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## Participatory Litigation: A New Framework for Impact Lawyering

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## ARTICLE

## Participatory Litigation: A New Framework for Impact Lawyering

Jules Lobel\*

**Abstract.** This Article argues that the manner in which class-action and impact lawyers have traditionally litigated leaves little room for class participation in lawsuits, and that a new, participatory framework can and should be adopted. Through the story of a successful class-action suit challenging California's use of prolonged solitary confinement in its prisons, the Article demonstrates that plaintiff participation is both possible and important.

Academic literature has assumed that broad plaintiff participation in class-action and impact litigation is not achievable. Yet this Article describes how, in a key California case, attorneys actively involved the plaintiffs in all aspects of the litigation: choosing class

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\* Bessie McKee Walthour Professor of Law, University of Pittsburgh School of Law. I want to thank my research assistants, Alex Downs, Sarah V. Itzkoff, Alex Wilkerson, Julie Casey, Jaden Rankin-Wahlers, Andrew Calve, and Amira Montasser El Sawi for their research help, the University of Pittsburgh School of Law's Document Technology Center for its work preparing this Article, and University of Pittsburgh law librarians Karen Sheppard and Kezia Lukombo for the help in submitting the Article. I also want to thank Dean Amy Wildermuth of Pitt Law for her support of this project.

The litigation that this Article recounts could not have been successfully undertaken without the inspiring and courageous collective solidarity and wisdom of those incarcerated at Pelican Bay State Prison, along with the tremendous work done by my colleagues at the Center for Constitutional Rights, Rachel Meeropol, Samuel Miller, Alexis Agathocleous, Azure Wheeler, Britany Thomas, our cooperating attorneys, Carol Strickman, Anne Weills, Marilyn McMahon, Charles Carbone, Rebecca Rabkin, Carmen Bremer, Greg Hull, Carole Travis, Matthew Strugar, Anne Cappella, and paralegals Claire Dailey and Linda Nakanishi. I thank my colleagues Jessie Allen and Deborah Brake, as well as Bill Quigley, Ellen Yaroshevsky, David Rudovsky, Samuel Miller, Rachel Meeropol, Carmen Bremer, Scott Morgenstern, Eve Wider, George Loewenstein, Art McDonald, Margaret Randall, Alice and Staughton Lynd, Terry Kupers, William Simon, William B. Rubenstein, Steve Schnapp, Todd Ashker, Gabriel Reyes, and Paul Redd for their helpful comments on drafts of the Article. The comments by participants of the Incarceration and the Law Roundtable were also very useful. Finally, I especially want to thank my wife Karen Engro for her insightful comments and editorial suggestions on drafts of the Article, and her encouragement of the project from beginning to end.

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representatives, deciding on claims to present, making important tactical decisions, negotiating and ratifying a settlement agreement, and monitoring the settlement decree. The Article also describes how the California lawsuit resulted from, and interacted with, a prisoners' movement that conducted three mass hunger strikes and garnered national and international attention. Ultimately, the Article uses the California narrative to develop a theory of participatory litigation that infuses political and legal representation with grassroots involvement.

Theories of political and legal representation have oscillated between a mandate form of representation, where the representative directly supports her constituents' views; an interest form of representation, where the representative is presumed to have the same interests as those she represents; and an accountability form of representation, where constituents or clients delegate broad discretion to the representative subject to periodic voting or another mechanism for removal. Participatory litigation, in contrast, allows for collaborative, collective, and consensus-building interactions between the representative and those she represents. In this model, the representative and the client teach and learn from one another.

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## Introduction

Imagine being confined in an eight-by-ten-foot windowless cell for twenty-two hours a day. Phone calls and contact visits with family and friends are prohibited. You only leave for approximately one and a half hours a day for recreation alone in an empty area somewhat larger than your cell, containing twenty-foot-high walls and a partial grate roof with little direct sunlight. You communicate with surrounding prisoners in a disembodied manner by shouting through your cell walls. There are no educational or vocational programs, and you have not seen trees, birds, or grass, nor meaningfully touched another human, for years.<sup>1</sup>

By 2011, more than 1,000 men at California's Pelican Bay State Prison Security Housing Unit (SHU) had spent years in this condition. At the time, approximately 500 prisoners had been in solitary confinement for more than ten years, with seventy-eight prisoners there for over two decades.<sup>2</sup> Prison officials had not placed these prisoners in solitary confinement because of serious misconduct in prison or because of the heinousness of their criminal offenses. Instead, officials placed the prisoners in solitary confinement based on alleged association with a prison gang. Being an alleged gang member was not even necessary: Anyone labeled an "associate," defined as someone who is periodically involved with gang members, could be put in the SHU.<sup>3</sup> Tattoos, artwork, and letters sufficed for SHU placement.<sup>4</sup> Prison officials reviewed placement decisions only once every six years,<sup>5</sup> and virtually all prisoners so reviewed were perfunctorily retained in solitary.<sup>6</sup> The only way out of the SHU was release from prison, becoming an informant, or death; in the vernacular, to "parole, snitch, or die."<sup>7</sup> Prisoners serving a life sentence were

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1. See Plaintiffs' Second Amended Complaint ¶¶ 3, 39-40, 45, 47-48, 58, 63-67, Ruiz v. Brown, No. 09-cv-05796 (N.D. Cal. Sept. 9, 2012), ECF No. 136; KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 2, 4, 10, 19, 26-28 (2016) (describing conditions at the Pelican Bay State Prison Security Housing Unit).
  2. Plaintiffs' Second Amended Complaint, *supra* note 1, ¶ 33; Julie Small, *Under Scrutiny, Pelican Bay Prison Officials Say They Target Only Gang Leaders*, 89.3 KPCC (Aug. 23, 2011), <https://perma.cc/Y7H8-SUTA>.
  3. Plaintiffs' Second Amended Complaint, *supra* note 1, ¶¶ 92, 94; CAL. CODE REGS. tit. 15, § 3378(c)(4) (2011).
  4. REITER, *supra* note 1, at 2.
  5. See Plaintiffs' Second Amended Complaint, *supra* note 1, ¶¶ 96-99.
  6. See *id.* ¶¶ 100-103, 120-122.
  7. Keramet A. Reiter, *Parole, Snitch, or Die: California's Supermax Prisons and Prisoners, 1997-2007*, 14 PUNISHMENT & SOC'Y 530, 536 (2012).

thus condemned to die in solitary unless they agreed to become informants, putting themselves and their families in danger of retribution in the process.<sup>8</sup>

Despite the formidable obstacles to organizing in these conditions, thousands of California prisoners went on hunger strike in July 2011 to protest the state of solitary confinement.<sup>9</sup> The strike, led by SHU prisoners, garnered national and international attention.<sup>10</sup> Although state officials claimed that the strike was gang inspired and led,<sup>11</sup> a top official eventually met with four strike leaders and agreed to minor reforms, including allowing prisoners to send one picture of themselves home per year and providing a pull-up bar for exercise in the recreation area.<sup>12</sup> The official also promised to consider procedural reforms regarding SHU placement and retention.<sup>13</sup> As a result, the prisoners ended the strike.<sup>14</sup> Despite the prisoner hunger strikes placing the national spotlight on California's draconian prison policies, they achieved only minimal success.<sup>15</sup> Todd Ashker, one of the four leaders of the strike, wrote to the Center for Constitutional Rights (CCR) asking us to file a class-action lawsuit challenging California's use of indeterminate solitary confinement.<sup>16</sup> We agreed to do so. The CCR took the prisoners' case because the prisoners represented a powerful grassroots movement challenging a torturous policy of prolonged solitary confinement. Moreover, the prisoners' struggle had

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8. See *id.*; *Wilkinson v. Austin*, 545 U.S. 209, 227 (2005) (discussing the dangers of informing). Many SHU prisoners had indeterminate sentences, meaning that they theoretically could have been paroled from prison after a certain number of years. But California had an unwritten—though in practice virtually absolute—rule that no prisoner housed in the SHU could ever get parole. See *Plaintiffs' Second Amended Complaint*, *supra* note 1, ¶¶ 14-23, 87-90. Practically, only those prisoners with determinate sentences could get out of the SHU after serving their full time, whereupon they would be released from years of isolation straight into the outside world. *Id.*

9. Ian Lovett, *Hunger Strike by Inmates is Latest Challenge to California's Prison System*, N.Y. TIMES (July 7, 2011), <https://perma.cc/VV3K-FB5X>.

10. See, e.g., *id.* (drawing attention to the movement via an article in a major international news publication).

11. *Id.*

12. REITER, *supra* note 1, at 196.

13. *Id.*; Letter from Robert A. Barton, Inspector Gen., California Off. of the Inspector Gen., to California Sen. Darrell Steinberg 2 (Oct. 17, 2011), <https://perma.cc/4KHH-YAR7>.

14. REITER, *supra* note 1, at 196. A second strike in September 2011 ended similarly. See Robert J. Lopez, *State Prison Officials Vow to Crack Down on Inmate Hunger Strikes*, L.A. TIMES (Sept. 29, 2011, 8:15 PM), <https://perma.cc/4P34-5TBU>; *Inmates End Hunger Strike at Pelican Bay, Prison Advocates Rally*, CBS SF BAY AREA (Oct. 14, 2011, 4:15 PM), <https://perma.cc/GE8M-LS38>.

15. See *Plaintiffs' Second Amended Complaint*, *supra* note 1, ¶¶ 160-163.

16. At that time, I was the president of the CCR.

national implications: At the time, reports indicated that approximately 80,000 prisoners in the United States were in solitary confinement.<sup>17</sup>

The CCR's representation of these prisoners is an example of "movement lawyering," in which attorneys represent sociopolitical movements using a multifaceted strategy that treats impact litigation as just one aspect of a broader activist campaign.<sup>18</sup> Unlike most of the impact litigation described in academic literature or practiced by progressive and class-action litigators,<sup>19</sup> however, the Pelican Bay attorneys actively involved the plaintiffs in all aspects of the suit: choosing class representatives, deciding on claims to present, making important tactical decisions, negotiating and ratifying a settlement agreement, and monitoring the settlement decree. The prisoners' activism, as well as their legal and practical knowledge gained from years of challenging solitary confinement, called for litigating this class-action suit in a different manner than the typical impact-lawyering approach. I term the resulting framework *participatory litigation* to denote that one central aim of the case was empowering the plaintiffs to play an important role in directing the litigation itself.

Participatory litigation challenges the practices and ethical understandings of class-action and impact litigators. It involves litigators providing plaintiffs with an authentic, nonmediated voice in presenting their claims to defendants, judges, and the public. Movement activists work closely with participatory lawyers in deciding on the named plaintiffs and the legal claims they raise. In contrast to the traditional attorney-client relationship, participatory litigation involves class members and named plaintiffs in tactical and strategic legal decisionmaking. Most importantly, participatory class-action litigation

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17. See COMM'N ON SAFETY & ABUSE IN AM.'S PRISONS, VERA INST. OF JUST., CONFRONTING CONFINEMENT 52 (2006); see also ASS'N OF STATE CORR. ADM'RS & ARTHUR LITMAN PUB. INT. PROGRAM AT YALE L. SCH., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON, at ii (2015) [hereinafter ASCA-LITMAN SURVEY] (estimating that "80,000 to 100,000 people were, in 2014, in segregation").

18. See Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 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); Ellen Yaroshefsky, Symposium Introduction, 47 HOFSTRA L. REV. 1, 1-2 (2018); see also Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2743-49 (2014); Deborah N. Archer, *Political Lawyering for the 21st Century*, 96 DENV. L. REV. 399, 401-02, 417 (2019).

19. For example, David Fathi, the director of the National Prison Project at the American Civil Liberties Union (ACLU) and an experienced class-action prison litigator, recognizes that the participatory-litigation framework described in this Article is quite unusual given his experience. Telephone Interview with David C. Fathi, Dir., ACLU Nat'l Prison Project (Feb. 2, 2021). My own observations, as well as conversations with experienced impact litigators such as David Rudovsky, Bill Quigley, Rachel Meeropol, and Sam Miller, confirm Fathi's conclusion.

encourages collective, communal decisionmaking on matters such as settlement negotiations and ratification while also providing a role for plaintiffs in collectively monitoring compliance.

Participatory litigation has three main elements that require a reorientation of traditional class-action and impact lawyering seeking structural change. The first element involves transforming the lawyer–client relationship by incorporating insights from rebellious,<sup>20</sup> collaborative,<sup>21</sup> client-centered,<sup>22</sup> and democratic<sup>23</sup> lawyering into impact, test-case, and class-action litigation. Even in complex litigation, lawyers and clients should have an equal dialogic relationship, with each bringing skills and insights to their mutual struggle. Probably the best description of this lawyering model is what Lucie White termed a “third-dimensional practice of law,” derived from Paulo Freire’s work and feminist understandings of “consciousness raising,” which posits the attorney with professional skills engaging in a “mutual learning practice” with oppressed communities.<sup>24</sup> An important aspect of creating a more egalitarian society is 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. Impact litigators can bring invaluable expertise in strategy, tactics, and legal theory to a lawsuit, but achieving long-lasting structural change and utilizing the litigation to further the goal of transforming society requires that the lawyers learn from and accept the expertise of their clients. Those clients, class members, and movement leaders may have insights and expertise gleaned from their understanding of the oppression they experience that class-action litigators all too often ignore. The lawyers who introduced me to participatory litigation, which they termed “accompaniment,” described it as “two experts . . . exploring the way forward together.”<sup>25</sup>

Second, by actively involving clients in the litigation, participatory litigation centers clients’ voices. While impact litigation has resulted in many

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20. See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 37-38 (1992) (describing rebellious lawyering).

21. See Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 *CLINICAL L. REV.* 427, 440-41 (2000) (describing collaborative lawyering).

22. See DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH*, at xxi (1991) (describing client-centered lawyering).

23. See Sameer M. Ashar, *Essay, Deep Critique and Democratic Lawyering in Clinical Practice*, 104 *CALIF. L. REV.* 201, 221 (2016) (describing democratic lawyering).

24. Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 *WIS. L. REV.* 699, 760-62.

25. STAUGHTON LYND, *ACCOMPANYING: PATHWAYS TO SOCIAL CHANGE* 4 (2013); see also ALICE LYND & STAUGHTON LYND, *STEPPING STONES: MEMOIR OF A LIFE TOGETHER* 87, 93 (2009) (describing the concept of two experts—one legal and one nonlegal—combining their expertise).

sweeping changes, it “is rarely designed to give voice to the clients’ own perceptions of their needs.”<sup>26</sup> Accordingly, impact litigators often make little or no effort to involve their clients in the litigation process.<sup>27</sup> In class-action lawsuits, plaintiffs are often excluded from any role, with courts even allowing lawyers to settle claims despite the opposition of most named plaintiffs or class members.<sup>28</sup> Indeed, an underlying question pervading class-action doctrine is how to make lawyers accountable to the class they purport to represent, especially when lawyers litigate or settle the case based on their own interests and views of what is best without consulting with or adequately representing the class.<sup>29</sup> A participatory framework seeks to radically alter that dynamic and use the class action to empower clients through their active, collective participation in the lawsuit.

Finally, participatory litigation attempts to integrate substantive legal reforms with democratic changes to challenged institutions. This difficult-to-achieve goal differs from due process, thought of as an individual’s right to be heard,<sup>30</sup> because its focus is on group rights. Participatory litigation furthers participatory democracy by demanding a communal or collective right to participate in institutional decisionmaking.<sup>31</sup> As some have noted, such demands in public-law litigation promote an “empowered democracy” by fostering the “citizen’s interest in breaking open the large-scale organizations or the extended areas of social practice” that “sustain insulated hierarchies of power and advantage.”<sup>32</sup>

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26. 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, 545 n.45 (1987-1988).

27. *See, e.g., id.* at 541, 545.

28. Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 VA. L. REV. 1103, 1119 (1992).

29. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 370-72 (2000); *see also* Ellmann, *supra* note 28, at 1119-20. Cases such as *Amchem Products, Inc. v. Windsor* draw this question into sharp relief. *See* 521 U.S. 591, 607-08, 625-28 (1997); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1048 (1995) (critiquing the lawyers who settled the case based on their own interests rather than the interests of the class they purported to represent); *see also id.* at 1137-41 (recounting how a key named plaintiff was unaware of virtually anything involving the case, including the settlement).

30. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (“For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard . . . .’” (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864))).

31. *See generally* Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1422-35 (1984) (defining communal rights and providing examples, including the right to strike and certain First Amendment protections).

32. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1055-56 (2004) (quoting ROBERTO MANGABEIRA  
*footnote continued on next page*

The demand for institutional participation could be seen as minimally reformist or perhaps even co-optive, but in many contexts it presents a radical challenge to institutions constructed on fundamentally undemocratic premises. For example, demanding collective prisoner participation in prison governance is so inconsistent with the hierarchical nature of American prisons that it can prefigure an alternative to incarceration: abolitionism.<sup>33</sup> While litigation is not a plausible vehicle for fulfilling abolitionist goals such as dismantling oppressive, hierarchical institutions, a participatory demand requiring some empowerment of and dialogue with the oppressed group can provide the seeds of a different, more egalitarian model of social relations.<sup>34</sup> Participatory demands are thus potentially transformative in imagining a radically different social order.<sup>35</sup>

The academic literature on movement lawyering—or “law and organizing,” a term given to a form of movement lawyering which focuses on combining legal work with community organizing<sup>36</sup>—contains a wealth of rich, detailed, and nuanced narratives of social-justice campaigns in which lawyers played an active role.<sup>37</sup> Yet surprisingly, these narratives contain little

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UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 530 (1987)).

33. The inconsistency was demonstrated in our case by prison officials' bitter opposition to even the most minimal democratic participation, even more so than their opposition to substantive Eighth Amendment reforms. For an example of abolitionism in action, see Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1621-23 (2019) (discussing activists' desire to transform “the power structures and immediate social relations that breed harm in the first instance” through abolitionist techniques).
34. W.E.B. Du Bois and Angela Davis, who both developed the notion of “abolition democracy,” viewed it as “a positive project [as opposed to a] merely a negative one.” Mon Mohapatra & Rachel Foran, *Abolitionists Want You to Imagine a Better World Beyond the Ballot Box*, HARPER'S BAZAAR (Nov. 11, 2020, 3:03 PM EST) (quoting Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1162 (2015)), <https://perma.cc/986J-EXCY>. Community empowerment and other forms of grassroots participation and leadership are thus important to the abolitionist-democracy framework. See, e.g., *id.*; McLeod, *supra* note 33, at 1622-23 (describing “local social-change projects” that “begin to realize incrementally the sort of changed world we would want to live in”).
35. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 426-34 (2018).
36. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447 (2001).
37. E.g., Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 443-50 (1995); White, *supra* note 24, at 699-701; White, *supra* note 26, at 546-63; Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405, 406-13, 417 (1998); Veryl Pow, Comment, *Rebellious Social Movement Lawyering Against Traffic Court Debt*, 64 UCLA L. REV. 1770, 1787-801 (2017); Sameer M. Ashar, *Public*  
*footnote continued on next page*

detail about client participation in major litigation. They focus instead on how attorneys and litigation can aid client participation *outside* of the courtroom: namely, in the streets, in the legislature, and in the press.<sup>38</sup> These movement narratives set forth a division of labor to counteract the potential for lawyer dominance or subordination of clients: The lawyer focuses on litigation and plays a supportive role in the organizing efforts that surround the case.<sup>39</sup> Scott Cummings, one of the most prominent and distinguished movement lawyering scholars, discounts movement participation *in* the litigation:

[D]iscussions of movement lawyering place less emphasis on lawyer-enabled participation and more emphasis on traditional conceptions of role specialization and lawyer expertise. Lawyers promote participation by using their legal expertise to support movement organizations, which are the vehicles through which participation occurs. At bottom, movement lawyering places more of an emphasis on building power than achieving participation as such—although the two are linked.<sup>40</sup>

In contrast, this Article proposes envisioning participation as a fundamental component of class-action, impact, and movement litigation. Participation affirms the plaintiffs' dignity and humanity, which is often systematically and brutally denied to them by institutions or officials.<sup>41</sup> Moreover, transformation of society requires challenging hierarchical relationships. This can be brought about with a new framework where both the professional and the layperson develop a mutual respect in their respective expertise and collaborate in their joint enterprise. Reimagining and reconfiguring the relationship between the professional and the nonprofessional is important in a wide range of endeavors, whether it be legislative policymaking, individual litigation, public speaking, humanitarian aid, or impact litigation.

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*Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1879-80 (2007); Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617, 1618-21 (2011); Guinier & Torres, *supra* note 18, at 2777-81.

38. See, e.g., Cummings, *supra* note 37, at 1648-50 (streets); White, *supra* note 26, at 547-50 (legislature); Ashar, *supra* note 37, at 1922 (press).

39. See, e.g., Ashar, *supra* note 37, at 1889, 1910-11, 1913 (describing a division of labor where organizers and workers defined overall goals and engaged in a political campaign while lawyers tended to the litigation); White, *supra* note 26, at 545-46 (noting that, although the poor may feel irrelevant in welfare litigation, "a lawsuit might be an occasion for poor people to join together, outside of the formal boundaries of the litigation, in spaces that are parallel to it").

40. Cummings, *supra* note 18, at 1727.

41. For an excellent discussion of the dignifying potential of litigation, see Angela M. Gius, *Dignifying Participation*, 42 N.Y.U. REV. L. & SOC. CHANGE 45, 70-73 (2018). See also Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL'Y & L. 143, 155 (2002) ("Often, empowering individuals to advocate for themselves recognizes and honors their own dignity.").

Perhaps more importantly, successful impact litigation often requires engaged participation by activist plaintiffs who understand oppressive structures better than their lawyers. Such engagement between lawyers and plaintiffs enhances the mutual trust and understanding that aids successful lawsuits. The involvement of class members, community groups, and named representatives is particularly crucial in constructing a settlement agreement to change harmful practices.<sup>42</sup> It is also vital in monitoring the resulting decree to ensure its long-term implementation.<sup>43</sup>

This Article explores participatory litigation through the lens of a major class-action case which has now spanned about ten years. It reflects on the efforts of the legal team, prisoners, and prisoners' family members to litigate *Ashker v. Governor of California*<sup>44</sup> in a participatory fashion, and it grapples with obstacles we faced, mistakes the plaintiffs and their attorneys made, and the successes and failures of our endeavor.<sup>45</sup> Part I of the Article sets forth the history of progressive scholars' and lawyers' attempts to address the contradictions and limitations of the law-reform model. Part II utilizes the Pelican Bay narrative to explore the possibilities of plaintiff participation in class-action lawsuits, particularly those suits seeking injunctive relief. I use the narrative form to explicate law and theory from the bottom up.<sup>46</sup> Transformative social change is aided by grounding theory "in experience rather than proceeding primarily from idealized and abstract premises with little attention to how those ideals are translated into actual practices."<sup>47</sup> Every case is different: The plaintiffs here were more engaged and legally knowledgeable than most others, but they were limited by the channels of communication available to them as prisoners. But the Pelican Bay narrative suggests that possibilities for plaintiff participation in class-action or other group litigation are not as minimal as commonly assumed. Accordingly, these

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42. See, e.g., Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 301-02 (demonstrating the important role that plaintiffs can play in constructing an adequate settlement).

43. See Sabel & Simon, *supra* note 32, at 1070-71.

44. *Ashker v. Governor of California*, CTR. FOR CONST. RTS., <https://perma.cc/7J25-N357> (last updated Apr. 9, 2021); see also *supra* text accompanying note 16.

45. On the critical importance of reflection for movement lawyers, see William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 23-24 (2007).

46. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 975 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413-15 (1989); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 878 (2021) ("[M]ovement narratives work simultaneously to denaturalize the status quo and to help make another world more possible.").

47. McLeod, *supra* note 33, at 1617.

possibilities should be more thoroughly explored.<sup>48</sup> What prevents impact litigators from adopting a more participatory framework is not that doing so is impossible or even difficult, but rather that the usual methods of conducting impact litigation do not motivate attorneys to think about participation.<sup>49</sup>

Finally, Part III distills lessons from the Pelican Bay litigation for society's conceptions of representation, expertise, and democracy. Political representation and group legal representation are in some respects analogous, and both are necessary in a large, complex society. The theory of both forms of representation oscillates between a mandate form of representation, where the representative directly supports her constituents' views; an interest form of representation, where the representative is presumed to have the same interests as those she represents; and an accountability form of representation, where constituents or clients delegate broad discretion to the representative subject to periodic voting or another mechanism for removal.<sup>50</sup> Participatory litigation, in contrast to the more traditional principal-agent theory of representation,<sup>51</sup> requires collaborative, collective, and consensus-building interactions between the representative and those she represents. In this model, the representative and the client teach and learn from one another.

## **I. Lessons from the Past: The Critique of Class-Action Impact Litigation**

### **A. The Critique of Liberal Legalism**

The major law-reform and impact litigation that dominated the Warren and early Burger Courts in the 1950s through the 1970s achieved significant judicial victories,<sup>52</sup> but was nevertheless subjected to increasing criticism.<sup>53</sup>

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48. Cf. Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 *FORDHAM L. REV.* 2449, 2457, 2461 (1999) (suggesting that, empirically, "there is nothing inherent in collective projects to give lawyers excessive power in their relationships with clients").

49. Telephone Interview with David Fathi, *supra* note 19.

50. See generally HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967) (describing different theories of representation).

51. Under the traditional principal-agent theory, a client or constituency accords broad discretion to a representative, and that representative is subject to client control and accountability. See *RESTATEMENT (THIRD) OF AGENCY* § 1.01 (AM. L. INST. 2006).

52. See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 2-4 (1979).

53. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 56-74 (1987); Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 *HARV. L. REV.* 937, 946-48 (2007) (describing critiques of the use of legal avenues to affect social and political change).

Law-reform litigation was criticized as ineffective and a “hollow hope” in achieving lasting, transformative change, deluding people into relying on the law and the courts to reform society.<sup>54</sup> Such litigation was also deemed hierarchical, elitist, and undemocratic in promoting the lawyer as the agent of change while relegating mass activism to a subordinate role.<sup>55</sup> Ella Baker, an influential civil rights activist, reportedly critiqued the NAACP and reasoned that “[t]he legal strategy ‘had to be’ directed by lawyers and other professionals, leaving most of the huge mass base . . . little meaningful role in the development of policy and program except raising funds and cheering the victories as they came.”<sup>56</sup> A third, related argument claimed that lawyers litigating impact cases were disconnected from, uninterested in, and sometimes even opposed to their clients’ views, as illustrated by Derrick Bell’s influential critique of the NAACP’s school-desegregation lawyering.<sup>57</sup> These critiques all challenged the legal-liberalist model, in which courts and lawyers served as the engines of social change.<sup>58</sup>

The predominant alternative espoused by critics of legal liberalism was to eliminate or at least de-emphasize litigation, particularly impact litigation, as a strategy for social change. For these critics, litigation should be “avoided whenever possible,” as it tends to “reinforce the client’s experience of powerlessness.”<sup>59</sup> As Derrick Bell once mused, “real progress [in civil rights] can come only through tactics other than litigation.”<sup>60</sup> While these critiques never totally rejected litigation, they emphasized lawyers using nonlitigation skills to aid movements seeking social change.<sup>61</sup>

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54. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336-43 (1991).

55. See Thomas Hilbink, *The Profession, the Grassroots and the Elite: Cause Lawyering for Civil Rights and Freedom in the Direct Action Era*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 60, 63-65 (Austin Sarat & Stuart A. Scheingold eds., 2006).

56. CHARLES M. PAYNE, *I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* 79, 87 (1995).

57. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 482-87 (1976); see also, e.g., White, *supra* note 26, at 535-36 (“The individuals who served as named plaintiffs in these [welfare] lawsuits sometimes had little contact with their lawyers or involvement in the lawsuit after the complaint was filed and their depositions [were] recorded.”).

58. See Cummings, *supra* note 18, at 1650.

59. See Richard L. Abel, *Lawyers and the Power to Change*, 7 *LAW & POL’Y* 5, 9 (1985).

60. Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 *HARV. L. REV.* 4, 24 (1985).

61. See Cummings, *supra* note 18, at 1704.

In much of the alternative-model literature, impact litigation was eschewed or ignored as inconsistent with new lawyering.<sup>62</sup> To one scholar, the goals of impact litigation are “typically predetermined by the lawyers’ own policy analyses,” and “[c]lients rarely deliberate with the lawyers, as equals, in formulating these goals, and [thus] clients’ personal feelings of injury are seldom the primary data that counsel respond to.”<sup>63</sup> Impact litigation was viewed as an unlikely setting for mobilizing or involving clients in the litigation or applying collaborative-lawyering principles.<sup>64</sup>

Accordingly, the alternative models of lawyering typically promoted skills such as negotiating, organizing, and strategizing on political issues.<sup>65</sup> Major case studies of these models of lawyering—such as Lucie White’s study of a South African village’s fight against removal and Jennifer Gordon’s article on workers’ centers—contained richly detailed narratives and analyses of political battles in which lawyers played a prominent role.<sup>66</sup> Impact litigation, however, was virtually absent from these studies.

Moreover, this new lawyering placed crucial importance on creating a different attorney–client relationship than typical of impact litigators. The collaborative “third-dimensional” model, for example, emphasized the attorney’s task of learning from and understanding the client holistically, not just as a subject with legal problems.<sup>67</sup> Alternative models viewed clients as people, not causes,<sup>68</sup> with the lawyer and the client engaged in a mutual

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62. Bill Quigley, one of the outstanding movement lawyers of the past few decades, states that movement lawyers should “work for and with organizations, not issues: This is not impact litigation or law reform.” Bill Quigley, 20 Tools for Movement Lawyering 1 (n.d.) (capitalization altered), <https://perma.cc/57UU-LKVW>; see also, e.g., Michael Grinthal, *Power with: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 33 (2011) (explaining public-interest lawyers’ “growing dissatisfaction with impact litigation”); Archer, *supra* note 18, at 417-18 (“What began as a tactical deemphasis on litigation evolved into a philosophical bias against litigation as a social justice advocacy tool.”); Martha L. Gómez, *The Culture of Non-profit Impact Litigation*, 23 CLINICAL L. REV. 635, 644 (2017) (calling for a transformation of the “dysfunctional culture . . . within non-profit impact litigation”).

63. White, *supra* note 26, at 545 n.45.

64. *Id.* at 542-45.

65. See, e.g., LÓPEZ, *supra* note 20, at 2-3; White, *supra* note 24, at 742, 763-64; Cummings & Eagly, *supra* note 36, at 447-50. But see Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN. L. REV. 213, 215, 221-22 (1993) (reviewing LÓPEZ, *supra* note 20).

66. White, *supra* note 24, at 719-38; Gordon, *supra* note 37, at 437-45.

67. See White, *supra* note 24, at 762-64.

68. See ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 289-90 (2013). By contrast, Melvin Wulf, the former director of the ACLU, is quoted as having stated that “[o]ur real client is the Bill of Rights”—reflecting a view that his clients were causes, not people. See Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1092 (1970).

learning process. One of the key goals was the transformation of the attorney–client relationship from one of domination and subordination of the client to one of mutual empowerment, with the creation of a “nonhierarchical community.”<sup>69</sup>

## B. Movement Lawyering

Progressive scholars have recently displayed a renewed interest in impact litigation under the banner of movement lawyering. Several factors account for this trend. First, the lawyering models described above were criticized for abandoning structural change for a postmodernist vision of micropolitics focused on transforming relationships.<sup>70</sup> Second, scholars have continued to recognize that litigation’s main achievement may not be courtroom victory, but rather indirect results such as educating the public, augmenting leverage, or mobilizing political action.<sup>71</sup> Relatedly, recent social movements have initiated impact litigation as part of a multifaceted approach along with organizing, public education, lobbying, and direct action.<sup>72</sup>

Movement lawyering is premised on the recognition that (1) fundamental and lasting societal changes stem primarily from grassroots movements; and (2) landmark judicial decisions generally reflect those societal changes. Movement law has five key attributes. First, movement lawyers represent grassroots movements and organizations fighting injustice and seeking transformational change. Second, campaigns involve not only (or even primarily) litigation but also a multiplicity of political and organizing tactics. Third, the likelihood of judicial victory is not dispositive in determining whether movement lawyers institute litigation. Instead, the touchstone is whether the case will aid the movement’s organizing. Fourth, litigation is used to promote a radical critique of the legal norms perpetuating injustice (even

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69. See William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 485-86 (1984).

70. Cummings, *supra* note 18, at 1657; Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109, 175-177 (2009); see Joel F. Handler, Presidential Address, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC’Y REV. 697, 724 (1992).

71. MICHAEL W. McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 10 (1994); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 209-10 (1978); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 486 (2004); White, *supra* note 26, at 563-64; Ben Depoorter, Essay, *The Upside of Losing*, 113 COLUM. L. REV. 817, 820 (2013).

72. DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 1-6 (2016) (describing how major constitutional campaigns on same-sex marriage, gun rights, and Guantanamo Bay were all undertaken with a multifaceted approach).

while pursuing limited reforms). Fifth, attorneys encourage grassroots participation in the movement's legal and political struggles.<sup>73</sup>

Recent scholarship has focused on two key features of movement lawyering that distinguish it from the impact-litigation campaigns of the 1960s and 1970s.<sup>74</sup> The first is the use of an “integrated advocacy approach, in which litigation plays an important (though not central) role.”<sup>75</sup> In this view, traditional impact litigators erred by adopting a “litigation-centric social change” model over a multilayered approach combining numerous forms of advocacy.<sup>76</sup>

Second, movement lawyering scholarship relies on the attorney's “accountability” to the movement to overcome the hierarchy present in the traditional attorney–client relationship.<sup>77</sup> A “participatory, power-sharing process within the lawyer/client relationship” is achieved through the representation of strong activist organizations such as the Montgomery Improvement Association, which led the 1955 Montgomery bus boycott and “was a constituency of accountability, capable of holding lawyers . . . to the discipline of shared power.”<sup>78</sup>

While the idea of accountability aligning movement lawyers with their constituency's interests is important, it focuses on the negative goal of checking attorney-driven litigation rather than the affirmative enterprise of

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73. These basic principles are based on my long experience with the CCR, as well as the political and academic literature on movement lawyering. *E.g.*, Quigley, *supra* note 62 (describing twenty principles and tools for movement lawyering); *How We Work*, CTR. FOR CONST. RTS., <https://perma.cc/HX4C-LF2G> (last updated May 20, 2015); Cummings, *supra* note 18, at 1658-60 (setting forth two key features associated with movement lawyering); Yaroshefsky, *supra* note 18, at 1-4 (explaining that movement lawyers use law to empower clients and advance social movements); JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 3-4 (2003) (noting that movement lawyers take cases even though “courtroom success [is] highly improbable”); Purvi Shah, *Rebuilding the Ethical Compass of Law*, 47 HOFSTRA L. REV. 11, 14 (2018); Michael Steven Smith, *Foreword* to MICHAEL RATNER, MOVING THE BAR: MY LIFE AS A RADICAL LAWYER 1, 7 (2021) (describing Ratner's four basic principles of radical lawyering); *see also* Guinier & Torres, *supra* note 18, at 2753.

74. *See, e.g.*, Cummings, *supra* note 18, at 1689-90.

75. Carle & Cummings, *supra* note 18, at 458; *see also* Archer, *supra* note 18, at 402 (arguing for the “transformational potential of integrated advocacy—strategic litigation, community organizing, direct action, media strategies, and interdisciplinary collaboration proceeding together”).

76. *See* Guinier & Torres, *supra* note 18, at 2756 & n.49 (criticizing “the tendency of litigation to migrate from tactics to strategic centrality” and “the failure of many cause lawyers to formulate their strategy in conjunction with cycles of mobilization”).

77. *See* Cummings, *supra* note 18, at 1691-92; Carle & Cummings, *supra* note 18, at 458 (“Movement lawyers think of themselves as broadly accountable to social movements, which are themselves represented by specific organizations and their leaders.”).

78. *See* Guinier & Torres, *supra* note 18, at 2753, 2777-80.

movement participation in the litigation itself. Beyond aiding political mobilization, litigation could provide an additional forum for empowering mobilized constituencies. Participatory litigation not only offers greater accountability but also challenges some basic conceptions of legal representation, such as the canonical perspective that tactical litigation issues are generally for the lawyer, not the client, to resolve.<sup>79</sup>

While class-action impact litigation can be hostile to grassroots participation,<sup>80</sup> a fundamental goal of movement lawyers should be to transform the litigation process in addition to challenging normative legal rules. Litigation can exclude poor people, but so too can extralegal arenas.<sup>81</sup> The democratic goals of expanding participation in societal institutions and reconceiving the role of professional expertise can apply with equal force to class-action impact litigation.<sup>82</sup>

Scholars have generally assumed that class-action impact litigation cannot be collaborative or participatory.<sup>83</sup> Even recent movement lawyering narratives involving significant lawsuits contain, at most, cursory discussions of grassroots participation in the litigation process itself.<sup>84</sup> The dearth of scholarship around participatory-litigation efforts suggests a need for empirical studies or narrative accounts to demonstrate the possibilities, dilemmas, and theoretical insights of a participatory-litigation framework. This Article aims to fill that gap.

### C. Participatory Antecedents of the Pelican Bay Litigation

A participatory framework was successfully used in dramatic fashion in major litigation efforts prior to the Pelican Bay lawsuit. In the civil rights movement and the early women's movement, lawyers such as Arthur Kinoy

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79. See, e.g., MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. (AM. BAR ASS'N 1983) (Scope of Representation) ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues . . ."); see also Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 29 (1990) ("It was a tactical decision—not the kind of issue that clients were supposed to decide.").

80. See White, *supra* note 26, at 541-45.

81. See Lobel, *supra* note 53, at 970, 976-77 ("[T]he extralegal model has suffered from the same drawbacks associated with legal cooptation.").

82. See Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 576-78 (2006) [hereinafter Piomelli, *Democratic Roots*]; Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1402-05 (2009).

83. See, e.g., Mary Kay Kane, Essay, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 389 (1987); White, *supra* note 26, at 540-45.

84. See Su, *supra* note 37, at 408-13; Ashar, *supra* note 37, at 1910-16; Cummings, *supra* note 37, at 1643-49.

and Nancy Stearns used a participatory framework to litigate class-wide issues.<sup>85</sup>

During the Mississippi Freedom Summer of 1964, Kinoy and other lawyers involved large numbers of Black activists in their litigation.<sup>86</sup> These lawyers used similar participatory mechanisms when the Mississippi Freedom Democratic Party (MFDP) asked them to challenge Mississippi's all-white congressional delegation resulting from Black disenfranchisement.<sup>87</sup> The lawyers assembled teams consisting of attorneys and organizers, and these teams went into thirty-three Mississippi counties to conduct hearings discussing the denial of voting rights to Blacks.<sup>88</sup> The lawyer-organizer teams took over 600 depositions; on "carefully selected occasions," the teams used federal subpoena power to "haul representatives of the power structure before gatherings of community people, where they were forced to testify to specific incidents of violence and intimidation and to the wholesale exclusion of Black people from the registration and voting process."<sup>89</sup>

In 1965, the teams submitted 600 pieces of evidence supporting the challenge to Congress.<sup>90</sup> Before hundreds of supporters, MFDP candidates and their lawyers spoke to the House of Representatives, urging Congress to reject the seating of the white congressmen chosen in an election that excluded Black voters.<sup>91</sup> Their challenge was rejected by the House, but 143 members of Congress voted to support it.<sup>92</sup>

The four lawyers involved in the challenge joined to form a new national legal organization supporting movement lawyering: the CCR.<sup>93</sup> Early in the CCR's history, a group of lawyers at the Center helped launch pre-*Roe* challenges to restrictive abortion laws in New York and Connecticut.<sup>94</sup> In both cases, the CCR and cooperating attorneys built on Kinoy's participatory initiatives in Mississippi. Working with women's organizations in New York and Connecticut, they initiated test cases in which the plaintiffs were not male

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85. ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER 250-55 (1983); Reva B. Siegel, *Roe's Roots: The Women's Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1885-94 (2010).

86. See KINOY, *supra* note 85, at 250-55.

87. See *id.* at 267-76, 280-82. See generally *The 1965 Mississippi Congressional Challenge*, C.R. TEACHING, <https://perma.cc/V8LS-VKZ7> (archived Oct. 2, 2021) (explaining the challenge's background and rationale).

88. KINOY, *supra* note 85, at 281.

89. *Id.*

90. *The 1965 Mississippi Congressional Challenge*, *supra* note 87.

91. KINOY, *supra* note 85, at 292-93.

92. *Id.* at 293-94.

93. *Id.* at 281.

94. Siegel, *supra* note 85, at 1885-94.

doctors, but women affected by the laws themselves.<sup>95</sup> And not just a few women, either: Between the New York and Connecticut cases, over 2,000 women became named plaintiffs in these class-action lawsuits.<sup>96</sup>

The women's organizations and CCR attorneys agreed to "use law as an organizing device."<sup>97</sup> CCR attorney Nancy Stearns and organizers from the New York Women's Health Collective attended numerous meetings where women were encouraged to talk about their experiences with the medical profession on abortion and other health issues.<sup>98</sup> At these meetings, Stearns explained the lawsuit and recruited plaintiffs.

Stearns and her team of lawyers used the lawsuit to tell women's stories. They scheduled publicly attended depositions of women who had abortion stories to narrate, and the *New York Times* and other media reported on these narratives.<sup>99</sup> At public hearings, women packed the court. Some brought babies; others brought coat hangers.<sup>100</sup>

Stearns's brief in *Abramowicz v. Lefkowitz*<sup>101</sup> focused not on the rights of doctors but on a woman's right to self-determination and equal status, which it argued was at the heart of a woman's abortion decision.<sup>102</sup> Moreover, as Reva Siegel noted, "the suit employed new feminist modes of argument," as "[t]he brief . . . opened by recounting stories contained in the depositions of fourteen witnesses who had testified" about the abortion laws' harsh effects upon women.<sup>103</sup> In response to mass activism and litigation, the New York State Legislature legalized abortion until the twenty-fourth week of pregnancy, which mooted the lawsuit.<sup>104</sup>

In Connecticut, a group of women met to discuss abortion rights and decided that a lawsuit could be a "wonderful organizing vehicle . . . to further

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95. *Id.* at 1185-87; SUSAN BROWNMILLER, IN OUR TIME: MEMOIR OF A REVOLUTION 110-11 (1999).

96. Siegel, *supra* note 85, at 1885, 1894.

97. Telephone Interview with Nancy Stearns, Former Att'y, Ctr. for Const. Rts. (Nov. 17, 2010).

98. Nancy Stearns, Commentary, *Roe v. Wade: Our Struggle Continues*, 4 BERKELEY WOMEN'S L.J. 1, 3 (1988-1989).

99. *See* BROWNMILLER, *supra* note 95, at 112.

100. *Stearns, supra* note 98, at 3.

101. *Hall v. Lefkowitz (Abramowicz v. Lefkowitz)*, 305 F. Supp. 1030 (S.D.N.Y. 1969).

102. Siegel, *supra* note 85, at 1885, 1891 n.72; *see* Janice Goodman, Rhonda Copelon Schoenbrod & Nancy Stearns, *Doe and Roe: Where Do We Go from Here?*, WOMEN'S RTS. L. REP., Spring 1973, at 20, 22, 28.

103. Siegel, *supra* note 85, at 1885.

104. *Id.* at 1886.

the goals of the women's movement overall."<sup>105</sup> These women enlisted several lawyers, including Nancy Stearns. The organizers published a pamphlet, created an organization named "Women versus Connecticut," and held meetings throughout the state to recruit plaintiffs.<sup>106</sup> In a clear departure from most class-action suits with a select few named plaintiffs, the group recruited around 800 women in that capacity.<sup>107</sup>

In both the New York and Connecticut lawsuits, organizers and lawyers challenged the notion that expert testimony—either of doctors or of social scientists—would be decisive.<sup>108</sup> Rather than rely on such testimony (which would come primarily from men), they wanted women's personal experiences with abortion and pregnancy to serve as the primary evidence in the case. In other words, litigators wanted "to have women testify, [as] women [and] as experts."<sup>109</sup>

Moreover, the cases focused on women speaking about abortion laws' effects on their lives rather than emphasizing the constitutional rights involved. At a Connecticut plaintiffs' meeting in April 1971, Stearns argued that what was needed was a "flesh and blood" presentation of the issues to the judges.<sup>110</sup> She recognized that "the only way we had a shot of winning in the way we wanted to win, was if we could educate judges about what the real impact was on women's lives."<sup>111</sup>

Many judges were resistant to women testifying about the impact of abortion laws on their lives. In the CCR's New York case, the court ruled that all testimony would be conducted through depositions, where the judges would not actually be present to hear the women testify.<sup>112</sup> In Connecticut, however, the three-judge panel heard the testimony of the female plaintiffs, who explained how back-alley abortions or unwanted children disrupted and harmed their lives.<sup>113</sup> The court's opinion in *Abele v. Markle* striking down

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105. Amy Kesselman, *Women Versus Connecticut: Conducting a Statewide Hearing on Abortion*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000*, at 42, 45-46 (Rickie Solinger ed., 1998) (quoting the author's interview with Betsy Gilbertson).

106. *Id.* at 48-52. The recruitment process afforded an "opportunity to stimulate discussion among women about reproductive freedom." *Id.* at 48.

107. *Id.* at 52.

108. JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* 40-43 (2003); see *infra* notes 110-11 and accompanying text.

109. NELSON, *supra* note 108, at 42 (quoting DIANE SCHULDER & FLORYNCE KENNEDY, *ABORTION RAP* 4 (1971)).

110. Telephone Interview with Nancy Stearns, *supra* note 97; see also Kesselman, *supra* note 105, at 52-53.

111. Telephone Interview with Nancy Stearns, *supra* note 97.

112. *Id.*

113. *Id.*

Connecticut's abortion ban suggested that the women's testimony had an impact.<sup>114</sup>

Several class-action claims involving prisoners' rights were also litigated using a participatory framework prior to the Pelican Bay litigation. Perhaps the most dramatic was a class-action suit by Michigan prisoners challenging various conditions of their confinement. The prisoner-plaintiffs at first represented themselves, and they eventually served as pro se lawyers acting under the supervision of a Michigan Prison Legal Services attorney.<sup>115</sup> In that capacity, the plaintiff-lawyers conducted examination and cross-examination of witnesses in the courtroom.<sup>116</sup> After fifteen years of litigation the case was settled, with the Michigan Department of Corrections agreeing, among other things, to revise their administrative segregation policies.<sup>117</sup>

My first real introduction to participatory lawyering came in a class-action suit challenging the placement and retention of prisoners in Ohio's new super-maximum security prison (supermax). Alice and Staughton Lynd led the litigation effort, and they recruited fourteen diverse plaintiffs to represent a class of approximately 400 prisoners held in solitary confinement. Similar to the abortion-rights organizers and attorneys, the Lynds relied primarily on named-plaintiff testimony regarding conditions of confinement and the process by which prisoners were placed and held in the supermax. During the trial, two named plaintiffs sat at their counsel's table (pursuant to court order) to consult with lawyers on strategy and tactics. We had no high-powered experts, while the state had recruited three prominent experts to testify.<sup>118</sup>

The most dramatic incidence of participatory lawyering occurred after trial, when Judge Gwin suggested mediation before another judge. That mediation resulted in a proposed settlement, which was then submitted to a collective meeting of all the plaintiffs. With the plaintiffs locked in cells in a semicircle, and only their faces visible through narrow slots of solid steel

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114. See 342 F. Supp. 800, 801-02 (D. Conn. 1972), *vacated*, 410 U.S. 951 (1973).

115. *Cain v. Mich. Dep't of Corr.*, 548 N.W.2d 210, 232 (Mich. 1996) (instructing the lower court to consider the appointment of a special counsel to represent the class of male prisoner-plaintiffs "who have thus far proceeded in propria persona"); TERRY ALLEN KUPERS, *SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT 179-80* (2017) (describing the plaintiffs acting as lawyers under the supervision of a Prison Legal Services attorney).

116. See KUPERS, *supra* note 115, at 179-80. Kupers, who was a witness in the case and was examined by prisoner-plaintiff Raymond Charles Whalen, stated that Whalen "was one of the most conscientious, creative, and competent attorneys I have ever worked with, even though he had no law degree." *Id.* at 179.

117. John E. Dannenberg, *Acrimonious Michigan Prisoners' Rights Suit Settled After 15 Years*, PRISON LEGAL NEWS (Oct. 2004), <https://perma.cc/3BQ5-4MVV>.

118. All of these facts are from my own experience as counsel for plaintiffs in *Austin v. Wilkinson*, 189 F. Supp. 2d 719 (N.D. Ohio 2002).

doors, the plaintiffs and their lawyers discussed the settlement offer for several hours. After much discussion where the lawyers expressed no opinion, the plaintiffs voted unanimously to reject the settlement. The plaintiffs recognized that while the settlement might help them individually get out of the supermax, it would not resolve the problems for others going forward. To close the meeting, Alice and Staughton Lynd, veterans of the civil rights movement, led the prisoners and lawyers in singing “We Shall Overcome.”

A month later, Judge Gwin ruled that the prisoners had a protected liberty interest in avoiding supermax confinement and that the procedures Ohio had used to place them in confinement violated due process.<sup>119</sup> That ruling was affirmed by the Sixth Circuit, and the Supreme Court agreed that the prisoners had a protected liberty interest.<sup>120</sup> The Court, however, upheld Ohio’s newly enacted reform procedures as constitutionally permissible.<sup>121</sup>

The CCR lawyers who represented the California prisoners could thus draw upon a history of participatory collective litigation. We grounded ourselves in that history, yet we sought to deepen and expand the practice and meaning of plaintiff class-action participation.

## **II. A Participatory Class Action: Challenging Prolonged Solitary Confinement in California**

### **A. The California Prison Hunger Strikes of 2011: Launching a Movement**

Movement lawyers represent a movement, not merely a class,<sup>122</sup> and the California prisoner hunger strikes of July and September 2011 launched a remarkable movement.<sup>123</sup> Prisoners from different ethnic and racial backgrounds—who often had violent histories and had engaged in violence against each other for years—were able to come together. Moreover, the prisoners’ ability to attract national and international attention and frame their struggle in the context of global human rights presented a powerful, unique, and compelling narrative for the resulting litigation.

First, the strikes represented an incredible organizing feat by prisoners confined in social isolation. Prisoners in solitary confinement develop a

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119. *Austin*, 189 F. Supp. 2d at 754. Judge Gwin relied in part on the prisoners’ testimony. *See id.* at 741.

120. *Austin v. Wilkinson*, 372 F.3d 346, 349 (6th Cir. 2004), *aff’d in part and rev’d in part*, 545 U.S. 209 (2005); *Wilkinson v. Austin*, 545 U.S. 209, 224, 230 (2005).

121. *Wilkinson*, 545 U.S. at 218, 230.

122. *See, e.g., Guinier & Torres, supra* note 18, at 2782 (“In the Montgomery Bus Boycott, the lawyers represented a movement, not a class.”).

123. For a summary of the hunger strikes, see notes 9-14 and the accompanying text above.

multitude of *individual* forms of resistance: refusing mental health treatment, teaching themselves new skills to maintain a sense of identity, learning about the law, and filing administrative grievances and lawsuits.<sup>124</sup> *Collective* resistance to supermax confinement, however, is naturally hard to organize. Indeed, the rise of solitary confinement and the use of supermaxes such as Pelican Bay were reactions by prison officials to the collective organizing of prisoners in the 1960s and 1970s.<sup>125</sup> The Pelican Bay hunger strikers broke through the isolation from one another and from the world, and their actions coincided with a renewal of prisoner hunger strikes throughout the country and around the globe.<sup>126</sup> As one leading commentator noted, the 2011 Pelican Bay hunger strike “was more productive and organized than any seen in the prior twenty years of the United States’ experiment with supermax confinement.”<sup>127</sup>

Second, the hunger strikes presented a powerful counternarrative to the prison officials’ story: that the prisoners were less than human, the worst of the worst, the most dangerous and violent people in their system. Inconsistent with that narrative, thousands of prisoners, many of whom had been convicted of violent crimes, engaged in nonviolent collective protest to challenge dehumanizing and torturous conditions.

These prisoner strikes were a collective form of resistance demanding recognition of humanity<sup>128</sup> and the creation of normative law.<sup>129</sup> As Robert Cover put it:

[T]he normative world-building which constitutes “Law” is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line. The torture of the martyr . . . reminds us that the interpretive commitments of officials are realized, indeed, in the flesh. As long as that is so, the interpretive commitments of a community which resists official

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124. Keramet Reiter, *The Pelican Bay Hunger Strike: Resistance Within the Structural Constraints of a US Supermax Prison*, 113 S. ATL. Q. 579, 585-87 (2014).

125. Jules Lobel, Essay, *Mass Solitary and Mass Incarceration: Explaining the Dramatic Rise in Prolonged Solitary in American Prisons*, 115 NW. U. L. REV. 159, 165 (2020).

126. See David Mizner, *Starving for Justice*, NATION (Dec. 4, 2013), <https://perma.cc/2NKL-GR9A>.

127. Reiter, *supra* note 124, at 588.

128. See generally Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1758-62 (2009) (analyzing the relationship between rights and prisoners’ hunger strikes at Guantanamo Bay).

129. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7-8 (1983); Guinier & Torres, *supra* note 18, at 2759-60 (introducing the term *demosprudence* to explain how “mobilized constituencies . . . introduce new sources of interpretative authority” that are “as much a source of law as are statutes and judicial decisions”).

law must also be realized in the flesh, even if it be the flesh of its own adherents.<sup>130</sup>

With the hunger strikes, the prisoners said “I am here,” and you must recognize me as a person.<sup>131</sup> Moreover, by their collective action of refusing to eat, the prisoners were “creating a sense of collective existence and solidarity as a prisoner class, which goes beyond the paradigmatic individual of human rights discourse.”<sup>132</sup>

Third, the hunger strikes required close collaboration between the leaders of the four main ethnic groups in California’s prisons (white, Black, Northern Californian Hispanic, and Southern Californian Hispanic).<sup>133</sup> For decades, ethnic violence and riots wracked the California prison system.<sup>134</sup> How were prisoners from violent backgrounds—who were “validated” as gang members or associates by the California Department of Corrections and Rehabilitation (CDCR) and were used to fighting with each other—able to achieve such unity in an increasingly racially polarized society?

Ironically, the CDCR’s attempt to create conditions of social isolation aided the prisoners’ recognition of their common humanity. Antonio Guillen, one of the hunger strike leaders, explained that California officials sought to reinforce physical and social isolation by assigning prisoners from different races and/or regional groups to a small, isolated pod containing eight prisoners in adjoining cells.<sup>135</sup> This CDCR policy backfired, because

[b]eing enclosed in such a small environment—a pod of eight cells—where at any given time a man only has maybe seven other people in his immediate surroundings for many years, one cannot help but to get to know his neighbors . . . . At least for me, I soon realized that many of these men were no different from who I am. We shared the same interests and things of importance, and some of us even thought along the same lines. As time went by, we soon started to share reading materials—books, magazines, newspapers etc.—and provid[e] legal assistance—filing prisoner grievances and court litigation.<sup>136</sup>

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130. Robert M. Cover, *Essay, Violence and the Word*, 95 YALE L.J. 1601, 1605 (1986).

131. Ahmad, *supra* note 128, at 1747; see BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 180-81 (2014).

132. Lisa Guenther, *Political Action at the End of the World: Hannah Arendt and the California Prison Hunger Strikes*, 4 CAN. J. HUM. RTS. 33, 35 (2015).

133. See Dale Noll, Note, *Building a New Identity: Race, Gangs, and Violence in California Prisons*, 66 U. MIA. L. REV. 847, 850, 852-53 (2012).

134. See *id.* at 847-48; Sarah Spiegel, Comment, *Prison “Race Riots”: An Easy Case for Segregation?*, 95 CALIF. L. REV. 2261, 2275-76 (2007).

135. Antonio Guillen, *Why I Joined the Multi-racial, Multi-regional Human Rights Movement to Challenge Torture in the Pelican Bay SHU*, S.F. BAY VIEW (Aug. 29, 2013), <https://perma.cc/W4TV-YHZR>.

136. *Id.*

Todd Ashker, another key leader, described how prisoners from different ethnic groups came to realize their common interest and developed a class consciousness in struggling “to be treated humanely.”<sup>137</sup> For Ashker,

[t]his common experience together, with the group of us being housed together in adjacent cells, wherein we engaged in dialogue about our common experience, legal challenges, politics and the worsening conditions, enabled us to put aside any disputes we may have harbored against each other and unite as a collective group—a prisoner class—with the common goal of using nonviolent, peaceful means to force meaningful, long-overdue prison reform to happen now.<sup>138</sup>

As leader Sitawa Nantambu Jamaa wrote, “We realize nothing productive can be done to change the current state of our situation, our prison environment, unless we end the hostilities between prisoners and end all racial and gang violence within the CDCR.”<sup>139</sup>

Moreover, the prisoners’ very survival as humans in the SHU required unity and common struggle. In the original call for hunger strikes, leader Mutope Duguma said that the prisoners’ situation was a form of “psychological and physical torture, as well as . . . civil death.”<sup>140</sup>

Eventually, the prisoners’ leaders formed a “Human Rights Movement,” which concluded in a remarkable 2012 agreement to end all violence and hostilities between the different racial and ethnic groups in the California prison system.<sup>141</sup> The agreement explained that “[i]f we really want to bring about substantive meaningful changes to the CDCR system . . . now is the time . . . for us to collectively seize this moment in time, and put an end to more than 20-30 years of hostilities between our racial groups.”<sup>142</sup> The prisoners’ newly constituted human rights movement viewed the agreement as central to their cause, symbolizing the multiracial unity and nonviolent protest behind the hunger strikes and charting a new path based on the common interests of the prisoner class.

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137. *Exclusive Audio: CA Prisoner Todd Ashker on His Evolution from Violence to Peaceful Hunger Strike*, DEMOCRACY NOW! (Aug. 23, 2013), <https://perma.cc/N8MM-LYS5>.

138. *Id.*

139. Sitawa Nantambu Jamaa, *CDCR’s \$9.2 Billion Corruption Machine vs. Prison Human Rights Movement*, PRISONER HUNGER STRIKE SOLIDARITY (Aug. 18, 2013), <https://perma.cc/5BDW-ARRY>.

140. Mutope Duguma, *The Call*, PRISONER HUNGER STRIKE SOLIDARITY, <https://perma.cc/4NWJ-CS2U> (archived Oct. 2, 2021). See generally Guenther, *supra* note 132, at 45-54 (describing the concept of civil death and the prisoners’ resistance to it). The concepts of civil and social death discussed in Guenther’s article find their fullest expression in Guenther’s excellent book, LISA GUENTHER, *SOLITARY CONFINEMENT: SOCIAL DEATH AND ITS AFTERLIVES* (2013).

141. Todd Ashker, Arturo Castellanos, Sitawa Nantambu Jamaa & Antonio Guillen, PBSP-SHU Short Corridor Collective, *Agreement to End Hostilities, Issued 8/12/2012*, PRISONER HUM. RTS. MOVEMENT (Aug. 12, 2012), <https://perma.cc/75N2-RVR3>.

142. *Id.*

Finally, the prisoners' demands reflected both an attempt to achieve winnable reforms and a radical challenge to California's policies. The hunger strikers' five "core" demands in April 2011 were: (1) "end group punishment [and] administrative abuse"; (2) "abolish the debriefing policy, and modify active/inactive gang status criteria"; (3) "comply with the [U.S.] Commission on Safety and Abuse in America's Prisons[] 2006 recommendations regarding an end to long-term solitary confinement"; (4) "provide adequate and nutritious food"; and (5) "expand and provide constructive programming and privileges for indefinite SHU status inmates."<sup>143</sup>

Keramet Reiter writes that in framing these demands, the hunger strikers "situated themselves squarely within the law, successfully countering correctional officials' characterizations of them as 'the worst of the worst,' undeserving of legal protections, or outside of the law."<sup>144</sup> By doing so, the strikers condemned their conditions of confinement without challenging the legitimacy of the broader prison system imposing those conditions. Reiter terms this a "legitimacy paradox."<sup>145</sup>

The Pelican Bay hunger strikers' demands were not revolutionary, but their collective nonviolent action reflected a profound challenge to prison officials' dehumanizing control, which lies at the heart of mass solitary confinement in the American prison system.<sup>146</sup> By terming themselves a "Human Rights Movement" and aligning with radical hunger strikers internationally, the prisoners also transcended legalistic demands.<sup>147</sup>

By September 2011, the California prison hunger strikers and their supporters had accomplished a great deal. They had forced California prison officials to negotiate directly with their representatives,<sup>148</sup> attracted national and international media attention,<sup>149</sup> and begun the process of norm creation that Lani Guinier and Gerald Torres term "demosprudence."<sup>150</sup> But they had not achieved any significant reforms.

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143. Todd Ashker, Arturo Castellanos, Sitawa N. Jamaa, George Franco, Antonio Guillen, Lewis Powell, Paul Redd, Alfred Sandoval, Danny Troxell, James Williamson & Ronnie Yandell, *Prisoners' Demands*, PRISONER HUNGER STRIKE SOLIDARITY (Apr. 3, 2011) (capitalization altered), <https://perma.cc/22PL-EG89>.

144. Reiter, *supra* note 124, at 581.

145. *Id.*

146. See Lobel, *supra* note 125, at 182-84.

147. See Reiter, *supra* note 124, at 588-89; Ashker et al., *supra* note 141. Indeed, Todd Ashker may have looked to the hunger strike of Irish Republican Army member Bobby Sands for inspiration. See Paige St. John, *Prison Hunger Strike Leaders Are in Solitary but Not Alone*, L.A. TIMES (July 28, 2013, 12:00 AM PT), <https://perma.cc/5ENU-D5D5>.

148. See *supra* notes 11-13 and accompanying text.

149. See, e.g., Lovett, *supra* note 9.

150. See Guinier & Torres, *supra* note 18, at 2759-60.

## B. Choosing Clients and Framing Claims

The lawyers at the CCR took this case because of the powerful movement the prisoners had organized and the injustices the prisoners were suffering. Nonetheless, we at the CCR recognized the serious obstacles that representing the prisoners would face. First, the case would require enormous financial resources and attorney time—a difficult undertaking for the organization. Second, participatory litigation requires close contact between lawyers and the movement they represent.<sup>151</sup> Pelican Bay is a seven-hour drive from San Francisco, and almost double that from Los Angeles. The CCR attorneys and I lived 3,000 miles away. Maintaining phone contact did not appear to be an option because with few exceptions California forbade the prisoners from making or taking any phone calls, even with lawyers.<sup>152</sup>

Third, the overwhelming majority of the prisoners were Hispanic or Black, and the three key CCR attorneys—Rachel Meeropol, Alexis Agathocleous, and I—were not. Could we adequately represent these prisoners? While the hunger strikes, human rights movement, and ensuing lawsuit were predicated on the idea of racial and ethnic unity against the torturous conditions suffered by all prisoners in the SHU, racial tensions continued to exist. For example, a key Black plaintiff at various points urged the CCR to recruit a Black lawyer to our team, an effort which we made and were only partially successful in accomplishing. In addition, as explained below, our lawsuit expanded on a pro se lawsuit brought by two white plaintiffs. These plaintiffs were initially my main point of contact with the prisoners, which raised concerns among the Black plaintiffs that we were favoring the white plaintiffs. The CCR lawyers believed that we could fairly and adequately represent all of the racial and ethnic groups despite our composition, but it required obtaining the trust of all the prisoners.

Our first step was assembling a team of California lawyers who had the trust of the prisoners, could meet regularly with them, and were committed to providing political support and advocacy tying the case to the broader hunger strike movement. Some of these attorneys played an important role in the Prisoner Hunger Strike Solidarity Coalition, formed in 2011 “to amplify the voices of [California] prisoners on hunger strike striving to achieve their Five Core Human Rights Demands.”<sup>153</sup> Equally important, many of my fellow

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151. Bryan Stevenson refers to this as “[p]roximity to the condemned, to people unfairly judged.” See STEVENSON, *supra* note 131, at 14, 17-18.

152. See, e.g., CAL. CODE REGS. tit. 15, § 3282(g)(6) (2021) (providing wardens the discretion to deny legal phone calls); Plaintiffs’ Second Amended Complaint, *supra* note 1, ¶ 45; Email from William Barnts, Litig. Coordinator, Pelican Bay State Prison, to author (Feb. 10, 2012, 7:09 PM) (on file with author).

153. *About*, PRISONER HUNGER STRIKE SOLIDARITY, <https://perma.cc/B47T-P6FB> (archived Oct. 2, 2021).

attorneys had a deep commitment to regularly visiting prisoners and responding to their letters, which proved essential to a participatory approach. Later we added a significant reinforcement through the Bay Area office of a national law firm, Weil, Gotshal & Manges.

### 1. Choosing named plaintiffs

One of our guiding principles for the litigation was to reverse the traditional role of class representatives. Unlike the client in a traditional lawsuit, a class representative is usually a “token” or “decorative figurehead.”<sup>154</sup> As one empirical survey concluded, there is “very little if any active attempt by lawyers to organize class members to participate in the suit or to engage in other activities complementary to the suit.”<sup>155</sup> Our legal team rejected that model and centered the Pelican Bay class-action suit around mutual collaboration between the attorneys and prisoners.

Accordingly, the lawyers collaborated with the prisoners to determine the named plaintiffs and class representatives. Consistent with academic writing on the subject, the prisoners expected that lawyers would cherry-pick the named plaintiffs so as to choose the most traditionally sympathetic representatives and remove plaintiffs who might be troublesome.<sup>156</sup> They objected to that procedure, and we agreed with their objection.

We therefore did not just choose prisoners whose background had the most compelling facts or prisoners who would draw the most sympathetic response from a judge. Nor did we pick plaintiffs who would likely be passive. Instead, the prisoners and the lawyers selected plaintiffs based on three criteria: (1) leaders of the hunger strike, regardless of their prison record or criminal offense; (2) those whose allegations would tell a powerful story; and (3) people who served as representatives of each ethnic and racial group. Eventually we

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154. Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 181-82 (1990); Coffee, *supra* note 29, at 406 (“[I]n the class action, the class representative is usually a token figure, with the class counsel being the real party in interest.”).

155. Bryant Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 380-81 (1988).

156. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 41 (1991); Coffee, *supra* note 29, at 406 (“Typically, counsel finds the client in order to launch its projected class action, not the reverse.”); Burns, *supra* note 154, at 183 (“The class attorney may even seek out a compliant class representative to avoid client intrusion.”); White, *supra* note 26, at 545 (“One result of [designing reform litigation] is that lawyers typically choose their plaintiffs strategically. The main criterion is how good the story will look to the court, how closely it will comply with a ‘fact pattern’ that will compel the desired legal remedy.”).

selected ten named plaintiffs: two white, four Black, one Northern Californian Hispanic, and three Southern Californian Hispanic prisoners. The plaintiffs included three of the hunger strike's four main representatives,<sup>157</sup> and all ten plaintiffs had been active participants in the hunger strikes.

## 2. Deciding on claims

The main obstacle the lawsuit faced was substantive, stemming from the forbidding legal landscape. A few years after Pelican Bay first opened in 1989, a team of talented lawyers challenged solitary confinement in federal court. In *Madrid v. Gomez*, Judge Thelton Henderson held the placement of seriously mentally ill prisoners in prolonged solitary confinement at Pelican Bay unconstitutional, but he found no constitutional violation for the majority of prisoners without serious mental illness.<sup>158</sup> Finding that harm suffered by those without serious mental illness did not constitute cruel and unusual punishment, Judge Henderson discounted the evidence of substantial psychological harm presented by two prominent experts.<sup>159</sup> Our potential clients did not want to claim that they were seriously mentally ill, so *Madrid* had to be distinguished.

Moreover, Judge Henderson's opinion in *Madrid v. Gomez* reflected the judiciary's general tolerance of the use of mass solitary confinement by American prison officials. To pursue an Eighth Amendment complaint, prisoners must demonstrate that prison officials deprived them of a basic human need which the officials knew of but were deliberately indifferent to.<sup>160</sup> Given this standard, various federal courts had taken the same approach as Judge Henderson: Solitary confinement undoubtedly caused some mental harm, but "[d]epression and anxiety are unfortunate concomitants of incarceration," and a "depressed mental state" alone was insufficient to set forth an Eighth Amendment claim.<sup>161</sup> Extreme isolation, despite its lack of

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157. The four main representatives were Todd Ashker, Ron Dewberry (known as Sitawa Jamaa), George Franco, and Arturo Castellanos. Ashker, Dewberry, and Franco were named plaintiffs, but Castellanos decided that he did not want to become a named plaintiff. See Plaintiffs' Second Amended Complaint, *supra* note 1, ¶¶ 14-23 (listing the suit's plaintiffs). At times, Antonio Guillen served as one of the four representatives instead of George Franco.

158. 889 F. Supp. 1146, 1261, 1265 (N.D. Cal. 1995). In a separate but important part of the *Madrid* opinion, Judge Henderson concluded that the Eighth Amendment's restraint on the use of excessive force by correctional officials against prisoners had been repeatedly violated at Pelican Bay. *Id.* at 1161.

159. See *id.* at 1232-36, 1261-67.

160. See *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

161. See, e.g., *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 472 (4th Cir. 1999). In *Madrid*, Judge Henderson found that "the conditions  
*footnote continued on next page*

companionship and its restriction on intellectual stimulation, did not deprive prisoners of a basic human need.<sup>162</sup>

Moreover, the CDCR's claim that prolonged SHU confinement for any gang-associated prisoner was necessary to contain and reduce prison violence resonated with the courts. The CDCR's justification for its isolation policy was that gangs were a violent, destructive influence in California's prisons and had to be destroyed to protect other prisoners and maintain order.<sup>163</sup> While the Eighth Amendment test does not appear to consider whether a prison policy serves a legitimate penological purpose<sup>164</sup>—torture is cruel and unusual even if it purports to advance a goal—most courts did not want to interfere with prison officials' discretion to take measures to control violence. Judge Henderson wrote in *Madrid* that while “the totality of the SHU conditions may be harsher than necessary . . . we can not say that the conditions overall lack any penological justification.”<sup>165</sup> In *Bruscino v. Carlson*, Judge Posner wrote that the conditions of solitary confinement at the United States Penitentiary in Marion, Illinois, were “depressing in the extreme” but justified by the “history of inmate violence.”<sup>166</sup> Judge Posner noted that “[i]f order could be maintained in Marion without resort to the harsh methods attacked in this lawsuit, the plaintiffs would have a stronger argument that the methods were indeed cruel and unusual punishments.”<sup>167</sup> Similarly, Justice Kennedy, writing for a unanimous Court in *Wilkinson v. Austin*, claimed that because prison security was “imperiled by the brutal reality of prison gangs,” prolonged supermax confinement “may be the State's only option for the control of some inmates.”<sup>168</sup>

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of extreme social isolation and reduced environmental stimulation found in the Pelican Bay SHU will likely inflict some degree of psychological trauma upon most inmates confined there for more than brief periods.” 889 F. Supp. at 1265. However, he wrote, “for many inmates, it does not appear that the degree of mental injury suffered significantly exceeds the kind of generalized psychological pain that courts have found compatible with Eighth Amendment standards.” *Id.*

162. *In re Long Term Admin. Segregation*, 174 F. 3d at 472.

163. See generally David C. Pyrooz, *Gang Affiliation and Restrictive Housing in U.S. Prisons*, in NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NCJ NO. 250319, RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS 117, 117-18 (2016).

164. *Porter v. Clarke*, 923 F.3d 348, 362 (4th Cir. 2019) (recognizing the “uncertain role of penological justification in conditions of confinement cases”); *Grenning v. Miller-Stout*, 739 F.3d 1235, 1240 (9th Cir. 2014) (“The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement.”).

165. 889 F. Supp. at 1263.

166. 854 F.2d 162, 163-66 (7th Cir. 1988).

167. *Id.* at 165.

168. 545 U.S. 209, 227, 229 (2005).

Given this legal and political background, the lawyers and prisoners collaborated on how to present our claims and define the Eighth Amendment class. A key challenge, endemic to struggles that seek to reform oppressive institutions and systems, was how to translate the prisoners' demands and beliefs into cognizable legal claims. That tension caused difficulty in drafting the complaint. The hunger strike demands called on the CDCR to "end conditions of isolation."<sup>169</sup> But *Madrid* precluded us from arguing that solitary confinement at Pelican Bay was per se unconstitutional.

Both the CCR and the prisoner-leaders believed that the litigation should serve broader purposes than just winning in court: educating the public about solitary confinement, publicizing prisoners' stories, mobilizing supporters, and allowing experts to review (and present the psychological and physical harm caused by) the CDCR's policies. The CCR has brought many cases that appeared hopeless at the outset,<sup>170</sup> including the Guantanamo Bay litigation<sup>171</sup> and *Austin v. Wilkinson*.<sup>172</sup> As such, we recognized the substantial possibility of losing in court.

Nonetheless, we wanted to present a strong legal claim and hopefully win, which required us to frame our Eighth Amendment claim in a way that distinguished Judge Henderson's *Madrid* decision. Unlike at least some of the *Madrid* plaintiffs, the hunger strikers—while suffering serious mental harm from years of solitary confinement—were not seriously mentally ill. The prisoners sought to make a broad challenge to prolonged, indeterminate solitary confinement rather than an incrementalist one based on specific harms to vulnerable populations (such as those with serious mental illness). The solution was to distinguish *Madrid* by defining our Eighth Amendment class as prisoners held in solitary for a very long time, which the prisoners and lawyers agreed to set as over ten years. This was much longer than the two to three years prisoners had spent in the SHU when *Madrid* was tried. While that decision narrowed our claim, it still encompassed some 500 prisoners at Pelican

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169. Ashker et al., *supra* note 143 (capitalization altered); *see also Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UN NEWS (Oct. 18, 2011), <https://perma.cc/K46A-3PSN>.

170. *See generally* JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA (2003) (recounting the CCR's history of unsuccessful litigation that nevertheless helped to fight injustice).

171. *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, CTR. FOR CONST. RTS., <https://perma.cc/9QDY-M4NJ> (last updated July 3, 2014); *Boumediene v. Bush/Al Odah v. United States*, CTR. FOR CONST. RTS., <https://perma.cc/TV24-GWN5> (last updated Jan. 20, 2010).

172. 189 F. Supp. 2d 719 (N.D. Ohio 2002); Press Release, ACLU, Federal Judge Says Ohio "Supermax" Prison Violates Constitutional Rights (Feb. 26, 2002), <https://perma.cc/V65E-UVYM>.

Bay.<sup>173</sup> It also allowed us to focus on the outrageous duration of time that people had been kept in isolation.<sup>174</sup> Indeed, Judge Henderson had emphasized that *Madrid* was based on the specific facts before the court at the time. He expressly declined “to speculate on the impact that Pelican Bay SHU conditions may have on inmates confined in the SHU for periods of 10 or 20 years or more.”<sup>175</sup> In that language we saw an opening.

The prisoners’ hunger strike, demanding that the CDCR agree to “end long-term solitary confinement” and “release inmates to [the] general prison population who have been warehoused indefinitely in [the] SHU for the last 10 to 40 years,” prefigured our legal claim.<sup>176</sup> While ten years seemed like a somewhat arbitrary number, it did clearly distinguish *Madrid*. That duration also fit with prisoners’ reports that after approximately ten years in the SHU they began to experience what psychologists and other experts termed a “social death.”<sup>177</sup>

But it made us nervous that we were seemingly legitimizing shorter-term solitary confinement for up to ten years, which we all thought still constituted torture. Indeed, the problem of defining the class was simply one example of the constraining aspects of litigation, in which our claims, remedies sought, and litigation strategy were continually cabined by the procedural and substantive restraints of the legal framework in which we operated.

The lawyers and plaintiffs agreed to use the complaint and the court proceedings to let the plaintiffs describe the horrendous harm caused not by merely weeks, months, or a few years in isolation, but by many years confined in stultifying conditions. In the complaint, the plaintiffs described in detail why social interaction was a basic human need: For example, very prolonged SHU confinement deprived them of the ability to feel, to experience emotions, “to the point of feeling ‘non-human.’”<sup>178</sup> Plaintiff Danny Troxell explained that he often felt as if in “a stupor,” while Luis Esquivel said that the lack of feeling made his days go by “as if [he were] walking dead.”<sup>179</sup> The plaintiffs’ statements and testimony would be supplemented by experts who could make the case that (1) such isolation caused serious psychological pain, even to those who were not mentally ill; and (2) that social interaction and environmental

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173. See *supra* note 2 and accompanying text.

174. Plaintiffs’ Second Amended Complaint, *supra* note 1, ¶¶ 166-167, 169-170.

175. *Madrid v. Gomez*, 889 F. Supp. 1146, 1267 (N.D. Cal. 1995).

176. Ashker et al., *supra* note 143 (capitalization altered).

177. Expert Report of Craig Haney, Ph.D., J.D. ¶¶ 91, 97, 176, *Ashker v. Brown*, No. 09-cv-05796 (N.D. Cal. Mar. 13, 2015), <https://perma.cc/4PSU-5UPH>; see GUENTHER, *supra* note 140, at xx-xxiv.

178. Plaintiffs’ Second Amended Complaint, *supra* note 1, ¶¶ 131-132.

179. *Id.* ¶¶ 133, 136.

stimulation were basic human needs, a claim that had not been presented to Judge Henderson in *Madrid*. Eventually we secured two prominent psychological experts to study and explain both the serious pain the plaintiffs experienced and why prolonged solitary confinement led to “social death.”<sup>180</sup> We also retained other experts: a neuroscientist suggested by one of the plaintiffs to opine on the human brain’s need for social interaction; a social scientist who demonstrated that the plaintiffs were statistically more likely to suffer serious physical ailments (such as hypertension) because of their prolonged solitary confinement; and a Berkeley social scientist who could testify that the denial to plaintiffs of the ability to meaningfully touch another human being deprived them of an essential human need.<sup>181</sup>

Both the lawyers and the plaintiffs also recognized the need to demonstrate that the CDCR’s SHU policies were not penologically necessary. The plaintiffs’ own stories demonstrated that they had been placed and retained in the SHU not because of misconduct but because of their perceived association with a gang. Tattoos, artwork, and cards had led to some plaintiffs’ SHU placement and retention.<sup>182</sup> A number of the Black plaintiffs had been held in the SHU because of their writings or books they were reading;<sup>183</sup> one was charged with possession of a pamphlet in Swahili, a banned language at Pelican Bay State Prison.<sup>184</sup> Others were placed and retained in the SHU based on unsupported confidential information from prisoner informants.<sup>185</sup> One aspect of our Eighth Amendment claim was that of disproportionate punishment<sup>186</sup>: We argued that the “[d]efendants have no legitimate

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180. See Expert Report of Craig Haney, Ph.D., J.D., *supra* note 177, ¶¶ 1-4, 176; Expert Report of Terry A. Kupers, M.D., M.S.P. at 5-6, 10, 72, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Mar. 13, 2015), <https://perma.cc/D593-QUU3>.

181. See Expert Report of Matthew D. Lieberman at 10, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Mar. 13, 2015), <https://perma.cc/3G5D-ZR55>; Expert Report of Louise C. Hawkey at 14-16, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Mar. 13, 2015), <https://perma.cc/P9EC-34VR>; Expert Report of Dr. Dacher Keltner, Ph.D. ¶¶ 1, 23-24, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Mar. 13, 2015), <https://perma.cc/HD6J-YB5Z>.

182. See Plaintiffs’ Second Amended Complaint, *supra* note 1, ¶¶ 16, 18, 22, 93, 104-105, 107-109, 115.

183. *Id.* ¶¶ 107-109.

184. *Id.* ¶ 109.

185. *Id.* ¶¶ 92-93, 108, 110.

186. Disproportionate punishment claims are rare in Eighth Amendment conditions-of-confinement challenges. But the basic concept—that the Eighth Amendment prohibits punishments which are disproportionate to the misconduct committed—is deeply rooted in Eighth Amendment law and ought to be applicable to conditions litigation. See Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit From Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 54-56, 61-68 (2009).

penological interest in retaining prisoners indefinitely in the debilitating conditions of the SHU simply because they are gang members or associates, without recent, serious disciplinary or gang-related infractions.”<sup>187</sup> This policy and practice was thus not “rationally related to [any] legitimate security needs.”<sup>188</sup>

In addition to the experts above, we eventually retained prominent experts to support the prisoners’ claims that the CDCR’s policies were unnecessary and misguided. Two high-level state prison officials in states that had reformed their solitary-confinement policies argued that keeping prisoners who had not committed any misconduct in the SHU did not promote prison security.<sup>189</sup> James Austin, the nation’s leading expert on prison classifications, demonstrated that the CDCR’s policies had not reduced violence in California’s prisons.<sup>190</sup> He further opined that the classification system used for the plaintiffs promoted an excessive number of false positives, “which allowed for the incorrect placement of a significant population of inmates in the SHU for excessive periods of time.”<sup>191</sup> After reviewing the plaintiffs’ (relatively minor) disciplinary histories, Austin concluded that “[a] system that places such inmates in SHU for over a decade defies all logic.”<sup>192</sup>

Finally, many of the prisoner-leaders had begun to frame their complaints in terms of human rights.<sup>193</sup> In writing the *Ashker* complaint, the prisoners and lawyers agreed to incorporate international human rights concerns, including the allegation that California’s practice of prolonged, indefinite solitary confinement “violate[d] international human rights norms and civilized standards of humanity and human dignity.”<sup>194</sup> The prisoners on hunger strike and their supporters had asked the U.N. Special Rapporteur on Torture Juan Méndez to visit and report on conditions at the Pelican Bay SHU. Méndez, who had been tortured and subjected to solitary confinement in his native Argentina, had requested permission from the U.S. Department of State to visit

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187. Plaintiffs’ Second Amended Complaint, *supra* note 1, ¶ 185.

188. *Id.*

189. See Expert Report of Terry J. Collins ¶¶ 1, 14, 20-21, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Mar. 13, 2015), <https://perma.cc/CAB6-9PNR>; Expert Report of Emmitt L. Sparkman ¶¶ 1-7, 15, 25-27, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Mar. 13, 2015), <https://perma.cc/RZ3P-HKWU>.

190. Expert Report of Dr. James Austin, Ph.D. ¶ 39, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Mar. 13, 2015), <https://perma.cc/U6J4-MNQB>.

191. *Id.* ¶¶ 16-18.

192. *Id.* ¶ 33.

193. See, e.g., Plaintiffs’ Second Amended Complaint, *supra* note 1, ¶¶ 156-157 (noting that plaintiffs *Ashker* and *Troxell* sent a formal human rights complaint to the governor of California in 2010 and again in 2011); see also *Ashker et al.*, *supra* note 141.

194. Plaintiffs’ Second Amended Complaint, *supra* note 1, ¶ 146.

in his official capacity, but he never got a response.<sup>195</sup> As the case progressed, we asked Méndez to visit unofficially as an *Ashker* expert witness. He did, and he filed a report which not only unequivocally criticized California for violating international norms, but also noted that California's practices were unique in the world.<sup>196</sup> His report stated that while he had visited numerous countries and reported on their prison systems, "I know of no other country that keeps substantial numbers of prisoners in decades-long solitary confinement simply because of membership in or affiliation with groups such as gangs."<sup>197</sup> Andrew Coyle, an internationally recognized expert on prison management and former high-level prison official in England and Scotland, also agreed to be an expert witness on the inconsistency between California's SHU practices and prison-management practices generally accepted around the world.<sup>198</sup>

In drafting the complaint and developing strategy, the lawyers and prisoners therefore sought to continue the process that the prisoners themselves had begun during their hunger strike: situating themselves within the boundaries of the law, while at the same time seeking to move those boundaries significantly. We sought to expand the Eighth Amendment formulation of basic human needs to include social interaction and environmental stimulation. The prisoners' basic response to the prison officials' claims argued that prisoners be placed in solitary confinement not based on mere association but instead only for proven bad behavior such as murder or assault. Moreover, the prisoners argued that they should not be placed in solitary confinement indefinitely, but instead for some limited period of time related to the proven misconduct. Finally, the prisoners asked the CDCR to accord them due process before SHU placement to protect against overclassification. After a lengthy court case and a political battle, California officials eventually agreed to our demands.

In consultation with the prisoners, we decided not to include a racial-discrimination claim despite the clear racism reflected in the overwhelmingly Black and Hispanic (but predominantly Hispanic) SHU population. The prisoners wanted to maintain unity, and such a claim might have undermined

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195. Sara Shourd, *Why the U.S. Won't Let the U.N. Look Inside Its Prisons*, DAILY BEAST (updated Apr. 14, 2017, 11:54 AM ET), <https://perma.cc/WX9R-4F9K>.

196. Expert Report of Juan E. Méndez ¶¶ 44-45, 48-52, 58-60, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Mar. 13, 2015), <https://perma.cc/3MLF-UDAX>.

197. *Id.* ¶¶ 44-45.

198. Expert Report of Andrew Coyle, PhD ¶¶ 1-8, 39-47, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Mar. 13, 2015), <https://perma.cc/BMM9-CCS3>.

that goal. The prisoners did not include a race-discrimination claim in their hunger strike demands, and the complaint tracked those demands.<sup>199</sup>

On one matter of importance, the lawyers and some of the prisoners had a disagreement in which the lawyers prevailed. That was undoubtedly due to our position of power. We chose to file this class-action suit by amending a 2009 pro se complaint brought by two of the white hunger strike leaders—Todd Ashker and Danny Troxell—then pending before Judge Wilken of the Northern District of California. That complaint sought damages in addition to injunctive relief. The lawyers decided, however, that we did not have the resources to litigate a claim for both an injunction and damages. We might spend years determining how much money to award each prisoner, and qualified immunity presented an obstacle to winning damages in the first place. Despite their preference, the plaintiffs accepted our reasons for withdrawing their damages claim in the amended complaint.<sup>200</sup>

Finally, we decided that immediately upon filing we would challenge the CDCR's bar on phone calls with attorneys. While the California lawyers regularly visited prisoners, I could not do so based on my location. But in our participatory model it was important for me, as the main representative of the CCR on the legal team, to maintain regular personal communication with the plaintiffs.<sup>201</sup>

After Judge Wilken accepted our Second Amended Complaint with ten class representatives, we sought regular phone calls with the named plaintiffs. The CDCR adamantly refused, so we moved for phone calls before Magistrate Judge Vadas. (Judge Wilken had designated Magistrate Judge Vadas to hear discovery and other preliminary disputes.) After Magistrate Judge Vadas indicated that he would rule in our favor, the CDCR agreed to permit one-hour phone calls with five named plaintiffs every two weeks.

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199. It also would have been difficult to assert such a claim based on the statistics of discrimination and the difficulty of proving intent to discriminate. See *Washington v. Davis*, 426 U.S. 229, 242 (1976); *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987).

200. More recently, Ashker filed a new complaint seeking damages for the continuing harm that the CDCR has caused him. *Ashker v. Kernan*, No. C 18-6350, 2021 WL 930456, at \*1 (N.D. Cal. Mar. 11, 2021). At least one recent class-action suit challenging solitary confinement has resulted in monetary compensation. Rebecca Feldhaus Adams, *Rikers Settles Class Action Solitary Confinement Case*, NPR (Dec. 13, 2017 4:49 PM ET), <https://perma.cc/8ZA4-SLMJ>.

201. On the complaint and other court papers I was the first named lawyer, and therefore sometimes was referred to as the lead attorney. But in practice our legal team operated cooperatively, and the title of lead attorney had more of a symbolic significance than any practical meaning. At first I did the courtroom appearances for the CCR, but later different attorneys argued parts of the case.

### C. Amplifying Plaintiffs' Voices

Participatory lawyering requires the lawyer, to the extent possible, to aid the client in speaking and articulating her claims in her own voice. In the most profound and impressive participatory-lawyering initiatives involving individuals, the lawyer, law student, and/or community aids the worker,<sup>202</sup> tenant or homeowner,<sup>203</sup> or criminal defendant<sup>204</sup> in presenting her own case in court in the context of community mobilization and family support. Impact and class-action litigation, however, severely limit the opportunities for class members' voices to be heard. The best the lawyer often can do is to accurately reflect the voices of the marginalized people she represents, to speak for them and to stand for them.<sup>205</sup> To do so, the lawyer has to collaborate closely with her plaintiffs, understand what they want, and know what they would say if given the opportunity.

At trial, plaintiffs are afforded the opportunity to testify, but testimony generally occurs in a carefully circumscribed and choreographed legal context. The lawyer guides the plaintiff in a manner that supports the legal claim, and the legal claim is the one the lawyer believes offers the best chance of success.<sup>206</sup> We sought to transcend this model and find a mechanism that allowed the prisoners' voices to be heard through the litigation. The task was daunting in that the CDCR severely limited media interviews with SHU prisoners.<sup>207</sup>

On May 31, 2012, we filed a motion to amend Todd Ashker and Danny Troxell's pro se complaint. Our forty-seven page Proposed Amended Complaint was not a concise summary of the facts favored by the Federal Rules of Civil Procedure;<sup>208</sup> rather, it articulated in great detail the plaintiffs' own descriptions of their oppression. We also worked with Gabriel Reyes, one of the amended complaint's ten named plaintiffs, on an op-ed which he published

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202. See Gordon, *supra* note 37, at 443-44.

203. Nicholas Hartigan, Special Project, *No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts*, 45 HARV. C.R.-C.L. L. REV. 181, 191 (2010).

204. Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1289 (2014-2015); Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 716 (2018).

205. This is akin to what Hanna Pitkin termed "acting for" representation. PITKIN, *supra* note 50, at 112-15.

206. See, e.g., White, *supra* note 79, at 21-32.

207. See Adrian Shirk, *Why Don't You Ever See TV Interviews with Inmates?*, ATLANTIC (July 15, 2014), <https://perma.cc/VL8X-K5LM>.

208. See FED. R. CIV. P. 8(a).

the same date we filed our motion.<sup>209</sup> Reyes explained the brutal facts of his solitary confinement, which had lasted more than sixteen years even though he was not convicted of a violent crime and had only two disciplinary violations during his incarceration. One violation was for donating his artwork to a nonprofit organization, and the second was for participating in the 2011 hunger strikes.<sup>210</sup> Reyes concluded by saying he recognized that he “broke the law, and . . . lost liberties because of that. But no one, no matter what they’ve done, should be denied fundamental human rights, especially when that denial comes in the form of such torture.”<sup>211</sup> The CCR also posted and publicized personal statements from most of the ten named plaintiffs as well as several of their family members.<sup>212</sup>

We also searched for a mechanism to humanize our clients by having them speak to the public by audio and video. The CDCR’s proscriptions meant that these prisoners had been disembodied and silenced: Their voices were only heard secondhand in news articles about the hunger strikes. As neuroscientists now recognize, actually “observing someone else’s suffering can evoke a deep sense of distress and sadness—almost as if it’s happening to us.”<sup>213</sup> For several years we were unable to accomplish our goal. Eventually, we insisted that the CDCR videotape the plaintiffs’ depositions, and the defendants agreed to do so.

After we received the deposition videos, the CCR made a short video composed of clips from some of the depositions. When we served ten expert reports on the defendants in March 2015, we sent redacted public versions to the *New York Times* along with the video we had made. The *Times* published a lengthy story about the expert reports on the front page of one of their sections and linked the video.<sup>214</sup> The powerful four-and-a-half-minute video sequence featured four plaintiffs—Todd Ashker, George Franco, Gabriel Reyes, and Paul Redd—discussing the effects of solitary confinement. Perhaps the most dramatic moment was when Paul Redd, a powerfully built fifty-eight-year-old man, said that “sometimes I’m at the point that I’d feel like going right

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209. Gabriel Reyes, Opinion, *The Crime of Punishment at Pelican Bay State Prison*, SFGATE (updated Nov. 27, 2012, 2:41 PM), <https://perma.cc/KZF2-KJLS>.

210. *Id.*

211. *Id.*

212. *Pelican Bay Prison Hunger-Strikers*, CTR. FOR CONST. RTS., <https://perma.cc/G47D-GJC3> (last updated July 16, 2013) (detailing through an editorial series the stories of SHU prisoners and their families).

213. Kim Armstrong, “*I Feel Your Pain*”: *The Neuroscience of Empathy*, ASS’N FOR PSYCH. SCI.: OBSERVER (Dec. 29, 2017), <https://perma.cc/Z7KE-2NC7>.

214. Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. TIMES (Aug. 3, 2015), <https://perma.cc/ZG6G-G7CB>. The *Times* produced their own video from the deposition clips we sent them, but their video was very similar to the video produced by the CCR.

to the judge [and saying], ‘Just give me the death penalty,’” and then broke down crying.<sup>215</sup>

A key aspect of participatory lawyering is community and family participation. We were fortunate that the hunger strikes spawned a strong group of prisoner family members, California Families Against Solitary Confinement (CFASC).<sup>216</sup> We worked closely with family members: A family member spoke at many of our press conferences, and I often met with the CFASC in Los Angeles. On reflection, however, most of my meetings with the prisoners’ families utilized the traditional hierarchical model. I gave a presentation on the case that everyone could understand, followed by a lively question and answer session.<sup>217</sup>

In court, the lawyers spoke for the prisoners, except for one dramatic incident in the monitoring phase after settlement.<sup>218</sup> Otherwise, prisoners could not participate in the courtroom hearings or conferences.<sup>219</sup> Despite these limitations, we did have some success in using the litigation to amplify the voices of our plaintiffs and their families.

#### D. The Plaintiffs Take the Lead: Supporting the Prisoner Hunger Strike During Litigation

One problem with impact litigation is that it often takes years before plaintiffs get any relief. This delay can sap a dynamic movement of its momentum. We therefore sought to fast-track the class-action suit: The plaintiffs and lawyers agreed to move for a preliminary injunction shortly after filing the complaint. When I raised that plan at our first conference with

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215. Colin Archdeacon & Ctr. for Const. Rts., *Effects of Solitary Confinement*, N.Y. TIMES (Aug. 3, 2015), <https://perma.cc/QKR5-TZ3E>; Paul Redd Deposition Transcript 3 (2015), <https://perma.cc/5835-KJLL>.

216. Ben Brazil, *Dolores Canales Fights for an End to Solitary Confinement* (Aug. 20, 2020, 3:30 PM PT), L.A. TIMES: DAILY PILOT, <https://perma.cc/5MRE-WDY9> (tracing the history of the group and Dolores Canales’s role in starting it).

217. In my most recent meeting with family members and released class members on August 14, 2021, my reflections led to some significant modifications of the usual meeting format. First, we started with fairly in-depth presentations from family members and ex-prisoners about their own histories and activities. Those presentations took a substantial portion of the meeting, but they allowed me to gain insights into our class members’ and their families’ lives and perspectives. These insights will undoubtedly be helpful in the future. Moreover, after I gave an update on the litigation, there were not only questions and answers, but also a very productive strategy session which came up with some excellent ideas going forward.

218. See *infra* Part II.G.

219. Early on in the litigation, I requested that one or two plaintiffs be able to attend court hearings via videoconference, but Judge Wilken denied that request. See Transcript of Proceedings at 45, *Ruiz v. Brown*, No. 09-cv-05796 (N.D. Cal. May 3, 2013), ECF No. 198.

Judge Wilken, however, she clearly was not keen on such a strategy. We abandoned the idea.

That meant that our case proceeded at what seemed to the plaintiffs like a snail's pace. After Judge Wilken granted us leave to amend, the defendants filed a motion to dismiss. Judge Wilken, writing a strong opinion distinguishing *Madrid* and other cases, denied that motion in April 2013.<sup>220</sup> Yet almost a year had passed since we had moved to file an amended complaint. Accordingly, the prisoners grew increasingly frustrated. The CDCR did begin to make reforms by initiating the Step Down Program (SDP), which transferred some prisoners out of Pelican Bay to other SHUs around the state or placed them into general population units.<sup>221</sup> But the prisoners rejected this program as a negligible reform where many would still be condemned to a lifetime in solitary confinement.<sup>222</sup>

In spring 2013, the lawyers learned that the prisoners were contemplating another hunger strike. The CDCR considered such a strike misconduct, warranting disciplinary action. We neither encouraged nor dissuaded the prisoners. Our view was that they had a right to nonviolent protest, and we would support them if they chose that route.<sup>223</sup>

On July 8, 2013, over 30,000 prisoners throughout California went on hunger strike,<sup>224</sup> attracting national and international news attention.<sup>225</sup> The 2013 strike made clear that prisoners, not lawyers, were the key actors in the movement against prolonged solitary confinement in California. Using our phone access and legal visits, we transmitted the prisoners' positions and views

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220. *Ashker v. Brown*, No. 09-cv-05796, 2013 WL 1435148, at \*5-6, \*9 (N.D. Cal. Apr. 9, 2013).

221. Defendants' Notice of Motion & Motion to Dismiss Plaintiffs' Second Amended Complaint, or Alternatively, to Stay; Memorandum of Points and Authorities at 6-8, *Ruiz v. Brown*, No. 09-cv-05796 (N.D. Cal. Dec. 17, 2013), ECF No. 160; Memorandum from Kathleen L. Dickinson, Dir., Div. of Adult Insts. & Anthony Chau, Chief, Off. of Corr. Safety, to Assoc. Dirs., Div. of Adult Insts. & Wardens 40-50 (Oct. 11, 2012), <https://perma.cc/ZR92-LRTN> (describing the SDP).

222. Victoria Law, *Seven Months After Historic Prison Hunger Strike, Opponents of Solitary in California Gauge the Pace of Change*, SOLITARY WATCH (Feb. 10, 2014), <https://perma.cc/F3PK-N4ET> (quoting prisoner criticisms of the SDP).

223. We thus avoided one criticism of litigation: that "after a social movement becomes focused on legal strategies, other avenues and strategies for social struggle such as protests, illicit strikes, and pickets are habitually condemned as deviant." Lobel, *supra* note 53, at 956.

224. *Learn More*, PRISONER HUNGER STRIKE SOLIDARITY, <https://perma.cc/D6LS-RLEP> (archived Oct. 2, 2021).

225. See, e.g., Jennifer Medina, *Hunger Strike by California Inmates, Already Large, Is Expected to Be Long*, N.Y. TIMES (July 10, 2013), <https://perma.cc/629J-5WDZ>; *Two Month California Prison Hunger Strike Ends*, BBC NEWS (Sept. 5, 2013), <https://perma.cc/47DN-NPLV>.

to the outside world, contacted their families, provided companionship, and played a supportive role in the media. We intervened with Clark Kelso, the receiver overseeing the CDCR's medical system, to get the CDCR to allow the prisoners to drink Gatorade. We sought to prevent the CDCR from force-feeding prisoners on hunger strike. We also contemplated seeking preliminary injunctive relief from Judge Wilken due to the emergency created by the strike. But we ultimately realized that Judge Wilken was extremely unlikely to grant such relief.

CDCR officials again attacked the hunger strike as gang inspired. Jeffrey Beard, the newly appointed secretary of the CDCR,<sup>226</sup> wrote an op-ed in the *Los Angeles Times* entitled "Hunger Strike in California Prisons Is a Gang Power Play."<sup>227</sup> Beard warned the public not to be fooled, because the strike was called by "violent prison gangs . . . in an attempt to restore their ability to terrorize fellow prisoners, prison staff and communities throughout California."<sup>228</sup>

What Beard ignored was that the hunger strikes represented years of prisoner anger and frustration, both at the CDCR's policy of indeterminate solitary confinement and the unconstitutional and unreliable process for determining who was an active gang member. The CDCR's policy was ineffective in preventing violence in California's prisons, and it amounted to torture for those ensnared in its grip. Eventually, ten internationally prominent experts submitted reports on behalf of the plaintiffs supporting those conclusions.<sup>229</sup>

Beard's op-ed reflected the CDCR's intransigence in refusing to accede to the hunger strikers' demands. As the strike dragged on into late August, about 100 prisoners, including most of our named plaintiffs, still refused to eat. These prisoners were prepared to die, but they eventually ended the hunger strike when my co-counsel Anne Weills and others convinced key California legislators to hold hearings on the CDCR's use of solitary confinement. The incarcerated had not won anything tangible. But they had accomplished the monumental feat of organizing 30,000 prisoners to engage in a hunger strike, refocusing national attention on California. It was multifaceted advocacy, with the prisoners leading the way.

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226. Tonya Chin, *Jeffrey Beard Confirmed as CDCR Secretary*, BOND BUYER (July 12, 2013, 2:55 PM EDT), <https://perma.cc/YC6U-8ZQF>.

227. Jeffrey Beard, Opinion, *Hunger Strike in California Prisons Is a Gang Power Play*, L.A. TIMES (Aug. 6, 2013, 12:00 AM PT), <https://perma.cc/CJU3-JNRP>.

228. *Id.*

229. *Expert Reports in Ashker v. Brown*, CTR. FOR CONST. RTS., <https://perma.cc/QLC6-URX5> (last updated Aug. 3, 2015); see also *supra* Part II.B.2 (discussing the expert reports).

E. Legal Strategy and Tactics: Participation at Work

A basic tenet of legal ethics is that, while clients decide “the objectives of representation,” the lawyer has “responsibility for technical and legal tactical issues.”<sup>230</sup> That traditional division of responsibilities follows a formalist model of representation, in which the client gives the lawyer authority and the lawyer manages the client’s affairs with minimal interference (subject, of course, to the client’s authority to fire the lawyer). More recently, an increased level of client involvement has gained widespread acceptance, requiring more lawyer–client consultation and interaction.<sup>231</sup> The legal code of ethics, however, still requires only that the lawyer “consult with the client as to the means by which [the client’s objectives] are to be pursued,”<sup>232</sup> placing ultimate legal decisionmaking power in the lawyer’s hands.<sup>233</sup>

The Supreme Court recently discussed the distinction between objectives and means in the context of a criminal defendant’s Sixth Amendment right to assistance of counsel. In *McCoy v. Louisiana*, the Court held that a defendant’s autonomy to make decisions as to the “objective of the defense” includes her right to “insist on maintaining her innocence at the guilt phase of a capital trial.”<sup>234</sup> A criminal defendant’s decisions on whether to plead guilty, waive a jury trial, testify, and forgo an appeal “are not strategic choices about how best to *achieve* a client’s objectives; they are choices about what the client’s objectives in fact *are*.”<sup>235</sup> In contrast, “[t]rial management is the lawyer’s province”<sup>236</sup>. Questions of “what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence” do not require client consent.<sup>237</sup>

The objective–means distinction thus empowers lawyers to make a large swath of important decisions on behalf of their clients. And lower courts have narrowly interpreted the scope of client objectives: In *United States v. Wilson*,

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230. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS’N 1983); *id.* r. 1.2 cmt. (Scope of Representation).

231. Comm. on Pro. Resp., *The Evolving Lawyer-Client Relationship and Its Effect on the Lawyer’s Professional Obligations*, 51 REC. ASS’N BAR CITY N.Y. 443, 443-44 (1996).

232. MODEL RULES OF PRO. CONDUCT r. 1.2(a). For example, the comments to Model Rule of Professional Conduct 1.4 point out that “a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail.” *Id.* r. 1.4 cmt.; *see also* White, *supra* note 79, at 29 (“I felt myself saying too much. Why had I even raised the question of which story to tell? It was a tactical decision—not the kind of issue that clients were supposed to decide.”).

233. Comm. on Pro. Resp., *supra* note 231, at 458.

234. 138 S. Ct. 1500, 1508 (2018).

235. *Id.*

236. *Id.*

237. *Id.* (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)).

for example, the Third Circuit held that “whether to contest or concede a jurisdictional element [of an alleged crime] is a tactical decision reserved for counsel, not defendants.”<sup>238</sup> Indeed, in both the civil and criminal context, the current ethics rules “leave the lawyer relatively free to decide strategic and tactical questions as he or she sees fit, even in the face of a client’s objections.”<sup>239</sup>

Lawyers maintain even more control over the litigation in the class-action context, and fundamental issues such as settlement are generally viewed as within the lawyer’s control even when the named plaintiffs are opposed.<sup>240</sup> The same is true in complex litigation, where ethical and constitutional rules are interpreted to accord the lawyer greater decisionmaking authority under the theory that the client is ill-equipped to make complicated legal determinations.<sup>241</sup> Lawyers generally control the litigation because it is easier, it causes less stress, and it lets them avoid dealing with difficult clients. Clients embrace this behavior in certain cases because they are content to let attorneys decide legal issues without their input. In addition, most lawyers think that they are better situated, better educated, and more objective when it comes to deciding strategic litigation matters. Impact lawyers in particular are not trained to act differently, and they often believe that the client does not have much to offer when it comes to complex matters. What these lawyers ignore is that clients often do have a great deal of knowledge about and experience with the issues in the lawsuit and that legal strategy can benefit from more collaborative decisionmaking.

In the Pelican Bay litigation, the lawyers proceeded from a radically different perspective regarding lawyer–client roles. Most of the important litigation decisions, whether related to tactical moves or overall objectives, were made collaboratively. Often there were differing opinions between lawyers of different backgrounds, politics, and temperaments, different perspectives between the lawyers and those incarcerated, and disagreements among the plaintiffs themselves. Nevertheless, the lawyers and plaintiffs respected one another’s opinions, skills, and insights, enabling us to make decisions collaboratively and collectively. This approach generally prevented the conflicts that can surface in group representation from hindering our

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238. 960 F.3d 136, 143-44 (3d Cir. 2020). Shepardizing *McCoy* in July 2021 led to 125 lower-court decisions distinguishing or urging caution in applying the case and just twenty-seven citing it positively.

239. Todd A. Berger, *The Constitutional Limits of Client-Centered Decision Making*, 50 U. RICH. L. REV. 1089, 1107-08 (2016).

240. Ellmann, *supra* note 28, at 1118-19.

241. Berger, *supra* note 239, at 1102 & n.48.

litigation efforts or forcing the lawyers to decide which interests should prevail.<sup>242</sup>

The first major tactical decision in which the prisoners played a role involved our due process argument. In the amended complaint, we broadly alleged that the defendants had violated due process in placing and retaining prisoners in the SHU.<sup>243</sup> However, it was more difficult to challenge placement than retention on due process grounds. In *Wilkinson v. Austin*, the Supreme Court held that although the prisoners in an Ohio supermax had a liberty interest, the procedure required before their administrative confinement was somewhat flexible.<sup>244</sup> The procedures approved of in *Wilkinson* afforded less protection than those necessary for punitive confinement in *Wolff v. McDonnell*,<sup>245</sup> and the Ninth Circuit had dismissed claims that SHU placement violated due process under the lesser administrative standard.<sup>246</sup> We therefore focused our complaint not on placement but on retention, arguing that (1) six years between reviews was obscenely long; (2) review criteria were vague and misleading; and (3) the entire review process was meaningless.<sup>247</sup>

Just before the defendants filed their motion to dismiss, we received a lengthy document, entitled Memorandum of Points and Authorities Submitted for Consideration by Class Counsel and Representatives on Cruel and Unusual Punishment and Due Process, from a Pelican Bay SHU prisoner named Edward Dumbrique.<sup>248</sup> Dumbrique, who had a GED, participated in the hunger strikes, corresponded with me prior to our filing the complaint, and had been thinking about filing a lawsuit challenging confinement in the SHU. Dumbrique's

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242. 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. MIA. L. REV. 1099, 1107 (1994); Ellmann, *supra* note 28, at 1106.

243. Plaintiffs' Second Amended Complaint, *supra* note 1, ¶¶ 200-202.

244. See 545 U.S. 209, 224-29 (2005); see also *supra* notes 119-20 and accompanying text.

245. 418 U.S. 539 (1974); Elli Marcus, Comment, *Toward a Standard of Meaningful Review: Examining the Actual Protections Afforded to Prisoners in Long-Term Solitary Confinement*, 163 U. PA. L. REV. 1159, 1178 (2015).

246. Bruce v. Ylst, 351 F.3d 1283, 1287 (9th Cir. 2003) ("[T]he heightened standard of *Wolff v. McDonnell* [does not apply] because 'California's policy of assigning suspected gang affiliates to the [SHU] is not a disciplinary measure, but an administrative strategy designed to preserve order . . .'" (citation omitted) (quoting *Munoz v. Rowland*, 104 F.3d 1096, 1098 (9th Cir. 1997))); *Cervantes v. Adams*, 507 F. App'x 644, 644 (9th Cir. 2013); *Mitchell v. Marshall*, 564 F. App'x 324, 325 (9th Cir. 2014).

247. Plaintiffs' Second Amended Complaint, *supra* note 1, ¶¶ 96-119, 195, 200-202.

248. Memorandum of Points and Authorities Submitted for Consideration by Class Counsel and Representatives on Cruel and Unusual Punishment and Due Process from Edward Dumbrique to author (Sept. 2012) (on file with author).

memorandum was his response to my letter soliciting his “legal and factual insights, and strategic and tactical views.”<sup>249</sup>

Dumbrique argued that a 2010 amendment to California law that prevented gang-validated prisoners who were held in the SHU for administrative reasons from earning good-time credits<sup>250</sup> rendered SHU confinement punitive, requiring the hearing procedures set forth in *Wolff*.<sup>251</sup> When I reviewed Dumbrique’s memorandum, I was impressed but unconvinced. Dumbrique’s argument was very clever, but my initial impression was that it was foreclosed by *Wilkinson*’s holding that the *Wolff* framework did not apply when the state’s rationale was administrative rather than disciplinary.<sup>252</sup> But upon reflection and after some research, I thought Dumbrique’s argument about the punitive nature of the loss of good-time credits was sound. I raised Dumbrique’s point with the lawyers and named plaintiffs, and we agreed to forcefully brief it in our opposition to the defendants’ motion to dismiss.<sup>253</sup>

At the hearing on the defendants’ motion to dismiss before Judge Wilken, a significant part of the argument involved Dumbrique’s point.<sup>254</sup> Judge Wilken denied the defendants’ motion, holding that under *Mathews* we had adequately pled a due process violation.<sup>255</sup> Judge Wilken withheld judgment on Dumbrique’s *Wolff* argument, determining that the court “need not decide at this stage whether [the plaintiffs] are entitled to the specific hearing procedures described in *Wolff v. McDonnell*.”<sup>256</sup> Eventually, the state accepted Dumbrique’s claim, agreeing that the CDCR would not place prisoners in the SHU based on gang validation, but instead do so only after a guilty finding in a disciplinary hearing conducted pursuant to the requirements of *Wolff*.<sup>257</sup>

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249. Letter from author to Edward Dumbrique 2 (Dec. 7, 2011) (on file with author).

250. CAL. PENAL CODE § 2933.6(a) (West 2010) (amended 2017); see also *id.* §§ 2933, 2933.05. Good-time credits generally reduce the sentence that prisoners must serve and are earned by prisoners who remain free of major misconduct. See *Wolff*, 418 U.S. at 546 n.6.

251. Memorandum of Law on State and Federal Due Process Violations from Edward Dumbrique to author 1, 3-7 (Sept. 2012) (on file with author).

252. See *Wilkinson v. Austin*, 545 U.S. 209, 228-29 (2005).

253. See Plaintiffs’ Opposition to Defendants’ Motion to Dismiss Second Amended Complaint at 12-13, *Ruiz v. Brown*, No. 09-cv-05796 (N.D. Cal. Jan. 17, 2013), 2013 U.S. Dist. Ct. Pleadings LEXIS 9353, at \*26-29, ECF No. 178.

254. Transcript of Proceedings, *supra* note 219, at 11-12, 19-21, 29.

255. *Ashker v. Brown*, No. 09-cv-05796, 2013 WL 1435148, at \*6-9 (N.D. Cal. Apr. 9, 2013); see *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

256. *Ashker*, 2013 WL 1435148, at \*9.

257. Settlement Agreement ¶¶ 13, 15-16, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Sep. 1, 2015), ECF No. 424-2.

Prior to the hearing on the defendants' motion to dismiss, another tactical issue arose in which prisoners again played a leading role. In March 2013, at the suggestion of plaintiff Todd Ashker, we requested mediation.<sup>258</sup>

I was somewhat reluctant to agree to mediation, thinking it would lead only to delay. Moreover, the lawyers wanted to establish a precedent holding that prolonged solitary confinement constituted cruel and usual punishment. Nonetheless, Ashker convinced us and other plaintiffs that requesting mediation would put the defendants on the defensive and be viewed favorably by Judge Wilken. Judge Wilken ordered settlement talks before Magistrate Judge Vadas.<sup>259</sup> Ashker's idea would eventually lead to dramatic results.<sup>260</sup>

Perhaps the plaintiffs' most dramatic tactical intervention took place approximately nine months before settlement. By winter 2014-2015, we had made considerable progress. Our due process and Eighth Amendment classes were certified, we had obtained valuable discovery, and our ten prominent experts were nearing completion of their reports. Trial was scheduled to begin before Judge Wilken on December 7, 2015. However, the CDCR's actions complicated our strategy.

In October 2014, the CDCR made its pilot SDP (Step Down Program) permanent,<sup>261</sup> accelerating its efforts to moot or at least dramatically undermine the plaintiffs' claims.<sup>262</sup> By late 2014, only about half of the original Eighth Amendment class, and only two named plaintiffs, remained at Pelican Bay's SHU. The other eight plaintiffs had been transferred pursuant to the SDP to either another, slightly less restrictive SHU, or to a highly restrictive general population (GP) prison.<sup>263</sup>

The CDCR's reform program could easily have split the plaintiffs, who now faced somewhat different situations, presenting typical class-conflict problems. Moreover, the lawyers and prisoners had different responses to the situation.

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258. See Joint Case Management Conference Statement at 13, *Ruiz v. Brown*, No. 09-cv-05796 (N.D. Cal. Mar. 7, 2013), ECF No. 183.

259. Transcript of Proceedings, *supra* note 219, at 30-31; see also Notice & Order Setting Settlement Conference in Pro Se Prisoner Early Settlement Program, Requiring Meet and Confer, and Setting Status Conference at 1, *Ashker v. Brown*, No. 09-cv-05796 (N.D. Cal. Apr. 15, 2013), ECF No. 192.

260. See *infra* Part II.F.

261. Order Granting Motion for Leave to File a Supplemental Complaint at 2-3, *Ashker v. Governor of Cal.*, No. 09-cv-05796, (N.D. Cal. Mar. 9, 2015), ECF No. 387 [hereinafter Order Granting Motion].

262. See Transcript of Proceedings at 24-25, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Feb. 24, 2015), ECF No. 385.

263. Order Granting Motion, *supra* note 261, at 3-4, 4 n.1.

The lawyers wanted to push ahead quickly, finish our expert reports, file a motion for summary judgment on our due process claim, and not make any move that might delay trial. The prisoners, however, wanted us to file a supplemental complaint to challenge the CDCR's transfer of class members to different SHUs and even to GP without changing their isolation.

The lawyers resisted filing a supplemental complaint because we thought the defendants would use the new filing to demand new discovery, seek new expert reports, file a new motion to dismiss, and delay the trial to the point where our class could dissipate. We also worried that delay would lead to another hunger strike and that some named plaintiffs and class members might die. But after sharing our concerns, several plaintiffs strongly insisted we file a supplemental complaint to ensure that the transferred plaintiffs could continue in the case. They felt that it was wrong to allow the CDCR to moot claims simply by transferring prisoners to other SHUs where they were still kept in solitary. When we polled our named plaintiffs by phone, they all agreed.

We decided to follow the prisoners' strategy and file a supplemental complaint, but there was disagreement among the lawyers regarding how to preserve the December 7 trial date. Eventually, the lawyers agreed to argue that Judge Wilken should (1) bifurcate the claims; (2) try the original allegations challenging incarceration at Pelican Bay on December 7; and (3) if the plaintiffs prevailed, then try the supplemental claim that transfer to another SHU continued the harm created by confinement at Pelican Bay.<sup>264</sup> Judge Wilken accepted our supplemental complaint and agreed to bifurcate the claims, hearing the original claim first.<sup>265</sup> Judge Wilken's decision forced the defendants to recognize that they were unlikely to moot the plaintiffs' class claims. Moreover, it transformed the case from a challenge to solitary confinement in one California prison to a case potentially affecting prisons across the state.

These examples are representative of our participatory approach, which ignored the distinction between client-controlled objectives and lawyer-driven legal tactics. While some tactical decisions—such as how to write briefs and draft motions—were almost entirely lawyer made, most important decisions were made jointly. The California lawyers' legal visits, and my phone calls with the named plaintiffs and class members, often included discussions of legal strategy and tactical decisions.

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264. See Reply in Support of Plaintiffs' Motion for Leave to File a Supplemental Complaint at 6 n.1, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Jan. 29, 2015), ECF No. 377.

265. Transcript of Proceedings, *supra* note 262, at 13-14; Order Granting Motion, *supra* note 261, at 11.

Our view of participatory litigation is exemplified by a letter I wrote to plaintiff and hunger strike leader Ron Dewberry, known as Sitawa Nantambu Jamaa. I explained that

it would be incorrect and politically reactionary to do this case without input, guidance and leadership from prisoners like yourself. . . . Of course, we lawyers have particular skills and expertise to bring to this situation, but I would appreciate any comments, suggestions, modifications etc. you might have on the draft complaint, and on our entire legal strategy. We might not agree, and we would have to hash it out and discuss it, but we want your input.<sup>266</sup>

The letter was an immediate response to a letter from Sitawa seeking to ensure that he and other plaintiffs were included in key decisionmaking in the developing case. Because we were amending a pro se complaint brought by two white plaintiffs, and our initial contact with the prisoners thus focused more on those plaintiffs, Sitawa was concerned that other plaintiffs, particularly Black plaintiffs, would either be left out or given a subsidiary role in the ensuing class action. Part of my letter explained why our initial contact was with the two white plaintiffs and what we would do in the near future to rectify that unbalanced situation. I also apologized for the situation and immediately sought a court order allowing phone calls with all of the named plaintiffs. Sitawa was a revolutionary leader who demanded an important role, and he was intent on not being subservient or deferential to the lawyers. The interchange was a crucial moment of trust building with our key plaintiffs. Its import was in recognizing Sitawa and the other plaintiffs' leadership, not just of the hunger strike, but also in the case itself. My letter signaled to Sitawa that I and other CCR lawyers were not the typical class-action attorneys he had encountered in prior cases, but that we viewed the litigation as a partnership between the lawyers and prisoners and encouraged joint decisionmaking on important legal matters.

#### F. Settlement Negotiations: Empowering the Collective

Both the traditional lawyering model and the client-centered model focus on "enhancing the autonomy of the client."<sup>267</sup> The traditional model protects client autonomy by positing a largely passive client who sets the overall parameters and goals of the representation and then yields, and the client-centered approach requires the lawyer to actively learn from the client and involve the client in problem-solving.<sup>268</sup>

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266. Letter from author to Sitawa Nantambu Jamaa 1 (Apr. 24, 2012) (on file with author).

267. Simon, *supra* note 242, at 1102. As Simon notes, "the client 'empowerment' recommended by the new [poverty law] scholarship seems quite similar to the client autonomy exalted in the traditional doctrine." *Id.* at 1104.

268. Berger, *supra* note 239, at 1092.

The traditional and client-centered models emphasize individual empowerment. Our goal was fundamentally different: to empower the prisoners in their *collective* capacity. Both the lawyers and the plaintiffs wanted the litigation to aid in building the prisoners' human rights movement and facilitate group dialogue and decisionmaking. We viewed the litigation as providing a collective First Amendment right, similar to a union's right to collectively bargain and strike or a citizen's right to demonstrate.<sup>269</sup> Litigation can be a form of "cooperative, organizational activity,"<sup>270</sup> falling within the First Amendment's ambit of the "freedom to engage in association for the advancement of beliefs and ideas."<sup>271</sup>

California officials viewed collective action, such as the hunger strike or the prisoners' Agreement to End Hostilities, as a threat to their control over California's prisons. The Supreme Court has generally permitted prison officials to bar organizing that is protected in other contexts: *Jones v. North Carolina Prisoners' Labor Union, Inc.*, in which the Court equated collective organizing with the potential for prison disruption, illustrates the Court's deference to officials in this regard.<sup>272</sup> Litigation is therefore one of the few opportunities that prisoners have to engage in protected collective resistance.

The first real opportunity to effectuate our collective, participatory approach came when Judge Wilken ordered mediation before Magistrate Judge Vadas. We requested a meeting with all of the named plaintiffs to discuss our negotiating position in the mediation. The CDCR lawyers strenuously objected, saying that such a meeting was impossible and unprecedented and suggesting that we discuss our negotiating demands individually with each prisoner.

We argued that the plaintiffs needed to discuss the demands and approach with one another, not solely with us. Magistrate Judge Vadas agreed, and he ordered the defendants to arrange for an in-person meeting between lawyers and all of the plaintiffs at Pelican Bay.

On June 12, 2013, co-counsel Anne Weills and I went to Pelican Bay for an extraordinary and unprecedented three-hour meeting with all of the named plaintiffs. Anne and I were greeted at the prison by about twenty correctional officials, and we were escorted to a large room with glass windows. All of the prisoners were placed in individual cages that looked like old telephone booths, with glass and wire mesh doors so that they could see and hear each other. Anne and I sat at a large table in the front facing the prisoners, and we

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269. See Lynd, *supra* note 31, at 1422-35.

270. *In re Primus*, 436 U.S. 412, 438 n.32 (1978) (quoting *NAACP v. Button*, 371 U.S. 415, 430 (1963)).

271. *Id.* (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

272. 433 U.S. 119, 132-33 (1977).

initiated a discussion based on a tentative list of demands the lawyers had drawn up in individual discussions with the plaintiffs.

The discussion was lively and respectful, with all ten plaintiffs participating and discussing their views. Our main role was facilitative: We asked clarifying questions, took notes, and moved the meeting forward. By the end, the plaintiffs had agreed on several new demands and modified some of the demands in the initial list. I later quipped to my law school colleagues that the meeting was more civil, respectful, and useful than many faculty meetings. Anne and I stressed that we would not enter into a settlement agreement unless the plaintiff representatives agreed on the terms at a follow-up meeting. At the end of the discussion, to commemorate the remarkable achievement of meeting collectively to discuss strategy and demands—albeit in draconian conditions—we participated in a minute of silence.

The prisoners' basic demands were that (1) the CDCR end indeterminate confinement in the SHU; (2) future SHU terms be imposed for no more than five years and for serious, proven misconduct, not gang affiliation; and (3) the CDCR develop an innovative pilot program, termed a Management Control Unit, to gradually transition SHU prisoners to GP. The plaintiffs also requested that the Agreement to End Hostilities be "posted in all of California prisons[] bulletin boards and be sent to every inmate under the control of CDCR."<sup>273</sup>

Magistrate Judge Vadas allowed two plaintiff representatives to attend the mediation held at Pelican Bay on June 19, 2013. Unfortunately, the mediation session proved to be a waste of time, as the CDCR and the Attorney General's Office were intransigent, did not negotiate, and violated the court's order by not sending someone with the authority to settle.

Several weeks later the prisoners commenced their July 8 hunger strike, and in an effort to end the hunger strike on somewhat favorable terms, the lawyers and plaintiffs agreed to submit a partial settlement proposal of our Fourteenth Amendment due process claims. The CDCR rejected our proposal, stating that they sought a global resolution of the entire case.

Magistrate Judge Vadas also wanted a global settlement, and after the hunger strike ended he ordered the plaintiffs to draft a comprehensive settlement proposal. We requested another meeting with plaintiffs, which Magistrate Judge Vadas granted.

In December 2013, Anne and I once again met with the named plaintiffs in the same setting. This time, perhaps to emphasize just how dangerous these prisoners were, the prison officials made us don full flak jackets as if we were going into a war zone. Such symbolic protection was ridiculous given that the plaintiffs were locked in individual cages, the prisoners had been searched for

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273. For the language of all of the demands, see Letter from Anne Weills, Att'y for the Plaintiffs, to Mag. J. Nador J. Vadas 1-2 (June 13, 2013) (on file with author).

weapons, and we were not afraid of the prisoners attacking us. But the prison officials overruled our objections. Wearing these preposterous outfits, Anne and I marched into the meeting room.

We spent the three-hour meeting discussing a draft settlement proposal that the lawyers (in consultation with the plaintiffs) had sent out to everyone. While Anne and I formally facilitated the meeting, plaintiff Gabriel Reyes led the discussion, which went through the terms point by point and solicited comments and disagreements. Again, the discussion was lively, respectful, and engaged, and by the end we had consensus on a comprehensive proposal. The main difference from our earlier proposal involved fleshing out what was now termed a Modified General Population Program, to which the long-termers in the SHU would be transferred for a six-month transition period. After this period, absent serious misconduct, the prisoners would be placed in GP.

We submitted our settlement proposal on December 24, 2013, but the defendants found our proposal unacceptable and settlement negotiations appeared dead. Or so we thought.

In March 2015, we served the defendants with our ten expert reports, which demonstrated that prolonged solitary confinement at Pelican Bay caused the prisoners serious psychological and physical harm, deprived them of social interaction (a basic human need), was unnecessary and counterproductive penologically, and violated international norms and practices.<sup>274</sup> Those expert reports, combined with Judge Wilken's allowance of a supplemental complaint, apparently pushed the CDCR's officials toward settlement. At the beginning of April, CDCR Undersecretary Scott Kernan called me to begin negotiations.

Kernan and CDCR Secretary Jeffrey Beard proved serious and told us that they would present a detailed proposal. We agreed to negotiate, but we demanded that the CDCR arrange for subsequent meetings between all of the named plaintiffs and the legal team to discuss and respond to proposals. By that point the plaintiffs were scattered at different prisons across the state, so the lawyers and plaintiffs agreed to telephonic conferences.

Moreover, because we viewed ourselves as representing the prisoners' movement and not merely a class of prisoners,<sup>275</sup> we demanded that Arturo Castellanos be included on the conference calls. Such a demand was unorthodox because Castellanos, who was not a named plaintiff, had no legal standing to participate in these discussions. But Castellanos was one of the four main leaders of the hunger strikes and the prisoners' human rights movement, and his participation was critical to negotiating a settlement which would garner widespread support among the prisoners.

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274. *See supra* note 229 and accompanying text.

275. *See supra* note 122 and accompanying text.

The CDCR agreed to our procedural demands. Over the next few months, Carol Strickman, a lawyer closely associated with the hunger strikes, and I negotiated with the CDCR by phone and brought the resulting proposals back to the prisoner phone conference. After each round of negotiations, the named plaintiffs and Castellanos went over the proposals point by point, discussed them, and presented their alternatives and modifications to negotiate with Beard and Kernan. The lawyers and plaintiffs participated as equals in these discussions, with the lawyers generally facilitating, the plaintiffs and Castellanos raising substantive points, and everyone working out disagreements to develop our negotiating position.

After three months of negotiating, a final agreement was ready for collective discussion and a ratification vote by the named plaintiffs. It provided that the CDCR would (1) end indeterminate SHU placement based on alleged gang affiliation; (2) limit future SHU placement to a determinate term imposed after the prisoner was found guilty in a disciplinary hearing that comported with *Wolff* due process protections as set forth in the CDCR rules;<sup>276</sup> (3) release all class members without a recent conviction for serious misconduct from the SHU to GP (it turned out that almost none of the 1,500 class members had such a conviction); (4) apply the settlement to all CDCR SHUs systemwide; and (5) create a new unit, the Restrictive Custody General Population (RCGP) Housing Unit, as a transitional GP unit for prisoners not released to GP under the agreement and those with safety concerns precluding such release.<sup>277</sup> The agreement included monitoring for two years and enforcement before Magistrate Judge Vadas, with a de novo appeal to Judge Wilken.<sup>278</sup>

We also negotiated for the plaintiffs to play a direct role in monitoring, including (1) an annual meeting between the plaintiffs and lawyers; (2) a semiannual meeting between four prisoner representatives and the defendants to discuss the implementation of the agreement; and (3) a meeting between four prisoner representatives and CDCR experts evaluating the SDP.<sup>279</sup> The agreement almost broke down when the CDCR adamantly refused to accept these participatory provisions, but Magistrate Judge Vadas ultimately resolved the dispute in our favor (although he reduced the frequency of the meetings).

The final stage in the settlement process was a ratification call with all of the named plaintiffs. We had already had a conference call with the four key leaders who formed a de facto prisoner executive committee—Sitawa, Ashker,

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276. See Settlement Agreement, *supra* note 257, ¶¶ 13-17. We therefore won on the point that Edward Dumbrique had raised in his initial memorandum. See *supra* notes 250-51 and accompanying text.

277. Settlement Agreement, *supra* note 257, ¶¶ 13-17, 25-28.

278. *Id.* ¶¶ 37, 48-50, 52-53.

279. *Id.* ¶¶ 21, 40, 49.

Castellanos and Franco—and they had given their approval to move the settlement forward (although Sitawa was somewhat tentative). But tensions and disagreements among the prisoners had begun to emerge.

In conversations with plaintiffs before the ratification call, several raised significant concerns. First, we had served the defendants with a strong motion for summary judgment on our due process claim at the beginning of July. Some prisoners got cold feet after reading the motion, feeling that we should not settle until Judge Wilken decided the due process claim. The summary judgment motion asked for prisoners' gang validations to be expunged from their records—a prospect that many plaintiffs found exciting—but this relief was not in the settlement. Some prisoners also felt that we should get an explicit acknowledgment of the CDCR's constitutional violations and the harm that they had suffered over the years. The agreement did not provide such an explicit acknowledgment, but a judicial victory would. One named plaintiff did not attend the final ratification meeting and did not sign the agreement. Gabriel Reyes expressed to me what others may have felt, saying that while he respected me as a lawyer, he thought I was too reasonable a negotiator and that we could have gotten even more in the settlement. In retrospect, perhaps he was right.

Second, some prisoners and lawyers felt that the negotiation process had been very rushed. Both sides were negotiating against the backdrop of a December 7 trial date, which we were adamant about preserving. Maintaining that date kept pressure on the defendants, who would have to face a trial in just a few months if the settlement talks broke down. In retrospect, however, while the time pressure pushed the settlement process forward, it also led to us not fully considering some of the settlement's difficulties and problems.

At the ratification meeting, the legal team recommended that we accept the final settlement but emphasized that the decision of whether to settle was the plaintiffs' alone. Ashker spoke brilliantly and forcefully in favor of settlement, arguing that the Prison Litigation Reform Act limited what we could get as relief even with a courtroom victory.<sup>280</sup> After much discussion, each plaintiff stated his vote and the reasons behind it. One by one they each voted to settle, stating that the agreement was the best we could get, that we had come a long way, that it allowed us to maintain unity, and that they were thankful for everyone's participation.

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280. The Prison Litigation Reform Act attempts to limit the relief that prisoners can obtain even after proving constitutional violations. *See* 42 U.S.C. § 1997e; 18 U.S.C. § 3626(a)(1) (“The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”).

At the very end it was Sitawa's turn, and he expressed his conflicting feelings. Sitawa was a principled, revolutionary Black leader who commanded tremendous respect among the prisoners. He was housed near several Black prisoners who undoubtedly did not support the agreement. Sitawa said that he did not like the agreement because it treated gang-validated prisoners as second-class citizens, imposing additional punishment if they committed a serious disciplinary violation. He was right, and in retrospect we should not have agreed to that point, but the CDCR was insistent on retaining the SDP.

Tensions caused by mostly white attorneys representing a class of mostly minority plaintiffs were simmering below the surface. Sitawa had mentioned several times to me over the course of the litigation that he would appreciate the inclusion of Black attorneys on our team. We somewhat rectified the situation by adding new lawyers of color, but visits and phone calls with white lawyers still constituted the bulk of the plaintiffs' contacts with our team. The lawyers had worked hard to maintain racial unity and win the trust of the prisoners by treating everyone with dignity and respect. But the Black plaintiffs came from a radical Black-nationalist background, and it was unlikely that their representation by primarily white lawyers did not in some way affect their outlook.

Nonetheless, Sitawa concluded by saying that he would vote for the settlement agreement for the sake of unity. He was an incredible statesman, and he said that everyone had given something up. But he wanted to be sure that we enforced the agreement to its fullest extent. Sitawa later told me that he had spoken with Danny Troxell, a white named plaintiff who was housed nearby, and that Troxell had asked him not to torpedo the agreement. Sitawa spoke last because he did not want to influence others' votes, and in the end he chose to support the group, albeit with qualms. Sitawa's actions both reflect his ability as a leader and shed light on how the prisoners were able to overcome their own differences, interests, and conflicts to act in a unified manner during the hunger strikes and the litigation. The prisoners' and lawyers' collective decisionmaking required mutual respect, listening to one another, and placing a high value on unity—even if doing so meant submerging individual views. It was a learning experience for all of us, particularly the lawyers.

After the vote, the plaintiffs decided on a statement representing their view of the settlement:

This settlement represents a monumental victory for prisoners and an important step toward our goal of ending solitary confinement in California, and across the country. California's agreement to abandon indeterminate SHU confinement based on gang affiliation demonstrates the power of unity and collective action. This victory was achieved by the efforts of people in prison, their families and loved ones, lawyers, and outside supporters. Our movement rests on a foundation of unity: our Agreement to End Hostilities. It is our hope that this groundbreaking agreement to end the violence between the various ethnic groups in California prisons will inspire not only state prisoners, but also jail

detainees, county prisoners and our communities on the street, to oppose ethnic and racial violence. From this foundation, the prisoners' human rights movement is awakening the conscience of the nation to recognize that we are fellow human beings. As the recent statements of President Obama and of Justice Kennedy illustrate, the nation is turning against solitary confinement. We celebrate this victory while, at the same time, we recognize that achieving our goal of fundamentally transforming the criminal justice system and stopping the practice of warehousing people in prison will be a protracted struggle. We are fully committed to that effort, and invite you to join us.<sup>281</sup>

On September 1, 2015, the parties announced the settlement agreement, which received general acclaim in the press. A *New York Times* editorial proclaimed that "the slow push for meaningful reform [of solitary confinement] got a big shove in the right direction," arguing that the "importance of California's settlement" was that it demonstrated that "broad reform is surely possible around the country."<sup>282</sup> The lengthy story covering the settlement in the *Times* ended with an extensive quote from the plaintiffs' statement.<sup>283</sup> The San Jose *Mercury News* quoted Sitawa's sister, who termed the settlement a "monumental leap," and Dolores Canales, the head of CFASC (California Families Against Solitary Confinement), who noted that "[t]his legal victory is huge, but it is not the end of our fight."<sup>284</sup>

The prisoners' collective victory increased their sense of solidarity. As William Simon has perceptively written, the "experience of confronting their adversary together in circumstances where he was obliged to acknowledge them as a group and as other than subordinates and to account to them in some minimal way . . . empowered them in relation to the adversary."<sup>285</sup> But as Canales and the class representatives recognized, the fight was far from over. Enforcement of the settlement agreement would be a long, arduous, and often frustrating experience.

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281. Todd Ashker, Sitawa Nantambu Jamaa, Luis Esquivel, George Franco, Richard Johnson, Paul Redd, Gabriel Reyes, George Ruiz & Danny Troxell, *Statement of Plaintiffs on Settlement of Ashker v. Governor of California*, CTR. FOR CONST. RTS. (Aug. 31, 2015), <https://perma.cc/9RT9-CS5G>.

282. Editorial, *Solitary Confinement Is Cruel and All Too Common*, N.Y. TIMES (Sept. 2, 2015), <https://perma.cc/PU88-ZLST>.

283. Ian Lovett, *California Agrees to Overhaul Use of Solitary Confinement*, N.Y. TIMES (Sept. 1, 2015), <https://perma.cc/XVA4-LRMK>.

284. Howard Mintz, *California Prison Abuse Case: Solitary Confinement Policy Softened*, MERCURY NEWS (updated Aug. 12, 2016, 1:17 AM), <https://perma.cc/4H5W-RRSE>.

285. Simon, *supra* note 69, at 483-84.

### G. Participatory Enforcement and Monitoring

The class-action model of legal liberalism often blinds lawyers to the difficulties, obstacles, and problems of monitoring and enforcement.<sup>286</sup> Participation by class representatives and members is particularly important in the implementation phase of structural-reform litigation, as often the plaintiffs understand problems and possible solutions far better than the lawyers involved. This insight is not limited to litigation: It has also been applied to implementing government policies more generally. As Paul Farmer, a professor of medicine at Harvard and co-founder of the organization Partners in Health, noted about the participatory process of his work in Haiti, which he termed “accompaniment”: “[T]he great failures of policy and governance usually occur because of failures of implementation, and accompaniment is good insurance against such failures.”<sup>287</sup>

Accompaniment, as defined by Farmer and practiced by liberation theologians and lawyers such as Alice and Staughton Lynd, requires professionals to journey together as equals with and learn from the people who they seek to aid.<sup>288</sup> As Farmer notes, accompaniment is particularly critical in the implementation phase of any reform.<sup>289</sup>

Similarly, William Simon suggested years ago that perhaps the most promising development in class-action participation was not the “notice and intervention provisions on which conflicts doctrine has focused, but the remedial provisions that give class members a direct role in monitoring the decree.”<sup>290</sup> Our goal was to incorporate plaintiff participation into the monitoring and implementation of the settlement agreement.

Judge Wilken approved the settlement agreement on January 26, 2016, calling it “remarkable . . . . [I]t is extremely fair, extremely humane, and

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286. Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 712-13 (1993); see also Bell, *supra* note 57, at 513-14.

287. Paul Farmer, Kolokotronis Univ. Professor of Glob. Health & Soc. Med., Harvard Univ., Commencement Address at the Kennedy School of Government, Harvard University: Accompaniment as Policy (May 25, 2011), <https://perma.cc/CP9J-KA34>.

288. *Id.*; see also LYND, *supra* note 25, at 5; LYND & LYND, *supra* note 25, at 4-5.

289. Farmer, *supra* note 287.

290. Simon, *supra* note 69, at 487; see also *Morgan v. Kerrigan*, 530 F.2d 401, 429 (1st Cir. 1976) (describing the role of community groups in monitoring and implementing a school-desegregation decree); *Floyd v. City of New York*, 959 F. Supp. 2d 668, 686-88 (S.D.N.Y. 2013) (directing the parties to obtain community input under the guidance of a facilitator in order to develop reforms for the New York City Police Department); Sabel & Simon, *supra* note 32, at 1032 (discussing a court-approved compliance plan providing for plaintiff and expert input into proposed policies and initiatives at a mental institution); Yaroshefsky, *supra* note 18, at 3 (describing movement lawyering in the *Floyd* case and how clients convened a two-day long community meeting to discuss proposed remedies).

extremely innovative.”<sup>291</sup> Twelve class members (out of twenty-five total), or about 1.5% of the affected class of prisoners, sent the court objections.<sup>292</sup> Judge Wilken held that no objection cast doubt on the fairness of the settlement,<sup>293</sup> although in one important matter involving the newly created RCGP unit, she agreed with the objectors and suggested a needed modification.<sup>294</sup> We did more than the defendants wanted to ensure adequate class notification, not simply posting the agreement in all prisons but also translating it into Spanish and distributing a copy to every class member at Pelican Bay.<sup>295</sup>

By fall 2016, the CDCR had transferred virtually all prisoners in indeterminate SHUs around the state into GP. The few not transferred were placed in the RCGP due to safety concerns or disciplinary misconduct. Pursuant to an oral agreement with Secretary Beard, the disciplinary misconduct that many class members had received for their participation in the hunger strikes was ignored during the CDCR’s review process. The CDCR believed that they had substantially complied with the settlement agreement and were awaiting the two-year mark to terminate the case. Magistrate Judge Vadas appeared to agree with the defendants, and indeed rejected every enforcement motion that we made while he was in charge of monitoring the agreement.<sup>296</sup>

We disagreed with the CDCR and Magistrate Judge Vadas. We promised the plaintiffs that we would enforce the agreement to its fullest, and the plaintiffs believed the defendants were violating many of the agreement’s

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291. Reporter’s Transcript of Fairness Hearing & Motion Hearing at 6, *Ashker v. Brown*, No. 09-cv-05796 (N.D. Cal. Feb. 17, 2016), ECF No. 493 [hereinafter Transcript of Fairness Hearing].

292. Notice of Joint Motion & Motion for Final Approval of Settlement Agreement at 1-2, 9-10, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Jan. 12, 2016), ECF No. 485 [hereinafter Motion for Final Approval].

293. Transcript of Fairness Hearing, *supra* note 291, at 4-5.

294. Judge Wilken agreed with objections arguing that since prisoners transferred to the RCGP for safety concerns had committed no misconduct, they should get the same number of contact visits as prisoners in typical GP units. We had, in retrospect, mistakenly agreed to far fewer contact visits for those placed in the RCGP, and we eagerly agreed with Judge Wilken. The defendants agreed to negotiate further on this issue. Reporter’s Transcript of Proceedings at 8-9, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Dec. 22, 2015), ECF No. 477. It took almost a year to negotiate a better, but still unequal and unsatisfactory, arrangement for contact visits at the RCGP.

295. *See* Motion for Final Approval, *supra* note 292, at 1-2. Fortunately, early on in the litigation, the firm Weil, Gotshal & Manges agreed to become co-counsel and to share expenses with the CCR so that we could afford the litigation.

296. Judge Wilken reversed Magistrate Judge Vadas’s ruling with respect to one of the enforcement motions. *See* Order Regarding Plaintiffs’ Motion for De Novo Determination of Dispositive Matter Referred to Magistrate Judge Regarding Production of Documents Required by Settlement Agreement at 1-5, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Feb. 6, 2018), ECF No. 970.

provisions. For example, the settlement agreement provided that the CDCR would train staff to prevent the misuse of confidential information and ensure that the information used against prisoners was accurate.<sup>297</sup> But misuse continued,<sup>298</sup> and while several enforcement motions were unsuccessful, a careful review of redacted copies of confidential memoranda demonstrated that the CDCR was systemically misusing and misreporting confidential information. We filed an omnibus motion seeking extension of the settlement agreement, claiming, among other things, that the CDCR's misuse violated procedural due process.<sup>299</sup> This time, Magistrate Judge Illman, who had replaced Magistrate Judge Vadas, ruled in our favor, granting the extension and holding that the CDCR was continuing to violate the constitutional rights of our class members.<sup>300</sup> The defendants appealed that decision to the Ninth Circuit, which dismissed the appeal on jurisdictional grounds and remanded to Judge Wilken.<sup>301</sup>

Many of the innovative features of the settlement have been negated by the CDCR. For example, the RCGP, the new, innovative unit provided for by the settlement—a feature that the prisoners had fought for,<sup>302</sup> and I had extolled in speeches and articles—was turned into a unit that replicated some aspects of the SHU. Almost half of the prisoners confined there were placed on “walk-alone status,” in which they recreated alone, had no physical contact with other prisoners, had no group activities, and were essentially put in a new form of solitary confinement.<sup>303</sup> Moreover, what was foreseen as a transitional

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297. Settlement Agreement, *supra* note 257, ¶ 34.

298. Numerous named plaintiffs and class members had informed us that the debriefing system and the CDCR's misuse of informant information was at the heart of their control of the prisoners.

299. See Motion for Extension of Settlement Agreement Based on Systemic Due Process Violations at 3-4, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Nov. 20, 2017), ECF No. 905 [hereinafter Motion for Extension].

300. *Ashker v. Newsom*, No. 09-cv-05796, 2019 WL 330461, at \*14 (N.D. Cal. Jan. 25, 2019) (finding that the CDCR's use of confidential information to place people in the SHU systemically violated the Due Process Clause of the Fourteenth Amendment), *appeal dismissed*, 968 F.3d 975 (9th Cir. 2020).

301. *Ashker v. Newsom*, 968 F.3d 975, 979 (9th Cir. 2020).

302. The RCGP was the name that the CDCR gave to what the prisoners proposed as a Modified General Population Unit in their December 2013 settlement proposal.

303. We challenged walk-alone status as being clearly violative of the settlement agreement because it was not the “small group” recreation that the agreement required. Settlement Agreement, *supra* note 257, ¶ 28. We lost before Magistrate Judge Illman, appealed to Judge Wilken, who ruled in our favor, and then lost when a Ninth Circuit panel reversed Judge Wilken's decision. Order Denying Plaintiffs' Enforcement Motion Regarding RCGP Prisoners on Walk-Along Status at 7-8, *Ashker v. Cate*, No. 09-cv-05796 (N.D. Cal. Mar. 29, 2018), ECF No. 987; Order Granting Plaintiffs' Motion Regarding Violation of Settlement Agreement Provision Regarding RCGP Prisoners on Walk-Along Status at 1, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal.

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unit for a few prisoners had morphed into a permanent placement for many prisoners with no way out. Our extension motion challenged the RCGP as constituting deprivation of a liberty interest and argued that placement and retention in the RCGP violated due process.<sup>304</sup> We won on the former point, but lost on the latter before Magistrate Judge Illman.<sup>305</sup>

After the Ninth Circuit's remand, both parties appealed Magistrate Judge Illman's extension ruling to Judge Wilken. In a lengthy April 2021 decision, Judge Wilken affirmed Magistrate Judge Illman's ruling regarding liberty interests and reversed his holding that the placement and retention of prisoners in the RCGP did not violate due process.<sup>306</sup> Judge Wilken also found that the defendants were engaged in ongoing, systemic constitutional violations in their misuse of confidential information.<sup>307</sup> Judge Wilken ultimately granted a settlement extension, and the defendants have once again appealed to the Ninth Circuit.<sup>308</sup>

The CDCR also undermined the innovative provisions requiring prisoner participation in monitoring the settlement. The four representatives did have a productive meeting with the experts the CDCR brought in to evaluate the SDP, and the experts listened to the representatives and expressed some support for the plaintiffs' views on the program (including that it should not be used in conjunction with disciplinary confinement in the SHU going forward). The CDCR did not, however, discard the SDP. The semiannual meetings between the defendants and the four representatives that we had fought so hard to incorporate into the settlement agreement did occur, but the CDCR refused to engage in any meaningful dialogue with the representatives. The CDCR was willing to release these gang-validated prisoners to GP, yet they still would not recognize them as having valuable insights. Instead, the CDCR saw the plaintiffs as dangerous gangsters: people to be tolerated but not listened to.

The most important breakthrough in plaintiff participation during the monitoring period came in the context of an issue that the CDCR officials absolutely refused to discuss. After the CDCR transferred almost all class members to GP prisons, the lawyers and plaintiff representatives began to

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July 3, 2018), ECF No. 1029; *Ashker v. Newsom*, 968 F.3d 939, 942-44, 946 (9th Cir. 2020).

304. Motion for Extension, *supra* note 299, at 31-47.

305. *Ashker*, 2019 WL 330461, at \*13.

306. Order Extending the Settlement Agreement at 24, 31, *Ashker v. Newsom*, No. 09-cv-05796 (N.D. Cal. Apr. 9, 2021), ECF No. 1440.

307. *Id.* at 48; *see also id.* at 55 (finding that the CDCR's transmission of old gang validations to the Board of Parole Hearings was a systemic constitutional violation).

308. *Id.* at 56; Defendants' Notice of Appeal, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. May 7, 2021), ECF No. 1456.

receive complaints that GP in some maximum-security prisons was akin to solitary confinement, particularly with respect to out-of-cell time.<sup>309</sup> When the representatives attempted to discuss this issue at the semiannual meeting, the CDCR simply refused, saying that it was outside the scope of the settlement agreement. The legal team asked class members to complete daily activity logs; fifty-five prisoners returned these logs, and the conclusions were startling.<sup>310</sup> Almost a third of the respondents reported receiving less than one hour per day of out-of-cell time, less than they had received in the SHU.<sup>311</sup>

We filed an enforcement motion claiming that in reality these prisoners had not been transferred to GP, but instead were being forced to continue in segregated, SHU-like conditions in derogation of the settlement agreement.<sup>312</sup> Magistrate Judge Illman ruled against us,<sup>313</sup> but Judge Wilken reversed this decision, reading the agreement to require that the defendants transfer the plaintiffs to new facilities that provided at least as much out-of-cell time as they had in the SHU.<sup>314</sup> Judge Wilken ordered the parties to meet and confer before Magistrate Judge Illman to discuss a remedy.

We decided that the lawyers would not meet alone with Magistrate Judge Illman and the defense counsel, but instead requested that Magistrate Judge Illman grant writs of habeas corpus to bring all four plaintiff representatives from their prison cells to the San Francisco Federal Courthouse to participate. Judge Illman granted the habeas writs,<sup>315</sup> and on August 21, 2018, a

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309. See Plaintiffs-Appellees' Answering Brief on Appeal at 8-9, *Ashker v. Newsom*, 968 F.3d 939 (9th Cir. 2020) (No. 18-16427), ECF No. 41. The critical factor in determining whether prisoners are housed in solitary confinement is the amount of time they spend outside of their cells. *Id.* at 26 (noting that the Department of Justice defines solitary confinement as being confined in one's cell for twenty-two or more hours a day); ASCA-LITMAN SURVEY, *supra* note 17, at 2 (defining restrictive housing by out-of-cell time); see also Judith Resnik, *Not Isolating Isolation*, in *PROLONGED SOLITARY CONFINEMENT: EFFECTS, PRACTICES, AND PATHWAYS TOWARD REFORM* 89, 112 (Jules Lobel & Peter Scharff Smith eds., 2020).

310. Plaintiffs' Enforcement Motion Regarding Violation of Settlement Agreement Provision Requiring Release of Class Members to General Population at 1-2, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Oct. 13, 2017), ECF No. 849 [hereinafter Plaintiffs' Enforcement Motion]; Plaintiffs-Appellees' Answering Brief on Appeal, *supra* note 309, at 8-10.

311. Plaintiffs' Enforcement Motion, *supra* note 310, at 1-7, 9.

312. *Id.* at 1.

313. Order re Plaintiffs' Motion Regarding Settlement Agreement Provision Requiring Release of Class Members to General Population at 5, *Ashker v. Brown*, No. 09-cv-05796 (N.D. Cal. March 29, 2018), ECF No. 986.

314. See Order Granting Plaintiffs' Motion Regarding Violation of Settlement Agreement Provision Requiring Release of Class Members to General Population at 2, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. July 3, 2018), ECF No. 1028.

315. See Order and Writ of Habeas Corpus Ad Testificandum, *Ashker v. Brown*, No. 09-cv-05796 (N.D. Cal. Aug. 10, 2018), ECF No. 1067; Order and Writ of Habeas Corpus Ad

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multivehicle motorcade, with sirens blaring and police escorts clearing the streets, drove the four plaintiff representatives from San Quentin Prison, where they had been in holding cells, to the federal courthouse in downtown San Francisco. At approximately 9:30 AM that morning, the four plaintiffs walked into the courtroom shackled and in prison garb, closely guarded by U.S. Marshals. The lawyers were sitting around a table, and the prisoners sat down next to us, with the entire perimeter of the courtroom surrounded by approximately twenty-five armed U.S. Marshals, presumably to protect the lawyers and the judge from violent attacks by the plaintiffs.

At an earlier conference call with the four plaintiff representatives, we all agreed that the lawyers would serve only as facilitators during the conference. The four representatives would make substantive presentations. After my introduction, each representative presented a short analysis of a different problem facing the plaintiffs in GP—a small amount of out-of-cell time, a lack of prison jobs, few educational opportunities, no rehabilitative programming—and a proposed remedy. The remedies were pragmatic, fairly simple, and achievable: restoring group meals in unused prison cafeterias instead of serving meals individually in cells; having prisoners apprentice and learn plumbing so that plumbing backups and problems would not await CDCR repairs for months; and having prisoners run group and educational programming. Both the defense counsel and Magistrate Judge Illman asked some questions, and after more than three hours the prisoners were returned to San Quentin for transfer back to their prisons.

Not much ever came of this session. The CDCR made a few minor changes to the maximum-security GP prisons, appealed Judge Wilken's order, and eventually won reversal at the Ninth Circuit.<sup>316</sup> We had lost in court, but the political mobilization surrounding our courtroom effort, the recognition our effort received,<sup>317</sup> and the achievement of forcing the defendants to meet with the plaintiff representatives in open court to discuss remedying the abysmal

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Testificandum, *Ashker v. Brown*, No. 09-cv-05796 (N.D. Cal. July 25, 2018), ECF No. 1046; Order and Writ of Habeas Corpus Ad Testificandum, *Ashker v. Brown*, No. 09-cv-05796 (N.D. Cal. July 25, 2018), ECF No. 1047; Order and Writ of Habeas Corpus Ad Testificandum, *Ashker v. Brown*, No. 09-cv-05796 (N.D. Cal. July 25, 2018), ECF No. 1048.

316. *Ashker v. Newsom*, 968 F.3d 939, 942 (9th Cir. 2020). After the Ninth Circuit decision, the four plaintiff representatives urged us to petition for en banc appeal, which we agreed to do. The petition was denied. See *Plaintiffs-Appellees' Petition for Rehearing En Banc* at 18, *Ashker v. Newsom*, No. 18-16427 (9th Cir. Aug. 31, 2020), ECF No. 79; Order at 1, *Ashker v. Newsom*, No. 18-16427 (9th Cir. Oct. 14, 2020), ECF No. 80.

317. The recognition included an amicus brief in the Ninth Circuit filed by prominent former high-level prison officials supporting our position. Brief of Amici Curaie Former Correctional Officials in Support of Affirmance at 1-4, *Ashker*, 968 F.3d 939 (No. 18-16427), ECF No. 48.

conditions in maximum-security California prisons made the effort successful from a long-term, political perspective.

More than five years after the settlement agreement was signed, the implementation struggle continues. After Magistrate Judge Illman's ruling granting a one-year settlement extension,<sup>318</sup> the defendants sought a stay of the extension and the agreement's monitoring provisions pending appeal. Judge Wilken denied the stay, and her denial was affirmed by the Ninth Circuit.<sup>319</sup> We therefore conducted another year of monitoring during the pendency of the first appeal. Based on our review of documents from the additional year, we have filed a new motion seeking a second yearlong extension.<sup>320</sup> Judge Wilken is now determining whether to grant our motion while the order affirming the first extension is on appeal.<sup>321</sup>

As often happens in reform movements, successes in court diminished the prisoners' struggle. The injustice of indeterminate solitary confinement that united them is now gone, although other injustices remain. The prisoner leadership has been scattered throughout many CDCR prisons, and the only real means for the four key representatives to communicate is through our legal meetings.

The threat that the prisoners' legal and political victory will come undone in future years continues unabated. The powerful California Correctional Peace Officers Association sought unsuccessfully to intervene in our case fairly soon after we filed the Second Amended Complaint,<sup>322</sup> and later filed an

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318. *See supra* note 300 and accompanying text. The settlement agreement only allows for extensions in one-year intervals, after which a new motion for extension is required based on evidence of ongoing constitutional violations. Settlement Agreement, *supra* note 257, ¶¶ 41, 43.

319. Order Granting Motion for De Novo Determination of Ruling Regarding District Court's Jurisdiction Pending Appeal & Motion to Stay at 2, *Ashker v. Newsom*, No. 09-cv-05796 (N.D. Cal. June 26, 2019), ECF No. 1198; Order at 2, *Ashker v. Newsom*, No. 09-cv-05796 (N.D. Cal. Oct. 21, 2019), ECF No. 1212.

320. Plaintiffs' Second Motion for Extension of Settlement Agreement Based on Systemic Due Process Violations at 1-3, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Sept. 25, 2020), ECF No. 1346-3. Magistrate Judge Illman filed a report and recommendation concluding that the second extension motion should be denied, and the plaintiffs have filed a de novo appeal with Judge Wilken. *See* Report and Recommendation Re: Motion to Extend Settlement Agreement at 14, *Ashker v. Cate*, No. 09-cv-05796 (N.D. Cal. July 12, 2021), ECF No. 1497; [Proposed] Order Granting Plaintiffs' Motion for De Novo Determination of Dispositive Ruling by Magistrate Judge Regarding Plaintiffs' Second Motion for Extension of Settlement Agreement Based on Systemic Due Process Violations at 1, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. July 28, 2021), ECF No. 1507-1.

321. *See supra* note 308 and accompanying text.

322. Order Granting in Part Motion for Class Certification; Denying Motion to Intervene at 1, 3, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. June 2, 2014), ECF No. 317.

amicus brief objecting to the settlement agreement with the district court.<sup>323</sup> While the CDCR's policies have changed, it is unclear whether its culture and staff attitudes have. Unfortunately, I have personally experienced the undoing of momentous reforms. In *Austin v. Wilkinson*, we won a major victory in the district court resulting in the release of around 80% of the prisoners subjected to solitary confinement at the Ohio State Penitentiary.<sup>324</sup> Yet "almost 20 years later Ohio has changed its policies to undo much of what we seemingly had accomplished by the *Austin v. Wilkinson* litigation."<sup>325</sup>

My career has been defined by filing and quickly litigating political cases, and then moving on to the next case after each one. The Pelican Bay case constitutes a different experience for me, one in which the long process of enforcement has proved challenging yet rewarding. We promised the prisoners when we settled that we would stick with them to ensure that the settlement agreement was fully implemented. Thus far we have kept our word.

### III. Class Action, Impact Litigation, and Participatory Democracy

The Pelican Bay litigation illustrates both the dilemmas and the transformative potential of grassroots participation in impact, class-action litigation. Transformative change requires not only a radical restructuring of our economic, social, and political institutions to eliminate the class, race, ethnic, and gender inequalities that pervade American society, but also a fundamental change in our understanding and practices of democracy, representation, and expertise. Transforming the lawyering and litigation process is one aspect of rediscovering the democratic tradition of active self-government by engaged citizens.<sup>326</sup>

The insights and questions derived from the Pelican Bay litigation fall into four main categories. First, the litigation embodies "acting with" representation, a form of representation that is not typically explored in academic scholarship or class-action lawyering. Second, the litigation raises a general question about participatory tactics: Can the group participation and collaborative class-action lawyering described in this Article be applied to other injunctive class actions, or were the specific circumstances of these plaintiffs anomalous? Third, the litigation demonstrates why participation is

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323. Brief of Amici Curiae in Opposition to Settlement at 3-7, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. Jan. 25, 2016), ECF No. 487.

324. 189 F. Supp. 2d 719, 754 (N.D. Ohio 2002); *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1026 (N.D. Ohio 2002); Email from Alice Lynd to author (January 31, 2021, 4:11 PM) (on file with author).

325. Email from Alice Lynd to author, *supra* note 324.

326. See Piomelli, *Democratic Roots*, *supra* note 82, at 548; see also Guinier & Torres, *supra* note 18, at 2743.

not merely an abstract democratic value, but can instead play an essential role in successfully litigating class-action cases. Finally, the Pelican Bay story underscores the profound expertise of some plaintiffs, calling on lawyers to transform the relationship between the layperson and the professional in struggles to remake institutions and policies.

#### A. Theories of Political and Class-Action Representation

Fundamentally transforming American society requires rethinking deeply ingrained views of representation. In any large society, democratic governance requires some type of representation. In the United States, several views of representation have competed since the nation's founding.

The first theory of representation, against which the colonists rebelled, was the British theory of virtual representation, in which the legislator represented society's interests and not that of a particular constituency.<sup>327</sup> Supporters claim that virtual representation results in legislators who are more cosmopolitan, broad-minded, and willing to support needed legislation without being tied to the views of any constituency.<sup>328</sup> Yet it is clearly an elitist, undemocratic mode of representation.

By contrast, early state constitutions fostered a descriptive, or actual, theory of representation,<sup>329</sup> in which the representative should resemble or mirror his constituency. As John Adams put it, a representative legislature "should think, feel, reason and act like [the people at large]."<sup>330</sup> Under this theory, constituents could mandate their representatives' actions to guarantee maximum popular input and control over legislation.<sup>331</sup> In nascent state governments, election districts were small, elections were held frequently, and legislators had term limits.<sup>332</sup> State representatives were typically from the

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327. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 173-81 (1969); WILLIAM SEAL CARPENTER, *THE DEVELOPMENT OF AMERICAN POLITICAL THOUGHT* 46-47 (Howard Fertig, Inc. ed. 1968); Peter M. Shane, *Reflections in Three Mirrors: Complexities of Representation in a Constitutional Democracy*, 60 OHIO ST. L.J. 693, 700-01 (1999); Joseph Fishkin, *Taking Virtual Representation Seriously*, 59 WM. & MARY L. REV. 1681, 1690-92 (2018).

328. See Fishkin, *supra* note 327, at 1703 (describing the views of Edmund Burke).

329. See PITKIN, *supra* note 50, at 149.

330. *Id.* at 60 (quoting Letter from John Adams to John Penn (Jan. 1776), in 4 *THE WORKS OF JOHN ADAMS* 203, 205 (Boston, Little, Brown & Co. 1865)).

331. *Id.* at 149. See generally *id.* at 144-67 (discussing "mandate" representation, where representatives must obey the wishes of their constituents, versus "independent" representation, where representatives may vote according to their judgment).

332. See, e.g., PA. CONST. of 1776, §§ 8-9.

same rural, less-educated background as their constituents,<sup>333</sup> and it was common practice for a group of constituents to agree on instructions that expressly bound their representatives to vote in a particular fashion.<sup>334</sup>

The Framers' theory of representation rejected both the descriptive, mandate representation of state governments and the virtual representation of England. Instead, the Framers favored consent and accountability. The states' experiences with what some Framers termed the "inconveniences of democracy,"<sup>335</sup> or "the turbulence and follies of democracy,"<sup>336</sup> led them to structure a system in which they hoped "[t]he people . . . [would] have as little to do as may be about the [g]overnment."<sup>337</sup> American democracy was thus transformed from popular participation to accountability: Representatives had larger constituencies and longer terms in office, and the consent of the people came in the form of periodic elections and popular ratification of the Constitution. Representation, in other words, moved from congruence of interest to popular consent.<sup>338</sup> The Framers' conception of representation maintained the accountability value of electoral democracy but eschewed grassroots participation. As Benjamin Rush put it, although "all power is derived from the people[,] they possess it only on the days of their elections. After this, it is the property of their rulers."<sup>339</sup>

The civil rights and the new left movements of the 1960s presented bold critiques of this representational framework, renewing interest in participatory democracy.<sup>340</sup> In the legal arena, this critique of representation

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333. See Gordon S. Wood, *Democracy and the Constitution*, in HOW DEMOCRATIC IS THE CONSTITUTION? 1, 12 (Robert A. Goldwin & William A. Schambra eds., 1980).

334. WOOD, *supra* note 327, at 189-90. The concept was not that the constituents petitioned their representatives but rather that they instructed them. *Id.*

335. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 135 (Max Farrand ed., rev. ed. 1966).

336. *Id.* at 51.

337. *Id.* at 48; see RICHARD. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 4 (25th anniversary ed. 1973).

338. Stephen C. Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1072 (1980) (describing political representation as "mov[ing] from interest to consent as its legitimizing basis").

339. Carpenter, *supra* note 327, at 103 (quoting Benjamin Rush, Address to the People of the United States (1787), in H. NILES, *PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA* 402, 403 (Baltimore, William Ogden Niles 1822)). Madison opposed a proposed amendment which would have enabled the people "to instruct their representatives." 1 ANNALS OF CONG. 766-67 (1789) (Joseph Gales ed., 1834).

340. See Piomelli, *Democratic Roots*, *supra* note 82, at 548-50. See generally BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984).

led to a reconception of the lawyer–client relationship as collaborative, nonhierarchical, and participatory.<sup>341</sup>

Impact litigation, whether the lawsuit is brought by a class, a movement organization, or a group of plaintiffs, is in many respects akin to political representation: The lawyer is representing a collective body and making decisions on important legal and policy issues.<sup>342</sup> Indeed, class-action lawyering often resembles virtual representation, where the lawyer’s task is to advocate for the class as a whole rather than the named representatives.<sup>343</sup> Scholars have long recognized the challenges of this dynamic,<sup>344</sup> and it does not help that the ethical rules make no major distinction between individual and class representation.<sup>345</sup>

How do we address the problems occasioned by group representation? David Luban has argued that lawyers should “adopt the most direct form of representation possible under the circumstances,” acting on the wishes of the class when it is small enough, the wishes of named representatives when the class is sufficiently mobilized, and the wishes of “typical” lawyer-selected plaintiffs when the class is unmobilized or prohibitively large.<sup>346</sup> Only where those representative models are impossible does Luban suggest undertaking “best-world representation,” where the lawyer alone determines the best interest of the class.<sup>347</sup> Stephen Ellmann, Lawrence Grosberg, and Mark Neal Aaronson have applied a client-centered model to group representation, suggesting that the lawyer should pay particular attention to group dynamics in furthering collective decisionmaking.<sup>348</sup> The client-centered perspective on

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341. See Piomelli, *Democratic Roots*, *supra* note 82, at 547-48, 598-610; Simon, *supra* note 69, at 485.

342. See White, *supra* note 26, at 538-39 (citing scholars who describe “public interest litigation as a complex, multi-dimensional form of political action”); Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 68.

343. Ellmann, *supra* note 28, at 1118-19 (“[T]he lawyer owes her most fundamental duty of loyalty not to [the named plaintiffs] but to the class itself.”); Coffee, *supra* note 29, at 411.

344. See, e.g., Ellmann, *supra* note 28, at 1118-19; Coffee, *supra* note 29, at 371-72, 406-13; Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 927 (1998).

345. Ellmann, *supra* note 28, at 1104-05, 1117; CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 493 (1986) (“Despite the prominence of . . . [conflict] issues in class actions, nothing in the professional codes addresses them directly.”).

346. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 351-53 (1988).

347. *Id.* at 352.

348. See Ellmann, *supra* note 28, at 1110; Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709, 712-13 (1989); Mark Neal Aaronson, *Representing the Poor: Legal Advocacy and Welfare Reform During Reagan’s Gubernatorial Years*, 64 HASTINGS L.J. 933, 974 (2013).

group representation emphasizes obtaining “client assent in some meaningful form while engaging periodically in genuine client consultation.”<sup>349</sup>

The Pelican Bay litigation presents a different model of representation from those discussed in the political, philosophical and legal literature above.<sup>350</sup> Instead of using the “acting for” agency model,<sup>351</sup> we operated on an “acting with” view of representation, characterized by the plaintiffs’ active participation and a collective, nonhierarchical decisionmaking process. Participatory litigation radically reorients class representation away from either the lawyer-driven virtual model or the client-centered perspective. Instead, it focuses on the creation of what William Simon has called “nonhierarchical communities of interest,” which value “communication among clients” and “direct [client] participation” in the litigation.<sup>352</sup>

Under this framework, the lawyer represents clients in court and speaks on their behalf, but also encourages them to participate directly in the lawsuit. The “acting with” highlights in our litigation were the meetings with the plaintiffs prior to and during the negotiating process, class members’ contributions to our legal arguments, and, most vividly, participation of the main representatives in the remedies mediation.

#### B. Were the Pelican Bay Plaintiffs Anomalous?

One could question whether the Pelican Bay experience is widely applicable. Ironically, the plaintiffs’ extreme isolation in oppressive conditions induced them to study law and develop significant expertise. Most other litigators are unlikely to stumble across a similar class of plaintiffs who are eager to participate and offer the lawyers such a wealth of knowledge. Nonetheless, while our plaintiffs were somewhat atypical, the leadership of a mobilized community is likely to contain potential plaintiffs and class members who can play a participatory role.<sup>353</sup>

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349. Aaronson, *supra* note 348, at 974; *see also* Grosberg, *supra* note 348, at 751 (suggesting that class-action attorneys should “increase client input while informing class members that ultimate decisionmaking responsibility rests with the class lawyer”).

350. Nikolas Bowie has recently argued that in the colonies and early state governments, the right of assembly came to mean a right “to meaningfully participate in enacting needed legislation.” Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1727 (2021) (emphasis omitted). While that right could mean just the right to elect representatives, it could also be viewed as a right to community participation—possibly the political equivalent of participatory litigation.

351. This model involves direct representation of the constituency’s views by the representative. *See generally* PITKIN, *supra* note 50, at 112-43 (discussing “acting for” representation).

352. Simon, *supra* note 69, at 486-87.

353. *See, e.g.*, LYND, *supra* note 25, at 25-34 (explaining that local workers’ expertise on issues was invaluable in labor disputes); Sturm, *supra* note 42, at 301 (describing a case in  
*footnote continued on next page*

Thus, a key lesson from the Pelican Bay suit is that participatory litigation is best achieved within the context of a mobilized, activist constituency. Because we were representing people who had engaged in a mass hunger strike, knew the realities and facts of their situation, and understood the legal issues involved, our clients not only were receptive to but demanded active participation in the lawsuit. The prisoners' participation was enormously beneficial throughout the case. Movement lawyers have limited time and resources, and the Pelican Bay litigation suggests that case selection should focus not on the underlying legal issues, but on whether there is an activist, grassroots movement to represent. Indeed, a major reason that the CCR agreed to represent the Pelican Bay prisoners was the movement that they had created.

Of course, movement lawyers often litigate cases that do not arise from mass activity. The CCR did this in its Guantanamo Bay litigation and in other cases involving the war on terror.<sup>354</sup> Such litigation resists oppression, speaks truth to power, can aid in political mobilization and public education, and perhaps can result in judicial victory. But even then, lawyers should seek participatory opportunities for plaintiffs.

Even in situations where the plaintiffs and the class are not as engaged as the Pelican Bay plaintiffs and class, lawyers can still use a participatory framework. That framework does not require a fixed checklist of practices, but instead reorients counsel to consider how to engage the named plaintiffs, class members, family members, and community in the legal process. Participation is not an all-or-nothing conception, but rather a continuum that must be applied creatively in each situation. There are, of course, cases where the plaintiffs do not wish to participate and instead would rather leave strategic and tactical matters entirely to the lawyers. But even then, lawyers should afford the plaintiffs the opportunity to weigh in on important decisions.

Lawyers cannot truly appreciate the possibilities for participation without first imagining an alternative to the current mode of class-action lawyering. David Luban's thoughtful instruction that class lawyers should adopt the most direct form of representation possible "under the circumstances"<sup>355</sup> requires

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which Black engineers played a crucial role in negotiating a settlement); Shauna I. Marshall, *Class Actions as Instruments of Change: Reflections on Davis v. City and County of San Francisco*, 29 U.S.F. L. Rev. 911, 939-40 (1995) (describing how plaintiffs participated in an employment-discrimination class action); cf. White, *supra* note 26, at 548-49 (describing a North Carolina welfare suit in which the plaintiff's wife played a crucial role).

354. See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004); *Arar v. Ashcroft*, 532 F.3d 157, 161 (2d Cir. 2008), *aff'd en banc*, 585 F.3d 559 (2d Cir. 2009); *Rasul v. Bush*, *supra* note 171 (describing the CCR's role in the *Rasul* case).

355. LUBAN, *supra* note 346, at 353.

the recognition that “the circumstances” are not simply objective but socially constructed. To the extent that lawyers recognize an obligation to explore mechanisms for class participation, what at first appears to be daunting might ultimately prove hospitable. Even in our case, we could have achieved greater participation if we had thought more about how to involve class members beyond the activist named plaintiffs.

To help ensure more participatory class representation, courts could seriously scrutinize whether the lawyer and the named plaintiffs adequately represent the class, as Derrick Bell suggested forty-five years ago.<sup>356</sup> Attorneys could also be required to secure named plaintiffs willing to actively engage in the litigation. To be sure, such requirements may discourage lawyers from bringing some class actions. Yet the costs seem minimal compared to the benefits, and the class actions that would most likely be precluded are those where the main benefit adheres to the lawyer, not the class.<sup>357</sup>

There is increasing evidence that class actions are incorporating more participation, particularly at the settlement and remediation stages. This trend should be encouraged. Susan Sturm has argued for third-party participation at the remedial stage of actions involving structural injunctions.<sup>358</sup> Samuel Issacharoff and class-action attorney Elizabeth Cabraser have observed that in the context of mass torts, technological developments facilitating class-wide communication and the aggregation of actions in multidistrict litigation have resulted in the increased participation of absent class members.<sup>359</sup> Surely Rule 23(b)(2) class actions could make use of modern platforms such as Zoom to host meetings of class members, a possibility not available to us in the prison context. Francis McGovern and William Rubenstein have argued for “negotiation class[es],” which promote class member participation in settlement discussions,<sup>360</sup> and Charles Sabel and William Simon demonstrate the increasing use of innovative, “experimentalist” remedies that move away from top-down models and instead “contemplate a permanent process of ramifying, participatory self-revision.”<sup>361</sup>

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356. Bell, *supra* note 57, at 508-11.

357. See Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1733-38 (2004) (explaining the benefits of rigorous judicial scrutiny in selecting class counsel).

358. Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 981 & n.5, 983-84 (1993) (arguing for third-party inclusion and for ending the distinction of the “third-party” label).

359. Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 849-51 (2017).

360. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 108 (2020).

361. Sabel & Simon, *supra* note 32, at 1019-20.

That substantial participation in injunctive class actions should be expected is implicit in the 23(b)(2) class mechanism, whereby a plaintiff class can seek declaratory or injunctive relief because a defendant “has acted or refused to act on grounds that apply generally to the class.”<sup>362</sup> In 23(b)(2) cases, plaintiffs can often file claims and obtain broad relief without utilizing the class-action mechanism. But even where class certification might be viewed as unnecessary (because an individual claim for injunctive relief could provide full relief for the class), certification still serves the “central function” of ensuring that class members receive adequate representation, notice, and the chance to comment on any proposed settlement—namely, some opportunity to participate.<sup>363</sup>

The Pelican Bay case illustrates the participatory function of 23(b)(2) class actions. The CCR could have brought the Pelican Bay case through individual plaintiffs, seeking a declaration that the CDCR’s policy of indeterminate solitary confinement was unconstitutional and an injunction preventing the enforcement of that policy. (Although we might have faced procedural hurdles, such as individual claims being mooted or judicial reluctance to order broad relief or discovery, those challenges are often manageable.) But instead we chose to bring the case as a class action, in large part based on the understanding that doing so would enable broader participation by the incarcerated class and the named representatives. We rejected arguments to name only a few plaintiffs for the same reason.

Class participation in 23(b)(2) class actions is therefore implicit in the Federal Rules of Civil Procedure, and such participation should be enforced by the judiciary. If class-action lawyers want to achieve greater class-member (or at least class-representative) participation in their future lawsuits, the Pelican Bay litigation provides an instructive model.

### C. Participation and Successful Class-Action Impact Litigation

Perhaps the most important lesson offered by the Pelican Bay framework involves overcoming a seemingly intractable problem: class conflicts.<sup>364</sup> The minimal conflict between lawyers, plaintiffs, and class members in our litigation was due at least in part to the participatory, cooperative model we used to build trust. We emphasized that all participants should voice their views, respected and at times deferred to the strongly held views of others, and

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362. FED. R. CIV. P. 23(b)(2); *see also* 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 4:34–:35 (West 2021). I am indebted to William Rubenstein for suggesting this point.

363. *See* RUBENSTEIN, *supra* note 362, § 4:35.

364. *See* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1242–43 (1982) (noting that “the problem of class action conflicts” is, to a “considerable extent, intractable”).

expanded on the unity that had developed during the hunger strikes. Structural, institutional mechanisms are unlikely to solve class conflicts; instead, lawyers must exercise “an extraordinary display of ethical sensitivity and self-restraint” to do so.<sup>365</sup> The collaborative, consensus-building attitude of our litigation—represented by Sitawa’s honesty, wisdom, and judgment in our settlement discussion—was built into the fabric of the participatory experience. Values such as restraint and respect for the collective can be built through participation, and these values can aid not only in resolving class conflicts<sup>366</sup> but also in movement activities generally.<sup>367</sup> Working with the prisoners allowed us to experience this firsthand.

I do not believe that we would have been able to achieve the settlement that we won but for the trust among the prisoners and lawyers. And this trust would not have existed without everyone’s participation in the lawsuit. The unity that almost all of the named plaintiffs maintained at the end of the settlement process, despite tensions and conflicts, was in large part due to our long participatory process. Our participatory, collaborative effort was thus crucial to the successful outcome of the Pelican Bay litigation.

The Pelican Bay litigation also offers insights for the essential movement law practice of ensuring lawyer accountability. The organization that we represented was quite rudimentary and could not, on its own, hold lawyers accountable. Grassroots activists and leaders were our main source of accountability, and these parties strongly aided our endeavor. As in our example, dynamic movements often involve mass action with only rudimentary organization, with the rise of organizational bureaucracy hindering the struggle and reflecting weakening activism.<sup>368</sup> Moreover, where the represented organization is lawyer driven, the lawyers are often accountable only to a broader set of lawyers, not to community organizers or leaders.<sup>369</sup> Thus, even when movement lawyers represent organizations, they should attempt to include individual, activist plaintiffs—perhaps grassroots

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365. Bell, *supra* note 57, at 505; see also LUBAN, *supra* note 346, at 354; Susan D. Carle, *Power as a Factor in Lawyers’ Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 169 (2006).

366. See Marshall, *supra* note 353, at 940-47 (discussing the role of participation in resolving conflicts in an employment-discrimination class action).

367. See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1655-56 (1997) (“[T]he process of democratic decisionmaking . . . [could] increase the individuals’ sense of belonging to the community, and could further the civic republican’s much-idealized community discourse.” (footnote omitted)).

368. See FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL*, at xii (1977).

369. Telephone Interview with Brian Wolfman, Former Dir., Pub. Citizen Litig. Grp. (Jan. 12, 2021).

members of the organization—who can engage in collective strategizing around the case.<sup>370</sup>

The plaintiffs' involvement in political organizing does not replace the need for transforming the nature of legal representation. Our strategy depended on both legal and extralegal advocacy: It was important that the plaintiffs engaged in three hunger strikes, and it was equally important that the plaintiffs played a role in their own litigation.

One could object to this analysis, arguing that while the prisoners did indisputably participate in the litigation, they were still subordinate to the lawyers who spoke for and represented them. The forums in which the prisoners spoke for themselves, negotiated on their own with CDCR officials, led the struggle, and began to create new legal norms were their three hunger strikes. The standard movement account could describe our Pelican Bay struggle as such: Attorneys led the legal battle with client input, and the prisoners, aided by the litigation, engaged in organizing and political action. But even this division of labor challenges hierarchy and the dominance of expertise by subordinating the legal to the political. In any case, the above critique minimizes the significance of the prisoners' participation in the litigation itself, which was critical to our success.

The Pelican Bay litigation highlights the importance of multifaceted movement advocacy that leans on mass struggle led by marginalized groups. But fundamental societal transformation requires changing the manner of litigation in addition to its context. In the Pelican Bay struggle, the plaintiffs' litigation experience would have been considerably different and less satisfying had we simply aided their hunger strikes and litigated the class action in a traditional hierarchical manner.<sup>371</sup> The collaborative effort between the lawyers and prisoners aided in providing the prisoners with what Terry Kupers refers to as "a sense of agency," which proved important in successfully litigating the case.<sup>372</sup> While our efforts to democratize the litigation were only partially successful, they point to a pathway for future efforts.

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370. For example, in the Montgomery bus boycott litigation, the plaintiffs were grassroots individuals and leaders of movements and not the Montgomery Improvement Association, even though the Association was a key entity supporting the lawsuit. Guinier & Torres, *supra* note 18, at 2778-81. See generally Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1049 (1989).

371. See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 94-95 (1988); Sturm, *supra* note 358, at 996-97.

372. KUPERS, *supra* note 115, at 176 (capitalization altered). I am indebted to plaintiff Todd Ashker for making this point and for referring me to Kupers's mention of the concept of agency.

#### D. Overcoming the Hierarchy of Expertise

Finally, the Pelican Bay litigation had some success in overcoming the hierarchy of expertise that affects many lawyer–client relationships, particularly in impact litigation. The lawyers, of course, had the significant expertise required to litigate the case. But the named plaintiffs and class members also had expertise, and not simply regarding the prison regime and the harm it had inflicted upon them. The prisoners had expertise in the strategy, tactics, and law central to the suit. Some of the plaintiffs could be considered Gramsci’s organic intellectuals, constituting “the thinking and organising element of a particular fundamental social class,”<sup>373</sup> or as Mari Matsuda describes, “grass roots philosophers who are uniquely able to relate theory to the concrete experience of oppression.”<sup>374</sup> This description fits prisoners such as Todd Ashker, who had read philosophy, politics, and neuroscience, and suggested expert witnesses to the lawyers (some of whom we used); Antonio Guillen, who profoundly analyzed social relations in a carceral setting; Sitawa Jamaa, who was steeped in radical Black-nationalist thought yet understood the need for unity; and Edwardo Dumbrique, who had resisted his solitary confinement by mastering the law of incarceration. Working with and learning from each of these men encapsulates the importance of relating theory to practice. Imagining a more egalitarian society requires developing nonhegemonic relationships between professionals and the people with whom they work, based in part on the recognition of different forms of intelligence and expertise.

The Pelican Bay litigation suggests that the unclear divide between goals (client decisions) and means (lawyer decisions) contained in the ethical rules<sup>375</sup> does not capture essential aspects of how litigation decisions ought to be made, and that this divide should be modified if not scrapped. Legal expertise is certainly critical to many decisions, but where the clients had strong opinions on matters of importance to them that could be characterized as tactical or technical, our collaborative, participatory model accorded those views significant respect and deference. But that did not mean that the lawyers automatically deferred to the clients’ views. Instead, the decision was a complex, mutual one informed by the strength of the different views, the relative importance of the matter, and the expertise involved—not whether the issue could be defined as a technical legal matter or a client goal.

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373. Quintin Hoare & Geoffrey Nowell Smith, *Introduction* to ANTONIO GRAMSCI, *The Intellectuals*, in SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 3, 3 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

374. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987).

375. See Rubenstein, *supra* note 367, at 1633-34 (recognizing that the means–goals distinction is indefinite and ambiguous).

### Conclusion: Accompaniment

The challenge to elitist, hierarchical relations has gained traction in a wide range of professional contexts, including law,<sup>376</sup> humanitarian aid,<sup>377</sup> social work,<sup>378</sup> academic research,<sup>379</sup> education,<sup>380</sup> and theology.<sup>381</sup> I have found the liberation theological concept of accompaniment to be the most inspiring and insightful.<sup>382</sup> Although I am a secular Jew, I have nonetheless found the prophetic spiritual lens extremely helpful in understanding social-justice work.<sup>383</sup> Contemporary theologians have set forth a doctrine of accompanying the poor: listening, sharing, learning, and walking with them.<sup>384</sup> In his medical and humanitarian work, Paul Farmer defined accompaniment to mean traveling with someone on a lengthy journey and breaking bread with them.<sup>385</sup> For Farmer, “accompaniment does not privilege technical expertise above solidarity or compassion or a willingness to tackle what may seem to be insuperable challenges. It requires cooperation, openness, and teamwork . . . .”<sup>386</sup> Alice and Staughton Lynd, the lawyers who first introduced me to the term, describe accompaniment as involving “two persons exploring the way forward together.”<sup>387</sup>

For theologians, accompaniment is rooted in praxis, which seeks to combine theory and action. “To accompany another person is to *walk with him*

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376. See White, *supra* note 24, at 760-64; LÓPEZ, *supra* note 20, at 70, 79-80.

377. See Farmer, *supra* note 287.

378. See Terry T.F. Leung, *Client Participation in Managing Social Work Service—An Unfinished Quest*, 56 SOC. WORK 43, 51 (2011); Lea Zanbar, *Social Workers’ Implementation of Client Participation: What Factors Make the Difference?*, 44 J. SOC. SERV. RSCH. 96, 96-97 (2018).

379. See Emily M.S. Houh & Kristin Kalsem, *It’s Critical: Legal Participatory Action Research*, 19 MICH. J. RACE & L. 287, 311-12 (2014); PATRICIA MAGUIRE, *DOING PARTICIPATORY RESEARCH: A FEMINIST APPROACH* 36-41 (1987).

380. See PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 48 (Myra Bergman Ramos trans., Bloomsbury Acad., 50th anniversary ed. 2018) (2000).

381. See GUSTAVO GUTIÉRREZ, *A THEOLOGY OF LIBERATION: HISTORY, POLITICS AND SALVATION* 307 (Caridad Ina & John Eagleson eds. & trans., 1973).

382. See LYND, *supra* note 25, at 5-6.

383. See Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1337-43 (1995).

384. See Jennie Weiss Block & Michael Griffin, *Introduction to IN THE COMPANY OF THE POOR: CONVERSATIONS WITH DR. PAUL FARMER AND FR. GUSTAVO GUTIÉRREZ* 1, 5-6 (Michael Griffin & Jennie Weiss Block eds., 2013).

385. Farmer, *supra* note 287.

386. *Id.*

387. LYND, *supra* note 25, at 4; see also LYND & LYND, *supra* note 25, at 93.

or her.”<sup>388</sup> It is active, not passive. “[T]he paradigmatic form of human action is not simply that of ‘being with’ another but, rather, the act of ‘walking with’ the other,” and it “incorporates both the ethical–political and the aesthetic dimensions of human praxis.”<sup>389</sup> The prominent liberation theologian Gustavo Guitierrez talks of “accompaniment which is reflection.”<sup>390</sup> Accompaniment therefore combines the action of walking together with reflection on the spiritual, practical, and political aspects of the joint struggle against oppression and suffering. That concept describes our long, still unfinished, Pelican Bay litigation journey.

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388. ROBERTO S. GOIZUETA, *CAMINEMOS CON JESÚS: TOWARD A HISPANIC/LATINO THEOLOGY OF ACCOMPANIMENT* 206 (1995).

389. *Id.*

390. Daniel G. Groody, *Reimagining Accompaniment: An Interview with Paul Farmer and Gustavo Gutiérrez*, in *IN THE COMPANY OF THE POOR*, *supra* note 384, at 161, 165.