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Critical Human Rights Lawyering in Latin America and the United States – The Latin American roots of participatory impact lawyering

La Defensa Legal de Derechos Humanos Críticos en América Latina y Estados Unidos – Las raíces latinoamericanas de la abogacía con impacto participativo

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Abstract

This essay argues that lawyers have traditionally litigated class-action, structural and impact lawsuits in a manner that does not encompass plaintiff participation in the lawsuit. By comparing two relatively recent lawsuits – one a successful California class action lawsuit challenging prolonged and indeterminate solitary confinement in that state's prisons, and the other a Guatemalan lawsuit in which two former military members were convicted of sexual violence against the indigenous Mayan population in a small Guatemalan town during the height of the Guatemalan civil war – this essay demonstrates that plaintiff participation is both possible and often necessary to successful impact litigation. The article also encourages lawyers and researchers to explore the possibilities and difficulties of plaintiff participation in these kinds of lawsuits. The last section of the article explores the Latin American roots of participatory litigation of the type cases represented by the Guatemalan and California cases discussed in the essay. Both of these cases can trace their roots to the theory of "accompaniment" practiced by the Latin American liberation theologians in the 1970s and 80s, which was transported by lawyers into litigation.

Keywords: *Class action; Strategic litigation; Impact litigation; Participation; Plaintiffs decision-making.*

Resumen

Este ensayo sostiene que los abogados tradicionalmente han litigado demandas colectivas, estructurales y de impacto de una manera que no incluye la participación del demandante en la causa. Se comparan dos demandas relativamente recientes: la primera, una demanda colectiva exitosa en California que impugnaba el confinamiento solitario prolongado e indeterminado en las prisiones de ese estado, y la segunda, una demanda guatemalteca en la que dos ex militares fueron condenados por violencia sexual contra la población indígena maya en un pequeño pueblo guatemalteco durante el apogeo de la guerra civil guatemalteca. Al hacer esta

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comparación, este ensayo demuestra que la participación de los demandantes es posible y, a menudo, necesaria para obtener impacto exitoso en un litigio. El artículo también anima a abogados e investigadores a explorar las posibilidades y dificultades de la participación de los demandantes en este tipo de juicios. La última sección del artículo explora las raíces latinoamericanas del litigio participativo del tipo de casos representados por los ejemplos de Guatemala y California discutidos en el ensayo. Ambos casos pueden tener sus raíces en la teoría del "acompañamiento" practicada por los teólogos de la liberación latinoamericanos en las décadas de 1970 y 1980, que fue adoptada por abogados a la litigación.

Palabras clave: *Acción de clase; Litigio estratégico; Litigios de impacto; Participación; Toma de decisiones de los demandantes.*

I. INTRODUCTION

The mainstream method that lawyers use when litigating law reform, strategic or class action cases in both the United States and Latin America is for the lawyers to make virtually all the strategic or tactical litigation decisions and for the people they are representing to barely participate in the case. For example, legal scholars and others criticize United States class action litigation as hierarchical, elitist and undemocratic in promoting the lawyer as the agent of change, while relegating mass activism to a subordinate role.[1] While impact litigation in the United States has resulted in many sweeping legal and institutional changes, it "is rarely designed to give voice to the clients' own perceptions of their needs" and the lawyers often make little or no effort to involve or empower the clients in the litigation process.[2] In class action lawsuits, plaintiffs are often excluded from any role, with courts even allowing lawyers to settle claims despite the opposition of most named plaintiffs or class members.[3]

Plaintiffs in Latin American human rights cases similarly suffer from lack of participation in the litigative process. As Professor Judith KIMERLING has noted,

> "The NGOs purported to defend human rights and their associates too often... marginaliz[ed] the people and communities on behalf of which these NGOs are supposed to be advocating."[4]

However, recent cases in both the United States and Latin America illustrate the possibilities of participatory litigation. This essay will discuss several important cases involving strategic, impact litigation which were centered on a participatory model. The first is a United States class action in which prisoners successfully challenged prolonged solitary confinement in California.[5] The second, is a Guatemala case in which the survivors of sexual and gender-based violence aided by several NGOs were able to initiate a successful prosecution of their abusers.[6] Finally, this essay argues that this developing participatory litigation model has key roots in Latin American history and theory,

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[1] HILBINK (2006), p. 64
[2] WHITE (1987-1988), pp. 535, 541, 545.
[3] ELLMAN (1992), p. 1120
[4] KIMERLING (2013), pp. 241, 292.
[5] Ashker v. Governor of California, No.09-cv-05796 (N.D. Cal.).
[6] *Ministerio Público v. Reyes & Valdés* (2016) at 1, (hereinafter Sepur Zarco).

albeit not in legal theory. Latin American liberation theology of the latter half of the 20th century was in large part based on the concept of accompaniment, in which the priest's role was to aid the empowerment of poor people in their quest for justice. This idea of accompaniment was transported to the United States legal context by Staughton and Alice LYND in their litigation on behalf of prisoners, and was a key component of the Guatemala women's struggle.[7] So too, Brazilian educator Paulo FREIRE's methodology articulated in *Pedagogy of the Oppressed*, which posits the student and teachers as equal partners in a dialogic learning experience can be seen as one of the inspirations of what Professor Lucy White has termed a "third dimensional practice of law", in which the attorney with professional skills engages in a "mutual learning practice" with oppressed communities.[8]

I write this article as both a scholar and as a key lawyer in one of the case studies that the article presents – that of the class action lawsuit which successfully challenged prolonged solitary confinement in California. That experience both provides me with valuable insights into the participatory nature of the litigation, but also possibly limits my objectivity and fuels over-optimism about the achievements and possibilities for participatory litigation.

A scholar like myself, writing about an issue in which he or she is both a participant and researcher must therefore engage in a continual process of self-reflection and questioning to ensure that the scholarship is neither idealization nor pollyannish. In this article that process means raising and addressing critical questions such as the following. What were some of the obstacles faced in developing a participatory mode of litigation? Did the plaintiffs really have meaningful decision-making in the various stages of the lawsuit? Were there areas which they could have participated more, but where the lawyers usurped the plaintiffs' potential role? To what extent did the lawyers not adequately challenge the subordinate roles that the plaintiffs were placed in? Were the prisoner plaintiffs unique so that the lessons drawn from the class action are not generally applicable? Finally, how did the plaintiffs themselves feel about the litigation experience?

II. THE TRADITIONAL MODEL FOR STRATEGIC LITIGATION

The traditional model of strategic, class action, impact litigation generally eschews plaintiff activism and participation. In the United States, the most prominent 20th century example of successful impact litigation was the NAACP's legal campaign to end racial segregation. That successful campaign, however, viewed the lawyers, not the clients or the participants in the struggle, playing the leading role.

For example, Thurgood Marshall, the brilliant lawyer who argued *Brown v. Board of Education*, viewed the courts, not mass activism as the central venue for achieving racial equality.[9] His expressed skepticism about the Montgomery Bus Boycott, in which the black population of Montgomery boycotted the city's segregated bus system gaining national attention. Marshall stated that dismantling Jim Crow, "was man's work, and should not be entrusted to children,"[10] and that "all that walking for nothing. They might as well have waited for the Court decision."[11] Derrick Bell, an attorney for the NAACP and later a prominent law professor authored an influential critique of the NAACP's school desegregation lawyering, arguing that the lawyers were disconnected from,

[7] SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 53.
[8] WHITE (1988), pp. 761–62, FRIERE (1970).
[9] RUBINOWITZ, SHAW & CROWDER (2016), p. 528.
[10] BRANCH (1988), pp. 189-190.
[11] RUBINOWITZ et al. (2016), p. 528.

uninterested in, and sometimes even opposed to their clients' views.[12] Ella Baker, an influential civil rights activist critiqued the NAACP's strategy because, "the legal strategy 'had to be' directed by lawyers and other professionals, leaving most of the huge mass base (...) little meaningful role in the development of policy and program except raising funds and cheering the victories as they came."[13]

So too, human rights litigation involving Latin American plaintiffs also has suffered from the lack of plaintiff participation. One prominent example of lawyer driven human rights litigation is the ongoing 30-year lawsuit against Texaco/Chevron for polluting and damaging indigenous peoples land in extracting oil in the Amazon region of Ecuador. In 1993, U.S. based class action lawyers filed a case against Texaco in federal court in New York on behalf of an estimated 30,000 indigenous and settler residents in Ecuador.[14] While the New York class action lawsuit was dismissed on *forum non-conveniens* grounds,[15] the lawyers eventually won a huge judgment in Ecuador, which has been attacked when enforcement has been sought in United States or international tribunals.[16]

However, most importantly for this essay, the indigenous people whose rights were involved in that lawsuit played virtually no role in the action. The lawyers selected the plaintiffs and defined the class without consulting local groups.[17] The complaint was not translated into Spanish nor distributed to the community. Professor Judith KIMERLING, whose research was the basis for the environmental damage allegations in the complaint and who worked closely with the indigenous community later wrote that, the "litigation elites" failed "to allow meaningful participation by the affected indigenous communities in decision making processes."[18] Indeed, over time "the lawsuit seemed to carry the struggle away from the Amazon to distant courts."[19] Even worse, in 1999, press reports revealed that secret settlement negotiations were taking place between the plaintiffs' attorneys and Texaco. When local groups attempted to inquire about the status of these talks, the plaintiffs' attorneys denied the talks, although Texaco later revealed that negotiations had been underway for about a month.[20]

After the Second Circuit Court of Appeals affirmed the dismissal of the class action lawsuit in 2002 on the basis of *forum non-conveniens*, many of the original Aguinda plaintiffs filed a new lawsuit in Ecuador. However, the plaintiffs did not include representatives from several important affected indigenous communities.[21] Moreover, the lawsuit sought an order directing ChevronTexaco to pay funds to remedy the harm solely to the Amazon Defense Front, a settler organization with close ties to the plaintiffs' lawyers but no representation of important indigenous communities. The decision to award the relief sought totally to this organization was apparently made by the lawyers without consulting the plaintiffs.[22]

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[12] BELL Jr. (1976), p. 470.
[13] PAYNE (1995), p. 87; HILBINK (2006), p. 65.
[14] Aguinda v. Texaco 303 F.3d 470 (2d Cir. 2002).
[15] Id.
[16] BARZALLO (2021).
[17] KIMERLING (Spring 2000).
[18] KIMERLING (2013), p. 286.
[19] KIMERLING (2013).
[20] Id.
[21] PLAINTIFFS COMPLAINT ADDRESSED TO THE PRESIDENT OF THE SUPREME COURT OF JUSTICE OF NUEVA LOJA (2003), *Maria Aguinda Salazar v. Chevron Texaco Corp.* (filed May 7, 2003); KIMERLING (2006), pp. 413, 631.
[22] KIMERLING (2006), pp. 631–33.

The Ecuadorian lawsuit filed in the wake of the Second Circuit's dismissal of *Aguinda* continued the problematic dynamic whereby NGOs who claimed to support the affected communities basically left the conduct of the litigation, including the proposal for a remedial plan, to the lawyers.[23] After the Aguinda plaintiffs won a huge judgment in Ecuador, Chevron sued plaintiffs lead attorney Steven Donziger and fifty-four other counsel and organizations who worked on the *Ecuadorian* case in Federal Court in New York, and also contested the validity of the judgment in an arbitration proceeding against Ecuador at the Hague.[24] The indigenous communities moved to intervene in the New York Federal Court action to defend the *Ecuadorian* judgment, claiming that the plaintiff lawyers and key NGOs do not adequately represent them, claiming that major decisions were made without their participation or consultation and that they were deprived of meaningful information about key remedial issues.[25] That motion was opposed by both the plaintiffs and Chevron, and denied by the Court.[26]

Judith KIMERLING, who worked closely with the indigenous communities concluded that, "[t]he failure of the plaintiffs' lawyers and their NGO supporters to foster transparent, participatory, and accountable processes for decision-making by the claimants (...) threatens the case's potential (...)".[27]

Nor is the Ecuadorian litigation an isolated incident. A recent study of twenty-seven human rights based climate cases in Latin America concluded that the organizations most likely to bring climate lawsuits "tend to be highly professionalized and to upheld a rather technocratic ethos."[28] Moreover, of the twenty-seven cases, only one has been filed by members of indigenous communities because the organizations working on climate litigation "are either unwilling or unable to include local indigenous organizations in their strategy, which tends to be designed and deployed in the centres of power or urban areas."[29] Similarly, when a truck contracted by a mine to transport poisonous mercury turned over spilling the mercury near the indigenous Peruvian village of Choropampa Peru, the villagers and their supporters turned to public protest. United States lawyers then showed up and promised a lawsuit, but never informed the indigenous peoples about what they were doing except to get them to sign a power of attorney, allowing the lawyers to agree to individual settlements on their behalf. Many were thus deprived of any adequate compensation.[30]

III. DEVELOPING A PARTICIPATORY MODEL OF STRUCTUAL, CLASS LITIGATION

A recent class action in which I was one of the lawyers makes a clear break from the traditional class action lawyering in that the lawyers entered into an equal dialogic relationship with the clients, with each bringing skills and insights to their mutual struggle. In this case the lawyers actively involved the clients in all phases of the litigation and centered the litigation around the clients' voices. This participatory framework used the litigation to empower clients through their active, collective participation in the lawsuit.

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[23] KIMERLING (2006), pp. 649–50, 659–60.
[24] *See generally*, PLAINTIFFS' AMENDED COMPLAINT (2011), Chevron Corp. v. Donziger, No. 11-CV-0691 (LAK) (S.D.N.Y. Apr. 20, 2011, KIMERLING (2013), p. 245.
[25] KIMERLING (2013), pp. 287–90.
[26] KIMERLING (2013), p. 289.
[27] KIMERLING (2006), p. 659.
[28] AUZ (2022).
[29] AUZ (2022).
[30] LI (2017), pp. 185–91.

3.1 The Prisoners Struggle and Lawsuit Against Solitary Confinement

This case involved a class of more than 1,000 prisoners incarcerated in prolonged solitary confinement in California's Pelican Bay State Prison. They were isolated in 8 x 10 foot windowless cells for twenty-two hours a day. Phone calls or contact visits with family or friends were prohibited. They only left their cell for approximately one and one-half hours a day to "recreate" alone in a somewhat larger empty area containing fifteen-foot high walls and a partial grate roof permitting little direct sunlight. These prisoners had no educational or vocational programs and had not seen trees, birds, or grass, nor touched another human for years.[31]

By 2011, approximately 500 of these prisoners had been in solitary confinement for more than ten years, seventy-eight in excess of two decades.[32] They were not placed in solitary confinement because of serious misconduct in prison, nor the heinousness of the criminal offense they had been convicted of, but rather due to some vague alleged association with a prison gang. Tattoos, artwork, political writings, and greeting cards sufficed. Only once every six years was their placement reviewed, and virtually all were perfunctorily retained in solitary. The only way out was release from prison, becoming an informant, or death—in the vernacular—to parole, snitch or die.[33]

Remarkably, given their isolation, these prisoners organized two hunger strikes in 2011 which involved thousands of prisoners, garnered national and international media attention[34] and eventually attracted the Center for Constitutional Rights (CCR) to represent them in a federal court class action. CCR's representation of these prisoners is an example of "movement lawyering," in which lawyers represent political and social movements using a multifaceted strategy which views impact litigation as one aspect of a broader activist campaign.[35] However, unlike most impact litigation, the CCR lawyers actively involved the grass roots plaintiffs in all aspects of the litigation, including the indispensable components of choosing class representatives, deciding on claims to present, making important tactical litigation decisions, negotiating and ratifying a settlement agreement, and monitoring the settlement decree.[36]

A key aspect of the participatory framework is obtaining the trust and mutual respect of the plaintiffs. One important obstacle and tension that the lawyers faced was that the overwhelming majority of the prisoners were Black or Hispanic and the key CCR lawyers were not. While the hunger strikes and the class action lawsuit were based on maintaining racial and ethnic unity, racial tensions continued to exist. For example, a key Black plaintiff urged us at various times to recruit a Black lawyer to the legal team. We made an effort to do so, but were only partially successful in that we recruited several Black attorneys who stayed on the case for several years, but left for other jobs. For the past five years, all of the key attorneys on the case have been white.

Another serious challenge in overcoming the lack of trust these plaintiffs had experienced with lawyers was geographical. The CCR was located in New York City, I lived in Pittsburgh, Pennsylvania, where I was teaching at the University of Pittsburgh Law School. Both New York and Pittsburgh were over 3000 miles away from the California prison. Participatory litigation requires a

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[31] LOBEL & CARBONE (2012), *see also*, REITER (2016).
[32] LOBEL & CARBONE (2012) at para. 33. SMALL (2011).
[33] REITER (2012).
[34] *See, e.g.*, CNN WIRE STAFF (2011); LOVETT (July 8, 2011); LOPEZ (Sept. 29, 2011).
[35] GUINIER & TORRES (2014); CUMMINGS (2017); CARLE & CUMMINGS (2018); ARCHER (2019).
[36] For a more detailed and in-depth analysis of this case and the lawyering strategies, see LOBEL (2022).

high degree of contact and communication between the plaintiffs and lawyers. To make matters worse, phone contact with the plaintiffs seemed impossible, because California generally prohibited these prisoners from making or receiving phone calls – even with lawyers.[37]

To aid in developing the trust required for participatory litigation we obtained the assistance of California lawyers to litigate the case with the CCR. Those lawyers could meet regularly with the plaintiffs – although even that required a 7-hour drive from San Francisco to Pelican Bay and were committed to providing the political support and advocacy linking the lawsuit to the prisoners own political efforts in their hunger strikes.

In addition, one of the first things we did once the class action was initiated was to file a motion with the court to obtain regular phone calls with all the named plaintiffs. We succeeded, and the court ordered California to allow me to call each of the plaintiffs every two weeks. The continuing visits from the California lawyers, my bi-weekly phone calls with them and my occasional in person visits with them in California helped create the trust essential for participatory litigation.

3.1.1 Choosing the Class Representatives

We sought to reverse the traditional role of class representatives. Unlike the client in a traditional lawsuit, the class representative is usually a "token" or "decorative figurehead."[38] As one empirical survey concluded, "there [is] very little if any active attempt by lawyers to organize class members to participate in the suit or to engage in other activities complementary to the suit."[39] Our legal team rejected that model, basing the Pelican Bay class action on mutual collaboration between the lawyers and prisoners.

Our first step was jointly choosing the named plaintiffs/class representatives deciding on the legal claims. The prisoners experience was that lawyers would "cherry pick" the named plaintiffs so as to choose the most traditionally sympathetic representatives and to remove plaintiffs who might be troublesome.[40] They objected to that procedure.

Therefore, the lawyers did not just choose prisoners who had the most compelling facts that would draw the most sympathetic response from a judge. Nor did we pick plaintiffs who would likely be passive. Instead, the prisoners and the lawyers mutually selected plaintiffs based on three criteria: leaders of the hunger strike; those who would present very compelling facts; and representatives from each ethnic and racial group. Eventually we selected ten named plaintiffs—three of the four main leaders of the hunger strike,[41] two whites, four African Americans, one Northerner Hispanic, and three Southerner Hispanics. All had been active participants in the hunger strikes and represented all the ethnic and racial groups harmed by California's policy.

3.1.2 Plaintiff Decision-making in Presenting Claims to the Court

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[37] See e.g. Cal. Code Regs. Tit. 15 Sec. 3282(g)(6)(2021).
[38] WEGMAN BURNS (1990), pp 181-82; COFFEE Jr. (2000), pp. 384, 406; ELLMAN (1992), p. 1120; GOLD (2017).
[39] GARTH, NAGEL & PLAGER (1988), pp. 375–77, 380–81.
[40] MACY & MILLER (1991), p. 41; COFFEE Jr. (2000), p. 406; WEGMAN BURNS (1990), p. 182.
[41] Todd Ashker, Ron Dewberry (Sitawa), George Franco were named plaintiffs, Arturo Castellanos decided that he did not want to become a named plaintiff. *See* LOBEL & CARBONE (2012), pp. 14–23 for the plaintiffs named in the complaint.

In structural litigation, lawyers are accorded broad decision-making authority under the theory that clients are ill-equipped to make complicated legal determinations.[42] In the *Pelican Bay* litigation, the lawyers proceeded from a radically different perspective of the lawyer-client roles. Most important decisions about the litigation were made collaboratively. There were often differences of opinion on tactics and generally we made decisions collaboratively and collectively, with the lawyers and plaintiffs respecting each other's opinions, insights and skills.

An important example of the lawyers listening to and respecting the plaintiffs arguments came in the context of our response to Defendants motion to dismiss.[43] Just before Defendants filed their motion to dismiss, we received a lengthy document, entitled A Memorandum of Points and Authorities Submitted for Consideration by Class Counsel and Representatives on Cruel and Unusual Punishment and Due Process, from a prisoner, Edwardo DUMBRIQUE.[44] DUMBRIQUE, who had taught himself law, had corresponded with me prior to our filing the complaint. DUMBRIQUE's memorandum was his response to my letter soliciting his "legal and factual insights, and strategic and tactical views."[45]

DUMBRIQUE arguments were impressive, but I was at first skeptical. However, I raised DUMBRIQUE's point with the lawyers and named plaintiffs, and we agreed to forcefully brief it in our opposition to Defendants motion to dismiss.[46] We therefore significantly shifted our argument based on DUMBRIQUE's insights and intervention. Eventually, the State accepted DUMBRIQUE's point, agreeing that they would not place prisoners in prolonged solitary based on gang validation, but only after a guilty finding of misconduct in a disciplinary hearing.

3.1.3 Amplifying Plaintiffs Voices

Participatory lawyering requires the lawyer to aid the client in speaking and articulating her claims in her own voice. In the most impressive participatory lawyering initiatives involving individuals, the lawyer, law student and/or community aids the worker,[47] tenant or homeowner[48] or criminal defendant[49] in presenting their own case in court. Impact, class action litigation, however, severely limits the opportunities for class members voices to be heard. The best the lawyer can often do is to accurately reflect the voices of the marginalized people she represents, to speak for them, to stand for them, somewhat akin to what Professor PITKIN termed "acting for" representation.[50] To do so, the lawyer has to understand what the plaintiffs want, and what they would say if given a chance. At trial, the plaintiffs would ordinarily be afforded the opportunity to testify, but in a carefully circumscribed and choreographed legal context in which the lawyer guides them in a manner which will support the legal claim the lawyer believes offers the best chance of success.[51]

We sought to transcend the representative model and find some mechanism for the prisoners' voices to be heard through the litigation. The task was daunting in that CDCR forbad

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[42] ELLMAN (1992), pp. 1118–19; BERGER (2016), pp. 1089, 1107–08.
[43] HARRIS *et al.* (2012).
[44] DUMBRIQUE (2011).
[45] LOBEL 2011.
[46] *See* HULL *et al.* (2013) pp. 12–14,
[47] GORDON (1995), pp 143-144.
[48] HARTIGAN (2010), p. 191.
[49] MOORE, SANDYS & JAYADEV (2015); GODSOE (2018).
[50] PITKIN (1967), pp. 112-143.
[51] WHITE (1990), 19-32.

media interviews with the prisoners, and any recordings except on ancient CDCR recorders, with the resulting recording being virtually indecipherable.

Our complaint therefore articulated in great detail the plaintiff's own descriptions of their oppression. We also worked with Gabriel Reyes, one of the ten named plaintiffs in the amended complaint, on an op-ed he published in which he explained the brutal facts of his solitary confinement.[52] CCR also posted and publicized personal statements from most of the ten named plaintiffs and several of their family members.[53]

We also searched for a mechanism to humanize our clients by having them speak by audio and video to the public. CDCR's proscriptions meant that these prisoners had been disembodied and silenced, with their voices only heard secondhand in news articles about the hunger strikes. For several years we were unable to accomplish this goal, until we insisted that CDCR videotape the plaintiffs' depositions.

After we received the deposition videos, CCR made a short video composed of clips from some of the depositions. We sent the video to the *New York Times* which published a lengthy story on the case and included a link to the plaintiff videos.[54] The powerful, four and a half minute video, included four plaintiffs, Todd Ashker, George Franco, Gabriel Reyes and Paul Redd discussing the effects of solitary confinement. Perhaps the most dramatic moment was when Paul Redd, a powerfully built, 57-year-old man says, "sometimes I feel like writing to the Judge and saying, just give me the death penalty," and breaks down crying.[55]

A key aspect of participatory lawyering is community and family participation, and we were fortunate that the hunger strikes spawned a strong group of prisoner family members, California Families Against Solitary Confinement.[56] We worked closely with family members, a family member spoke at many of our press conferences, and I often met with the group in Los Angeles. On reflection, however, my meetings with the families utilized the traditional hierarchical model. I gave a presentation on the case that everyone could understand, followed by a lively question and answer session. It was only recently when I changed this format and the meeting started with fairly in-depth presentations from family members and ex-prisoners about their own histories and activities, thereby allowing me to gain insights into our class members' and their families lives and perspectives.

3.1.4 Settlement Negotiations—Empowering the Collective

Another key component of participatory class action litigation is the role plaintiffs play in settlement negotiations. Typically, in class actions lawsuits, settlement negotiations are handled exclusively by the lawyers without much or, as in the *Ecuador* case, any plaintiff participation. Our goal, in contrast, was not only to win needed reforms of California's solitary confinement regime, but to utilize the litigation process to empower the plaintiffs *collectively*. Therefore, any settlement negotiations had to be a collective process, whereby the plaintiffs actively participated in the negotiation process and had the final decision as to whether to settle. Indeed, since the plaintiffs

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[52] REYES (May 31, 2012).
[53] CENTER FOR CONSTITUTIONAL RIGHTS (2013). *See also* Truthout, Hunger Strike Profiles, July 2013.
[54] GOODE (Aug. 4, 2015).
[55] GOODE (Aug. 4, 2015).
[56] BRAZIL (Aug. 20, 2020) (tracing history of group and Dolores Canales' role).

often have greater knowledge of the conditions and problems they are challenging, they are in a key position to work out potential solutions and remedies.

We decided that prior to entering any settlement negotiations, we had to meet with our named plaintiffs collectively, so that they could decide on their settlement demands. California prison officials strongly objected to any in person collective meeting with these prisoners in solitary confinement, claiming it would create a security risk and would be unprecedented. We, however, persevered and won the right to have a collective meeting.

Thus, in June 2013, co-counsel Anne Weills and I had an extraordinary and unprecedented three-hour meeting with all ten named plaintiffs. All of the prisoners were placed in individual cages with glass and wire mesh doors allowing them to see and hear each other. A lively and respectful discussion ensued, in which the prisoners discussed their key demands that the lawyers should present to the prison officials. At a second, follow up meeting, conducted later that year, the prisoners elaborated on these demands, and hammered out a set of proposals for settling the case.

It took over a year of intense pre-trial litigation to convince the defendants to enter into serious settlement discussions, but when they did, we were adamant that the plaintiffs play a key role in the negotiations. At that point, many of the named plaintiffs had been moved out of Pelican Bay to other prisons around California so we couldn't meet collectively in person. So, after each round of negotiations, the lawyers had a conference call with the named plaintiffs to go over the proposals point by point so that the plaintiffs held the primary role in accepting or denying terms and suggesting modifications.

One troubling question about the settlement negotiations is why the lawyers did the actual negotiating with California prison officials, and relegated the plaintiffs to reviewing and responding to drafts. From a participatory framework, it is preferable for the plaintiff representatives to be involved in the negotiating itself. For the lawyers to do so alone, reproduced the prisoners subordinate roles.

This question raises a fundamental structural problem with the concept of participatory litigation: we were dependent on the acceptance of participation by other actors- the courts and defendants. For example, early on in the litigation we requested that the District Court judge allow plaintiff representatives to be present in the court hearings by videoconference (since it was burdensome for them to be transferred 7 hours from Pelican Bay to Oakland, California where the hearings took place). The judge summarily denied our request.

When settlement negotiations became serious, the Defendants made clear that they would not negotiate directly with the plaintiffs. In fact, they didn't even want to negotiate directly with any of the California activist lawyers. We could not get them to negotiate with the plaintiffs, but insisted that I, and one of the California activist lawyers who had a long history of support for the prisoners and who they trusted the most, would constitute our negotiating team. We then insisted that the plaintiffs be able to review each draft and present their disagreements, suggestions and comments through the lawyers. Not ideal, but the one can question whether it was best we could get. Perhaps we should have pushed for a direct plaintiff role in the negotiations more forcefully.

Finally, after months of negotiating, the final stage was for the plaintiffs to have a telephonic conference to discuss and decide on whether to accept the agreement, which incorporated most of their demands. After an intense meeting in which the plaintiffs expressed their views, a vote was taken and the plaintiffs in attendance at the meeting unanimously agreed to ratify the agreement.

Before and during the meeting some of the tensions that had simmered beneath the surface emerged, particularly between some of the African American plaintiffs and the rest of the plaintiffs and the lawyers. One of the African American plaintiffs strongly disagreed with the settlement and refused to attend the meeting. Out of respect, he did not want to vote against the settlement, but he didn't want his name associated with it. Our key African American plaintiff was torn between the opposition of several radical Black prisoners housed near him, his own reservations about the agreement, and the need for unity amongst the plaintiffs. In the end, he concluded the meeting by saying that he would vote for the agreement for the sake of unity. The settlement process had tested the trust amongst both the plaintiffs and with their lawyers, but the trust had generally held up.

The resulting settlement received general acclaim in the country and provided what the *New York Times* termed a "big shove" to the movement to reform and limit the use of prolonged solitary confinement.[57] The plaintiffs put out their own statement which was drafted by them at the meeting, stating that.

> "This settlement represents a monumental victory for prisoners and an important step toward our goal of ending solitary confinement in California, and across the country. California's agreement to abandon indeterminate SHU confinement based on gang affiliation demonstrates the power of unity and collective action. This victory was achieved by the efforts of people in prison, their families and loved ones, lawyers, and outside supporters (...). We celebrate this victory while, at the same time, we recognize that achieving our goal of fundamentally transforming the criminal justice system and stopping the practice of warehousing people in prison will be a protracted struggle. We are fully committed to that effort and invite you to join us".[58]

3.1.5 Monitoring and Enforcing the Settlement

Traditional impact litigation thinking often obscures the obstacles and problems of monitoring and enforcement, focusing instead on "winning" the case. Plaintiff participation is particularly important in the implementation of structural reforms, as they often understand the problems involved in reforming the system much better than the lawyers do.

The settlement agreement provided for the plaintiffs to play an important role in monitoring. It required a semiannual meeting between the four main prison representatives representing the different ethnic groups in the California prison system and the defendants to discuss the implementation of the agreement. The Settlement also provided for an annual telephonic meeting between all the plaintiffs and the lawyers, and a meeting between plaintiff representatives and Defendants experts to evaluate an important reform set forth in the Agreement. The Settlement Agreement almost broke down when California officials agreed to the substantive reforms but refused to accept any participatory provisions. They said that they were willing to accept monitoring by the lawyers but not by the plaintiffs themselves. Magistrate Judge Vadas resolved the dispute by agreeing that participatory provisions should be in the Agreement, but reducing the frequency of the meetings.

The most prominent example of participatory enforcement was when the plaintiffs and counsel uncovered that many people transferred from solitary to general population prisons were getting less out-of-cell time than they had in solitary. We brought an enforcement motion arguing

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[57] THE NEW YORK TIMES EDITORIAL TEAM (2015).
[58] CENTER FOR CONSTITUTIONAL RIGHTS (2015).

that this practice violated the Settlement Agreement. Judge Wilken agreed with us and ordered the parties to meet and confer before the Magistrate Judge to determine a remedy.

The plaintiffs' representatives and the lawyers agreed that the plaintiffs would take the lead in the courtroom conference. After my short introduction, each representative presented a short analysis of a different problem facing the plaintiffs in General Population, and a proposed remedy—small amount of-out-of cell time, lack of prison jobs, few educational opportunities, no rehabilitative programming. California officials made no significant changes after this meeting, and generally the participatory enforcement provisions of the Settlement have not yielded major results. But the achievement of forcing the defendants to deal with the plaintiffs was important.

In my discussions and my solicitation of comments on the participatory litigation concept a number of the Pelican Bay plaintiffs have emphasized how different their experience in this case was from prior litigation they were involved with. Both they and I felt that both the lawyers and plaintiffs learned a great deal from our interaction, that mutual trust was built, and that the success of the case was in substantial part attributable to participatory framework within which we operated.

3.2 Participatory Strategic Litigation in Guatemala: The Sepur Zarco Case

A landmark Guatemalan case in 2016 in which two former military members were convicted of sexual violence and sexual slavery committed against Maya Q'eqchi' women in the small indigenous town of Sepur Zarco in the 1980s during the height of the Guatemalan civil war has very significant participatory parallels to the Pelican Bay prisoner struggle.[59] Both the Guatemalan and California cases involved multifaceted advocacy intertwined with a legal struggle in which the people seeking justice played the central roles. Both involved what is known internationally and in Latin America as strategic litigation, referred to in United States parlance mostly as impact litigation, which is defined as "processes brought before judicial and quasi-judicial bodies that aim to have a lasting impact beyond that of repairing the harm suffered by the victims."[60] Strategic litigation in Latin America "refers to a way or litigating socially or politically significant cases that cannot move forward using traditional litigation."[61]

3.2.1 Military Abuses Against the Women of Sepur Zarco

In 1982, the Guatemalan army attacked the community of Sepur Zarco, killing many male Mayan Q'eqchi' leaders who had sought recognition of their land rights.[62] For the next six years, soldiers repeatedly raped women and forced them to wash their clothes and cook for them at the military base in town. After the civil war ended and democratic government was restored, several NGOs worked with the Mayan women to begin a long process of seeking accountability and justice for these acts of sexual violence.

Eventually, on September 30, 2011, fifteen surviving Mayan women filed a criminal complaint alleging crimes against humanity due to sexual violence and slavery, under a Guatemalan

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[59] *Ministerio Público v. Reyes & Valdés* (2016) at 1, (*Sepur Zarco*). For a fuller discussion of the *Sepur Zarco* case see SÁCOUTO, FORD OUOBA & MARTIN (2022); MARTIN & SÁCOUTO (2020); LEDUC (2018), KRAVETZ (2016); CASAÚS ARZÚ y RUIZ TREJO (2017).

[60] UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER (2021), LEDUC, (2018), p. 178.

[61] IMPUNITY WATCH *et al.* (2017), p.12.

[62] *Ministerio Público v. Reyes & Valdés* (2016).

procedure allowing civilians to file criminal complaints. They were aided in this effort by the Alianza Rompiendo el Silencio y la Impunidad (Alianza), which had been formed by three civil society NGOs, the Equipo de Estudios Comunitarios y Accion Psicosocial, (ECAP). Union Nacional de Mujeres Guatemaltecas (UNAMG) and the Mujeres Transformando el Mundo (MTM), which had provided psychological, political and legal support to the women. The Alianza organized a symbolic Tribunal of Conscience in 2010, modelled on prior international tribunals, which was successful in publicizing and informing society of the sexual crimes experienced by the women. The Tribunal paved the way for the women to file their criminal complaint.[63] In a sense, the Tribunal played a similar role in the Sepur Zarco case to the hunger strike at Pelican Bay, in breaking the silence about human rights abuses which had hitherto been ignored by the public. Both experiences empowered a collective response by those suffering from injustice.

As in other civil law jurisdictions, Guatemala permits victims and/or their representatives to participate in criminal cases as civil claimants, by petitioning the court to initiate a criminal prosecution. Not only the fifteen surviving women (known as Abuelas), but also two organizations, UNAMG and the MTM became civil claimants at the outset, and thus had standing to work closely with the prosecutor in developing the criminal case. MTM was primarily a legal organization and UNAMG, was an advocacy group.

3.2.2 The Women's Participatory Role

The *Sepur Zarco* case is an example of participatory litigation, in which the grandmothers (Abuelas) of Sepur Zarco were the central actors in the case. Their testimony, "the voices of the victims", were viewed as "the central axis of the case."[64] The civil society organizations—MTM and UNAMG—involved in bringing the complaint and aiding its development, "engaged the women extensively in the decision-making process, while giving them broad visibility during the proceedings."[65] For example, the women decided with the aid of MTM, who would be the petitioners in the complaint, and who would testify in court.[66] The women also participated in decision-making as to legal strategies. Ensuring that the Abuelas were actively involved required innovative approaches, in that the women spoke only Q'eqchi' and not Spanish and had no experience or familiarity with legal proceedings. MTM lawyers therefore held a meeting in which they explained the criminal trial process using animals as symbols and used familiar terms to describe the process and the role everyone played in it. The civil organizations ensured that interpreters were present at proceedings so that the women understood what was being said and could participate themselves.[67] For the lawyers, this participatory process meant that they had an ongoing presence in the region and made numerous trips to Sepur Zarco to consult with the women.[68]

3.2.3 Forming a Collective

Perhaps most importantly, the Abuelas themselves decided to create a new organization, the Jalok U Collective, whose members were the surviving victims of Sepur Zarco.[69] The name Jalok U

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[63] MARTIN & SÁCOUTO (2020), pp. 248–49.
[64] SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 69.
[65] SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 57.
[66] SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 58.
[67] SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 58.
[68] IMPUNITY WATCH *et al.* (2017), p. 20.
[69] LEDUC (2018), p. 171; MARTIN & SÁCOUTO (2020), pp. 247–48; SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 57; IMPUNITY WATCH *et al.* (2017), p. 20.

means "transformation" or change in Q'eqchi."[70] The creation of Jalok U allowed the women to collectively become a co-civil complainant and thus to participate in the criminal proceedings alongside the other two NGOs. It gave the women the ability to have representatives and a presence at the hearings.[71] Forming this organization and becoming a civil claimant gave the women "their own voice in the proceeding" and strengthened their role as "subjects of law" and not just victims.[72] Asserting their claim to justice through their own organization helped transform the Abuelas from "victims" to "authors" of their own stories which was important in their reclaiming their dignity.[73] Forming their own group also provided them with emotional strength. As one of the Abuelas explained, the group "strengthened us, going together to seek justice."[74]

As in the Pelican Bay struggle, a crucial element was the petitioners organizing themselves into a collective and making decisions collectively. For the women,

> "What enabled this work is the Maya world-view. The women believe strongly indeed in collectivity; they do not see with an individual lens like our regular victims do (…). With these spaces, these circles of dialogue that we had (…) the process was long, and so was the decision-making."[75]

The Sepur Zarco women and civil society organizations were successful in their prosecution of two key army commanders for the sexual violence and slavery, each being found guilty by the tribunal and receiving more than 100 year prison sentences.[76] But, unlike the Pelican Bay prisoners who settled their case for an end to their solitary confinement, the women's courtroom victory resulted in 16 measures of transformative reparations, such as the installation of a comprehensive health clinic in Sepur Zarco, the improvement of schools, and the provision of housing and certain other basic services in the community.[77] As with *Pelican Bay* plaintiffs, the Jalok U Association participates in the compliance process.[78]

IV. THE LATIN AMERICAN ROOTS OF PARTICIPATORY LITIGATION

A recent workshop on strategic litigation for gender-based violence in Latin America organized by the UN High Commissioner for Human Rights and other groups pointed out that Latin American civil society has played a pioneering role in giving practical meaning to the general principle of "victim-centered" litigation.[79] This is unsurprising, in that some of the basic concepts underlying participatory litigation have deep roots in Latin American movements and theories that developed in the second half of the twentieth century. This section will explore some of those roots.

The first important concept which the *Pelican Bay* struggle was in part based on is that of accompaniment. Accompaniment is an idea closely associated with Latin American liberation theology of the 1970s and 80s most prominently espoused by theologians such as Peruvian Gustavo Gutierrez and the Archbishop Oscar Romero of El Salvador. Liberation theologians posit the basic

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[70] LEDUC (2018), p.71.
[71] IMPUNITY WATCH *et al.* (2017), p. 20.
[72] SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 58.
[73] SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 58.
[74] Statement of Demecia Yat, quoted in SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 57.
[75] IMPUNITY WATCH *et al.* (2017), p. 20.
[76] IMPUNITY WATCH *et al.* (2017), p. 20.
[77] Sentencia de Sepur Zarco, pp. 508–11.
[78] MARTIN & SACOUTO (2020), p. 262.
[79] United Nations Human Rights, Office of the High Commissioner (2021), p. 5.

spiritual task as accompanying the poor in their struggles: "listening, sharing learning and walking with them."[80] The theologian Roberto GOIZUETA, the most prominent contemporary elaborator of accompaniment has developed a "Hispanic/Latino Theology of Accompaniment."[81] For GOIZUETA, "To accompany another person is to *walk with* him or her."[82] It is active not passive. "[T]he paradigmatic form of human action is not simply that of 'being with' another but rather the act of "walking" with the other" (…) and "incorporates both the ethical-political and the aesthetic dimensions of human praxis."[83] The prominent liberation theologian Gustavo Gutiérrez talks of "accompaniment which is reflection."[84] Accompaniment therefore combines the action of walking with and reflection on the spiritual, practical, and political aspects of their journey and joint struggle against oppression and suffering.

Accompaniment therefore requires "a form of long-term companionship advanced by physical proximity."[85] GOIZUETA criticizes those

> "happy to help and serve the poor, as long as we don't have to walk with them where they walk, that is, as long as we can minister to them from our safe enclosures. The poor can then remain passive objects of our actions, rather than friends, companeros and companeras with whom we interact."[86]

The antidote to rendering the poor "passive objects" is accompaniment.

Most recent theological pronouncements on accompaniment emphasize its long term or permanent nature. The final document of the 2007 meeting of the Latin American bishops' conference in Aparecida, states that solidarity with the poor "springs as a permanent attitude of encounter (…) and in the permanent accompaniment of their efforts to be the subjects of change and transformation of their situation.[87] Pope Francis has continued to emphasize permanent accompaniment as central to the work of the Church.[88]

My legal career prior to the *Pelican Bay* case consisted of litigating high impact, important cases which were usually decided by the Courts fairly quickly on the basis of primarily legal arguments.[89] I would then move to the next case. When we brought the *Pelican Bay* case, I was hoping for a similar short term commitment. I thought that we could move for a preliminary injunction and get a quick decision on the constitutionality of prolonged solitary confinement. The Judge rejected that approach—fortunately. The *Pelican Bay* case has taught me the value of "permanent accompaniment," which while not permanent, has now lasted almost twelve years during which time I have gotten to know the plaintiffs, shared thoughts and crisis with them, spoke with each of them on the phone every other week in the early days of the case, and flew across country numerous times to meet with them. In short, I walked with them on their journey for justice. So too,

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[80] BLOCK & GRIFFIN (2013), pp 1, 5-6.
[81] GOIZUETA (1995).
[82] GOIZUETA (1995), p. 206.
[83] GOIZUETA (1995), p. 206.
[84] BLOCK & GRIFFIN (2013), p. 165.
[85] POPE (2019), pp. 123, 136 (quoting GOIZUETA).
[86] GOIZUETA (2009), p. 199.
[87] CELAM (Conferencia del Episcopado Latinoamericano y del Caribe) 2007. Documento Conclusivo de Aparecido, para. 394.
[88] DEANE-DRUMMOND & DENEULIN (2021).
[89] *See* LOBEL (2003).

the lawyers for the Abuelas, and the psychologists and communications organizations, recognized that the Abuelas struggle was a long term one which required their physical and emotional presence on the ground. Indeed, the psychological support organization started working with the Abuelas almost twenty years before their ultimate victory in court, and their accompaniment opened the Abuelas to talking about the sexual abuse they had suffered.

Another essential characteristic of the theological concept of accompaniment is mutual listening which leads to mutual transformation.[90] The Amazon Synod invoked by Pope Francis in October 2019, proclaimed that the Church should be one that "serves and accompanies the peoples of the Amazon" with a "spirituality of listening".[91] Mutual listening and transformation is precisely the mode of operation of the Pelican Bay lawyers and plaintiffs as well as the NGOs and the Abuelas in the *Sepur Zarco* prosecution.

Although the theological concept of accompaniment is well established in Latin America, one can question whether that theology played any role in the secular struggles of the Pelican Bay prisoners or the Sepur Zarco Abuelas. However, despite its development as a theological concept, accompaniment has been utilized in many secular settings where those with certain skills such as lawyers or doctors are seeking to assist poor people in need.

For example, in the medical arena, Dr. Paul FARMER, a Professor of Medicine at Harvard and co-founder of the organization Partners in Health, termed the participatory process of his medical work in Haiti "accompaniment."[92] FARMER drew from liberation theology's preferential option for the poor and its doctrine of accompaniment to undergird his organization's work in bringing the best possible care to impoverished and marginalized patients.[93] One of his most important published works is a dialogue with the Peruvian liberation theologian Gustavo Gutierrez.[94] For FARMER, "to accompany someone is to go somewhere with him or her, to break bread together (...) there's an element of mystery, or openness in accompaniment (...) sticking with a task until it's deemed completed by the person or people being accompanied (...)."[95] Moreover, accompaniment does not privilege "technical expertise above solidarity or compassion or a willingness to tackle what may seem to be insuperable challenges. It requires cooperation, openness, and teamwork (...) ."[96] Other secular medical care organizations around the world have used accompaniment to frame their work providing health care for the poor.[97]

So too, my Pelican Bay work drew heavily from liberation theology and accompaniment. I was introduced to the concept by two lawyers, Staughton and Alice LYND, who were co-counsel with me in a major legal challenge to Ohio's use of indeterminate prolonged solitary confinement in its newly opened supermax prison in the early 2000s.[98] That case presaged the participatory litigation later utilized in the *Pelican Bay* case.

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[90] LYND (2013), p. 7.
[91] http://secretariat.synod.va/content/sinodoamazonico/en/documents/final-document-of-the-amazon-synod.html at para. 26, 20.
[92] FARMER (May 25, 2011) (emphasis in original).
[93] BLOCK & GRIFFIN (2013); NICHOLSON (2021); FARMER (2011).
[94] BLOCK & GRIFFIN (2013).
[95] FARMER (2011).
[96] FARMER (2011).
[97] NICHOLSON (2021), pp. 236-241.
[98] Wilkinson v. Austin, 545 U.S. 209 (2005).

Staughton LYND later wrote a book describing his work with prisoners, workers and civil rights activists as "accompaniment."[99] His book and his secular legal work drew heavily on the Catholic liberation theology developed and practiced in Latin America, devoting a lengthy chapter to Archbishop Oscar ROMERO's work and theology in El Salvador.[100] For both Staughton and Alice LYND, accompaniment involves "two persons exploring the way forward together."[101] Both the LYNDS and I had moving experiences interfacing with liberation theology in Nicaragua in the 1980s.[102] For the LYNDS, I, and Paul FARMER, accompaniment presented a way to overcome the hierarchical dominance of our professions, to see the people we were assisting as equals, with each bringing to their mutual work "a particular experience based on professional training or life experience."

So too, the secular feminist movement in Latin America which assisted the women victims in Sepur Zarco viewed themselves as "accompanying the Abuelas," and practiced many of the features associated with that term.[103] The feminist movement's emphasis on equality and breaking down hierarchy dovetails with some of the insights from liberation theology. Similarly, the pro-choice movement in Latin America has made central to its work the idea of accompanying women through their abortion process.[104] Indeed, one feminist writer has noted that Latin American feminist movements were "not merely imitative of U.S. experiences," and an important contributor to the growth of feminism in the region "was the upsurge of Catholic activism" associated with liberation theology.[105] While Latin American feminist narratives generally insist on a secular reading of women's activism, significant contributions were made by "popular feminists, working class women in Church or neighbourhood associations, organizing against the dictatorships."[106]

Finally, the great Brazilian popular educator Paulo FREIRE made significant contributions to the development of participatory strategic litigation.[107] FREIRE's methods of participatory education have been used to promote adult education, literacy, community development, and social change. Naturally, FREIRE's philosophy and methodology of education was picked up by litigators whose goal was promoting societal transformation.

FREIRE posited that liberation through education requires a mutually beneficial dialogue between the mentor and the mentee to become active, critical, and creative agents in shaping their own lives.[108] In doing so, FREIRE criticizes traditional educational methods as imposing ideas and transferring information onto the students, instead champions education to create cognitive, self-determined people. Traditional methods create a hierarchical model of the teacher and student, reducing the students to the "objects" or empty vessels into which the teacher deposits knowledge.[109] By contrast, democratic educational methods are based on dialogue and mutual interaction between the teacher and student, with the goal to break down and eliminate the hierarchical relationship between the two, each bringing their own unique yet equally dispositive perspectives to the

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[99] LYND (2013).
[100] LYND (2013), pp. 83–125.
[101] LYND (2013), p. 4; LYND & LYND (2009), pp. 87, 93.
[102] LYND (2013), p. 7.
[103] SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 53.
[104] KRAUSS (2023).
[105] SCHILD (Nov.–Dec. 2015).
[106] SCHILD (2015).
[107] WHITE (1988), pp. 760-762.
[108] FREIRE INSTITUTE (2023).
[109] FEATHERSTONE (2020); FREIRE (1970).

relationship.[110] In participatory education, both the teacher and student become active partners in learning: both are transformed in the process. For FREIRE, a key goal of liberatory education is to break through the "culture of silence" that pervades the educational process and society more generally.[111] To do so, the issues discussed must be close to the daily lives and reality of the participants.

Popular education ideas were critical to both the Pelican Bay and Sepur Zarco struggles. At Pelican Bay, the meetings the lawyers had with the plaintiffs to discuss settlement was a powerful example of two groups of experts bringing their own knowledge to the meeting, learning from each other throughout the litigative process. In Sepur Zarco, the entire struggle was a long term educational process, both for the Abuelas and the lawyers, psychologists and organizers. Indeed, the MTM lawyers used a Freirian educational model to explain the legal processes the Abuelas would face at trial, in which the lawyers described the phases of a criminal trial using animals as symbols.[112] In this way, the complex, foreign legal process was made real to the Abuelas, and they could participate in the discussion and actively learn from it. Moreover, a key aspect of both cases was breaking through a "culture of silence," where the prisoners and abuelas voices and stories had been silenced by society.

V. CONCLUSION

The two cases discussed in this essay demonstrate that both in Latin America and the United States it is possible to utilize a participatory model of strategic, impact litigation. Those efforts are radical attempts to challenge traditional litigation practices, and find their roots, in part, from Latin American liberation theology and popular education developed in the latter half of the twentieth century.

While these two cases strongly support the theory that participatory strategic litigation is possible and desirable, it remains to be seen whether such litigation establishes itself in the future as an often-used model. One important question about the Pelican Bay litigation is whether the prisoners there were anomalous, in that their extreme isolation in oppressive conditions led them to study law and develop significant expertise. Similar plaintiffs are unlikely to be found in other situations. For example, DUMBRIQUE's drafting of a memorandum of law is not likely to be replicated by many other class action plaintiffs. One could argue therefore that the Pelican Bay experience is unlikely to be widely adopted by other litigators.

The Pelican Bay plaintiffs experience is therefore somewhat atypical in two respects. The first is that their isolated, draconian conditions inhibited participation. For example, it was not even possible to meet with the named plaintiffs as a group without obtaining a court order to do so. But ironically, their isolation also led many of them to study law, making it easier for them to participate in a class action lawsuit.

While the Pelican Bay plaintiffs might be somewhat atypical, the leadership of a mobilized community is likely to contain potential plaintiffs and class members who are willing and able, and desire to play a participatory role. The Sepur Zarco struggle, from another continent with very different circumstances and plaintiffs illustrate that the Pelican Bay plaintiffs are not unique. Other types of struggles involving school desegregation, police reform, workers' rights or employment

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[110] FREIRE INSTITUTE (2023).
[111] FREIRE INSTITUTE (2023).
[112] SÁCOUTO, FORD OUOBA & MARTIN (2022), p. 58.

discrimination claims have also achieved at least some of the critical elements of participatory litigation found in the Pelican Bay and Sepur Zarco cases.[113]

The lesson of both of these struggles is that participatory litigation is best achieved within the context of a mobilized, activist constituency. It is in that context that plaintiffs are most likely to both demand participation and have the necessary skills and insights to fully participate. Participatory litigation also requires activist lawyers who see the value in participation in furthering both democratic ideals and in developing the trust with the plaintiffs which aids the litigation.

There is currently interest in participatory litigation in a number of arenas. One important arena is international. A victim centered approach featuring victim participation has been identified in international fora as a key principle in transitional justice and other legal proceedings.[114] International courts such as the International Criminal Court and the International Criminal Tribunals for Rwanda and Former Yugoslavia have incorporated formal victim participation in their statutes.[115] Despite these provisions for formal victim participation, victims are generally sidelined in practice,[116] largely limited to their role as witnesses[117] and even then constrained by their inability to tell their stories in the manner in which they would like.[118] Indeed some scholars have argued that recent efforts to formally ensure victim participation have reinforced the same top down institutional focus that existed previously.[119]

The gap between victim-centered aspirations and the lack of meaningful participation in most strategic or international legal proceedings highlights the need to publicize the examples in both Latin America and the United States where real participation has taken place. Thus, both the *Pelican Bay* litigation and the *Sepur Zarco* prosecution present important examples of the possibilities for making plaintiff or victim participation central in legal proceedings. In both cases, there was a group of activist "victims" who demanded participation and NGOs who were extremely supportive of that demand. The *Sepur Zarco* Abuelas were slowly empowered by psychological and emotional support, as well as political and educational efforts, from and by civil society organizations, to the point where they wanted to and were capable of forming an organization and participating in the legal process. In the *Pelican Bay* situation, their prolonged stays in solitary confinement led to a realization of the need to organize collectively. A key question for follow up research is whether in the future, there is a trend for more strategic litigation to involve a participatory methodology and approach, or whether the *Pelican Bay* and *Sepur Zarco* cases turn out to be anomalies.

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[113] See LOBEL (2022), sources cited in fn. 290, 293.
[114] ORENTLICHER (2022), p. 44; IMPUNITY WATCH *et al.* (2017), p. 5, UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER (2021), p. 5.
[115] ORENTLICHER (2020), p. 40.
[116] UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER (2021), p. 5
[117] MCGONIGLE LEYH (2012), p. 384.
[118] KILLEAN (2018), p. 24.
[119] EVRARD et al. (2021), p. 433; FLETCHER (2015), p. 320.

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