

TRANSCRIPT

"STRATEGIC LITIGATION IMPACTS: GLOBAL NARRATIVES ABOUT SOCIAL CHANGE"

A conversation with Colin Gonsalves, Dmitri Holtzman, and Sherrilyn Ifill

Moderator: James Goldston

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ANNOUNCER:

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JAMES GOLDSTON:

Welcome, everybody. I'm Jim Goldston, the director of the Open Society Justice Initiative and very pleased to be-- hosting this panel on-- the impact of strategic litigation. We have three fantastic star panelists with us today to talk about a subject that is coursing right through the Open Society Foundations and beyond. On my far right, Colin Gonsalves is-- perhaps India's premiere human rights litigator and the founding director of the leading strategic-- litigation organization, Human Rights Legal Network, who has-- pursued and secured a number of path breaking-- judgments that we will-- be hearing about in-- in that country.

To-- his left his-- Sherrilyn Ifill who is the-- director-- president of the NAACP legal defense fund, the premiere civil rights organization-- in the United States-- who wears many other hats. One of them is as a member of the Open Society Foundations' board.

And then-- Dmitri Holtzman-- who is-- currently a-- fellow at the Columbia University. But was the-- executive-- director of the education-- equality law center, a-- a leading-- legal center allied to the-- one of the premiere organizations seeking

equal access to quality education in South Africa-- which has undertaken really some path breaking work that I hope we'll hear about as well.

So very pleased to welcome-- our colleagues to-- OSF for this discussion today. And if I can just-- say by way of introduction that-- the question of what impact, if any, strategic litigation has-- is of-- great interest to-- Open Society Foundations-- and to the Open Society Justice Initiative in particular.

OSF spends-- a fair amount of money supporting-- strategic litigation-- around the world. And let me just say as well that-- we'll be talking about various terms. I'm using the term strategic litigation to talk about any litigation that is advocacy inside a courtroom before a judicial body that is part of a strategy that has a conscious purpose and that is aimed at having some impact on anyone beyond the immediate applicant in the case. But people talk about public interest litigation, of course, social action litigation, test litigation, et cetera.

And-- OSF supports a lot of that. We don't quite know how much though the-- the ability to figure that out is improving year by year. So we'll come to you with the-- the final numbers when we have it. But we know it's a lot. The Justice Initiative engages in a lot of litigation with partners-- around the world.

So we have a collective interest here at the foundation that learning more about what works, what doesn't-- and whether we're throwing our money down the tube, frankly. And-- and-- and that's-- that's one interest in-- in this. I-- I-- to some extent strategic litigation is a test of a count-- of the existence of the rule of law in its fullest-- manifestations in a particular countries. But at the same time it is a contribution to the construction and consolidation of the rule of law one hopes. And we're hopefully gonna hear a little bit about how that has happened in three-- different contexts.

But I think it's fair to say-- and here's where maybe we can begin with a question that-- certainly among the academic literature and in large portions of NGO communities in different countries there is a trope of critique of strategic litigation. Like, it was nice once but we've kinda gone beyond that. We've learned a lot of things about-- how expensive litigation is, how elitist it is at practiced in certain contexts, how-- counterproductive-- it can be by creating an adversarial relationship where maybe that's not needed, how it diverts attention from other kinds of advocacy towards change whether on the street or letter writing or in the-- in the-- in the parliament or whatever.

And yet at least if one looks anecdotally at the kinds of groups that Open Society and a few like donors are supporting it is a phenomenon that is proliferating around the world into countries that-- where it never existed before. The Four Foundation did a path-breaking study back in 2000, Many Roads to Justice, that talked about the-- the public interest law work that its grantees were doing.

And if you look at the 15 years between that Four did that study and now there are dozens of new organizations that have been born and undertaken path-breaking litigation in common law countries, in civil law countries, north, south, east, west. Everywhere it's just exploding.

So-- so if I may-- just-- begin by-- by-- asking colleagues and maybe-- Sherrilyn, let me turn to you, if I can, to begin, is everybody just mistaken? Are we all getting along? Are the foundations wasting their money? Are the groups who are engaging in this activity just misguided?

SHERILYN IFILL:

No I don't think so. First of all, thank you so much for-- asking me to join this extraordinary-- gathering. And for teeing up-- what I think are complicated and important questions to be asking about-- strategic litigation, you know, in many ways I-- I feel as though-- the organization I lead, the NAACP legal defense fund is in some ways responsible-- for much of what became the attraction of this kind of litigation, certainly in the United States, but I would say even kinda jump the shark-- internationally because of the model that was used by-- by LDF and because of the kind of seminal-- what was regarded as the seminal success of Brown versus Board of Education-- which essentially was the-- the decision that began the end of legal apartheid-- in this country 100 years after-- the end of the Civil War-- and the-- and the reconstruction amendment.

So there was this model-- that worked and that seemed to work and actually did work for about 15 or 20 years not only in-- on the education front but on multiple fronts-- as it relates to racial justice, as it relates to gender equality and so forth.

So there became this attraction because of the success of it. I do think it has its limitations and one of the stories of Brown and one of the stories of our work has been a reckoning with the limitations of litigation. Litigation functioning alone can be deeply problematic.

And I think many people forget that Brown actually never did function alone. That there always was this interaction with people on the ground. As a matter of fact, the Brown litigation-- which challenged segregated schools in this country was something that-- my organization was working on for 20 years. But-- but the filing of the cases that became Brown-- the four cases that became Brown was really pushed by activism on the ground. In Virginia it was pushed by a 16-year-old African-American student, Barbara Johns, who led a walk-out in her segregated, inferior high school-- in Virginia, Moton High School.

She was begged by the principal, you know, the black principal, by parents, "Don't do this. (LAUGH) You know, please just wait for this process." And she was so outraged by the substandard desks, by the hand-me-down books, by the ongoing conditions in her high school that she convinced her fellow students, 300 of them, to do this walkout of their black high school.

And it was then that the lawyers began really pressuring Legal Defense Fund and saying, "I know you were waiting for the perfect case but, like, we have to do something." So there always was this connection between the litigation and the ground game. I think that story's just been forgotten and it's therefore fed into the

idea that this was just about the lawyers. So the important thing is to remember there always has to be this ground game. But I do think it's important to remember the limitations of litigation.

One of the things you mentioned that people skip right over is how expensive it is. And I can tell you now leading the organization what I can accomplish with a very strong demand letter I wanna accomplish with a very strong demand letter.

What I can accomplish with a set of meetings, what I can accomplish with-- some policy efforts, I wanna accomplish with some policy efforts because litigation is expensive. It's-- it's longstanding, you know, you stay in cases for years and years and years as they go up and down and it's imperfect. But there are qualities about litigation that are really important. The power of law to state what is supposed to be the rules that govern our society is-- is hugely important. The power of-- of law to state what reality is, you know, one of the things that happens and happened in this country and continues to happen around issues of racial injustice is that they're-- try very often anecdotal. They're stories that we tell in our own communities.

The perfect example is police violence against unarmed African-Americans. This is something we've been talking about forever and ever and ever and have not been believed. And I can tell you any number of cases that you probably have never heard of in which we've been dealing with this issue.

But what law does is it allows you to create that as truth. What-- what is an allegation, what is a story is transformed in the process of litigation and through the presentation of evidence and the acceptance by a judge into fact. And that case, what that judge i-- judge writes now becomes the story, becomes ac-- is actually the creation of history. And that is hugely powerful and hugely important to marginalized communities. I'll stop there.

JAMES GOLDSTON:

Thank you, Sherrilyn, very much. Colin, so does that power to transform allegation into fact-- has that had real resonance in India? Is the experience of public interest litigation in India (COUGH) one that-- that-- that is inspiring for folks there?

COLIN GONSALVES:

Yes, I'd agree with Sherrilyn largely on that. It's just that in the developing countries you can't get ahead with writing a demand letter. (LAUGHTER) Nobody listens to you. They'd throw it into the dust bin. You don't get much-- headway by even following Mahatma Gandhi's non-violent principle and doing a hunger fast. The politicians will let you die on the streets.

So you need to think of two things. Either you do direct action and very, very vigorous, not so legal or outside the law direct action. But you take the law into your own hands which I think has its own virtues. But I don't want to talk too much about

that here. (LAUGHTER) And it's-- it's a feasible kind of option.

And the re-- the next is to go to court in-- what is called a public interest litigation case. It's very cheap. So the expense angle doesn't work so much. You can get in, the filing charges are, like, maybe \$25 to get into a court in a very big case.

It's very cheap. It could be very ki-- quick. It could be very, very quick in the sense that you could file a case on Friday and get it heard on a Monday by mentioning to the judge that these cases are often (UNINTEL). Like when we had-- a racist attack on Christians by a particular community and hundreds of them were killed and their houses burnt. The case was filed on Friday, mentioned before the chief justices' court and heard on a Monday. And by Tuesday he had passed orders for the paramilitary forces to go to that particular state because the police were acting in collusion with the rioters, massacring people. So-- so (COUGH) can be very quick.

Now public interest litigation has always had its detractors. Government of course is our biggest enemy. And I think we take it more as a medal (LAUGH) than a criticism. When government does very, very hostile to individuals and groups doing public interest litigation.

And as long as that hostility is expressed I think that is the best, best expression of the (UNINTEL) public interest litigation. Some of the NGOs are not so happy with public interest litigation for reasons that may not be unjustified. So in a sense, they may have valid reasons for not doing public interest litigation. Perhaps some experiences that they may have had with a particular lawyer, a particular case, or particular judge who was, you know, I've seen people saying, "We took that case on, you know, contraceptives years ago, Depo-Provera, we took that case. And the judge said this and the judge said that."

And I'm amazed by how many women in the moment have been turned off litigation because of that one experience that they've had, right? Now can you assess public interest litigation and the impact of public interest litigation. I think it's easier to access than other areas of work.

Have you done a good case? Have you won the case? I take a very hard line view on this. Because it's possible to do a good case and lose it. And that-- this want in, you know, even doing a case and even if you lose the case. But I say if you take a more-- more mean kind of approach (LAUGHTER) to assessment, right, have you won the case, have you got a judgement, can you read the judgment? And if you won, the judgment hasn't been implemented. Who says it's been implemented? Have the beneficiaries come forward and said yes?

And public interest litigation in India, if you-- even if you take a very mean, restrictive standard, oh my God, there are hundreds and hundreds of cases. Hundreds of judgments. Translation into practice, even if you say 50% implementation is a good rate, we have hundreds and hundreds of cases.

And I just want to mention three very quickly and then stop-- recent cases. The corruption cases. Nobody ever thought you could stop corruption in this country or even take meaningful step. And then you had a very energetic public interest

litigator through an organization called Common Cause take the first case regarding Telecom licenses. The Congress government took money and gave multi-nationals and Indian companies licenses to rule the Telecom waves here. Case done, Supreme Court intervened, very combative arguments, lots of papers coming, documents coming before the court.

All the Telecom licenses in the country canceled. Incredible. Start from scratch. And the option system will be the way to give government contracts. Followed by the coal licenses where all the mining companies, including multi-national companies, paid money to the government, got the contract. Onset aside. Every one of them and options introduced.

And then the appointment of the Central (UNINTEL) Commissioner who's essential-- the main person to the constitutional post actually-- the main person who looks at corruption in the country. Again, a public interest came, we're appointing a person who, himself, has a case against him in one court. A forgotten case. Long back, some case against him was pending for corruption. Set aside. Appointment set aside. So these kind of actions never before done, even in a country like India where public interest litigation is so common. And if you ask impact, huge impact. Systemic change, huge systemic-- change. And the way in which the country is governed has-- really impacted the way in which India is governed. I would say yes.

JAMES GOLDSTON:

Dmitri, in South Africa-- there was of course litigation challenging various aspects of the apartheid regime during its existence. But clearly litigation was not the chief vehicle by which apartheid was brought down, right? There was massive popular protest in the streets, reinforced to some extent by international pressure and other-- other tools. Since the advent of Democratic government how important a role do you see litigation playing in South Africa in fulfilling the promises-- the great promises of one of the great constitutions in the world?

DMITRI HOLTZMAN:

So-- I must just say thanks for-- for having me here. I just wanna pick up before answering that specifically on-- on two things that I heard. One which I entirely agree with is that-- the issue of-- of understanding what the limitations of litigation are I think is important when looking at this question-- about the impact.

You know, my immediate answer to you to say-- in asking is there-- is there a point-- does it actually have an effect is-- is yes. But then the (UNINTEL) part of me comes in and says, "But it also depends." You know, the effect of impact depends on a number of factors.

One of which I think is also-- you know, Colin, you were speaking about-- (UNINTEL) countries. And-- the option that you then have even being direct action

or-- or litigation. I would send it in fact-- the way in which we've understood our-- our role is to try and combine both. That the-- the relative ability to generate impact has been most-- effective when we are actually able to-- to combine direct action-- and strategic litigation. And specifically very strategic litigation.

And I'll give a couple of examples-- if you allow-- can support direct action. Rather than being seen as an-- just an additional tool. But in fact where the question of-- for example, how is it that you can make sure that a judgment that-- does, in fact, get passed-- ha-- has the highest prospects of being implemented to the-- to the greatest extent possible is then usually dependent on the ability of direct actions be able to follow on that.

And something that we've tried to do is-- is craft the litigation that we look at as not being a kind of final point but rather a way in which can support then further-- further (UNINTEL) legal action and-- and-- and development. But secondly I think the question of-- the-- the specific legal context, the appetite of the judiciary, for example, to-- be willing to hear these cases-- if you're looking for example at-- in limitations of-- of-- litigation I'd say that really the criticism on the-- the limited impact that it has holds most true is actually around issues around social economic rights-- litigation.

So it's easier to-- I think-- and I'll say easier-- not lightly. But it's easier to deal with corruption cases, for example, where you can see it impact much more quickly than if we're talking about implementing a education policy that's going to change-- you know, in some instances hundred ye-- hundreds of years of back logs (?).

And it's in those areas where I think lawyers need to be circums-- circumspect in terms of what it is that we can actually achieve. And there we have the-- the issue of direction action combined with strategic litigation becomes most important. Post-1994 in South Africa I think there are many examples, in fact, that we can use.

Although looking at 20 years of democracy and 20 years of having a very comprehensive bill of rights some people would argue that the amount of litigation that's been brought is actually not been as high as what would have been expected. We're starting to see an increase and a change in that in the last couple of years which I think is both positive.

But in some instances I know Colin might-- take issue with me on this. But might be-- sometimes dangerous in creating too much of a reliance on the judiciary. Putting too much pressure and-- on judges who are not often equipped enough to, for example-- where they are-- in some limited instances issuing-- what-- why is it slipping (UNINTEL). Structural (UNINTEL). You know, our courts are very wary about doing that-- because, for example, should we-- how much time should a court-- be able to allocate or-- resources allocate in monitoring-- changing the face of school infrastructure, for example. Do they have the ability to do that?

And yet we are seeing an increased demand of litigation and seeking those kinds of orders. So while I think-- and maybe in-- I know in your follow-up questions you'll ask to give some examples I'll-- I'll be able to refer to those. I think that there is

definitely an increasing role for lawyers to play.

But that a lot of that is actually dependent on the pol-- political context. And in fact, I would say-- the role of lawyers needs to be changing and understanding ourselves is how is it that we not just waiting for that case to come so that with can go to court. How do we actively write letters of demand, provide ongoing legal support-- take (UNINTEL) litigation here and there. But ultimately be looking to bold people's power, bold movements-- and use the law in a way that-- that does that which I think is much more effective than looking at the question of strategic litigation in-- in isolation. Without saying too much more I-- I think I'll stop there now.

JAMES GOLDSTON:

Thank you, Dmitri. Sherrilyn, is the role of lawyers changing? Derek Bell was one of just a number of people who-- who-- who wrote a very powerful critique of the relationship of lawyers to various civil rights movements in the 1950s and '60s.

And-- and-- and suggested, if I recall, that there was a sense that lawyers, to some extent, did not necessarily represent their clients' interests in shaking the litigation in certain ways, at least in some cases. Have lawyers learned from that experience? And today do lawyers conduct themselves with that experience in mind? And if so, how does that influence the strategic nature of the litigation?

SHERRILYN IFILL:

Well, I'd say two things, fir-- first of all-- I'm actually giving the Derek Bell lecture this year. And-- and-- and he was a great mentor of mine. And-- and his criticisms of the kind of litigation that he was engaged in at LDF-- I think was really important-- really important to be heard and said.

Particularly when you're engaged in litigation that takes place over a long period of time. So you begin, you know, a case in 1950. And then in 1967, right, you're still workin' on that case. It's-- it's a whole different set of parents. It's a different set of kids. The zeitgeist of the country has changed. What p-- you know, it's a difference between the circumspection of the 1950s and the black power movement of the (LAUGH) 1960s, right? And the lawyers remain static while the community is changing and dynamic. So I think that-- or the community, you know, started out with you but now they're saying, "You know what, it's not worth it to me to place my children in harm's way if the resistance from white people is gonna be so violent. I actually don't-- I'm not interested in integration. I'm interested in my--" right.

So-- so that idea of your clients being part of the team is something that certainly I've very much integrated. The idea that you are always consonantly in communication with your clients and they are helping shape the outcome of the case.

So I think that that actually has been felt-- by lawyers and certainly affects the way I practice and the way I lead LDF. But I also think that this idea of understanding what

the community needs as first and foremost is something that's transformed-- civil rights litigation and-- and really public law litigation, you know, in the U.S. across the board. The idea of the client as the center and not you as the center is really important.

Now this is an ongoing message that has to be reinforced because lawyers do play to their strengths. We do it. You know, you-- you learn how to do something and then everything looks like that thing that you know how to do. So it-- it requires serious discipline and vigilance to be able to do it.

And I'll give you-- an example. Many of you saw the video of Walter Scott, the man who was killed by police officers in North Charleston, the man who was running in the park and was shot. It was seen all over the world. And we've been down in North Charleston talking and working with that community. And we already had a relationship with the community because we've done voting rights litigation there for a long time. So this is not a new relationship but it's an ongoing relationship with the community that we've worked with over many years.

And what the community told us was that-- you know, while there is this prosecution of the officer who shot Walter Scott that-- that is ongoing and that's obviously not something we're involved in, that's the state prosecutors suing-- prosecuting-- the police officer, Michael Slager, they wanted us to understand the context of policing in that community. And to understand that this was not a one-off.

So we-- we spent a lot of time just talking with people about what was happening in that community. They asked us on their behalf to write a letter to the attorney general of the United States asking her to launch a pattern of practice investigation of the police in North Charleston. And they provided us examples of their-- of many experiences that they have had-- violent experiences with police in that community.

And so we did that. We-- we crafted a very long, detailed letter to the attorney general. And we've continued in our relationships in Washington D.C. to press that pattern of practice. We've herded nothing from the attorney general and we suspect that we won't hear anything (LAUGH) anytime soon.

So we talked with the community and what they decided they wanted was to continue to press ahead with their own investigation. And what they wanted was to have a people's town hall in which they provided this information publicly and they wanted us to help them do it. And so we did. We got a court reporter to come in to be able to transcribe-- the stories of individuals about their encounters with police. We got the location, we-- we made it all happen. We-- our organizers went out and did the flyers (COUGH) and helped people in the community come. And that's what they wanted.

They wanna begin the process-- whether or not the law is gonna recognize the pattern in practice investigation or not-- they wanna begin as though they are creating their own pattern in practice. So that's something that we're helping them do. It's not litigation. (LAUGH) It's not-- it's not a case.

We are continuing to ask the attorney general to press the pattern in practice. But

we're also trying to support this community in their effort to take the matter into their own hands. To-- through their own power-- challenge the nature of policing in that community. So there are these ways in which I think, you know, putting the clients at the center and-- and hearing from them what they really want allows you to council them which is to say, "Here are the ways in which I think the-- the law-- the formal legal system can help you. Here are the other things that can be done that can help you that we can provide support for. Here are the things that you can do that really we can't really help you with but you may find these things effective."

And that's really our job as lawyers is to be able to council the community about the array of choices that are available to them to help and support them with those that fall into our expertise to broke for them relationships with others who can provide them the support that we need. But that's the kind of example I think of being able to be flexible and creative in your space as a lawyer where you're doing more than one thing for the community. But at the center of it is helping them how express how they wanna (UNINTEL).

JAMES GOLDSTON:

Excellent. Thank you very much. Colin, I know you've thought a lot (COUGH) and your-- your whole professional career is very much about the relationship of public interest lawyers to broader communities. And you've brought some seminal cases on behalf of communities. I wonder if you could make a couple of observations about that.

And particularly the comment that Dmitri made that there are different kinds of public interest and-- and assessing impacts you've gotta talk about the different kinds of litigation you're talking about and maybe when you're dealing with social and e-- economic rights, if I understood Dmitri correctly, impact may be harder to assess and/or harder to secure. What's the experience in India? (COUGH)

COLIN GONSALVES:

Let me just say a few words about the role of the public interest lawyer first. I have a very-- a very-- sort of sharp-- take on the role of the lawyer. And I-- I-- I-- I start with-- (UNINTEL) observations. He was the chairperson of the committee that drafted the (UNINTEL).

Loved by the people of India. But particularly loved by the Dalit community which are the low caste. Roughly put you could say the Indian equivalent of-- Martin Luther King in terms of, you know, the-- the fiery nature of his personality and his ability to combine constitutionalism with movement. And he would say, "To get rid of oppression you must organize, educate and agitate." And I will add one word to that and that is instigate.

JAMES GOLDSTON:

I thought you were gonna say litigate.

COLIN GONSALVES:

(LAUGHTER) No, no, no. You see, I was-- I was a trade unionist before I became a lawyer. And I was very inspired by a person called Natasaman (PH) who was a very militant trade unionist in Bombay. At that time-- and I was the organizing secretary-- we had-- one million workers in our union.

And if there's anything Natasaman taught us it was to break the law, not to go by the law. Because of course we're very-- in repressive institutions and the law was used to confine agitation and struggle-- even non-violent struggle, just assembly, was a crime.

And he taught us that. And I-- I learned a lesson when I looked through the eyes of working class people, I learned a lesson that the working class people must, in their attempt, to-- to get emancipation-- they must learn when and where to actually take the law into their own hands. And-- and disregard the law.

Now it might sound very heretical to say this. But let me give you a simple example. Tribal people live on lands, indigenous live on people lands everywhere in the world. They don't have title to land like an Englishman has, right? He's living on government land for, like, decades. His grandfather and his grandfathers before them. But English law will tell you, you know, law will tell you right across the world that you're a trespasser.

And the State will tell you, "I can come and take your land whenever I want for a public (UNINTEL) because you're an encroacher of land." What do (UNINTEL) do? Do they write letters? No. Do they go to the courts? No. The court will say, "What right do you have, sir? You've stayed for, you know, 1,000 years. So what? This is government land. Get off the land."

So what do they do? They organize, they resist the-- the resist the local police. And the government will send in the paramilitary forces. They'll fight them tooth and nail, making homemade bombs and pistols and so on. And then they'll send in the army and they resist them tooth and nail. And they'll say, "We won't give our land. We won't give our forest. We won't give our waters. We will resist." Right. Perfectly correct. And then they ask us as (UNINTEL) what you say, Mr. Gonsalves, they breaking the law? And I say and correctly so.

Your law is wrong. Your law is bad. Your law is antiquated. Your law is obsolete. This land is their land. And contemporary customary law of indigenous people, if you look at the-- the case law from South America or you look at the case law from Australia, they say yes. They have a right to claim their rights as, you know, the-- the rights of a land.

They're not going to move, sir. And if they're breaking the law, so be it. And I say it on-- on TV debates. If they're breaking the law, so be it. You change the law. Gandhi

broke the law, right, when he had that Dandi march. There-- there was a British law that said you can't make salt. So he said, "Come on, let's break the law." And didn't Gandhi break the law 100 times in-- in making movements against government orders? He was prosecuted 100 times. And he stood before the court and said, "Your job is to implement the law, sir."

He told the judges, "Your job is to implement your law. And I don't hold it against you. I respect you for that. My law is to lead my people to emancipation and freedom. And that is what I do, irrespective of your law." So he must know what the laws, we must know when to take the law, you know, at face value, when to break the law when it's necessary.

What is the role of a lawyer? What is the role of a lawyer? The role of the lawyer is to be a great instigator of people's movements. In a situation where the blood is just below boiling point. It's there. You can sense the anger. They don't know is right to do, is it wrong to do, they're breaking the law. When it's at that point the role of the lawyer with all his understanding or her understanding or what law and social movements and everything-- the role of the lawyer is to bring that blood to boil.

That's your role. And then to defend in the courts and to defend outside the court. There must be a seamless movement. A seamless movement between struggle, agitation and the courts. You must be able to get into the courts, get outta the courts, get into the courts, get outta the courts like lawyers did during the freedom movement against the British.

They were in. They were out. They were in jail half the time. Many of our lawyers are in jail. Many of our lawyers have been killed. So in-- in a developing country your understanding of law, the use of law, the role of the lawyer, public interest litigation is a tiny part of that. An important but tiny part. Right? The social movement, change and the very important role of the lawyer that gives people courage. They-- they know that what's right and what's wrong. They know what's right and what's wrong. But when you tell them as a lawyer that is okay to do it. The consequences will be this. We can't save you. This is the consequences. But it's right in equity and morality and law to do something. That is the role of the lawyer, the instigator of social movements.

JAMES GOLDSTON:

They have not-- (LAUGHTER)

COLIN GONSALVES:

Sorry about that, too. (LAUGHTER)

JAMES GOLDSTON:

--fantastic. (APPLAUSE) They did not teach that in most of my law schools. (LAUGHTER) So do-- just before going on, would you care to reflect just briefly on the-- on the purported fundamental difference of socio-economic rights and the ability of litigation to affect the-- that spear?

COLIN GONSALVES:

Yeah. I think on soci-- I'm sorry, Jim. I missed your-- (OVERTALK)

JAMES GOLDSTON:

That-- that was wonderful.

COLIN GONSALVES:

--that was very--

JAMES GOLDSTON:

I just wanna-- (OVERTALK)

JAMES GOLDSTON:

--opportunity. (LAUGHTER)

COLIN GONSALVES:

So on social economic rights, you know, the-- the impact is huge. The right to food case, now I don't want to talk about that much. It's well documented. But the right to food case where starvation death was-- starvation deaths in our country ten years ago were-- was eliminated by litigation assisted by social movement is huge.

The other kind of cases that are being done on-- on health rights, on housing rights and so on, it-- it's very possible that social economic r-- litigation can have huge impacts where there has been sustained exploitation for a long period of time.

So I do believe that social economic litigation in the course has-- education I believe where India has a law and it's not emblematic education will see through public

interest litigation, huge systemic change. You will see systemic change in areas in developing countries which have remained very backward for long periods of time.

You can't-- you don't know why-- I don't know, I always felt in South Africa education was an area, food was an area. I also felt in South Africa there were areas where things were so bad for so long public interest litigation couldn't possibly change that. But India, definitely. And in many countries (UNINTEL)--

(OVERTALK)

COLIN GONSALVES:

--economic rights will go through big changes.

JAMES GOLDSTON:

Dmitri, so that's a good segue-- for you to respond or reflect. The general question I guess is since we're three different systems are reflected here-- three different traditions of public interest strategic litigation. So are we bringing these together just because it's an interesting discussion or is there actual practical relevance to the learning across borders?

Does it matter what happens in the United States or India or anywhere else when it comes to South African social actors, litigators, others thinking what should we do and how should we do it? Or are you deriving it from your historical experience primarily which makes perfect sense?

DMITRI HOLTZMAN:

So I guess it-- again, it depends on where you're at. I think Colin would say I don't care what anyone else is doing. I'm gonna go ahead and do that-- (LAUGHTER) and do this anyways. I mean-- firstly, I-- I wanna say-- I wanna just respond to--

(OVERTALK)

DMITRI HOLTZMAN:

--something that Colin was saying. I think that-- I-- I agree with much of what you're saying except you've just mentioned also that you're a lawyer from a trade unionist background. And I-- I see-- I see some of that possibly influencing where-- where your approach is.

'Cause the extent to which I agree is that I-- that there is a role for lawyers to instigate. I mean, there is a role most definitely for lawyers to be there to defend social movements-- or people that are standing up for their power and they face--

resistance or repression in some instances and where the lawyer be-- used as a tool. And some-- some instances it may not even. It may not be-- not be available. But I-- I-- I am cautious about-- you know, the-- the idea that the lawyer must be the instigator in all circumstances. You know, in-- in our context in South Africa we've got a few instigator lawyers.

But the point from which they're instigating is not from-- not lawyers from a-- perspective of what is best for the community, it's for-- it's what is best for the lawyer, what is best for the jurist prudence, for example. And so-- you know, I've got-- we've got an example in-- in education. I won't mention the name.

But there's a particular advocate who-- is kind of gung-ho-- on all types of government accountability cases with his own agenda. And which is not always attached in any-- in any way to particular clients or to movements. In fact, he's-- he's a rogue lawyer-- who's looking to in any which way show up the government and, in essence, develop a law in that. Now there might be certain advantages to that. But some of the disadvantages we've seen, for example. So let me give you-- the-- the particular case. This advocate's been sitting with a-- draft notice of motion around education-- and a case for education.

Basically calling out any client which can come and fulfill-- which in essence can allow me to sign the paper. But I've-- I've-- I've set out the case before I've ever spoken to anybody. And we have been very concerned about that kind of-- of lawyering.

You know, there is literally instigating-- a case, not necessarily a movement-- which could be very dangerous for not only the-- the amount of work that has been brought up-- towards litigating and-- and developing the law on education-- up until now it also could set back-- possible, you know, through one really bad judgment-- could set-- set us back-- many, many years down the lines. And so that's why I think goes back to this issue of where the lawyer is able to situate themselves in the community-- so that there isn't this idea that the lawyer's on the savior.

But in fact, where we've got lawyers-- and this is sometimes very difficult, in fact, for lawyers to do, is to be embedded with-- organizing work communities-- s-- so that there is a kind of shape understanding, there is a partnership and there's not a dictatorial relationship between-- lawyers and-- and the clients.

And sometimes that can be very, very difficult to achieve. It also then depends on the way in which-- society itself is-- is-- is organizing. The lawyers can, as you say, come with the best intentions but sometimes be completely off track-- with what the-- the needs are. And not only-- what can-- what way-- way-- (COUGH) sudden rise can be won in court. But where is the overlap between that and actually being able to-- generate real change for-- for real clients, in fact?

The-- so-- so that's just the-- the one thing was that I think it's-- it's-- it depends, again, the context and the ability for lawyers and social movement lawyers to organize themselves in the-- in the way that I think develops that-- that proper perspective.

In terms of the question of-- of, you know, whether or not we look elsewhere-- I mean, I think that that's definitely-- in some instances we-- are fortunate to have-- not have to make certain arguments around the (UNINTEL) certain rights, for example-- you know, South Africa coming late to the game-- and developing its constitution and democracy has-- the advantage, in fact, of drawing on-- international experiences from, you know--

SHERILYN IFILL:

And mistakes of others.

DMITRI HOLTZMAN:

--I-- I was complete-- (LAUGHTER) both-- both the advantages-- and the mistakes. You know, and I think-- again, in education-- it's-- it's-- it's-- being on stage now, for example, is fascinating for me to see how many legal organizations there are that are focusing solely on education work. How much litigation has actually happened around that? And yet, how--

SHERILYN IFILL:

How much unsuccessful litigation.

DMITRI HOLTZMAN:

--precisely. Precisely. Which has been-- if anything, it's just been a warning about how it is that we take on these cases. And, you know, I-- I-- I mentioned the-- the issue of-- of-- the-- the judicious (UNINTEL) of these kind of cases which I think, again, is also very important that that's where this overall between-- developing social movements-- that can generate a public discourse, that can get-- you know, the media on board with getting the right kinds of facts available to people so that they understand what the actual issues are.

And in essence, create a political climate that then makes a case more ripe-- for when it is brought to court rather than, you know, rushing off to that as-- as a start can be very important. But then also just in terms of the issues that you take on.

You know, if you look at education for-- as-- as an example in a field-- one of the things that we in gen-- and I'll say we-- I-- I'd say the, you know, few-- law organizations that are dealing with education case in South Africa have been very careful about the-- the-- both the timing and I think also the kinds of cases that we've started to prepare-- the judiciary for, engaging with-- broadening what the-- the idea-- or what the-- what the nature and content of what education actually is.

And we've looked to-- to the United States to see where have-- where have you been able to get-- successful victories-- or successful court orders that have-- have led to actual change. You know, where do we start, for example, looking at access to education issues before driving into the-- the bigger and more important (UNINTEL) quality of education.

I'm only starting to see some of those places come through the United States after, you know, 50 plus years of-- of-- of litigation. I think it's a mixture though-- (COUGH) 'cause again, we can't-- we cannot compare the-- the-- the social political circumstances of any particular country, what the judiciary looks like, what the respect of rule of law is-- what the level of-- of social organizing an-- an organization has been or just one of the few fa-- or one of the many factors that need to be considered in-- in us-- developing our own strategies back home.

And so, yes, I mean, I think it would be-- it would be remiss for us not to-- to-- to look at international experience-- and allow that to-- to inform us. But not to necessarily follow and say we can then take that strategy that's been used in the United States or that's failed there that more definitely (UNINTEL). Yeah. It's not always the case. I think-- you know, you have to have-- an understanding of-- of-- of what your particulars and your context actually-- actually mean for your strategy.

JAMES GOLDSTON:

Great. Thank you very much. I wanna turn to one other issue before opening it up for colleagues to-- to participate here. But since we're in a foundation I do need to ask a little bit about the political economy of this phenomenon.

It is w-- since we don't know down to the last cent how much-- is spent on-- strategic litigation around the world. But we do know that a small number of private foundations support a large proportion of the litigation that's undertaken. Does that matter? Is-- does that matter for the cause? Does that matter for the legitimacy?

Does that matter for the success of the arguments? Does that matter for the manner in which the judgments that depend on that support are received and how effectively they're implic-- (COUGH) implemented? Are those issues you-- any of you-- need to deal with in your work?

SHERRILYN IFILL:

Well, I would say that one advantage-- that I have regarded as very important to our work because very often we are facing either s-- lawyers of the state or private-- or private lawyers, particularly when we're in the economic area where we're bringing places-- cases around employment discrimination or environmental justice and so forth and we're facing private lawyers who are very well-resourced-- is the sense that we will be able to stick with this.

And-- and (LAUGH) sometimes I'm not sure we can. But I can say it credibly that if I

have started a case, you know, it may take seven years. But we can stick with it and we can stick with it at the same level that you are bringing to the table. That's actually a very powerful and important thing, particularly around litigation that's focused on race and the U.S. to be able to say and to be able to demonstrate to our opponents.

Because it-- it very often is the way litigation is here a war of attrition. We don't end up in the Supreme Court shortly. We don't, you know, file on Friday and end up there on Monday. It is a war of attrition. And resources are used as part of the tool of our-- that our opponents essentially-- wage their war with, that they-- that they know that they can wear us down.

So knowing that we have the resources to be able to manage that litigation going forward is really vitally-- important. It's also true that-- having your independence is important. So we don't take any money from any government. (COUGH) And that's an article of faith that's really important because we sue governments (LAUGH) all the time and we wanna be able to do that without-- ever seeking government funds.

And it's important for the communities that we work in to know that too. To know that we're not so hard up that we can be bought in any way by any governmental-- source. The other thing I would say is I actually value the fact that we-- make attorney's fees-- when-- when we prevail.

I think it's really actually important. We are, at this point, probably-- we've done at least for the last three years about \$1 million in attorneys' fees from winning cases-- in New York City and other places around, you know, police abuse, around employment discrimination and so forth.

JAMES GOLDSTON:

Th-- and this is just to clar-- this is attorneys' fees under federal statutes that provide fees--

SHERRILYN IFILL:

That's right.

JAMES GOLDSTON:

--for vindicating certain claims.

SHERRILYN IFILL:

And-- and the-- and the-- those provisions in federal statutes were hard fought for and important precisely because they would give the power and the authority to

organizations-- like mine and others to be able to generate their own fees which I think is-- is vitally important as well.

Let me just say a last thing about the kind of litigation that we think of as public interest litigation here, you know, when civil rights and-- environmental statutes were being enacted and passed in the 1960s and '70s-- the idea of those statutes was that we wanted to give private individuals or organizations the ability to function like what we call private attorneys generals.

That you could actually have a public role and you would be bringing litigation on behalf of the public. And so to be able to do (COUGH) that I think is really an important and powerful tool. It's actually been forgotten very much in-- certainly in civil rights litigation. We're not treated by-- very often by judges-- as though we are providing this service to the public which I'm constantly reminding them of.

Like, when we vindicate, you know, the-- the civil rights of people to participate and vote in an election we're doing it on behalf of this community. But we're actually doing it on behalf of the public as well. So I think that role-- is really important to maintain and to preserve. And that's actually the way in which I think the foundation support kind of speaks to the-- values of the foundation.

Because the litigation is not really on behalf of individuals although it may be on behalf of individuals. It really is part of the public apparatus and the public service of-- of-- of vindicating the rights of people who are most marginalized who have the least power and so forth.

And a-- as I say, it's kind of free stuff for everybody else. The-- the reason why people criticize public law litigation in this country is because the effects of it have become ubiquitous. And I say this all the time, I'm always in these, you know, fancy rooms where people say, "Tell me, you know, was Brown a success," or whatever is the question. And I'm always in a room full of people that would not be in that room but for this litigation, that wouldn't have been hired-- at the places that they were hired but for the years of this litigation.

It's almost become like air. And I think this is something to just watch out for and think about in-- in the future that the success of your work-- can-- can become so deeply embedded that it's no longer understood as being connected to the work of communities that sacrificed and lawyers that litigated and so forth.

It becomes just kind of I'm sure that America was headed in this direction anyway. America was not headed (LAUGHTER) in this direction at all. In fact, America-- marshaled all its resources not to head in this direction. But we forget that. And so we say, "I wonder if it had an effect." Kinda, yeah, it did. (LAUGHTER) And I think it's important for us to remind people of that. When-- when we do these calculations, especially with foundations of, you know, you have to prove and evaluate your work and prove the success of your work, there is no metric for the free stuff that we've given.

For every business person who's American who gets to go around the world and talk as though they are from a country that is somehow superior to other countries, we

gave them that. And we gave them that because we pressed and created a country in which the-- at-- at least in the law you could not have this apartheid system which was a shame for the country, right.

And so everyone benefited from it in all kinds of ways that are just not quantified. And so I just think it's important for our foundations and thinking about supporting this work all over the world to think about the fact that it's-- it's not just about whether you won the case. It actually is about the way you transformed a level of thinking about the human condition-- in-- in particular societies and in particular countries that's almost never traced back and attributed to the people who really worked and fought and sacrificed and made that happen.

JAMES GOLDSTON:

Thank you for providing an important justification for the work of many people in this room. That's been duly noted. (LAUGHTER) But let me ask, Colin, Dmitri, if you wish-- the situation of-- of the-- the-- fact that so much of the funding for public interest litigation comes from often American foundations, is that not a tricky issue in some of-- cases or places you operate or no?

COLIN GONSALVES:

For India, little comes from America.

JAMES GOLDSTON:

Okay.

COLIN GONSALVES:

Little comes. (LAUGHTER) The big supporter for work in India is-- the German NGOs. The Scandinavian countries have left. There's-- there is actually-- and I can't understand it. There's very little funding for public interest litigation or-- strategic litigation. Very little. Some--

JAMES GOLDSTON:

Most of the support for the litigation comes from people giving their time, from paying clients, from where?

COLIN GONSALVES:

--no, it just-- whatever comes in you spread it out very thinly. So the senior most lawyer that-- who'd work-- 12 hours a day every day of the week, Saturday, Sunday, would get a salary of \$1,000 a month. So you just get what comes in and you spit it out. So there's very little support actually.

Despite the fact that the impact of public interest litigation is there to see for everyone. So I don't know. I think it's-- it's just that-- supporters have lost the appetite for struggle. Because even economic rights litigation is very struggle oriented. Take land and displacement from land. How do you make a distinction between economic rights and political? No distinction at all. (UNINTEL) fighting to retain their lands immediately get into struggle against the State.

There's very little appetite. I think there's a rapidly decreasing appetite for struggle. And there's a rapidly decreasing appetite to support organizations that are combative in their work. So they are productive, they get results, they do good work, they work very cheaply, they don't have health insurance, they don't have (UNINTEL), they work very well. But combativeness is something that turns off.

So the-- we get some support from America which has stayed with us. We get some support from German. Germany is very pro-struggle. They understand for some reason. I can't understand it. (LAUGHTER) All the other countries of Europe have abandoned us. But Germany is very much in the-- are you really struggling against the State? They give you money for that. (LAUGHTER) And it's like core funding. So they don't-- it's not, like, you know, at the end of three years, you know, apply again and maybe they give you, "Oh can you switch to something else?" But I-- I-- I'd say we are struggling actually on the basics of old.

JAMES GOLDSTON:

Dmitri?

DMITRI HOLTZMAN:

Yeah, I'll-- I'll just deal with the one narrow part of your question about the effect of-- which is, again, a different situation to-- to India and South Africa having, you know, five or six major-- foundations which are providing-- support for public interest litigation and other c-- c-- civil rights-- civil rights-- civil society organizing work-- is that f-- firstly there-- there's a challenge in South Africa is that-- the most of the funding comes from those-- those few organizations and that we as a society have not been able to generate f-- alternative sources of funding which has created a massive-- dependence on those-- those few organizations.

What I think is a natural-- indication of that is that it does then start to create a level of unhealthy competition amongst organizations which are then constantly

scrambling-- for resources from the-- from the same small pool-- which, you know-- it's a very unfortunate-- consequence because ultimately, you know, we all fighting the same enemy-- which are the conditions rather than-- may not be understood to be saying the states is necessarily the em-- enemy.

But-- there's-- an unhealthy competition that comes from that. But I think one thing that perhaps is an easier way for foundations to listen the way in which that competition is created but also the way in which the-- way-- the way in which funding is provided so that it further supports what I see as a division-- or dichotomy between-- public interest law work-- and social mobilization.

If there-- you were speaking about the metrics-- for example, in, you know, how-- how is that a law organization can show its impact or-- if its programs, you know, if it's set out to meet these objectives. Most of the ways in which that happens-- one of the things would be how many times have you taken on a case or has your case been successful?

And you, you know, for some organi-- for some foundations they love to show that-- these were how many clients-- that were affected by any particular litigation when, in fact, in many instances the benefits of-- strategic litigation can be much wider-- are usually much wider than the narrow-- implementation-- or otherwise of-- of a particular court order.

And so I think that, you know, if-- if foundations are going to be more responsible and would actually assist in law organizations becoming more infused with new (UNINTEL)-- in providing-- support which sees the-- in fact, what Colin speaks about, the seamless line between organizing-- and the courts-- I don't know what the-- the middle one was.

But-- you know, that seamless line is something that can't see litigation as lawyers sitting, waiting there for a case to come in. And suddenly now we jump into action. If you're gonna bold, you know, even-- even as a strategy for boldly (UNINTEL) of public interest litigation the un-- the support that you have to be giving is-- is ongoing from the beginning.

And in fact, for us, the approach that we've taken is that if we don't get to court-- in fact, that's (UNINTEL)-- we've then most of the times won the battle because we've been able to provide legal support that then generate political pressure that can have change from-- before we even get into this long process of-- of getting stuff in out. To-- to touch on something that-- Sherrilyn was saying-- we've had a similar situation where government-- which is, you know, usually the respondent in-- in all of these-- socioeconomic-- cases-- has simply adopted a strategy to say, "Okay, bring whatever case you want and we'll defend it."

Even with sometimes the most ridiculous time wasting-- arguments. And-- and the strategy is to say, "We'll actually make sure you run out of-- first to let your-- your-- the momentum that you've built up outside of court is gonna run out of steam because the moment you get involved in your first letter of demand and response we can now delay this-- in fact, up-- up until a year."

And watch how the delay tactics correlate with the election cycles, for example. I mean, we've had instances where you can watch and say, "The government is waiting for-- for us to come to court on this issue." Because then you go to court and you're stuck in-- in-- in pre-trial proceedings for a long it's-- you know, they want eight months to go onto the next election and we'll deal with this issue after the next election because, you know, that becomes a strategy only to then-- at the last minute-- then we've had this on some of our biggest cases-- two days before trial, we've been preparing for nine months to get to court.

And two days before trial the government will come and say, "Okay, let's-- let's settle this." Which has been a massive waste of our resources and is-- is becoming a government strategy which understands the litigation aspect as being a, you know, final straw which in many instances it should be.

But the legal work to get you to that point must have started, in fact, in many instances years before that. And I think that is a way in which foundations can understand that providing funding whether it be core funding or-- or programs that doesn't require lawyers to have to prove their worth by how many times they've been in court but understanding that there are other ways in which they can provide ongoing support-- and which is sometimes less tangible, but just as critical in-- in-- in-- developing a practice of movement lawyering that sees lawyers as part of a bigger movement rather than the end of it.

SHERILYN IFILL:

T-- t-- can I just add one thing to that because we just got f-- funding for-- a project like-- that's kind of responsive to what you're talking about. When I came abroad to lead LDF I felt powerfully that this was the most important thing I could do was to-- to get support for this institute within LDF that would allow us to hire more organizers.

We had two organizers on staff. But they were only limited to criminal justice and I felt we needed organizers for all of our work. So it allowed us to add more organizers, allowed us to increase strategic communications, allowed us to bring on people to do r-- research so we could do our own research which has been really helpful in this whole policing text now where we really need to understand, you know, what is happening in particular communities and allow us to really-- launch affirmative campaigns that-- that may have a litigation piece and may not have a litigation piece.

And I think that when you talked about the transformation of public law litigation I think that it's recognizing those components. The losses that we faced in civil rights in the United States-- were somewhat to do with the transformation from the Supreme Court from the Warren Court. But also had to do with our failure to steward the other parts of the movement that are essentially to-- to help understand how language plays this important role, to understand, you know, what the role of

media in communications would be.

We-- we didn't-- predict the advent of the 24-hour news cycle. We didn't see how the right was going to use our own language and transform it into language for themselves. We didn't see any of that. And-- but even when we began to see it, we didn't respond to it in time. So I think-- and-- and that's part of what you have to be able to provide f-- to the clients that you represent and to the community, the ability to sustain their narrative and their story. I always-- I taught law for 20 years and I used to tell my students that your job, you know, as the lawyer is not that you, yourself, are trying to create an opportunity for you to speak.

If you're doing the job really well you have created the platform and the opportunity for your client to speak and to be able to tell their story. And for your client to speak and tell their story in-- in modern civil rights litigation in the U.S. requires that you also play some role in creating the context in which the j-- judges are hearing this case, that you are enabling them to affect the public conversation about race, the public conversation about policing, the public conversation about education.

So I just think-- thinking through the future of that litigation and then how you would evaluate the success has to look at those other elements that are non-litigation elements be that are supportive of the overall movement that may include litigation.

JAMES GOLDSTON:

Excelled, excellent.

DMITRI HOLTZMAN:

Can you I say one more short thing?

JAMES GOLDSTON:

You may.

DMITRI HOLTZMAN:

I know you wanna go-- but I also think we need more lawyers like Colin that come from trade union backgrounds to become lawyers.

JAMES GOLDSTON:

There are no other lawyers like Colin.

DMITRI HOLTZMAN:

And that's true. (LAUGHTER) That's true.

(OVERTALK)

DMITRI HOLTZMAN:

But-- you know, that-- that-- you were saying that that's not something that we-- they teach us in law school. You know, I mean, I-- I myself have also-- when I left law school I didn't wanna become a lawyer anymore. I wanted to, (LAUGHTER) you know, being involved with activist.

And that's what I did-- until at some point I realized, okay, well, now we actually do need a couple more lawyers that will, you know, be working and-- hand in hand with us. But I think that that's also something that is-- is currently lacking is that lawyers have the experience of going to the-- the-- going into (UNINTEL) organization where they don't always-- have the kind of experience of working in a bigger movement, you know, and understanding that there is, perhaps, a space for us as lawyers not to be seen as-- as something that's set apart from but can start to think ourselves as-- as-- as together with-- people that are working in-- in activist organizations.

JAMES GOLDSTON:

Fantastic, thank you very much. So colleagues, anyone here? There's been a lot put on the table. A lot to take issue with. A lot to praise. A lot to question. Excellent. Thank you for your bravery. (LAUGHTER)

TAMARA EZRA:

Hi. Thank you for a great discussion. My name is Tamara Ezra and I work here at the public health program. And I-- actually I lead our law and health work. So this discussion is very relevant for the work we're doing on health rights litigation.

The question I have is actually for Sherrilyn and I was interested in, you know, U.S. context and-- version of what you asked Jim for-- to Dmitri about lessons from the international community. And are there any lessons from the international community that we're (COUGH) taking and are informing the work now in the U.S. context. And also what do you see as opportunity for litigation and social and economic rights here in the U.S.? Thanks.

SHERRILYN IFILL:

Well, on the first question I would say I think we are very often-- we get depressed

because, you know, we actually think that-- that public interest law litigation is so much more dynamic in places outside the U.S. than it is in in (LAUGH) the U.S. these days.

And it helps us recognize how cramped-- you know, our constitution really is, as if we didn't already know. But also how-- how lacking in imagination we have been about a whole variety of issues. We-- you know, I just participated last year in-- in a effort in Detroit around water.

And you probably remember this that in Detroit last year-- the City of Detroit was, first of all, in bankruptcy. And-- at the same time the city water bureau decided to turn off water for people who were delinquent in paying their bills. And they were turning off water for 70,000 residents, almost entirely African-American.

The-- the framing of this was about-- was basically as though we're a consumer matter. You know, it was people who hadn't paid their bills. And-- and I decided that we were gonna enter this field in part because I thought the brand of my organization entering it would make it a civil rights issue even if it really wasn't seen as a civil rights issue. And-- and it was effective. And now it was hard 'cause it was in bankruptcy court and that was kinda weird. And-- but as it turns out without us kind of trying to intervene in that forum there really was no place to vindicate this right.

And it can't be possible that nearly 100,000 people can have no water and there's no, like, forum where you can challenge that. But in fact, that was true. That's what kind of the law provided. So it really required-- us to do some kind of interesting things with actually with the local-- ACLU and-- and in-- it involved having special (UNINTEL) from the UN come in and-- we-- we took them around to meet all of our clients.

And we had a water fair. And so they could learn and write their own report which was then given to the bankruptcy judge. Now although the bankruptcy judge declared that he did not have jurisdiction to hear any of these water issues-- and technically speaking he didn't-- but like you I felt like, well, somebody's gonna hear it. So, I mean, if-- we-- we're here. He was moved by the embarrassment.

I mean, and that's what he called it. He said, "This is an embarrassment." And he-- he ordered at least for the summer a moratorium on the turnoffs because he-- he thought it was embarrassing the city. I mean, here he was about to wrap up the bankruptcy process and now there was this international story about people with no water in Detroit.

So I-- I think that we f-- we feel that we-- it really-- we should be bolder actually-- in thinking about the kind of litigation that we do. I think that we've been-- we were trapped by early success (COUGH) and then didn't pivot to imagine a different way of litigating. I mean, one-- one thing I will say about judges especially in the federal system, I mean, you just-- you have to surprise them. You-- you have to surprise them. You-- you really do because-- they are from a very narrow background, most of the federal judges in the United States are former prosecutors.

They have gone to probably the same seven or eight law schools-- if that many. Right

now the United States Supreme Court I think all of the justices are from two law schools. (LAUGHTER) Two law schools, two religions. I don't-- what else? I don't know. (LAUGHTER)

I mean, so we're talking about an extremely homogenous population of decision makers-- who really don't know a lot. And so you-- part of what I think we're now seeing again is the need to-- to play this educative function which is the other function of litigation. And that's when you have to get creative. You know, I always remember Thurgood Marshall, people thought it was rude-- rude of him to say this. But when he went to the Supreme Court he said about his colleagues who, you know, he got along with more or less-- he said, "Not one of them knew anything about Negroes--" that was the word he then used-- Negroes-- "Not-- not a single one of them, before I came on this court." They didn't know anything about black people.

And it was tr-- nobody said, like, he's lying. (LAUGHTER) They really didn't. I mean, it was true. Right? So-- but I think that largely, you know, it's-- it's somewhat about race. But it's really about-- a homogeneity of experience. And even-- even as lawyers, I mean, you talk about a lawyer with a trade union background, you know, you don't have federal judges who have had a background as public interest lawyers or civil rights lawyers for the most part. Just a few.

It's one of the things we pushed President Obama on was to point-- a point where people who have been federal defenders, that was a big deal. They're all prosecutors. To appoint people who had been civil rights lawyers, to appoint labor lawyers and so forth. And he's done some of that, to his credit.

So-- a lot of what we see is the need to kind of reinvigorate our imagination and to play to that educative function where you're doing things that are unusual. And even if they throw you out it's a story that-- that you then can elevate and it suggests what might be possible.

JAMES GOLDSTON:

Fabulous.

TAMARA EZRA:

Thank you.

JAMES GOLDSTON:

Thank you. Michael and I know-- I don't know if I wanna invite Sudir (PH) or Jane or anybody else who wants to come in 'cause then we'll have to wrap it up soon but please.

MICHAEL SFARD:

So (COUGH) thank you again for-- that fascinating-- presentations. My name is Michael Sfard (PH). I'm-- a human rights lawyer from Israel. I've been litigating-- cases on behalf of Palestine and Israeli communities for the last 15 years mainly-- in context of the Israeli occupation over Palestine.

And-- (COUGH) and-- of course every jurisdiction has its own political and social-- circumstances which make-- makes a difference in the way you calculate success in litigation. And I guess the A-- NA-- NAACP has-- to-- is to blame for putting a very high standard with Brown on what is considered to be successful litigation.

But I would like to make-- to flag that when you calculate-- when one calculates what is a successful-- litigation-- while success is a much more complex thing than just winner-- winning or losing. And-- in my experience and c-- experience of my colleagues back home there are many, many-- legal battles that we waged in many cases that were successful-- were very success-- successful at the end without even one victory, without one injunction-- in court. So you can get through litigation information, you can get through litigation-- the courts to state-- to get position-- you can get time through-- for-- for the social movement to-- to-- organize itself.

And I wonder if in-- I think the-- the closest-- our situation is to South Africa prior to democracy in that sense. And I-- and I am-- I just wonder if any of you-- think that-- when they-- when you calculate your successes you also take into account other-- products-- byproducts in which the litigation is a tool that helps the primary force for social change which is not the court but-- the media, the politics or public-- perception.

JAMES GOLDSTON:

Great, thank Michael. I think Sherrilyn has-- has made this point. Do you wanna--

MASA ZURUP:

I have a follow-up question to make if I may.

JAMES GOLDSTON:

Put it on.

MASA ZURUP:

Thank you.

JAMES GOLDSTON:

Go ahead. Please.

MASA ZURUP:

Hi, my name is Masa Zurup (PH). I'm with Pelmet (PH). I'm a senior deal officer there for the Middle East and North Africa. We're very proud to have Dmitri as one of our fellows this year. So first of all, thank you all for this very interesting panel. And I would like to just follow up on what you were saying, Michael, it's good to see you again.

MICHAEL SFARD:

Thank you.

MASA ZURUP:

We met-- I think maybe a decade ago in Palestine. (LAUGHTER) And-- i-- our program, the Middle East and North Africa, we're also developing-- trying to help our partners in the region develop-- litigation strategies. And I wanted to ask the panelists to maybe elaborate a little bit more on what you just touched upon, Michael, how to measure success of litigation strategies.

And Colin, you were saying earlier that-- you know, one measure of success might be did you or did you not win the case. Dmitri, you were saying that maybe a measure of success is you didn't even make it to the c-- to the court. And-- issues were resolved outside of the courtroom.

Could the three of you perhaps elaborate a bit more on how to measure that success because we are really trying to help our partners in the Middle East and North Africa develop these strategies, help-- help them assess whether or not they've been successful. And we're not quite sure also where to start 'cause it's quite a new-- initiative in the Middle East. Maybe we've-- we've had a couple of decades there of strategic litigation. We've had some interesting cases in Lebanon, for instance, affirming the right to know or in Egypt when it comes to labor rights-- movements and labor-- affirmation of labor rights, that would be interesting maybe for you, Colin. So yeah, this-- this would be my-- my question. Thank you very much.

JAMES GOLDSTON:

Excellent. Colleagues, how do we measure success?

COLIN GONSALVES:

Actually I started off by taking the meaner standard which is you, you know, if somebody's really out to quiz you on the work that you do you say, "Okay, these are my judgments." So that's the sharpest, the meanest-- what I call the meanest standard of success.

But I agree with you, Michael, in fact, for every success there are ten cases where it comes before the Supreme Court. And the Supreme Court judge, you know-- you know, says something which-- which shows how she's thinking. And you have a remarkable success on the spot. Ten to one, that's the ratio.

Now I've had-- can I assure anybody, look, I won this case. I can't. But I can certainly explain that when I went to court this was the situation and the court remarkably changed. I'll give you the-- the antiretroviral case. It came before the Supreme Court in India.

India took a stand worse than the South African president, right, who-- who said, "No, we won't get the antiretrovirals. We took a stand like that for a decade and the world didn't criticize us. We won't get you (UNINTEL). Came before the chief justice. I told the chief justice after two years of the case pending-- I said, you know, "So the policy of the Indian government is to let people die. Then find an affidavit and say this is my policy. I'm not going to give you the antiretroviral Your policy is to let people die. And after two years of hearing me and nagging him, nagging him, nagging him, he turns to (UNINTEL) and says, "So (UNINTEL), time has come for you to put your policy on paper."

Is he right? It seems he's right. Is he right? Now I didn't win that case. Two months down the line the union health minister announced the policy of the antiretroviral distribution free. So there are-- Michael, you're absolutely right.

I can give you one more example. The-- the disappearances cases in the northeast, 500 persons disappearing every-- every year. 500 fake-- fake encounters-- what they call fake-- you know, the police say it's a genuine encounter, (UNINTEL) 500. Case comes to the Supreme Court. Case is pending in the Supreme Court. No judgment, nothing. Supreme Court judges just expressing alarm. How can you kill 500 persons a year and not prosecute a single police officer? Last year there was one execution. And that was a genuine encounter but-- with a non (UNINTEL). One. 500 to one. Is it today three years. Is there a judgment? No. You're absolutely right, Michael. (COUGH)

DMITRI HOLTZMAN:

Yeah, I mean-- I-- I think you-- in your question actually-- gave half of your answer or if, in fact, not the entire answer. (LAUGHTER) You're giving us leading questions. I mean, I-- I-- I always say that the-- when looking at the strategic-- strategic part of litigation-- so not just, you know, responding to a client that comes in and-- and--

'cause I think (UNINTEL) also sometimes-- something (UNINTEL) will say, "Oh yeah, sometimes something that we ignore is as-- as if the conditions are always ripe for the cases that we do take on and win."

And then we can claim that, "Well, it was always part of the strategy." You know, sometimes you get a case and unfortunately there perhaps isn't the movement that's waiting to-- to support. But you've got clients that are in front of you seeking-- some kind of recourse and-- and-- and you're the only ones that-- are able to assist in-- in doing that.

So besides those cases, the ones where you are able to-- have some c-- some level of planning and-- or that you see a-- a string of cases that will form part of a-- a systemic issue, I mean, you know, the ones that you-- you mentioned, for example, it's-- it's not just-- it's-- it's an entire political system, in fact, that-- within which these individual cases-- are being-- are being brought and-- and raised.

For me the issue there-- there's no one answer to it. It'll be, you know, how-- how does this serve the broad objective? And i-- if so it might not be able to-- the litigation of it might not be able to achieve that by itself. But is there one way in which it actually, you know-- contributes towards that. So even if you know, for example, that-- you know, you're gonna take on-- a number of cases and possibly lose every single one of them-- I still think that there's value in bolding up that record, for example, that might not-- lead up to legal victories down the line.

But as, you know, as been mentioned that it develops-- it-- it puts certain information out there. You said it yourself that it requires a certain kind of response which becomes political statements. It becomes-- a political record which then hopefully can be used-- as part of the same broader-- political objective that you're working towards. And-- and in that way the-- the litigation seeks to-- to support it.

It-- to give you an example of something that we've taken on-- which-- which relates to-- to what you were saying of-- of this important issue of getting government to put its position-- down in-- in front of a court can sometimes be-- be very powerful. It was something that was used-- in the treatment action campaign-- the litigation round-- antiretrovirals-- you know, which was a political back and forth.

There was a big movement that was involved. It was-- you know-- information about-- skepticism-- s-- skepticism, about the research that had been produced. And so it was this ongoing t-- you know, tug of war-- in the politics outside. And eventually the court was able to say, "Okay but now, you know, the-- the minister can make this statement to the media today and flip-flop on that tomorrow-- and use this-- report today and a completely different one tomorrow."

But eventually when you get to court and-- and the court is-- is required to test the kind of reasonableness of that you get a definitive answer of it. And, you know-- the-- the Justice Cameron of the Constitutional Court-- he's written a book recently which-- details some of this. And-- and one of the things that he-- he writes about-- the treatment action campaign, the series of cases-- which I find out to be quite powerful was that, you know, after that case it then settled-- this debate.

It settled some of the political and even some of the debate around the sciences by-- by definitively putting what the court's position is after having considered everything that was-- that was presented be-- be-- before them. So I don't think the-- the-- the-- the answer is simple other than to go back to the original question I think that litigation-- if we understand-- the possible impact of it more broadly than just winning a case. You mentioned all the other factors as well, I think it can be-- be absolutely-- powerful and-- and perhaps some benefits that you don't see in the court process-- itself.

SHERILYN IFILL:

I-- I think it's also really d-- dangerous for-- for social justice lawyers to be afraid to lose. (LAUGHTER) I mean, I just think that's devastating. I just-- you-- you just can't do this well if what you're thinking only is that you're going to win because you are going to lose a lot of the time.

And that's part of-- I mean, otherwise that's not strategic, right? Strategic litigation necessarily means that there's some experimentation involved. And it's not experimentation if there's no chance of failure. So there does have to be a way in which you have calculated some other way that you're advancing the strategy that's not just about your-- your win/loss record.

And I-- and I'm a big believer because of what I said earlier in the creation of the record, the-- the-- the construction of reality around race and oppression is a huge battle. And litigation is one of the places in which when you get it you got it. Right? It's there. It's got the power of-- of law. A judge has re-- repeated what your client said and therefore made it true. (LAUGH) And so that strikes me as very important.

And then the last thing I would just say is there are times when, you know, our Supreme Court in this country is extremely conservative. So I regard it as a victory-- to have helped the court not hear certain civil rights cases. I don't want them actually to hear any civil rights cases (LAUGHTER) at this moment.

Whatever ones they're hearing I'm engaging however I can to influence them. But I would rather them not be hearing them. There's no case that I'm, like, teeing up right now to bring to this Supreme Court. So there's also that too. There's-- avoidance is a tactic as well.

JAMES GOLDSTON:

So when we thought about putting together this panel we thought it would be a good idea. But I don't think we anticipated that it would be so rich and so filled with remarkable insights. And I wanna thank my colleague, Colin, Sherrilyn and Dmitri for an extraordinary (APPLAUSE) (Unite).

* * *END OF TRANSCRIPT* * *