* note 10, at 668-69.

61. Sometimes organizations in civil rights and poverty practice pay their lawyers and thereby hold financial leverage in the relationship. In this study, organizations were far more likely than other types of clients to pay their lawyers: In 33% of matters for organizations, the clients paid fees (often reduced), as compared with 14% of matters for individuals where there was no law reform purpose, 5% of law reform matters for individuals, and 0% of matters for plaintiff classes.

62. Yeazell argues that we should expect individuals generally to exercise more control where they are individual plaintiffs than in any type of collective litigation. Yeazell, *Collective Litigation*, *supra* note 9, at 44.

dimensional strategies.⁶³ The plaintiff classes in this study pursued the only strategies they and their lawyers were capable of pursuing—litigation and publicity. Since the class action is a form of representation rather than a form of organization, plaintiff classes by definition could not and did not pursue business planning, legislative projects, or administrative advocacy. Organizations consumed ninety percent of the facilitative services described by lawyers in this study. When organizations pursued litigation, they generally pursued other strategies simultaneously; in eighty-six percent of matters involving litigation by organizations, they pursued other strategies as well, as compared with forty-six percent of litigation matters for individuals and sixty-nine percent of matters for plaintiff classes.

Lawyers also reported differences in the types of benefits achieved according to the types of client served. Lawyers for plaintiff classes often reported that they had helped change an institution or changed rules governing eligibility for, or the administration of, welfare benefits.⁶⁴ While they sometimes said that their work had helped educate government officials about a problem, in only one class action in this study did a lawyer report that his work had helped educate or mobilize a constituency,⁶⁵ and in that matter a client organization had participated in the litigation.⁶⁶

Lawyers for organizations much less frequently reported that they had helped reform an outside institution than did lawyers for plaintiff classes. Unlike their class action counterparts, however, they often

63. In 45% of all matters where clients were individuals and there was no law reform purpose, lawyers used single-pronged litigation, as compared to 38% of matters where the clients were individuals but there was a law reform purpose, 34% of matters for plaintiff classes, and only 5% of matters for organizations.

64. See, e.g., Interview 19,1 (the state began devoting greater resources to the AFDC system); Interview 20,2 (state redesigned the social services delivery system for teen parents who are wards of state); Interview 26,2 (led to the demise of the union leadership and to an increase in minority representation in the union); Interview 30,1 (forced state to begin moving mentally retarded people who were misplaced in geriatric nursing homes and created mechanism for protecting them); Interview 33,2 (1000 people received child care); Interview 48,1 (jail conditions have improved); Interview 48,3 (mental health care has improved); Interview 50,3 (state has changed its approach to serving teen parents); Interview 56,2 (hundreds of children who were not formerly receiving child support awards are now receiving them); Interview 59,2 (improved state mental health care system); Interview 59,3 (improved the state's largest state psychiatric hospital); Interview 60,1 (improved Cook County jail); Interview 61,1 (federal agency's employment practices are fairer); Interview 69,2 (gives "limited English proficient" children procedures for ensuring that they receive adequate education).

65. For articles exploring whether litigation can serve as a vehicle for organizing constituencies, see Wexler, *supra* note 8, at 1058; 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, 538-39 (1987-88).

66. See Interview 45,1 (in class action on behalf of tenant organization and class of tenants, housing conditions improved and tenants became much more aware of their rights and more willing to pursue them).

said that they had helped a client group develop an organizational structure or had helped an organization improve its operations. Many of those who represented organizations in transactional work reported that their work resulted in bricks and mortar accomplishments, such as building or rehabilitating housing, child care, or recreational facilities;⁶⁷ in formalizing and consolidating small businesses;⁶⁸ or in securing capital and other resources for such projects.⁶⁹ They said that they helped clients navigate daily impediments to their operation⁷⁰ and, in some cases, sought to remedy problems that threatened the organizations' very existence.⁷¹ They also reported that their work had helped their clients become more sophisticated as organizations.⁷² In their advocacy work on behalf of organizations, lawyers frequently reported that the work had influenced the legislative process⁷³ or energized the group's members.⁷⁴

67. *See, e.g.*, Interview 2,1 (will create 50 units of affordable housing); Interview 2,2 (clients rehabilitated dilapidated building and transformed it into decent, affordable housing); Interview 13,1 (client built housing for disabled people); Interview 14,2 (client acquired SRO hotels and converted them into housing and services for homeless people); Interview 14,3 (client created a child care program); Interview 27,1 (will result in the rehabilitation of a building where 200 families can live); Interview 31,2 (developed housing for 62 families).

68. *See, e.g.*, Interview 8,1 (helped a Puerto Rican client acquire a small metal fabricating business on an abandoned industrial site); Interview 27,3 (advised small minority businesses about regulatory matters).

69. *See, e.g.*, Interviews 4,14 (helped low-income housing developers devise financing schemes to build low-income housing); Interview 6,2 (agreement with HUD would give client the first crack at buying foreclosed properties at reduced prices); Interview 13 (lawyer advised a client about how it might qualify for a City subsidy); Interview 21,1 (loan program would help move capital into community).

70. *See, e.g.*, Interview 5,1 (resolved dispute over taxes on leased computer equipment); Interview 16,2 (represented organization in a suit by one of its own employees); Interview 16,3 (represented organization in a dispute with its landlord); Interview 27,3 (represented small minority businesses on routine regulatory matters); Interview 57,3 (helped an organization manage liability issues relating to its employees' interactions with youth); Interview 62,3 (provided general counsel services to a large African-American service and advocacy organization).

71. *See, e.g.*, Interview 4,2 (zoning authorities would have closed a not-for-profit homeless shelter); Interview 51,3 (hospital serving an African-American community sought to avoid closing following its bankruptcy filing).

72. *See, e.g.*, Interview 4,1 (lawyer helped tenant management organizations function effectively as organizations and prepared them to qualify for funding from the Chicago Housing Authority); Interview 6,1 (lawyer's work would "enhance [client's] efforts to move into new neighborhoods" and "enhance our lending efforts"); Interview 16,1 ("Each time we work on something, we move on the learning curve" which "makes the process smoother"); Interview 31,1 (next time client organization will address lead paint issues before acquiring a building); Interview 36,1 (not-for-profit housing developer became more sophisticated about how to acquire and finance the rehabilitation of housing); Interview 41,1 (client achieved goal of becoming self-sufficient on an operating basis).

73. *See, e.g.*, Interview 53,2 (an education reform statute was adopted); Interview 62,1 (lawsuit kept schools open long enough to enable the legislature to act).

74. *See, e.g.*, Interview 1,1 (zoning appeal on behalf of a church that sought to shelter homeless people served a spiritual function for those involved); Interview 12,1 (helped a tenant organization coordinate a rent strike); Interview 23,3 (community

These variations in types of work pursued and types of benefits secured suggest that different types of collective representation may serve different functions. In particular, they suggest that lawyers who serve organizations are facilitating political organizing and institution building in ways that lawyers for individuals and plaintiff classes generally are not.

II. LESSONS FOR LAWYERS' ETHICS

Just as our procedural rules governing class actions may reflect ambivalence about when to allow collective litigation to proceed in our resolutely individualistic legal system,⁷⁵ current ethics doctrine offers scattered bits of guidance about how lawyers should approach certain types of collective representation without embracing any overarching theory for managing problems of conflicts and accountability in collective work. The rules generally assume that the client is an individual without squarely acknowledging that, more often than not, lawyers represent groups rather than individuals. Moreover, as Stephen Ellmann has shown, under current doctrine, deciding whether to characterize one's representation as individual representation, intermediation, organizational representation, or class representation, is pivotal; it leads to strikingly different guidelines for interacting with clients.⁷⁶ If one represents several individuals, the rules generally provide that the lawyer owes a duty of loyalty and confidentiality to each of them as individuals and that any conflict among them requires the lawyer to withdraw from the representation of all.⁷⁷ If the clients are individuals who seek to reach compromise that is in their collective interests, in certain narrow circumstances the lawyer may function as an intermediary and attempt to help them reach an agreement.⁷⁸ If the client is an organization, whether formal or not, the lawyer is charged with representing that organization rather than any of its constituents, and conflicts within the entity generally are to be resolved by reference to the organization's internal structure.⁷⁹ Where the organizational structure is clear, this doctrine offers relatively simple answers about

groups have begun working with tenants to develop strategies for improving the neighborhood); Interview 26,3 (has shown African-American firefighters' union that they need to develop "staying power" and to acquire resources to accomplish that); Interview 29,1 (clients have become more sensitive about the framework for redistricting decisions).

75. See Yeazell, *Collective Litigation*, *supra* note 9, at 47-62 (asserting that the class action doctrine reflects an uneasy compromise between the individualistic premises of our legal system and concerns about the costs of litigation and problems of access).

76. Ellmann, *supra* note 8, at 1112-13.

77. The Model Rules bar a lawyer from representing anyone whose interests are "materially adverse" to those of any client she had previously represented in "the same or a substantially related matter" unless the client consents. Model Rules of Professional Conduct Rule 1.9(a) (1998).

78. See *id.* Rule 2.2(a), (c).

79. See *id.* Rule 1.13; Leubsdorf, *supra* note 3, at 827.

how lawyers should discern the client's interests and preferences; ordinarily, the lawyer looks to the officers for answers. Ethics doctrine, however, offers little guidance about representing groups that are just beginning to take shape and groups whose decision making processes fail to protect those whom the organization is designed to serve. In matters where the client organization lacks reliable internal governance procedures, lawyers are left to the ambiguous application of the "entity" theory to a group whose interests may be difficult to discern, whose constituencies may have conflicting interests, and/or whose members cannot agree, or have not yet agreed, on mechanisms for resolving disagreements.⁸⁰ In the area of representation most plagued by conflicts and accountability problems—injunctive class actions—the Model Code and the Model Rules have virtually nothing to say.⁸¹

This Article does not attempt to develop any uniform set of rules regarding conflicts and accountability issues in the many different circumstances in which lawyers represent groups. To the contrary, it argues in favor of an approach that is sensitive to the actual practice contexts in which lawyers work and to the pressures and constraints that influence lawyer behavior. This Article sketches a general framework for assessing conflicts and accountability in the various types of collective work that lawyers pursue for poor people.

Would such an enterprise disserve poor people? Some scholars have suggested that holding lawyers accountable for fairly representing groups in civil rights and poverty practice interferes with the goal of enabling these lawyers to pursue effective collective work for the poor.⁸² William Simon describes as part of the "Dark Secret" of collective practice that lawyers inevitably influence clients and suppress conflict.⁸³ It is in the very nature of collective projects, whether organizing tenants, bargaining on behalf of workers, or crafting new institutional arrangements for corporations, that individuals surrender control to groups, and that the lawyers who represent groups necessarily take sides in conflicts among the participants.⁸⁴ Simon argues that professional responsibility doctrine has "tended to presume com-

80. See Ellmann, *supra* note 8, at 1139; Leubsdorf, *supra* note 3, at 828. For discussions of the difficulty of determining who speaks for the organization in corporate practice, see Jonas, *supra* note 11, at 619; Reycraft, *supra* note 11, at 608.

81. See *supra* note 27 and accompanying text.

82. See, e.g., Luban, *supra* note 2, at 319-40 (arguing that activist lawyers may sometimes be justified in manipulating clients on behalf of a cause); Mark V. Tushnet, *The "Case or Controversy" Controversy*, 93 Harv. L. Rev. 1698, 1708-13 (1980) (asserting that in public interest litigation, lawyers should be accountable to the norm the lawyer enforces but not necessarily to the individual client); see also Garth, *supra* note 4, at 493-94 (criticizing the view that, "if class actions most often lead to results that comport with our notions of good public policy, we arguably need not worry about occasional conflicts among members or between lawyers and class members, even if those conflicts are not satisfactorily resolved").

83. Simon, *Progressive Lawyering*, *supra* note 12, at 1102-04.

84. See *id.* at 1102-11.

mon interests for investors and managers organized as a corporation” while it also has “tended to presume conflicting interests requiring separate representation in situations involving individuals who were not formally affiliated.”⁸⁵ In large class actions, Simon asserts, there almost always are conflicts among members of the class, and lawyers must necessarily make judgments about clients’ interests because no adequate measures are available for discerning actual client preferences.⁸⁶ Lawyers for corporations face conflicts among the various constituencies within the organization—employees, managers, and shareholders. These intra-corporate conflicts, however, are “resolved” by laws equating the corporation’s purposes with the shareholders’ interests.⁸⁷ Ethics doctrine, in turn, directs lawyers to defer to officers and the board, who are legally obligated to serve shareholders’ interests and who incidentally also are responsible for hiring and firing the organization’s lawyers.⁸⁸ Simon argues that emphasizing conflicts of interest and difficulties in discerning the interests of members of groups discourages poverty lawyers from pursuing collective projects.⁸⁹ Insisting on conflict-free lawyering for the poor, he asserts, leaves poor people at a disadvantage as compared to their better-organized, wealthier counterparts, whose interests are served through corporate entities and by corporate counsel who, in reliance on the corporate entity doctrine, proceed with collective projects in the face of such conflicts.⁹⁰

85. William H. Simon, *Visions of Practice in Legal Thought*, 36 Stan. L. Rev. 469, 477 (1984) [hereinafter Simon, *Visions of Practice*] (citations omitted).

86. *Id.* at 479.

87. For arguments that corporations should be responsive to other constituencies, see Christopher D. Stone, *Where the Law Ends: The Social Control of Corporate Behavior* 88-118 (1975); and Joel F. Henning, *Corporate Social Responsibility: Shell Game for the Seventies?*, in *Corporate Power in America* 151, 151-70 (Ralph Nader & Mark J. Green eds., 1973). See also E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1147-48 (1932) (“[T]he business corporation [is] an economic institution which has a social service as well as a profit-making function . . .”); William H. Simon, *Contract Versus Politics in Corporation Doctrine*, in *The Politics of Law: A Progressive Critique* 387, 394-402 (David Kairys ed., rev. ed. 1990) (asserting that corporation doctrine today treats the social function of the corporation as apolitical, in striking contrast to its treatment in public discourse throughout the nineteenth century as a set of economic arrangements affecting not just lenders, investors, and managers, but also other constituencies and the larger society).

88. See Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 Geo. J. Legal Ethics 289, 304 (1987) (“One need not be a professional cynic to discover in Rule 1.13 a resolution that will ingratiate lawyers to the very corporate officers who decide the terms and conditions of their employment or retainers, predictable costs to the client notwithstanding.”); Leubsdorf, *supra* note 3, at 828 (observing that treating the board and officers as the corporation’s proper representatives “reinforces the power of the individuals who hire the lawyers—the officers and the board”).

89. Simon, *Visions of Practice*, *supra* note 85, at 478-82.

90. Simon writes:

This Article acknowledges inevitable problems of representativeness and conflicts in certain types of collective representation of poor people while also advocating that we hold lawyers responsible for discerning conflicts and for responding to them. As Simon has observed, the premise that lawyers should respect individual autonomy can be useful in "inhibit[ing] the lawyer's instinct toward arrogance or paternalism."⁹¹ Moreover, much of what lawyers do on behalf of groups of poor people involves no significant conflicts. As Simon acknowledges and as the data in this study illustrate, many collective projects are largely voluntary.⁹² Even if many large organizations, including many national unions, cannot support themselves without using coercion or sanction to maintain organizational discipline,⁹³ lawyers who represent smaller organizations with well-defined decisionmaking structures and easy means of exit generally need not engage in coercive tactics. Implementing the decisions of the organization often simply means deferring to the choices of individuals to submit to the decisions of the group.⁹⁴ In projects involving the "moral and practical problems" that Simon identifies with collective practice, such as law reform on behalf of individuals, class actions, the representation of large unions, and work on behalf of nascent client groups whose internal governing procedures are not yet defined, lawyers should be accountable for the balance they strike between individuals and groups and between different constituencies within the group. Asking lawyers to attempt both to respect individuals' choices to make connections by participating in groups and to seek to "limit the intrusions on individual autonomy that group interactions generate"⁹⁵ need not discourage lawyers from pursuing collective work for poor people so long as the standards we set are reasonable.

The bar has rationalized loyalty to established organizations by treating the organizations as persons entitled to personal care and trust. It has rationalized opposition to collective action by the disadvantaged by treating each participant as an isolated individual with personal interests which would be betrayed by any effort to achieve power by joining with others.

William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 *Stan. L. Rev.* 487, 503 (1980); cf. Leubsdorf, *supra* note 3, at 826 ("Referring to large organizations as 'the client' and 'the lawyer' enables the speaker to cast over them the aura of personal rights and personal service that traditionally accompanies the troubled client seeking help from a trusted lawyer.").

91. Simon, *Progressive Lawyering*, *supra* note 12, at 1107.

92. *Id.* at 1111 ("It may be, as some post-modernists have suggested, that the nature of progressive political activism is changing in ways that make the traditional preoccupations of coercion and incentives obsolete." (citing Pauline Marie Rosenau, *Post-Modernism and the Social Sciences* 144-55 (1992))).

93. See Richard Lempert & Joseph Sanders, *Law and Social Science* 339-47 (1986); Olson, *supra* note 7, at 9-16.

94. See *id.* at 33-34 (concluding that "certain small groups can provide themselves with collective goods without relying on coercion or any positive inducements apart from the collective good itself").

95. Ellmann, *supra* note 8, at 1107.

Requiring lawyers to be accountable to clients and to respond to conflicts within groups may require different approaches for different types of collective representation, because the opportunities, pressures, and constraints of these various types of practice vary significantly. This study illustrates that, even within civil rights and poverty practice, groups differ substantially in their accountability to their own members and in their lawyers' power with respect to the groups. In law reform work on behalf of individuals, clients often have little leverage with lawyers who wish to pursue the cause at the expense of the client.⁹⁶ Moreover, the constituencies on behalf of whom lawyers seek to change the law generally have no way of registering their preferences because they lack any formal relationship with the lawyer.⁹⁷ In large injunctive class action litigation, the absence of formal mechanisms for discerning the preferences of class members and the inadequacy of current procedures for protecting the interests of dissenters give lawyers enormous power and responsibility to define the client's interests and to set strategy. As one lawyer in my sample observed, "It's very easy to . . . lose touch with your clients, and then *you* become your client. . . . [I]t's very easy to fall into this practice of not talking to clients and then just making all the decisions for clients."⁹⁸ Lawyers who represent groups that are just taking shape and selecting methods for making decisions engage in a delicate task, because these clients often depend heavily on their lawyers' advice⁹⁹ and because such fledgling organizations may be vulnerable to hijacking by willful leaders.¹⁰⁰ Lawyers who represent groups whose decisionmaking structures give real voice to their members' deliberations and guidance to their lawyers about how to implement their collective purposes have less opportunity and justification for substituting their own goals and strategies. Even when those processes are not perfectly democratic, decisions generated by those procedures generally reflect arrangements agreed upon by participants in the group.¹⁰¹

96. See *supra* notes 54-56 and accompanying text; see also Breger, *supra* note 1, at 349 (stating that in law reform work on behalf of disadvantaged individuals, "there are no constraints on an attorney's behavior except those which he chooses to impose upon himself").

97. See Hegland, *supra* note 1, at 805-06; McMunigal, *supra* note 9, at 805-19.

98. Interview 48.

99. Ellman writes:

The lawyer should, I suggest, be particularly protective of the autonomy of individual members when the lawyer herself brought their group into existence. . . . [T]he danger that a skilled and sympathetic professional may even inadvertently push people into associations they would not otherwise have accepted puts the lawyer who gave such advice under a duty to monitor its results.

Ellmann, *supra* note 8, at 1134 n.87.

100. See *id.* at 1151 (noting that the lawyer for an inchoate group must ensure that he does not become "the ally of leaders who are usurping power over their members" (citation omitted)).

101. See *supra* notes 58-59 and accompanying text.

In recent years, a number of different commentators have urged that lawyers' ethics should take into account differences in the contexts in which lawyers practice.¹⁰² This Article suggests that any move toward clarifying lawyers' obligations in collective practice should take into account structural differences in various types of collective representation. With respect to another set of ethical issues—external questions about how lawyers should balance their responsibilities to clients against their responsibilities to third parties and the public—William Simon advocates a model of ethics according to which lawyers “attempt to reconcile the conflicting legal values implicated directly in the client's claim or goal.”¹⁰³ One of the variables he asks lawyers to consider is whether procedural mechanisms available for evaluating the client's proposed course of conduct are reliable: “[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she need assume for substantive justice.”¹⁰⁴ Applying a similar criterion to an internal question about lawyer accountability—how to assess the client's interest and how to balance the interests of conflicting constituencies within the group—lawyers' ethics should consider the reliability of the procedures by which decisions will be made for the group, or in the case of formal organizations, for the natural persons who are the group's beneficiaries.¹⁰⁵ The more reliable the decisionmaking structures and opportunities for exit by individual members, the less direct responsibility the lawyer should bear for discerning the interests and preferences of the group's members and responding to evidence of dissent within the group.¹⁰⁶

Applying this framework to the types of collective representation illustrated in this study yields the following basic guidelines for assessing clients' interests and resolving conflicts. Lawyers representing individuals in law reform litigation should be permitted to represent individuals whose interests and preferences coincide with their own

102. See *supra* note 3 and accompanying text.

103. William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1096 (1988).

104. *Id.* at 1097-98.

105. Pope asserts that labor unions are fundamentally different from corporations in this sense. While shareholders in corporation doctrine are treated as the natural persons who are the beneficiaries of corporate functions, union members are the natural persons for whom unions conduct their activities. Pope argues, therefore, that the entity doctrine should not govern all conflicts within the organization, particularly union members' disputes with union management. Pope, *supra* note 3, at 52-55.

106. Pope has applied a similar framework in concluding that, while union leaders generally may be counted on to represent their members' interests in disputes with third parties, union lawyers may not always defer to union officials in disputes between unions and their members. He notes that union members, unlike corporate shareholders who can easily express their disapproval of management policies by selling their shares, often cannot escape the union's influence or their obligations to pay dues without abandoning their jobs. *Id.* at 29-30.

law reform commitments, but they generally should serve their clients' ends at the expense of law reform if those purposes diverge,¹⁰⁷ and they should not purport to represent the constituency of affected persons, who have no recourse against the lawyer. In class actions, lawyers should exercise ethical sensitivity in discharging their largely unconstrained role as class counsel.¹⁰⁸ They should attempt to understand and to represent the interests of the members of the class and be attentive to conflicts within the class.¹⁰⁹ Lawyers representing organizations whose decisionmaking structures are well-defined and from which members can easily exit generally may defer to decisions generated by those processes,¹¹⁰ except where they believe that those who

107. Several lawyers in this study acknowledged that they had faced conflicts between their own law reform commitments and their clients' preferences, but all of those who indicated that they had such conflicts said that they resolved the conflict in favor of the client. *See, e.g.*, Interview 32,1 (lawyer who sued police for refusing to protect an African-American family who had moved into a hostile white neighborhood was disappointed when the family chose to move rather than to fight, but the lawyer deferred to the family's judgment that their children's safety should take priority over the fair housing principle); Interview 32,2 (lawyer who represented a plaintiff in a lending discrimination case said that "a sore point" between his client and him had been his client's decision to seek only money damages and no broader relief from the defendant bank); Interview 54,2 (lawyer was disappointed when his client chose to accept a monetary settlement because he thought they would win at trial).

McMunigal has argued that requiring the lawyer to defer to the client whenever the client's interest and law reform goals diverge demands more than we can reasonably expect of cause lawyers. McMunigal, *supra* note 9, at 815-16. McMunigal advocates allowing lawyers to negotiate with clients to pursue law reform objectives at the client's expense, so long as the lawyer adequately discloses the choice to the client and the client consents to proceed on those terms. *Id.* at 817-18. He argues that the public dimension of law—"the generation of precedent, development of the law, and the application of public values in resolving disputes"—is in some respects analogous to the advancement of medical research. *Id.* at 816 (citation omitted). Even if client and patient interests generally should take precedence over collective goals in legal and medical practice, clients and patients should be able to choose whether or not to allow their cases to be used for collective purposes. *See id.*

108. Bell has argued that civil rights lawyers must "come to realize that the special status accorded them by the courts and the bar demands in return an extraordinary display of ethical sensitivity and self-restraint." Bell, *supra* note 12, at 505.

109. David Luban has persuasively argued that problems of class conflicts "require the lawyer to be as representative as it is possible to be." Luban, *supra* note 2, at 356. For arguments specifying how lawyers might discern conflicts and how courts should respond to them, see Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 Syracuse L. Rev. 709, 714 (1989) (arguing that "because . . . no individual client . . . can determine the course of a class action, it is doubly important that a class lawyer reach out to a sampling of class members to ascertain its views and feelings on a variety of non-legal considerations about which only clients should voice opinions"); Rhode, *supra* note 5, at 1255-56 (suggesting that we liberalize intervention procedures in institutional reform litigation).

110. I agree with Stephen Ellmann that most of the groups with which lawyers will interact in civil rights and poverty work will accept democratic values. Ellmann, *supra* note 8, at 1133. That conclusion, however, is not essential to this analysis. Individuals often choose to join organizations in which their opinions are not highly valued. So long as individuals who join such organizations have real opportunities to exit, lawyers may represent these organizations without trampling on individual autonomy.

speak for the organization are abusing the trust of the organization's intended beneficiaries.¹¹¹ Organizations of poor people, no less than corporations, generally should benefit from the presumption that the entity, rather than its individual members, is the client.¹¹² In groups without any formal decisionmaking apparatus, lawyers should help clients develop democratic processes for generating decisions.¹¹³

This focus on the structure of relationships between lawyers and groups and between groups and their members in civil rights and poverty practice highlights how organizations sometimes can function as mediating institutions through which lawyers facilitate collective action without attempting to define clients' interests.¹¹⁴ Scholars have written extensively during recent years about the virtues of voluntary organizations. Commentators from both the left and the right embrace community organizations as vehicles for delivering social services and structuring civic life.¹¹⁵ A large body of recent research suggests that participation in local organizations powerfully improves communities' prospects for bettering schools, reducing crime, and promoting economic development.¹¹⁶ Proponents of organizations also applaud the ways in which collective processes shape individual participants' perceptions of their own interests and distill them through the lens of collective goals.¹¹⁷

111. This is the general approach set forth in Model Rule 1.13. This rule, however, does not go far enough in protecting the organization against abuses by management. When the lawyer believes that management is engaged in self-dealing at the corporation's expense, Rule 1.13 requires the lawyer to "refer [the] matter to higher authority" in the organization. Model Rules of Professional Conduct Rule 1.13 cmt. (1998). If the board ratifies the misconduct, however, then the lawyer's only recourse is to resign without disclosing the misconduct. For strongly critical analyses of this resolution, see Gillers, *supra* note 88, at 297-305; James R. McCall, *The Corporation as Client: Problems, Perspectives, and Partial Solutions*, 39 *Hastings L.J.* 623, 637-39 (1988).

112. For an argument that building and maintaining organizations is more difficult for relatively powerless people than for the more powerful, see Claus Offe, *Disorganized Capitalism* 170-220 (John Keane ed., 1985).

113. See Ellmann, *supra* note 8, at 1116-18.

114. Stephen Wexler made this point almost 30 years ago: "[The lawyer] can be another hook on which poor people depend, or he can help the poor build something which rests upon themselves—something which cannot be taken away and which will not leave until all of them leave." Wexler, *supra* note 8, at 1053-54.

115. See Peter L. Berger & Richard J. Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* 34-40 (1977); Sara M. Evans & Harry C. Boyte, *Free Spaces: The Sources of Democratic Change in America* 184-87 (1992); Robert Fisher, *Let the People Decide: Neighborhood Organizing in America* 153-66 (1984).

116. See Robert Putnam, *Bowling Alone: America's Declining Social Capital*, 6 *J. Democracy* 65, 66-67 (1995).

117. Cf. Frank Michelman, *Law's Republic*, 97 *Yale L.J.* 1493, 1503 (1988) ("In the strongest versions of republicanism, . . . [p]olitical engagement is considered a positive human good because the self is understood as partially constituted by, or as coming to itself through, such engagement."); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1541, 1548-51 (1988) (describing republican conceptions of politics "as above all deliberative" and directed toward "achiev[ing] a measure of critical dis-

This Article adds one more item to the list of organizations' virtues. Unlike class actions and law reform litigation, which impose few structural constraints on lawyers' conduct, organizations generally have internal mechanisms for resolving conflict and generating decisions binding on their lawyers. Unlike the members of injunctive plaintiff class actions and beneficiaries of reform litigation, who may constitute a group only in the limited sense that they share certain attributes as victims,¹¹⁸ members of small organizations share voluntary bonds; they generally have chosen to join groups and to participate as members.¹¹⁹ Class action lawsuits and law reform litigation on behalf of individuals have the advantage of allowing the enforcement of collective rights without the hard work of organizing.¹²⁰ Indeed, it may be almost impossible to organize some of the disparate groups whose interests these devices sometimes promote.¹²¹ Nevertheless, organizations can protect dissenters and generate consensus in ways that class actions and impact litigation on behalf of individuals cannot.

CONCLUSION

Lawyers for poor people often serve groups rather than individuals. Yet, our conceptions of ethical lawyering draw primarily from models of service to individuals. Critics of lawyers for poor people often equate collective representation with class action litigation and other types of impact litigation as to which structural attributes of the groups represented and their relationships with their lawyers create serious problems of conflicts and accountability. This Article illustrates that collective representation for poor people often takes the form of representing organizations, where conflicts and lawyer accountability issues generally are much less worrisome and where the goals pursued may differ from those ordinarily sought through law reform work. Any move toward revising ethics doctrine to acknowledge that lawyers routinely serve groups rather than individuals should be sensitive to these important differences in types of collective representation. In a time when critics often suggest that lawyers threaten cli-

tance from prevailing desires and practices, subjecting these desires and practices to scrutiny and review").

118. See Owen M. Fiss, *The Supreme Court 1978 Term: Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 19 (1979) (asserting that the group of victims in structural suits "exists independently of the lawsuit; it is not simply a legal construct").

119. See Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 Colum. L. Rev. 866, 868-91 (1977) (tracing the history of class action suits in litigation on behalf of more cohesive, organic social groups).

120. See Marc Galanter, *Delivering Legality: Some Proposals for the Direction of Research*, 11 L. & Soc'y Rev. 225, 240 (1976) ("The class action may also be thought of as a device for securing the benefits of scale without undergoing the outlay for organizing.").

121. See Joel F. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* 6 (1978).

ent autonomy whenever they depart from the most humble types of individual client service, we should avoid discouraging lawyers from helping clients build organizations and institutions serving clients' collective as well as individual needs.

Notes & Observations