

SOME REALISM ABOUT BAR ASSOCIATIONS

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INTRODUCTION

What are bar associations' responsibilities for law reform? Under what conditions do bar association committees act in the public interest? Do lawyers even believe in the "public" interest as something that can be collectively defined?

The American Bar Association (ABA) encourages all lawyers to participate in activities "for improving the law, the legal system [and] the legal profession."¹ The ABA assumes that, "[b]y reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein."² It views such efforts as part of lawyers' professional obligation as "public citizens,"³ as well as lawyers' obligation to work "pro bono publico."⁴ The ABA Model Code of Professional Responsibility ("Model Code") regards lawyers' obligations to assist in improving the legal system as an axiomatic and foundational norm.⁵

Lawyers' efforts to improve the law and the legal system may take various forms, but ABA Model Rule 6.1 first lists service on bar association committees.⁶ Bar associations, too, take various forms and

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1. MODEL RULES OF PROF'L CONDUCT R. 6.1(b)(3) (2006).

2. MODEL CODE OF PROF'L RESPONSIBILITY EC 8-1 (1986).

3. AM. BAR ASS'N COMM'N ON THE RENAISSANCE OF IDEALISM IN THE LEGAL PROFESSION, FINAL REPORT—AUGUST 2006 1 (2006), <http://www.abanet.org/renaissance/downloads/finalreport.pdf> [hereinafter ABA RENAISSANCE REPORT] (referring to lawyers' "time-honored role . . . as public citizen[s]").

4. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2006).

5. MODEL CODE OF PROF'L RESPONSIBILITY Canon 8 (1986) ("A Lawyer Should Assist in Improving the Legal System"); *id.* at Preliminary Statement ("The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers . . .").

6. MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 8 (2006) (providing examples of valuable law reform activities).

have various goals.⁷ But most bar associations engage in at least some activities aimed at improving the law, such as drafting model statutes, commenting on proposed legislation, and weighing in on legal and public policy debates.⁸

The normative expectations are different for a lawyer working to improve the law than for a lawyer representing a client. As a client's advocate, a lawyer must zealously pursue legal objectives sought by the client without regard to the lawyer's personal views.⁹ When a lawyer serves in a nonrepresentative capacity, by contrast, the ABA directs the lawyer to act "without regard to the general interests or desires of clients or former clients"¹⁰ and to "espouse only those changes which he conscientiously believes to be in the public inter-

7. See Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 *YALE L. & POL'Y REV.* 193, 193-94 (1996) (distinguishing between comprehensive and specialty bar associations); Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 *FLA. ST. U. L. REV.* 35, 36 (1994) (distinguishing between unified and voluntary state bar associations). There are hundreds of bar associations in the United States, including 282 state and local bar associations with at least 300 members. ABA DIV. FOR BAR SERVS., 2005 BAR ACTIVITIES INVENTORY (Joanne O'Reilly ed., 2006) [hereinafter 2005 BAR ACTIVITIES INVENTORY]. The ABA is the largest comprehensive bar association, with over 400,000 members in 2006. See About the American Bar Association, <http://www.abanet.org/about/> (last visited Nov. 18, 2007). The American Association for Justice (AAJ) (formerly the Association of Trial Lawyers of America) is the largest specialty bar with about 56,000 members. See About AAJ, <http://www.atla.org/about/index.aspx> (last visited Nov. 18, 2007); 1 *ENCYCLOPEDIA OF ASSOCIATIONS* 738 (Sandra Jaszczat ed., 1996). Thirty-two states and the District of Columbia have unified bars, meaning that a statute or court rule requires membership as a condition of practice. See ABA Div. for Bar Servs., <http://www.abanet.org/barserv/stlobar.html> (last visited Nov. 18, 2007) (providing a U.S. map showing the thirty-two states with unified bars); BD. OF GOVERNORS OF THE ALASKA BAR ASS'N, SUNSET REVIEW FOLLOW-UP, Audit Control Number 41-20050-06, at 37 (2006), available at <http://www.legaudit.state.ak.us/pages/audits/2006/pdf/20050rpt.pdf>.

8. See generally Johnstone, *supra* note 7 (reviewing the structure, activities, and effectiveness of the major comprehensive bar associations). Johnstone writes that, "[a]lthough there are sharp differences . . . in policy priorities and implementation, the major comprehensive bar associations today are remarkably similar in the policies they seek to advance," including "advocating needed changes in the law and opposing those they consider undesirable." *Id.* at 195-96.

9. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101, EC 8-4 (1986). The rules on conflicts of interest prohibit a lawyer from representing a client if the lawyer's personal beliefs would impair his ability to serve the client's objectives. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 (2006).

10. MODEL CODE OF PROF'L RESPONSIBILITY EC 8-1 (1986).

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est.”¹¹ As the rules of the American Law Institute (ALI) state, “members are expected to leave client interests at the door.”¹²

Yet, while the lawyer-statesman is a powerful icon among American lawyers,¹³ many observers are skeptical that lawyers, individually or collectively, can set aside their clients’ interests, political leanings, and other biases to serve as purely public-interested members of the “governing class.”¹⁴ As Robert W. Gordon has written, “when lawyers start talking this way about their public duties . . . most of us understand that we have left ordinary life far behind for the hazy aspirational world of the Law Day sermon and Bar Association after-dinner speech—inspirational, boozily solemn, anything but real.”¹⁵ Some argue that the profession has become more commercial and instrumental than ever before.¹⁶

11. *Id.* at EC 8-4. The bar has instructed lawyers engaging in law reform “to identify the capacity in which he appears, whether on behalf of himself, a client, or the public.” *Id.*; see also MODEL RULES OF PROF’L CONDUCT R. 6.4 (2006). A lawyer who makes a presentation to a legislature or administrative agency regarding a proposed change in the law would be engaging in impermissible deceit if he failed to disclose the fact that the appearance is on behalf of a client. MODEL RULES OF PROF’L CONDUCT R. 3.9.

12. Am. Law Inst., Rules of the Council, Rule 4.03 (2007), http://ali.org/doc/rules_council.pdf. The full text of the rule reads as follows:

To maintain the Institute’s reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interests at the door. In communications made within the framework of Institute proceedings, members should speak, write, and vote on the basis of their personal and professional convictions and experience without regard to client interests or self-interest.

Id.

13. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1988) (discussing the ideal of lawyers as “a separate estate . . . independen[t] from the dominant factions of civil society”). Most scholars trace the conception of the lawyer-statesman to Tocqueville. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 263–70 (J.P. Mayer ed., George Lawrence trans., 1969) (1850). Tocqueville’s views, in turn, were influenced by the leading Federalist lawyers. See Gordon, *supra*, at 14; Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 382 n.5 (2001) (locating the origins of the governing class idea “not in Tocqueville but in the political understandings of American lawyers”).

14. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 1–4, 354–75 (1993) (decriing the loss of the lawyer-statesman ideal); Pearce, *supra* note 13, at 407–20 (analyzing the collapse of the “governing class” ideal).

15. Gordon, *supra* note 13, at 13.

16. KRONMAN, *supra* note 14, at 7 (stating his “gloomy conclusion” that the ideal of the lawyer-statesman cannot be revived); SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 18 (1994) (discussing the “deterioration” of lawyers’ morals and manners and stating that “we did better in the past”); BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 136 (2006) (acknowledging that lawyers have always engaged in “professional hand-wringing,” but suggesting that the current level of instrumentalism is something new); Gordon, *supra* note 13, at 51 (analyzing the necessary conditions for lawyer independence and concluding that “the rhetoric of decline has captured something real”).

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The empirical literature on bar associations likewise invites a certain amount of cynicism—or at least pessimism—about the possibility of public-interested law reform. Research shows that representative bar groups tend to be politically ineffective due to internal division.¹⁷ Most examples of effective bar influence involve elite, ideologically homogenous groups.¹⁸ Recent research on the effects of group deliberation on decision making also suggests some reason to be skeptical about the benefits of democratic deliberation for public policy outcomes.¹⁹ Such research points to enduring questions about the role of professionals in democracy and the nature of public policy expertise.²⁰

This Article considers the implications of this research for the role of bar associations in law reform. It focuses primarily on comprehensive,²¹ voluntary²² bar associations, such as the ABA and voluntary state and local bars. Part II identifies various sources of bias in individual lawyers' advocacy of the public interest while serving on bar

17. See TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 119 (1987) (discussing the “contradictions of inclusiveness” in the Chicago Bar Association); John P. Heinz et al., *Diversity, Representation, and Leadership in an Urban Bar: A First Report on a Survey of the Chicago Bar*, 1976 AM. B. FOUND. RES. J. 717, 771–72 (discussing the tension between diverse membership and political efficacy).

18. See MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* 177–93 (1988) (discussing the assets and liabilities of elite organizations); Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 144 (2002) (discussing the shared legal and political views of the early NAACP).

19. See Matthew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 12 (2006) (finding that deliberation tends to decrease social welfare); David Schkade et al., *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915, 926 (2007) (discussing the phenomenon of group polarization); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 79–96 (2000) (reviewing experimental research on group deliberation).

20. See STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* 1–20 (1994) (arguing that there has been a shift from “social trustee” to “expert” professionalism in the United States); POWELL, *supra* note 18, at 225–50 (discussing the role of legal elites); Gordon, *supra* note 13, at 68–83 (reviewing and rejecting various critiques of the lawyer-statesman ideal).

21. There has been relatively little empirical research on specialty bar associations. What research exists suggests that the dynamics of group deliberation are similar to those in comprehensive associations. See *infra* notes 46–49 and accompanying text.

22. The Supreme Court has held that there are constitutional limits on the funding of political activities by unified (compulsory) bar associations. *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990) (The First Amendment limits the expenditure of compulsory dues to expenditures “for the purpose of regulating the legal profession or improving the quality of . . . legal service[s]” in the state. (internal quotation marks omitted)). A number of scholars have criticized this ruling and the unified bar concept generally. See David Luban, *The Disengagement of the Legal Profession: Keller v. State Bar of California*, 1990 SUP. CT. REV. 163 (arguing that *Keller* encouraged political disengagement); Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1 (arguing that the unified bar should be abolished); Smith, *supra* note 7 (arguing the same).

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committees.²³ Part III considers the extent to which such biases can be overcome by carefully structuring the collective debate—to include diverse views, for example—and concludes that viewpoint diversity, without more, has proven to be ineffective.²⁴

Part IV analyzes the implications of the research for the role and design of bar law reform committees.²⁵ First, it argues that bar groups should be more explicit about the goals of law reform and the limits of legal expertise regarding contested political values. This does not mean that bar associations should avoid political engagement altogether, as some have suggested.²⁶ Instead, bar associations should strive to set a public example of productive political debate by gearing their efforts toward research, fact finding, and the clear articulation of issues, rather than focusing primarily or exclusively on policy outcomes.²⁷ The bar should also promote the associative and expressive benefits of civic debate.²⁸ In other words, to the extent that law reform efforts raise divisive value questions, the bar should shift its attention from outcome to process, association, and expression.

Part IV also proposes that, in designing committees, bar leaders should be attentive to research on bar associations and the dynamics of group deliberation and should strive to contribute to this research by testing proposed innovations—for example, the use of a facilitator.²⁹ Such self-study would have immense value for the pro-

23. See *infra* notes 33–41 and accompanying text.

24. See *infra* notes 42–104 and accompanying text.

25. See *infra* notes 105–136 and accompanying text.

26. See Johnstone, *supra* note 7, at 240 (recommending that bar associations avoid “contentious social issues”); David M. Leonard, *The American Bar Association: An Appearance of Propriety*, 16 HARV. J.L. & PUB. POL’Y 537, 547–49 (1993) (arguing that the ABA is excessively politicized and should avoid taking stances on public policy issues).

27. See Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 349 (2004) (exploring “the possible role of the lawyer in . . . newer forms of structured democratic discourse”); Schkade et al., *supra* note 19, at 935–36 (suggesting that group polarization may be less extreme when the group is not asked to make a collective decision).

28. See DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY 74–77 (2006) (finding that exposure to competing views tends to increase an individual’s political tolerance); Menkel-Meadow, *supra* note 27, at 351–59 (reviewing arguments about the benefits of democratic deliberation as an end in itself); Schkade et al., *supra* note 19, at 929–30 (noting the “desirable social effects” of political deliberation in mixed groups).

29. See JAMES S. FISHKIN, CTR. FOR DELIBERATIVE DEMOCRACY, DELIBERATIVE POLLING: TOWARD A BETTER-INFORMED DEMOCRACY, <http://cdd.stanford.edu/polls/docs/summary/> (last visited Nov. 1, 2007) (finding “dramatic, statistically significant changes in views” as the result of facilitated deliberation); Menkel-Meadow, *supra* note 27, at 361–62 (discussing the importance of a facilitator in building group consensus); Schkade et al., *supra* note 19, at 939; Sunstein, *supra* note 19, at 117 (discussing Fishkin’s research).

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fession,³⁰ both academically and practically, and would further contribute to the design of deliberative institutions.³¹ Systematic self-study would also go a long way toward grounding discussions of lawyer “professionalism” and providing practical strategies for improvement.³²

II. THE PROBLEM OF INDIVIDUAL BIAS

There are reasons to doubt whether individual lawyers do, or can, set aside client interests when serving on bar law reform committees. As a threshold matter, the bar association itself may not be clear about its purpose in law reform. Although bar associations typically identify public service as one of their goals, and may even claim or imply a primarily public-interested stance, most also purport to serve their own members and the profession generally and do not address potential conflicts of interest among members, the profession, and the public.³³ Thus, bar members who serve on law reform committees may not have a clear understanding of the role they are expected to play.

Further, even if the association as an entity is committed to promoting the public interest, it does not follow that the association expects individual lawyers to serve disinterestedly in this effort. One could argue that the public interest is best served through a process in which each lawyer zealously represents her clients’ special interests.³⁴ Indeed, many argue that this is the dominant professional ideology among lawyers today.³⁵ Thus, in the absence of instruction, individual

30. See Alex Elson, *From the Trenches and Towers: The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625, 627 (1998) (arguing that in-depth study of the ALI is “overdue”).

31. See Menkel-Meadow, *supra* note 27, at 349 (discussing lawyers’ potential contributions to “democratic experimentalism”).

32. See Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995) (criticizing the religious nature of the “professionalism crusade”); Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217, 220–21 (2002) (arguing that most statements about lawyer professionalism are divorced from empirical observation and “accessible only to believers”).

33. See Johnstone, *supra* note 7, at 195 (stating that most bar associations “aim to benefit three principal target groups: individual lawyers, the legal profession generally, and the public at large”).

34. See generally MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). See also Gordon, *supra* note 13, at 10–11 (discussing the “ideal of liberal advocacy”).

35. See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 87–89 (3d ed. 2001) (discussing the “standard conception” of the lawyer’s ethical role); Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, 54 BUFF. L. REV.

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lawyers may assume that they were appointed to the committee because of their identification with a particular set of client interests and therefore are expected to serve in a representative capacity.

Finally, even if the association is explicit about its commitment to the public interest and its belief that individual lawyers should adopt a public orientation, it is unlikely that private practitioners will be able to fully set aside client interests. To begin with, there is a selection bias. Lawyers who disagree with their clients' positions on law reform will have little incentive to make their disagreements public by serving on a bar committee.³⁶ Most clients would view such active opposition as disloyal and punish their lawyers and their firms by withdrawing their business. Many law firms discourage or prohibit public service that would offend paying clients.³⁷ Thus, lawyers who are inclined to serve on bar committees are likely to choose areas in which their interests are compatible with their clients' interests.

Furthermore, lawyers' own beliefs about the public interest are likely to be strongly influenced by their practice. Most lawyers identify, or at least empathize, with their clients' interests and may share many aspects of their clients' worldviews.³⁸ No matter how conscientiously they try to balance competing interests, lawyers who represent individuals in white-collar criminal investigations are likely to better understand the interests of individual employees and emphasize the individual's interest in being treated fairly. Corporate counsel are likely to better understand the role of the attorney-client privilege in obtaining information from employees and emphasize the importance of the privilege in promoting corporate compliance with law. And government lawyers are likely to better understand the challenges and

1067, 1068 (2007) (discussing the rise of a "libertarian ideology" of law practice that denies "any public obligation other than to serve the client").

36. See Gordon, *supra* note 13, at 23 (stating that "few lawyers will feel like engaging in . . . public campaigns to make life harder on their clients").

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37. See DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* 146–48 (2005); Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 116–23 (2004); Esther F. Lardent, *Positional Conflict in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 *FORDHAM L. REV.* 2279, 2280 (1999); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 *STAN. L. REV.* 1395, 1409–19 (1998).

38. See JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 137–66 (1982); ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 231–69 (1988) (discussing corporate lawyers); Gordon, *supra* note 13, at 56–58; Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 *HOUS. L. REV.* 309 (2004) (discussing solo and small firm practitioners); Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar*, 30 *LAW & SOC. INQUIRY* 269 (2005) (discussing plaintiffs' lawyers).

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complexities of corporate investigations and have greater confidence in government lawyers' integrity and sense of proportion.

If the lawyer has a diverse clientele, it is possible that differing client interests will balance each other out. For example, matrimonial lawyers who represent both husbands and wives, commercial lawyers who represent both buyers and sellers, bankruptcy lawyers who represent both debtors and creditors, and mergers-and-acquisitions lawyers who represent both acquiring and target companies may find that relevant client interests are in equipoise. Yet, while a diverse clientele may increase lawyers' independence from any one set of clients, it also gives lawyers an incentive to avoid actively espousing their own views.³⁹

In any case, many areas of practice involve a relatively unitary and distinctive set of interests. In some areas, such as criminal law, where lawyers cannot serve simultaneously as public prosecutors and criminal defense lawyers, it will be impossible to have a balanced clientele. The same is true for in-house counsel and other lawyers who have only one client. Thus, it seems unrealistic to expect that private practitioners will be able to serve in a wholly disinterested manner when dealing with matters directly affecting their clients' interests. If one were to choose a single lawyer to define the public interest, it would not be a lawyer whose clients have a significant stake in the outcome.

One might imagine that the solution lies in carefully structuring bar law reform committees to ensure the inclusion of members with a broad range of views. Certainly, broad representation is important if individual committee members are expected to serve in a representative capacity. But, even if each individual member is expected to promote the public interest, presumably the collective discussion would benefit from diverse views.

As Part III explains, however, viewpoint diversity tends to be an ineffective strategy for bar-sponsored law reform. Rather than leading to balanced proposals backed by robust consensus, viewpoint diversity tends to lead to stalemate or trivial, symbolic action. Historically, most significant reforms have been accomplished by small, like-minded groups of elite lawyers, who innocently—or arrogantly—believed that theirs was a universal definition of the common good.⁴⁰ Research on group deliberation likewise suggests a choice between preexisting consensus or stalemate.⁴¹ The question, then, is

39. See Gordon, *supra* note 13, at 36 (discussing the pros and cons of client diversity for lawyer independence).

40. See *infra* notes 50–70 and accompanying text.

41. See *infra* notes 71–104 and accompanying text.

whether there is any productive public policy role for a representative bar.

III. THE LIMITS OF VIEWPOINT DIVERSITY

The empirical literature on bar associations focuses mainly on the history and politics of the ABA⁴² and the major urban bars.⁴³ Perhaps the central theme of this literature is the trade-off between membership diversity and political efficacy. In an early, influential study of the Chicago Bar Association (CBA), John P. Heinz and his coauthors described the problem as follows:

Herein lies the dilemma of every professional association. The more its membership reflects the diversity of the larger society, the more limited and noncontroversial will tend to be the set of goals, however important they may be, that it can effectively pursue. . . .

[A] bar association that is broadly representative of the major elements within the profession is less and less likely to be able to satisfy all of its constituencies. There are too many groups within the profession that have too many conflicts with too many other groups—conflicts that are deep-seated and not subject to compromise. Any action of the association that would be likely to be regarded as “decisive” or “progressive” is also likely to offend one or more of these major factions.⁴⁴

The tension between diversity and efficacy tends to be greatest in the most inclusive—that is, comprehensive and unified—bar associations;⁴⁵ however, observers report the same tension in many specialty bars. For instance, the National Lawyers’ Guild was formed to challenge the perceived conservatism of the ABA, but was immediately “[h]amstrung by . . . internecine squabbling between the radicals and

42. See generally M. LOUISE RUTHERFORD, *THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION* (1937); EDSON R. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* (1953); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 *LAW & SOC. INQUIRY* 677 (1989); Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 *WM. & MARY L. REV.* 2001 (2005).

43. On the Chicago Bar Association, see generally HALLIDAY, *supra* note 17; Terence C. Halliday & Charles L. Cappell, *Indicators of Democracy in Professional Associations: Elite Recruitment, Turnover, and Decision Making in a Metropolitan Bar Association*, 1979 *AM. B. FOUND. RES. J.* 697; and Heinz et al., *supra* note 17. On the Association of the Bar of the City of New York, see generally GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870–1970* (1970); and POWELL, *supra* note 18.

44. Heinz et al., *supra* note 17, at 771–72.

45. See Johnstone, *supra* note 7, at 232 (stating that “what follows almost invariably from large memberships in comprehensive bar associations is stultified programmatic action”).

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the liberals.”⁴⁶ The American College of Real Estate Lawyers (ACREL), whose members represent many types of clients, limits its involvement in policy issues to avoid taking sides among members.⁴⁷ Thus, diverse representation may lead to “stultified programmatic action,”⁴⁸ even in bar associations that are organized around lawyers’ specialized interests.⁴⁹

The empirical literature suggests that the recipe for effective political action is not viewpoint diversity but rather status and insulation from competing views. Most examples of successful law reform—defined by whether the bar’s proposed changes were effected—have been achieved by small groups of professionally and politically prominent lawyers, who began the process with a strong value consensus. Value consensus appears to be especially important for effective political action outside the boundaries of lawyers’ core areas of expertise.

In his study of the Association of the Bar of the City of New York (ABCNY), for example, Michael J. Powell identified four resources that are necessary for the successful exercise of professional influence over policy issues.⁵⁰ The first is technical expertise. As Powell noted, it is technical expertise that justifies the profession’s entry into policy debates in the first place, and, historically, the profession’s influence has been strongest on matters with a significant technical component. For instance, lawyers tend to be influential in the process of drafting legal and administrative rules.⁵¹ Technical expertise also provides a cover for lawyers with a substantive agenda, because “frequently, what appear to be technical concerns have important substantive implications.”⁵²

Technical expertise is not sufficient to guarantee political effectiveness, however. Other necessary resources include money, prestige,

46. Michael Powell, *Anatomy of a Counter-Bar Association: The Chicago Council of Lawyers*, 1979 AM. B. FOUND. RES. J. 501, 502–03.

47. See Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501, 536 (1997).

48. Johnstone, *supra* note 7, at 232.

49. See Michael John Balaoing, *The Challenge of Asian Pacific American Diversity and Unity: A Study of Individual Ethnic Bar Associations Within the Asian Pacific American Community of Los Angeles*, 2 ASIAN PAC. AM. L.J. 1 (1994) (reporting significant tensions in the effort to merge four separate Asian Pacific American bar associations in Los Angeles); Kilpatrick, *supra* note 47, at 535–36 (discussing the limited scope of ACREL’s law reform efforts and reporting “some frustration” with its approach).

50. POWELL, *supra* note 18, at 179–93.

51. *Id.* at 181 (discussing the role of Illinois bar associations in drafting the Illinois Criminal Code and noting that “[t]he product of the bar associations was adopted almost in its entirety”).

52. *Id.* (“Recognizing that their technical expertise provides an avenue for legitimate entry into the policy-making process, lawyers may . . . emphasize their technical contributions when in fact they are also interested in the substance of the issues involved.”)

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and social connections, such as those stemming from law school ties and lawyers' interorganizational mobility.⁵³ For instance, Powell attributed much of the ABCNY's success in achieving its law reform goals⁵⁴ to the revenues it was able to generate from its relatively high dues and additional, voluntary contributions from Wall Street law firms.⁵⁵ The social connections of bar leaders, many of whom served on foundation boards, also allowed the ABCNY to secure grants from private foundations headquartered in New York City. These grants, in turn, enabled the ABCNY to create special committees with paid professional staffs to research and write high-quality reports on the policy issues of the day. Several of the ABCNY's law reform efforts "utilized the highly professional work of such special committees funded by foundation[] grants."⁵⁶

Powell's emphasis on the importance of reformers' social and professional statuses is echoed in numerous other accounts of successful law reform efforts. Most successful groups have been highly selective and exclusive in their membership. For instance, the ALI has been described as an elitist organization,⁵⁷ and certainly its membership policies are exclusive. With the exception of ex officio members designated by the bylaws, ALI membership requires two sponsors, recommendation by the membership committee, and election by the council.⁵⁸ Yet, notwithstanding criticism of some of its output⁵⁹ and complaints about a lack of viewpoint diversity among its members,⁶⁰

53. *Id.* at 182–84 (discussing the movement of ABCNY leaders in and out of New York law firms, state government, and federal regulatory agencies such as the Securities and Exchange Commission).

54. *See id.* at 184–88 (discussing the ABCNY's opposition to the Bricker Amendment, which would have restricted the treaty-making authority of the executive branch); *id.* at 217–19 (discussing the ABCNY's efforts to liberalize the grounds for divorce in New York).

55. *Id.* at 182.

56. POWELL, *supra* note 18, at 182.

57. *See* Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WIS. L. REV. 1, 35 (quoting Geoffrey C. Hazard, Jr., *Remarks*, 67 A.L.I. PROC. 131, 133 (1990)).

58. *See* Elson, *supra* note 30, at 631 (discussing the relationship between exclusive selection procedures and member independence from special interests); N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 85–86 (1990) (describing the credentials of the founding members).

59. *See* Abrahamson, *supra* note 57, at 34 (reviewing the critical literature); Elson, *supra* note 30, at 626 (reviewing the same).

60. *See* Richard A. Posner, *Remarks Prepared for Delivery at the Annual Dinner of the American Law Institute, May 18, 1995*, in AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 72ND ANNUAL MEETING, May 18, 1995, at 4–47 (arguing that the ALI lacks intellectual and generational diversity).

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the ALI has been effective in influencing public policy outcomes.⁶¹ Geoffrey C. Hazard, Jr., former director of the ALI, described its elitism as a strength, stating that “[t]hose who have the ability, opportunity, the capacity for responsibility, and equally, as I have said, luck, should accept the responsibility to look at the society from the larger public-interest perspective.”⁶²

Another consistent finding that emerges from the empirical literature is the importance of value consensus and insulation from competing views. As Powell noted, the ABCNY was a relatively homogenous organization throughout the 1950s and 1960s⁶³ and “enjoyed a high degree of value consensus.”⁶⁴ As a result, “the ABCNY was able to adopt strong, uncompromising policy positions . . . [i]n contrast [to] more heterogenous and inclusive organizations such as the CBA.”⁶⁵

Susan D. Carle’s account of the early history of the legal committee of the National Association for the Advancement of Colored People (NAACP) likewise highlights the importance of having a shared, perhaps even dogmatic, worldview.⁶⁶ Carle focused on the relationship between the members of the NAACP’s first national legal committee and the legal ethics establishment in New York City. Her central question was how NAACP legal committee members were able to reconcile their own use of nontraditional litigation techniques, such as the solicitation of strangers as clients, “while sitting on bar committees that penalized other practitioners for similar conduct.”⁶⁷

Her answer was that committee members “drew a distinction between their motives, which they knew to be ethically pure, involving pro bono work for others, and the motives of those from a lower strata of the bar, who were engaging in comparable activities with pecuniary, self-interested intent.”⁶⁸ According to Carle, this “world view was based on a universalist understanding of the public good, very different from contemporary understandings of pluralist politics.”⁶⁹ Carle elaborated on this worldview as follows:

61. See Abrahamson, *supra* note 57, at 3–4 (discussing the influence of the restatements); Charles W. Wolfram, *Bismark’s Sausages and the ALI’s Restatements*, 26 HOFSTRA L. REV. 817, 834 (1998) (concluding that the ALI “seems to work well in spite of itself”).

62. Geoffrey C. Hazard, Jr., *Remarks*, 67 A.L.I. PROC. 131, 133 (1990).

63. POWELL, *supra* note 18, at 180.

64. *Id.* at 220.

65. *Id.* (discussing the ABCNY’s adoption of a “‘pure’ no-fault accident-compensation proposal”).

66. See Carle, *supra* note 18, at 97.

67. *Id.* at 100.

68. *Id.*

69. *Id.*

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To the optimistic early twentieth-century mindset of the lawyers on the legal committee, legal solutions to social injustice were ascertainable through study and analysis—one's perspective did not vary depending on one's position in society. This universalist understanding of social justice translated into a sense of confidence about the reach of legal ethics rules. The purpose of these rules was to prohibit "bad" conduct but not to interfere with "good," altruistically motivated endeavors. That there could be anything suspect about the legal committee members judging these questions when their own conduct was at issue simply would not have occurred to them.⁷⁰

The importance of value consensus for the success of bar law reform efforts is consistent with experimental research on the dynamics of group deliberation. Such research finds that group deliberation is of limited value in bridging political divides, especially where individuals' initial views and values are strongly held.⁷¹ Instead, group deliberation tends to amplify individuals' preexisting views and shift the group as a whole toward a more extreme position.⁷²

This tendency toward "ideological amplification"⁷³ is perhaps unsurprising in likeminded groups. For instance, one recent study divided participants into groups of liberals and conservatives and asked each group to deliberate for fifteen minutes about global warming, affirmative action, and same-sex civil unions.⁷⁴ After deliberating, the liberal groups became more liberal on all three issues, and the conservative groups became more conservative, as measured by the mean view for each group.⁷⁵

Interestingly, however, a similar phenomenon called "group polarization" occurs in mixed groups.⁷⁶ The term "group polarization" is somewhat misleading, in that it does not refer to the tendency of a group to shift toward two poles.⁷⁷ Rather, it refers to the tendency of deliberating groups to coalesce, not around the middle of the range of members' views, but around a more extreme version of the majority

70. *Id.* at 144.

71. See ROGER BROWN, *SOCIAL PSYCHOLOGY* 226 (2d ed. 1986); Sunstein, *supra* note 19, at 92–93 (reviewing experimental research).

72. See Sunstein, *supra* note 19, at 85–90.

73. See Schkade et al., *supra* note 19, at 917 (defining ideological amplification as "an amplification of preexisting ideological tendencies, in which group discussion leads to greater extremism").

74. *Id.* at 920 (explaining the methodology of the study).

75. *Id.* at 917, 921 (summarizing the results of the study).

76. *Id.* at 927 (defining "ideological amplification" as "a special case of group polarization").

77. See Sunstein, *supra* note 19, at 85.

position.⁷⁸ Thus, on policy matters where mixed groups are asked to reach a consensus, the best predictor of the decision's direction is the median predeliberation view of group members.⁷⁹ In most contexts, however, groups also move toward a more extreme version of the median predeliberation view.⁸⁰ The fact that some group members oppose the view does not prevent a group shift from occurring.⁸¹

For instance, a study of mock jury decisions about punishment and punitive damages found that the direction of group decisions was largely a function of members' predeliberation views, even when there was considerable diversity in those views.⁸² Thus, group decisions about whether to punish were unaffected by deliberation. When a majority of jurors favored punishment, the jury would recommend punishment, and when a majority favored none, the jury verdict was "virtually certain" to be none.⁸³ In actual juries that do not hang, the median predeliberation verdict predicts the outcome 90% of the time.⁸⁴

Deliberation did, however, produce a "severity shift" in group punishment ratings and dollar awards for punitive damages.⁸⁵ Among mock juries that awarded any punitive damages, "27% reached dollar verdicts that were as high as or higher than the highest predeliberation judgment of their individual members."⁸⁶ Moreover, the size of the severity shift was unrelated to the level of predeliberation agreement among jurors. Thus, sizeable shifts occurred even in groups whose members were in substantial disagreement about whether or how much to punish.⁸⁷

Researchers attribute the phenomenon of group polarization to a variety of causes, some of which suggest design interventions for bar

78. *Id.*; see also Schkade et al., *supra* note 19, at 927 ("[G]roup polarization refers to the tendency of deliberating groups to shift to a more extreme position in line with the pre-deliberation tendencies of their members.").

79. See BROWN, *supra* note 71, at 210–12; Serge Moscovici & Marisa Zavalloni, *The Group as a Polarizer of Attitudes*, 12 J. PERSONALITY & SOC. PSYCHOL. 125 (1969); Schkade et al., *supra* note 19, at 925–35 (reviewing the experimental literature).

80. See Sunstein, *supra* note 19, at 85 (stating that "[g]roup polarization is among the most robust patterns found in deliberating bodies"). See also Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175 (2002).

81. Sunstein, *supra* note 19, at 94.

82. David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1140–41 (2000) (summarizing the findings of the study).

83. *Id.* at 1153 (discussing the decision to punish and reporting "no evidence of any systematic effect of deliberation on outcomes").

84. See BROWN, *supra* note 71, at 229; Sunstein, *supra* note 19, at 103.

85. See Schkade et al., *supra* note 82, at 1140 (reporting evidence of a severity shift).

86. *Id.*

87. *Id.* at 1156.

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committees, as discussed in Part IV.⁸⁸ One cause is people's urge for social conformity, which leads them to defer to the opinions of others whether or not they actually agree.⁸⁹ In a classic experiment by Solomon E. Asch, for example, subjects in groups were asked to match a line drawn on a card to one of identical length, selected from among three choices.⁹⁰ After several rounds of matching in which all members of the group agreed, some members—Asch's confederates—chose the wrong line in what was clearly an error.⁹¹ Nevertheless, under pressure from the majority, minority subjects went along with the error 36.8% of the time.⁹²

The urge for conformity does not explain the tendency of groups to shift toward more extreme positions, however. That shift is better explained as the result of "social comparison" and the limited argument pools that are present in many groups.⁹³ Social comparison refers to people's desire to be perceived favorably by people with whom they identify.⁹⁴ For instance, among groups of young men asked questions about risk taking, individual men "may want to be perceived (and to perceive themselves) as daring risk-takers."⁹⁵ Likewise, among groups of liberals, individuals who view themselves as slightly left-of-center may shift their position to the left to maintain their accustomed position relative to others in the group.⁹⁶

Limited argument pools are the result of unbalanced (or uninformed) groups, in which group members' predispositions affect the range of arguments available.⁹⁷ For instance, in a group of seven with two members in favor and five opposed, there are likely to be more and better arguments available to the members opposed.⁹⁸ Where argument pools are limited, minority views tend to be suppressed or to

88. See *infra* notes 105–136 and accompanying text.

89. Schkade et al., *supra* note 19, at 925; Sunstein, *supra* note 19, at 77–81.

90. Solomon E. Asch, *Opinions and Social Pressure*, in *READINGS ABOUT THE SOCIAL ANIMAL* 13 (Elliot Aronson ed., 7th ed. 1995).

91. *Id.* at 15–16.

92. *Id.* at 16; Sunstein, *supra* note 19, at 79–80 (discussing Asch's experiment).

93. See Sunstein, *supra* note 19, at 88–90 (reviewing theoretical explanations for group polarization).

94. See BROWN, *supra* note 71, at 210–29 (reviewing the literature on social comparison); Sunstein, *supra* note 19, at 88–89 (providing an overview of social comparison research).

95. Sunstein, *supra* note 19, at 88.

96. See Schkade et al., *supra* note 19, at 932.

97. See Sunstein, *supra* note 19, at 75–76 (discussing the dangers of "enclave deliberation").

98. Schkade et al., *supra* note 19, at 930–31; Sunstein, *supra* note 19, at 89 (discussing informational influences on group polarization).

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give way to “cascade” effects.⁹⁹ Cass R. Sunstein has explained these effects:

People typically have different thresholds for choosing to believe or do something new or different. As those with low thresholds come to a certain belief or action, people with somewhat higher thresholds join them, possibly to a point where a critical mass is reached, making groups . . . “tip.” The result of this process can be to produce snowball or cascade effects Consider, for example, smoking, participating in protests, striking, buying stocks . . . even leaving bad dinner parties.¹⁰⁰

As a result of social comparison and social cascades, groups that start out slightly unbalanced tend to become more unbalanced as the result of group deliberation.

The experimental literature suggests limited conditions for productive deliberation in mixed political groups. To the extent that group members are not entrenched in their views and do not have reasons to identify with or against other members of the group, well-balanced groups may be capable of productive deliberation, in which social pressures take a backseat to informational influences, such as exposure to new facts and arguments. In James S. Fishkin’s experiments on deliberative polling, for instance, in which mixed groups have access to balanced briefing materials and a neutral facilitator and are not asked to reach a decision, many members report changes in their views as the result of deliberation.¹⁰¹

On the other hand, where people are entrenched in their views, as is often the case in public policy debates, deliberation tends to be unproductive—much as the bar literature would suggest.¹⁰² For instance, group deliberation tends to have little influence on people’s views about abortion and capital punishment.¹⁰³ The experimental literature suggests the same would hold true for any divisive issue about which group members have devoted significant thought. Research shows that, “when people have a fixed view of some highly salient

99. Sunstein, *supra* note 19, at 81–84 (discussing “informational” and “reputational” cascades).

100. *Id.* at 82.

101. See FISHKIN, *supra* note 29.

102. See BROWN, *supra* note 71, at 226 (stating that “familiar and long-debated issues do not depolarize easily”).

103. CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 22–24, 54–56 (2006) (finding that ideological amplification generally occurs in the federal judiciary, except in cases involving abortion and capital punishment, where judicial judgments are firmly held); Eugene Burnstein, *Persuasion as Argument Processing*, in GROUP DECISION MAKING 103, 111–12 (Hermann Brandstätter et al. eds., 1982) (finding the least depolarization with highly visible public policy questions, such as whether capital punishment is justified).

public issue, they are likely to have heard a wide range of arguments in various directions, producing a full argument pool, and additional discussion is not likely to produce movement.”¹⁰⁴

IV. IMPLICATIONS

Based on the bar association and group deliberation research, one might argue that the ABA and other comprehensive bar associations should avoid controversial political issues altogether and limit their law reform activities to technical issues, such as drafting and statutory interpretation. For instance, Johnstone takes this position in his review of bar law reform efforts, specifically mentioning abortion as an example of an issue that should be avoided:

An association should limit or avoid involvement with an issue if that involvement threatens to cause a substantial number of its members to resign or become inactive, or if that involvement threatens the association’s general effectiveness. Caution is especially advisable on contentious social issues that have little direct bearing on the legal profession and the usual work of lawyers. It seems particularly foolish for a bar association to risk its viability over issues regarding which it cannot realistically expect to exert much influence. For example, there have been very disruptive consequences for the ABA when it has taken up the issue of abortion.¹⁰⁵

Some bar associations also take this position and have adopted self-imposed limits on political involvement. For instance, ACREL limits its official involvement to the clarification of statutory or regulatory language and the identification of “mechanical” problems with proposed laws or regulations.¹⁰⁶ The Bar Association of Metropolitan St. Louis has adopted guidelines for political involvement that, among other things, require that the issue “is not clearly inappropriate” and “that the position to be taken would be supported by an informed membership.”¹⁰⁷ According to the ABA’s *2005 Bar Activities Inventory*, 45% of unified state bars and 25% of voluntary state bars do not take positions on federal legislation, and 17% of unified state bars do not take positions on state legislation.¹⁰⁸

104. Sunstein, *supra* note 19, at 93 (discussing “depolarization”).

105. Johnstone, *supra* note 7, at 240. More than 1,500 lawyers resigned from the ABA after the House of Delegates endorsed pro-choice legislation in 1990. James Podgers, *Which Way ABA?: Pondering New Policy Directions*, 78 A.B.A. J., Dec. 1992, at 61.

106. Kilpatrick, *supra* note 47, at 536 (quoting Telephone Interview with Roger Schwenke, ACREL member (Mar. 11, 1997)).

107. Johnstone, *supra* note 7, at 229 n.201 (citing Deirdre O. Smith, President’s Report, *Where We Stand*, ST. LOUIS B.J., Winter 1995, at 3).

108. 2005 BAR ACTIVITIES INVENTORY, *supra* note 7, at VIII (Governmental Relations).

Such limits do not prevent individual lawyers from attempting to improve law and policy through other means, including membership in other types of legal and political organizations. Nor do they prevent the organized bar from serving the public interest in specialized and technical areas of law. Indeed, one might argue that the public role of the profession has not diminished, but merely shifted to more specialized areas of practice.¹⁰⁹ As Gordon has observed, the lawyer-statesman ideal originated when the United States was an immature state without the public bureaucracies, academic institutions, or advocacy organizations that now do much of the work originally done by the private bar.¹¹⁰ Now “the age of the gentleman-amateur” statesman has passed, and politics have become more democratized.¹¹¹ Perhaps the story is one of decentralization and increasing specialization, rather than professional or moral decline.

For instance, bar association committees have been active and seemingly independent of client interests in the regulation of third-party closing opinions.¹¹² According to a recent study by Jonathan C. Lipson, many aspects of closing opinion practice are shaped by “non-economic social forces,” including lawyers’ professional pride.¹¹³ Lipson noted especially the active role of bar association committees:

A comparatively small coterie of opinion “gurus” sits on these committees, both at the state and national level. They apparently know one another, either personally or by reputation, and often collaborate on opinion-related bar association projects. These gurus are not remunerated in any direct or significant way for the service they provide. While there are undoubtedly many reasons for volunteering in this way, one reason is . . . a kind of pride, both civic and personal.¹¹⁴

Likewise, Tanina Rostain has challenged the importance of client interests in explaining the role of the tax bar in curbing abusive corporate tax shelters.¹¹⁵ Based on a detailed review of the bar’s various reform initiatives, Rostain concluded that “it is implausible to explain the organized tax bar’s support of reform in terms of its members’ or its clients’ financial interests.”¹¹⁶ Instead, she argued, “the bar [was]

109. See Gordon, *supra* note 13, at 66 (referring to this as the “relocation” thesis).

110. *Id.* at 65.

111. *Id.*

112. See Jonathan C. Lipson, *Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)*, 3 BERKELEY BUS. L.J. 59, 115–22 (2005).

113. *Id.* at 62–65.

114. *Id.* at 122.

115. Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 113 (2006).

116. *Id.*

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seeking to restore the importance of tax expertise based in judicial doctrines” and “affirm the status of tax lawyers as guardians of the tax system.”¹¹⁷

While these examples highlight the potential for professional independence on the part of highly specialized groups, such efforts are no substitute for visible, sustained public policy involvement by the comprehensive bar. This Part argues that comprehensive bar associations have something special to offer in divisive policy debates. This does not mean that bar associations should jump in on all issues or that some issues are not best left to other forums. But the bar should reject the conflict avoidance strategy suggested by Johnstone and others.

To begin with, this strategy relies on the slippery distinction between “legal” and “political” issues. However clear this distinction may be at the margins, many important public policy debates, such as those about privilege and torture, involve both. By avoiding controversial political issues, bar associations are likely to remove themselves from the most pressing legal issues of the day.

Moreover, lawyers have special training in civic and political debate. This is not to say that lawyers are “uniquely endowed with political wisdom and insight into everybody’s long-term best interests.”¹¹⁸ As Gordon has noted, this pompous version of the lawyer-statesman ideal “was always ridiculous.”¹¹⁹ But lawyers have special training in the art of detachment¹²⁰ and special exposure to the argument pool about the distinction between law and politics. Lawyers are also uniquely motivated to invest in civic debate. How many mentors have told their protégés to develop their professional networks by participating in bar activities? Thus, from a societal perspective, bar associations are an important deliberative enclave where like-minded citizens—by virtue of shared professional training—can develop and amplify arguments that might be “squashed in general debate.”¹²¹

Finally, the bar has a unique opportunity to improve the quality of deliberative institutions. Bar associations represent a massive institutional apparatus and a valuable set of sites for democratic experimentation. In addition to the ABA and 53 state bar associations, there are

117. *Id.* at 113–14.

118. Gordon, *supra* note 13, at 74 (discussing critiques of the lawyer-statesman ideal based on competence). R

119. *Id.*

120. *Id.* (noting that lawyers “are professionally capable of detachment, able to see different sides of a problem”).

121. Sunstein, *supra* note 19, at 111 (discussing the advantages of “enclave deliberation” and noting that “many social movements have been made possible through this route”). The rights of criminal defendants come to mind. R

111 local bar associations with an average membership of more than 3,000 lawyers.¹²² The combined expenditures of local bar associations alone is over \$100 million per year.¹²³ Even if only a small fraction of bar activities were devoted to law reform, the aggregate effort and investment represents a huge resource.

Bar associations should be more explicit and purposeful in tapping this resource. This means, first, acknowledging the limits of what bar committees can accomplish in divisive policy debates. As Part III explained, representative bar groups are unlikely to reach consensus on divisive issues through group deliberation.¹²⁴ Thus, proposing specific policy outcomes may be unrealistic. Moreover, the experimental literature suggests that directing deliberative groups to focus on outcomes may increase group polarization.¹²⁵ There are, however, other valuable contributions that bar committees can make.

For example, bar committees can deliberate without attempting to propose an outcome but rather as a means of developing briefing materials for other groups. Many bar committees already engage in extensive research and fact finding and produce detailed substantive reports and minority reports for lawyers, legislatures, and others.¹²⁶ Much of the value of such reports is not in the specific policy outcomes that they propose, but rather in their contribution to the argument pool.¹²⁷ Most bar associations also produce materials for continuing legal education.¹²⁸ Representative committees may be especially useful in producing balanced materials and identifying where irresolvable political divisions exist.

Bar committees can also deliberate as a means of self-consciously testing the benefits of different structural designs.¹²⁹ The deliberation research suggests that even relatively modest design innovations may

122. 2005 BAR ACTIVITIES INVENTORY, *supra* note 7 (Section 1).

123. *Id.*

124. *See supra* notes 42–104 and accompanying text.

125. *See* Schkade et al., *supra* note 19, at 939 (distinguishing between “deliberating groups that attempt to reach a shared conclusion (as in our study) and deliberating groups that simply talk (as in Fishkin’s studies)”; Sunstein, *supra* note 19, at 117).

126. *See, e.g.*, N.Y. State Bar Ass’n, Substantive Reports, <http://www.nysba.org/> (select “Publications”; then follow “Substantive Reports” hyperlink) (last visited Jan. 2, 2008) (listing reports by various committees of the NYSBA).

127. *See, e.g.*, ELIZABETH COOPER, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE TO STUDY ISSUES AFFECTING SAME-SEX COUPLES (N.Y. State Bar Ass’n, Oct. 2004) (explaining the legal implications of civil unions versus same-sex marriages).

128. 2005 BAR ACTIVITIES INVENTORY, *supra* note 7, at III (Continuing Legal Education). Eighty-two percent of state bar associations and ninety-five percent of local bar associations conduct CLE programming. *Id.*

129. *See* Menkel-Meadow, *supra* note 27, at 352 (arguing that “lawyers have a great role to play in the practice of democracy as . . . ‘process architects’”).

improve deliberation and reduce the usual tendency toward group polarization.¹³⁰ For instance, Fishkin's experiments with deliberative polling suggest that the use of a facilitator may help to expand the argument pool and limit cascade effects.¹³¹ Research on mediation and other forms of dispute resolution also suggests that "expert facilitators can minimize strategic gaming and bargaining" and help to build group consensus.¹³² Indeed, simply making participants aware of the effects of limited argument pools and the nature of social influence within groups may help "inoculat[e]" participants against inadequate arguments.¹³³ As a result of their specialized training in advocacy and structured argument, lawyers may be especially receptive to such interventions.

Bar associations should strive to contribute to ongoing research about the potential benefits of different institutional designs. In addition to opening up a whole new angle for jokes about lawyers and lab rats,¹³⁴ such experimentation would be of immense academic—and perhaps operational—value. Although most arguments about the lawyer-statesman focus on public policy outcomes, particularly the need to exert control over corporate America,¹³⁵ much democratic theory focuses on the value of democratic discourse, both for the legitimacy of policy outcomes and for its independent associational and expressive value.¹³⁶ Democratic theory thus invites the profession to refocus its attention on the constitutive value of thoughtful civic debate. Bar associations are uniquely positioned to play this role.

130. See Sunstein, *supra* note 19, at 108 ("The simplest lesson here involves individual susceptibility and [the importance of] institutional design."); Schkade et al., *supra* note 19, at 918 ("[O]ur findings . . . provide strong support for [deliberative] safeguards.").

131. See FISHKIN, *supra* note 29; Sunstein, *supra* note 19, at 117 (discussing Fishkin's research).

132. Menkel-Meadow, *supra* note 27, at 362.

133. Sunstein, *supra* note 19, at 108–09.

134. See MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005) (providing an analysis of historic and contemporary trends in lawyer jokes). In 2002, Galanter identified the following joke as "the single most prevalent of all current lawyer jokes": "Why have research laboratories started using *lawyers* instead of *rats* in their experiments? There are three reasons: first, there are more of them; second, the lab assistants don't get attached to them; and third, there are some things a *rat* just won't do." Marc Galanter, *Changing Legal Consciousness in America: The View From the Joke Corpus*, 23 *CARDOZO L. REV.* 2223, 2234 (2002) (emphasis in original).

135. See Gordon, *supra* note 13, at 2–3, 15 (tracing the evolution of the lawyer-statesman ideal and noting proponents' particular emphasis on independence from corporate clients).

136. See Menkel-Meadow, *supra* note 27, at 347–59 (reviewing discourse theory); James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 *TENN. L. REV.* 421 (1996) (criticizing discourse theory).

V. CONCLUSION

ABA leaders have recently called for a “Renaissance of Idealism” in the legal profession—a recommitment by lawyers to engage in pro bono and public service.¹³⁷ In its final report, the ABA Commission on the Renaissance of Idealism in the Legal Profession identified time constraints as the main obstacle to lawyers’ public service and urged “decision makers in America’s law offices to free up time for lawyers to volunteer.”¹³⁸

This Article has focused on what happens when those busy idealists serve on bar law reform committees. How can lawyers make the best use of the time they devote to bar-sponsored public service? How should bar associations channel the idealistic—and commercial—impulses of their members? To answer those questions, this Article has argued, a dose of realism is in order.

Bar committees should be realistic about the kinds of contributions they can make and their expectations for individual members. This does not mean shying away from high-profile political debates; on the contrary, bar committees may be uniquely valuable in such debates. It does, however, mean being informed about the consequences of viewpoint diversity and the dynamics of group deliberation. It means placing more emphasis on research, fact finding, and the clear articulation of issues, rather than focusing only or primarily on outcomes where political differences are entrenched. Finally, it means exploiting the strengths of bar associations as institutions and sites for democratic experimentation.

Bar associations embody many of the tensions in modern democracy, including the fundamental tension between viewpoint diversity and political efficacy. Identifying constructive responses to this tension, and models for public service in the face of it, is a realistic ideal.

137. ABA RENAISSANCE REPORT, *supra* note 3, at 2.

138. *Id.*