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AMERICAN UNIVERSITY

WASHINGTON COLLEGE OF LAW

A GLOBAL LAWYER:

A symposium Celebrating the Contributions

Of Herman Schwartz to the Rule of Law

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P R O C E E D I N G S

PROFESSOR SAEZ: All right. So, we're going to get started. We have the guest of honor with us. So, good morning, my name is Macarena Saez, and I'm the director of the Center for Human Rights and Humanitarian Law here at American University Washington College of Law.

And along with my colleague, Fernando LaGuarda, who's the director of the Law and Government Program, we are really happy to welcome you all here to this symposium called, A Global Lawyer Celebrating the Contributions of Herman Schwartz to the Rule of Law.

It was not easy to decide what topics we should cover for this symposium, because in his written productive career as an attorney, scholar, activist, and thinker, our colleague and friend, Herman Schwartz, has had a tremendous influence in many different areas of the law. The topics we chose have been influenced by Herman's writings and actions, and have had an important development since Herman started his

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career, his law career, more than 30 years ago.
A couple of days ago, I had a conversation with a colleague about what is relevant in academia. And I was arguing that, in my opinion, there are two distinctive types of scholars, those who aspire to have a name among their peers, and those who aspire to take the conversation to the level of making a difference in the real world.
I think few scholars are able to achieve a level of success in either of those camps, and even fewer become a name both for their theoretical contributions, and their influence in policies and protections of rights, and Herman embodies that combination of scholar and activist that is so difficult to find, and that we should seek and encourage more.
I have no doubt that today's panels will be full of productive and dynamic conversations, and each panel will be a real mini master class for all of us today, especially for law students. I also hope that each panel will

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inspire more young professionals to use their law degrees to stop injustices, and strengthen the rule of law in the United States and abroad.
One last thing I have to mention before I give up to our Dean, Camille Nelson, to officially open the symposium for us, is that there is a poster board of the flyer that we did for the symposium outside, and there are lots of sharpies out there, so if you want to greet Herman in that poster board, you can do so in every of the breaks, and during the reception today.
So, thank you again for being here, and I want to invite in Camille Nelson to officially open the symposium. Thank you.
MS. NELSON: Good morning everyone. I'm going to try that again, if it -- we're celebrating Herman, so good morning everyone.
AUDIENCE: Good morning.
MS. NELSON: Wonderful. Thank you, Macarena. Thank you, Professor Saez, for that very kind introduction, and for kicking us off.

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I am especially grateful for all that you've done, and all that your wonderful colleagues at the Center for Human Rights and Humanitarian Law, and also the Program on Law and Government, and Fernando LaGuarda have done to bring us together today as a community in celebration of our beloved colleague.
And on behalf of American University Washington College of Law, welcome to A Global Lawyer, a Symposium Celebrating the Contributions of Professor Herman Schwartz to the Rule of Law. It is an honor to be part of this celebration of our dear colleague, Professor Herman Schwartz, and his formidable and ongoing legacy. And it is a testament to that legacy that we have the privilege of welcoming so many distinguished guests to speak on a rich array of absolutely critical topics. Topics that Herman has championed his entire career.
Professor Schwartz has led in championing what matters, which is the motto of this great law school. I especially want to

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recognize all of you who have taken the time to be here with us today, and I want to underscore the words of Maya Angelou, who once famously said, "If you are going to live, leave a legacy. Make a mark on the world that cannot be erased."
And I do believe that is what our dear friend and beloved colleague has already done. When we look back at what Professor Schwartz has accomplished for this law school, for local communities across the country, across the nation, for individuals and organizations, indeed, around the world, it is obvious that he has left a lasting legacy.
One that cannot be erased. One marked by his intellect, his compassion, his passion for humanity, and his friendship, an enduring friendship. For decades, Professor Schwartz has been known as The Happy Warrior, for his work done to advance civil rights, civil liberties, and human rights here at home and around the world.
These causes have been the focus of his

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career as an attorney, as a teacher, as a scholar, as an advisor, as an advocate, and as an active participant in public debate. With great efficacy and never-failing good humor, Professor Schwartz's professional energies have been devoted to battling discrimination and oppression, while promoting social justice for all.

Listing all of Professor Schwartz's achievements would take more time than we have today, tomorrow, the weekend, next week, going on throughout October, so I'd like to take a moment to just briefly underscore and highlight some of his remarkable achievements, and quite frankly, iconic moments that have shaped his incredible legacy.

In the early 1970s, he conceived the idea of a Law Teachers Association that became, under the leadership of Professor Norman Dorsen of NYU, The Society of American Law Teachers. An organization that endures today, and an organization, a progressive organization, that

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many of us in this room, and outside of this room, have been a part of, and I see many of you in this room.

In 1984, Herman established the groundbreaking Herman Schwartz Israel Human Rights Law Fellowship Program, formerly known as the U.S. Israel Civil Liberties Law Fellows Program, giving Israeli lawyers an opportunity to learn how to promote and protect human rights through litigation, and teaching additional forms of advocacy.

And for more than 30 years, these Fellows have shaped legislation, they have shaped policy, they have shaped practice in diverse areas of Israeli life, and have also influenced legal education in Israel.

In addition, in 1990, Professor Schwartz cofounded the Center for Human Rights and Humanitarian Law, which became a world-renowned program to provide exceptional scholarship strategy and support for human rights initiatives around the globe.

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Further, Professor Schwartz has litigated major constitutional cases, and was counsel in well over 100 cases. Herman's work as the American Civil Liberties Union expert on electronic surveillance produced pathbreaking studies on the use and effectiveness of wiretapping and bugging, particularly related to the use of the Crime Control and Safe Streets Act of 1968.

Professor Herman Schwartz, on behalf of American University Washington College of Law, this wonderful community, we cannot thank you enough for your myriad, exceptional, extraordinary contributions.

I, and I know we all are, frankly, in awe of all you have achieved, and remain truly grateful for these accomplishments, and for your ongoing commitment to educating our students, and representing the law school exceptionally over many, many decades. Your footprint is tremendous.

Once again, to all of you here today,

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and to those who will join us throughout the day, it is my great honor to welcome you all to WCL and to today's symposium. I know you will enjoy a tremendous experience, and we look forward to this continuing conversation in the decades to come. Thank you for being here, and welcome.

PROFESSOR SAEZ: So, I'd like to invite the speakers for our first panel to come to the table, and so we can start our first panel on prison rights. One reminder to all the speakers, if to please, if you can speak to the mic, because this is being live streamed, and for audiences outside the United States as well. Thank you.

MR. MENDEZ: Good morning.

PROFESSOR SAEZ: Good morning.

PANEL 1

PRISON REFORM IN THE UNITED STATES AND ABROAD

MR. MENDEZ: Good morning. Ah, there we go. It's a real -- I'm Juan Mendez, I teach international law and human rights law here in WCL, and it's a real honor and a privilege to be

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invited by the Center for Human Rights and Humanitarian Law, and the Program of Law and Government, to moderate this panel today, especially as it is intended to be a tribute to our colleague and friend, Herman Schwartz.

And I especially appreciate that we see amongst you many people who have worked with Herman in so many different areas, and particularly people who I met through Herman, or actually who I met Herman through, some of you.

It's a really very interesting and happy occasion, I believe, to do this tribute to Herman. And not only has he been a wonderful colleague here at WCL, but when I was at Human Rights Watch, he helped us form and shape our prison project, and later I had the good fortune of sharing with him work at the Board of the Open Society Justice Initiative for several years.

As you know, this is a panel on prison reform, and many of you know that I have some very personal reasons for being interested in prisons, and -- but it's good to be at WCL,

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working on these issues, because there's so much talent, beginning and not ending with Herman, dealing with prison reform in the United States and abroad.

I think that WCL has become a real focal point for advocacy around these issues, and I'd like just to remember that just last night, the Center for Human Rights and Humanitarian Law, and the Academy of Human Rights co-sponsored a panel on the real dire conditions of prisons in Brazil, under President Jair Bolsonaro.

So, I want to say also that I have in my recent term as the special rapporteur for the United Nations on torture, I had occasion to learn, again, about prison conditions and prison reform around the world, and particularly in the United States.

I had lots of approaches by NGOs, and even by families of inmates around the country, and I paid particular attention to issues like solitary confinement, and the extensive use and abuse of solitary confinement in United States

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prisons.

I also had the occasion, with others, of participating in some international law standard setting that resulted in the now called Nelson Mandela Rules, approved in 2015, that is a new name of the UN standard minimum rules on prisoners.

So, as you see, I've been an aficionado of prison reform, but I also feel it is a privilege to be able to moderate a panel of real experts on prison reform, that we are going to hear in a few minutes. And you have the biographies, so I'll introduce them in the order in which I -- we've decided that they will speak.

And Professor William Hellerstein, who was a professor of law emeritus at Brooklyn Law School, will talk to us about his experiences with Herman in the seminal case of the Attica Prison in upstate New York. And I think you know what came out of that, and for many years has represented an important career in -- on prison reform.

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Professor Hellerstein is the author of numerous articles on criminal law and prisoners' rights, including prison conditions in Jamaica, a study that he wrote for Human Rights Watch.

After Professor Hellerstein, our own Professor Brenda Smith, who is a Senior Associate Dean here at the Washington College of Law, will follow. I want to focus, particularly, on the fact that she is a director of the project on addressing prison rape, and in that same vein, she was appointed by, at that time minority leader, Nancy Pelosi to be a member of the National Prison Rape Elimination Commission.

And then, in third place, Professor Deborah LaBelle, is going to speak to us. She is a member of the ACLU of Michigan, and a very active advocate and lawyer, who even yesterday argued a case in court on these issues.

She is a director of the Juvenile Life Without Parole Initiative at the ACLU of Michigan, and the author of Basic Decency, Protecting the Human Rights of Children, and of

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Ensuring Rights for All, Realizing Human Rights for Prisoners in Bringing Human Rights Home. With that, I will ask Professor Hellerstein to begin.

PROFESSOR HELLERSTEIN: I am deeply honored, and is a great pleasure to be here.

UNIDENTIFIED SPEAKER: Can you key your mic?

MR. MENDEZ: Press the button.

PROFESSOR HELLERSTEIN: Oh. I'm very honored, and it's a great pleasure to be here, to speak about my dearest friend and comrade in arms, Herman. I would say that the title, if I had to give a title to my talk, would be Herman Schwartz, Scholar Pioneer of Prisoners' Rights.

How does one measure the impact of a single person on a revolution? And it is a revolution of sorts. Herman Schwartz was a pioneer in the earliest days, and we have known each other for over 50 years as a result. He was one of the early few who engaged in prisoners' rights in the state of New York, when nobody was doing it, and even before the Attica uprising of

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September 1971, he was already representing inmates around the state, and arguing cases.

He also was developing a project at the NYCLU, on prisoners' rights. At the same time, another wonderful lawyer named Phil Hershop (phonetic) in Virginia, was doing the same for prisoners, and I think when Aryeh Neier became head of the ACLU, the National Prison Project was born in 1972, the merger of Herman's New York work, and Phil's work in Virginia. And what the work of the National Prison Project of the ACLU has been, is monumental.

The year before that National Prison Project was established, I had the idea in New York. I was that time head of the Criminal Appeals Bureau for the Legal Aid Society of New York, and sought funding for our own prisoners' rights project. The funding came from the federal government, and it became effective September 1, 1971, just a few days before Attica.

When Attica broke out on September 9, Herman heard it on the radio, and he immediately

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contacted the Deputy Commissioner of New York State Corrections, Walter Dunbar, offering his services. They were not immediately received. He also left a business card with Commissioner Oswald, saying that, if he can be of any help.

Commissioner Oswald, knowing Herman to be a person of talent and commitment, eventually decided to let Herman actually participate in the early days, by transmitting the requests of the prisoners. He also was eventually on the panel of a very large panel, having negotiations with the inmates, but that all came to a tragic end when Governor Rockefeller decided it was time to do some shooting.

On the morning of the 13th, I was sitting in my office, hearing that after retaking of the prison was ongoing, and I decided since so many of the people at Attica are appellate clients, whose briefs on appeal we were writing, that there was certainly going to be brutality, and God knows what.

And so, I dragooned a couple of my

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young lawyers, and hopped on a plane to Buffalo, and went to the Buffalo Law School, where I met Herman. And we were trying to figure out what to do. How do you get into a prison that's under siege, where there's been, obviously, a lot of bad things going on?

And we decided to, in Herman's house, to seek a preliminary injunction or a restraining order from Judge Curtin, a federal judge whom Herman knew well. So, we went, as I remember, at midnight to Judge Curtin's house. He even opened a six pack and said, what's your case?

Well, we hadn't been able to talk to any inmates, so what our case was, was in what we thought was happening. Curtin ordered us into the prison, and so I, with a bunch of hippie doctors and my lawyers, headed for the prison on a rainy morning, got to the prison door with the Judge's order having -- because he'd called ahead to the prison, but they wouldn't let us in.

I called Judge Curtin at home, at about 5:00 a.m. in the morning, and there were no cell

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phones then, I was standing in a booth, and he was very upset, but he said there was nothing he could do, we would assemble in the morning, in his courtroom, and see where things were. We could not make the case that morning.

Couple of days later, one of the national guardsmen who took part in retaking, came forward with horrendous stories. And so, he, Judge Curtin, reopened the hearing, and Herman and I, and other lawyers, conducted a full evidentiary hearing into brutality, and other acts, interrogations, what have you.

After several days of testimony, Judge Curtin ruled against us in a very extensive opinion, essentially saying we had proved our case, but that it was over, and that they weren't doing it anymore. We were not happy with that.

I took -- we took an appeal to the Second Circuit, and -- which I argued, and the Circuit reversed Judge Curtin, holding that even though it was over, an injunction should issue against brutality and other acts of cruelty,

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which was sort of a landmark ruling, because you don't usually get an injunction for something the court says is already over.

And that's where Herman's friendship and our life in prisoners' rights struggle began. Herman's work, as I said, had begun earlier. He had already won a Second Circuit case with regard to medical care in prison, so he was becoming quite the man about town in prisoners' rights.

So much so that in 1975, Governor Hugh Carey nominated him to be chairman of the State Corrections Commission, which is an oversight board. Well, that made the sheriffs and other law enforcement officials very unhappy, because he wasn't just a member of the board, he was chairman, and I think Hugh Carey knew, and the sheriffs knew that Herman doesn't just hang around when he does something, so he didn't make it out of the Senate.

And I remember he told me that when we were in Aruba, my wife and I, you know, it was a very bad piece of news. So, not having done

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that, Herman continued his work in prisoners' rights, and we remained in touch. How do you figure what Herman's work contributed to?

Well, those were amazing years, and Herman, as has already been mentioned, had argued several cases in the Supreme Court, involving prisoners' rights, and the revolution began. I thought I would just take a few minutes to encapsulate 50 years of Supreme Court movement, to lay a foundation.

As you recall, the Warren Court was a great court, from my perspective. It created a criminal procedure revolution, recognizing the rights of criminal defendants, but it didn't do much. It wasn't asked to do much in prisoners' rights, because it was early.

It held a ruling involving racist segregation, and outlawed it, and access to the court case. In fact, I remember one of my own students, in his evaluation, said, someone should tell Professor Hellerstein, Earl Warren is dead. Well, yeah, he is, but he lives in my heart.

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Anyway, the Burger Court began on October 1969, before Attica. We all know what the Burger Court meant for prisoners' rights. Warren Burger was conservative, as you know, it was Nixon's appointment and his attack on the Warren Court. The early years of the Burger Court were promising.

They came down with decisions of increasing prisoner access to the courts, some modicum of protections with regard to not having to exhaust state and administrative remedies to bring suits under the Federal Civil Rights Act. And so, we were getting pretty excited that there was something going on.

Also, the Chief Justice had also written an article in the American Bar Association Journal, talking about the bad state of prisons and the need for -- so, we thought that was a new constitution, his article, when he gave it in the journal.

So, we didn't know what to make of it, but we kept litigating, and we had a few good

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years. I think -- I've tried to figure out why the Burger Court was beginning to pay attention to the claims of prisoners. I think Attica had something very central to do with it, because of what the Attica retaking exposed, both the cruelty of the retaking itself, and of the conditions that the inmates at Attica were contesting, and seeking remedies for.

However, the silk purse was turning into a, sort of, a sow's ear, because starting out 1975, there was a push back in the Burger Court, and they were beginning to pull back on prison disciplinary matters, with regard to whether you transfer somebody from a medium back to a maximum, which is a big difference in a prisoner's life, what kind of due process should you get.

If he's been falsely accused of say, being a prison union leader, should he have a hearing? And the court still held, no, that transfer from one to the other should be left to the discretion of the prison system. So, things

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were turning a little sour.

In 1979, in a case that I'm responsible for, and I am not proud about it, the Bell v. Wolfish, the court seemed to lay down a major setback in with regard to the total conditions of the prison.

Now, I am responsible for, because it was our office, and we won in the District Court, and won in the Circuit Court. They found that the conditions, guess where, in the MCC, the Manhattan Correctional facility, which Aaron Lee Epstein just decided to off himself.

But this is was a very new prison back in 1975, when we brought the case, and I should say brought is not the right word, I didn't bring it. The judge called me on the phone at our Christmas party and said, Rabbi Wolfish is complaining about treatment in the MCC, and he's filed a complaint, and I want you to do the case.

And I knew then, if we won the case, it would go to the Supreme Court, and they would say, uh-uh-uh. These inmates are staying a

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little better than some of the motels that I've been in in my life, in the 60s.

Anyway, the case got to the Supreme Court, and the court really -- we've -- you know, it was a landmark against condition litigation, but it didn't turn out that way, because the distinctual, in my mind, because the MCC, then, was a new facility. It's not so new now, and it's got lots of problems, but.

So, the Burger Court did not close off spigot for prison conditions litigation in places where things were pretty bad, so I would characterize the Burger Court years as, the good, the bad, and not all that ugly.

Ugly came with William H. Rehnquist. That was ugly. But we knew that when he was Associate Justice, because he never met a prison -- prisoners' right that didn't exist. Now, as Chief Justice, with the change in the court's composition, and as the, you know, the ascension of Antonin Scalia, a dynamic duo in the opposite way, the Rehnquist Court set out really,

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to turn things back with regards to freedom of speech and religion, due process for prisoners, access to the courts, and prison conditions.

So, case after case took a negative turn. Justice Scalia, in Lewis v. Casey said, what? The Burger Court's decision on law libraries for inmates; hmm. No inmate has a right to a law library. If he has no access to books, he has to show a definite injury by not having access to books. Now, I don't know how you'd do that.

What got worse, with regard to prison conditions, is the court now said, even in a conditions case, which is a systemic situation, not just one person, you have to meet the standard of deliberate indifference. Well, how do you meet the standard of deliberate indifference, if the state hasn't funded the entire prison to take care of medical care, health, of all kinds of things? How do you prove that?

Many of the prison officials I have

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litigated with said, we're glad you're suing us, because if you win, the state will have to fund us. Now, the Supreme Court's saying, well, you still have to prove deliberate indifference. That was a very turn -- a bad turn of events.

So, in a nutshell, prisoners' rights took a considerable step backward, thanks to the Rehnquist Court. In 1996, Congress helped out greatly with the Prison Litigation Reform Act, which made it even more difficult to litigate cases on behalf of prisoners. Signed by none other than William Clinton, as President.

My students, you know, they loved Clinton. I never understood why he signed, you know, the act that curtailed habeas corpus. Left you -- I even have this argument with my wife, and the women -- and women and Bill Clinton are very interesting. I didn't see it, for the things I believed in.

Got to leave those to Walter Roberts Court, where we sit now. Well, thankfully they haven't done all that much bad. They haven't

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nearly -- he did something very, very good. Of course, it was Justice Kennedy wrote the 5/4 decision, in the case called Brown v. Plata.

They affirmed both court rulings, requiring the release of prison populations in the State of California, because the conditions in the entire state were unconstitutional, as found by the courts, causing tremendous harm to inmates' health, mental well-being, et cetera.

And that sort of stands like a flag. We don't know what the Roberts Court is going to do if it gets its hands on more cases. I would not bet the farm that the results would be good. So, that's the prisoners' rights revolution, in a constitutional sense, in a nutshell.

What has it all meant? Herman was a pioneer, and so, was there something that was pioneered? Yes. And I've got friends in the movement who are not happy, they're very negative, very nihilistic. It's, you know, it's all turned against us. Prisoners are not going to get what they should be getting under the

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Constitution. I don't share that view.

I would like things to have been better juridically, but I think my feeling, my takeaway, is it is far different than when Herman and I started, in a number of ways. First of all, it's part of our conversation nationally, there is still substantial law, and the lower courts, federal and state, have shown a willingness to intervene, despite the tide of the law turning.

I also think within the prison systems themselves, as a result of this revolution, which probably is an anti-revolution juridically, corrections in so many places are more professional. You could even say they're bureaucratic.

But there's a different dialogue going on. The kinds of things -- you know, we've come a long way from, the prisoner as a slave of the state, that the Virginia Supreme Court said in Ruffin v. Commonwealth. We've come a long way.

Have we arrived at where we would like to be, at least normalitivly? No. But has it

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been a waste of our efforts? No. My love for Herman, my respect for Herman comes from the days when he was walking around with Ed Corrin, he had law students fighting these fights.

We joined up together, and I'd like to look back on our professional lives together, and all the people who joined on, in ACLU, and all the lawyers and social reformers out there that know it has not been a waste of our time. We have done things, and there are things yet to be done.

The entire conversation in criminal justice is changing. The sensitivity of the courts themselves to evolve through convictions, is part of the picture. That can't be separated from the prisoners' rights revolution. It is a far different world than the one that I looked at coming out of law school in 1962, and existed when Herman and I began our work together in '71.

So, I am grateful for that. I am grateful that I have the honor, and the distinct pleasure of working with one of the greatest

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scholar pioneers that this country has ever seen.
MR. MENDEZ: Thank you, Professor Hellerstein, and I've been told that we can extend this panel a little beyond what the agenda shows, and the coffee break will be moved to 10:45 a.m. So, I'm hoping we'll have quite a bit of time for questions and answers.
I especially like the upbeat tone of the last remarks by Professor Hellerstein, because it gives us and the younger generations a hope that there's a lot of work to be done, but there's a will to do it. So, now I turn to Professor Brenda Smith for her presentation.
PROFESSOR SMITH: Thank you. So, I'm actually going to claim the part of the younger generation, so I'll claim it. I'm honored to have been invited to speak at this symposium on Herman's contributions on the treatment of prisoners.
I'd like to say first, that I actually started my work on prisons at a women's rights organization, the National Women's Law Center.

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While at the law center, I worked closely with the National Prison Project that Herman founded.
I think it's fair to say that when I was at the National Women's Law Center, having come from the DC Public Defenders Service, I was looking for some way to connect the work that I had done on behalf of prisoners at the DC Public Defenders Service, to what was going on from a, I guess, policy level, to the work that was going on behalf of women.
I sought to use the tools that the Center, and those tools that the National Prison Project had developed, to ensure equality and safety for, particularly, disenfranchised group of women; women in prisons and jails.
When I arrived at the National Women's Law Center from the DC Public Defenders Service, I was surprised that the center had actually not staked out a position on women in prison, and in fact, I remember actually convincing Marsha Greenberger and Duffy Campbell that my trips out to the Lorton Minimum Security Annex were really

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not about prisons, but really to try to translate all of the work that we were doing on behalf of women in the community, to this particular group of women.
And I think, as many of you know, whenever you go into a prison, you are transformed. And I have to say, when I went into the Lorton Minimum Security Women's Prison, I was transformed. So, what I found there, was I found women who were actually living in what had been an army barracks, unclassified, with actually no access to legal services, because very few people came out to Lorton to work with the women, they actually came out to talk to the men who were at all of the other facilities.
Women did not have access to the same kinds of educational programs, while men could get a college degree, and participate in any number of apprenticeship programs. Women could barely get a GED, and the work that they were permitted to do, was cleaning up the prison, and sewing uniforms for the men's industries.

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They had few visits. Most people went to visit the men, and many of these women lost custody of their children while they were in custody. During the time that I was working at the prison, I, again, talking about transformation, a woman came to me and asked if I could assist her in obtaining a termination of a pregnancy.
She had actually been incarcerated at the Minimum Security Annex for well over two years, and so she conceived while she was in custody, and again, part of that transformation.
So, let's move it back to where I was working, which was at the National Women's Law Center. And so, the work that I did in order to address the situation that I found in that prison, had to be framed in ways that were congruent with the Center's equality lens.
And so, looking at Title IX, around access to educational and vocational opportunities, the 14th Amendment, equal protection, Title VII. And so, as a very young

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lawyer, 29, I wasn't sure that that lens fit, but I have to say that it actually built on a long discourse of early feminists who challenged the treatment of women in custody, their conditions in confinement, the inequality for women -- of women's prisons, and the treatment of women workers, the length of access to appropriate services and opportunities, and the victimization and exploitation of girls and women in custody, by male staff.

Going back to New York, actually, in fact the first women -- the first prisons for women in New York were created because of the beating death of a woman called Rachel Wealth -- Welch, in 1825. She was a pregnant woman, who had conceived while she was in custody.

Rachel Welch's death led to separate prisons run by female matrons, but still baked inequality into the prison system for women, where the early matrons were primarily female, but control of women's prisons still rested primarily with male legislators, wardens, and

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governors.

That reality continues today. Because the 14th Amendment, equal protection doctrine, that looks at whether men and women are similarly situated, women can, and still do, receive less and different educational, vocational, work, and institutional opportunities than male prisoners, because of their smaller population numbers, their gender, and their perceived preferences viewed through the lens of domesticity.

So, while men receive college degrees, in still poor facilities, women still can barely get a GED while in custody, but they can receive parenting programs, and programs that teach them to sew and cook, still.

So, while still in facilities that are dangerous, and dirty, and constitutionally deficient, men do have some access to apprenticeships and work opportunities in and outside of prison, because of these perceived differences between them and women.

What this does mean, in practice, is

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that men have access to programs and services that can often reduce their time in custody, and improve their opportunities once released. On the other hand, women still, by and large, are undereducated and under occupied while they are in custody.

This inequality has serious consequences. Longer time, and I argue, increased vulnerability to exploitation and victimization. As a result, women endure unconstitutional conditions of confinement that include trading sex for sanitary supplies, being observed and searched by male officers, still conceiving in custody and delivering in shackles.

These are facts for women in custody that required federal legislation to resolve. So, in 2019, not in 1969, '79, '89, or 1999, 2019, the First Step Act passed, ending the shackling of pregnant women in federal prisons, and requiring the provision of sanitary supplies, again, in federal prisons, not in state and local prisons.

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And in fact, in Tuckwiller (phonetic), which was actually sort of the space for Dothard v. Rawlinson, which allowed women to supervise men in custody. Providing sanitary supplies was actually a piece of a settlement that was reached in the last three years, so again, talking about how inequality breeds poor conditions for women in custody.

Promising work in this space, has been the abundance of litigation, some of which I and my co-panelists, Deb LaBelle, participated in. Both damages and injunctive relief cases, including Women Prisoners v. DC, a decades long piece of litigation I was involved in on behalf of 700 or so DC women prisoners, which addressed sexual abuse in custody, education, medical care, work, and vocational opportunities.

I also shout out the work of Deb in Glover v. Johnson. A case -- a damages case, where Deb achieved a $100 million damage award on behalf of women in Michigan's prisons, for similar content that I sued about in DC.

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I think also, what Deb is going to talk about, which I also found really important, and also, I think that Juan, you've been such a leader in this area, is the use of human rights bodies, shining a light on this treatment in the U.S., which is supposed to be a beacon of progressive values, or at least it used to be, right?

And this work before the American -- before the Inter-American Commission on Human Rights, and the UN Committee Against Torture, to name and shame with regard to the sexual abuse of women in custody, the shackling of women during labor and delivery.

I also think that the passage of the Prison Rape Elimination Act, which created a national set of standards, data collection, and gave life to movements that had been long stymied, including the idea of ongoing oversight, which Professor Hellerstein talked about, of custodial institutions, federal engagement, ensuring minimum standards for the treatment of

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people in state facilities, standards, and also raising the age of criminal culpability, and efforts to remove youth from adult prisons and jails is, again, something that's very promising, but is something that we will continue to have to fight for.

I also think that another important outcome of Herman's work, has been the expansion of the idea of vulnerability, to include not just women, but also men, boys, and sexual minorities.

I also think that the work that we need to do as well, is to rethink the ideas about predation and power, and the role that custodial settings, whether they are transport, prison, jail, immigration detention facilities, and military play in seeding that vulnerability.

So, finally, I thank you, Herman, for much of the institution building, for the theory creating that you started and that you are continuing to inspire in this area, and I am grateful, as well as I know other panelists are for your significant contributions in this area.

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MR. MENDEZ: Thank you very much, Professor Smith. And now, we turn to Attorney Deborah LaBelle.

PROFESSOR LABELLE: Before I start, I actually have to exorcise a really bad flashback that Professor Hellerstein evoked in me, and it was arguing one of my early cases in front of the U.S. Supreme Court, where Justice Rehnquist was chief, and in response to an inquiry, unused, about the PLRA, and the low cost of compensation for attorneys to do these cases, which was part of the desire to turn off the spigot of advocates working on this.

I mused that I simply didn't understand why the Court would not want to compensate people who were defending the U.S. Constitution for incarcerated citizens less than corporate raiders, at which point Justice Rehnquist got up and left the bench, which was apparently somewhat unheard-of, for my smart ass remark, apparently. And though later they said he was having back problems, but that evoked that memory. In future

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appearances, I was a little more discreet and thoughtful.

But I really do want to thank American University for -- actually, I feel it's a great honor to say, and that I'm on this panel, to recognize some of my work, in trying to integrate reform on behalf -- in prisons, and human rights work is fulfilling any of the legacy, the great legacy and footsteps of the person we're here to honor.

And I'm touched by it. And I hope my work does a little bit of credit to his amazing legacy, which we all, in the advocacy community, rely on constantly to this day. I was going to give a little more academic talk, but then yesterday, as Juan mentioned, I was in court, arguing a case on -- and part of the case that's heading to trial, the class of youth, young boys, in adult prisons, subject to solitary confinement and sexual abuse.

And so, the issue that we were talking about, was that the State of Michigan had filed a

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motion in limine, trying to preclude us from using the word children in the trial, and that we couldn't mention the word children, because they were tried as adults, or they were convicts, or there were inmates, or they were prisoners, and they actually moved to forbid us from using the word child.

And it brought back the whole reason that some of this work is crucial to use a human rights lens. So, the language is important. And so, we're talking about the, you know, the ICCQI, were talking about, you know, the convention and the rights of the children, we're talking about the Mandela rules, we're talking about that these are children.

And in fact, the whole case centers on the failure of the State to recognize their status as children, and to treat them in accordance with that status. And, you know, we are now -- we morphed into a deep human rights argument in front of a state court judge.

And part of us -- I mean, what's so

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important about the value of incorporating international law treaties, and documents in our domestic work, and those of us who work on prison reform, and on behalf of people who have been marginalized, we're often advocating legal positions that stand on the fine age of danger in the first place.

And so, sometimes when we say, well, how can you even argue more tenuous law and application of human rights law, when you barely have a constitutional basis to argue this, and the point, in some ways, is, exactly.

That part of it is, but part of it is about the value added by documentation, by language, by remedies, and by reminding courts and judges about the inherent dignity of people based upon their humanity.

Their human status, not where they're at, not who they are, but except for their humanity and their human status. And it especially matters, the language, not just in courts, because we don't talk about -- if we talk

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about prisoner rights, we've already diminished it just by that phraseology, prisoner rights.

No, we're talking about the human rights of people wherever they may be. They may be in immigration detention, they may be in prisons, they may be in jails, they may be in lockups, they may be in universities. Wherever they are, you cannot diminish and degrade them by the phraseology of making their status lesser than human.

And so, not only does it matter in the courts, but it matters to my clients. When -- you can talk due process, you can talk all sorts of things, but it doesn't resonate in a way that when you're talking to people who are deeply marginalized, and in quiet prisons where bad things happen, because bad things always happen when you do it behind closed places, where no one sees them, and you do it to people who you view of shame that are unworthy.

And so, you don't have a great group coming forward to defend. That's where really

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bad things always happen. And so, for them to say, no, I have an inherent right to dignity because of my human status, that is a powerful tool of hope inside. It's deeply powerful.

The Mandela rules, which I always send in to the people I represent. It's to say, no, there are standards here that are being breached. There are people around the world who recognize you have certain rights.

And one of the -- I do want to talk about how, a very positive thing, about how important human rights work, and framing it in this way, in the context of people in detention has been -- actually, I want to tell an amazing success story here, because I think if we're going to move forward on this, that it has to be an essential component of what we do.

And the -- I want to talk about youth in detention, which has to be -- children in detention has to be the most diminished in terms of rights. First, we don't have rights for children. You know, we haven't -- in our

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domestic -- children don't have rights. I mean, we don't have a body of law for them.

We have in divorce proceedings certain things about what's in their best interest and that, but we do not have a body of law for children's rights. And if you put children in detention, and treat them as adults, which is this bizarre transmogrification that they want to do to children, you know.

I mean, the supreme court even refused to do that in the Humvee cases, saying, you can't take someone who is a U.S. citizen, and just by their acts, transform them into a foreign terrorist that doesn't have rights in the United States.

They said, no, they're still a U.S. citizen, whatever they did. But for children, whatever they do, the courts want to transform them into adults, by what they did, which of course is deeply disturbing, and what has been the feeder program for our prisons in this country, where I think everyone knows where 25

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percent of the population of prisons, although 5 percent of the world's population.

We keep feeding them in, and the feeder are children. Young children, and mostly children of color. So, what -- they're the most deeply impacted, and the least able to reach out. They don't have attorneys, they don't have resources, their families are often not in a situation to reach out.

So, one of the things that many of us did about 10 years ago, is we sat down with these issues. And I was actually a senior Sorrels Fellow at the time, and there were other folks there, Brian Stephenson, Kim Crenshaw, there were thinkers, there were -- what do we do about children, and what we do about this process?

And one of the concepts at that time was, we would take the most horrible punishment of children, that was -- Roper was on the horizon to get rid of the death penalty, but we would take children who the large numbers who had committed homicides, and we would get the Supreme

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Court to recognize that they were children. Children, children, children.

And we would follow it by a human rights framework. And so, we took this on. First, we went to ACLU, Human Rights Watch, and Amnesty, who for the first time that a giant documentation report. They usually fund each other a little bit for funding.

But they got together, and they did The Rest of Our Lives, which was a documentation report on children serving life without possibility of parole in American prisons. And no other country had been doing it at that time, except Somalia, and they really didn't have a government to get rid of it, but so -- you know, we were incredibly exceptional.

So, we said, okay, first we had the documentation. Thousands of children, because no one had ever documented this before. And then, we went to the international bodies. We went to -- you know, we started engaging the International Covenant on Civil and Political

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Rights, we started putting in questions, we made it an issue thing.

The convention on the rights of the child forbids this, the ICCPR forbids it. And when we started to urge that these -- really that the UN bodies address it. So, the United Nations Human Rights Committee addressed this issue as part of their observations. Then the Committee Against Torture included this issue in their recommendations on U.S. compliance.

Then the Committee on Elimination of Racial Discrimination addressed it with SIR, saying it -- because it was just disproportionately children of color. Then we -- the human rights -- U.S. Human Rights Network did a whole report called, Children in Conflict of the Law and addressed it.

And we took it to the Inter-American Commission. While -- which it pains me to say, has now had it for seven years, without a report, but that's a whole other issue, but many of you know in this body here.

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And then, we decided to work toward the -- to the Supreme Court, and we worked together to bring the first case, which is Grant v. Florida in 2010, and what's so important about Gran, what's so important, is that in the opinion, in the opinion, because the Amicus briefs were deeply based on human rights analysis and remedies, in the opinion, the court itself started to quote -- and it's one of the few cases, of course, that the court has adopted language referencing the international treaties and bodies, and in doing so, the court said, there is support for our conclusion.

And the conclusion was that life without the possibility of parole for children, in this case that did not commit homicide crimes, was unconstitutional. They said, "there is support for conclusion in the fact that continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.

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"Today, we continue the long-standing practice in building global consensus." It's not long-standing practice; I don't know, but "global consensus against the sentencing practice in question. We note that as the petitioner and the Amici emphasize, Article 37 A in the United States convention, on the rights of the child, ratified by every nation except the United States and Somalia, prohibits the imposition of life in prison without possibility of release, for offenses committed by persons under the age of 18.

"As we concluded in Roper, the United States now stands alone in the world, and has turned its face against life without parole for juvenile non-homicide offenders."

So, this was, for us, a big win, that we framed it this way, that the court heard it, and that the court, it added to not wanting to be exceptional.

But the language in this, if you'd note, is juveniles persons, we weren't there yet.

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We were not there yet. And so, we went, in the Miller case, Miller v. Alabama, which was two years later only, which is pretty amazing in terms of the trajectory.

The court took about two years after, to abolish life without possibility of parole for children across -- who had committed any crimes, including homicide crimes. And in that case, I wasn't at the argument, but I remember the person who was there, who argued it, coming out and saying, we've won.

And I said, are you sure? And they said, everyone but Scalia, Yu, and Thomas, of course, because he didn't speak, but used the word children, and they used the word children 40 times in that opinion. There were no more juveniles, there were no more inmates, there were no more convicts, there were only children.

And we did win, although there's a nasty footnote by Scalia about -- Justice Scalia, about how, how could people call murderers children? And -- but that was from beginning to

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end, and it was 10 years. It was a 10-year effort.

But to take this -- to make the recognition of children and the human rights, that they're entitled to be treated consistent with their status as children, was because of the human rights frame, because of working with all the advocates on this one way to go forward.

And there's still a lot to do, but now we have a body of case law that allows us to talk about children. Why should children be in adult courts at all? Why should children be in any adult prisons? Why should this be happening, when it's contrary to any concept of how we treat our children in this world? And it's exceptional.

I would note one -- you know, I think it's very positive. I think it's encouraging. I would note one caveat. We argued in the cases, and in Montgomery, which was a decision by Justice Sotomayor, who carried on the decision about against life without parole, and added to

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the fact that this should not be done.
We argued from mental health. We argued -- we had briefs from doctors, talking about brain science, what all of us as parents know anyways, that our children are not ready for prime time prior to the age of 18, and they're impulsive, and all of that sort of thing.
We had business community briefs, we had faith briefs, we had victim's families briefs, we had race, a deep race by LDF put in, and the only thing that our Supreme Court would not touch, was race. Everything else was there.
Class, economic problems, failure to have good counsel, because they all had assigned counsel, awful, you know, community upbringing, failure of the social services to intervene in abuse situations. Everything was there, and completely silent on the fact that's deeply in our, certainly in our juvenile justice system, for youth, which is a disproportionate impact on children of color.
So, we still have a ways to go, and you

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know, with regard to we have got there for children, but I think that we have to push our courts into the other inequities that fill -- result in filling our detention facilities, and our prisons.
But I'm heartened, and again, and I thank our honoree for giving us the spot to merge these two concepts on -- and pull them together to move forward the law. Thank you.
MR. MENDEZ: Thank all three of you for wonderful presentations, and for the hopeful tone of them. Also, for keeping to the time allocated, which gives us a chance for having questions and answers. Questions from the audience, and answers from you all, in the next maybe 20 minutes or so.
I assume that we have a microphone that we can circulate? Or maybe not. Anyway, I would appreciate it if you identify yourself as you ask your question or make your comment. The floor is open. Please.
AUDIENCE: I'm (inaudible), and I have

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a question about -- you remember, President Obama, at the end of his term, tried to say that prisons under federal authority could no longer be private, and as soon Trump came in, he said, no, we're going to have private prisons, where -- so, can you comment on private prisons, indeed, how much worse are they than public prisons? Thank you.
PROFESSOR HELLERSTEIN: I've always been of the view that private prisons are totally unacceptable. They operate on a single line, profit, and when that's all you care about, you don't care about much else. And I've not had any personal experience with private prisons, because the New York system doesn't have them, but I've -- I'm aware of my friends who do, and just what's out there, and it's not a good thing.
It never should've started. It doesn't -- it raises constitutional issues, but it raises human issues. You know, here we fought all these years to professionalize -- to attempt to professionalize prisons run by state

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officials, and as you heard in my remarks, some people disagree, I think we made some progress.
There is a greater sensitivity. In various places, they're doing it the right way. Prison officials sometimes consult with prisoners' rights organizations before they do some things. Not often, but the dialogue has changed depending on what state you're in, what locality you're in.
I don't think that exists at all in the private prison system. I find it abhorrent. I have never heard anyone say that, look at our private prison system, that we're got here -- it's been amazing you have it. It is not. So, the sooner it leaves, totally the better.
PROFESSOR LABELLE: I would just add, being from Michigan, and where they do have them, or had them, think they are on a lane, frankly, with Supreme Court decisions that held them to the same standards from the state.
PROFESSOR HELLERSTEIN: Right.
PROFESSOR LABELLE: And so the wahoo,

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we can get away with all of this, and it is, and they were, but they've been hit very hard with damages, and -- which is the only thing they care about, money. So, I think that -- I don't think -- I think that trend is against.

MR. MENDEZ: Mr. Cam.

MR. CAM: Yes, your comment on the University's in the District of Columbia --

(Crosstalk)

MR. CAM: And how would you -- how would you recommend that we in clinical programs increase awareness and amplify the voices of the kids who were being subjected to this?

MR. MENDEZ: The question was, for those who couldn't hear, how our panelists would recommend using the clinical programs of law schools to foster these principles that we've been talking about, if I understood you correctly.

MR. CAM: Correct.

PROFESSOR SMITH: Being a clinician -- thanks for the softball bit. I think that the

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answer is to actually have these clinics, and to support them. I also think that these clinics need to be more than one semester clinics, because as you can tell from those of us who have been doing this work, these are not cases that are resolved in a semester.

These are cases that are long-standing, and that require a long-term commitment over many years, sometimes decades, and in fact some of the most important prison litigation has come out of the contributions of law school clinical programs.

But it's also very hard. Many clinics, you know, do not have the benefit of being on hard money, they are funded by grants, and so I'm looking over in this area, which I suspect has some funders in it somewhere.

And so, I would suggest that the importance of funding this work is also really key to that, not only in terms of its longevity and its durability, but also building the cadre of lawyers who are going to go ahead and continue

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this work, and sort of dream these different ideas, and come up with different mechanisms in order to address this inequality.

MR. CAM: Are there partnerships with client groups that could be formed, that you would suggest?

PROFESSOR SMITH: Absolutely. I mean, I think that, you know, one of the key features of the clinical education is being client centered. You know, that we don't -- we bring the cases, but the cases are those of the clients, in terms of being client centered.

And there's amazing work that's going on, not only in conditions clinics, but also, for example, going on in reentry clinics, going on in entrepreneurship clinics as well. And so, this issue of human rights, and actually civil and political rights, restoring the vote, giving people access to being able to get business licenses, and get their life back is also important.

And so, I'd argue that the issue of

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prisons is actually quite present in every aspect of our clinical programs, in all of those -- in all of those clinics, so thank you for the question.

MR. MENDEZ: Stand up.

PROFESSOR LABELLE: If I could respond from the other perspective. We have -- I'm in Ann Arbor, the University of Michigan, there's also Lane State Law School, and we have students deeply embedded, not just in our firm, that we have created cohorts, so -- or groups, so that we have someone from the school social work, someone from the school public health, someone from the clinic of law program, and information technology working as one core group with -- we do the oversight through the clinical law, in terms of some of the cases we're doing, because -- and we're adding a journalism student, because media's so important.

And it is -- works really good, not only in our firm, but there have been, of late, many of the firms, like OTC in DC and New York,

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we have Latham, we have Cleary, all of the blue stocking firms want to commit, especially to the issues of -- they like children in detention, and so it sells better for them, and so they have committed big pro bono resources.

And what's been helpful to the clinical law programs, is to also embed for the summer, the clinical students within those law firms, so it allows to carry on beyond the semester.

PROFESSOR SMITH: Right.

PROFESSOR LABELLE: So, there are creative ways to do it, and it is so important and so useful for us, and I think for the students.

MR. MENDEZ: Professor, I understand you want to comment on that?

PROFESSOR HELLERSTEIN: I'd be glad to comment on it. I'm grand devotee of clinical education, of the point of view of the student, as well as whatever segment of the population has sought to being helped. At my law school, I created a second local clinic, which is a non-DNA

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innocence project.

And the students who have worked with me, not only have been incredible, but who have been in evaluation said, if I took nothing else in law school, this was worth the price. If it's worth the price, from the point of view of the law student, and I've seen it in a number of contexts in my career, having run a large law office (inaudible).

For seven years I was pro bono counsel for the Proskauer firm in New York, and had the delightful opportunity of using the millions of big law to litigate prison cases. Litigated at statewide deprivation by our prison system in New York, of the services for the hearing of disabled and deaf.

Inmates got a statewide settlement, despite the strong opposition of our least desirable Attorney General at the time, Dennis Vacco. So, to me, there was nothing -- I'm well aware of the battles that engaged, of the academic community against clinical education in

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the early years, a dreadful mistake.

Clinical education is here to stay. It not only serves to marry students to the problems of the world in all contexts, it gives them a (inaudible). This was also true of the Proskauer firm, where I -- you know, you can have six to seven-year associates at the big firms, they have never argued a motion, they have never had a deposition. They have done bupkis, as we would say.

They've worked, you know, 9,000 hours a week, lost their wives, you know, but they've never done anything in their department, except when they've worked for me on prisoners' rights cases, and they couldn't wait.

And we had an arrangement with the Southern district. We would take all the prisoners' rights cases on the docket there, we could handle, and that changed their lives. They were cross-examining, they were writing motions, they were arguing temporary this, temporary that, they felt like lawyers.

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So, clinical education is tremendous in so many ways, and I've learned that young people have very important things to say to the alpha (inaudible) like me who are litigating, because our view, like Earl Warren, is dead. They have different perspectives. They're also much better at technological stuff. So, is the pleasure from all -- all various sources, that any law school that doesn't commit fully to the most extensive clinical program it can have, is making a grievous mistake.

MR. MENDEZ: Thank you. I have -- I think we have time for one question and your answers. Professor Shaluck (phonetic)?

MS. SHALUCK: Thank you all, and this is really more in the nature of a comment, inviting all of your thoughts about this, because I'd like to go back to Professor Hellerstein's discussion of referencing of Herman's contribution, because that's what -- one of the things we're here to think about today.

And so, all of your remarks, as well as

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the questions so far, go to what it is that early work that Herman and others generated, and you talked about making this topic a focus of our inquiry, making the people in prison, and who they are in their complexity, visible to us.

To thinking about them as people with rights. To thinking about human rights, and civil rights, and rights to basic necessities of life, and just how important Herman was in creating that vision of who, and it's who we are as advocates, as scholars, as members of faculties, as public intellectuals.

And so, Herman, I hope, one of the messages that comes out of today, is just how critical Herman's creation of that vision, and not just the cases he won, or the places he went, or the things he did, but all of that had transformed all of us.

When Professor Smith spoke, and spoke of her early work, going out to Lorton Prison, I had just begun here at the Washington College of Law, starting a women in the law program, and one

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of the things Brenda did, was say, come out to Lorton.

PROFESSOR SMITH: It's true.

MS. SHALUCK: Talk to the inmates about what you're doing in the women in the law clinic. Talk about custody, and children, and visitation with children, and how critical that was to the lives of the women in prison. Well, that kind of activity was generated by what Herman did, as Professor Hellerstein did. One of the thing -- first thing you wanted, and had to do, was get into the prison.

And that's what Professor Smith was doing. She was getting us into the prison to see what was actually happening there. So, I don't know, maybe this is -- I'm just trying to give the panelists another opportunity to think about your own work, and maybe people in the audience, of what it -- how much of a debt we owe to the people who created this for all of us.

MR. MENDEZ: Thank you, Professor Shaluck. We actually have to close at -- in

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three minutes, so rather at 10:45 as I had thought, so I'm going to ask the panelists to react to Professor Shaluck's comments, in whatever order.

PROFESSOR LABELLE: Well, I think that, for me, it's very clear, and actually hearing this talk, I started law clerking at the firm Goodman, Eden & Miller & Goshen in Detroit. Annie Goodman, was also involved later on in the Attica cases.

And so, I learned about Mr. Schwartz's work early on. He was at light speed already, passing into the Midwest, and then of course, and doing my work for (inaudible), and deeply involved in looking at the melding of human rights and work with people in detention, and discussing both his cases and your writings.

So, it permeated all of it, and it was a great, you know -- many steps. We had as many steps further down the road that we didn't have to travel, that was already a path, it was already carved out, so I thank you for that.

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PROFESSOR HELLERSTEIN: Well, I just thought of this. Herman was a role model for me in a very technical sense, and I just realized this, but early on in our work with he could write his first draft, was always the best. I mean, he didn't have to do more than one.

I so him do it on airplanes, I saw him, you know, do it while we were sitting together, and I said to myself, why do I have to do seven, or eight, and nine drafts. And I said, maybe this -- and I just remembered that now, and I'd ask Herman, and he gets it, and he's taken a lot more than I can do, because he's got three cases going, and I'm still slogging through one brief.

But you know, what Herman has done is really immeasurable, because it's in the atmosphere, both nationally and internationally. But I still remember the days when Herman and Ed Corrin were students, and Norman and still just Herman and two students still just working away, creating doctrine.

You know, there was no law. Ideas

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weren't born then, they still aren't, as you hear -- describe them, and arguing them, and they're always going to be important, but there was Herman with his little briefcase in his office in Buffalo.

You know, just the way he carried himself. He wasn't, you know, a tiger. He wasn't one of the most impressive looking people, but when he started talking, you know, -- I was more aggressive. In fact, he used to call me the Bronx Linebacker in one of his writings, but yeah -- packing the courts, you could look it up. He's got a whole thing on me, the kid from the Bronx, Linebacker.

You know, but I took care of him, and he took care of me, and he took care of a lot of others, but it is like nothing else.

MR. MENDEZ: Professor Smith?

PROFESSOR SMITH: I will tell you the last thing that Herman said to me, which I think sums up Herman's contribution. As I was coming up to do my presentation, he said, give them

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hell. I think that speaks for itself. And Herman, thank you for giving us a template for how to continue to give them hell. Thank you so much.

MR. MENDEZ: All right. Let me ask you to thank our speakers with another round of applause. We're going to go on a 15 minutes coffee break now. Thank you.

PANEL 2

BUILDING A HUMAN RIGHTS COMMUNITY IN ISRAEL: THE IMPACT OF THE NEW ISRAEL FUND HERMAN SCHWARTZ FELLOWSHIP

MS. KADISH: As soon as everyone gets seated, we'll get started. Yes. Good morning everyone. As soon as everyone's seated, we'll get started.

Good morning everyone. It's hot. Good morning, my name is Ruti Kadish, and it's a pleasure to be here, and in honor. And I am fortunate enough -- was fortunate enough to coordinate the New Israel Fund Herman Schwartz Human Rights Fellowship, while I was working at

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the Israel Fund for almost a decade.

And I did not get to work with these wonderful people on this panel, I came around a little bit later, and -- but worked with the last crop of human rights lawyers that came through the New Israel Fund Law Fellowship.

So, I want to say -- so, I'm not going to spend a lot of time introducing the folks on the panel, everyone has the bios, but I want to tell you a little bit about the fellowship, we felt which without Herman none of us -- and none of us would be here, if -- people in the last panel were talking about Herman's influence.

Well, really, without Herman, this would've not have happened, and none of us would be here today. So, it's truly a credit to his vision and drive. And the fellowship was, the way I heard it, was that in 1983, Herman was in Israel on a tour, a study tour, and sought to meet with people who were doing the kind of work he was doing here, and found out there were less than a handful of people doing that.

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I think (inaudible) Galveston was one of them, and I forget who the other person was --

UNIDENTIFIED SPEAKER: Joshua -- I don't know.

MS. KADISH: Less than -- anyway, less than a handful of people, which reminded -- which made Herman -- which gave him that idea, to start a program here that would train you -- in law -- Israeli attorneys, both Palestinian and Jewish attorneys, and who would then go back to Israel, and bring what they learned to Israel, and essentially establish a Human Rights Bar in Israel.

And that is, in fact, what happened over the course of 33 years, starting in 1984. There was sometimes one, sometimes two, at some point two attorneys -- Israeli attorneys (inaudible), at least for the last year, it was always a Palestinian and Jew, would come here, spend a year at WCL studying it, doing an LLM in Human Rights Law, and more importantly, actually, doing the clinical kind of work, and kind of

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doing externships at Washington area NGOs in the different areas of law.

And taking -- learning those skills, seeing sort of the, really, the cutting edge, state-of-the-art NGO kind of work, and then taking it back to Israel in the second year of the fellowship, spending that time at an NGO in Israel, or in the case of some people, creating an NGO in Israel.

And so, that is what the -- it's -- that is what the fellowship did, and it's really, it's -- we are hard-pressed to think of an area law in Israel, of human rights law, civil rights law, that was not impacted by this fellowship over the course of the year, and over 50 graduates, but it's more like 60 graduates.

It's really a testament to Herman's vision of what could be, and in fact, I want to say two more things about -- two thing -- two other things about the fellowship. One, is that it was so successful, that it really organized itself out of a job, because by the time the

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fellowship ended, it was -- we realized that it was no longer necessary, that there was a Human Rights Bar in Israel, that there were, out of a whole range of clinics at the various law schools, the various universities that were continuing to train human rights lawyers, that there were NGOs.

There was a, really, a robust movement and range of NGOs that were also training human rights lawyers, and the fellowship had essentially -- the fellowship was, essentially, no longer necessary. And I know that when -- Herman says that when he first envisioned this program, he thought it would last for 5, 10 years.

Well, it lasted for 33 years, and I think, to a large extent, towards the end, it was because it was such a wonderful program that we were hard-pressed -- it was hard to let go of it, even though it became clear that it really no -- it was so successful, that it was no longer necessary.

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And the other thing I want to say about the fellowship that Innes (phonetic) mentioned, in terms of the externships, is that Herman -- you know, on my conversations with Herman, he said that really, okay -- so, people will come, they will do the LLM, they will do some academic work, but really the important work is the clinical work, is getting the experience at the NGOs, in the externships, and taking that back to Israel, and doing the work -- that kind of work in Israel.

So, that's a little bit about the fund -- the -- I'm sorry, the fellowship, the New Israel Fund Herman Rights -- Herman Schwartz Human Rights fellowship. I know, a long name, but we were (inaudible) to recognize everything in there.

So, what we're going to do this morning, in this panel, is rather than focus, just speak, or we're going to do it in interview style, and we have a set of questions. We'll do two rounds of questions, and then we'll open it

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up to a conversation with everyone here, and we'll close with -- we'll take 10 minutes at the end, to allow panelists to speak personally to Herman.

So, with that, I'll get started. So, in 2004, a little over a decade and a half into the life of the fellowship, there was a wonderful article in Haaretz, which is the equivalent of Israel's -- it's Israel's New York Times, essentially, that credited the work of the law fellows, the returning law fellows, in bringing about it as a, it described it, a quiet revolution.

And the author argued that the fellows were dramatically transforming Israeli jurisprudence, and increasing respect in Israel for a fundamental human rights. I want to start by asking each of the panelists to reflect on their part in this revolution.

So, Tali, I want to start with you. You came to the program as a children's rights advocate, working at the national -- at Israel's

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National Council for the Child. And just a few years after completing the fellowship, you transitioned into the field of restorative justice, and also moved into academia.

And I wanted to ask you, how the fellowship set you on this new trajectory?

MS. GAL: Thanks, Ruti.

UNIDENTIFIED SPEAKER: (Inaudible).

MS. GAL: Yeah, is it working? No?

UNIDENTIFIED SPEAKER: (Inaudible).

MS. GAL: Now?

UNIDENTIFIED SPEAKER: Yes.

MS. GAL: Okay, so thank you Ruti, and we will keep the emotional part to the end, but I just want to say that Herman is one of the only people in the world that can take me from my comfortable place in Haifa, and fly all the way to the United States to talk with you, so it's -- thank you, Herman, and thank you American University for the invitation. I am honored and humbled to be here.

So, to your question. I have been a

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children's rights lawyer. I was working at the National Counsel for the Child, with Tamar Morag, whom you'll hear from soon. She was my mentor and (inaudible), and I was finally accepted to the program, which took me two years I think, to be accepted.

And I convinced the committee that children's rights are human rights. Actually, it was -- oh, shoot. (Inaudible).

(Crosstalk)

MS. GAL: So, Tamar made the way for me to say that children's rights are human rights. But I had another, all similar to path, which was that victim's rights were human rights, because I was working with child victims, escorting them to court, and preparing them to give testimony, and walking with them, and holding their hands, and giving them water, and going with them to (inaudible) every time, their testimony was (inaudible), et cetera.

And I was trying to learn how to promote victim's rights, and child victim's

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rights better, from (inaudible). So, I came to the program. Herman asked me, victim's rights aren't really human rights, are they? I think I convinced them by the end of the year, but we had a lot of discussions.

I went to the constitutional law class with Herman, which was amazing. And I also did internship in -- two internships in two wonderful places. One is the office for victims of crime at the Ministry of Justice, and the other one is a children's advocacy center, which is a one-stop shop for children -- victimized children, and they receive everything throughout their trial.

And what I found during my studies --

MR. YAKIR: (Inaudible).

MS. GAL: Is that better now?

MS. KADISH: Yeah, we'll share this one.

MS. GAL: Yeah, we'll share it. Is that better?

GROUP: Yes.

MS. GAL: So, what I found while I was

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working as an intern, and also during my studies, is that, really, when I look at victim's rights, and when I look at defendant's rights, human rights, because I consider myself -- considered myself, and still do as a human rights activist researcher, sometimes, and very often, they conflict with each other.

And these questions were begging me, of course, were bothering me. So, I came back to Israel, and the year here was amazing, and I wrote a thesis, and I wrote seminars, and it was wonderful. It was different from the LLB, because suddenly I was able to create something, and not only to study passively.

And I had this -- first of all, I got the idea of studying more, just because it was so much fun, so doing a PhD. And the other thing was, that I was looking for something that would not have this conflict between victim's rights and offender's rights.

I heard about restorative justice when I -- while I was here, and I kept learning about

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it, and reading about it, and then I decided to go to do a PhD of restorative justice, focusing on child victims. And I did that later on, a few years later, later in -- at the Australian National University, in Australia, with John Braithwaite, who is the leading criminologist in restorative justice.

But the seeds were planted here, opening my mind to different values, and different human rights, and to studying more deeply than in the first degree, which was great, but different. So, I hope this is answering your question.

MS. KADISH: Thank you. Hasan, I want to turn to you. So, the story I heard from Herman, is that you came here intending to proceed to a PhD, and he had something else entirely in mind. Something more of like, what would become Adalah, the legal center for Arab minority rights in Israel, which you founded when you went back.

And I don't -- I won't ask you to

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confirm that story, but I would like --

MR. YAKIR: But the good news is -- the good news is that Hasan just recently completed his PhD, with a distinction from the (inaudible), from the Faculty of Law, of the Hebrew University, Jerusalem. So, it's -- that's quite a (inaudible). That's quite a few years, between you and me.

MS. KADISH: Now I don't feel so bad. It took me 10. So -- but I do want to reflect on how -- when I ask you to reflect on how the fellowship informed the establishment of Adalah.

MR. YAKIR: Maybe without this.

MS. KADISH: Your voice is (inaudible).

MS. GAL: Go ahead.

MS. KADISH: Speak loudly.

MR. JABAREEN: Is my voice strong without that?

(Crosstalk)

MS. KADISH: No, go. I turned that off. I turned that off.

MR. JABAREEN: Thank you for this

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question, and I am happy to be here. It's really -- it brings back very good nostalgia to see friends that I know them 20 years ago, and we still with some have a great connection. I came here in 1994, 1995.

This year, consider one of the best years, and maybe the best year for any progressive Israeli Jewish person, and Palestinian person. This year was the year of the agreement between Israeli government, Rabin government, and the PLO, something that no one of us imagined before.

And this year was the rise, internationally, of multiculturalism. Those years, the years of the fall of apartheid, after the fall of Berlin Wall, so the optimism is very, very high.

And in Israel, in fact, was just one civil rights organization, the Association for Civil Rights in Israel, ACRI, which is like the ACLU, similar to the ACLU job description here, and before I came, I worked as a lawyer there.

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So, I came here, it was also for the first time for me to come to U.S., and English for me, third language after Arabic and Hebrew, it wasn't easy to begin. It wasn't easy in the beginning, but I knew that I have to be trained to be human rights lawyer, especially that I came from country that there is no heritage of human right lawyering.

There is no heritage. Of course, lawyering, except that experience of ACRI, which was limited to few lawyers at that time. And within that, I said to Herman, in the low schools of Israel, there is not one Palestinian academics.

Maybe I will make my PhD, because in Israel, to be in the law school, you'd be very influential, and they had been very influential, and maybe I can influence the discourse. And then I raise the universal question in human rights, that then this what shape my legal consciousness.

I said, in fact, also, there is no need

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for separate organization, we have ACRI. ACRI is universal, serve Arab and Jews, men and women, right and left, and it's colorblind. Then he said, well, that's in Israel, but our experience show that beside ACLU, we have also NAACP. And we cannot imagine the American civil rights movement today, without NAACP.

So, yes, in the human rights philosophy, we can, and it's important, also, to establish organization based on politics of identity, but not to stuck there. To know that it's empowering, only, to start with that.

And I am going to suggest to you, to do your internship in NAACP. And it's yes, for the first time, I was exposed to a human right organization, or civil right organization that based on identity, ethnic, racial, or any other kind of identity, and yes, with universal perspective.

The establishment based on particular identity, but the work will carry universal perspective. And after that experience, I said,

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in fact, I was exposed for the first time to something like that. We -- I didn't know. We didn't have something.

And he encouraged me to go back, and to establish organization for the Palestinian rights in Israel. And yes, we did that, and the name of the organization, Adelah, the Legal Center for Arabic Minority Rights.

Now, our organization already had, we can say, seven formal fellows of this program. And I have here, also, friends that they support us, like Aryeh Neier that he was the president of OSI, give a support.

And OSI bought our organization in the beginning of 2000s, a few years after the establishment as the flagship human right organization in the Middle East, and we are proud of that. And yes, I think after 20 years, what Herman told me, I think every Israeli human right lawyers, and Palestinian human rights lawyer can say today, that we cannot imagine the human rights movement in Israel, Palestine without that

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(inaudible).

So, it's difficult to say, thank you, Herman, because the facts come usually toward the end of mission. I can say I love you, Herman. I appreciate what you did. And Herman continue with relation with us, and support, and I think we still have, together, to think, and to consult with Herman about the new era that we are facing today, from his experience.

We established, as I said, in the era of Oslo agreement, when we thought that the human right framework is based on the concept of two state solution, meaning West Bank, Gaza is Jerusalem will be best in international humanitarian law, and Israel is separate legal system, based on Israeli constitutionalism, and the incubation is temporarily.

All that I have (inaudible) was saying the incubation will be in that. And he was optimistic. All of us were optimistic at that time. But today, this perspective falls. So, how we can conceptualize our human right

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lawyering by imagining that there is no such solution, and maybe we have to look to all Palestine, Israel (inaudible) West Bank, Gaza is Jerusalem as one entity, and how can speak of constitutional rights and equal rights between, for example, settlers in the West Bank and Palestinian West Bank. Is it possible?

So, we are facing, now, a new agenda, and I am sure that Herman love those challenges, and he is the man who can give good consultation, good advice, good word from his experience. This is why I say we still have time to work with Herman.

MS. KADISH: Thank you, Hasan. We're going to turn now to Tamar. Tamar, are you there on video link?

MS. MORAG: Yes, I'm here. Can you hear me?

MS. KADISH: I can hear you, but I can't see you, so I -- because you're on -- anyway, you're in front of me, but in any event.

MS. MORAG: Oh.

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MS. KADISH: So, Tamar's joining us from Israel. Tamar, you mentioned that the law fellowship was formative in several ways when we talked. I'd love for you to talk a little bit about your experience coming into the fellowship, and how it impacted your work going forward.

MS. MORAG: Sure. When I arrived in Washington, in 1987, I wanted to become child advocate. It actually had been a dream of mine since I was in law school, but when I tried to examine what was favorable in Israel at the time, I found almost nothing.

And my first internship in Washington, which Herman set up for me, was at the Children's Defense Fund, the leading child advocacy organization. I remember my first day there. When I walked into the building and saw the posters on the wall.

Posters that dealt with the campaign that they had at the time, of issues such as child poverty, children in prison, children making a difference. All making a statement

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about children and their interests being as center of our policy.

This was an incredible moment for me, just seeing those posters, because I think that for the first time I thought that maybe child advocacy is a real and legitimate field, and that I was in the right place.

But later on I interned in three other organizations. At the ACLU here in DC, that I think many fellows interned in. I interned at the Street Law Project at Georgetown Law School, and later on in New York at the Children's Rights Project of the ACLU.

Interning or working in these very, very different organizations exposed me, first of all, to a broad range of tools and strategies for social change, and yeah that I admit there are some amazing and inspiring people who shared a strong enthusiasm for their work, and a belief the change is possible.

The second part of the program, which involved studying here at the American

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University, was for me no less important, and I disagree with Herman Schwartz about all the program being about (inaudible).

And some of my colleagues have already said, this combination of academic studies and (inaudible) is what made the program so successful. It is here that I learned about following (phonetic) Professor Schwartz's process, about the foundations of American constitutional law, and theoretical, and ideological basis of the human rights (inaudible).

And this was right before the (inaudible) would become much more relevant in Israeli law in the early 1990s, so that was a very important piece for all of our (inaudible). And I returned, I joined the Israel National Counsel for the Child, which is a leading child advocacy organization (inaudible), and was appointed its first legal advocate.

The other -- the deep influence of this year on my motivation and my commitment, we can

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(inaudible) it's probably the most important in fact, and (inaudible) many significant issues and specific issues that I have been involved in over the years that are strongly connected to my Washington experience.

(Inaudible), I can locate a direct influence of the fellowship, for example, the most dominant examples are import of two models I've learned about in the U.S.. The one being the Street Law Project in which law schools -- law students teach youth of disadvantaged groups about law, as a tool for empowering them and teaching them about their right. This actually operates now in two Israeli (inaudible).

And the other one is the Guardian (inaudible) model for separate representation of children, in both child protection and custody. More interestingly, the fellowship also had a significant impact on me in connection with one of the most difficult effort I took part in, and I'm talking about is the U.S., unfortunately, is still very controversial, and that is the

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prohibition of corporal punishment of children by both parents and teachers.

Resonating with me in this campaign, which I'm happy to say eventually led to the full prohibition of punishment for human rights (inaudible), that other disempowered groups that have (inaudible) me ever since my year in Washington.

Now, (inaudible) concern with children's rights, the fellowship influenced my (inaudible) in other fields as well. For many years I taught a course on law and social change, which was largely based on best (phonetic) lecturers, and tried to get in this course the students a taste of my experience in the fellowship by exposing them to various actors in the field.

Many, if not most, of the guest lecturer were in fact (inaudible) were here on this panel, who came I think more than once to speak at the school. And then, throughout this course (inaudible) year after year that there

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were a variety of fellows that came to lecture and talk about their work, in what I can only describe as the transformative influence, the influence that Washington had on Israeli law (inaudible).

So, looking back now, 30 years later, at the role that the fellowship had had in my year, and we'll -- we will be emotional later on, but I already want to say that I am deeply aware, and very, very thankful for the great impact it has had in life.

MS. KADISH: Thank you, Tamar. And last, I'm turning to Dan. Dan, you were one of the early fellows, and you came into the fellowship having been at ACRI, at the Association for Civil Rights, as many mentioned, as some of us have mentioned already, one of the first and, at that time, only human rights organization in Israel.

Maybe not the only, but among the -- and you came in and, from my understanding, you intended to go back there. So, what I was --

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what I'd love to hear from you is, what did you bring when -- after the year here, what changed in your work, or what did you bring back that was different from your experience at ACRI prior to the fellowship?

MR. YAKIR: I was involved with ACRI as a second-year law student, at the Tel Aviv branch of ACRI, the Association for Civil Rights in Israel, and I came here as a very young lawyer, and left Washington exactly 30 years ago.

I came as a second-year lawyer, with no practical experience in public law, constitutional law, or human rights law. I worked into private lawyer -- law firms, and then with contracts, and civil litigation.

And the first experience I got was here, through the academic courses, both on constitutional law -- American constitutional law, the First Amendment with Bert Wexler, that I could (inaudible), and international humanitarian law, and the law of war with Raywood Goldman, which was not an abstract -- this abstract

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concept.

So, international law for us, because unfortunately is very -- it's a leading force on the Gulf, of occupation and the law of war, and I done it extensively later on with human rights violation in the territories of (inaudible) specialties.

So, on the one side there were those legal -- the academic courses that I took, that gave me a fine perspective of American law and international law. And secondly, it was the practical experience with the ACLU, and Ard Spitzer (phonetic) was my boss back then, and Lily (phonetic) the director of the (inaudible) branch of the ACLU.

And he is still in this position after all those years, as I am in the same position with ACRI, and I learned a lot from him, accompanying him. The main case that was litigated in the spring term of 1989 was against the minor curfew law.

The DC Council adopted a law requiring

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all minors to stay at home during the night because the murders rate in Washington DC was at the highest in the country, or the second highest in the country. And it was fascinating to see Ard building the case, assembling the plaintiffs.

One was a Jewish kid who was selling for the bar mitzvah, and couldn't attend a bar mitzvah party because it was in the night. One was a minister who couldn't baptize a born children at midnight mass.

Another was a kid who was in drama course, and couldn't go to rehearsals because they were over the curfew hours. And another was a child who had to work for a living and couldn't work night shift because of that.

So, well, it was back then. I should remind you, it was back then in 1989. There was no Internet, and Ard sent me to the main library here at the Law University. On January 1, 1989, there was -- Washington Post published a full-page of pictures of all the murder victims of 1988, and Ard sent me to the main library here at

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the -- and he knew to go over the microfiches of the Washington Post that had the date -- the name, the date, and the age of the victim.

And I had to go through all the minor victims, and through their microfiche, to try to assess what were the circumstances of their murder, and if a minor curfew law was, in fact, would've prevented that murder.

And my findings were that all of them, or almost all of them, were murdered in-house, and the curfew law would not have prevented it. And I filed an affidavit with the court, and you can find a full note in the judge's decision granting a preliminary injunction, mentioning my affidavit. So, this was my main contribution to American constitutional law.

But that was a lesson for life. How to build a case. How to recruit plaintiffs, a variety of plaintiffs, that their constitutional rights were infringed upon. How to present our argument before a federal -- the District Court.

And I, during the summer, I moved to

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New York, working with the Lesbian and the Gay Rights Project, as it was called back then at the ACLU, before we started to call it the LGBTQI community, and that was a fascinating, both personally and professionally for me.

Being gay, very much in the closet, it was a formative experience, both personally and professionally, working there on gay-rights at the very interesting moment in the history of the community back then. And all those scales and (inaudible) I came back to ACRI, and my main goal in applying to the fellowship, was to get back for the second year to join ACRI, because this was the only chance to join ACRI as a lawyer.

ACRI had only two lawyers back then. Both of them fellows of this wonderful program. Joshua Sheflam (phonetic), who was the first fellow, and Ned Basive (phonetic), who was on the second year of the program, and that gave me an opportunity to join the Tel Aviv branch, to be the first lawyer of the Tel Aviv chapter of ACRI, and I've stayed since.

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MS. KADISH: For our second round of questions, I want to dive -- ask our folks to dive a little bit into the actual work in Israel -- Israel, Palestine. And so, Tamar, we'll start with you this time. You've -- much of your work is focused on advancing the rights of children to separate representation in court proceedings, and their right to participate in all decision making that affects them.

Could you please share with us a little bit of the developments in Israeli law regarding these issues, and if relevant, how that -- if there's anything you've brought from the fellowship to that?

MS. MORAG: Definitely. Thanks. (Inaudible) I want to draw a distinction between two different initiatives that I was involved in. One borrowing directly from the United States, was the recognition of children's rights to have proper (inaudible).

That means to have a lawyer of their own. A lawyer that represents only their

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interests, and not the interests of the state, not the interests of the parent, both in child protection proceedings, as well as in custodies.

The other initiative that I'm currently involved in, is a development of mechanisms for child presentation in all decisions that affects them. That means that we should ensure that the child has the right to be heard, if possible, directly, before a decision is made on his or her behalf.

Now, I'll start with (inaudible) initiative. Learning during my year in Washington, developing American law, that already at the time viewed the appointment of (inaudible) of lawyers representing children as imperative to securing children's due process rights, and safeguarding checks and balances (inaudible) child protection proceedings, was actually a formative experience for me.

And when I returned to Israel, I was so excited about this, that you know, that one of the first that we did at the Israel National

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Counsel for the Child, was to establish a part of the project (phonetic) for child representation, (inaudible) separate representation -- representatives for children.

And yet, this kind of project was met at the time, we're talking about the early 90s, especially in the area of child protection, with a lot of opposition. In looking back, I think that at the time, it was foreign to Israeli culture.

Over the years though, partly due to changes in the Israeli society, in which rights talk has been more significant place, and trust in government has decreased, and with this -- with the decrease of trust in government, the recognition of the (inaudible) checks and balances, and partly due to the dignity of other (inaudible) who've joined the efforts to enable children to have a guardian (phonetic) (inaudible), the idea of the need to have a separate representative for children began to percolate into Israeli law.

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At the end of the 1990s, after Israel joined the UN convention on the rights of the child, a very special committee for the plaintiff (phonetic). The committee was asked to reevaluate the entire value of Israeli child law in light of the convention on the right of the child.

I was appointed as vice chair of this committee, and I'll not be able to share all committees right here, but as part of my role in this committee, I was also assigned the issue of (inaudible) for (inaudible) of children, and we did write a very full and long report on the matter.

And following the latest recommendation, UNEC (phonetic) was at the Israeli legal aid, with a wonderful name. It's called Lawyer On My Own, For My Own (phonetic), which (inaudible) with child representation of children, and children are quite regularly were not going to get it.

There's still a (inaudible), but

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children are quite regularly appointed not with child protection proceedings (phonetic), a lawyer, and in many cases, also more and more contested (inaudible).

And so you know what it is. Our latest initiatives that are actually, currently involved in, involve promoting children's right to participate in all decision-making (inaudible). The driving force for the great changes Israel is going through in the area of child participation, is a convention on the rights of the child, as mentioned earlier, here unfortunately, the U.S. does not (inaudible).

And from my own perspective, the foundations for my activity in this field have also set, and insights I gained, in the tools I acquired many, many years ago (inaudible). The committee (inaudible) and convention in Israel developed proposals aimed at the change in child participation in the various areas of children (inaudible).

I personally was involved in the

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enhancing (phonetic) (inaudible) going to be developing a model of child participation, and what I believe to be the most complex context, and that is child participation in divorce proceedings, in family courts.

We developed, in the committee, and interdisciplinary (phonetic) model of child participation, in which children are invited to the family courts, in aid (phonetic) with a social worker. And first of all, they're asked if they want to participate at all, and if they do, they're given a choice.

They can meet directly with the judge, or chat to the social worker, who will then share their views with the judge. Because of the complexity of this specific context of child participation, we decided we were not going to go to legislation before we check out our model.

So, we had that (inaudible) of logic, in which we tried to model in two (inaudible) and had (inaudible). The results of the (inaudible) study, I think, were very great. First of all,

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and most importantly, were the (inaudible) from the children that they really like participation. I think (inaudible) that they would recommend it.

And then some of them also said that it helped them. And when we asked how it helped them, well, they give a lot of reasons, but (inaudible) one thing they would -- they all talked about being respected, being recognized (phonetic).

Another finding from that pilot (phonetic) project, was that participation was not only beneficial to the legal (inaudible), which is something that we thought would happen, but it was also beneficial in enhanced parent, child relationship.

And I think that one of the most interesting, yet most troubling findings from our research, was the fact that we found a big gap between what the parents thought the child wanted or felt, and what the children felt was (inaudible).

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And with the child's permission, the coach (inaudible) then actually shared with the parent what children had said, and many parents say this was (inaudible). And then actually changed, many times, how (inaudible) really a tool for hearing -- having children heard not only by the courts, but also by (inaudible).

Following our pilot, legislation was enacted, and child visitation units were now sent (inaudible) to our family courts. I must say though, there is a long way to go before we reach full implementation of the legislation, its process, but I hope (inaudible).

MS. KADISH: Thank you, Tamar. And turning again to Dan. One of the things I want to mention in, again, that article that those of -- I'm sure those in the audience who are -- were related to the fellowship -- I shoot a shout out to Larry Barber (phonetic), who was the CEO of NIF (phonetic) at the time, to Mort Helprin, who, as part of open societies foundations, helped fund the fellowship, to Norman Rosenberg,

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who was previously the CEO, or Executive Director of the Israel fund, and also had a hand in the fellowship, and to Fran Goldman, who's here.

Acknowledging all the people who had a hand in the fellowship. And to Hadar Harris, who ran the fellowship on the AE side. So, for -- I think all of those folks remember this article that was in Haaretz in, as I said, in Israel's New York Times, that in addition to mentioning the work of the returning fellows, it also mentioned the Chief Justice at the time, and -- Aharon Barak, who was creating -- it was part of this constitutional revolution.

And so, I want to ask Dan, who -- you've argued dozens of cases in the Supreme Court, both in Barak's court, and other courts after that. The Wikipedia page is overwhelming, so I couldn't choose cases. But I would love to hear from you, of the few -- if you could highlight a few cases that really were part -- that are illustrative of that constitutional revolution, in terms of human rights law.

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MR. YAKIR: First of all, the fact that Hasan and myself feel such at home arguing an argument, a (inaudible) is that at the Supreme Court, we had these exact mics as well. But other than that, we -- I came back to Israel in 1989, and it was on the brink of the constitutional revolution.

The two first basic laws that were enacted in regard to human rights, were enacted in March 1993. And even before that, during the presidency of both Shargal (phonetic) and Balach (phonetic), there was a shift in the court towards a much more liberal court, and one of the most important aspects was the changing of the doctrine of standing, allowing organizations like ACRI to petition the courts on their own behalf without a specific person who was injured by the policy of the state.

This doctrine is now under attack by the much more conservative Supreme Court that we have, but it still is in effect. It allowed us to bring many issues before the court where it

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was hard to find a person that was injured by the policy, or there were a lot of people who were hesitant to be in the front of such a challenge, and it allowed human rights organization to bring much more cases to the court.

Besides that, human rights and civil liberties got forefront seat in the jurisprudence of the court, even before the constitutional revolution, but after then, and as you might know, Israel doesn't have a written Constitution. The decision by the Cnasa (phonetic) 1950, was that the time is not right to develop a full-fledged written Constitution, and it will -- and then be adapted by a piece of legislation called Basic Laws.

And until 1993, many basic laws were enacted regarding the branches of government, basic laws of the judiciary, basic law of the government, basic law of the Cnasa, basic law of city controller, but no Bill of Rights, no basic law in regard to human rights.

In 1993, the first two were enacted,

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and the most important one is basic law, human dignity and liberty. It doesn't cover all the rights. Another problem, it immunes all previous legislation from constitutional challenge, but it gives the court for the first time, the power of judicial review over primary legislation of the Cnasa.

Until then, the court was -- didn't have the power. It adapted the doctrine of interpreting every standard of the Cnasity (phonetic) light, all human rights and basic democratic values, but if the wording of the statute was clear, there was nothing that the court could do against it.

And since 1993, the courts had the power of judicial review over primary legislation, what -- and it led to a first criticism by politicians, by the Cnasa, by the government, whenever the court exercises its power, though it's very cautious in those issues, and we've a handful of sections of laws were declared unconstitutional, but still it invoked a

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major criticism against the court, and we have now a much weakened Supreme Court because of that.

And there are some bills to curtail the power of the court. And the last government, that is the current (inaudible) government, wanted to pass an amendment that says that in any case that the court overrules a statute of the Cnasa, the Cnasa, with a special majority, will be able to overturn the decision, and to say, that even if the court declared it unconstitutional, we ratify the statute, and it will be into effect.

So, there were numerous cases where Hasan and myself joined forces, and tried to challenge statutes, and not many of them were successful, but there were landmark decisions, like the decision when President Barak retired, he handed down a very important decision declaring unconstitutional law that prevented Palestinians from filing (inaudible) cases against the Israeli army, in cases where

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Palestinians were either killed or injured in the occupied territories.

There were numerous other cases where the court accepted part of a petition, and in three consecutive years, we mounted challenges against amendment to the anti-infiltration law. As you know, we are also have the problem of asylum-seekers and refugees, and there is a lot of controversy via the right policy towards them.

And those amendments gave the power to the Ministry of Interior, to indefinitely incarcerate asylum-seekers and refugees, in order to coerce them to leave the country. And in three consecutive years, the Supreme Court accepted parts of our petition, limiting the power of the state to incarcerate refugees or asylum-seekers, and this brought a lot of criticism against the court.

And there was a proposal of amendment to bar the Supreme Courts from dealing with immigration policy whatsoever, but it didn't pass. And the optimistic part of the last

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election results, is that the government, we won't have a majority to pass such an amendment against the powers of the Supreme Court.

MS. KADISH: That is maybe the most hopeful part, right? We walked away from the brink of disaster. Hasan, I won't to turn the same question to you. If you can highlight a couple of cases over the last 20 years that you're particularly proud of, particularly influential, particularly important in your mind?

MR. JABAREEN: I was --

MS. KADISH: I know it's hard to choose, but in the interest of time.

MR. JABAREEN: I will choose the most -- I will choose two cases that they are considered, probably considered by many, that they are the most influential cases, or at least one of the few most influential cases in Israel legal history.

Now, when you are human -- active human rights lawyer, you cannot speak about cases that you won the case only, and (inaudible) maybe when

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you retire, you speak about only winning cases, but when you're still active, you have to remember the victim of the lost cases first. And I will start with that, (inaudible).

And one of the victims of this case met me before we enter -- before we started this, and he sat here, his name Morhad Asani (phonetic). In the end, he was a fellow, lawyer fellow in this program in 2000 to 2003.

He came here, he was lawyer in (inaudible). After he came back from the program the second year, he got back to Abir (phonetic). Abir lived in (inaudible) in Bethlehem. She was teaching in Bethlehem University. Immediately passed law in Israel that there is no anymore Palestinian family unification in Israel.

That's mean that she cannot live with Morhad (phonetic) in Israel. Morhad Israeli Palestinian citizen. She is a Palestinian resident of (inaudible). Both Morhad and Abir lived under Israel regime, but Israel regime consider that was like as another entity,

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although it's under its power.

So, we challenged this case, and me and her were the leading lawyers in this case, and was one of the most debated cases -- in fact, it is the most debated cases in Israel legal history. It divided the hall half and half. We lost the case six by five.

And of course we argued that there's no country in the world that prohibit its citizens for family unification, at least for the spouse or first-degree relatives (inaudible). At that time, I contact Herman, and Herman was also one of the people in -- here in this country, and many American professors were worried about this law.

I contact him to consult about having international expert opinions about different countries, in order to bring it before the court, and he recommended to us -- I went to professor from South Africa to give expert opinion about the law in South Africa, during apartheid and after. And also recommended us to contact one of

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the legal division in OSI, the justice initiative, that they can also provide expert opinions about different countries.

And really, we found that there is no country had such a law like that, even during the apartheid. One of the cases that they came before the court of the apartheid, was about family unification between a black man and woman, wife, husband, that they live in (inaudible), what they call (inaudible) areas, and Justice, then, Richard Goldstone say that apartheid has never meant to prohibit family unification, and they exited the case.

So, we have then very strong argument in this case. Last sentence that I said to the panel, which was 11 Justices, headed by President of the Chief Justice, Aram Barak, who voted against the law, I said, Honor, if you accept our petition, nothing will be changed in Israel law, we'll continue in the same status quo.

But all of us, we have to know that if we, the petitioner, lose the case today, of

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course we don't lose, justice will be lost, but the law will be changed only. And in fact, the law of Tangat (phonetic) was changed totally. Racist laws after one after the other started to come to target Palestinian citizen of Israel, in all (inaudible) of life, and we're still struggling.

Now, I met before I entered, Morhad Asani. Morhad, we lost his case, so what he could do? He and his wife, Abir, couldn't live in Israel. So, he choose -- he chose the thing that I wanted to do as a fellow, but I did that not because I was forced to do. I wanted to do that, but because I was (inaudible).

So, he decided to come here to American University, and to continue PhD, with hope that within that time the law would be changed, because the law was called temporary law. And now I met him, and he said, after 20 years, we're still here, struggling in our life. No American citizenship, and no Israeli citizenship for his wife, and she cannot come back.

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And like he told me about this difficulties, and he was one of the petitions of this case. So, this is why I couldn't, without mentioning this case is one of the most in human, crucial cases that we lost. If I want to speak about winning cases, of course we had win.

One of the most influential case, also constitutional law, that we won, that was in 2002 (inaudible). It was two years almost before the loss of the family unification case. The Attorney General of Israel, his name Liachim Robich (phonetic), then, and he became Supreme Court justice, asked to disqualify Arab political party, and to prohibit El Torran (phonetic) for the election.

Why? Because this, Arab political party, advocate for a state for all of its citizens. And in Israel, as a Jewish state, it's not allowed. Israel is a for the Jewish people, it's not liberal democracy. It's not like any other Western (inaudible). It's for Jews only.

So, you cannot ask Israel and advocate,

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even through democratic means, through (inaudible), for a state for all of its citizen. Now, he relied on law, basic law, article seven of the basic law of the (inaudible), which said, no political party or candidate is allowed to negate the definition of Israel as Jewish and democratic state.

So, he said, Jewish and democratic state mean that it's state for Jewish people. It's democratic in that, that treat the individuals, all the individuals, equal, but there's no equality based on group rights that I and Jews, as two different groups, are equal. There is no.

And no equality in citizenship, because we have law (inaudible). No equality in language, because the Hebrew should be the central language of the Jewish state. So, this political party should be disqualified.

Now, if he won that case, no other will participate in the election of (inaudible), and today we can say that after that experience, that

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Arabs, or Palestinian citizens, they are not participating in the election. Now, which was very, very difficult guesswork.

Why? Because the law is clear. The law is really saying that if you advocate for a state for all of its citizen, it's against the notion of Israel as Jewish and democratic state. So, I had to get interpretation from the law, that the court could accept it.

So, I suggested that if political party recognized the right of Israeli Jews for self-determination in this country, so it should be allowed. But you cannot prohibit political party, just because it's advocate for a state for all of its citizens.

And in fact, Honor -- it was also, again, before 11 Justices. We are lucky all of our cases (inaudible), in order to win big or to lose big. And Honor, if I lose the case today, you will be the first judge in the modern history that prohibit political party to run for election, just because its agenda is liberal,

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political, democratic agenda. Just because of that.

And again, we brought something similar, but like in other countries that show that even oppressed regimes didn't have that. In the end, we won the case by seven Justices, against four. Four said, it's enough that you say states for all of its citizen, that's mean that you are not allowed.

And Justice Arim Barak wrote the resolution of majority, and he found different way. He said, the state for all of its citizen negate Israel as a Jewish state. But we have to respect the freedom of expression.

In order not to help a political party to run for the election, so the Attorney General must bring serious evidences to show that this political party worked daily and intensively against the factors that constitute Israel as Jewish state.

For example, he has to bring evidences to show that this political party had active

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action against the law for there, or against using Hebrew language. Since the Attorney General didn't have those evidences, we cannot accept his request.

So, it was win in that matter, but this issue of the case, it's used every election, by doing this to try to disqualify Arab political party based on the decision of Barak to say, well, we have evidences against the Arab political party that they negate the definition of Israel as Jewish state.

Why? Because they had statement against the law for there, they had statement against the Jewish state. And all that time we discussed whether the evidences are relevant or not, or sufficient. So far, I am happy that I didn't lose one of those cases in that.

And really, our organization, our staff represent in the last 25 years, in every election, all Arab political parties, and political lists, and those kind of disqualification gets lost, as was in the last

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election, that Likud party, the Netanyahu party asked to disqualify the Arab place, which is the only (inaudible), because its agenda is state for all of its citizen.

MS. KADISH: Thank you Hasan. And we're getting a little short on time so last question for Tali.

In your work you've bemoaned the failure of the Israeli welfare and criminal justice systems to adequately address the disproportionately high percentage of victimized children. You have called on them to consider restorative injustice in a serious manner and to design, operate and evaluate restorative justice programs and that are attuned to the specific needs, vulnerabilities, and interest of victimized children. So if you could tell us a little bit about that work now?

MS. GAL: Thank you. So before coming to the States and also after returning from the Fellowship here, I was working, as I said as a children's rights lawyer in the Israel National

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Council for the Child. And what I was mainly doing I started and operated the child victim assistance project, through which I escorted children to court and supported them.

And then we built a training program and I am no longer there, of course, but there are tens of volunteers now across the country who are escorting children for trial victims in court. And what I remembered from the children and the youth was that they were vulnerable. They were hurt. They were retained, but at the same time they were very strong and they wanted to be heard. And they wanted someone to listen to them.

And what I learned again, and again, is that our tendency, adults tendency, professionals tendency to keep the children away, especially the victimized children, to keep them away from the discourse because we don't want to hurt them again.

We don't want them to hear, you know, the bad stuff and the bad words or whatever about

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violence, about sexual assaults et cetera, shutting them down and keeping them away from the table actually violated their rights again. Because it takes them away the opportunity to be heard, to be part of a discussion about their own lives.

So I was seeing it again and again, children were coming to me wanting to say something to the judge, and if not to the judge, at least to the prosecutor, and if not to the prosecutor at least to the intern. And the system was shutting them down because first of all, they are victims, and victims are not a party.

You know there are some -- and that victims' rights (inaudible), well, of which I was a part of the reform that led to that did some things towards victims' rights. So there were some opportunities to submit statements for example. But they were not only victims who are guests, and not always welcome guests, they were also children so they are vulnerable and we want

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to give them a way. So the duality of being a victim and being a child kept them so far away from where things were decided about their own future.

So as I said, I started to study restorative justice and I went, I did my PhD in Australia then came back. My family grew during that time and I continued in Kadana (phonetic), I was actually in an intersection debating whether I should establish an organization or establish a program promoting restorative justice for child victims are going to academia, and I chose academia.

But I still train practitioners. So I want to talk a little bit about restorative justice just so that people understand what it is and how it is related to human rights. And particularly children's human rights.

So imagine you are a victim. I hope none of you is a victim ever, but I imagine you are a victim, let's say of a violent crime, and something bad had already happened to you. But

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now something needs to be happening now because you feel the world has changed and you want justice to be done. And imagine you are and offered an opportunity to meet with your perpetrator.

To meet with him, or her, not in court where the perpetrator will defend himself, and not talk to you but talk to the judge. But face-to-face in a safe environment where you have your supporters. You choose your own supporters, parents, partner, children, friends, whoever you choose. You come with them, safe, after preparation, to a room. You sit side-by-side to your perpetrator who also comes with his or her supporters. I'll talk in a minute about them.

And you have the opportunity to ask questions, why me? Why me is the big question that every victim struggles with. Did I wear something wrong? Did I say something? Was I responsible in any way for the fact that you chose me to hurt me? That's one question that bothers all victims.

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The other one is what exactly happened? What did you think? What did you plan? Why did you do that, and not that? What happened afterwards? What did you think about it later on? Did you feel sorry about what happened? Are you still -- do you understand what happened to me, et cetera. So they want to listen and to hear answers.

And the third thing that they want is to tell their stories. Their stories about what happened to them. How they were affected. Victims lives are changed after victimization. It happens in sexual assault, it happens in violent assaults, it happens in all kinds of assaults. Even property crimes change people's lives. And if any of you have been burglared, this is something that you just can't move on without anything happens. So this is the opportunity that is given to the victims.

Now, think about yourselves as offenders. As someone who did something wrong. It's been a terrible day, or you have had a

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terrible life, are you did something really wrong, and even really terrible. You have the opportunity to take responsibility, to say, you know, I did it. You are not pushed into apologizing. This is something actually that comes in naturally. But, you have to acknowledge that this is what you did.

You have an opportunity to come and meet your victim. Sometimes it's years after the assault has happened. And you have the opportunity to hear from them what has happened to them. Many offenders come to these conferences not because they want to meet their offender (sic), but because they want some discount in their punishment, or some of them do want to say that they are sorry.

In these meetings what we see over and over again, and there are movies now, and there are all kinds, you can look for restorative justice and find many testimonies about it, is that for the first time offenders really understand what they did. Because when the judge

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tells them what you did was wrong, or when a probation officer or when a social worker tells them what you did was wrong, they don't really listen. They are used to having others telling them that they were wrong, and they were horrible people, et cetera.

But when they hear the victim telling their story. When they hear their own mother in the room apologizing for the victim's mother for what their son, what her son did, this is something that makes a difference, and it changes people. And you hear it again and again.

So this is what I found fascinating, and I thought having children in the room, child victims, would be amazing and will give them the opportunity to be heard that they don't get in court. At the same time, it would be terribly complicated so you know this is something you need to work on. How to do it. How to establish safety. How to make sure that they participate in a way that suits their needs and vulnerability and capabilities. And every case is different.

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So this is what I've been engaged on in research, in training, in writing, and teaching the law.

MS. KADISH: Thank you. Thank you, Tali.

So we, not surprising, we are over time. It won't shock you to know that. So we have a little bit of a break after so people, unfortunately, I'm sure there are questions. Please feel free to -- I will assume that the panels will be happy for you to approach them and ask questions.

But I want to give everyone just a minute, no more than a minute because we are running late. Far be it from me to keep you from your lunch. Just a minute to address Herman directly. Everyone really wanted to do that so we will just go down the line. And Tamar, let's start with you.

MS. MORAG: All right. Herman, I'm sorry I can't see you. I'm so excited even from afar to take part in celebrating your very

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inspiring career.

You (inaudible) people I know who are there to look back with the (inaudible) you do, not only on their professional career but on the impact you've had the lives (inaudible). Herman, you are, and have been for me, for years, a model. A model of generosity of (inaudible) with them. A never-ending passion recruiting the world. You personify a unique and rare combination of a commanding (inaudible) of the highest caliber and an ability to translate it into real world results.

All of this is coupled with exceptional personal works. Look at it today, diversity of causes you've worked for over the years and your ability to constantly find new and exciting challenges in this work. It seems that no human rights cause is actually foreign or irrelevant to you. And I think this is one of the things that enabled you to form such strong connections with (inaudible) of such wide-ranging interest.

Every time we've met over the years

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I've always enjoyed meeting with you, your curiosity, your true interest in so many (inaudible). And I'm always touched by your sincere interest in everything I do.

Herman, thank you. Thank you so much for your significant role you've had in my career, for your constant support and good advice. I am beyond mentioning grateful to you. I wish you a wonderful retirement and look forward so much to seeing you and Mary here (inaudible).

MS. KADISH: Thank you Tamar. And Dan.

MR. YAKIR: My main regret from the year I stayed here in Washington was never, ever (inaudible) student. It was while you were on sabbatical in the year of '88, '89 so I didn't have the opportunity to study with you. But you were ever present at the with aid, and good advice and arranging whatever internship we wanted.

And the first internship I wanted was the one for the local chapter of the ACLU here in

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Washington. And the most embarrassing moment of my -- one of the most embarrassing moments of my professional life was that the ACLU asked for a writing sample to submit to be accepted as an intern.

And somehow I was thinking of handwriting sample because it was very well (inaudible) in Israel to screen candidates for employment with graphologists. And it sounded somewhat bizarre to me why the ACLU would use graphology. But I thought I wasn't in a position to argue about it. So I sat down and copied 10 lines from the Daily Washington Post with my finest handwriting and faxed them the sheet.

And I am embarrassed to this day to tell it. And suddenly it dawned onto me what a mistake I had made. But a few days after it I was told to come, on Sunday, on Monday at 9:00 a.m. and start my internship. And when I came I was so embarrassed I decided, (inaudible) said don't mention it.

And why am I embarrassing myself to

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tell it to you today? Just to show that the words from Herman take for instance an intern was enough and I had to go through the motion and ask for a writing sample but probably they didn't even bother to read it and they just accepted me. And the rest is history. This is -- I mean one example of the stature of Herman and his influence and how he got us any internship we wanted.

And I am grateful for this opportunity, for the good advice, for the friendship, for the love you have for Israel and for its prosperity and for its democracy and for progressive human rights. And I wish you all the best and good health to you and Mary.

MS. KADISH: Tali.

MS. GAL: So I was asking myself why is it that I love Herman so much that I would come to here all the way. And not only that just why do I feel this way? And I think Herman has this combination of being tough and meticulous. I remember you corrected my English in ways that

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others would not have dared to do.

And the constitutional law class was tough, was really hard and I loved it. Because you know you challenged me, you pushed me and others I think forward the whole time. And what I learned from you is that this is tough love. This is when you love someone and when you care about someone you put your effort into making them better; making them more knowledgeable, more exact, more accurate and this is something that I've learned from you, and I cherish that you have that and that you taught me that.

And I also wanted to say that Herman is the youngest person I know. Because you are always so curious. Just to see you and Mary, I'll say a word about Mary with people will allow me to. Just to see you reading papers together, getting angry about -- and there is a lot to be angry about these days -- and asking questions and looking at things to think about, and discussing politics and art, and nature, and literature, and poetry. This is for me this is

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being young. And this is something that I'm also learning for me and I hope that I will stay young, not as much as you are but a little bit.

And the last thing I wanted to say is to Mary. That Herman, you have a match. And it's been wonderful and I adopted both of you as parents, so thank you both.

MS. KADISH: Hasan?

MR. JABAREEN: I think Herman, you didn't think in the past that you will be the most influential person for establishing the leading Palestinian human right organization at all.

And really, without you, your advice, I don't think that this organization could be established at that time. So I think this is my self to say (inaudible). And always I, not just me, also Rina that I know her through my stay here and this program, and she came with me and we got married and established and (inaudible) together.

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Also, I think both of us know that without you, Herman, we couldn't do that and I am sure that I am not who I am now without your advice. So to say thank you, grateful, I don't think that they can express this. And if there is in our (inaudible) something that (inaudible) father beyond the (inaudible) father or -- I mean emotionally I think that always not just me. Also many of our staff refer to you as the father. The father of the founders of the organization and the father in the meeting as the model. They are so -- that always when help and good and give the good advice. And always he is optimistic.

Even during the wars when we called him he was optimistic. And when we sometimes we have a moments that we are down and we say, oh father, what does it deserve anything because one more can destroy what we achieve. Immediately you start to bring us aspects of American history, (inaudible) history and the second (inaudible) arise. One of his (inaudible) all that are

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trying to choose one of those historical moment in our modern history in the straining for human rights in order to give you more hope and more energy.

Now, we are going to meet tomorrow for lunch. And I am going to discuss with him many things. What we would do with other cases. Because the retirement is just official here. And in fact, I look at him I had idea that I would suggest that me and Danny here, tomorrow we consult with him and will take the case of Morat and to go back to the Supreme Court and change the law because the law was supposed to be a temporary law and we lost because the majority say it is a temporary law.

And then we bring it and it we say after 20 years it's not temporary. So I think I am continue to discuss with him on tomorrow.

We love you, Herman, and when I say we, also not just me and Rina, and also Herman even the human (inaudible) it's not just (inaudible). He took care for our wedding that will be before

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the new Supreme Court before Justice Ruth Ginsberg. And in fact, if Dan contributed to the American legal history through that footnote, me and Rina contribute (inaudible). Our wedding was the last wedding before Justice of the U.S. Supreme Court of persons who are not first degree relatives.

Because when we got our married the (inaudible) was against Supreme Court to U.S. why every American citizen would have this authority? So they decided that this would be just for first degree persons that they have (inaudible) to a judge.

Thank you for everything and see you tomorrow.

MS. KADISH: Thank you. Thank you everyone. And to the panelists, thank you. To Herman, thank you for me personally for everyone who was involved in this fellowship and made it possible. And now all I need to say to you is you go out this door to get lunch, and you come

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back in from this door.

UNIDENTIFIED SPEAKER: I think you can use both doors.

MS. KADISH: Oh, now you can use both doors. Oh sorry. Okay you can use both doors.

(Luncheon break 12:32 p.m. to 12:51 p.m.)

LUNCHEON CONVERSATION
THE CONTRIBUTIONS OF PROFESSOR HERMAN SCHWARTZ TO HUMAN RIGHTS AND THE RULE OF LAW

MR. LAGUARDA: Welcome back everyone. Welcome back and thank you for taking your seats with your lunch. We are ready to begin our lunch program. Thank you. And I would ask Professor Orentlicher, please proceed with the panel discussion.

PROFESSOR ORENTLICHER: It's really a great honor to be able to participate in any way in celebrating Herman Schwartz, about whom we've heard so much, and (inaudible) the purpose of why we esteem and adore Herman so much.

I'm really happy to help facilitate a

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conversation with two men who are each imminent in their own right and through their contributions to human rights and other spheres. And who are here, more importantly, because they are eminently well-qualified to talk about some of Herman's influence in the field as we've already heard, but also in their own careers, and on Claudio's part in the law school community that organize this.

I want to say that when I talked to Herman a week or so ago about this program I mentioned to him that I was trying to think about a theme that kind of unified all the disparate fields in which he has had an impact. And he immediately, his first instinct was to say don't even try that, Diane. Don't even try to find a unifying theme.

And I want to find his words. He said the problem with seeking coherence through unifying themes is that there isn't any. So in Herman's own view, he does kind of stumble accidentally from one impactful area to another.

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He went from being an antitrust lawyer to an imminent activist in fields as disparate as social justice, voting rights, prison reform, I'm leaving out a ton of them. Comparative constitutionalism of course, and on and on and on.

But then, upon reflection, it's obvious that there are some unifying things and I hope that they will kind of come out a little bit more strongly in this conversation. The most obvious one is that notion of scholar as activist. And Herman is not just a scholar who is an activist, but he is an imminent scholar as somebody on the previous panel noted. He is esteemed, and rightly so, for his rigorous, and influential, and insightful scholarship. And he is not just an activist but, as we all know here and have heard already, he has been amazingly influential across an astonishing range of fields.

I am going to refer you to the bio for this program for further background on our two guests who are, as I said, and as I think

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everybody here knows enormously influential, and renowned, deservedly so in their own right. I will briefly say Claudio Grossman is Senior Emeritus of the Washington College of Law.

And he too has played, like Herman has played, myriad leadership roles in many different forums. In the field of human rights, and more broadly in the field of public international law. His contributions have been recognized in his appointment to myriad influential positions, including relatively recently, his appointment to the International Law Commission of the United Nations.

More relevant for this gathering, he has been a key figure in Herman's life as a colleague. I guess originally as a junior colleague, and then later as his dean. But has been a comrade in arms with Herman over decades.

Aryeh Neier, also really needs no introduction but is now president emeritus of the Open Society Foundation where he was the founding president from 1993 to 2012. Before that, for 12

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years he was the executive director of Human Rights Watch. And before that, he was the national director of ACLU. Then again, I could go on and on, but you get the idea.

I mentioned earlier, that there in fact, some through lines in Herman's life and one of them actually is Aryeh, so I'm going to turn to Aryeh first. And I'll first say that when I was chatting with Herman a week ago, he said to me and I'm going to quote here, "Aryeh has been the key figure in my life in terms of the human rights work. Aryeh has been crucial -- pause -- absolutely crucial. I followed Aryeh wherever he went."

So I want to start by turning to Aryeh to talk about some of the place you and Herman went together, and ask you a sort of broad question about reflecting on some key respects in which Herman has been especially influential and impactful in an area where you were involved with him.

Mr. NEIER: Well, I wouldn't say

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that -- is this on?

PROFESSOR ORENTLICHER: I think you have to press it.

MR. NEIER: I wouldn't say that Herman followed me. I would say that I did my best to enlist Herman in the various activities in which I was engaged, and he was quite willing to take part in those activities.

As you noted, I divided my career into three institutions, the ACLU, Human Rights Watch and the Open Society Foundations. And I think Herman is the only scholar activist who I have collaborated with closely in all three of those institutions. Scholar activists play immensely important roles in all three institutions, but Herman, as I say, was the person that I always turned to to work with me on various matters.

When I got to know Herman in the ACLU, Herman was already an established figure in the ACLU. He was a lawyer, or a law professor at the University of New York in Buffalo, active in what had been called the Niagara Frontier, an

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affiliate of the ACLU. And when I became the director of the New York Civil Liberties Union, I was able to merge the Niagara Frontier branch of the ACLU and other chapters that the ACLU had around New York State into a single statewide New York Civil Liberties Union.

And by the time I got to know Herman he was established as the ACLU voice on electronic eavesdropping, wiretapping, and other forms of electronic eavesdropping, and he was involved in the litigation on such matters as a desegregation of the schools in Buffalo New York. So he was dealing with a very important matters.

The issue on which I particularly got to know Herman and work with Herman on was the prisoners' rights issue. And I think it's necessary to think back to the 1960s to understand why that was such a revolutionary issue in that period. Essentially, the law had been that prisoners were civilly dead. That they did not have rights.

But in the 1960s there were at least

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two new classes of prisoners who challenged that idea. First, there was the black Muslim prisoners, those who had converted to Islam under the leadership of Elijah Mohammed. And many of them were in prison; a lot of the recruiting took place in prison. And they wanted their own worship services, and they didn't want to eat pork. And so they began to ask for rights.

And another category of prisoners that was new in that. Were the -- those who had rejected participation in the Vietnam War. They had sometimes applied for conscientious objection and were turned down for conscientious objection. Then they were people very much concerned about rights. Among other things, they wanted to get certain periodicals in prison. And the periodicals ranged from Playboy to the New York review of books. And those prisoners also began to assert rights during that period.

So new classes of prisoners were very important in creating an interest in the idea of prisoner's rights. And Herman was at the State

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University in Buffalo, and there was a nearby prison 30 miles away, Attica State Prison. And Herman began litigating on behalf of the prisoners confined at Attica.

I can recall that in 1969, 50 years ago, two years before the Attica riot Herman called me one day and said that he thought he would be able to get permission to establish an office within Attica prison. And that way have the prisoners have direct access to him on an ongoing basis. And with the New York Civil Liberties Union sponsor that effort and also, I suppose, pay the costs, whatever was involved.

Herman very often look to me as a sort of source of money bags. I was the person to go and finance the various things in which he engaged. But I said yes. We would do it. Well, he didn't get permission to establish an office in Attica. Maybe history would've been a little bit different if he had been able to do so. But he stayed very much involved in the litigation in Attica. And of course, played a very important

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role if ultimately an unsuccessful role, when the prisoners took over the prison. But when Governor Rockefeller, in effect, ordered a massacre of the prison.

By the way, if you haven't read it, there was a book published about three years ago by Heather Ann Thompson, Blood in the Water, on the Attica prison riot. And half a century, or nearly half a century after the riots she manages to bring the entire thing to life in an extraordinary way. It is a riveting book to read, and I recommend it highly.

But Herman, in my career at the ACLU was involved in a variety of issues, but prisoner's rights were at the forefront. And when I became the national director of the ACLU, I wanted to establish a national prison project, and was ultimately able to do so, and asked Herman to be the chair of the national prison project, because this was something that were going to use to challenge prison conditions all over the United States.

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PROFESSOR ORENTLICHER: I want to come back a little bit later after I first turned to Claudio to ask you to follow up on how Herman's vision of prison reform affected your own approach at ACLU. But first, just take really quick follow up on your assistance to Herman and financing some of his prison reform work. Now, I happen to know that one of the places you helped him get money was from the Playboy Foundation.

MR. NEIER: Yes.

PROFESSOR ORENTLICHER: So I want to ask, did Herman receive any other benefits from the Playboy Foundation?

MR. NEIER: Well, let me tell you what happened there. I was chosen as the ACLU director in 1970. It was a contested election. The selection committee had divided and I won by the landslide majority of 35 to 32, so I became the ACLU director on that basis.

And a day or two later, after the stories were in the newspaper I got a call from a friend of mine in Chicago, a lawyer named Bert

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Joseph. And Bert was somebody who I had worked with several years earlier on an effort to desegregate an all white suburb of Chicago, Deerfield, Illinois. And Bert call me to congratulate me, and he also said to me that he also had a new job.

And I said what's your new job and he said two days a week I will be giving away Hugh Hefner's money in the Playboy Foundation. And he made it clear that the Playboy Foundation would be at the disposal of the ACLU on a lot of matters. It was not a foundation in the usual sense. It was not a tax-deductible foundation. It was a business expense of Playboy.

And Bert was able, very easily, to justify a grant in support of litigation on prisoner's rights because prisoners wanted to get Playboy, and there was litigation over whether prisoners would get Playboy, and he had been the attorney in a couple of the cases. And so the Playboy Foundation was an easy mark in helping to get the first funding for the prison project.

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PROFESSOR ORENTLICHER: And I repeat my question; did Herman get any personal benefit from this? Yes?

MR. SCHWARTZ: I think you ought to know that more came in than you knew. More benefits.

MR. NEIER: Okay.

Mr. SCHWARTZ: I got two copies, not one, but two copies of Playboy for a period of, I don't know -- I'm not quite sure when it stopped.

MR. NEIER: What I don't remember, Herman, is among other things the Playboy Foundation organized a conference on prisoner's rights at the Playboy mansion. I did not go to that, but did you go?

MS. SCHWARTZ: Yeah.

MR. SCHWARTZ: I went, Mary went and my mother-in-law came.

(Laughter)

MR. NEIER: The truth is that there are a number of stories about what took place at that event.

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MR. SCHWARTZ: And my colleague Will Hellerstein --

PROFESSOR HELLERSTEIN: Oh, yeah.

MR. SCHWARTZ: -- was also there.

PROFESSOR HELLERSTEIN: And I remember the pool.

MR. NEIER: Yes. Fred Herschkopf was (inaudible)

PROFESSOR HELLERSTEIN: A good time in there.

MR. NEIER: -- had a good time in the pool.

PROFESSOR HELLERSTEIN: I was, however, a devoted husband at the time.

PROFESSOR ORENTLICHER: So as you can see, one of my goals in this panel was to elevate the conversation. So if I can (inaudible) by saying Herman's (inaudible) a bit when he got this great subscription. He read it only for the articles.

So Claudio, I want to ask you the same question I asked Aryeh. But your variation of

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it. If you can talk about a way you've observed up close in which Herman's had a particular impact. And kind of also thinking as to matters of the law school his impact that seems so much to personify Herman's approach to his work. Perhaps you could talk about that a little bit.

MR. GROSSMAN: Well, I share with Aryeh a couple of things too; being seen as a source of resources when I was the Dean. But I am resenting the fact that I was not made part of this Playboy situation. And I wasn't aware of it. I think since it was as source for the (inaudible) contributions to the course of human rights, I think that law schools have a very lot by not being a part of it. But people in the law school created by Whitman, as you know, in 1996.

But let me say when I think of Herman, the first thing that I think of is solidarity. And I would -- that's sometimes the words lose meaning by the fact that we repeat them. And we are having -- we've had concepts to (inaudible) to a structure. And for me the word solidarity

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has special meaning because I was a political refugee from Chile, for being (inaudible). And when I came to this country as a full ride, visiting scholar from the Netherlands. I living in the Netherlands ten years. I had there the (inaudible) scholarship, one way, no return as you can understand.

Well, this professor in constitutional law he came from (inaudible) became for me a place for human solidarity. A place where you can go, talk, always his door was open. To discuss about the humane and the divine. Not about the (inaudible) any of this (inaudible). But it had a meaning; it was a tremendous personal meaning. A domain where we could talk and ask everything.

And when you would feel enriched after talking to him. And how would you feel enriched? For example in the rule of law. You know, the rule of law as an instrument of change, as a value in itself, that's -- it was (inaudible) claims in the legal matter. It was always a

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talking and Herman was involved in that.

I would tell you that in law schools it's not normal to (inaudible). Law schools have a different normal than one in (inaudible) in many ways. No professors do not acquire reputation on the basis of attracting grants. No law professors tend to be -- the destiny of their success is measured more in terms of their legal reputation that instead of working with others, like (inaudible).

And that's fine. I'm not really (inaudible) in any way, but Herman definitely what he saw (inaudible) the country was (inaudible). In terms of the creation of (inaudible) that would unite people for the purpose of achieving a better world on the basis of the legal (inaudible) and the legal narrative by using (inaudible) the national instrument.

And that is the story of the creation of the Center for Human Rights. The Center For Human Rights that lead the space for students in January of every year, as a matter of a fact, to

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see for them a possibility to contribute with the legal -- with the legal (inaudible) better proposition.

And the Center is a creation in which if Herman would not have been here it would not have taken place. And he was the person that in charge of the -- he was in charge of the Center. And the Center (inaudible) things for students. It created a space for (inaudible) litigation, many (inaudible). And we mention that Herman gave an example of his own (inaudible) to make a (inaudible).

This school is a school where we participated in the Laskis case and cases involving indigent population, in the keeping of children in what they (inaudible). He is using more the American system on top of the board in women rights, and in the community has tortured some of us decided cases that established that (inaudible) was a form of torture. That was (inaudible) about that. But the (inaudible) human trade member or even a (inaudible) to delay

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torture.

So a government embody solidarity, not only in terms of abstract policies that needed to be pursued but the (inaudible) of the States. Nothing wrong with that, but personally in expressing warmth, affection, and creating a space where everyone could go and talk with him.

And he's because in terms of the law school -- you know what will be enough? I mean the creation of the program in Israel? Imagine what meant that, no (inaudible). Not (inaudible) right. And also I think that would have been enough.

And then the participating in the creation of a center of human rights that will promote worldwide policies of tolerance and policies that based on the rule of law.

Let me finish by saying also in my experience in cases about (inaudible) the fate of (inaudible) experience in my own life and also having been in (inaudible) and (inaudible) to have an kind of -- convening a special paper --

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one thing that happened is that the validation of rights.

The thing that they are (inaudible), we cannot refresh them from what is the right conduct disappears. There is no (inaudible) women that think (inaudible) that wrote a book called the La Fiesta in (inaudible). And (inaudible) knowing about the (inaudible) the detainer in (inaudible). And in that knowledge, a person working the (inaudible) agencies of Trujilia (phonetic) have lost his favor. So he decides to give to Trujilia his young daughter to be raised by Chuhilo. And what I felt impressing in the (inaudible) by Joseph is it appeared the normal thing to do.

Normal became abuse, bullying, violation of rights and for me when I thinking Herman, I thinking someone who (inaudible), projected (inaudible) and did not accept what was abnormal as normal.

PROFESSOR ORENTLICHER: Thank you. I already indicated that I was going to follow up

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with this question, but I'm going to repeat it, which is, and Claudio, you sort of started to touch on this. Beyond his impact out there in the world, in so many difference spheres Herman has influenced the way so many of us think about issues. Has helped us reframe our own understanding of what is possible to do, right?

And so I wonder if I could turn to you, and maybe Aryeh first again, to talk about the ways in which Herman's approach to issues kind of opened up new possibilities in your mind?

MR. NEIER: Well, the idea of protecting rights within prisons influenced me in the following way, that I began to think about other institutions in which people did not have rights. And where rights were off limits. And it made me think in terms of mental hospitals; in terms of institutions for the developmentally disabled, juvenile institutions, and the schools and the armed forces, in the military.

I always regretted that I never significantly got to extend that to nursing

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homes, which were in a sense voluntary institutions, but for a lot of the people actually live the in the nursing homes they were not so voluntary.

But over a period of time at the ACLU I was able to launch efforts dealing with all of those kinds of institutions, other than nursing homes, and I used to refer to them as enclaves in which people did not have rights. And people who knew me in that. At the ACLU always associated the idea of dealing with enclaves with my own role at the ACLU. But the effort of dealing with prisons preceded the other efforts and had a very large influence in the way in which I went to about addressing those issues during my tenure at the ACLU.

PROFESSOR ORENTLICHER: Thank you. That's so impressive. Those of us of a certain age here understand how, you know, 30 years ago there really was a narrow understanding of what counted as human rights that were enforceable. And I remember when I was a full-time human

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rights lawyers in the 1980s frequently been puzzled about why we only talked about political prisoners and not other prisoners, and Herman just took it on.

He didn't just ask why aren't we doing this, he just went for it and help to reframe our understanding of where human rights applied. We heard some more about that this morning. So it's a super important impact.

Claudio, do you want to address that?

MR. GROSSMAN: I think that the role that the institution increases. I think it's something that very much inspired many of us, if not all of us.

As you mentioned a lot of attention have been focused in the (inaudible) community on the situation on political prisoners. But it was also the torture in some countries, political prisoners because they come at prisoner with torture. So it was very important to understand in a holistic way the situation of prisoners. And when I was in the (inaudible) commission and

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the committee against torture, I was not there when the key thing is the (inaudible) made by Herman. The key thing was, for lack of a better word, to let the (inaudible) the side, basically, of prisoners. Let us see the topic of prisons as a whole.

MR. NEIER: If I can tell a story on that. It involves your country, Chile, and one of my colleagues had paid a visit to Chile and had visited a regional branch of the non-governmental organization, the Chilean Commission on Human Rights and --

MR. GROSSMAN: In (inaudible).

Mr. NEIER: Yes. And in talking to the leader of that branch of the Chilean Commission, he was told that things had improved, that there had been only a couple of the cases of torture during the past year. And my colleague asked doesn't that include the common prisoners? And the answer was oh no, they all get tortured. He was talking about the political prisoners.

And, you know, an organization like

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Amnesty International was formed to deal with prisoners of conscious and in its early years didn't deal with common prisoners. When we created Human Rights Watch one of the founding ideas of Human Rights Watch is that we would not make that distinction, that we would be concerned not only with the people who were in prison for reasons of conscious, or for political reasons, but we would deal with all prisoners.

And Amnesty, over time, shifted its policy as well. And for many years now has dealt with all prisoners. But one needed to make that shift.

MR. GROSSMAN: Yeah, and to go on (inaudible) I think that was important for me with Herman, is the role of constitutionalism. The role of the Constitution. Even if Herman himself did not believe that the model of the U.S. Constitution was somebody that could be at adopted by other countries, you know, he would go to some countries, I think there was an expectation of those who did not know Herman that

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he would try to install the same way of thinking in another country.

No. But there was an idea of constitutional is some that it was not only embodied in the U.S. Constitution, and I think that was very important to me in many ways. For example, in the issue of emergency situations, are in the topic of freedom of expression, but that there was a something that was essential here that was independent, impartial, competent tribune.

And I would say this. As you mentioned earlier if this fact that a person is a prisoner, the person is a prisoner when we attempt to establish special categories of people that are treated differently and special types of tribunes, that's really what all of us want. I mean if there was something important in this idea of constitutionalism, this idea of the separation of power, and this idea of a court and court said that are independent and that deal with all the situation. And I think that that --

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and finally, let me say also, the role of (inaudible). Not dealing up. I think that all these values are not only in a paper. They are the natural expression that says that paper has patience. You can put in an opinion in the newspaper, but they replace expectations of human (inaudible) of living decently. And the power goes well beyond simply the fact that they are in (inaudible).

And I think what a very important thing for what Herman stands for and inspires other people.

PROFESSOR ORENTLICHER: I wanted to ask each of you to reflect, if you can, because it's fascinating to hear what Herman is light, in kind of a more intimate sphere of collegiality. My guess is that Herman was forthright in telling you when he disagreed with you?

MR. SCHWARTZ: Yes.

PROFESSOR ORENTLICHER: And didn't mince words about it. So I wonder if you could talk about how he approach that, because my

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experience with Herman was that you could be just adamantly in disagreement. Just, you know, he's here and you are here and he would turn it into an invitation and invite me to disagree with him in the Washington Post. But I can't even remember which side you are on in which side I was on. But many years ago you did an op Ed piece, and I disagreed with it and you said, well let me help publish a taking exception piece. And so I did.

So let me give you a tee off. What about economic and social rights? Did he --

Mr. NEIER: Okay. Well, Herman and I disagree on the subject of economic and social rights. I am a advocate of limiting the international human rights efforts to a focus on civil and political rights. And Herman takes the opposite point of view, but Herman invited me here to this law school and we debated on the subject and the law school published an account of our disagreement.

And I have seen that particular account

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of our disagreement quoted and reprinted in a good many places. So that's what I -- Herman was always blunt. Herman was a very clear when he didn't agree with me on something. And he was, you know, quite vigorous and expressing his disagreement. Not rude, but vigorous.

PROFESSOR ORENTLICHER: Claudio?

MR. GROSSMAN: He always agreed with me. At some cost.

PROFESSOR ORENTLICHER: So maybe following up on your comment.

So fill in the blank here. I always find myself smiling when I remember the time Herman, blank.

MR. NEIER: Okay. In the early days in which I sought funding for Herman's work on prison matters, I got report from a consortium of small foundations in New York. And I had a very friendly relationship with the woman who directed that consortium of small foundations.

And when I approached her for funding for Herman's work on prisoner's rights she was

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very receptive, but she said she thought Herman should consult with, and I won't name the name, but she named a prominent legal scholar. In fact, he was the Dean of a leading law school, and she suggested that Herman should consult him about the project.

So I didn't know the person. I knew his name, but I hadn't met him. And I repeated that to Herman. Herman's response to me was why should I consult that horse's ass? And later on, I had another conversation with the foundation director, and she repeated the request that I should have Herman consult that to prominent legal scholar.

And I was indiscrete and I repeated Herman's comment to her. And then there was silence on the other end of the phone for a little bit. And then she informed me that she was about to get married to him.

MR. SCHWARTZ: (inaudible) yeah.

MR. NEIER: I should say that the, as memory serves me, I think the grant was made and

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I remained her friend for many years until she died. Her husband predeceased her, but she and I worked together on various projects over a period of time.

MR. SCHWARTZ: I would add she forgave me for this. Because as it happened, her brother was a contemporary of mine in college and she knew me --

MR. NEIER: Was that her former husband?

MS. SCHWARTZ: No, her brother.

PROFESSOR ORENTLICHER: Brother.

MR. SCHWARTZ: Her brother was my contemporary. However, some people are very, very forgiving because years later when we had the international prison project people went around interviewing and looking at prisons around the world. The two of them volunteered to do a report on Indonesia.

MR. NEIER: Indonesia. Yeah, I remember that.

MR. SCHWARTZ: To which they were going

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on this person's sabbatical.
MR. NEIER: I think it was published in The New Republic.
MR. SCHWARTZ: I didn't know that.
MR. NEIER: Yeah.
MR. SCHWARTZ: So that some people are really (inaudible) of gaps of various kinds.
MR. NEIER: Well, it was my fault to repeat your comment.
PROFESSOR ORENTLICHER: So you just witnessed some restorative justice.
Claudio?
MR. GROSSMAN: When I (inaudible) reason to smile at one, and the only thing I think of is particularly in the other two buildings where we had (inaudible) and (inaudible) sit down, there was no place to sit down because the office of Herman is full with all kinds of strange, (inaudible), you know and they (inaudible). And you see he is planning for the (inaudible) center and I said that we are (inaudible) of us. And then I got intent to

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define Herman.
But when I think of Herman I think of that office. That I think is a way, I mean with the (inaudible) of action which is Herman on the computer and we did (inaudible) create ideas and promote institution and so forth.
It's a very warm place I would say and difficult to find a seat on occasion.
PROFESSOR ORENTLICHER: I forgot to ask, Macarena, do you want me to allow some time for questions?
Sorry, Macarena? I'm sorry. Do you want me to allow some time for questions? I forgot to ask you before the panel.
PROFESSOR SAEZ: Oh, absolutely.
PROFESSOR ORENTLICHER: Okay.
PROFESSOR SAEZ: You're the (inaudible).
PROFESSOR ORENTLICHER: Okay. Let me ask you one more round of questions of our two speakers, and then open it up for the remaining five minutes.

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I'm obviously happy for the opportunity for us to recognize that Herman is not just an extraordinarily visionary and effective human rights and civil rights lawyer. But also a very cherished human being. And so your stories have helped to bring out that dimension.
But I want to kind of come back to his role in the work that both of you have done. One of the things that the three of us have in common or that's sort of the uniting institution of the Open Society of Justice Initiative which Aryeh created and Claudio is now on the board of. And Herman and I were on the original board members of that. I wonder if you could talk about why you turned to Herman when you were thinking about creating this new institution?
MR. NEIER: Well, most of the scholar activists who I knew were either involved in international human rights, or they were involved in domestic civil liberties. There were relatively few who I can think of, and Herman was foremost among them who were deeply involved both

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domestically and internationally.
And I wanted the Open Society Justice Initiative to play a role in litigation internationally. But the lawyers who had experience of the litigation in the United States were actually more involved in litigation then many of those who were focused on international human rights.
And so because Herman combined both the involvement in international human rights and the involvement in domestic civil liberties and had undertaken so much litigation, it seemed to me that he would to play an immensely important role in the Open Society Justice Initiative in helping it to fulfill the role that I had in mind for it.
And, in fact, it has become a leading body in international human rights litigation. And I think Herman contributed a great deal to making that take place.
PROFESSOR ORENTLICHER: Thank you.
Claudio?
MR. GROSSMAN: Well, Diane, you can

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imagine that I have been a Dean of a law school for 31 years. Let me say in that time, you have crisis this and situations of tension and so forth. As a matter of fact, when I went wants to Columbia (inaudible) Commission there was a -- and we talked with the President of Columbia.

And I said we arrived, there have been some massacres. And somebody in our group said, well, told the person don't you have nightmare, with all the situation in your country? And the person said, well, no. Actually, I sleep very well. My nightmare starts when I open my eyes.

Now, but with all the nightmares of Columbia, I thought that Columbia was easier than a law school from the point of your political things here. Because you have the narco trafficants, you have the army, you have the capital of political parties, the church, some international actor, and you could come to the conclusion that you could not do anything.

In a law school you have a lot of independent actors. And then you have

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billionaire city, and (inaudible) and grantings and a lot of things. And I -- when I had the problem I will go and talk to Herman. And always Herman, I mean it made me think about others. And it entered my imagination and this space of kind, like I said. Even if there were difficulties sometimes to find a suitable chair, I will tell you I have -- I think with tremendous affection and gratitude to those moments where we could talk. See these matters in (inaudible). Appointments --

I will tell you, when I became the Dean, on a Monday, you know, I trusted. I received the letter of appointment that I received on a Monday, it was (inaudible) and the letter of appointment said you will not appoint a Dean for finance. The second thing, you will not appoint a (inaudible) in any administration position (inaudible). You have run -- it was a formality, I have run for the presidency of the union.

So I never have discussed those matters

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with anyone. I mean that was not part of my conversation with the presidential (inaudible). So I went to Herman. And I what do we do? I say they're trying to -- what you can't do and what do you think you can do. Well, I ended that talking with the (inaudible) and we never talked to that. And I'm not going to exclude anyone from any position and I don't think it's good for you and this is not. So he said okay, I'll change this, and you'll get the letter and he deleted the topic of (inaudible).

But he kept the appointment of the, let me say that the appointment of the Dean for the finance will be his. And I had told him, you know they report to you. If I don't do a good job you can -- I am responsible, but in the law school everyone reports to the dean of the law school.

And you could not give away the control of that for anyone. But he would -- (inaudible) the notion of the law school is not a separate from the university. You work over it and again,

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I will go and ask Herman what do you think about this mess? I ended up calling the president. He was not there and I told the dean, the provost if I don't get the letter by 3:30 I have faculty meeting and (inaudible). He said, well, the president will call you. I say do you have a problem then?

I got the letter at 3:30. The converse saying that was not there. And I can only tell you had it not been by conversation (inaudible) that I have with Herman I would have reacted in a different way, perhaps not giving a chance (inaudible). And that's simply from the faculty (inaudible).

So I think that -- and that was not the only person at issue. It established a relationship an institutional relationship that allowed for many things in the law school. Sol I think that Herman played a very important role. I have not known a person who is quicker on his feet and can provide you with advice. And is not something -- I mean when you are dealing with

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complex situations it's not -- nothing is easy. So you have to battle different things and those exchanges were very important for me. And I think for the institution.

PROFESSOR ORENTLICHER: Thank you. I think we're just about out of time. And I know that my colleagues will thank me if I bring this to a close on time. So I just want to close with seconding a point that Jabareen made earlier this morning, which is that while we are all happy for this opportunity to express our appreciation for our just extraordinary colleague, and cherished colleague, we're not letting you go anywhere.

And this is not a -- it's just a moment to thank you and to say we look forward to being your colleague for many, many more years. And thank you, Herman, for all that you've done and all that you are.

PROFESSOR SAEZ: We will start our next panel in (inaudible) so --

MR. LAGUARDA: Okay. Welcome back

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everyone. Please have a seat. Please take a seat and we will begin with our next panel.

We'll get started in a moment. Thanks very much. Thanks for returning for our afternoon program.

I want to introduce the moderator of our next panel, our former colleague in the program on law and government, Bill Yeomans who will be moderating our discussion in the next panel.

And a reminder to everyone that we do have a coffee break after this panel. So if you haven't had your coffee you will still have an opportunity. Thank you.

PANEL 3
PERSPECTIVES ON VOTING RIGHTS AND SOCIAL JUSTICE

MR. YEOMANS: Okay. Hello everybody. It's great to be here. I am delighted to be part of this amazing event for Herman. I have taken to calling Herman Palooza, but I'm sure it has other names as well. But it's a real pleasure to

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be here and if you would just indulge me for one moment.

I had heard about Herman for decades while I was working in Washington but had never really worked with him. Never had a lot of contact until I came here to the law school. And when I did we immediately fell into any number of heated conversations. And one of the wonderful things about Herman he is he does have this amazing set of values, protection of civil liberties, progressive social values, and I think he and I agree on most of the end of goals that aim for.

But we had no end of disputations conversations about how to get there. And I just want to say, they were so educational for me, they were an important part of my day. We spoke almost daily it seems. I would come in and see it in his big chair. I don't know what else to call it. It's not really a chair, it's almost a throne. And we would go at it.

And we became good friends and co-

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authors and colleagues, and I will forever be indebted to him for helping me grow as a teacher, and as a person.

So thank you, Herman. Okay. So as a young manager I was given a piece of advice by wise old head said if you really want to succeed, don't be afraid to surround yourself by people who are smarter and better looking than you. And I've really outdone myself today.

We have on this panel three of the country's leading voting rights advocates and civil rights and generally, but voting rights in particular who are really on the front lines of what's going on in the country today. And so I'm really excited to have them here. And let me -- I'm not going to spend a lot of time introducing them because I could spend all of our time doing -- well, just going through their awards.

But just so you know who they are. Starting at the far end is Dale Ho. Dale is the director of the ACLU's voting rights project supervises the ACLU's of voting rights litigation

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and advocacy work nationwide. He has that been at the center of many of the recent most important voting cases in the country, including arguing in the Supreme Court in the recent census citizenship question case.

He is involved in litigation around the country. He is an adjunct at the NYU school of Law. He is a frequent commentator and all forms of media. And so we are delighted to have him.

Next to him is Allison Riggs. Allison leads the voting rights fights program at the Southern Coalition for Social Justice, which is an organization in North Carolina. She has been there for a decade, which is about as long as there hasn't been a Southern Coalition for Social Justice.

And she too has been in the forefront of some of the most important cases of recent years, including arguing a couple of cases in the Supreme Court, a Texas redistricting case from the term before this past one, and the North Carolina gerrymandering case in this past term.

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And I said to her before we came out here, the results certainly didn't reflect the quality of her argument.

MS. RIGGS: We lost.

MR. YEOMANS: I assumed people would know that. She did a great job.

And then next to me is Jon Greenbaum. Jon, I have to look on my phone to get your title because I --

MR. GREENBAUM: Chief counsel.

MR. YEOMANS:. Chief counsel for the lawyers committee for civil rights. And Jon is a long time civil rights litigator advocate. We first knew each other back in the Department of Justice. Jon was in the voting section, was a key member of that section for a number of years. And has since moved on to different pastures with similar subject matter. And he too has been involved in many of the most recent bits of litigation -- most important bits of recent litigation. So we are delighted to have him here as well.

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You notice, he is not Kristin Clark. Kristen, unfortunately, had to make an emergency appearance at a board meeting apparently. So she could join us.

So what we're going to do, were going to try to cover a fair number of voting issues starting with a discussion of sort of the post Shelby County landscape and the kinds of vote suppression tactics that have arisen in the wake of that decision. We are also going to move on to talk about some current and upcoming issues. Particularly, we will talk about the senses, and were going to talk about redistricting.

So without further ado, let me just give a little bit of background to make sure everybody is on the same page. The Voting Rights Act passed in 1965. An incredibly important piece of legislation, really changed the voting landscape and franchised millions, and was held constitutional by the Supreme Court in 1966.

It was a renewed in 1970, 1975, 1982, and 2006. And it has, for our purposes to really

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essential fixtures. One is Section 2, and one is Section 5. Section 2 is an authorization for private and government entities to sue to redress election practices that result in discrimination based on race.

A Section 5 is the preclearance provision. And the preclearance provision required that cover jurisdiction submit all of their proposed election changes to the Department of Justice or get clearance from a three-judge court in the District of Columbia before they could go into effect.

And what the jurisdiction had to show was that the change would not have the purpose or effect of discriminating on the basis of race. This applied to, as I said, covert jurisdictions. It was a coverage formula in Section 4 of the act which was created in 1965 and depended on registration, and turnout in presidential elections, and whether or not a jurisdiction had used a test or device in the past that was discriminatory.

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So most of the South, and a number of other places in the country were covered jurisdictions. They had to submit everything they were going to do to the Department of Justice, so the Department of Justice knew about all of that and advocates knew about all of what was happening. The Department of the Justice could object, and, it was not completely effective, but a pretty effective approach to enforcing voting rights.

The Supreme Court in 2013 in Shelby County decided that the Chief Justice decided that times have changed, the five justices decided, times have changed, the Act, the preclearance requirement was no longer justified. The coverage formula was outdated, it was based on old data. The country had moved beyond that, and coverage formula now violated something called equal sovereignty of the states, which many of us thought we had moved past in the Civil War. But it was brought back.

So coverage states were unleashed, and

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immediately took advantage. So the day that Shelby County was decided the Texas attorney general announced that the photo ID law that had been on hold in taxes would go into effect. And the North Carolina legislature, as we'll hear, in acted a sort of greatest hits of vote suppression law that had a devastating impact in North Carolina. Other previously covered jurisdictions followed suit.

So it has been the job of these people to try to tamp down as many of these vote suppression efforts as possible. And they've had to do it through advocacy and through litigation. In the problem, of course, with litigation in the voting area is that you cannot undo elections. Once an election change is use, once the election happens, voters have lost their opportunity to vote meaningfully and people have been elected who should not have been. So a heavy task, but they have done an extraordinary job.

So I wanted to start with Jon Greenbaum

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and ask him for a little bit of sort of the lay of the landscape of the post Shelby world. What's going on?

MR. GREENBAUM: Thanks, Bill. It's a pleasure to be here. Professor Schwartz, I look forward to reading the homework that you have given us. Discussing your work, Bill, in terms of discussing us, I wish I could have given his bio because it's quite distinguished as well. When I was a trial attorney at the civil rights division, Bill was the deputy assistant attorney general, and then, for a while, the us acting assistant attorney general.

So as Bill mentioned, the Shelby County case was a watershed moment in terms of voting rights issues in this country, and the biggest setback that we had in decades. Bill gave two examples of how in the first month after the Shelby County decision states that were governed by Section 5 proved that times had not changed.

Texas, the day the decision came down and said that it was going to start implementing

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its of voting rights voter ID law. A law that had been blocked by Section 5, both by the Department of Justice and later by a federal court because it was discriminatory. And we spent the next 3-1/2 years litigating over that issue, where we won in front of a -- we won first of all in front of the trial court in federal district court in Texas.

We won before a Fifth Circuit panel, and then we won before the Fifth Circuit en banc, but during all that time, during all those elections between the summer of 2013 and the fall of 2016 that law was in effect.

And then similarly, there was the North Carolina voter suppression law where Allison will probably talk about it some more, but in basic terms what North Carolina did was to determine which voting changes could they make that would have a discriminatory effect, and they made those changes. And if they determined that a voting change wouldn't have a discriminatory effect, they didn't make the change.

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And that also was litigated basically all the way up through the end of the Obama Administration. So again, another 3-1/2 years where during most of that time that law was in effect.

And we've seen problems and a lot of other places, some of which don't get attention like those. I mean we got involved at the lawyers committee in cases involving Hancock County in Georgia. A small rural county, a majority black county. But, a place where the demographics are changing because it's now a place where people are now building their lake houses.

They were having a mayoral election in the big city in Hancock County known as Sparta, a majority black city. And the election commission decided they would do a voter purge. And they focused, and all but two of the voters that they purged were African-American. And, in the upcoming mayoral election white candidate won, mayor for the first time in decades.

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So we sued, and we won and they admitted that they had violated the national voter registration act. But, in the meantime, as Bill said, you have elections, and in this case, that white mayoral candidate won. And we've seen a whole bunch of other examples of that. In fact, I was adding this up for testimony I gave for Congress a couple of weeks ago.

My organization of lawyers committee has filed 41 voting cases since the Shelby County decision. Four against the federal government because now there are times in which you need to sue them. Of the other 27, 29 were in the states that used to be covered by Section 5. Even though those states -- even though, you know, there were only nine fully covered states under Section 5, and only two partially covered states, so that's an idea of where the discrimination is still concentrated.

And then, just to let you know in terms of the success rate, we've gotten a result, or settlement, and 33 of the cases and we won 27 of them. But, even with our organizations and groups like ours, it's simply not enough. We don't know a lot of times when discriminatory voting changes might be made in some small town or some small county in the South.

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Because a lot of these things happen under the radar and voters don't realize, okay, my polling place has been moved from a community center to the sheriff's office until they show up at the polls that day. And that actually happened in one of the matters in Georgia that we were successful with our grassroots partners in stopping this, that they wanted to move the polling place to the police department.

So you know these are the issues that were continuing to deal with, and it's going to be exacerbated when we get to redistricting. Because redistricting is the time in which not only do we have to deal with the fact that thousands, tens of thousands of jurisdictions are going to be redistricting for the first time since Shelby County, but they make a lot of

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voting changes related to the redistricting. Like polling place changes, precinct changes, and other rules.

And so, you know, we have a big gap and that we are dealing with and that we are going to be dealing with in a more robust way in the years to come.

How am I doing on time?

MR. YEOMANS:. That's great.

MR. GREENBAUM: Turn it over?

MR. YEOMANS:. Yeah, let's go down to Dale.

Dale, you've been litigating lots of these cases. Tell us a little bit about what you've been up to.

MR. HO: Sure. Just before I do that I just want to thank you for the introduction, Bill. It's a real honor to be here today and get a chance to talk to you all. It's a real privilege to be here at an event for Herman. He's a real legend at the ACLU where I work directing the voting rights project there.

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I just want to give a little bit of an overview of the voting rights work that we've been doing since Shelby County, which I think will bring home what impact that decision had. The devastating impact it had on voting rights.

A decision to release in those states and counties with the worst histories of discrimination from federal supervision really couldn't have come at a worse time. In the run-up to the 2012 presidential election, 19 states passed 25 laws that make it harder either to register to vote, or to cast a ballot. And that came kind of like a bolt of lightning for us.

At least I can say I was not expecting that to happen in the run-up to the 2012 presidential election. Voting becoming easier pretty much across the country. And then, I guess something happened with the 2008 election, I'm not sure what that might have been that made a number of states decide too much voting rights we're going to make voting harder.

A number of those voting restrictions

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were stopped because of the Section 5 preclearance regimen. Early voting cutbacks in Florida for example. Texas is voter ID law in which Jon mentioned. A voter ID law in South Carolina was loosened up so that voters without ID could actually still vote under that law.

But when the Supreme Court struck down the federal preclearance regime, or at least immobilized it with the Shelby County decision, despite what Chief Justice Roberts said about things having changed in the South, Justice Ginsburg warned that getting rid of preclearance system was like throwing away your umbrella in a rainstorm because you're not getting wet.

And sure enough, the downpour came. We've been litigating -- we've been up to our eyeballs I would say in litigation over the past six years or so. And I think the patterns we've seen in that litigation reveal three points.

The first is that, again, notwithstanding Chief Justice Roberts characterization of things in the South, the

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problems we see in voting rights appear to remain concentrated in exactly those parts of the country that Section 5 was protecting.

There have been a total of 26 successful cases brought under Section 2 of the Voting Rights Act that are available on Westlaw. There are more cases than that, but these are cases where there has either been a judicial decision are a settlement in a case alleging racial discrimination under the VRA.

That doesn't include all the voting rights cases over the last six years, not cases under the National Voter Registration Act, or under the Constitution, or under other provisions of the Voting Rights Act, like the language assistance provisions. But 26 cases successful under Section 2 of the VRA since Shelby County.

More than half of those cases were in the dozen or so cases that were covered by Section 5 until the Shelby County decision. So we see that those handful of states continue to have sort of an outsize number of voting rights

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of violations.

The second thing I noticed when I looked at these cases is that more than half of them occurred at the local level instead of the state level. Now, when a state changes its laws to in act a new voter ID law, or a new restriction on registration, or cutbacks in early voting, that's typically something that gets covered in the local paper. It's a bill that gets passed in a state legislature, and folks like us at the ACLU hear about it, we can try to litigate that.

But when changes to voting practices happen at the local level it's much harder for us to hear about it. And that, I think, underscores another thing that we lost with the demise of the preclearance regime, which was the simple obligation for states and localities that were covered by it to provide notice. To let the Department of Justice know about it. The Department of Justice would publish that information and that would allow folks like us to

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know about what was happening at the local level. And now we're sort of left playing detective, or playing catch-up most of the time.

And there is a third point, I think, that emerges when you look at these cases, and I'll just talk about the ACLU's experience. We've litigated 10 successful Section 2 Voting Rights Act cases since Shelby County. Again, that's not all our voting rights cases because some of them are brought under other statutes.

But if you look at the cases we've litigated, the average length of time is about two years to litigate those cases. That's even when we're seeking an expedited schedule. You know, it's funny when I go and talk to law students I tell them voting rights cases are so much faster than other kinds of civil litigation. We are sometime finished in two years. And the students are sort of like, wow.

What I think that gets home is what Bill was mentioning about the fact that voting cases are different from other kinds of

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discrimination cases. If you suffer from, say, employment discrimination you don't get, say, a raise that you were entitled to. You can bring a case, and after the fact, if you prevail, you can in theory, anyway, be made whole after the fact. You can get your back pay, you can get it with interest.

But if an election happens under a discriminatory voting regime, there is no way to undo that election and make the victims of discrimination whole. Just in those 10 successful cases that we brought, between the time that we filed suit in the time that we got a favorable result for our clients, just in those 10 cases 350 federal, state, and local officials were elected in those places under regimes that were later determined to be discriminatory.

The best example I can think of is other than the North Carolina case that Allison led and is going to talk about, is a case that we brought in Ferguson, challenging the way that the school board is elected there. I think everyone

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is familiar with Ferguson, in some ways the birthplace of the Black Lives Matter movement after Michael Brown was shot.

The school district there was created pursuant to a 1975 desegregation order. As recently as 2014 the school district had zero African-American board members despite the fact that the student body of the school district was 80 percent African-American. We brought a lawsuit challenging the method of election there to try to make it so that it could provide black voters in Ferguson an opportunity to elect members of their own community.

The case took four years to litigate from start to when we got a favorable ruling from the Eighth Circuit on appeal. And in that time, the entire school board turned over 1-1/3 times before we could finally get relief implemented which went into effect earlier this year.

So the third point I think that I'm trying to make was that we really lost something with preclearance. We lost the ability to stop

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voting discrimination before it happens and that really results in irreparable harm for voters.

MR. YEOMANS:. Thank you, Dale.

Allison, North Carolina.

MS. RIGGS: So in the run up to the Shelby County decision, a lot of the civil rights community was warning what would happen if we lost Section 5, and we were frequently dismissed as worrywarts, and exaggerators. And North Carolina created a scenario where I never got less pressure from saying I told you so.

Just as a little background, North Carolina in the spring of 2013, before the Shelby County decision came down, the House in the North Carolina General assembly passed a voter ID law. This was when Section 5 was in place and they knew they would have to go through preclearance. It was a problematic law, but it was -- it had some give.

So then it got sent to the Senate and it just sat there for months. The Senate didn't do anything. In June, when the Shelby County

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decision was announced, one of the head senators of the North Carolina Senate said great, no more preclearance. Now we can go with the full bill, referring to the voter ID bill.

And we were, well, what's the full bill? You just passed a voter ID bill out of the House. They come back a short time later and changed what had been a 17 page a voter ID bill into a 58 page omnibus election bill that not only rolled back every election reform designed to increase participation, but took the ID law that had passed out of the House and stripped out IDs that had been acceptable in the House, and made it a more stringent voter ID law.

And just so you understand, elect oral change in North Carolina had happened really quickly and really dramatically in the previous 10, 15 years. We got early voting in the late 1990s. In the mid-'90s, early '90s North Carolina participation rates were abysmal. We were in the 40s, the gap between black and white participation was enormous.

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And so from '99 to 2011 we started implementing these reforms, having early voting's, no excuse absentee voting, same-day registration during early voting. Out of precinct voting, so if you couldn't get to your assigned precinct on election day you could still vote.

Preregistration far 16 and 17-year-olds. And that led us to the situation where in 2008 and 2012 we finally saw something approaching parity between black and white participation. And North Carolina's participation rate overall was incredibly high. It's a youth participation rate was off the charts. And President Obama won North Carolina in 2008.

So that is what led to rolling back every single one of those reforms that I just listed, proof. Then an ID law that was a good enough in the House, suddenly student IDs aren't good anymore. Public assistance IDs aren't good anymore.

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And so we litigated the case and I was lucky to co-counsel with Dale. The Department of Justice was involved in this case, and it took forever. We brought claims under Section 2, under the Constitution, under the 26th amendment, and it took a long time. We had some elections under these really problematic provisions and we saw voters being disenfranchised left and right.

And even though we ultimately won, we secured one of what is to me, and unbiased, the most inspiring opinions out of Fourth Circuit finding that this lot was intentionally racially discriminatory. That the legislature knew what it was doing and designed this law with surgical precision to undermine the ability of black voters to participate in the political process.

Despite that huge win, and keeping it out of the Supreme Court, despite that North Carolina -- it's not like they said okay. I did wrong. I do better from here out. The message they took was what we did wrong was lumping it all together. If we just did all of this stuff

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piecemeal we would be fine. And that's what we're facing now.

They found another way to get ID back in the mix. They found new and creative ways to attack and undermine early voting, and so it becomes a game of whack-a-mole. These laws go into effect immediately. We have to seek preliminary injunctions which, you know, are difficult to gather that kind of evidence really quickly, and to stop the laws from going into effect.

And so it's a real injury to voters of color in our state and across the South because there is just only so many of us, and there are only so many resources to do this work. The Department of Justice's preclearance ability was really important. And just to sort of let you know how devious this is, I mean these legislators are acting -- they can put a positive spin on anything. And without the Department of Justice doing a really careful analysis based on data this stuff goes through and seems okay.

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A recent example is, last year North Carolina's legislature enacted a bill that they called the uniform early voting hours requirement. That sounds okay. They said we want every county to have all of its sites open the exact same time, from 7:00 a.m. to 7:00 p.m. We have 100 counties in North Carolina. Not every county wants to be operating early voting sites at 7:00 a.m. They could have evidence that that no one will vote at 7:00 a.m., but they were being forced by the state to do that.

So what did we find happened? In order to staff at these hours that didn't make sense, in order to comply with this rule that if one site is open every site is going to open, we solve formally covered counties reducing their number of early voting sites from 5 to 3. From 4 to 2, and across the state a loss in the number of early voting sites.

And the legislature said well, we had more hours of early voting than we ever had. I'm like yes, during the hours that no one was using

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them. We have very rural counties. Keeping a site open in a rural part of the county, the county board of elections might have decided that if it makes sense to open a site in a rural area on the weekends when people use it.

But now, they had to keep all sites open all the time. They have limited resources. It's not like that this mandate for uniformity came with a check. So sites closed left and right and a real disservice to voters, especially in a state where public transportation is lacking, shall we say.

So this is what we fight every day, and it's not stopping. It's a getting more and more creative just like what we saw when Section 5 was put into place in the first place. That the discriminators were coming up with new ways to get around the laws. And in fact, very little has changed since 1965 on that front.

MR. YEOMANS:. Oh that's so sad.

So yeah. I so I think what the panelists have made very clear is that the fact

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that we have local elections and that we allow local jurisdictions to administer elections opens up nearly infinite possibilities for vote suppression. And as Dale mentioned, one of the things that was lost, and as I mentioned earlier, with Section 5 and with preclearance was that in the past when we had Section 5 all of those changes had to be surfaced. They had to be reported to Washington before they could go into effect.

It is obviously, now, extremely difficult as I've said to know what's going on, to know when a local jurisdiction is making plot may be a fairly minor change, or may appear, as Allison says, to be a fairly neutral positive change that will have a huge discriminatory impact. It is extremely difficult to keep tabs on these things, and it is because we have -- we conduct thousands of elections every time we have an election.

So, the future. We have a future coming. And there are two events coming that are

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hugely significant for voting and are certainly related. And the first is the census. We are coming up on the 2020 census and the second is the event that traditionally follows the census, which is redistricting throughout the country. And this will be the first time that we are dealing with redistricting without Section 5, which will pose enormous new challenges.

But before we get to redistricting, we have to get through the census. And there have been some recent issues concerning the census that have been unusually significant. And I wanted to ask both Jon, and Dale, to talk a little bit about the importance of the census to voting rights and what's it going on this upcoming census.

Jon, you want to start?

MR. GREENBAUM: Yes, I'll start and then turn it over to Dale at some point in the conversation. So why does the census matter? Well, census matters because the census is what we used to count people. And why discounting

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people matter in terms of redistricting? Well, it's because one person, one vote.

And so basically every 10 years, because in most places you have population changes every 10 years anyplace that has districts, whether we're talking about congressional seats, or state legislative seats or school board seats, or city council seats, or water district seats. Anyplace that has districts has to redistrict, and uses the census data as the basis for having equal numbers of people in each district.

A couple of big issues that are out there that are interrelated. The first was the subject of litigation that both Dale and I were involved in related to the Commerce Secretary's decision to put a citizenship question on the 2020 census. And the Commerce Secretary was essentially hell-bent to do this. He had early talks with people like Steve Bannon and Kris Kobach putting a question on.

Later on we found out about some

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additional documents and that were out there that were used. But he needed to get another federal agency to say that there is a good reason for putting a citizenship question on the census. And he went to the Department of Homeland Security and they said we can't find one.

The first time he went to the Department of Justice and they said we can't find one. But later, after a conversation between Commerce Secretary Ross and Attorney General Sessions, Sessions said we will give you what you want.

What they came up with was a concocted reason saying that citizenship dates is needed by the Department of Justice in order to enforce Section 2 of the Voting Rights Act; something that the Department of Justice had never needed before and something that was particularly ironic given that the Department of Justice during the Trump Administration wasn't bringing Section 2 cases. In fact, it's only brought one in its three years.

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So they came back and, like I said, the Department of Justice said okay, we need citizenship data for the census. But that didn't necessarily mean you had to have a citizenship question. And so the employees within -- from the Census Bureau who work on the census basically came up with a memo talking about all the various options for what's going to give you the most accurate citizenship data on a census.

And they said the most accurate way to do it is actually to use administrative records, over putting a question on the census itself. And it gave the reasons why. So then, Secretary Ross basically said that's not good enough. What if we used a combination of asking the question and putting the data -- asking the question using administrative records?

And the Bureau came back a second time and said no. Using the data itself is going to be more accurate. You're going to get more accurate data, you are going to get more information, and more accurate information. And

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a large part of the reason why is that if you put a citizenship question on the form, a lot of people will answer the form. And particularly people that are most vulnerable residents will not answer the form.

Which, of course, is a large reason why the political people wanted the question to be on in the first place so that certain people would not answer the form. And that would, ultimately, help -- and we later found out from a Republican strategist that Republicans saw this as a way of improving their chances of winning elections.

And so there were three cases that were filed when the Commerce Secretary made his decision there were three cases that were filed with respect to this. The California case, first filed in the state of California. My organization of lawyers committee represented the City of San Jose and Baja in that case.

The case that was filed in New York by New York and several other states that Dale and the ACLU and other organizations were brought in.

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And then a third case that was filed in Maryland that involved several private plaintiffs in that case.

Before I turn it over to Dale, I would just say that as a civil rights litigator for the last 25 years, I've been involved in a lot of crazy cases. This one was by far, the craziest one that I was involved in. And, you know, I go back to those eight days between when -- after we thought we had won the case in front of the Supreme Court and President Trump had tweeted and said it's not over.

In those eight days between that tweet and then when they finally conceded were extremely stressful. I mean I thought that we were headed for a constitutional crisis because the Constitution gives Congress -- delegates to Congress the authority to conduct the census. And essentially what the President was doing was taking over that authority. And I was concerned that a majority of the Supreme Court was going to let him do it. But luckily it never came to

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that. We got a big victory.

And I'll turn it over to Dale to talk about the rest of it.

MR. HO: Thanks a lot, Jon. So just to give people a sense of the stakes of this case. The Administration's own estimate as of this summer, not ours, don't take my word for it. The Census Bureau's own estimate this summer was that if a citizenship question were on the decennial census questionnaire 9 million people would not respond to the census.

Now, because the census is the basis for divvying up representing in the House of Representatives, allocating seats internally within states during the redistricting process and also serves the basis for distributing $900 billion in federal funds annually, you can imagine what the might mean if 9 million people don't respond to the census who are concentrated in particular places.

Just to give you a sense. I mean, if you put 9 million people together that would be

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our 11th largest state. It's more people than in the state of New Jersey. That state would have 12 seats in Congress and 14 votes in the electoral college. So we're not talking about just you know, losing a few numbers here and there.

The district court in our case, at a time when the census bureau's estimate was actually lower, in terms of the effect, found that California, New York, Florida, Illinois, Arizona, and Texas were all likely to lose a seat in the House if there were a citizenship question on the census. And then within those states representation would get drained from urban communities diverse areas of the states and would flow to rural disproportionally white areas of those states.

We have two basic arguments against the Administration's attempt to put the question on. One a sustentative one that basically the notion that enforcing the Voting Rights Act could, in some way, be facilitated by adding this question.

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It was not supported by the evidence that was before the Commerce Secretary at the time he made his decision.

And then second, a series of procedural arguments that the Secretary in making that decision regardless of whether of its' substantive validity didn't follow proper procedures including that he didn't openly and honestly disclose his real reason for adding a citizenship question to the census.

We won in a 5/4 decision from the Supreme Court as Jon alluded to. But I want to say if you believe the CNN reports that Chief Justice Roberts, after the oral argument initially was ready to side with the government, but at some point switched his vote; if that's the case then, you know, I think I can say with certainty that the result of the case did not reflect my real advocacy either.

There was a lot of gloom and doom actually after the argument. I actually thought the argument had gone well. But if you went in

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thinking that we were the underdog, and it's certainly the case that nothing that happened during that argument would have changed that assessment.

Now, between the oral argument and when the decision was issued our co-counsel in the case who were litigating an unrelated partisan gerrymandering case separate and apart from the one that I think Allison is going to talk about in the state court of North Carolina came across some files from eight deceased Republican gerrymandering guru. A man named Dr. Thomas Hofeller. And in those files they found two documents related to the citizenship question, which was kind of bizarre.

One of the questions indicated that if Republicans wanted to pursue a redistricting strategy that excluded non-citizens entirely they would need a citizenship question to do that. And the good news from Dr. Hofeller's perspective is that would produce a process that would be in his words advantageous to Republicans and non-

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Hispanic whites, and disadvantageous to Hispanics. That's the first document.

The second document in Dr. Hofeller's files was a request purported from the Department of Justice to add a citizenship question to the census because it would facilitate enforcement of the Voting Rights Act and protect minority voting rights.

We looked at that letter and that letter was contained, or the language in that letter was contained verbatim in a first draft of the Department of Justice's letter requesting the question, which was hand delivered by the Commerce Secretary's advisor census issues to the acting assistant attorney general for civil rights who had oversight of the voting section and who ultimately drafted the Department of Justice's official request for the citizenship question.

So for the first time, and we didn't discover this until after the oral argument in the case. But for the first time we had a

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document that spelled out in black and white what we had believed all along, which was that the Administration wasn't in fact interested, surprise, the Trump Administration was not interested in protecting minority voting rights. But there, plainly in black and white they had a goal of subverting minority voting right protections and diluting the representation of Hispanic communities.

We, you know, frankly didn't know what to do with this. The record is closed, a lot of people advised us, you know, the case has been fully submitted to the Court, it's over. You know take your lumps, which is what people expected were coming, and maybe they were. Maybe Chief Justice Roberts had already changed his mind at that point.

But we decided not to go down without swinging and did something, I think, pretty unusual. We filed a motion for remand in the Supreme Court based on the discovery of these new documents and asked the Court to allow the

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District Court to, in the first instance, assess what these documents actually meant.

But by doing that we were able to put those documents squarely before the Supreme Court so it wasn't just something out in the ether that maybe the Justices were reading about. That they didn't have any way of escaping what we all, at that point thought we knew to be true.

We got the decision a couple of weeks later and the decision -- not the decision nor the concurrences, nor the dissents, make any mention of the Hofeller files. So I think we'll never know, or at least we won't know for a long time whether or not they had any impact on the decision.

But I think what they made clear is that the efforts to suppress minority voting rights that we were talking about in the first half of this, those wave of laws that have made it harder for people to register to vote or to vote, that they're directly connected to other kinds of efforts to weaken the power and

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representation of minority communities.
MR. YEOMANS:. Okay. Thank you. So the next step after the census is complete is for State legislatures to convene and start redrawing legislative districts. North Carolina, again, has been going through an interesting process recently. But all states are going to be facing a very interesting process this time around and particularly in previously covered jurisdictions. This will be the first time we've gone through the decennial redistricting cycle without Section 5 in place. And it is going to be a different environment.
So Allison, give us your thoughts.
MS. RIGGS: Yeah. I hate always being the Debbie downer. It's hard, but I promise I'll end with a positive call to action. I swear. So redistricting doesn't just happen at the state level. That's the sexy attention getting redistricting. It happens everywhere and it happens in a very compressed time schedule. Your town councils, your school boards, many, many of

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those jurisdictions that elect from districts will have to redistrict. So it just happens in a wave and it happened in 2011 to 2012. It's going to happen in 2021 to 2022. We will be swamped.
And it wasn't easy with Section 5. We engaged in a lot of redistricting and I've had a number of cases that stretched on until this year that we filed after the 2011 redistricting cycle and it's been an uphill battle, particularly in federal court. I think this last cycle has seen more Supreme Court cases on redistricting than we've seen in some time.
And the three buckets that they've fallen into are Section 2 and constitutional claims of intentional race discrimination, racial gerrymandering cases and partisan gerrymandering cases.
And really the only category that saw any significant success was the racial gerrymandering cases where state legislatures in Alabama, and North Carolina, and Virginia had purposely and cynically packed black voters into

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as few districts as possible to limit their political power.
But in doing so, used race in an extreme way to separate black voters from white voters. And that offended even the conservatives on the court. And so we had some success that there.
In Texas the -- I mean this is what is discouraging about litigating Section 2 and Constitution cases in this federal judiciary. Texas experienced enormous population growth that the 2010 census captured. So much so, that they got four additional congressional districts. And 90 percent of that population growth was due to growth of communities of color. The Anglo population in most areas decreased, and in some places it just barely increased.
Despite that, despite being the primary driver of population growth in Texas, communities of color not only solve no benefit from the 2011 redistricting cycle, they lost representation. They didn't get any additional congressional

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seats where they could elect their candidates of choice. They lost one. And the same in state legislative districts. And this was when we had Section 5, so DOJ objected. A DC District Court said yeah, this is bad.
But then we lost Section 5 and Texas was back at it again. And so we continued litigating this case again. And in 2017 a three-judge panel comprised of two Republican appointees said yeah, this is intentional racial discrimination. This is not okay.
There was just a variety -- and this was a grab bag of violations. They had racial gerrymandering violations, they had intentional racial discrimination violations, Section 2 violations and we went up to the Supreme Court and we won on all of those. And the only thing that survived our visit to the Supreme Court was the racial gerrymandering claim and one house district. Everything else was reversed. So that's the challenge we face in this atmosphere and in this Court.

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The good news is the Supreme Court can't take up all of these cases. They didn't like taking as many as they did. And local redistricting doesn't need to go through a three-judge panel usually, so we can just try and avoid the court granting cert.

But another thing we had hoped to see some progress on in this decade was getting -- the social science around partisan gerrymandering has developed and become more precise in assessing where the partisan harms in purposeful manipulation of district lines to ensure that some group, whether it's white folks are Republicans or whoever stays in power.

And my group is a racial justice organization and we have litigated partisan gerrymandering cases because we think there is a racial justice implication to them. Particularly in the South, but throughout the country there is alignment and intersection between race and politics that we can't ignore. And we don't want legislatures to be able to engage in intentional

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racial discrimination and just call it partisan discrimination.

And so we, again, won in the District Court. Won unanimously with a Republican appointee, and in a 5/4 decision the Supreme Court said no, these cases aren't just judicial, these are political questions. We are not going to wait into that thicket. And so it was a disappointment.

The Court had an opportunity to indicate constitutional rights and really step into the breach where the technology has become so sophisticated they can almost draw a perfect gerrymander. We used to call gerrymanders that didn't work as intended dummy gerrymanders. Well, the gerrymanders went to college now and we don't see any of that anymore. They perform as they are intended to perform.

So now we are stuck on partisan gerrymandering claims in state courts and, you know, state courts are even slower than federal courts usually, unfortunately. So it's going to

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be a challenge. And not having Section 5 is going to be a real burden on communities of color across the South because some of the stuff is not going to be noticed and publicized the way it used to be.

It used to be you could go on -- and remember redistricting is happening in mass in a wave, at every level of government. It used to be you could go on DOJ's website and see data and maps of the proposed redistricting plans being submitted to DOJ for their review. So you could see all the data you needed to see right up there on the website.

Now, without that notification element not only can groups like ours not easily assist affected communities, but affected communities don't have an ease of access to that kind of information. They may go to a town council meeting and see some maps, but they will have that granular data that really tells you if there is a problem or not. And they are going to have to do a lot more advocacy.

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And so we are really at a turning point in how we do redistricting education and outreach. We can't be everywhere. Folks on the ground are really going to need to not only understand redistricting and how to engage in the legislative process, but engage in and open up the process in a more democratic way.

Right now much of the software is very expensive. The data is hard to obtain. And so all of our groups are working on changing that in conjunction with academics and technology experts, opening up online redistricting software platforms so people can play with maps and analyze maps and see what the impact is.

But it's going to take a concerted effort not only with the civil rights community and grassroots organizations on the ground, but I think folks from the private bar are really going to be needed even more than we need them normally, pulled in to help support all of these communities that are now going to experience redistricting in a different way than they have

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before.

And this is doable. This is doable if every single person in here makes a commitment to themselves and to folks in formerly covered jurisdictions to lend your expertise, to land your talents, to lend your support, financial or moral. However you can do it to the work that we have to do because it's going to be challenging.

But we are creative and we are relentless, and we are good at arcade games like whack-a-mole. So I think there is a lot of people really geared up for the fight and since the urgency of what's about to happen in 2021. And we look forward to hopefully bring more of you in to help with this work.

MR. YEOMANS:. Okay. Well, that was a moderately positive note. It gives people some hope. Just one, again, speaking about Section 51 technical point that we haven't really discussed is that Section 5 did have an effect standard in it. So it prohibited election changes that would have the purpose or effect of discriminating.

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And effect was defined by the Supreme Court as meaning retro aggression. Basically minority voters could be worse off after the change than they were before the change.

Nothing like that standard will apply going forward. Going forward, advocates will have to show that there was intentional discrimination or that Section 2 of the voting right act which has a results standard which is sort of an intense light standard, I say that only in friendly company. Those standards are much more difficult to satisfy than retrogression. So we will be facing that as well.

Just one other note, just going back to the beginning of our conversation, after the Shelby County decision a bunch of us, including the lawyers committee, the ACLU, and others sat down to try to put together legislation that would restore preclearance that would come up with a formula that could survive, that could pass Congress and survive the scrutiny of the Supreme Court.

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It did and that legislation has been pending for the last, at least five years now, with no movement, not surprisingly in this Congress.

AUDIENCE: I wouldn't say no movement.

MR. YEOMANS:. Backward movement.

AUDIENCE: Movement in one house, not in the other.

MR. YEOMANS:. Okay. Well certainly the House. The House has taken it up and there is HR4 in the House.

But there is hope, I think, that if we have a president of another party and a Congress of another party that at some point we could restore some of the sanity of Section 5 to these jurisdictions, as Dale pointed out that tend to be the same jurisdictions over and over. And I guess Jon pointed that out too. Who again could be covered by Section 5 and should be covered by a preclearance requirement.

So there is that to look forward to.

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Would love to get any of your questions. We have just a few minutes left. Yes.

AUDIENCE: Many years have now expired since Shelby County and there is a list of greater powers that takes you back to pre Voting Rights Act. Is there any thought (inaudible) that you have enough data now to structure a lawsuit that could show the Supreme Court, if they would look, that Roberts view that the Civil War was over doesn't hold water?

Now, I don't think there are (inaudible), but has any thought -- I mean if you have categorized all these things that those of us who are old enough to know about as (inaudible) of the Voting Rights Section of the Civil Rights Commission in 1963, my first job out of law school, and whack-a-mole was even worse then, as you know.

So now you've got almost nine years, and as you said the moment that case came down, I mean you couldn't buy a pair of sneakers quicker

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than they ran those things. Is there any possibility of amassing data based on well, it's Roberts is saying it's all over. The folks down South are really (inaudible), you know. Eat those corn pones and stuff like that. They're (inaudible), they love all the black folk. Is that a crazy idea or is it --

PROFESSOR HELLERSTEIN: Yeah.

AUDIENCE: You think it's crazy?

MR. YEOMANS:. I think what you're describing is a great legislative record.

MR. GREENBAUM: Yeah.

MR. YEOMANS:. And there was a great legislative record in 2006, and I know that Jon was very engaged in putting together the nationwide record requiring the continuation of preclearance and Congress held some 20 hearings, compiled 15,000 pages of documents. I was on the Senate Judiciary committee then when we passed it, and it would have been very difficult to compile a better record, or a more compelling record.

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That didn't matter to a majority of the Supreme Court, and I think it would matter even less to this majority of the supreme court, unfortunately. And so the challenge would be coming up with a new (inaudible) formula that would survive scrutiny, putting it into a lawsuit. I don't see the frame for that.

MR. GREENBAUM: Yeah, I don't see the frame either and Bill, I -- we're sort of on the defensive here in terms of what the Supreme Court did in Shelby was kicked it back to Congress to come up with a new formula. And so the question has got to be there's got to be more Congress as opposed to a new lawsuit. Now, of course if Congress passes something then we'll be involved in defending against the constitutional challenge that will follow.

AUDIENCE: I have a question about this goal of (inaudible) citizenship. It's not a new idea, but it is one that is gaining a log or currency. And what -- so could you talk about just what are the strongest arguments against

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that and is that something that will come up simply because there is some state that is going to say that's how were going to do it and they're going to force the issue that way? In your crystal ball, what do you see?

MR. GREENBAUM: So it's interesting because the one person one vote doctrine has never meant what it says, right. Your one person, one vote that makes it sound like every district should have the same number of voters. But that's not actually the rule that emerged from Reynolds v. Sims, the Supreme Court case that established that.

What the case instead required is that every district have the same number of people, right. So that legislators each represented the same number of people all of us, voters and nonvoters are represented equally in the political process.

Now, all that being said, one person one vote, has such a powerful kind of sway rhetorically that some people have tried to push

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in that argument to say let's not have citizens count -- let's not have non-citizens count at all in the redistricting process because noncitizens can't vote. We need only citizens to be counted. Now that kind of ignores the fact that children can't vote either, right.

And there are all kinds of people who are ineligible for other reasons and there are all kinds of people who don't vote, right. I mean you are never going to have a system where every district has the same number of voters because that's going to change from election to election.

But as he said, this idea has been kind percolating for a while on the right. And you have seen kind of efforts by activists on the right to try to litigate their way into those issues and sue jurisdictions that draw districts and based on equal numbers of people and say, uh-huh, you can't count all people you have to exclude the non-citizens. And those cases haven't succeeded and a Supreme Court case a few

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years ago Evenwell from Texas ruled that states are not required to draw districts with equal numbers of citizens.

But the Supreme Court's decision left open whether or not states are permitted to do so. And I think the fear that we have is that some state or county is going to come back in the next cycle and do precisely that. And if you can imagine a place like Texas, very perversely, right getting all this new representation in Congress on the basis of its burgeoning non-citizen population saying thank you for that. And now, we're not going to count you, and we're only going to give representation to citizens. It would be pretty devious.

I think, and maybe I'm naïve, I think that's a bridge too far, right? But it seems like a pretty, pretty bald-face hypocrisy to try to get away with something like that at the state level.

But it would not surprise me, and in fact I would expect that there will some local

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jurisdictions, some county that's had a really large increase in its non-citizen population in the last decade worried about what kind of political ramifications that's going to have in terms of the existing power structure and say, uh-huh, we don't want to count them. That will engender a lawsuit I think, and it could go to the Supreme Court at that point and I think it would be a pretty tough case to win.

AUDIENCE: What partnerships do you have or strategies do you have to deal with the actual grass roots that drove registration and promoting that regarding specific districts to counter this? You're fighting the rules and you're (inaudible) from participating. But that doesn't mean there doesn't have to be (inaudible) energy on the grass roots level to actually get people to vote.

And I didn't know whether you're partnering with that or whether that's something that you would be interested in doing. I say that because for several decades I've been

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working to try (inaudible).

So the new software technology to bridge communities. To get people to link to help each other (inaudible) kids to school, do homework so that a strategy that has not just a voting agenda, but a strategy that has a community building agenda that's independent might get independent foundation support. And the technology is already -- it's available. I'm simply saying you don't have to spend money (inaudible). I've spent three decades developing it.

MS. RIGGS: There are networks now like there haven't been in the past. C3 coordination at the state level, they're usually called state C3 tables where we see folks pooling resources, pooling their energies and their talents to communicate with each other. And just in North Carolina we use our C3 table for all kinds of engagement activities, civic engagement activities.

We've pushed early voting advocacy at

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the county level. We have, you know, every county considers its early voting plan, the number of sites to have and we turn folks out en masse to these meetings. Folks are excited, and these are the same people were going to go back to and say look at this online redistricting platform. We're going to provide you with the data you need to look at your redistricting maps and plans in your community.

I think as frustrating as some of the legal stuff has been in the last decade, what I've seen is a real commitment both in how we work with grassroots groups and how the philanthropy world works realizing that yes, I wish there were funding for 10 times as many of us, but putting money in the hands of folks on the grounds you can get excited to make change, can use this new technology to monitor what's going on and to fight back. And to try and mitigate some of the state level, or even local level legislation that's harmful. That is -- we're making good progress on that.

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AUDIENCE: The destruction of the census case, just reminds me that I've never -- I can't remember anything quite like it where the Court didn't believe the government. They just didn't believe it I mean (inaudible) go with the presumption (inaudible) most of the time. I just wondered if there's any growth in that because the Court finally saw -- every once in a while the Court sees something they've been told about. I wonder if there's any future in challenging the word of the government.

MR. HO: It's so interesting where we are right now because I remember when I was (inaudible) just starting as a civil rights lawyer and the urge not to bring cases or bring claims that called into question the government's motives. Right, you're never going to get conservative judges to go with you on that. You're not even going to get moderate liberal judges to go with you on that.

You've got to bring claims of based on the impact, you know, whatever the intent may

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have been it's got an improper impact and you can strike it down on that basis without calling anyone names or hurting anyone's feelings, right. And that had -- had, for a time continue to be the advice that we were getting. Maybe it started changing after the Shelby County where we were may be getting advised to go ahead and make an intent to argument to give the Court some suspicion of what's happening. But you're still not going to get a court to strike down something on the basis of improper intent.

And in the North Carolina case that Allison argued at the Fourth Circuit where the Fourth Circuit unanimously found that the North Carolina legislature acted with "surgical precision" in targeting black voters, right. It was kind of like a wake-up call, to me at least.

And I think we're still in a lowercase conservative in taking these kinds of risks Muslim band litigation, you know, there was an equal protection constitutional claim there but the bulk of the action was on the question of

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whether or not the president had the authority under the Immigration and Naturalization Act. So it was still kind of narrow statutory, almost a procedural claim then it was more about intent.

And the Court kind of looked the other way and said well, you know, we know that some things have been said, or tweeted perhaps but, you know, within the four corners of this document it's (inaudible) invalid so we're just going to accept it.

And we have the same internal debates in the census case as we were going up to the Supreme Court. But for the first time I started hearing more people saying you have to emphasize intent here. If you just tell them that there was some evidence that the secretary should have paid attention to but he didn't that's not going to give the chief enough of a concern to feel like he needs to step in here and stop something.

And I was almost tempted at one point, maybe if I had had 30 more seconds at the podium I would have said it, to say there's not a single

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person in this room that thinks that this Administration is going to all this trouble because it wants a better Voting Rights Act to enforce.

I mean seriously. Just get real for one second. It was good that I didn't because we won. So -- but you know, I do think going forward particularly with an administration that has made what had previously been subtext into text, it might be a fruitful pursuit to try to focus more on intent.

MR. GREENBAUM: I really -- I don't say this much but all of our cases that get to the Supreme Court, even though I think we should win them all, the census case should have been a 9/0 decision. It really should have. And I think it doesn't speak well for the Justices that didn't go our way. I mean the behavior here was outrageous and you had four Justices that were willing to sign off on that.

MR. HO: But I think it speaks to how gun shy we've been about these kinds of issues.

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I mean their conduct was outrageous, as Jon says, but even then, you know, the lead argument that I was making in the Supreme Court was a very dry, kind of technical. The evidence says this but these Secretary ignored it. And I think it's may be we're at a context now where we need to be a little bolder.

MR. GREENBAUM: And I can say this now, but we thought that the more aggressive argument should've been made on motive.

MR. HO: Well, we did make it, right.

MR. GREENBAUM: No, but I -- but you didn't emphasize it. Without getting into the details it was sort of embedded in your brief, and our view was that was the out front argument that -- and you know, we got the right result. And you did do a great job.

MR. YEOMANS:. Okay, Herman. You have the microphone.

MR. SCHWARTZ: Yeah, I just wanted to say that in the citizenship case you say you

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don't know whether the revelation about Hofeller had anything to do with it. There revelation, I checked was in April. I think after your argument?

MR. GREENBAUM: It was.

MR. SCHWARTZ: And although Roberts didn't say, and of course judging by the oral argument you guys were going to lose. I mean they almost dismissed -- what are you talking about? We don't go behind the Secretary of Commerce when he says he has to do that. I mean they're just not going -- the Muslim case the same thing. We're not going to go behind.

And then, there is a line in which Judge Henry Friendly is quoted in which it is said, something about, "We should not be naïve about what's really going on" in paren. So you put it all together. If there hadn't been that stuff revealed, if it had been revealed and the Court came out the way it did it's interesting, Roberts you think changed his mind.

The Court would have just looked

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unbelievable. With all of this evidence in the newspapers, all over the place, the estranged daughter, boy --

AUDIENCE: That's crazy.

MR. SCHWARTZ: (inaudible) out that Hofeller, who by the way was a genius at this districting, and was known as the Republican districter. He worked with North Carolina very closely. The net effect for the Court would have been sort of like the Affordable Care Act. This is a bridge too far.

MR. GREENBAUM: I think you're right. But I'll say something about the oral argument. With Chief Justice Roberts when he's strongly against you, you know it, right. I mean he comes out firing. He did not come out firing in this case. I mean something held him back.

I agree with you that probably after the argument it was probably 5/4 against us. But he was -- he was holding back. Maybe even knowing that something might come out.

MS. RIGGS: I thought that was true

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because the Chief Justice came after me hard in the Texas case and was very quiet in partisan gerrymandering case. But one positive lesson I learned from the Hofeller situation is these guys are not smart enough to keep quiet. Dr. Hofeller had spent his career telling people not to email anything. And apparently he didn't follow his own advice.

So I think, you know, in these next few years we really have to devote -- I mean it's not like we were, you know, taking the lazy out on discovery battles. But I think we've got to push the front on legislative privilege and try and get some of this stuff that is proving the true intent and creates this atmosphere where it would be just beyond the pale to be that naïve.

MR. SCHWARTZ: It wasn't Hofeller who emailed. It was stuff in his files. He kept quiet.

MS. RIGGS: According to David Dailey he's got one email in there that's pretty bad. I don't see (inaudible).

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MR. YEOMANS:. Okay. Well, I think we're out of --

PROFESSOR SAEZ: I mean, I don't see any more questions coming.

MR. YEOMANS:. Okay. All right. Well, please join me in thanking our panel.

PANEL 4
COMPARATIVE CONSTITUTIONALISM: FROM THEORY TO PRACTICE

MR. LAGUARDA: Okay. Welcome back everybody. We are going to get started with our last panel of the day.

We're going to get started with our last panel of the day. Thank you very much. And without further ado, I would like to introduce my colleague, vice-dean Susan Carle who will be moderating the panel.

MS. CARLE: Good afternoon everyone. I think you will find that we have left among the best for last here. We are really excited about this panel, really excited about looking at

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Herman's contribution in this amazing area of law.

I am going to start by introducing the panelist, and I am going to do it in the order in which they are going to speak. We have had a few conference calls to sort of figure out how to best structure this panel.

So starting that my immediate left, I would like to introduce AE Dick Howard who is the Warren Booker Distinguished Professor of International law at the University of Virginia.

He is a widely acknowledged expert in the fields of constitutional law, comparative constitutionalism and the Supreme Court. He is a graduate of the University of Richmond and received his law degree at the University of Virginia. He was a Rhodes Scholar at the University of Oxford, and he was a law clerk to Hugo L. Black of the U.S. Supreme Court.

He was executive director of the commission that wrote Virginia's current constitution, and directed the successful

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referendum campaign for its ratification. He has been counsel to the General Assembly of Virginia and a consultant to too many state and federal bodies to name.

He is the author of many books, articles, and monographs including the Road from Runnymede Magna Carta and the Constitution, and constitutionalism in America. And commentaries on the Constitution of Virginia which one a Phi Beta Kappa prize. More recent works include Democracy's Dawn and Constitution Making in Eastern Europe, which will be the subject of this panel.

He has briefed and argued cases before state and federal courts including the Supreme Court of the United States. He is a regular guest on many television shows and he has been often consulted by constitutional drafts of persons in other states and abroad. He has worked with revisions on new constitutions in Brazil, Hong Kong, the Philippines, Czechoslovakia, Poland, Romania, Russia, Albania,

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Malawi, and South Africa.

And I could go on. So he will be speaking to sort of layout in general in a broad overview the work of reformers in Eastern Europe after the fall of the Iron Curtain, and the attempts to establish Democratic constitutionalism in Eastern Europe, and also successes and failures and where all of that ended up.

Second, Mark S. Ellis will be speaking. He is the executive director of the International Bar Association, which is the foremost international organization of bar associations. It is made up of law firms and individual lawyers and currently has about 190 national bar associations, major international law firms and 80,000 individual members from all around the world. Prior to joining the IBA, Mark spent 10 years as the first executive director of the Central European and Eurasian Law Initiative, or CEELI, which I expect we will hear quite a bit about on this panel.

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CEELI is a project of the American Bar Association and what it does is provides technical legal assistance to 28 countries in central Europe and the former Soviet Union and to the international criminal tribunal for the former Yugoslavia and the Hague. It remains one of the most extensive international pro bono legal assistance projects ever undertaken by the U.S. legal community.

Mr. Ellis also served as legal advisor to the independent legal commission of Kosovo. He advised on the creation of Serbia's war crimes tribunal. He was actively involved with the Iraqi high tribunal and also acted as legal consultant to the define team of Nuan Jea (phonetic) at the Cambodian war crimes tribunal.

He has been admitted to the list of witnesses to the council of international criminal court, appointed to the UN created advisory panel on matters related to defense counsel of the mechanism for international criminal tribunals.

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He's a long-time consultant to the World Bank on investment policies in central and eastern European -- eastern Europe and the former Soviet Union and he has served as an adjunct professor at Catholic University, Columbus School of law and is presently an adjunct professor at the Florida State University College of Law.

He has been twice a Fulbright Scholar, earned his JD and bachelor of science degrees from Florida State University and an PhD from King's College. And I could go on and on, but there is not time.

Last, but certainly not least Vici Jackson will speak. Vicki Jackson is the Thurgood Marshall professor of constitutional law at Harvard Law School. She writes and teaches about U.S. Constitutional law and comparative constitutional law. She is author of the Constitutional Engagement in a transnational Era. And co-author of comparative constitutional law, a leading course book int eh field. She has written on the constitutional aspects of

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federalism, gender equality, election law, free speech, sovereign immunity, courts and judicial independence. She has written about the methods -- the logical challenges and comparative constitutional law.

Her books include Federalism and two edited collections, Federal Court Stories and Defining the Field of Constitutional Law as well as inside the Supreme Court, the Institution and Its Procedures. Her scholarly projects include Normative Conceptions of the Role of Elected Officials in a Democracy, Proportionality and constitutional Law and Interpretation, gender equality and the interaction of international and domestic law, and the co-evolution of the constitutional of international law and the internationalization of constitutional law.

She has very recently the president -- I could go on and on, and see I am embarrassing her. Very recently the president of the American Law Schools or the director -- the president of the American Association of Law Schools in which

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she visited our school and gave a very lovely talk at the National People of Colors conference. And she's also served on the executive committee of the International Association of Constitutional Law. And I could go on and on even more, but I think I would rather leave the time for our panelists.

So we'll start with Professor Howard.

PROFESSOR HOWARD: Susan, thank you very much. It's really a thrill to get together with other people here and from around the country to pay tribute to one of my most special friends and someone for whom I've had deep respect and admiration, having worked together in central and eastern Europe.

It goes back 30 years now, believe it or not. But it was a real threshold in my understanding of other parts of the world. So I want to join others in saying, well done, Herman.

Thirty years it has been. That's pretty remarkable that we -- I think many of us in the room will remember that time that after the rise

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of solidarity in Poland that the Berlin Wall came down and in a remarkably short time regimes, communist regimes in central and eastern Europe, in effect, collapsed.

And my first introduction to that part of the world was when the State Department called me one day; this was in 1988. The Berlin Wall had not yet come down. And asked me if I would spend two days with a delegation if Hungarian constitutional drafters and I said you've got to be kidding. I mean this is a communist country. What kind of constitution will they write and what would I possibly have to contribute.

Well, they came down and we spent a couple of days talking about what do you do when you write a constitution? I was then invited to Budapest. This was still 1988 and I could sense change in the air. It was really quite remarkable. I said something is going on here. You could see students down int eh metro stations handing out leaflets and the like. And then, of course, as 1989 came along things really began to

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unravel.

One thing that I learned and I want this to be feel like alight motif from my remarks this afternoon, is how much a county's history matters. How contextual constitutions are that they depend so much on history and tradition, and culture and mentality and there's no sort of one size fits all.

I remember having dinner one evening with friends in Budapest, Hungarian friends. And I asked the about the revolution of 1848 and there was a cafe called the Cafe Pilhock (phonetic) where the liberals and the reformers and all hang around and have coffee and the like and talked about what might happen.

And I said I'm curious to know whether that cafe still exists. Maybe it's still not even a cafe anymore, but I would sort of like to see places where historic things happen. So when I asked that question, a Hungarian woman sitting at the table turned to her friends, pointed at me, and said, there I told you he was Hungarian.

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I had no Hungarian blood that I know about for sure, but the message was clear. You had to be Hungarian to care that much about Hungarian history. And that, to me, I could tell other stories like that, but that's fairly typical of these small countries and how intensely caught up they are in their own experience.

Now, mind you, as drafters of constitutions in the region went about their work, in many ways they were drawn to western models, especially the German basic law to documents like the United Nations declaration, the European Convention of Human Rights. They clearly were looking to the west because they wanted desperately to be readmitted to the family of Europe from which they had been wrenched during the time of communism.

So the principles that they brought into play were familiar ones to people in the West, free and fair elections, a free press, independent judiciary, a checks and balances

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constitutional supremacy. I mean those were all part of the general bargain. And they did ask for advice.

Now how important this was, one can only surmise, but they did have advisors both from the United States and from Western Europe. And foremost among those advisors, I have to say, work teams that were put together by CEELI. By what was then called the Central and Eastern Law Initiative, the inspiration Homer Moyer and Sandy D'Alberte and sitting here at the table, Mark Ellis.

And I am very confident in saying that among all the advice teams of that work to be seen in the capitals of central and eastern Europe CEELI was the gold standard. I mean that was the best of the lot. And it was during that time that I came to know Herman. We had met before, but we hadn't really worked together on any projects. And I came to realize that he was the gold standard among the individual advisors.

If CEELI was the best group, Herman was

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the best individual. He was seasoned, he was wise, he was thoughtful, he had a perspective that very few people did. And in particular, unlike so many Americans who got on airplanes and flew off to places like Budapest and Prague, he understood where he was. He understood the people and their history and their politics, and their mentality, and it was a blessing to the rest of us who worked with him.

Now, he -- I see Wendy is here and others who worked in that area. We will remember what an incredibly exciting time it was. I mean it was like sort of a springtime of nations. It was like being in Philadelphia in 1776, or being in Europe in 1848. You had a sense of exuberance, of walls coming down literally, as well as figuratively.

Of new beginnings, and you will remember, many of you will remember the heady optimism of that time. This was when Francis Fukuyama, wrote his famous book called the end of history in the last land. You may remember in

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that book that he predicted that Western liberal democracy was the wave of the future. It would sweep the globe. It might take longer in places like China and Russia, but that's where we were headed. That was the sort of optimism that carried people in that time.

Well, nobody talks that way anymore. I mean do you here, I mean even Fukuyama has sort of, I think, reversed course with some of his predictions. But the widely shared optimism about liberal constitutional democracy is being undermined as we speak by nationalism, by populism, by xenophobia, by anti-globalism.

And I wanted to give one specific example. I could give others, but I'm going to talk about Hungary is simply a case study because it's one of the places that I did work and had the most memorable experiences.

When I was there, I met a then unknown graduate student. I think he was 26 years old, whose name was Viktor Orban. You may know the name Viktor Orban. Well, he was just a graduate

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student. And he made a famous speech at the time of the reburial of Imre Nagy calling for free elections and for the Soviets to get out, and go home. And it was really electrifying.

Well, today a very different Viktor Orban is on the scene. He proclaims that Europe's liberal consensus is at an end. He says Hungary is, and I think he coined the phrase, a liberal democracy. And so he sees himself as a buffer against the bureaucrats in Brussels and George Soros and migrants and others.

I think Viktor Orban's journey is one of the most remarkable transformations in modern European history. And it's also a story, I think, with a moral, and that is how the transition to democratic constitutional government in central and eastern Europe which, after the admission of those countries to the European Union seemed to most of us, or many of us at least, to be irreversible. That they were on a course tied to the West.

It seems to me it's beginning to

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unravel. I'm not saying that they have gone all the way back, that would be overreaching. But certainly there is a threat, it seems to me to the consensus that we had taken for granted.

You may know of events in Hungary; how Orban's party, Fidez won -- the curious electoral system of Hungary is hard to describe. But they won an election with a little over half the votes, but got two thirds of the seats in parliament. And in Hungary, you can amend the Constitution by a two thirds vote of Parliament.

And so what Orban and his colleagues have done is basically piece that by piece dismantled many of the components of constitutional democracy. Attacks on the media, undermining checks and balances by putting his favorites in various majors offices. Gutting the constitutional court which at one time was one of the great, great constitutional courts of that region, now, it's made up entirely of judges appointed by Fidez.

Crony capitalism, he doles out favors.

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Elections are taking place in gerrymandered districts. Of course, I should pull off to say one should not be too quick to judge Hungary if gerrymandered districts are undermining democracy. We know something about that in this country.

But one of the things that struck me about Hungary and some other countries is how they played the victim card. Hungry, you may know was on the losing side of World War I, and at the Treaty of Trianon they lost something like two thirds of their territory. And so there are 1 million or 2 million ethnic Hungarians today who live outside of Hungary. They live in Romania and other bordering countries. And the Hungarians simply have not forgotten that.

And Orban, for example, conferred voting rights on those ethnic Hungarians in neighboring countries, and you may be sure they, in turn, vote for Fidez.

Now, I would love to talk about Poland, but time will permit me walking you through, but

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all the devices that that Orban has used in Hungary, you will find have been used in Poland by the Law of Justice party. They have pretty much played the same card. Indeed, they look out for each other in European union circles.

Poland, the Law and Justice department is very good at thriving on cultural and identity politics. Poland, as the bastion of traditional values against the sort of free thinking ideas that come out of Brussels. And if there is an interesting Polish national mythology; there was a 19th century Polish poet who once described Poland as a being the Christ of nations.

And you have this image of Poland being crucified on a cross. And the story is that here is Poland, the bastion of Western Christian civilization against the Ottoman hordes and they have bled for the people of Europe and what kind of thanks to they get? The Europeans don't give them the time of day.

The Poles, in particular have a very strong sense of what it means to be Polish. The

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Polish nation, after all -- the Polish state I should say disappeared in the third great partition in 1795 and didn't reappear on the map of Europe until 1918. And yet the idea of the Polish nation was kept alive during all that time. So the Poles see the whole idea of Poland as being fragile.

So what's going on in those countries, in my judgment, can be amplified and generalized to suggest transit global, that I'm increasingly worried about. The three trends that I think are important. First, is the resurgence of nationalism. And by nationalism I mean the notion that the nation has an internal, sort of a special core different from everybody else. And that that core has to be defended against other people. And often invoking a past that's sometimes mythologized.

Secondly, populism, a powerful force. Populace, I think that's the vote in -- and my English friends I've tried to get them to explain Brexit. I think populism had a lot to do with

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that, the tabloids there attack the English judges as a being enemies of the people, which used to be Stalin's language in the Soviet Union. So populist politicians talk about the corruption of elites and how conspiracies are at play.

And then finally, and I think this may be the most powerful, or the most troubling trend, if you like. And that is the rise of authoritarianism as an alternative to the liberal state. And by authoritarianism, I think if it has certain earmarks, certain indicia, they would include first majoritarianism, the notion that elections yield a mandate, in effect, that checks and balances are not to be respected.

Secondly, to have state or oligarchy control of the economy. Similarly you control the media whether it's public or private, to have it echo the state line. Suppressing in NGOs, especially if they receive any money from outside, to make them register, to drive them out. This is the story of Central European

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University which has had to leave Budapest and go to Vienna.

Dictatorship of the law. This is a striking phenomenon. Here in a law school, this is something that's used in a lot of countries, and that is to take the form of the law to suppress your enemies. Turkey for (inaudible), Turkey for example has, in the criminal code a section that makes it a criminal offense to insult Turkishness. Well, I don't know what that means.

It basically means whatever the prosecutor and a friendly judge take it to mean. So you may be sure that journalists and scholars and others have been punished under that particular heading.

Revising history. This is something that textbooks get rewritten to parrot the prevailing party's story. So these are powerful forces. We see them at their zenith in places like China and Russia. The more oppressive countries become more repressive yet. Democratic

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states become illiberal democracies.

And so it makes me think of looking even further back; how in the years since World War II, think of how genuine constitutional liberal democracy was in 1945, and then how it spread through Japan and Germany, through the Mediterranean in the 1970s. Through countries like Chile and Argentina in the 1980s, Central and Eastern Europe of course wholesale after 1989.

The burgeoning spread. It seems to me for the first time in recent years there's been a bit of a decline, and maybe it's a decade of decline if you like.

So I don't want to end on a pessimistic note, but I do want to end on a note of one should certainly take account of these trends, and I'm going to be intrigued to see whether in our discussion this afternoon we have any thoughts about what our response ought to be.

Susan, thank you.

MS. CARLE: Thank you very much. Next,

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we will turn to Mark.

MR. ELLIS: Thank you very much.

When you go to a high school and college reunion there's always that prize for who traveled the furthest. And I woke up this morning at 5:00 this morning in Seoul, South Korea. I'm telling you I win. I wouldn't have done that for anybody else but Herman Schwartz. I really wouldn't have. But this is a person who in all my years of friendships with such great respect, admiration, and love for this man. He has had a real impact on my life, and so I'm blessed in knowing him.

When we talked (inaudible) about CEELI and Dick had mentioned that sense of Herman being kind of the gold standard and that is absolutely right. But the first time, I think we all met in a more professional capacity was in Prague in Czechoslovakia. And Wendy Lourdes had put together some funding and put together Lloyd Cutler and Herman Schwartz and some others to come into Prague and talk about what

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Czechoslovakia was thinking about at that time, with split or to stay united.

And I was fortunate, and I think it was probably hungry and who made the suggestion because CEELI was just beginning to start. We had done a project yet and he asked me to come along. And it was such an important trip because I realized the way Herman had set this program up talking about constitutional issues and legal reform that this was probably the model that CEELI probably needed to follow.

So the success of CEELI actually is due to the work of Herman and Dick as well. We brought him in so early and thank goodness we did.

When I was preparing my notes on this because it was decided I was going to talk a little bit about the constitutional courts specifically. Both because it's an area that Herman has focused a lot on and because I thought it was intriguing because we were, during -- after 1989 focusing a lot on judicial reform.

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And constitutional courts were quite something that had great attention to.

But actually, before '89 there was only two countries in the region that had experimented with these constitutional courts. One was Poland and the other was where I was living at the time, at that time Yugoslavia. But neither of these experiments really indicated that these courts had much authority, much, kind of robust constitutional review at all. That just wasn't the case.

But when we look at these constitutional courts and the creation of the courts after '89 and again CEELI was very much involved with the discussions on some of these things. Initially I think these courts still struggled to gain any type of credibility.

And specifically within the constitutional law because of course it was all new for everyone, including trying to identify those who were qualified enough to sit on these courts and to be able to make these

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interpretations. But in hindsight, when you look at that particular transitional period, I think these courts played an essential role in contributing to the process of this transition to democracy and did so in a number of vital ways.

And it was actually when I was preparing my notes I was looking back at my own notes that I kept during the time and then looking at who has written in this area and actually came up with Herman and Dick, and then later with Vicki. So it's quite extraordinary that you have these individuals here.

But Herman had made a comment that several of these states, these new constitutional courts provided an effective political check on the other branches on the national, and sometimes local government. And he said, and diffuse some of the most explosive conflicts both in substantive issues and inner governmental branch issues. I think he was absolutely right.

But most importantly, I think they generated a really high degree of respect for the

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primacy of law. And the primacy of the courts in interpreting what that law is and then suggesting that these courts have the authority to make that interpretation. So their mere existence and their survival because that was questioned. That was -- even with the excitement of '89 as Wendy will know, there was uncertainty about exactly how this was going to work.

And even Dick, I think, had mentioned some uncertainty about that in some of the countries that we were working in at the time. But, I think, gradually these courts, particularly the courts became really the hallmark of this transformation. And they did so slowly but with increasing authority and the perception that this was the right way of going in providing some type of balance to the government.

I too want to just talk just a couple of minutes on Hungary and I've selected Hungary and Poland. Vicki will probably allude to it as well because it's fascinating both with what was

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happening after '89 and what's happening today, and the important role that the courts played then, and what's happening to the courts right now.

The Hungarian court really kind of faced its due task of trying to foster legitimacy in this kind of constitutional order. But at the same time preserving its kind of -- as a political entity as well, which these were at the time. And part, I think, of the success from Hungary, and again, Herman refers to this in some of the writings he does -- that he had written.

It was because of the fact that Hungary was had the model of this form of communism throughout central and eastern Europe. So the transition was a little easier there and was able to embed more quickly and had a bit more history on that. And I think Herman was right.

And it wasn't too far after when the court came and it emerged that all of us out and you realized how powerful the Hungarian court was going to be. And again, when you look back to

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the constitutional court, and particularly the powers that were given this court, and this may very well have been some of the earlier work that Dick had done in Hungary as well.

But it is quite striking that you had a court that had the authority to strike down not just national but international treaty law, deal with direct conflicts between the state organs and to oversee the impeachment of the president as well. And most importantly, we were able to have constitutional complaints coming directly from citizens. And this ability kind of for the private -- the ability for citizens to go directly to the court is essential, and essential for the success of that court.

And I think that at its height the Hungarian constitutional court was really seen as probably the most successful, certainly the most active court in central Europe. Within six years of its creation the court had brought down more than 200 national laws and nearly one third of all those brought before it for review. And many

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of those decisions were cutting edge decisions. And decisions that were moving Hungary through this transitional phase into a democratic state.

Again Herman's observation, "what is especially surprising, given the wide scope and deep impact of the court's decision is the support the court had enjoyed from all sides despite the many criticisms." That is absolutely essential to embed within citizens the understanding of the importance of the court and the respect for the court is something that is transformative for the countries.

But then, we moved to not Dick's student because I certainly don't want to say that, but Mr. Orban. And they are, you have -- you begin to shift and you begin to shift pretty dramatically. And I should say before that you had, as I said, the ability of citizens to move directly to the court. That was really essential in Hungary and I think that gave it such significant credibility.

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But now, with Orban, you're going to start seeing the reversal to the court. Not only to other aspects but particularly the court. The court was one of the first -- that should give you an indication of how important the court had been for Hungary, it was one of the first areas of that Orban started moving against.

And as soon as his party became, and as soon as he came to power, he started turning this court into really a political instrument in support of a government. He started this kind of revolution, or an attack that started stripping back the competencies of the court, its decisions were being overturned by constitutional amendments being pushed by the government. And the bench was beginning to be packed by government appointees.

And then I was looking at some of those cases that was coming out and the one that I love is the case regarding the decision on homelessness this last year. I don't know if you have heard about this, but the government had

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decided to initiate some new legislation that said that living in public places on a permanent basis was prohibited. That you just couldn't do that, the homelessness was criminal.

So this was a constitutional issue. It came before the constitutional court and the majority of the court, of the justices, the justices now having been placed on there by Orban, said, "According to the value of fundamental law, no one has the right to be poor or homeless. This status is not part of the right to dignity." Quite extraordinary when you read that.

But it wasn't just the poor quality of its decision because that's apparent in the wording. But it was because it was and now a political court. And it is a political court. And that was the new transformation that has occurred under Orban.

Poland, as Dick says, is very similar, kind of similar in process, although for Poland the constitutional court in the sense of its

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authority, its ability to listen or to take cases directly from the citizens didn't come until quite later. It wasn't in 1989 or a few years after, it was really quite late in 1997 actually.

But now, with the law, and just as part of it came in, that court too has become a very powerless institution. It was, again, the government's attack pretty quickly on trying to bring back court into the government's fold. And so the court is now considered to be quite friendly to the government, and is viewed as kind of an arm to the government. So rather than it's an institution of objective reasoning, it is simply now an institution for government policy.

And this is kind of when I started looking at the statistics it is quite extraordinary. Before this crisis of the court accepted about 5 to 600 cases annually. That started in 2016. The number of cases now have decreased down to 282 as of last year. I have mapped it out, it just kept going down.

The court was also known for kind of

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its efficiency. In 2014 alone the court had rendered 110 judgments. That dropped to 73 in 2015, and in 2017 it had dropped to 89. And so it's clearly now a court for all purposes it's review mechanism has ceased to exist. It relates only to what the government has asked for.

So finally, I just want to conclude because I do live in Europe and the crisis, as Dick says, on nationalism, populism, what can counter the rise in nationalism, as Dick says, or populism or authoritarianism, that history points? And actually it holds within the European Union and the European Court of Justice.

And the European Court of Justice, interesting has played, and is playing right now a very important role in countering this development that we're seeing across these countries. And the cases that are now beginning to emerge, and I say now emerging, I'm literally talking about within the lats year and a half. These are really important cases coming out that is making it quite clear that from Europe's

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perspective and from the European Court of Justice's perspective these issues of the independence of the judiciary are paramount to protecting the rule of law. And so these cases are moving.

Whether or not the Commission and whether or not Parliament has the sufficient vision and power to strike back at countries like Poland and Hungary is still to be determined. But I think the crisis is there. And I think it has awoken countries to say, not only these countries are in jeopardy, but the European union itself as a body is in jeopardy if these policies and principals that are being set forth by countries like Hungary and Poland are not stopped. And that, to me, is crucial and that's a question that's still unknown as to its answer, but I'm hoping it moves in our direction.

I'll stop there. Thank you, Susan.

MS. CARLE: Thank you very much Mark.

MS. JACKSON: I'm going to stand up because I'm short, and I've been sitting for a

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while.

So I am just so honored to be here. Can you hear me okay? All right. To honor a really rare incomparably wonderful human being, scholar and public interest advocate, Herman Schwartz. So thank you for the opportunity to express my great admiration and gratitude as you will come to hear.

So we're back in the early 1990s and I am on unpaid leave following the addition of a third child to our family. And Herman Schwartz calls me. I had met Herman through our mutual friend, David Silverman, who I think is going to be here later today. And so we are in the early '90s and Herman calls me up and he says Vicki, I want you to come to a conference in Prague. And maybe also Salzburg, I can't quite remember.

And the conference is on making a new constitution in a country that at the time I thought of as being called Czechoslovakia. Now, as you know from my colleagues Czechoslovakia was the site of the so-called Velvet Revolution. The

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peaceable displacement of communist control over the country inspired by the leadership of Vaclav Havel and the (inaudible) and made possible by the Soviet withdrawal.

And the country was embarked on a constitution making process. Now when Herman called me I was a both very surprised and very flattered. I was, as yet, and on tenured law professor at Georgetown. And I had written, as far as I can remember, on late on U.S. Constitution law issues. But I was quite interested in constitutional change and in the federalism. Herman and I might have talked about these over various dinners that we had had.

And want some domestic details had been worked out with this new-born and two other children, thanks to my incredibly supportive spouse who is also here today, I accepted.

And I owe a great deal to Herman because it was through this trip that I first became completely fascinated by constitutional experiences elsewhere, leading me within that

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decade to produce both an edited collection and casebook on comparative constitutional law with my then Georgetown, and now Harvard colleague Mark Tushnet. And then becoming active in the field.

So going back again to the early '90s, after I said yes to the invitation to what I thought was a country called Czechoslovakia, I learned, when I went to get the visa that the country's name had become something like the Czech and Slovak Federal Republic. A small harbinger of the much larger changes to come. For by late 1992, with in a year or two of this the two parts had separated, each becoming its own independent country.

Now, right before I traveled to Prague I was a given a draft constitution, one of many to review on federalism issues. And I recall many conversations with Herman as he tried to educate me on the history of this country, about which I had formerly known nothing. And it was through these conversations and what I learned

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while I was in Prague, which was the capital of the Czech and Slovak Federated Republic, that I first started to think about and realize how much local knowledge is needed really to understand another country's constitution, a point that Dick Howard made, also.

And I believe I learned a great deal from you also at those conferences, Dick.

And my experiences there also contributed to my thinking about federalism, giving me an appreciation of the role of what I will call existing power holders. Informing federal systems. What do I mean? So I recall one discussion with Herman in which I rather naively raised the possibility of envisioning a federal republic for this country that would have more than two parts. That is, of using other geographic boundaries, not just between the Czech part and the Slovak part, but trying to break it up into smaller multiple parts.

Because I said to him bipolar federations are likely to be very unstable.

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Well, yeah. Yeah, I mean that's (inaudible) Czechoslovakia. But Herman explained to me why this idea would be totally impractical given the history and looking --

People can't hear me?

UNIDENTIFIED SPEAKER: Yeah, it's (inaudible).

MS. JACKSON: Should I stop or can I keep going? I'm going to keep going. Can you hear me?

AUDIENCE: Yeah.

MS. JACKSON: I'm looking, looking at the perspective of the delegation. Let me k now if you can't hear me. Can you hear me?

UNIDENTIFIED SPEAKER: Yeah.

MS. JACKSON: Looking at it from the perspective of the delegations from the Czech Republic and the Slovak Republic you've got all these people who can envision being governors, or presidents, or heads of their supreme courts. And you have to take that into account if you want a peaceful kind of transition.

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And as I listened to the debates while I was there I came even more to appreciate why Herman felt this way. So I'm listening to members of the delegation from the Slovak Republic explained why it was completely, logically, inconceivable that a Supreme Court for the whole country could review the decisions of the highest court of the Slovak Republic a sovereign entity.

And it was like being a fly on the wall back at the time of Chief Justice Jon Marshall's tenure at the U.S. Supreme Court. In Martin against Hunter's Lessee, in 1816, and again in 1821 in Combs against Virginia, the Marshall court concluded that it could, indeed, exercise appellate jurisdiction over the decisions of the highest court of the state of Virginia.

In doing so, our Supreme Court rejected quite vociferous arguments to the contrary by the state of Virginia and by a leading critic of the Marshall Court, Judge Spencer Rome. They argued that any exercise of appellate jurisdiction by

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the U.S. Supreme Court was inconsistent with Virginia's sovereignty. And honestly, listening to these discussions and probably really gave me a much a better understanding of the nature of U.S. constitutional history and what those debates were about in the early 19th century, and how it could have gone in a different direction.

Now, my experience in Prague also led me to reach some more general conclusions about the formation of federal systems. And that is, that there will always be very important elements of what we might think of as historic contingency involving who already holds power, and what their history has been. That any given polity will constrain the possibilities for creating federal systems.

So when students and scholars say oh, what was the purpose of creating the federal system? You wanted to experiment? You wanted to do this? And I think well yeah, that might be function served, but what with the actual forces leading to the creation? And you have to look at

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who was at the table. Who had the power to gum up the works?

All right so those are some of the things I learned as a result of my encounters with Herman and the country that was once called Czechoslovakia.

And there was one other sort of substantive comment as I'm coming close to -- and near the end. And that is on the role of outsiders. Foreign legal experts in three areas, constitution making as Herman, and Dick, and Mark, and I, to a very limited extent, were involved in. Constitutional interpretation and constitutional adjudication.

And in that my academic work I have considered the role of outsiders in constitutional interpretation and adjudication. Now, what do I mean? Well, on interpretation when the OAS, or the U.S. or the UN decides that, for example, Honduras has had a rupture from its own democratic constitutional order as occurred in 2009, those outsiders are reaching a decision

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about what the Honduran Constitution provides for in the way of removing a president and appointing a successor. It's a big mess in Honduras. I won't go into the details.

But when countries are reacting this way that's what they're looking at. Did this happen legitimately, or was this some sort of a pseudo-coup? They are in effect interpreting the Honduran Constitution, and this happens actually more than you might think when you start looking around the world.

Constitutional adjudication. So in a recent co-authored paper I worked on, we studied what we called hybrid constitutional courts such as that in Bosnia-Herzegovina, which is required under the Constitution negotiated as part of the Dayton Accords. To include as members of the court three judges not from any constituent part of that country and appointed by an outsider, the president of the European Court of Human Rights.

The highest courts in Fiji as well as in Hong Kong have frequently had foreign judges

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sitting on them from other common law jurisdictions and deciding constitutional cases as well as other cases.

Now, on constitution making. I was in Prague as a very junior member of a gathering of real giants in the field of constitutional design including such great luminaries as Pierre Trudeau, if memory serves, Lloyd Cutler, Herman Schwartz and, if memory serves, I think maybe Larry Tribe was also there for that one.

And while I have not written about that experience, I do want to say that there may be some paired advantages and disadvantages similar to those I haven't written about in other settings when foreign experts become involved in a constitution drafting process.

And now, outsiders can bring significant benefits, and I will mention two. One is they may have expertise and knowledge of legal phenomenon that are not as well known in the country they are in. Second, they might be perceived as more impartial. They don't have a

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dog in the fight because they are from outside. They're not going to continue on there.

(inaudible) the paired disadvantage is that outsiders may lack crucial local knowledge. And rather than being perceived as more impartial, they might be regarded as foreign interlopers acting, whether consciously or not, more in the interest of their own governments or countries then in the interest of the people who are supposedly engaging in constitution making.

Now, this is, I think, a conundrum. It's a balancing act two whose contours I was first introduced by Herman, for which I will be forever grateful. And let me just be clear, I am not trying to suggest that we should stop the enterprise of learning from comparative experience elsewhere. I've devoted a major part of my own scholarly career to that.

And as we heard from the two prior speakers, there is -- I don't think they used this word, but there's almost a playbook at work, borrowing a word from Kim Shepley (phonetic),

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among the illiberal democracies that seem to be emerging, attack the independence of the courts, stifle electoral competition, shut down the press, the Free Press, the independent press. Shut down the free and independent universities or the Academy of science, or Central European University. And these are techniques that are not seen in only one country.

And what I would last suggest is something I think Herman's whole career showed an innate appreciation for. Is that if you want to build a good and just constitutional democracy in your own country, you really need to be engaged in the quality of constitutional democracies in other countries. It's really hard to be the only -- to be the only constitutional democracy around, or one of few.

So we really have a stake in learning about what's going on in other countries. And figuring out how to sustain what is good and just in our constitutional democracy, and fix what is not. So thank you, Herman, for your many

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contributions to constitutionalism at home and abroad in so many areas. And I'm sure you all join me.

MS. CARLE: Okay. Well, we have some time for further discussion and questions from the audience. I would take the moderator's prerogative, which is to ask the first question.

Which is, we have heard a lot about the hopes and the excitement and the period of optimism about what might happen in eastern Europe and then the sort of results that did not end up quite the way everybody was hoping.

And a little bit about what factors contributed to that, and among those context, history, the self-conception of the people, the national identity of the people. Who already held power and what the historical contingencies were. And I wondered if you could expand just a little bit on that and the lessons learned.

And also the way in which popular constitutionalism is a part of, or a lack of sort

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of a popular conception of what the elites were trying to do in drafting these new constitutions and what the importance of the independence of the courts. To what extent is that one of the factors that we need to look to in thinking about the lessons of this. Yes, go right ahead, everybody.

MR. HOWARD: It would take somebody who understood anthropology, history, sociology and other disciplines in a way that I do not. But I sense that one of the trends said that's going on, we see it domestically in this country, and we see it in Western Europe in places like France, the United Kingdom, Germany, we see it certainly in central and eastern Europe, and I think in other places.

And that is the sense that the people we dealt with when we went to Prague and Budapest and those cities, we were dealing by and large with the educated elite. The judges, the loggers, they were every bit as good as anybody in the West, no doubt about that. And they were

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just sort of naturally the people you gravitated to, you talked to, you worked with.

We didn't go out into the countryside. We didn't go out into the small towns and villages of say eastern Hungary or southern Poland. I don't know much about those places.

This is only kind of a hunch that somehow some of the sliding back that we tend to regret is the resurgence of popular feeling among people who feel left out, feel neglected, feel left behind and in many cases economically are. I mean they are also living in very hard times and they attack globalism and the like and they attack the elites in the cities.

And that's why, say for Orban in Hungary and for Law and Justice in Poland it's easy to label the elites as being much more comfortable in the drawing rooms of Brussels with people like themselves. They don't really understand ordinary folks like us. This is very popular. I think this is powerful and this may explain, to use the -- to coin the phrase popular

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constitutionalism. I think this may be one of the factors that is in play.

MS. CARLE: Thank you. Any other comments?

MR. ELLIS: In London when the Brexit vote happened up until that point I was quite certain that there would be a remaining vote that was very, very certain in my mind. It was only afterwards that I realized why I erred. It was exactly what Dick had just said. Because my input, my information was coming from where I lived in London.

And London was not going to exit anything. So the newspapers I read, BBC that I listened to had been slanted and it was an absolute huge disconnect in what was happening outside that. And I do believe Dick is absolutely right in the sense of a disconnect in other countries.

I would say that there are real concerns. I don't want to dismiss those who perceive grievances against globalization,

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against economies that are just not working for them anymore. That has to exist in order to be able to turn that into a political movement. And then if you have an Orban, or Horace Johnson or Nigel Farage that's a perfect storm of being able to make that work.

And then it's much easier than to bring in disinformation, false allegations and just build up that discontent. So that's point one and point two, I would just say when we could have moved out of central (inaudible) Europe and these countries, whether it's Poland, Hungary, Czech Republic, I wouldn't have ever in for a million dollars thought we would be where we are right now. And I just wouldn't have thought. But one thing that I think had been missing and is missing now, is really about civic education.

When you look at the -- and you have to realize it and this is pretty among the younger people, but the younger generation they're long away from 1989. This is two generations in fact that -- but the lack of civic education about the

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principles of the rule of law, the principals of liberal democracy is absent time and time again in the countries. And you can see it in the polling of young people who were pulled into the idea of an authoritarian type of approach.

That to me, is scary and that is something that Europe needs to deal with. It's something this country needs to deal with here.

MS. CARLE: Thank you.

MS. JACKSON: So can I just add?

MS. CARLE: Yes.

MS. JACKSON: Is it on? Right. So I am not sure, as an empirical matter whether illiberalism correlates with lack of education. I'm just -- query. I took a look at literacy rates from Wikipedia, this great source, and you know if Wiki is right, Poland's ahead of the U.S. and so - -query. I'm just not sure.

And I remember ra study I read a long time ago about India and about that Indian democracy lived mostly in the villages, not in the big cities. So I'm just -- I'm not sure

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about education as such.

Which is a different question than who you hang out with. So one of the thing is in the world we now live in, all of us hang out much more than we would have 40 years ago, with people who think similarly. We are more likely to be Facebook friends, I mean I don't do Face -- but we're more likely to hang out. Okay. And I think that's true around the world.

Which means that one of the phenomenon that's going on here is the radical change in the technology of communication. Change in speed of communication, the fact that someone can come out of nowhere and develop a popular following and win elections without going through intermediary organizations, like political parties. So that's one of the phenomenon.

Second, there is huge pressures in the world created by migration. Migration is typically for people who are different from us, and human beings seem to have some capacity to deal with people who are different from them, but

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apparently not infinite capacities. And so we need people who believe in constitutional democracy and the idea of liberal restraints on government need to come up with a way of responding to that.

And third, one of my colleagues mentioned the economic pressures as being real, and you know, maybe we are reaping the results of decades of neoliberal economic policy. All of which, I believe, are creating pressures that go into this stew.

The last thing I want to say is I don't know that -- so there are still elections held. Now, you know, elections without a free press aren't such reliable indicators.

But what's interesting about what's going on in the eastern European countries, people are talking about is that we are not seeing military coups. We are not seeing the tanks are rolling down and a military leader saying no more elections for 10 years. That's not what we're seeing. So it is important to

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these illiberal leaders to win elections and that may offer some possibility for change of direction. Just not to be totally pessimistic care.

MR. ELLIS: Susan could I just respond to Vicki a little on this point of education if I could. The issue is not literacy. The issue is literacy and what. If you are not providing the civic education and the principles of democracies, liberal democracies, that's the problem.

So if you look at, again, back to that perfect storm. If you have a government that is attacking the judiciary and beginning to alter the judiciary so it's no longer an independent judiciary, a population, citizens, who are willing to allow that, who then buy into that that's the lack of the civic education, of the understanding of the importance of these in very fundamental principles that ensures not only the independence of the judiciary, but the rule of law and democracy.

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That is where I think we are falling away.

MS. CARLE: Thank you very much. We want to open it up for questions now, and we already have a queue forming. Herman, do you have anything you want to say? Any comments?

Or are you -- this would be very rare but you might be overwhelmed by --

MR. SCHWARTZ: I think that I share a bunch of the thoughts back in 1990, '91, '92 that there would be significant change. But I think that in some ways I'm not surprised by what's happened.

We're talking about an area of Europe that has really never known anything like what liberal democracy. Hungary between the wars, earlier Poland these countries were not anything like liberal democracies and the pressures, I haven't followed East Europe closely so I don't really know. But I somehow am not terribly surprised.

As to the role of outsiders, I think

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that one of the things I knew right away was that we had a very limited role. This was at their constitutions. We didn't know their languages. We didn't know the legal traditions whereby a word in a constitution, words in our -- each word in our constitution carries a host of prenumbers and traditions. Words are suitcases, and (inaudible) certain kinds of contents. We don't know those.

So I saw our role really as very limited. There were some things we could tell them about. Some things they knew without us. For example, one of the things I usually suggested was the notion of an ombudsman. And the Polish ombudsman played a huge role, starting out incidentally on prison issues.

One of the things that seemed to me very clear but again, this is only in the constitution, was that try to institutionalize the projections. Write into the constitution that there is a right to resort to a court, that's common in Latin America. We could tell

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them about some of our bad experiences.

Our court system was not much of a model. They had constitutional courts which judges sitting on those courts for limited periods of time. They were mostly academics. They were immensely powerful compared to ours. The Polish constitution knocked out a deal that the finance minister had made with tone of the international -- the IMF or with the World Bank. The finance minister resigned, nothing happened to the court.

The Hungarian constitutional court in those first many years through out a big chunk of the economic program that had been adopted by the parliament. Nobody complained.

In different societies I think we were able to help a little, provide them with certain tips and point out things that had gotten screwed up as far as we knew. We played a very limited role. To some extent, it was useful.

I came away being very clear in my mind that what Learned Hand said, constitutions and

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courts cannot save a people. It all depends on what's happening to the people inside. Whether it's migrants, whether it's economic problems it's the surrounding society that makes it possible. Without that, a constitution won't do much. And outsiders certainly won't do much.

But those of us involved, as Dick said, had a wonderful time.

(Crosstalk)

MR. ELLIS: Before quitting, do you remember the one thing that we did add, and this is an interesting historical point. Vicki was talking about constitution making, it's because of these countries were in Europe and they were looking for integrating in Europe. And so we brought in European experts around those tables, if you recall, Dick.

Now, that was interesting because we were getting funding CEELI was getting funding from the U.S. government. And I remember going to that meeting and saying I want to get money to pay for Europeans to come in. They didn't like

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that at all. But I think that change the dynamics as well because it allowed us to continue to play the role that you described correctly as simply there to be a sounding board.

It said their process, it was their draft, and having Europeans join us, I thought raised the credibility of the process.

MR. SCHWARTZ: We had Germans, and I'll just close a little bit.

One of our wonderful, unhappily now dead, French friends Roger Rivera (phonetic), Roger said at one point, good constitutions, like good wines, don't travel well.

MS. LOURDES: Mark you just -- I'm Wendy Lourdes and my husband was the American ambassador in Prague. We lived there during communism, we got to know most of these people, including Vaclav Havel very, very well. So on the first of January, this is how it all happened and this is why it's important to the history and then how the experts took over.

But it was Jan Jaworski, a Slovak who

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had just gotten out of jail two weeks before and was suddenly deputy prime minister of Czechoslovakia and he was suddenly up next to the castle and he invited Bill and me for lunch. We had given an inaugural dinner for Vaclav Havel the night before he became president.

And Jan said, hey Wendy, we need to have a constitution and free Czechoslovakia, you're going to help us. And I said Jan, I'm not even a lawyer, how can I possibly help you with your constitution? But we had taken Lloyd Cutler to see Vaclav Havel, the summer before. And I knew about Herman because I had been working for Human Rights Watch in New York. And this is how that all happened.

And we picked up the phone and I called Lloyd from Prague and I said how would you like to help the drafting committee and the new parliament to write the constitution. He said I'd love nothing more. Then I married Herman and Lloyd who didn't know each other and ended up on opposite sides of the border situation. And they

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are very different people, these two men. And they became fast friends, of course.

And what I was going to say, and Herman just brought this up, and I'm going to follow on this. What they did was an American initiative was to bring the leading and with their roster the former general counsel on the white house, Lloyd, and all of the contacts. They were able to bring the leading jurists from each of the parliamentary countries in Europe to come to Prague and sit with these people and get to know them.

And what that Czecslovaks told me afterwards was we had somebody we could call at 2:00 in the morning. We had somebody where if we were having a fight we could pick up and call (inaudible). We could call Benkopf (phonetic). We could call any of these other people. That's the part that so important. The shared experience, the American initiative in bringing together -- we (inaudible) a parliament and constitution in this country so you know -- and

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so they (inaudible) because they don't have a constitution.

And so that -- and to prove that it worked is that the Slovaks after they split and this was just two authoritarian figures, Vaclav Havel and Mitchar (phonetic) who decided to split. There was no referendum. There was no vote, there was no nothing.

The Slovaks asked Herman and Lloyd and their constitutional group to come and do it for Slovakia, which meant that they didn't see these as interlopers coming in from outside and telling them what to do. And by the way, we did not accept U.S. government money at all, ever for that part of this. We only took private, you know, RBF and all the other foundations.

Now, in these countries Hungary and Poland are a problem. But the children have taken to the streets in Slovakia and in the Czech republic and are demanding that there be anticorruption laws, that there be rule of law. They are demanding that there be civic education

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in those countries. They don't remember '89. It's long ago. It's two generations ago but they are demanding and Zuzana Caputova, a young woman who headed up (inaudible) international in Slovakia is now the new president.

So it is -- there is some optimism on all of this that can happen. But my former offices are now the leading NGOs and one of the main things that they are focusing on is civic education. Because they know that this is a not being taught in the schools in any of these countries. And they can't just rule by demonstrations, they have to understand, so that's a little of the history, the combination of the great fun we all had doing it. The role that CEELI played was absolutely, totally important, and crucial in that part of the world and the importance of civic education.

MS. CARLE: Thank you very much for that. I saw so many hands and know people have a lot to say, and a lot to talk about but I have gotten the sign that it's time to go to the

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reception. And I hope all of this conversation can continue during the reception that will be right outside the building.

Thank you. A big hand for our panel.

MR. LAGUARDA: I have to say two things before you go to the reception. The first is despite what you might think this entire day was not Herman's idea. Actually, not surprisingly it was the idea of my colleague Professor Macarena Saez, so please give her a round of applause.

Okay. Then I copied the idea. And if you are inspired by what you heard, especially about civic education we hope you will be inspired to buy the book of a selection of Herman's work for sale in the lobby during the reception. One hundred percent of the proceeds, and you can donate more, go to support one of Herman's favorite causes, the Marshall Brennan Constitutional Literacy Project here at AUWCL. So please be generous and it's a wonderful book.

And please sign the poster that is out

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front during the reception. Please sign it, don't feel bad. I signed it, others have signed it so please sign it. Thank you very much and please enjoy the reception.

MS. CARLE: And thank you for not --

(Symposium ends at 4:48 p.m.)

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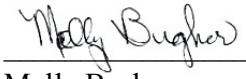

Molly Bugher

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