Michele Storms:

Well, since you all got so quiet, I think we should start. Welcome, everyone. My name is Michele Storms, Assistant Dean for Public Service here at the University of Washington School of Law, and I'm very happy to have you all here with us for the first Gates Public Service Law speaker series program of this school year.

Through this speaker series, we are really pleased that here at the University of Washington School of Law we're able to bring in highly esteemed individuals who are doing all kinds of different public service work. It's a good way for us to realize our own mission of helping you as students and people in our community who join with us for these events to see that there is a wide range of things in the world that people are doing for justice, and a wide range of ways that they're doing it, whether it's litigation or legislation or working with the executive branch, working in communities, doing community education, mobilizing communities. There's a wide range of ways that people can address issues that concern us all.

So as the year progresses, you'll be hearing from many wonderful people, but I am especially happy to introduce our speaker tonight, who is Jules Lobel. He is a University of Pittsburgh professor. He lectures on constitutional, international, human-rights, and foreign relations law.

He's an expert on emergency powers and the laws governing war, has conducted human rights investigations in Gaza and Israel's West Bank, and made presentations on human rights in the United States and abroad. He's written several books, some of which will be available after the lecture this evening, including A Less Than Perfect Union, Success Without Victory: Lost Legal Battles and the Long Road to Justice in America, " and I think most recently one called, Less Safe, Less Free." About that particular book, one truly wonderful person, Mary Robinson, the former president of Ireland, said, "Everyone who cares about Democracy after 9/11 should read this book."

He is Vice-President of the Center for Constitutional Rights, where he's litigated important cases regarding application of international law in the U.S. courts. In the late 1980s, he also advised Nicaraguan government on the development of its first democratic constitution, and has done the same for the country of Burundi. Now, he's not only concerned about doing that work himself; he actively engages students.

For an audience that's largely students, you should know that whether he's working on cases or not, he is connecting students with private attorneys, and giving them the opportunity to, while they're in school, connect with this important work. In one of this own very famous cases, Arar v. Ashcroft, which was a federal lawsuit brought against former Attorney General John Ashcroft, FBI Director Robert Mueller, and the former Secretary of Homeland Security Tom Ridge, and several other people, challenging their rendition of a Canadian citizen by US immigration officials, the rendition to Syria, where unfortunately he was tortured and forced to falsely confess to being a member of Al-Qaeda. Eventually he was released, but he was never charged.
In connection with that particular litigation, he developed an independent study course so that students in his law school class could work directly on that case and even get to travel to New York to hear the arguments. He has said, "I feel passionately that the legal system should be about providing justice to those people who are oppressed and mistreated. I also feel strongly that the United States government should recognize human rights and international law, in practice as well as in theory, and that government officials should be held accountable when they violate the norms that we as a society have agreed to abide by."

So against that wonderful information, I am really excited and proud to be able to introduce to you Professor Jules Lobel.

Audience:

[applause]

Professor Jules Lobel:

Thank you, Michele, for that wonderful introduction. I'll try to live up to it.

Law students and lawyers are taught how to successfully win cases. That's our job as law professors: to teach you how to practice law in an expert way, so you can win cases. If you're going to be a mainstream lawyer, you want to win a judgment for your client.

If you are a law reform, public interest lawyer, often you're trying to bring cases to achieve some change in society: either structural, by winning an injunction, or some change for poor clients, but in both cases, the emphasis, both in the public interest bar and in the corporate, mainstream bar is to win your cases. Now, the emphasis on courtroom victory in the law, which permeates, I think, the whole law, and is reflected in the way we view our heroes, the great lawyers who won terrific cases, like Thurgood Marshall and Clarence Darrow, but the emphasis on this winning reflects and is rooted in a broader attitude in American culture, which focuses on winning. I think the best, maybe most colorful, example of this was the former Green Bay Packer coach, very famous coach, Vince Lombardi, who once asked what winning meant to him, and he said, "Winning isn't everything, it's the only thing."

In politics, business, sports, and in law, we have a passion to win, as Americans. We also, I think, have a great fear of losing. In soccer, for example, when some entrepreneurs decided to bring soccer to this country as professional, they were told, "You have to get rid of ties. Americans won't like ties. Ties are just un-American."

So they figured out a system ...

Audience:

[laughter]

Professor Lobel:

... to get rid of ties in soccer. In politics, we don't have proportionate representation, at least in our national system. It's a winner-take-all system.

If you look at many famous politicians, like Lyndon Johnson, their whole life essence was taken up with winning, to the point where Johnson wouldn't get out of Vietnam not because he thought he could win, but he was afraid of losing, of being tagged as a loser. I guess only on television is the biggest loser a compliment.
In law, we eschew mediation for the courtroom drama of winning and losing. Well, today I want to talk about, and I want to challenge and question, this American emphasis on courtroom victory, one that I think you get throughout your law school career, and particularly for public interest law students starting their career because a critical role of public interest lawyers throughout American history and today has been to use litigation not simply to win courtroom cases, but as a means to enable a political or social movement to get their voice heard; to spark public debate; to engage in public dialog through the use of the law and through the use of the courtroom; to get these movements' voices heard on a national scale. These litigators were not just speaking to the court, but much more broadly, speaking to the public.

Now, of course, even for the litigators that I'm going to talk about, the public interest litigators throughout our history, particularly in the 19th century, who sought to use law and litigation not simply to win cases, but as a forum for protest and for raising public debate, of course, they wanted to win, too. They spent a great deal of time and energy trying to figure out ways to win in court. As a law professor and as a litigator, I think it's critical to develop students' legal skills as to how to be the best lawyers they can, how to win in court, and how to use the law to the best of their ability for clients.

But my point today is that for many litigators, I think particularly for public interest litigators, their goals in using the law are much broader than just courtroom victory, than just winning in court, and goes fundamentally -- and this is particularly true for an organization like the Center for Constitutional Rights, to help the movements that they represent, to help the organizations they represent, to help the clients they represent get their voices heard, and build their movements. The question for any legal strategy, or legal tactic, or case that you want to bring is, "How will it affect that movement?" not simply whether we will win or lose in court.

Now, unfortunately I come to this strategy of not winning in court through bitter experience. I spent probably a decade of the '80s challenging U.S. foreign policy and U.S. intervention abroad in American courts. With organizations like the National Lawyers Guild, the Center for Constitutional Rights, we sued on many, many different fronts.

In fact, I'd say one of my great claims to fame is-- I told the students earlier -- and I don't know if this is so famous, but is that I've sued every President since Reagan.

Unfortunately, we were spectacularly unsuccessful in courts.

Unfortunately, we were spectacularly unsuccessful in courts.
We lost virtually every case that we brought, although we won often in the lower courts, but in the end, virtually every case turned out to be in the 'Lost,' column in the courtroom count. In fact, I often thought of writing to the Guinness Book of World Records...

Audience:

[laughter]

Professor Lobel:

... [laughter] to see if I could be included as having the longest losing streak. This actually continued until I won my -- after, I'd say, about 10 years of bringing these cases, I finally won a case. I got a ticket for driving with my registration expired, because I was so busy I forgot to renew the registration. I told this to a colleague at the university, and she told me, "Well, you have a ticket for a registration that's expired. The law is that all you have to do is go register, and the ticket will be wiped out."

So I said, "Great. I think I should be able to win this case."

Audience:

[laughter]

Professor Lobel:

I paid the registration fee. I went down, and I sat in court for about an hour behind interminable traffic tickets, parking tickets. After an hour, I had the law; I had a whole opening argument to make.

I got up, and I tried to make my argument, and the judge just looked at me and said, "Ticket dismissed, go home."

Audience:

[laughter]

Professor Lobel:

I said to myself, "This is my big chance."

Audience:

[laughter]

Professor Lobel:

So I tried to go into my argument. He said, "Ticket dismissed, go home," and I counted it as a win.

Audience:

[laughter]

Professor Lobel:

Just to show you that winning is very useful, I was so enamored of the colleague who gave me this great advice that we got into a relationship, and we're now married, so ...
Audience:

[laughter]

Professor Lobel:

But just to give you a little flavor of this type of litigation, for example, we brought a case on behalf of people who wanted to travel to Cuba. Then, as now, traveling to Cuba is a federal crime punishable by 10 years in jail. Any of you want to travel to Cuba, you better see somebody before you do it; there are exceptions, but just as the general public.

We challenged this as a violation of people's rights, and also as going beyond what the law allowed the president to do. We actually won unanimously before the 1st Circuit Court of Appeals with then Judge Breyer writing, "Any reasonable reader of the statute would say that the president was acting beyond his authority when President Reagan tried to --when President Reagan imposed this ban. Unfortunately, it turned out that five Justices of the Supreme Court were unreasonable readers, and they reversed the 1st Circuit.

This would happen over and over again, so it got me thinking about the role of winning and losing, and what I was doing, and what really the meaning of these types of cases, and more generally, of public interest law is. Let me just, by the way, first say that there are some well-known public interest lawyers, as well as the mainstream bar, questioned the legitimacy and the efficacy of using courts in this way, of using courts as forums to raise public discussion, of using forums to raise people's concerns, as opposed to just winning or losing a case for your client. For example, in the 1920s, Felix Frankfurter, who was then a Harvard Law professor, and was a member of the ACLU's executive board criticized the ACLU for attempting to influence public sentiment in a pending case, saying that the case must be tried in the courts, not in the press, or in the publicity.

There's been attention throughout the ABA and the rules on ethical practice to what extent is it legitimate to use courtroom battles as a mechanism for developing public education and public consciousness. But I think, particularly in today's world, most lawyers do it. Most lawyers see it's a very important part of their work, and many, many important cases are used for this purpose of developing public consciousness.

Another criticism of the talk I'm going give would be by people such the former Director of the Inc. Fund, Jack Greenberg, who would say that test cases generally shouldn't be brought if they are likely to be lost. He was questioning whether the people who brought Plessy v. Ferguson, the 1890s case challenging segregation, which lost, should have brought that, or should they have just done nothing, and allowed that to happen without having a Supreme Court test because in that climate, it was pretty obvious that that case was likely to be lost. So Greenberg's point is that you shouldn't bring cases that you think you might lose, even if you think that there's an injustice because often you'll just create bad law, bad precedent, and it will set the movement back.

We at the Center for Constitutional Rights strongly disagree with that approach, as I will develop. In contrast to that, there are many social scientists who have shown that litigation is actually one of the most effective ways of movements obtaining publicity for a cause, and is often used by movements as a crucial organizing tool. Now, I think this view of not looking at success or failure in terms of courtroom victory, or winning or losing, but looking at in terms of the broader goals of developing a movement, is particularly important in this era because we are faced with very, very conservative courts.

The Supreme Court that now sits, starting today, this term, 'starting today,' is probably the most conservative Court that we've had in the last hundred years. The people who do this type of analysis, and there are various studies of it, say that four out of the six most conservative justices since 1937 -- Scalia, Roberts, Alito, and Thomas -- sit today on this Court, four out of the top six in
terms of conservative justice. Secondly, while the Court has not been all -- I mean it's not been uniformly conservative.

I mean you can win cases. Even in this time before this Court, it's clearly possible to win some important victories; however, the first term of the Robert's Court saw a rate of conservative opinions, as measured by some standard, that was the highest since 1953, the last year on the Court before the arrival of Chief Justice Warren. Justice Stevens, who just recently retired, had his own way of tallying the Court's direction.

In April, before he retired, he said that every one of the 11 justices who had joined the Court since 1975, including himself was more conservative than his or her predecessor, with the possible exception of Justice Sotomayor and Justice Ginsberg. In fact, when asked whether the replacement of Rehnquist, who was one of the six most conservative, by Justice Roberts had moved the Court to the right -- Renhquist being very, very conservative -- Stevens said, "Definitely, yes."

So we are faced with a challenge, as a public interest bar, of a Court which is very, very conservative, in which measuring your success by victories and defeat is either going to make you very timid or very depressed. So I would like to present an alternative picture. It's an alternative picture which is taken from American history because while many of you may think that the public interest litigation and the public interest bar is a feature of the 1950s and '60s, starting with the civil rights movement, in fact, public interest litigators go back to the beginning of our country.

Particularly in the 19th century, there was a very strong public interest bar made up of abolitionist lawyers in the 1840s and 1850s, who defended runaway slaves, and who challenged slavery in Northern courts, and also challenged the deprivation of civil rights. In fact, an identical case to Brown v. Board of Education was brought in Massachusetts, the great free state of Massachusetts, by Charles Sumner, who was later a US senator, a very well-known abolitionist senator, on behalf of black schoolchildren who couldn't go to public school in Boston. He argued the case before an abolitionist judge, who turned him down, saying that integrated or equal education was not required by the Massachusetts equality clause, the Massachusetts version of the 14th Amendment.

That case was cited by Plessy v. Ferguson as a Northern state, so Northern abolitionist lawyers were doing this. The courts in the 1840s and '50s, like today, were very conservative, so I'd like to paint a picture of these lawyers, and what they saw themselves doing, and maybe what lessons it has today. Probably the best-known of these lawyers was a man by the name of Salmon Chase.

Salmon Chase was a lawyer in Cincinnati, Ohio. He started his career as a bank and commercial lawyer. He later became known because he did so many fugitive-slave cases as the attorney general for runaway slaves. It was the sort of precursor of today's private attorney generals in the Civil Rights Act, but he was the attorney general for runaway slaves.

He started his career as this attorney general for runaway slaves -- this was obviously not an official title -- in 1837 when he was approached by an abolitionist friend to represent a 20-year-old, light-skinned, black woman named Matilda Lawrence who had been taken to Ohio from New Orleans by her father and owner, Larkin Lawrence. She ran away, both from her father and from her owner. Her father went back to New Orleans, and hired a slave catcher who came back up to Ohio and found her, and was about to take her back to New Orleans.

She was arrested, pursuant to the Fugitive Slave Act of 1793, which required the Northern states to be complicit in slavery and return runaway slaves.

Chase said he would take the case. He went into court, and he spent, I think, three hours arguing three basic points, which he argued throughout his career.
One is that slavery was contrary to natural law, natural right, and that Northern courts should not enforce slavery, and should not enforce this Fugitive Slave Act, even if it was passed by Congress because it was violative of basic human rights and basic natural law. Second, he argued based on English precedent -- a very famous English case, the Somerset case -- that slaves who were brought into a free state were legally free, and that therefore a slave who was brought into Ohio or Pennsylvania voluntarily, not because they ran away, but once they were brought into the state voluntarily by their owner, they became free. That was the law in England.

It was the law in England since the latter part of the 18th century, being pronounced by a famous law lord, Mansfield. His second argument was eventually adopted by a number of Northern states, including Ohio, but it was rejected by the U.S. Supreme Court in Dred Scott, which, by the way, was a very, very conservative court in the 1850s, composed mainly of either southerners or people sympathetic to the slave owners. Third, Chase argued that the Declaration of Independence was not meaningless, and that the Declaration of Independence's great rhetoric on equality had to be infused into the Constitution, which as you hopefully know or may know, the original Constitution had no mention of equality.

So the abolitionist argument was that the equality, the ringing phrase that Jefferson wrote in the Declaration had to be used to interpret the Constitution, and to require freedom for slaves who found their way to the North. Well, as you may guess, he lost. Matilda was, as they called it, sold down the river, back to New Orleans, where she was sold by her master to somebody else, and was never heard from again, but it launched Chase on this career where he literally represented dozens of fugitive slaves over the next 10 years.

He lost most of his cases. Increasingly, his cases, as in the 'Matilda,' case, drew large crowds in the courtroom, got great attention. Even when he lost, it sometimes happened that either the court accepted some of his legal propositions, like this proposition that slaves brought voluntarily had to be freed or were legally free, or the court ordered the publication of his arguments so that he started reaching a broader and broader audience. Chase and other abolitionist lawyers doing the same thing in different states, began to get their message heard; and it was one way of the abolitionist movement, developing a platform, a program, and getting their message out to great, large sectors of the Northern public.

Probably, Chase's most famous case, and probably most futile, was a case that he litigated in 1842, where he agreed to represent an old, white farmer named John Van Zandt, who had been caught red-handed transporting nine fugitive slaves from Kentucky to Ohio. Chase was actually optimistic about the case because sitting on the Circuit in Ohio was John McLean, who was a Supreme Court Justice, was the only abolitionist justice on the Supreme Court, was very sympathetic to the abolitionist movement, to fugitive slaves. Chase went into his usual litany of arguments: natural law, natural rights.

At the end, after the trial, McLean said to him -- said to the jury, "I want you to ignore all of this. All this natural law business, it's not for you to decide. Your only question is what the law says. You have to read the Fugitive Slave Act, decide whether he's guilty or not of violating it. Don't listen to any of the rest of this."

Of course, the jury convicted. They jury found him guilty, and forced Van Zandt to pay damages and compensation. At that point, even a die-hard litigator like myself would have probably given up because the appeal to the Supreme Court, he had just lost before the only sympathetic justice on the Supreme Court, but Chase was not daunted by these odds.

He decided to appeal. Not only did he appeal, he wrote an enormous brief. He got as co-counsel, William Seward, who was then governor of New York, and later to become Secretary of State
under Lincoln, probably most known for, 'Seward's Folly,' which now gets us Alaska, but Seward also wrote a brief.

The Supreme Court didn't even give them the courtesy of hearing argument and ruled nine to nothing against it. Chase's brief was tremendous rhetorically. He argued, "No legislature can make right wrong, or wrong right. No legislature can make light darkness, or darkness light, and no legislature can make men things, and things men."

He also pointed out to the Court, which took -- where I'm from in the Bronx, there's a word for this. There's a Jewish word for this which is, 'chutzpah,' --which is, 'tremendous guts,' to say this -- but he said to the Court, "The final arbitrator in cases of a moral and political nature is not you, even if you think you have the final say."

He said, "It's not the Court's judgment, but public opinion, not of the American people only, but of the civilized world," but Chase lost.

He lost nine to nothing. Nonetheless, his arguments in this case were widely publicized. It was reprinted as a pamphlet, distributed both to all members of Congress, and widely distributed among legislators and the political elite around the North.

His co-counsel William Seward's argument brief was published in the New York Tribune. Legal luminaries, like the retired Joseph Story, accurately predicted that Chase's brief was a, "triumph of freedom, and his points will seriously influence the public mind, and perhaps the policies of the country." Charles Sumner, who was later to be senator from Massachusetts, as I said, said it was the best brief he had every read, and he used it, and he has quoted from it in all of his anti-slavery arguments.

Chase's brief and his arguments became the bedrock foundation of the constitutional argument against slavery of the Republican Party. It had an enormous influence on Northern public opinion. Chase himself became a senator, based on all these losing cases, became the senator of Ohio in 1849, the governor of Ohio in 1855 to 1859, and he became the Secretary of Treasury under Lincoln when Lincoln won the presidency in 1860, and he served as Secretary of Treasury during most of the Civil War.

Unfortunately, one of Chase's great flaws was his ego, which was enormous, and Lincoln, with his typical wit once said, "Chase is about one-and-a-half times bigger than any other man I had ever known."

I think he was referring to his brilliance, his great intellect, and great ability, but also his enormous ego. His ego finally got the better of him, and he tried to run for president against Lincoln in 1864, figuring that he would be better than Lincoln, and that got -- Lincoln finally had had enough of Chase, and he fired him as Secretary of Treasury, but he decided to kick him upstairs into a less meaningful post. He appointed him to be, I think, the fourth or the fifth Chief Justice of the U.S. Supreme Court.

His legal career was mainly this career of representing runaway slaves, fugitive slaves. Chase was Chief Justice of the Supreme Court from 1864 to 1873 when he died. He was also on a U.S. bill.

I don't know if any -- because of his great work at the Treasury, to honor him they put him on a bill. I don't know if any of you, if you look in your wallets, if you have a $10, 000 bill ...
... you can find the picture of Chase. I've always wanted to hit it big so that I could get a $10,000 bill and look at Chase. I've never done it.

None [laughter] of my cases have hit that big, and I've never done it, but he's on the $10,000 bill. He was just one of numerous abolitionist lawyers who used this same strategy of litigating in court even though they were facing conservative judges, usually losing, but doing it both to try to help fugitive slaves, but also to raise the consciousness in the North, about slavery, and about the complicity of the Northern society in slavery, which they were incredibly effective in doing. Just another example, which I'll just talk much more briefly about, is Susan B. Anthony, who I'm sure you have heard of.

Well, Susan B. Anthony, in 1872, had not only been hired to work for Grant, Grant's reelection campaign, but she decided as a woman, she was entitled to vote, having read the 14th Amendment, which granted everybody the privileges and immunities of U.S. citizenship. She said, "Privileges and immunities should give me the right to vote."

She went down and with her forceful personality convinced the inspectors to let her vote. She was then arrested with a number of other women who voted under an 1870 act designed to prevent former Confederates from voting illegally, and designed to prevent the Klan from intimidating black voters. She did all of this in order to get to court, and she didn't know if she was going to win in court.

This was all part of a movement which had developed a theory, a legal theory, that women ought to have had the right to vote because they -- it was part of the suffrage movement, but they read the 14th Amendment as granting privileges and immunities of citizenship, which should include voting. When Anthony was arrested, she wrote her friend, Elizabeth Cady Stanton, "We're in for a fine agitation in Rochester."

This was in Rochester, New York. She immediately, after being arrested, went on a torrid speaking campaign in advance of the trial with a number of other comrades who came out and spoke with her to the point where the U.S. Attorney moved for a change of venue because he said, "We can't find the juror who's unbiased in this district."

So, sure enough, Anthony went on a speaking campaign in the new venue. So what they finally did was they got a Supreme Court Justice Ward Hall who the feminists described as a, "pea-brained big fellow," something like that, to preside over the trial.

After her attorney gave a three-hour argument, and she was about start testifying, Ward got up and said to the jury, "I hereby charge you with finding Susan Anthony guilty," which, for any of you who've even gone through first year law school ought to know, that is unconstitutional.

I mean the jury has to be given a chance to decide the case. He didn't want to give the jury the chance to decide the case. Anthony got up to object.

He said, "Sit down. Shut up," and fined her $100, which she refused to pay, setting up a Supreme Court test.

Ward, very cleverly, refused to jail her, refused to punish her by jail, so she had no habeas right for the Supreme Court review, and she never got Supreme Court review. She lost in court. Every newspaper in the country carried stories about the Anthony trial.

It is considered one of the great state trials of the 19th century. It influenced thousands of people. Anthony felt it was a great success.
Sandra Day O'Connor reflecting a hundred years later, more than 100 years later, on the Anthony trial said, "While Anthony lost in court, she was the victor, in fact, because the way she was treated at the hands of the legal system caused so much sympathy to give great impetus to the women's suffrage movement."

Eventually in 1873 and 1875, the Supreme Court decided two cases, one in 1873 holding that Myra Bradwell had no right to be a lawyer in Illinois. One of the concurrences said, "Women being of such a delicacy shouldn't be allowed to practice law."

There was only one dissenter, and the dissenter, you might guess, was Salmon Chase. In 1875, by a nine to nothing vote, Chase having died by then, the Supreme Court held that the privileges and immunities of U.S. citizenship did not include the right to vote. In any event, that's a brief -- I mean I could go on for longer, but you've probably had enough of me by now.

I can certainly take questions, but I want to just conclude by saying that in 2000, between the decade of 2000, 2010, or so, my luck changed. I was involved in two major courtroom battles in which we were victorious. In both cases, nobody gave us a chance.

The first one involved a case in Ohio challenging a super max prison where prisoners are locked up for years in tiny cells -- in this case, no bigger than a parking space -- without any due process. The lawyers in Ohio came to me because they couldn't find any prisoner lawyer, prison litigator, who would take this case because it was seen as hopeless, and they said, "We know someone who does hopeless cases."

Audience:

[laughter]

Professor Lobel:

"I mean this Professor Pitt. Maybe he'll do it."

I looked at it, and I said, "This is incredibly unjust,"so we did the case. I attribute the victory to this really to my colleague who's now my wife who again played the key role because she said to me, "You've got to get a new suit for this trial."

Audience:

[laughter]

Professor Lobel:

I said, "But this suit that I've been wearing, " which I'd been wearing for 20 years, "is my lucky suit."

Audience:

[laughter]

Professor Lobel:

She said, "How can it be your lucky suit? You've never won a case in it."

Audience:

[laughter]
Professor Lobel:

[laughter] I said, "No, no. It's going to come in big. I'm just waiting for it to come in big."

She said, "You've got to..." she's like, "I'm not going to be there to help you like in the parking case where I gave you the right answer. So you at least got to get a new suit."

So I did, and that, to me, is what I attribute this to, but we won in the District Court. By the way, we won where the judge appointed a mediator, and came up with a proposed settlement, which we thought was not bad, but which the prisoners who had the last word on this said, "No, we want justice."

We didn't think they were going to get justice. At least I didn't, and that's why I said, "Maybe you should settle."

They said, "No, we want justice."

They won in front of a conservative judge hands down. We then won in the Court of Appeals, 6th Circuit. The state appealed to the Supreme Court, and we drew in the Supreme Court.

We won one part of the case, a very important part which said that the prisoners who get sent to a super max like this have a due process right to a hearing. We lost on how serious the hearing had to be. The second case, which I want to conclude on, was the case brought on behalf of Guantanamo prisoners, which the Center for Constitutional Rights decided to bring in the winter of 2002, right after people were starting to be brought to Guantanamo.

When the parents of a couple of prisoners came to us, said, "Would you bring this case," we knew that even other public interest organizations like the ACLU didn't want to take this case. It was seen as a loser and very dangerous: a loser because there was direct Supreme Court precedent seemingly against us, Johnson v Eisentrager, a case where the Supreme Court had held that German prisoners captured during WWII had no rights to habeas corpus because enemy aliens had no rights to habeas corpus outside of the country, held outside of the country, and these were enemy aliens, supposedly, being held in Guantanamo. So it looked like precedent was against us, and public opinion, if you remember back to that time, Secretary of State Donald Rumsfeld said, "These people we're holding in Guantanamo were the worst of the worst, the most dangerous."

To be representing the most dangerous terrorists, who had been responsible for September 11th is not an easy matter. We decided that it was outrageous and unjust that people could be held forever, essentially, outside of the law, with no due process, with no judicial hearing whatsoever, and we decided to take the case. We lost in the District Court. We lost unanimously in the Court of Appeals.

Nobody gave us a chance. I mean it looked grim. Even I thought it looked grim, and I'm an optimist.

Audience:

[laughter]

Professor Lobel:

We petitioned the Supreme Court, but by then, the steady -- what Susan Anthony called, "the steady drumbeat of agitation," that we and many others around the world had kept up on what was going on in Guantanamo began to have an effect, and public opinion began to change a little bit.

We began to get amicus briefs from bar associations around the world, from retired military
officers, from retired diplomats, from Korematsu, Mr. Korematsu, who was the Korematsu of the Japanese internment case who filed an amicus brief in our case saying, "Don't let this happen again."

Remarkably, the Supreme Court took cert and held in Rasul v. Bush in our favor by a six to three vote. That was followed up by another case five years later, Boumediene, in which The Court held that these prisoners had a right to habeas corpus. Actually, once they started having the hearings, the habeas corpus hearings, it turns out that a majority of the people in Guantanamo were not that dangerous at all. Were not only not the worst of the worst, but as in my prison case, it turned out that many of the people that were sent there without any review, without any due process, were not even terrorists, were just misfortunate people to be at the wrong place at the wrong time.

But we won. What lesson do I draw from this victory? What lesson do I want to impart to you today?

There are two possible lessons. The first is what the New York Times concluded after we won. They did a whole feature on the Center for Constitutional Rights. They entitled the article, Scrappy Group of Lawyers ...

**Audience:**

[laughter]

**Professor Lobel:**

... [laughter] Show the Way for the Big Firms because what happened is we took this case. No big firm -- there was one big firm which finally agreed to after we took it, six months later, fought on the case, too, but most of the mainstream lawyers, and as I said, even public interest lawyers wouldn't touch this. But once we won, everybody joined the bandwagon, and now there are hundreds of big firms that are representing Guantanamo prisoners, and that are doing a huge amount of work, and we couldn't do it without them.

They are doing great work. We are very appreciative, but as the article said, "Scrappy Group of Lawyers Show the Way." I think one lesson you could learn from this is that if you are willing to face defeat, if you are willing to take the risk of losing, you can sometimes win.

You can sometimes beat the odds, and sometimes secure justice for people who otherwise would never get justice, but you have to be willing to fight. You cannot be timid. You have to be willing to stand up for what's right despite the odds that are being loaded against you, but it is possible to win, and I think we showed that in our Guantanamo cases.

That's not the main lesson I draw from the case. That's not the lesson I want to impart today. I think the lesson that one really should learn from this experience is that it is important in America, and particularly in American law schools, to redefine what we mean by, "success," to redefine what we mean by, "victory."

Not looking at whether you won or lost, not focusing on winning, which again, we all should try to do. We should try to be the best lawyers we can and try to win our cases, but not to focus on them, to focus on the struggle for justice itself. That's what, I think, fundamentally gave meaning to these litigators lives, to Susan B. Anthony's life, Salmon Chase's life, to the litigators that I work with, and to realize that success adheres in living out one's values; in persistence in the face of great odds; and the strength to stand up for principle even when defeat seems inevitable.
Once I started looking at this, I began to look at other cultures, and how they look at winning and losing. My own culture is the Jewish culture. I remember from my childhood, probably the most poignant memory of Judaism -- I didn't grow up in a religious family -- was on Passover night.

My mother asked us all, the whole group of the family around the table, to stand in a memory of silence for the fighters of the Warsaw Ghetto, who rose up against the Nazis on Passover in 1943. They knew they were facing hopeless odds, but we remember them because they struggled. They didn't accept defeat.

That's why I disagree with Jack Greenberg about Plessy v. Ferguson. Those people in Louisiana facing segregation shouldn't have just said, "There's nothing we can do."

They couldn't respond militarily. They couldn't respond politically. They did the best they could do, which was to try to bring a lawsuit, and to try to educate public opinion.

They lost, but in doing so, they stood up for justice. The Jewish tradition and the Christian tradition has a very heavy emphasis on the prophets. Look at the prophetic symbol for justice.

It's not the calm peaceful scale of justice that we use as our symbol, rather the symbol coming from Amos, prophet Amos, which Martin Luther King referred to in his great I Have a Dream speech, which is, "Let justice roll down like waters and righteousness like a mighty stream." It's the cascading river. As Robert Kennedy once said, "Every fight for justice is like a little ripple of hope. It spans out beyond this little ripple to create eventually a current of change."

Not only in the Jewish tradition, but you look at Australia, the major national holiday in Australia is ANZAC day, commemorating the Battle of Gallipoli -- anybody knows anything about military history was one of the worst defeats in modern military history suffered by any army. Why would they remember the Battle of Gallipoli? It was because they wanted to reflect and remember the values that went into that battle, not the victory or defeat.

Same thing in Japan -- has a whole history of remembering the tragic hero, honoring the tragic hero, not -- the guy who struggles against great odds and doesn't necessarily win, often gets defeated and gets killed, but it's those people that that culture remembers. I also think in America we have a, "great passion," as Emerson once put it, for instant success. I think a different way of viewing the law would view winning and losing much more long-term.

What's the long-term impact that you have as opposed to the immediate impact of the immediate case at the very time you're doing it. So that's what I leave you with, and I hope that my work, and I hope that your work, will go beyond winning and losing, and that you'll have some, both impact in the long-term, both on public opinion, about the way people view justice on a political and social movement; that you will use the law to give meaning to your life, to reflect your own values, to try to bring justice to people who don't have justice as opposed to simply viewing it as winning and losing in the court. Thank you.

**Audience:**

[applause]

**Professor Lobel:**

We have time for questions and some discussions. Any questions, comments?

**Woman 1:**
I'm wondering if you could talk a little bit about your work advising the Nicaraguan government, maybe like specifically why they were interested in having a U.S. attorney advise them, or if there were parts of the U.S. Constitution that were carried over into the Nicaraguan constitution.

Professor Lobel:

Yeah, the main thing they asked me about was a debate they were having in Nicaragua as to how specific, how technical, they should be in developing their constitution. When I got into the picture, they had over 400 articles in the constitution affecting very, very specific -- it was like a code, a European code. I spoke to them about the American tradition of having a very minimalist Constitution, a very vague Constitution, which struggle, which which future generations could put meaning into, which I think is a critical component of our constitution, and one of its best features; that it allows you folks to try to give meaning to the Constitution and not just everything being spelled out.

So that was the main reason...

Woman 2:

Can you talk a little bit about the cases that CCR chooses not to take? It sounds like, I mean ...

Professor Lobel:

Yeah. Well, we won't take a case -- that's a very interesting -- how do we choose to take a case? One criteria is, and this -- none of these are the be-all and end-all, but here are the different criteria. One is, is there a real political movement around it?

If this is a case where people are in motion, people are seeking justice, we want to represent them. We do look at, is this what the law is on the case? So if it's -- we won't take a frivolous case.

In all the cases that I did, I thought we had a very good [laughter] legal argument. Judges did, too. We eventually lost them.

So we'll look at the character of the legal argument. It just won't be the defining aspect of it, but we'll look at it. We'll look at to what extent there is a real injustice, some terrible injustice is taking place, which is why we did the Guantanamo case.

We'll look at the issue's importance as a national issue: Do we think this is something where there has to be a fight on so that the issue gets prominence, and gets some national opinion? We will look at how many people it will affect because we're a small organization, and we generally don't do cases that just is going to affect somebody, even if there's a terrible injustice being done. So that's some of the criteria.

I'm happy to talk more about it.

Woman 3:

Have you ever had a case in which there's been a victory, and that the federal government has decided not to appeal, if it's a case against the U.S. , and the U.S. [unintelligible 00:54:25] ...

Professor Lobel:

Yeah.

Woman 3:
... like [unintelligible 00:54:28] changes, or policy [unintelligible 00:54:35]

Professor Lobel:

In my cases, that has not happened very often, and it's because my cases often go to the heart of U.S. policy. The case where it should have happened was this, 'Arar,' case where I represented this Canadian citizen. Actually, when we argued the case in court, Obama had just won, and the Bush administration was arguing.

One of the judges in the Second Circuit said, "Counselor, you're saying this is the position of the U.S. government. Are you sure it's going to be the position of the U.S. government in four months?"

The ironic thing was that it turned out to be the position of the U.S. government under Obama, also. So that hasn't happened that much. There was one very important case I did, challenging the first Gulf War on behalf of 55 members of Congress.

The first Bush put half a million troops into Saudi Arabia, and he said, "If Saddam Hussein doesn't get out by January 15th, we're going to invade."

He got the approval of the UN Security Council. He never bothered to get the approval of Congress. He later said, "I didn't need the approval of some old goats in Congress to go to war."

We said, "Well, the Constitution says Congress has to declare war. You have to get the approval of Congress."

Now, we brought a suit on behalf of Congressman Dellums and 55 other members of Congress. We got an opinion in which the judge ruled on our behalf in every major, substantive legal issue, and even procedural issue. I felt like a basketball player dribbling down the court, getting away from the speedy point guards, getting away from everybody, and then about to get a layup.

There loomed, the judge said, "But the dispute is not ripe. You brought this in the middle of December, and the war's going to start on January 15th. There might be negotiations. Come back."

It was like The Wizard of Oz: "Come back when you've killed the Wicked Witch. Come back. If you can get a majority of Congress..."

We had had 55 members, which I thought was a lot of people to stand up to say this. "Come back when you can get a majority of Congress."

This case was front-page news in every major newspaper. The newspapers couldn't figure out who had won, and nor could the commentators. The newspapers said, "Judge rules president can't go to war, but refuses to give an injunction."

The Justice Department said "We won," because they sought an injunction, and the court denied an injunction. They were right. Congressman Dellums, on Nightline said, "We won because the courts said Bush can't do what he's going to do."

It goes to the whole question of whether there's a sharp line between winning and losing. In this case, it was very murky. We did not appeal.

We did not appeal because we thought if we had appealed, we would get a worse decision. This was like what the former dean of Yale Law School called an unappealable, declaratory judgment. The court had held that the president couldn't go to war, declared that the view of the Constitution
that we held was the correct one, but then he didn't issue an injunction, so the government couldn't appeal, so we said, "We're not going to appeal."

There are CCR cases where the government doesn't appeal, and there are obviously many cases where they don't appeal and they settle it. One case where that happened was the Haitian refugees in Guantanamo, where we lost the main case in the Supreme Court, but we won a very important victory in the District Court, and the government didn't appeal. But it often doesn't happen when you're dealing with issues like war and peace.

If you win, the government's going to appeal, or the War on Terrorism, they're going to appeal. I litigate on behalf of ACORN, where I got the District Court to hold that the statute de-funding ACORN was an unconstitutional bill of attainder. The Obama administration didn't like that statute.

I said, "Why should they appeal?"

Not only did they appeal, but they asked for an emergency stay. It was because politically, I think, they didn't want to appear weak, so doesn't usually happen.

One more question. Anybody else? Yeah, in the back.

Woman 4:

Would it be advantageous to your work if you brought cameras in ...

Professor Lobel:

In the courtroom.

Woman 4:

Do you have a view on that?

Professor Lobel:

Yeah, I don't think it would matter that much. I would prefer -- if there were cameras, that would be fine with me. I'm a ham, and I don't mind.

For our work, generally, I think cameras would probably be helpful, to publicize what we're doing. But the CCR, the ACLU, most public interest groups, and particularly the Center for Constitutional Rights, sees our mission as publicizing these issues; therefore, we have a whole staff that will do it. We generally get pretty decent publicity.

Again, probably the most fundamental question as to whether to take a case is, "Will this help the movement? Will the case be of an aid, an assistance, to a movement?"

I don't think cameras would make that much of a difference, so we would like to see whether people can use this in political organizing. If they can, we'll take a case even if it's a loser, as long as it's not frivolous. We won't take a case where there's no good legal argument.

If we think we have a good legal argument, we won't be deterred by the fact that it's a conservative court and it won't rule in our favor.

Thank you.

Audience:
[applause]