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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NACDL TASK FORCE ON RESTORATION OF RIGHTS

AND STATUS AFTER CONVICTION

NEW YORK, NY WITNESS SCHEDULE

Day 2
Thursday, May 16, 2013

Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019

The hearing convened, pursuant to notice, at 9:00 a.m.

BEFORE:

RICK JONES, Task Force Chairman

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2 MR. JONES: Welcome to day two of the
3 National Association of Criminal Defense Lawyers Task
4 Force on the Restoration of Rights and Status After
5 Conviction. We are pleased to have with us this
6 morning Judge Baer. We are expecting former governor,
7 Governor Paterson, to join us at some point, but we are
8 going to begin our conversation and our discussion with
9 Judge Baer this morning.

10 Judge, we are pleased to have you here. The
11 way that we conduct these hearings is to give you an
12 opportunity, ten or 15 minutes or so, to introduce
13 yourself to us and give us the benefit of your thoughts
14 on the topic, and we have lots of questions for you.
15 The way that we do our questioning is that one of our
16 members leads the discussion, and for purposes of this
17 conversation, Margie Love is going to be the primary
18 questioner.

19 To the extent that there is time when she
20 has asked all the questions that she might, the rest of
21 us are interested also in asking you a few questions,
22 and so we always find that there's never enough time.
23 And I suspect that we will find that this time as well,
24 but I expect this to be a very beneficial discussion
25 for us. So I'm going to stop talking at this point and

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2 turn the floor over to you, and welcome you, and thank
3 you for your remarks in advance.

4 JUDGE BAER: Thank you very much. I am
5 delighted to be here, Rick and the rest of the people,
6 some of whom I know a long, long time and some of whom
7 I don't know at all, but insofar as my history, which
8 is now getting extremely long, I think you have a bio.
9 I spent a good deal of time practicing public service
10 law and very little time making any money, and I do not
11 feel the worse for it. I think you have a bio.

12 I was an Assistant United States Attorney in
13 the office of Robert M. Morgenthau from like '61 to
14 '66, and then Mayor Lindsay asked me to leave that
15 office and become the initial executive director of the
16 newly instituted Civilian Complaint Review Board, which
17 at that time was civilian dominated, did not last long,
18 but Commissioner Leary who very shortly passed out of
19 the world, as did I, the police department asked me to
20 stay on. And I did reorganize, and it was interesting
21 since the bio is fairly dull. What was interesting, I
22 must say, about that experience was that we found that
23 when the police became dominant on the board, there
24 were more substantiated complaints than when there were
25 civilians who had dominated the board.

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2 within a year or two of college might actually be able
3 to go college.

4 I will not again try to bore you with the
5 details, but the shorthand version is that for one
6 reason or another again for probably the first time in
7 history, there's a requirement that within 24 hours
8 after being nominated for Supreme Court Justice, you
9 have to file your acceptances for the Board of
10 Elections. The democratic party neglected to do that.
11 So then Baer and a few other liberals had no democratic
12 competition, which is, in fact, what -- New York elects
13 Supreme Court Justices whether they know what they're
14 doing or not on a regular basis.

15 So it was not really something I wanted to
16 do, but in any event, my father thought this was the
17 best possible world, and that was where he was, and he
18 loved it. So I ran and actually was last. There were
19 ten nominees, and the Liberal Party had nominated seven
20 of the democrats who hadn't filed and three liberals.
21 I came in tenth, but coming in tenth meant that I was a
22 Supreme Court Justice for the State of New York, and
23 actually, that turned out to be a pretty good deal,
24 hardly money-wise. I repressed whatever that was. It
25 was so little money, probably a fifth of what I had

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2 been making a month before that, but in any event,
3 money isn't everything.

4 So I spent ten years on the Supreme Court
5 bench, and that was an exciting experience, and then I
6 had enough. Then I wrote an op-ed piece in the New
7 York Times saying how this is an unbelievable place to
8 work, and nobody really can do their job. Rotary
9 telephones in 1992 was really a scandal, and I left.

10 And I worked at JAMS with Milton Mollen, who
11 asked if I would form that operation which is, as you
12 know, an arbitration and mediation operation, and also
13 asked if I would join him on the Mollen Commission
14 investigating police behavior or wrongdoing or
15 corruption. And in '94, I was nominated by President
16 Clinton, and that brings us to where I am today.

17 In terms of your work, I must say that it is
18 my major interest, and I devote myself to criminal
19 justice and the problems as much as I possibly can.
20 The great advantage, amongst many others, that federal
21 judges have when they get to take senior status is that
22 they can pretty much take what they want in the way of
23 cases, and in fact, for the most part, they can
24 rearrange the cases given out through wheels. There
25 are wheels. This isn't really true anymore because

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2 What's happened, as you may know, is that
3 sequestration has created a big problem for a variety
4 of agencies in the federal government. Not that the
5 state hasn't suffered a great deal more, but for us, at
6 least, one thing that's gone is Second Chance money,
7 and Second Chance money is where much of our services
8 and treatment opportunities have always funded or how
9 it was funded.

10 So we can talk about who these people are
11 and how they've fared, but it's a program that lasts a
12 year. And we had a graduation at which Hakeem
13 Jeffries, who is a brand-new congressman from Brooklyn
14 and happened to be my law clerk in 1999 came to speak,
15 and he was remarkable. I have always had a great deal
16 of respect for Hakeem, but he knew just what to say and
17 how to say it, and everybody was transfixed, it seemed
18 to me. Anyhow, that's one program.

19 Another program that I take credit for but
20 indeed is not all me by any means is run with Pretrial
21 Services. Pretrial Services is the agency in the
22 courthouse that oversees the well-being of men and
23 women who have been arrested but have not yet been
24 tried or convicted, but almost invariably following an
25 arraignment, unless they're incarcerated, they go to

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2 and are supervised by Pretrial Services.

3 What's happened and why I thought this
4 program I'm about to tell you something of was
5 necessary is that there's a fairly long hiatus
6 frequently between conviction and surrender date.
7 There's plenty of people who get convicted in drug
8 cases, for instance, who go immediately or have never
9 left jail, but there are more and more white collar
10 defendants and the like who ask for 90 or 120 days to
11 surrender and are given it as a general rule or some
12 part of that. In any event, it may well be that it's
13 not a bad idea for them to be scared to death about
14 what's about to befall them, but this program and I
15 concluded that maybe that wasn't the most humane way to
16 go about it.

17 So we instituted a program with my
18 reentrants who have all served five, ten, 15, 20 years
19 in jail and BOP officials, who obviously are trained
20 and selected because they know what happens in prisons,
21 and every quarter, the men and women who are about to
22 be incarcerated but are out are invited, and attend if
23 they choose -- and we've had pretty good attendance --
24 a sort of meeting or seminar or whatever you want to
25 call it in which the BOP tells them exactly what they

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2 think is going to befall them and how they should be
3 prepared for thus and this and that, from everything
4 whether you can take your prescriptions with you and
5 almost all the kinds of things that the defendant
6 really is worried about, and has no idea about it, and
7 has no way to find out about until he reaches the
8 institution.

9 And then my one or two people who sometimes
10 don't look the part of white collar crime defendants,
11 but nonetheless, come and tell them what it's really
12 like on the inside, and it is pretty exciting to watch.
13 And after that, and basically -- not that you need to
14 know this for your own particular future, but indeed
15 basically, the reentrants that participate, at least in
16 the three sessions we've had thus far, tell them to
17 keep your head down and stay out of trouble.

18 But it's a program which I think has legs,
19 and I think will continue. Although, you know, there
20 is a great deal -- I'm sure you know. There is a
21 significant segment of our society who has no interest
22 in making this path any easier than necessary and
23 probably would be critical of this kind of a program.

24 The third program, which I do take credit
25 for, one reason being is that we haven't found enough

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2 with probation's help a series of prospects, which
3 obviously people coming right out of jail don't have or
4 where they might find work.

5 And frequently, I have found both in the
6 reentry program and in just thinking about this Coming
7 Home project that their friends, so-called, who usually
8 were responsible in part for getting them into trouble
9 are still right there. So we talk a little bit about
10 new neighborhoods and new housing accommodations, and
11 both of which are difficult, but at least setting him
12 or her on the right track.

13 And the unfortunate thing about -- why I
14 said we hadn't really gotten this started yet is
15 because these people who score in this high percentage
16 as being likely to recidivate, there is a 60-day or so
17 lag to give them this PICRA test and to collect the
18 material from the prison or prisons that they were in,
19 and the head of the probation department said one of
20 the reasons is these people have been rearrested
21 already. So we didn't get the 60-day period we had
22 allotted to get ready to give the talk to this guy
23 because he's no longer on the street, but that will
24 obviously not be what happens forever.

25 A lot of the programs we're doing, they're a

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2 little different than what you might hear from federal
3 judges since they either aren't part of it or aren't
4 interested in it, but for the most part, I have found
5 as long as I'm prepared to do it, my colleagues are
6 delighted that the programs are ongoing. Sadly, as I
7 mentioned at the outset, one of the problems is there
8 really isn't enough money to do the job well, but
9 that's an overview of where we're moving and hopefully
10 being helpful in some of the areas that you're
11 interested in.

12 MR. JONES: Thank you. Margie.

13 MS. LOVE: Thank you, Judge Baer. We're
14 very pleased to have you here. You are, I believe, the
15 first and only federal judge that we have heard from.

16 MR. GOLDMAN: No, in Cleveland.

17 MS. LOVE: Oh, yes. Dan, that's right.
18 Judge Polster from Cleveland spoke to us about his
19 reentry court effort. I guess I'd like to say at the
20 outset that one of our or perhaps the primary thing
21 that we're trying to accomplish here is to deal with
22 what you referred to actually, this significant segment
23 that has no interest in making the path to
24 reintegration any easier.

25 I'm trying to figure out what we, as

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2 lawyers, as defense lawyers, a defense lawyer
3 organization can do about recommending changes in the
4 system that will counteract this impulse, and that will
5 somehow substitute a different one, and the role of
6 courts institutionally in that effort to restructure
7 the system, and we've dealt a lot with the collateral
8 consequences of conviction, which you have written
9 about, I know, and collected them in New York.

10 What is going on in the federal courts
11 generally to encourage judges to look at the sort of
12 downstream effects of the cases that are adjudicated?
13 Many of whom don't go to prison at all. Although,
14 these days in the federal system, more of them do.
15 It's a different problem in the state system. But what
16 is happening in the federal judiciary systemically to
17 redirect the attention of judges to the
18 post-post-conviction phase of cases?

19 JUDGE BAER: One of the things I didn't
20 mention, Commissioners -- can we call you all
21 Commissioners? I'm glad to do that. One of the things
22 I didn't mention, which is somewhere close -- again, I
23 can't take full credit, but this time I deserve some --
24 is you know that after you are released, you obviously
25 have a conviction on your record and the only -- we're

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2 talking federal court. That's what you're talking
3 about.

4 MS. LOVE: Yeah.

5 JUDGE BAER: The only way you can move about
6 and get a license in this state at least is if you get
7 a certificate of relief from disabilities.

8 Unfortunately, the State of New York required, up until
9 March of 2011, that you go through the New York State
10 parole system to get your certificate of relief from
11 disabilities.

12 So they would do an investigation that took
13 somewhere between ten and 12 months before you had a
14 shot at getting your certificate, and that really
15 seemed unbelievably ridiculous to me for two reasons.
16 One, the probation department had a full presentence
17 report. They knew exactly the kinds of things that
18 parole would be starting to investigate, to look at,
19 and it was available, but apparently, not either asked
20 for or relied upon by parole.

21 In any event, to make a long story short,
22 along with the correction commissioner at the time and
23 my really great law clerk, I wrote a bill, which was
24 passed. The commissioner made it happen, I must say.
25 I wrote the bill. That was the easy part but now --

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2 I'm trying to look for the key section, but
3 essentially, what happens is that the parole board has
4 to take our presentence report, and so what has
5 happened is that instead of a year, it takes six weeks
6 to get your certificate of relief from disabilities.
7 That is a significant plus for any guy or gal getting
8 out of jail who was interested in doing anything, I
9 mean, from being a barber to a jockey.

10 MS. LOVE: So you basically kind of imported
11 the state relief system, parts of it, into the federal
12 practice so that federal --

13 JUDGE BAER: No, no. It still has to go
14 through parole, but they have agreed not to give us any
15 trouble when they use it because they never used it.

16 MS. LOVE: What about at sentencing?
17 Because one of the features of the New York system, the
18 certificate system, is that a judge -- this is sort of
19 unique in the country actually -- a judge right at
20 sentencing can relieve certain restrictions,
21 employment, housing for first offenders under the
22 certificate system who are not going to prison, those
23 who are not going to prison, who are sentenced to
24 probation or some sort of thing.

25 What do you think the prospect would be of

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2 trying to import that sort of at-sentencing relief
3 system into the federal system? What would you have to
4 do to do that?

5 JUDGE BAER: Well, I think it would just be
6 legislative now in the federal system. I tried to do
7 this through Senator Schumer, and his staff, they were
8 not really interested. And it may be because they
9 really didn't have jurisdiction, and they couldn't
10 really do something for New York. Not that they might
11 have. They didn't for the whole country, but it didn't
12 work there. Now, I just don't know whether giving a
13 judge that power is something that anybody at the
14 federal legislature can do. That might be tricky.

15 MS. LOVE: How about simply giving notice to
16 defendants before you, perhaps even at the plea stage
17 that this state relief is available to them? Do the
18 federal courts -- or would you think that would be a
19 good idea for the federal courts to do?

20 JUDGE BAER: You mean in terms of getting
21 the relief, the certificate quickly?

22 MS. LOVE: Simply advising them. If the
23 federal courts themselves don't have authority to give
24 any sort of relief based on the state system, would you
25 at least think it helpful to inform defendants before

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2 you at sentencing of what might be available to them
3 under state law? Not necessarily federal, there's very
4 little in federal, but what about that sort of
5 advisement system?

6 JUDGE BAER: Yeah. I guess I haven't looked
7 at this recently, but I thought maybe in the monograph
8 that I did on collateral consequences I included that.
9 We give a watered-down version of this to every
10 defendant. I'm not sure it's in here, but yeah, I
11 think that's a perfectly good thing. My view is every
12 little bit helps in this world, and I think we're
13 behind the eight ball in terms of getting things
14 accomplished in this area.

15 MS. LOVE: I think that the courts are
16 now -- the federal courts are now under some obligation
17 to advise defendants considering a plea about
18 immigration consequences.

19 JUDGE BAER: Yeah, but if you look at --
20 that is the United States versus Padilla case. If you
21 look at the Padilla case, you'll see in their wisdom,
22 the Supreme Court really narrowed that immigration and
23 really made it clear that they weren't talking about
24 other disabilities. So you can try and use it, but
25 anybody who's read the decision, I can tell you too

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2 bad.

3 MS. LOVE: Well, Judge Baer, I've read the
4 decision, and we're trying hard. There actually are a
5 number of courts, state courts in particular, that are
6 beginning to spread the Padilla notion to other kinds
7 of consequences. It's a slow process, and it's a
8 little scary, I imagine, but let me just take you back
9 to the federal courts, though.

10 What are federal courts doing, that you know
11 of, about seeing that defendants considering a plea are
12 aware of the collateral consequences? Is there any
13 sort of program in place or advisement to the federal
14 courts about that?

15 JUDGE BAER: Well, there's certainly nothing
16 written in stone. I mean, I think I -- I know I
17 distributed this monograph of mine that does spell them
18 all out. Spell out not all of them, but a goodly
19 number of collateral consequences. So each judge in my
20 court has a copy. What they do with it, you know,
21 every judge runs their own court.

22 I would like to think that we've done
23 something along those lines, and the problem is, I
24 think, practically -- first of all, I'm not sure when
25 you do it. I'm not sure when would be the best time to

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2 give this out. The U.S. Attorney would say what you're
3 doing is discouraging them from pleading, and that's
4 not your job. And I guess probably defense lawyers
5 could say I know that. Anyway, I'll tell him myself.
6 I don't need a catalogue. I don't know.

7 MS. LOVE: What obligation -- for example, I
8 know that your list of collateral consequences is
9 directed to defense lawyers. It was advice --

10 JUDGE BAER: Yeah, because I thought that
11 was safer in terms of distribution before I got too
12 much criticism, not that I'm not used to criticism.

13 MS. LOVE: The A.D.A. standards, the
14 criminal justice standards, actually do contemplate a
15 role for the judge in ensuring not their own notice but
16 that the defense lawyer has done his job. Do you see
17 that as something that courts could sort of build into
18 their -- the whole, you know, the plea process and the
19 advisement from the court, has defense counsel advised
20 you?

21 JUDGE BAER: Yeah. I think we do now
22 actually do more of that. I think that's what my --
23 here, if you've been on the federal bench, you know
24 that here at least, where we have like 30 or 40
25 different judges, senior and active, it's quite

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2 monastic, except for board of judges meetings, which we
3 have monthly. You really don't know what's going on in
4 everybody else's or anybody else's chambers, but I
5 believe that there is more movement towards more
6 understanding between the judge and the defendant and
7 their lawyer as to what he's in for.

8 MS. LOVE: Would you find it helpful if
9 there was more direction from a central source as to
10 what judges were supposed to do from the AO, for
11 example, judicial conference giving you some more
12 direction?

13 JUDGE BAER: Sure. I mean, like I said,
14 anything you can do in that regard would be helpful in
15 my view. I just -- you know, there are all kinds of
16 people on that bench.

17 MS. LOVE: I understand. I have one more
18 question, and really, I'd like to take you back a
19 little while to your years on the state bench when you
20 were on the Supreme Court for ten years. Was there any
21 sort of systematic consideration by the trial judges of
22 this opportunity under state law to get certificates of
23 relief from disabilities of some sort right at
24 sentencing? Did you all ever do that?

25 JUDGE BAER: Well, I looked at those cases,

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2 point. You know, would this rock the federal judiciary
3 to have a new, more aggressive responsibility for
4 collateral consequences?

5 JUDGE BAER: First of all, I don't think so.
6 Second of all, it can use some rocking. Not to give
7 you any pause. I'd have to see what we're talking
8 about to be sure that it's something, but for the most
9 part, this is an area -- I don't want to deprecate
10 Padilla because I think that was a help, but I don't
11 think there was much before that in this general area.
12 And I don't think that went as far as it should have,
13 but it's certainly sort of a wedge.

14 So I think the federal judiciary, if you
15 built on that, really wouldn't have too much problem.
16 I think, you know, most of my colleagues are really
17 quite sympathetic. When I told them all at the judge's
18 meeting that we're really going to have to suspend the
19 reentry program, they really were honestly concerned
20 and unhappy about how that -- so I think they're ready
21 to do anything that would be valuable in the areas that
22 you're working on. It's just like anything else. As I
23 say, there are all kinds of judges, and they have
24 different views, and many of them are different from
25 mine.

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2 MS. LOVE: But very little guidance coming
3 out central?

4 JUDGE BAER: Yeah, I don't know. This
5 reentry program, for instance, we had five -- the
6 Federal Judicial Center had selected five districts to
7 do a pilot program to see what the best reentry program
8 was so that they could allegedly replicate it.

9 So they had, this year, the kind of program
10 with a judge who had some oversight and hopefully kind
11 of a whip, and then they had the same -- all the theme
12 services and what we call a B program but with no
13 judge, and then they had a C program in which there was
14 no different services than anybody who was under
15 supervised release gets.

16 And so now, I mean, the excuse for having
17 done away with this program for the time being is
18 they're evaluating those three programs to see which is
19 going to be the best and which works better. So maybe
20 that's all true. So that's sort of on the right road.
21 I mean, at least we know that they're thinking about
22 it.

23 MS. LOVE: I'm going to turn over to my
24 colleagues who may have some questions here, and thank
25 you very much.

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2 MR. JONES: We have some little time left
3 for additional questions. I just pause to say we've
4 been joined by Jerry Cox, who is president-elect of the
5 association. Happy to have him.

6 Larry, questions?

7 MR. GOLDMAN: No.

8 MR. JONES: Chris.

9 MR. WELLBORN: I have one question for you,
10 Judge. I practice in both federal and state court in
11 South Carolina, and in my local jurisdiction in state
12 court, it's not unusual for judges on a busy week to
13 handle 30 to 60 pleas per day per court.

14 JUDGE BAER: How many?

15 MR. WELLBORN: 30 to 60, sometimes more in a
16 busy day. Now, granted there are lots of issues
17 related to that that one could discuss, but they have
18 instituted in our particular circuit a -- basically, in
19 response to Missouri versus Frye and Lafler versus
20 Cooper, which of course followed Padilla, a form which
21 asks -- all the lawyers are required to have their
22 clients read, sign, initial, and the lawyers have to
23 sign at the bottom indicating that they have advised
24 their clients of the following things and these forms
25 include not all -- I wouldn't say it's even close to

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2 being everything that really should be on there, but a
3 lot of the potential collateral consequences that these
4 folks are facing as a result of their plea to whatever
5 the charge may be, anything from a misdemeanor to a
6 five-year felony to a very significant felony.

7 And so even if -- going back to Margie's
8 question on the federal side, even if some judges might
9 be reticent to sit there and read from the bench a list
10 of all the potential collateral consequences or lawyers
11 might say, gee, I've already advised the client of
12 that, would you think that perhaps handing out a form
13 in advance of the plea, perhaps at the time the person
14 has their change of plea hearing before sentencing --
15 so we know what the person is already pleading to
16 because that's obviously on the record at the change of
17 plea hearing, hand out the form, and then have that
18 form filled out and submitted at the time of sentencing
19 so that that becomes part of the record. There's
20 something on the record showing the person has been
21 advised at least of the collateral consequences that
22 tend to the conviction. How do you feel about that?

23 JUDGE BAER: Well, I think that's a fine
24 idea. We do have a form like that. I don't think it
25 has collateral consequences, but it has a lot of "I

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2 better.

3 MR. WELLBORN: Right. But the concept of at
4 least having the form is not something that you think
5 would give you particularly or perhaps your brethren
6 and sisters on the bench any particular heartburn?

7 JUDGE BAER: No, I don't think so. I think
8 they're ready for it, and I think the country is ready
9 for it, too.

10 MR. WELLBORN: Thank you.

11 MR. JONES: Penny.

12 MS. STRONG: Judge Baer, good morning. My
13 name is Penelope Strong. I practice in Montana. The
14 only question I'd like to ask you is, I practice both
15 in the federal and our state court system. In my mind,
16 what the federal system lacks is an opportunity in
17 particular for first-time offenders to have either an
18 expungement provision in the federal system or a
19 deferred sentence that later allows, after successful
20 completion of their entire sentence, to have their
21 record wiped clean.

22 Do you have an opinion based on your years
23 of experience whether congress should look at enacting
24 some type of legislation in particular for -- for
25 example, a lot of people that get caught up in the drug

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2 conspiracies that really because of the looseness and
3 the latitude of the conspiracy laws, in my opinion,
4 there are some felony convictions, even if they don't
5 do time, that create a lifelong burden for those
6 individuals. The sole remedy for them to wipe their
7 record clean is federal executive clemency, and we have
8 learned that that's obviously, especially for the
9 ordinary person, largely unavailable and ineffective if
10 they do try to avail themselves of that.

11 JUDGE BAER: Well, you know, you're
12 preaching to the choir. So what I say really, I don't
13 think you can run with it. I think that you would have
14 some trouble expunging records simply because I guess
15 the bureau, FBI, would feel -- this is just off the top
16 of my head -- that we've investigated, arrested and
17 convicted this fellow, and now, nobody is going to know
18 that he's a bad guy because his record has been
19 expunged. I mean, I think those are the kinds of
20 arguments, whether you get them from the judiciary, I
21 would think so, but I can't be sure. From law
22 enforcement, I can be pretty sure that that would be
23 troublesome to them.

24 MS. STRONG: To follow up on that, in
25 Montana, we have a deferred sentence system, and that

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2 him about the fact that, you know, we don't have any
3 suspended sentences in the federal system. We don't
4 have any, if you will, I think relief for in particular
5 the first-time offenders. That's sort of where my
6 point is headed and --

7 JUDGE BAER: Well, you know, in the state
8 court, they have these ACDs, which we don't have, but
9 which stand for adjournment in contemplation of
10 dismissal. I think that could be imported into the
11 federal system, and what it really means is if you stay
12 on the straight and narrow for six months, there will
13 be no record, and it will be dismissed.

14 And I think there are plenty of -- assuming
15 you would include in whatever suggestion you made that
16 if the individual needed anything from drug treatment
17 to anger therapy, anger management that he would get
18 that during that period of time from probation, I think
19 that's something that's long overdue here, I mean in
20 the federal system. So it's close. It's as close as I
21 can visualize at the moment what can happen here
22 easily. I don't think it would happen easily. I don't
23 think anything happens easily here, but I think things
24 are changing.

25 I think Todd Clear, who's sort of a mentor

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2 of mine and a great teacher and now is the dean of the
3 School of Criminal Justice at Rutgers, spoke at the
4 Vera Foundation last month. His view is that -- this
5 is an oversimplification, but his view is that
6 essentially a new world is dawning, and there is not
7 going to be -- for lots of different reasons which he
8 talked about, there's not going to be the kind of
9 incarceration rates that we've seen heretofore, for, as
10 I say, basically we can't afford it, but for other
11 reasons as well. And there's going to be an effort to
12 try and provide more in the way of treatment because
13 apparently nobody believes that prison is doing the job
14 or ever did, the rehabilitative function that it's
15 supposed to be doing. So I think all these ideas, that
16 this is a good time to have you throw them out and hope
17 somebody catches them.

18 MR. JONES: We have time for just one more
19 question. Larry.

20 MR. GOLDMAN: Let me ask you one question.
21 One of the reasons for these hearings is because, at
22 least the criminal defense bar -- this at least is my
23 opinion -- has been ignorant or certainly not paying
24 enough attention to the effect of collateral
25 consequences. From what I glean from you, and I've

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2 always known you and appreciated your frankness, some
3 of your colleagues are not particularly -- correct me
4 if I'm wrong -- interested or enthusiastic about
5 getting involved in this issue.

6 Is there any way that this -- we, society,
7 the criminal justice system could impress upon federal
8 judges, state judges, I guess I'll throw in criminal
9 defense lawyers, prosecutors, everybody else I can
10 think of, the dreadful, often unforeseen criminal
11 collateral consequences of conviction? And I guess I
12 should focus more with you and other federal judges a
13 lot like you who's taken -- and we appreciate that -- a
14 keen interest in this.

15 JUDGE BAER: Gee, I don't know, Larry. I
16 think the good news is that the president has
17 nominated, I would guess, eight or ten new judges for
18 the federal district court in the Southern District of
19 New York within the last six or nine months, and that I
20 tried, unsuccessfully to a degree, to take each of them
21 out to lunch just to see who it is I'm living with, and
22 they have become a far -- they appear to be both from a
23 diversity standpoint, which when I came I didn't see
24 hardly any of, and from a political-leaning standpoint
25 to be far more in the same boat as I think I'm in. So

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2 I think that's moving in the right direction without
3 anything in particular -- I mean, I can't think off the
4 top of my head as to what might change for those that
5 are not that will change and turn them around, do you?

6 MR. GOLDMAN: Excuse me for one quick
7 follow-up.

8 MR. JONES: No, no.

9 MR. GOLDMAN: Do you think if the
10 Administrative Office of the U.S. Courts, or whoever
11 runs whatever the equivalent of federal judge school
12 is, was more aware of this and spoke to new judges
13 about this, there would be more awareness of it and
14 would be helpful?

15 JUDGE BAER: I think, you know, there are
16 baby judges school when you have a new judge. I think
17 if you get them to include this kind of a discussion,
18 that would be great. I mean, again, it's been a long
19 time since I was in baby judges school. They may do
20 it, but I certainly think that they don't do it so as
21 it couldn't be emphasized.

22 MR. JONES: Training in baby judges school
23 is a good way to end. Thank you.

24 JUDGE BAER: Thank you. I'm glad to come.
25 I'm sorry the governor didn't appear, but I wouldn't

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2 necessarily expect that he would.

3 MR. JONES: We are going to take a break and
4 reconvene at 10:30.

5 (Whereupon, a short recess was taken.)

6 MR. JONES: All right. Let's begin. Thank
7 you all for being here. We appreciate having you, and
8 we're looking forward to a very informative and helpful
9 discussion for us. We, as you know, are exploring,
10 have been going around the country really sort of
11 exploring the issues around the restoration of rights
12 and status after conviction, particularly with an
13 emphasis on the legal mechanisms and how effective or
14 not they are in helping people who are trying to rejoin
15 society, and we are pleased to have this conversation
16 with you this morning, I guess it is.

17 The way that we operate is that we give each
18 of you five to ten minutes to give us a sort of brief
19 introductory statement, tell us a little bit about the
20 work that you're doing, and then we have lots of
21 questions for you. And the way that we do our
22 questioning is that one of us will lead the discussion,
23 and for purposes of this conversation, that person is
24 Elissa Heinrichs. And to the extent that there is time
25 after she's done having a conversation with you, the

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2 rest of us, I'm sure, will have questions. If history
3 is any guide, we will run out of time before we've
4 exhausted all of our questions for you, but in the
5 interest of time, I'm going to stop talking and turn
6 the floor over to you. I guess, Ms. Warth, we'll start
7 with you.

8 MS. WARTH: With the last name of Warth, I'm
9 usually at the end. I'm Patricia Warth. I'm the
10 co-director of Justice Strategies for the Center for
11 Community Alternatives. The Center for Community
12 Alternatives for 30 years has been promoting
13 reintegrative justice and a reduced reliance on
14 incarceration through a combination of direct services,
15 advocacy and policy development. We have programs in
16 Syracuse, New York, in Rochester and in the New York
17 City area, Manhattan and Brooklyn. So a lot of my
18 comments will really be driven by the direct service
19 programs that we have and experiences of our clients
20 and our participants.

21 I did submit written comments a couple of
22 days ago. I had just intended to sort of outline my
23 thoughts and then ended up just in this mad frenzy
24 writing like a mad woman, and I realized in the process
25 of doing that I sort of used the word "mad"

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2 intentionally. I was angry as I was writing because I
3 really believe that in New York we, to a large extent,
4 have been a leader in the nation in having policies
5 that promote reentry for people, and yet despite the
6 fact that we have been a leader, we still see too many
7 people far too often needlessly living life as
8 second-class citizens because of their past mistakes.
9 And I truly believe that, if this is true, that this
10 still happens in New York, which is a leader, then the
11 New York experience, I think, can be very helpful in
12 informing this Task Force on what more can be done
13 because there is a lot more that needs to be done.

14 So I'm going to frame my brief comments
15 around two sort of major mechanisms in New York to
16 restore a person's rights, certificates of relief from
17 disabilities and certificates of good conduct and also
18 Article 23-A, our anti-discrimination statute. I'm
19 going to talk a little bit about what's working and
20 what's not working with those, and I talk about what's
21 not working not to diminish their value, but to really
22 inform recommendations as to what more needs to be
23 done.

24 So very quickly starting with certificates
25 of good conduct, I think many of you probably know in

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2 New York, we don't have expungement, and we have very,
3 very, very limited sealing. So we rely largely on
4 certificates of good conduct and certificates of relief
5 from disabilities, and I think to a large extent that
6 they're probably somewhat valuable in helping people
7 with occupational licensing issues, of marginal value
8 for occupational licenses, but with regard to getting
9 jobs within the private sector, not very valuable at
10 all. Employers really don't know what they are. They
11 don't know how to use them, but more importantly, we
12 see that they don't even have a process for asking
13 about and considering them in the employment decision.

14 So just as a quick story, we're working with
15 a gentleman named Bill, who applied for a job at
16 Walmart, had three interviews, at each interview
17 offered his certificate of relief from disabilities,
18 was told it wasn't necessary, was given a conditional
19 job offer conditioned upon a background check. The
20 background check was conducted by a third-party vendor,
21 GIS, and GIS deemed Bill to be noncompetitive. Bill
22 sent GIS and Walmart a copy of his certificate and
23 evidence of rehabilitation. GIS said that Walmart is
24 making the decision. They won't consider it. Walmart
25 said all correspondence has to be sent to GIS. Nobody

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2 will consider it. Nobody will take this into
3 consideration. And we can't get anybody to, and we see
4 this time and time. It's just one example.

5 The other problem we see with certificates
6 though, and I don't want to dwell on this too much, but
7 we see a lot of difficulty in overcoming barriers to
8 applying for certificates. The application process can
9 be confusing to people. It can also be very
10 time-consuming, depending on when and where you have to
11 apply, and for people who have to apply to courts, we
12 see a lot of difficulty with figuring out the process.
13 Every jurisdiction has a different process, and some
14 jurisdictions have no process.

15 So, for example, we were working with a
16 gentleman named Tom, who came to one of our community
17 meetings, was interested in learning about
18 certificates, decided for his single misdemeanor
19 conviction he was going to apply to the local town
20 court for the certificate, filled out the application,
21 walked it to the town court clerk, who told him he
22 couldn't apply himself. He had to retain a lawyer to
23 apply for him. So this is the kind of thing we see all
24 the time. So to a large extent, certificates, I think,
25 could be a helpful tool, but they're not enough. We

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2 need more.

3 In addition to certificates, New York relies
4 largely on our anti-discrimination statute embodied in
5 Article 23-A of New York's Correction Law, and, you
6 know, in quick summary of it, the statute says to
7 employers you cannot discriminate against somebody with
8 a conviction history unless you have determined that
9 that person's particular conviction is directly related
10 to the specific job duties or hiring the person would
11 create an unreasonable risk of safety, right.

12 And the statute gives employers eight
13 factors to consider and tells employers they're
14 supposed to consider whether or not the applicant has a
15 certificate, and we have seen two major problems with
16 Article 23-A. First, it only applies in the domain of
17 employment. So to the extent that employers do adhere
18 to it, it can be very effective at preventing them from
19 having bright-line bars and barriers to employment, but
20 in other domains, housing, higher education, volunteer
21 work, we see employers feel free to discriminate. I'm
22 hoping that Glenn will talk a little bit more about
23 higher education.

24 I'm going to touch on volunteer work for a
25 second. A gentleman named Ray called me, and Ray said,

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2 I have a drug conviction from 15 years ago, but, you
3 know, I have gone on with my life, went to college, got
4 a job, have a family. And my daughter is currently in
5 the school play, and the school needs volunteers,
6 parent volunteers, but I've been told I can't volunteer
7 because of my drug conviction. They don't want me
8 around children, and I said, well, what about getting a
9 certificate? Would that help you? He said no. They
10 told me a certificate won't matter. The only thing
11 that will help is sealing or expungement, right. In
12 other words, they need to be told they can't consider
13 it, but we see this in a lot of domains.

14 So I really believe that anti-discrimination
15 sort of standards that you see in Article 23-A needs to
16 be imported to other domains, though in a thoughtful
17 way. They can't just take the factors in Article 23-A
18 and plop them into other domains. There needs to be
19 thoughtful consideration about each domain and how best
20 to say to employers you need to have thoughtful
21 decision making.

22 The other problem with Article 23-A is that
23 employers simply don't follow it. A lot of employers
24 don't know about it, and a lot of employers have
25 figured out that by putting a question on the

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2 application and requiring applicants to check the box
3 if they have a conviction, that they can really
4 circumvent Article 23-A because, of course, they just
5 throw those applications aside when the box is checked.
6 And the applicant never really knows why, why they
7 weren't hired. They don't know if it was because of
8 their conviction, and so that's a huge problem in New
9 York.

10 These problems, I think, drive my
11 recommendations, and I'm just going to list them very
12 quickly, and then hopefully, we can talk about them
13 more because I want to give Ann and Glenn a chance to
14 talk, but I really believe that any jurisdiction that
15 really believes in restoring a person's rights and
16 status after conviction has to have at least these
17 mechanisms. I truly believe that the box needs to be
18 banned from initial applications in all domains. A lot
19 of people know about the Ban the Box Movement in
20 employment. We see more and more municipalities and
21 states saying to employers you have to take the
22 question off the initial application and defer the
23 inquiry until later in the application process. I
24 believe that that's a very important process.

25 In New York, I think it single-handedly

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2 employers accidentally get information about those
3 arrests, deny a person a job because of it. When we
4 write the employer and say that was sealed, you weren't
5 permitted to consider that information, invariably
6 employers reinstate the job offer. They like the
7 bright-line rules, and they're willing to consider
8 them. So I think that that's very important.

9 I do believe that there needs to be -- you
10 know, prior to sealing and expungement, decision makers
11 need to be guided by anti-discrimination standards much
12 like New York's Article 23-A, and I also believe that
13 we need enhanced enforcement. I think that New York,
14 the federal government, we've seen incredible, great
15 efforts from our leaders in educating people about the
16 importance of successful reintegration and reentry, but
17 I think enforcement of existing laws and policies needs
18 to be stepped up. So I will turn it over to Ann.

19 MR. JONES: Thank you very much.

20 Ms. Jacobs.

21 MS. JACOBS: I'm Ann Jacobs. I'm the
22 director of the Prisoner Reentry Institute at John Jay
23 College of Criminal Justice. I've been there for two
24 years. It's a research institute whose purpose is to
25 bridge the worlds of academia and research with

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2 practice and policy making, and prior to that for about
3 17 years, I was the executive director of the Women's
4 Prison Association, which engaged in both direct
5 service to about 2,500 women a year and their families,
6 and then I was engaged in policy work through the
7 Institute on Women & Criminal Justice. I want to
8 express my appreciation to the National Association of
9 Criminal Defense Lawyers Task Force on Restoration of
10 Rights and Status After Conviction. That's probably
11 the longest ever...

12 MR. JONES: It's a mouthful.

13 MS. JACOBS: But I really do want to
14 acknowledge you for the work that you're doing and for
15 giving me the opportunity to address you today. I
16 think it is a remarkable time. After four years -- or
17 four decades, many years, of working for criminal
18 justice reform, we can have conversations now that we
19 didn't have before. I mean, people actually utter the
20 words "mass incarceration," talk about police
21 legitimacy, which I hope will be broadened to a larger
22 conversation about legitimacy of our entire justice
23 system, and we can talk about the egregious racial
24 disparities in our administration of justice. I think
25 the focus of this particular Task Force is really

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2 central to all of those issues. I think that it's
3 integrally connected to all of those issues and that
4 your work could be pivotal to creating breakthroughs in
5 those conversations.

6 In my view, collateral consequences and the
7 status of people with convictions has everything to do
8 with who we think they are, how we see them, and how we
9 value them or don't value them. It has to do with what
10 we think the role of the criminal justice system is and
11 how deeply we're willing to think about that at all,
12 and it has a lot to do with our broader aspirations for
13 the kind of society we want and whether we're willing
14 to write off huge proportions of our population and
15 think we can still thrive doing so. 65 million people
16 with a criminal record is kind of breathtaking, and we
17 know that the number is still growing. By now, you
18 know far more about collateral consequences in the
19 restoration of rights than I do, but I do know how
20 crucial it is that we create a new paradigm out of
21 which we can frame our responses to people who are
22 convicted of crime.

23 Every two weeks, I spend a day in Otisville
24 State Prison working with men who are engaged in our
25 Prison-to-College Pipeline, which is our college

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2 program. So these are men who are within two years of
3 release. They have literally done every program that
4 they could possibly do while they were incarcerated by
5 the Department of Corrections, and I'm struck looking
6 at them at how young they look, and then I know what
7 their sentences are. Many of them are finishing up 19
8 and 20 years, literally more than half their lives in
9 our State Department of Corrections. Not only have
10 they done every program available to them, they have
11 read and they have thought a lot about who they've been
12 and what kind of life they want, and those are, in
13 fact, the conversations we're having, like what kind of
14 future is it that you're creating for yourself.
15 They're earning As and a very occasional B, and our
16 faculty, the John Jay faculty and CUNY faculty that go
17 there describe them as literally the best students that
18 they've ever had.

19 So they're working hard. They're doing
20 everything that they can possibly think of to do,
21 taking advantage of every opportunity that's being
22 given to them, and they're very conscious of wanting to
23 move beyond who they were in the past, the shame and
24 guilt that they feel about that. They want to be
25 successful. They want to contribute to others. This

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2 is actually what the story was for most of the women
3 clients that I saw when I was in the Women's Prison
4 Association. I feel very comfortable making a
5 generalization that people who go through the criminal
6 justice system more than the general population are
7 very preoccupied with wanting to contribute, of wanting
8 to give, of wanting to give back.

9 However, with every subsequent check-in,
10 even with the men who are coming out of the
11 Prison-to-College Pipeline, I see their energy
12 flagging. I see the discouragement. I see them
13 literally changing and losing the life in their eyes
14 with every week that they are on the street and
15 confronting the kind of barriers that we call
16 collateral consequences. Every day, literally every
17 day -- and we're a research institute. I don't know
18 how they find me. It's not easy to find me -- I get a
19 call from at least one person who's been out for a
20 while, and who's looking for a job, and who keeps
21 getting the door slammed in their face.

22 We actually have been on an e-mail chain
23 with a young man who's been out for quite a while, got
24 himself into NYU, did spectacularly there and has been
25 looking for the grad school that he's going to go to,

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2 They're blocked. They're unable to succeed. What this
3 represents to us is a really unacceptable loss of
4 social capital or human capital, I think. The criminal
5 sentence becomes a life sentence. It never ends.
6 People are branded years after their release, and they
7 get deflated. I do think that there is something to
8 Shadd Maruna's point that we have lots of ways that we
9 convict people and criminalize them, and we don't have
10 any repertoire comparable for ever saying that you're
11 done and restoring you to society.

12 I think that there is probably something to
13 that that this group should explore, but where I remain
14 focused is on the need for us to think about this in a
15 very different kind of way and to provide leadership to
16 the larger world in doing so. We need to recognize
17 that the people that we're mad at, that we might think
18 should have been punished and perhaps still should be
19 punished are not the only ones who are harmed by this.
20 Each of those 65 million people have family. They have
21 children. They're parts of communities that are
22 already disproportionately affected by the harm that
23 goes along when people cannot fully participate in the
24 economy and the community in which they exist.

25 Donald Braman did some wonderful research on

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2 the effects on family of incarceration in Washington
3 and talked about how we focus a lot on social capital
4 and don't realize that it's a double-edged sword. If
5 we deny people that, then the whole community, the
6 whole family, the whole setting in which they operate
7 are affected. So what I think we need to focus on is
8 no longer -- well, let me back up for a minute.

9 I think a lot of this stems from having a
10 system that really won't decide on what our system of
11 sanctioning is really all about. We want to punish,
12 and we want to rehabilitate, and we want to deter, and
13 we want to incapacitate, and we somehow think that we
14 can do all of these things at the same time. But any
15 rational kind of analysis of that says you got to at
16 least choose which one is your priority and align the
17 system consistent with that, and I believe that what is
18 this mess that we're encountering at the back end with
19 collateral consequences and endless stigma is actually
20 a reflection of that lack of clarity, of that lack of
21 discipline in deciding, well, which is it.

22 Because if it's punishment, then we should
23 talk about when you're done. You know, there should be
24 a way of completing the punishment, and if it's about
25 rehabilitation, there is no way that we would make it

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2 that difficult for people to participate in the
3 services and support and the ways in which they can
4 contribute to the community. We have to stop this sort
5 of knee-jerk reactive legislation that is a way of our
6 legislators looking like they're tough on crime and
7 that they're solving problems when, in fact, what
8 they're doing is making a mess.

9 As I said earlier, these problems stem from
10 how we, as a society, see and how we value people going
11 through the criminal justice system. Judge Baer made a
12 remark that the FBI has concern that no one would know
13 that these people were bad guys. Well, in my
14 experience, they're mostly not. I mean, I'm sure that
15 there is a small percentage of psychopathic people that
16 I really don't want on the street, but in the main, the
17 people that I see, if they came from a different social
18 class and a different kind of community and did what
19 they did at the same age as people who do, we would
20 say, well, boys will be boys, you know, and we would
21 find a way of having consequences for that that didn't
22 ruin their future. So too do we need to do in lieu of
23 what we are currently doing in a wholesale way to so
24 many people in our society.

25 So I was struck when I was at the Women's

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2 Prison Association about how transformational prisons
3 are. To an extent, sometimes for people who go through
4 them as inmates, but always for the people that we take
5 into prison. I never took anyone to prison who didn't
6 walk out shaking their head going this is not the kind
7 of place that I thought it was, and those people are
8 not who I thought that they were. Usually, they say
9 they're so articulate, which we all know is code for a
10 lot of things, right.

11 So I think that there is a particular
12 opportunity here for the bar to provide leadership. I
13 don't see how you can be involved in the practice of
14 criminal work, be a prosecutor or a judge, and not have
15 to go to prison regularly and not have the opportunity
16 to sit and talk to people who are there. We have
17 Undercover Boss. I think we need an undercover judge.
18 They should not go in with a full, you know, whatever,
19 but they need to have an opportunity to talk to people
20 there.

21 So I'm hoping that part of -- and I felt
22 like you were suggesting this in some of the materials
23 about your work that I read that I'm really hoping that
24 you will make some recommendations about how the
25 leadership, you know, and the social standing that your

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2 organization represents can be put for good, whether --
3 you know, I don't know if they need CLE credits, and
4 you can get it by going to prison, but I believe that
5 there needs to be an expectation that judges and
6 lawyers and the policymakers, the legislators should be
7 more rigorous in terms of what they do, and, in fact,
8 we should not let the press or academia get away with
9 the shoddy work that they do on our issues.

10 MR. JONES: Thank you. Glenn.

11 MR. MARTIN: So good morning. Thank you for
12 the opportunity. My name is Glenn Martin, and I'm the
13 vice president of Development and Public Affairs at The
14 Fortune Society and the director of the David
15 Rothenberg Center for Public Policy. But a little bit
16 about myself, I served six years in prison here in
17 New York State before I started doing this work about
18 13 years ago.

19 Ultimately, after visiting about 35
20 employers here in New York City trying to find a job
21 and facing the sort of barriers that we're talking
22 about today, even though I earned a two-year quality
23 liberal arts degree while I was in prison, I landed at
24 the Legal Action Center where I worked for about six
25 years and ultimately heading up the National HIRE

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2 Network in an effort to look at and help remove
3 barriers to employment faced by jobseekers with
4 criminal records.

5 And currently, I'm at The Fortune Society.
6 They have been around for about 46 years, founded as a
7 result of a play off Broadway right here in midtown
8 written by a playwright who had done time in prison to
9 tell the story of his experience, and ultimately, David
10 Rothenberg, who invested in the play at the time, found
11 himself on national television and came to his office
12 the next day here in the theater district, and there
13 were about 50 formerly incarcerated people there
14 waiting for him asking for help with some of the same
15 issues that we're discussing 46 years later.

16 If you fast-forward to today, we served
17 3,000 people last year. We have 200 people on staff.
18 Half of them are people who have done time in prison,
19 70 percent if we count folks with histories of
20 homelessness and drug use. A third of our board is
21 formerly incarcerated. We do about 400 job placements
22 per year. We provide housing, education, employment,
23 drug and alcohol treatment, mental health services,
24 healthcare, alternatives to incarceration, but we also
25 continue to be an advocacy organization. The role that

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2 we tend to play in spaces like this is really to
3 channel the voices of our clients into the
4 conversation. So I'm really glad that I didn't do the
5 legal piece for today's testimony because I think I
6 would have just been crossing everything out as my two
7 colleagues did a great job of hitting on many of the
8 issues that I probably would have hit on should I have
9 taken that focus.

10 The charge to me in the invitation was
11 really to talk a bit about my personal experience to
12 the extent that I'm comfortable and just talk about the
13 barriers faced by our clients, and then it sort of said
14 not all the traditional sort of collateral consequences
15 that we tend to talk about, which probably would have
16 led me to talk about things like -- you know, as I hear
17 about certificates of relief and their value, I think
18 about when we built our affordable housing in Harlem
19 and how when people applied, the lease-up company that
20 we used so that there's a fair process actually was
21 screening out applications based on a criminal record
22 before the potential renter even had any knowledge of
23 what was happening. So we learned that in the middle
24 of this process of getting people connected to
25 affordable housing and supported housing and Section 8

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2 vouchers, that before a person even knows how their
3 application is being considered, they're out of the
4 process, and so the certificates would play almost no
5 role.

6 Then also private and public colleges we're
7 working closely, the three of us, on addressing the
8 fact that colleges here in New York City in particular,
9 private and public and across the country are
10 increasingly creating barriers to applications based
11 solely on a criminal record anywhere from you can't
12 apply to go to school here to you can go to school
13 here, but you have to leave campus as soon as class is
14 done.

15 So the rest of my testimony, I'm going to
16 read. I didn't submit written testimony because I just
17 wrote it two hours ago, and the typos are horrible.
18 But I will read from it, and I'm going to read about
19 half of it in the interest of time. So what I did was
20 I convened a focus group of our clients a couple of
21 days ago. We run groups at Fortune no matter who you
22 are on the exec team from the president on down. So in
23 the middle of my group, I decided to use it as a bit of
24 a focus group for today's discussions.

25 So after a series of questions and responses

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2 between the clients and myself, it became increasingly
3 clear to me that with all due respect to the Task Force
4 and today's process, that I have to take license to
5 translate the challenge, today's challenge into an
6 invitation to speak more candidly and more broadly
7 about race and poverty. We all know that in the '80s
8 and '90s as part of the War on Drugs and Tough on
9 Crime, the system increasingly, disproportionately
10 targeted people of color and poor people. However,
11 even today, our criminal justice system and law
12 enforcement practices that feed the system are
13 operating at full throttle even while crime rates are
14 down and the scourge of crack cocaine has subsided.

15 So while our clients talk to me about the
16 traditional collateral consequences of criminal
17 convictions, many of which will be addressed in today's
18 testimony, they more often talk about facing the
19 relentless tentacles of a pervasive and systemically
20 racist criminal justice system, a machine built to
21 consume and further marginalize poor people and people
22 of color. The collateral consequences we've all been
23 traditionally exposed to, many of which serve as an
24 abrogation of civil rights, stem mostly from policies
25 enacted by overzealous and underinformed legislators,

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2 as well as the agencies outside of the courts viewing
3 themselves as playing a role in public safety.

4 In the United States, we engage in a
5 ceremony at the point of sentencing that was meant to
6 remind and enhance society that being found guilty of a
7 crime in the U.S. is met only not with direct
8 punishment meted out by the courts but also coupled
9 with a deliberate devaluation of one's civil status.
10 Unfortunately, we have no similar ceremony
11 post-conviction to return people to their prior role as
12 full-fledged citizens. Recognizing our other failed
13 domestic policies, we have instead used that to devolve
14 the existing system and widen it and widen the net
15 further extending its reach into the lives of the very
16 people we profess to want to help extricate from the
17 system.

18 Specialized courts, for instance, offer
19 diversion and resource opportunities for veterans,
20 people with drug and alcohol histories and mental
21 health issues use those going through reentry and a
22 myriad of other circumstances identified as
23 criminogenic or risk factors. While relatively
24 speaking, these opportunities are important and
25 worthwhile, it appears that the new slogan for our

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2 courts should be you have a problem, we have a court.
3 One has to wonder whether we will ever create an
4 expungement court, which would truly address the
5 lifelong scarlet letter of a criminal record, something
6 that follows our clients to their graves and beyond.

7 What policymakers might not have anticipated
8 particularly over the past four decades is that a
9 concentration of people affected that live in specific
10 communities, the collective way to legal and practical
11 barriers, the harshness and persistence of these
12 punishments, all combined with racialized over-policing
13 and over-enforcement amount to the perfect storm for
14 our atrocious recidivism rate in the U.S. So while we
15 can silo the conversation in order to get a grasp of
16 the issues and attempt to create measurable solutions,
17 the truth is that ignoring the underlying factors that
18 attract the criminal justice system to some of our
19 fellow citizens like a moth to a flame often only does
20 a disservice to the people we're meant to serve. Even
21 without the compounding and exacerbating effects of
22 having a criminal record, socioeconomic status and race
23 in the U.S. both have a profound impact or outcome
24 related to physical and mental health, education,
25 employment, housing, behavior, income, family and

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2 personal relationships.

3 After much deliberation, I decided that the
4 most impactful testimony I can deliver today is the
5 lesson carried in the short story about my own
6 personal -- my own professional work experience. In
7 2006, I had the opportunity to serve as a program
8 manager working with Princeton Professor Devah Pager on
9 her Race At Work: Discrimination in Low-Wage Labor
10 Markets research. The project was housed at the
11 Commission on Human Rights, and it afforded me the
12 opportunity to not only help execute the research but
13 also to be privy to the many insightful and sometimes
14 disturbing anecdotal experiences of our testers.
15 Unfortunately, decades of civil rights progress had led
16 some researchers and policymakers to doubt that
17 discrimination remains an important cause of economic
18 inequality.

19 To study present day discrimination, Devah
20 Pager and Bruce Western collaboratively conducted field
21 experiments in low-wage labor markets recruiting white,
22 black and Latino job applicants who were matched on
23 demographic characteristics and interpersonal skills.
24 These applicants were given equivalent resumes
25 carefully manufactured by the research team and sent to

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2 apply in tandem for hundreds of randomly assigned
3 entry-level jobs in New York City. The results showed
4 that black applicants were half as likely as equally
5 qualified whites to receive a callback for the job
6 offer. In fact, black and Latino applicants with clean
7 records fared no better than white applicants just
8 released from prison. Moreover, the positive outcomes
9 for black applicants when presenting evidence of a
10 criminal record were reduced another 57 percent.

11 What I learned from that experience is what
12 most people who have criminal records already know,
13 that race will always be a factor in their life
14 outcomes, even when fully or overqualified. Someone
15 like myself who's at the helm of a \$20 million
16 nonprofit most likely cannot land a job at the Pizza
17 Hut in Times Square due to my record.

18 So my testimony is not meant to minimize or
19 devalue the importance of today's hearing, but to
20 remind us that while we engage in work to lower the
21 very real and persuasive barriers that will be
22 discussed as part of this process, we need to ensure
23 that we don't allow our detractors to distract us from
24 the long-term goal and more difficult conversation of
25 redefining the role of our criminal justice system in

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2 America. A country built and held together using a
3 framework and a narrative of morality must one day
4 address the hypocrisy of a system that keeps 7 million
5 people under some form of criminal justice supervision.
6 Thank you for the opportunity.

7 MR. JONES: Thank you. Elissa.

8 MS. HEINRICHS: One thing that you said,
9 Mr. Martin, about the ceremonies, we had testimony
10 yesterday, and we've had conversations among Task Force
11 members about the value of a ceremony that honors the
12 closure of -- whether it's supervision, whatever.
13 There are lots of things that have been discussed.

14 Recently with a colleague, the question was
15 raised is this something that the individuals they're
16 meant to serve, would they want to participate? We've
17 also discussed when would this ceremony take place. At
18 what point is it practical, would it have the most
19 impact? Was this something that you talked about with
20 your focus group specifically?

21 MR. MARTIN: Yes.

22 MS. HEINRICHS: What did you get from the
23 individuals you spoke to? Is it something that's
24 valuable and why and when do they --

25 MR. MARTIN: I'll speak from the client's

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2 perspective, and I'll speak from my personal
3 experience. So there's probably no more of an
4 impactful experience than standing in front of a judge,
5 taking a plea or being found guilty or being sentenced.
6 That's something that you carry with you for the rest
7 of your life, that you remember because it really sets
8 you apart from the rest of society. It's a really
9 strong reminder that now you're different from everyone
10 else, and our clients talked about that.

11 They talked about how they've never had any
12 experience in their life that they felt was the
13 opposite of that. I think the closer they get to the
14 day they unceremoniously get off of parole, for
15 instance, or probation -- and usually, honestly,
16 there's not even a final meeting. You sort of get a
17 phone call saying, you know, you don't have to come to
18 the next visit. You're done.

19 MS. WARTH: We're not even getting that. We
20 had a couple of guys discharged who weren't told they
21 were discharged.

22 MR. MARTIN: Yeah, but that's the one time
23 when clients sort of say, you know, now it really feels
24 like I'm free, and even though they're often reminded a
25 short time later that they're not because of the

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2 experiences in their own community, but it would have
3 to be real, right. When you get sentenced, it's real,
4 like you are given very direct punishment, and you have
5 to carry out that sentence. So it has to be not just a
6 ceremony, but a ceremony attached to some sort of
7 stepping back, if you will, or closer to being like
8 everyone else.

9 I don't know the answer. I don't know the
10 answer to when that should happen, but again, the
11 closer people get to when they finally get off all
12 forms of supervision, even though again they're slapped
13 in the face not too long later when they apply for -- I
14 mean, I remember trying to buy a co-op here in the city
15 and getting all the way to the end of the process and
16 being told, okay, now we want to do a criminal
17 background check. After three months of dealing with
18 the bank and everything else, I just said, you know
19 what, I'm not going to bother.

20 MS. HEINRICHS: I have a question about
21 education and whoever wants to answer it. Mr. Martin,
22 you might have a perspective. You said that you had a
23 two-year degree when you were released. So you may
24 have a personal perspective, and I would invite you to
25 offer that.

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2 The question originates with Ms. Jacobs,
3 your discussion of the Prison-to-College Pipeline, and
4 I've read I think it was a 2011 article about the
5 program. And I emphasize 2011 because I noted in that
6 article that it was described as a program offered to
7 inmates five years prior to release. Today, you
8 mentioned two years prior to release, and that stuck
9 out because I was already thinking about what that five
10 years meant.

11 So when you said two years and, Mr. Martin,
12 when you said you had a two-year degree, my question
13 had been what happens -- with five years with the way
14 your program is set up, I thought that's great. That
15 gives motivated students the time to have a degree that
16 could, without other barriers, be used. They're
17 employable, without the other barriers, upon release,
18 right.

19 Two years, I think it depends on what you've
20 done with it, which positions you're looking at, but
21 I'm wondering what happens to the individual who's
22 released prior to completing the program and how
23 realistic is it for that individual to then secure
24 funding to continue their education? What's being done
25 to address that issue; anything you can offer?

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2 MS. JACOBS: Those are all great questions,
3 and they're, in fact, the ones that we're asking
4 ourselves and are being asked more nationally, too. I
5 mean, the Vera Institute is overseeing a Pathways to
6 College Program that has a similar kind of reentry
7 focus, and I think we're all trying to figure out is it
8 two years? Is it three years? Is it five years? In
9 the case of our program and our thinking, it was that
10 because there is such a stigma to public institutions
11 spending money on those people, we have to make sure
12 that we fundraise every cent that goes toward their
13 tuition and any benefit that they're getting so that
14 the administrators of the college are not vulnerable to
15 public backlash that somehow you're misusing state tax.

16 So there is a fundraising kind of challenge
17 there that had the framers of this project conclude
18 that we should do it like leveraging our resources to
19 get people started with an intent to have them continue
20 when they're out in the community and eligible for
21 basic -- you know, the same financial aid that other
22 people are. So I personally think it's better if
23 people use the time that they're in productively and
24 get as much work done and get their degree, if they
25 possibly can, but financially, it's very hard to do

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2 that because they're not eligible for TAP and Pell.

3 MR. MARTIN: So yeah. So I have a two-year
4 degree. It took me almost five years to complete
5 because Pell grants are no longer available. The
6 programs that exist are skeletons of what they used to
7 be when they were much more robust with the incentive
8 of Pell grants for colleges to come into the system.
9 So even if a person who may do three years or four
10 years still may not complete a two-year degree. Even
11 though they may be matriculating towards a degree, the
12 courses may not be offered every semester, but I do
13 think there's huge value in exposure and helping a
14 person with their self-esteem and the belief that they
15 can go to college. That does something for the entire
16 facility, but definitely does something for the
17 individual.

18 When people ask me about education as an
19 intervention to turn my life around, I say yes, there's
20 huge value in it, not even as a tool to get a job, but
21 as sort of a different way of thinking about the world
22 and sort of redefining of the narrative that I used to
23 get through life as a young man. But it was really the
24 correctional counselor who said to me, wow, look at
25 your grades. You should go to college, and that was

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2 just as valuable, if not more so. I think that's
3 what's happening to programs like this where you're
4 exposing people to something that maybe should have
5 happened ten or 20 years earlier, but it may not have
6 for most of them. It certainly didn't for me. So I
7 put the value in it until we get congress to act on the
8 Pell grant issue.

9 MS. WARTH: One thing to also remember is --
10 you know, and Glenn and Ann both talked about the
11 importance of exposing people to the opportunities for
12 higher education in prison and generating that interest
13 in continuing their education as a life-changing tool.
14 CCA in 2011 issued a report called The Use of Criminal
15 History Records in College Admissions Reconsidered in
16 which we talked about the fact that a growing number of
17 colleges and universities are screening applicants for
18 past criminal convictions.

19 So not only are applicants now required to
20 check the box on job applications but also on college
21 applications. So this is very important that we have
22 this opportunity in exposure in prison, but it's just
23 as important that people are able to continue their
24 interest in obtaining a degree once they leave prison.

25 MS. HEINRICHS: I'm glad you mentioned that

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2 because that's the next question. Again, this is for
3 the panel because I think the three of you are working
4 on the education piece, so whoever wants to answer. I
5 want to know more about it.

6 I'm familiar with the development with the
7 applications and what they're asking, but with your
8 work, I'm assuming, with the universities or
9 organizations, whatever, what's the feedback? I know
10 you hear, oh, it's public safety. We have an
11 obligation to our students. I know the arguments
12 against that, but are you making any progress?

13 MS. WARTH: We really thought -- at CCA,
14 when we began down this road, we really thought that if
15 we just simply educated admissions officers on the fact
16 that, you know, screening does not do anything to
17 enhance campus safety, but it has the unintended
18 consequences of screening out people of color,
19 applicants of color because our criminal justice
20 system, as Glenn very articulately stated, has such a
21 specific impact on communities of color. So all of
22 their efforts to enhance campus diversity are
23 diminished when they screen, and we also thought that
24 if we offered to them the value of education in
25 reducing recidivism -- in fact, you know, they got

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2 that, that they would see that it just doesn't make
3 sense to screen. So we did panel discussions at
4 various conferences. We met individually with
5 admissions officers, and they are not getting it.

6 They are telling us we get that it doesn't
7 enhance campus safety, but we feel -- they tell us two
8 things. One, we feel like we just need to know
9 everything about applicants. On one hand, they say
10 that, but they don't ask if applicants are married,
11 right. So they don't need to know everything, and then
12 the second thing they say is -- the second thing is
13 just crushing. They say that including the question on
14 the application sends a message about the type of
15 students they want. To me, that's a frightening,
16 frightening statement, given what we know about our
17 criminal justice system and given what we know about
18 how education can really reduce recidivism.

19 MR. MARTIN: Just to add to that, so we're
20 at a point now where we're pursuing a legislative
21 strategy to try to pass legislation that ties into our
22 Human Rights Law to bar colleges from even asking at
23 all about criminal records because we have the largest
24 government institution in the United States at CUNY,
25 college divisions that doesn't ask the question at all

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2 on the application. So now, we're trying to do it
3 legislatively.

4 I mean, the meeting that Patricia alluded to
5 where they said, well, we don't have any evidence that
6 it leads to public safety, but we're just asking
7 because we want to know more, was a meeting convened by
8 the Governor's office. So they were willing to say
9 that in front of the Governor's staff, the Deputy
10 Secretary of Public Safety. Then I knew that that
11 strategy wasn't getting us anywhere, and that
12 unfortunately, we have to turn to the legislature,
13 which is horrifying that we have to go to the
14 legislature to convince publicly funded institutions
15 and private institutions that benefit from public
16 dollars that they shouldn't be barring people based
17 solely on their criminal record because it has a
18 disparate impact. But this is all in the state where
19 we had to legislate away shackling while women are
20 having children. So I'm not totally shocked.

21 MS. WARTH: One thing to remember is Ann
22 works for an institution that doesn't ask. They don't
23 want to ask. They don't want to know. They know it's
24 not important. Even though most schools now do ask, a
25 significant minority don't. This significant minority

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2 don't report that they have particular campus safety
3 problems. So we keep having to remind legislatures and
4 schools of this.

5 MS. HEINRICHS: I have a question about
6 certificates, and I think you had mentioned that in
7 various jurisdictions, the process varies.

8 MS. WARTH: Some have no process.

9 MS. HEINRICHS: There's somebody who was
10 told they needed an attorney when they were trying to
11 fill out the form. I practice in Pennsylvania, and I
12 don't have a lot of good things to say about
13 Pennsylvania when it comes to this issue, but we have
14 limited expungement and recently -- I can't say it's
15 statewide, but for the most part, you can go online and
16 get an expungement form and complete it without an
17 attorney. It's intended to be completed pro se, you
18 know, for ARD situations like that. Has there been any
19 effort in New York to work with the Unified Court
20 System? I'm not sure what your Unified Court is called
21 here.

22 MS. WARTH: Office of Court Administration.

23 MS. HEINRICHS: Have they been approached
24 and do they have online forms that are statewide?

25 MS. WARTH: Well, two quick answers. One,

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2 not everybody can go to the court. Some people do have
3 to go to the Department of Corrections, but to address
4 your issue with those who can go to the court, as a
5 coalition of advocates across the state, we have tried
6 to meet with OCA and have not met with a lot of luck on
7 that.

8 And I do think that, you know, even if we
9 were able to get them on board -- I'm trying to be
10 diplomatic here -- I do think there's just some judges
11 who do what judges do no matter what. So, for example,
12 we have one local judge who gets most our certificate
13 applications. Even though the standard in New York is
14 that, you know, granting a certificate is consistent
15 with public safety and consistent with a person's
16 rehabilitation, he insists that a certificate is issued
17 only in extraordinary circumstances.

18 And so I had one client, for example, who
19 for a single misdemeanor conviction from six years
20 earlier was being screened out by the Department of
21 Health to work as a home health aide, work that she had
22 done for years. She was told she should get a
23 certificate, and she went to court three times, each
24 time with more and more evidence of good conduct and
25 evidence of rehabilitation, and each time, the judge

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2 denied the application saying she wasn't deserving.

3 I don't know how much you can do to control
4 that, but in my mind, that's part of the reason why
5 certificates in and of themselves aren't the solution.
6 I don't think you can totally ever work around problems
7 with certificates. I think that you have to work on
8 those. I think they're part of the solution, but I
9 don't think you can rely on them as the sole mechanism
10 for restoring people's rights and status.

11 MS. HEINRICHS: And what would the next
12 mechanism be that should be implemented?

13 MS. WARTH: I truly believe that expungement
14 and sealing are critical components, and as I said, you
15 know, I keep coming back to banning the box, taking it
16 off the initial application. I think that that's very
17 important, and before expungement and sealing, I think
18 that guiding decision makers on how to make thoughtful,
19 careful decisions and how to reject blanket bars.

20 MS. HEINRICHS: Who would do that?

21 MS. WARTH: Well, in New York, we've done it
22 in employment through Correction Law 752 and 753, which
23 I referred to as Article 23-A, which I can say as an
24 employer and I'm responsible for a lot of hiring at
25 CCA, works really well when employers use it. I mean,

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2 it really helps guide decision making in a thoughtful,
3 careful way. I think that that type of guidance needs
4 to be set forth in other domains as well.

5 It's not as simple as taking the guidance in
6 Article 23-A and just, you know, importing it to other
7 domains. There has to be thoughtful decision making
8 about the type of decision and how to guide the
9 decision making, but I think that that's a very
10 workable model that needs to be developed. But the
11 bottom line is, you know, the main criteria is there
12 can't be blanket bars. There needs to be
13 individualized decision making, and the person needs to
14 be given an opportunity to provide evidence of
15 rehabilitation and good conduct. That has to be part
16 of the process.

17 MS. HEINRICHS: I have one last question. I
18 think I'm going to direct it to you. You had
19 mentioned -- I think you're the one that said employers
20 like the bright-line rules. Do you feel that that is
21 tied into a fear of liability for employing?

22 MS. WARTH: I think it's sort of a
23 combination of fear of liability and post-9/11
24 everybody feels like they're supposed to do background
25 checks. I mean, for goodness' sake, you can buy an app

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2 to do background checks on your date or your
3 babysitter. I mean, there's just so much out there now
4 that the sense is you're supposed to, you're supposed
5 to, you're supposed to. So I think it's a little bit
6 of that. This is just something we're supposed to do.
7 It's part of good hiring practice.

8 We know from some of the research that the
9 Society for Human Resource Management has done that
10 fear of liability is an issue as well. So I think that
11 that needs to be counterbalanced against frankly fear
12 of a lawsuit for discriminating improperly, right?

13 MS. HEINRICHS: Right.

14 MS. WARTH: It can also be counterbalanced
15 with what I call safe harbors, right? So in New York,
16 for example, we have a limited safe harbor for
17 employers who can document that they've complied with
18 Article 23-A. Now, the problem with that is very few
19 employers know about it.

20 I want to circle back to -- I know a couple
21 of years ago, Glenn was very active in promoting
22 legislation that requires employers to, when they do a
23 background check, to give applicants a copy of Article
24 23-A, and employers aren't doing that either.

25 MR. MARTIN: So it has to be posted in the

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2 workplace, and that happens more readily because the
3 company that produced the posters really have to take
4 the lead.

5 MS. WARTH: It's money.

6 MR. MARTIN: Yeah, but less so with
7 employers actually doing it. They should be giving a
8 copy of the anti-discrimination law to the jobseeker
9 whenever they do a background check that contains
10 criminal record information. Judy helped me write that
11 bill.

12 MS. WARTH: I think that it's that type of
13 safe harbor legislation from what I understand -- Judy
14 who helped write it could talk about it. She's going
15 to talk later this afternoon. I think she'll talk
16 about that, but I think it can also be expanded to
17 decision making in other domains, in housing, in higher
18 education and in volunteer work.

19 MS. HEINRICHS: That's great. Well, I want
20 to open it up to my colleagues because I know they have
21 questions.

22 MR. JONES: Chris.

23 MR. WELLBORN: Just very briefly, just
24 thinking of this from a, I guess, frontline criminal
25 defense lawyer representing client perspective, there

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2 are obviously various points where we could do a better
3 job and might be more effective in representing our
4 clients who ultimately are going to have to suffer all
5 these consequences, whether it's pretrial,
6 post-sentence, post-release or even if they're never
7 incarcerated at all, which is the vast majority quite
8 frankly.

9 Other than lobbying and seeking changes in
10 the law, what can we, as lawyers, do that would be the
11 most effective in helping folks out? And I start with
12 Glenn, and then maybe move through the line because all
13 of you, I'm sure, are going to have your own
14 individual effort.

15 MR. MARTIN: That's a really good question.
16 The first thing that comes to mind for me is we'll say
17 like 90-something percent of people take pleas to keep
18 the system moving forward, but it means that your
19 attorney is really your mouthpiece for almost the
20 entire time you're going through the court system. So
21 to the extent that the attorney can be thinking about
22 all these things -- I know you guys just produced a
23 great document for defense attorneys. I'll let you
24 talk about that, but to the extent that you are the
25 voice to the judge and to the prosecutor that there is

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2 copy of the constitution in Greek. It means nothing to
3 the person, but if you can have an honest conversation
4 with the client about, listen, I know you want to go to
5 school. I know you're college bound. Let's talk about
6 that. Let's talk about what that means. You can
7 accomplish two things. One, you can give the client
8 advice that is meaningful to the client. Two, more
9 importantly -- and we've been very effective in this in
10 our sentencing advocacy program -- you can leverage
11 that information to get better outcomes in the plea
12 negotiations.

13 So we've used that kind of information to
14 talk to decision makers about disproportionate
15 punishment. When not being able to go to college, when
16 losing a job, when losing housing as a result of a
17 conviction, that's disproportionate punishment in many
18 circumstances, and that can be compelling information
19 for judges and prosecutors to learn about. We really
20 sort of see this as an opportunity to leverage better
21 outcomes and to really do what Ann has talked about
22 really at the front end look at what our criminal
23 justice system is doing and to really understand the
24 impact that the criminal justice system has on a
25 person's life, not just on the time that they're

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2 serving a sentence.

3 MR. JONES: Geneva.

4 MS. VANDERHORST: So I typed out a couple of
5 questions that I think now have been answered, but I
6 had been thinking about the last two years that we've
7 been doing these hearings. The reality is that it
8 seems we're pretty clear, as Ms. Warth and Ms. Jacobs
9 started out in their testimony saying, that the
10 majority of the community we're dealing with are not
11 bad guys, but we're dealing more with racial and
12 economic discrimination. And we are essentially
13 finding ways to get around that, and it's not really
14 getting people where they need to be.

15 So I'm starting to wonder now whether or not
16 -- how do we prepare our clients for their reality?
17 Because we can talk to them about expungements. We can
18 talk to them about certificates. We can talk to them
19 about diversion programs, elevation or ceremonies after
20 probation and parole, but the reality is they're going
21 to come back to communities that despite the fact we
22 have laws against discrimination aren't going to be
23 enforced. They're going to deal with it, and I heard
24 Ms. Warth talk about a vision for enhanced -- or
25 talking about having enhanced enforcement of the laws,

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2 particularly discrimination laws in these cases.

3 And I'm wondering what your vision is for
4 that and whether or not having them be voluntary, that
5 is whether or not employers or college admissions folks
6 volunteer to kind of consider this population or
7 whether or not we should have penalties that attach
8 monetary fines to them if we can prove that they are
9 discriminating against folks because of their
10 conviction records, whether or not we can be able to
11 bring civil suits against them and fine them for it
12 because it really seems to be that people are just
13 finding ways to block. They're not really finding ways
14 to open doors, and the reality is that when we get to
15 the end of this, we're hoping to be able to advise
16 folks from attorneys to judges to legislators to
17 probation and parole folks on how to open doors or at
18 least unlock the door and at least let it come open a
19 little bit.

20 What would you suggest in your vision for
21 enhanced enforcement? For all three of you, how would
22 you envision that happening? If you had an ideal
23 situation, how would you deal with that? Particularly,
24 I think we all agree that the underlying issues for a
25 lot of collateral consequences are there because of

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2 racial, economic discrimination.

3 MS. WARTH: Well, in terms of the New York
4 experience and enforcement of our anti-discrimination
5 statute, my vision is three-fold. One, I think there
6 needs to be much better education. So I really
7 appreciate the efforts of our current leaders, the
8 Obama administration in putting together the
9 Interagency Reentry Council, Governor Andrew Cuomo in
10 having a workforce development initiative to educate
11 employers on the value of hiring people and obviously
12 including people with past convictions. I think it
13 needs to go beyond employment.

14 I think the second thing that needs to
15 happen is there does need to be targeted litigation.
16 In New York, you do have a private right of action if
17 an employer has not complied with Article 23-A, but you
18 can also seek remedy through the Division of Human
19 Rights, either the statewide Division of Human Rights
20 or in New York City, the New York City Division of
21 Human Rights. And we have seen -- recently, Attorney
22 General Schneiderman, for example, has really sort
23 of -- his human rights or civil rights department has
24 really stepped up on enforcement and really just
25 recently, for example, settled a lawsuit against Quest

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2 Diagnostics, who have agreed to comply with Article
3 23-A. It always makes me laugh that our clients are
4 incarcerated for not following the law. Then they go
5 out to look for work and face employers who don't
6 follow the law. It's very frustrating.

7 But I think the third thing that needs to
8 happen is -- the litigation is difficult. It's hard to
9 file a lawsuit. It's hard to win a lawsuit. So I do
10 think there needs to be some -- the law needs to
11 include penalties for just objective failure to follow
12 the law. For example, I think that you know the
13 changes to New York law that require employers, for
14 example, to give applicants a copy of 23-A when they do
15 a criminal background check. I did a training for over
16 50 employers in Upstate New York last year, and none of
17 them, none of them are following that. None of them
18 are giving people a copy of Article 23-A.

19 I think they should be fined for doing that.
20 I think they should be fined whether or not it's proved
21 that somebody has been hurt by their failure to do
22 that. So I think that those kinds of step-up things
23 can be important, but I think I want Glenn to talk
24 about the bigger question you asked is how do you
25 prepare people for dealing with this?

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2 MR. MARTIN: If you're going to take that
3 on, you can have another two years of listening to
4 people. That's big. I will touch on that, but I
5 wanted to respond to another part of the question also.
6 I mean, you don't have many employers that will look
7 across the table and say, you know, I really like you,
8 but you're in that darn wheelchair because there is
9 enforcement of the Americans With Disabilities Act, and
10 the general public feels comfortable that there's
11 enforcement of the Americans With Disabilities Act.

12 So I would charge you to think about two
13 things. One is language. I think that our criminal
14 justice system has done a great job of creating its own
15 messaging, and we've all adopted it. And
16 unfortunately, what it does is it dehumanizes people we
17 care about. It talks about convicts and ex-offenders
18 and prisoners, and those are not the things that the
19 general public wants to really have a discussion about.
20 So to the extent that we can move the conversation back
21 to talking about people, I think there's huge value in
22 that as small of a tweak as that is.

23 I mean, we live in a country that's driven
24 by communications and messaging, and certain groups of
25 folks do a really good job of that and other groups do

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2 a much more poor job. I think that if we're going to
3 move the system, we need to define the language
4 everybody uses to move it in a certain direction. I
5 think if you look at the gay rights movement, it's a
6 great example of how they were able to shift the
7 language and make it so that anybody who used the
8 previous language was actually looked upon poorly as a
9 result. That's one sort of Cliffs Note.

10 The other thing I think about is Michelle
11 Alexander's book, *The New Jim Crow*, and while I don't
12 agree with everything in the book, mainly the siloing
13 of nonviolent drug offenders versus everyone else and
14 the remedy offered to the system, I do think she did an
15 excellent job of moving it away from just criminal
16 justice and good and evil. I think she recognizes that
17 when you get to a system of 2.3 million people
18 incarcerated, 7 million under supervision and 54
19 million records on file, that you've gone far beyond
20 locking up just the bad people, and what she did was
21 she tied it back to the civil rights movement and
22 essentially said the job wasn't finished. The job
23 wasn't well done. We need to revisit those things, and
24 to the extent that the general public is more willing
25 to have that discussion than a discussion about people

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2 who've broken the law, I think again there's a huge
3 value in just shifting the conversation and connecting
4 it to something that people are willing to have a
5 discussion about at the dinner table, and that's not
6 criminal justice.

7 I remember leaving prison in New York State
8 and having a conversation with the correction officer
9 on my unit, who I spent five years with essentially.
10 As much as you're told not to talk to the correction
11 officer, you're around the guy for five years. You're
12 going to talk to him, and he said -- amongst other
13 things, he said, you know, you being here helped me get
14 my boat, and when your son gets here, he's going to
15 help my son get his boat.

16 As tough as that was to hear, I think it was
17 one of the most valuable things I've heard because it
18 reminded me that it's not just about criminal justice,
19 and if you try to reform the system but we keep using
20 that terminology, we're destined to lose against a
21 system where if we don't hit a tipping point, we're not
22 going to be successful at all because we obviously
23 didn't get here overnight. So those are some of my
24 thoughts about how you shift the system and how you tie
25 the conversation back to the reality that race and

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2 criminal records are available to people, they make
3 judgment calls. So that's why I would push for the
4 move towards either expungement with the fallback being
5 civil sealing or something that keeps it out of the
6 hands of decision makers for civil purposes but might
7 not necessarily for criminal purposes.

8 MS. VANDERHORST: What about -- just to
9 follow up on that, what about --

10 MR. JONES: Geneva, I really can't. I have
11 too many people who are in line. I apologize.

12 MS. JACOBS: Can I say something?

13 MR. JONES: Sure, Absolutely.

14 MS. JACOBS: I think the questions that
15 you're asking are really important, and the
16 recommendations you'll make are going to be important
17 and will make a difference. But trained as I am in
18 other disciplines than law, I know about the law of
19 unanticipated consequences, and there are certain
20 changes that need to occur here that are more in spirit
21 and perception than they are ever going to be
22 accomplished through changes in law because everything
23 that we do can be sabotaged in some other kind of way.

24 So I was struck with your first question
25 thinking about the ceremonies. Yes, our clients would

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2 go, and they would appreciate it, but the point is not
3 really them. It's really to somehow signal to the
4 outside world that they're a whole human being again,
5 that, you know, is worthy of access to opportunity.
6 And so how do you change the audience's perception? I
7 mean, a ceremony in and of itself is just going to be
8 another certificate that they get to put up on their
9 wall, and for our clients, that's the booby prize.
10 They get certificates all the time. That's what their
11 life has been like, right. So how do we make that
12 real? How do we make an authentic restoration? And
13 that's a larger challenge, where again I challenge you
14 to recognize the leadership that you have to the larger
15 world.

16 MR. JONES: Larry.

17 MR. GOLDMAN: Let me just state kind of an
18 informational question, then follow it up. My
19 colleague, Rick Collins is here. Rick is co-chair of
20 the State Bar Association committee, which I'm a member
21 also, that has proposed an expungement bill. Has it
22 gone anywhere? I don't know or is it just -- you know,
23 the State Bar people sometimes listen to. It's not
24 like a Criminal Bar Association.

25 MS. WARTH: Right. The short answer is no.

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2 The bigger answer is there's a couple of sealing
3 expungement bills pending right now. So there's
4 conversation about sealing and expungement in New York
5 that I think is very important. I'd like to see more
6 conversation. I'd like to see more inclusive -- I'd
7 like to see conversations be more inclusive about who
8 benefits from sealing and expungement, but I think
9 there's going to be -- there needs to be a campaign. A
10 lot of it stems from exactly what Ann is saying. There
11 just needs to be a change in perception before we can
12 convince legislature that this is necessary.

13 MR. GOLDMAN: I'm not going to follow up.

14 MR. JONES: Margie.

15 MS. LOVE: I want to follow this up.

16 There's been a lot of resistance to expungement,
17 whatever that means, as sort of hiding stuff, and I
18 mean two sessions trying to get a sealing
19 recommendation through the ABA House and just being
20 burned to the ground by the business community, the
21 media.

22 I want to follow up with something you said
23 about wanting to have a bright line to tell employers
24 at this point you can't consider the record, and you
25 follow that up because it is sealed or expunged. Now,

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2 I mean, there are states that have laws that say you
3 cannot consider a conviction that don't necessarily
4 couple it with a sealing feature. If you had a
5 bright-line law that said after ten years, after seven
6 years, whatever it is, you may not consider -- forget
7 the expungement -- would that be easier to sell?

8 MS. WARTH: Oh, I see what you're saying.
9 So it's not necessarily sealed or expunged, but
10 employers are told. That's a good question, and I
11 haven't thought a lot about that. I think that that
12 would help. That would be a definite good step. You
13 know, my experience has been, you know, in New York, we
14 do seal certain records, right, and in a limited
15 conviction sealing. Yet employers often don't get that
16 information because mistakes are rampant on criminal
17 history records, and I know Judy is going to talk about
18 that later this afternoon.

19 We've had a lot of success when employers
20 make bad decisions based on mistaken information, and
21 when we go back to the employer and say you weren't
22 permitted to consider this information, that they
23 reconsider. We've gotten good employment outcomes from
24 that. So that suggests to me that, yes, if they're
25 told they can't consider the information, it would have

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2 to be coupled with and the applicant is not required to
3 disclose it, right?

4 MS. LOVE: Right, right. There are some
5 states that have that also. You're not allowed to ask
6 about things that are --

7 MS. WARTH: And I can legally deny if you
8 ask the wrong question.

9 MS. LOVE: Well, that gets into sort of
10 muddy ground when you sort of "tell a lie," but you're
11 not allowed to ask about is another sort of approach.
12 I just wanted to make a comment about this whole idea
13 about the messaging, about the kind of signals we send.
14 I've always thought that the first audience for us is
15 what I call the willing but worried employers. The
16 ones who really are hard over and don't want to do it
17 and just -- I mean, they're maybe our children's
18 problem.

19 The ones that I want to get to are the ones
20 that who would do it if they weren't so worried about
21 it, and that they saw it had a safe harbor, and they
22 were told in a bright-line rule, this is the right
23 thing to do. Maybe you couple it with penalties, but
24 maybe just say this is the right thing. You're not
25 supposed to do this. That's sort of where I'm thinking

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2 the first step is here.

3 MS. WARTH: I do agree with that. I do also
4 agree though that employers understand that they're
5 being told that this is the right thing to do when
6 there is a penalty attached to it. That's the reality,
7 right?

8 MS. LOVE: Yeah, and there are some states
9 that have those, too.

10 MS. WARTH: Right, right. But I do want to
11 go back to the other question because I should have
12 thought about this because that's one of the bills
13 we're working on right now in the domain of higher
14 education is short of sealing, saying to admissions
15 offices at colleges and universities you can't ask
16 about, you can't consider. So we would endorse that.

17 MR. JONES: Vicki.

18 MS. YOUNG: I can't remember. I think it
19 was Ms. Warth when you were talking about when the time
20 is to do advisement about collateral consequences and
21 the defense attorney needs to know about the client and
22 what the potential are so you can use it in plea
23 bargaining or disparate impact or sentencing. You need
24 to have an audience on the other side who's the
25 prosecutor, and for a long time, you know, the response

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2 was I'm sorry your client is not a citizen, but he
3 should have thought of that before, right. We've heard
4 that a lot.

5 So there's starting to be a little bit of
6 movement on the immigration/deportation issues, but
7 have you done presentations or gotten feedback with the
8 prosecuting community as to whether that's even
9 something to be discussed or considered or, fine, the
10 bleeding heart defense attorney can talk to me about
11 it, but sorry, my job is to do X? I mean, you can't
12 plea bargain if they're not talking to you. Well, that
13 happens all the time, but anyway, you know what I mean.

14 MR. MARTIN: So I'm not going to answer the
15 question directly, but I'll get as close as possible,
16 which is prosecutors tend to derive their power because
17 they say they represent the victims of the crime, in
18 most situations where there's a victim. I think we
19 need to do a better job in terms of messaging, right.
20 Our clients are the most pervasive victims in the
21 United States, young black men, except that's not the
22 conversation we tend to have when we think of victims.
23 So to what extent are these prosecutors thinking of
24 them as victims, number one.

25 Number two, bringing victims into the

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2 conversation and recognizing that sometimes they are
3 victims today and offenders the next day, but again,
4 just taking away some of that power that's based on a
5 falsehood to be quite honest by being more comfortable
6 engaging the victim's community, the victim's rights
7 community, and the more nontraditional victim's
8 community.

9 MS. JACOBS: But we've seen substantial
10 changes in the culture of prosecution in the last
11 couple of decades, right. I mean, they're
12 participating in all of these specialized courts, and I
13 don't want to overstate it, and I don't want to
14 overgeneralize based on, you know, a Joe Hynes in
15 Brooklyn, but there are some parts of the prosecutorial
16 community that do take an expanded view of what is
17 possible in criminal proceedings.

18 MR. MARTIN: There are, but what I see is
19 that as long as they have the ability to exercise the
20 power when they feel comfortable to be able to do so
21 because the opposite side is every time we try to move
22 a piece of legislation that moves us in the right
23 direction, expungement, we had probation hearings here
24 in New York City being the driver behind an expungement
25 bill, and it was the prosecutor that tried to water it

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2 down so much that we wouldn't have passed the laugh
3 test with the bill.

4 So unfortunately, when it comes down to
5 changing and taking away their power to be the decision
6 maker, they're not as amenable, but I agree with you
7 that a lot of them have moved -- I mean, we're in the
8 middle of reentry mania. Everyone is part of it.
9 Funding is driving the conversation. So to the extent
10 that they've been exposed to it and they're part of it
11 now, there's value in it, but we have a lot further to
12 go.

13 MS. WARTH: We saw that in the drug law
14 reform in New York, and establishment of an article in
15 our law really sort of setting up the procedures and
16 requirements for judicial diversion, a huge, huge, huge
17 opposition from the prosecutorial community as a whole
18 because they thought it was taking the gatekeeping role
19 away from them and putting it to a mutual third party,
20 the judge, which one would think would be okay, but
21 apparently, it's not.

22 But I do have to say this. I get probably
23 more frustrated than Ann in talking to prosecutors as
24 groups. I am less frustrated though when I talk to
25 them one-on-one, and I consistently have good outcomes

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2 when we have that one-on-one conversation. So I just
3 think we can't give that up. I'm not sure what that
4 means for this group, but I hope that maybe there's
5 more to be taken from that and not giving up on
6 prosecutors as individuals and maybe learning from
7 those lessons how we can message to them as a group.

8 MR. MARTIN: That's a really good point.
9 Case in point, I mean, we do alternative to
10 incarceration programs. There was a client I was able
11 to shake loose from the system about six, seven months
12 ago, who had some pretty serious charges; weapons
13 possession, terrorism threat, attempted assault,
14 endangering the welfare of a child, all of these really
15 serious looking charges. Except when you look at the
16 nuance of what really happened, it was a totally
17 different picture painted, but the conversation I had
18 with that particular prosecutor that ultimately led him
19 to say it was okay for this person to be diverted, I
20 could never have in front of a group of prosecutors.
21 It would be a nonstarter, yet in front of the
22 individual, the one-on-one conversation works.

23 MS. WARTH: They like to know about our
24 clients. It changes their thinking. They're open to
25 changing their thinking.

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2 MR. JONES: We have just a couple of
3 minutes. Penny.

4 MS. STRONG: The only question I had was
5 looking at some of these cases all the way from the
6 barber to the teacher who applied, would it be helpful
7 on the other end of legislative fixes to try to get
8 some of antiquated occupational bars out of the --
9 whether it's, you know, by legislation or
10 administrative rules, and do you have a lot of those in
11 New York? I know they're typical nationwide obviously
12 for medical, legal professions, teaching professions
13 generally have a good moral character conduct, but if
14 any of you could comment on that.

15 MS. WARTH: Yes. Huge, huge yes. Legal
16 Action Center where Glenn used to work, and I think
17 when you were there did a report on occupational
18 licensing in New York and discovered over 100 types of
19 positions in New York that require some type of
20 administrative review, licensing or clearance, and most
21 of these are entry-level jobs; home healthcare,
22 security, you know, cosmetology, barbering. These are
23 entry-level jobs that a lot of clients like to get
24 involved in.

25 We see this often. We do a lot of advocacy

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2 for the Department of Health for home healthcare and
3 long-term care, and I have to say that because so many
4 of our clients come from poor communities, they've
5 dealt with health issues since they were children,
6 right. So many of these people, this work is natural
7 to them. They feel comfortable with it, and they value
8 it as compassionate caregiving. These are the people I
9 would want to take care of my parents, right, yet
10 they're screened out by the Department of Health for a
11 misdemeanor conviction from six years ago. Really?
12 That to me is --

13 MS. LOVE: Try 26.

14 MS. WARTH: Yeah. Well, I had one guy
15 screened out from driving a bus because he had an open
16 arrest from 1968.

17 MR. MARTIN: Some of the people we see
18 barred from higher education are applying for online
19 courses, where they're not even going to be on campus,
20 yet their criminal record is enough to bar them from
21 it.

22 MR. JONES: We have time for just one more
23 question. Jenny.

24 MS. ROBERTS: So on the expungement front,
25 in some states, there's been talk of shielding rather

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2 like they now can in many jurisdictions.

3 MS. WARTH: I do see that as value. I don't
4 want to give up outright expungements, though, and
5 largely because of the things Glenn had said about at
6 what point are you done, completely done. So I'm going
7 to keep advocating for it when push comes to shove.

8 MR. MARTIN: You know, what comes to mind to
9 me as I listen to this conversation, I keep thinking
10 about chilling effect, chilling effect, chilling
11 effect. We have to do things that also address the
12 fact that there's a chilling effect when you're a
13 jobseeker with a criminal record.

14 MR. JONES: We are unfortunately out of
15 time, and I believe that they're standing in the
16 hallway to bring in lunch, and I know where people's
17 priorities are. So I would encourage you guys, if you
18 have the time, the ability and the permission, to stick
19 around and have some lunch. I'm sure people have
20 additional questions, but I do want you to know -- and
21 unfortunately, I didn't get to ask my question, but I
22 do want you to know that this has been a fabulous
23 conversation. Really, if we did nothing else in
24 New York while we're here, this has really been worth
25 it. So I appreciate your time, and I appreciate you

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2 bringing your talents to help us in this endeavor.

3 Thank you very much.

4 MS. WARTH: Thank you for the opportunity.

5 MS. JACOBS: Thank you.

6 MR. MARTIN: Thank you.

7 (Whereupon, a lunch recess was taken.)

8 MR. JONES: All right. Let's reconvene. We
9 are pleased to have you here and are looking forward to
10 an interesting dialogue. As you guys know, we have
11 been sort of going across the country speaking to
12 various and sundry stakeholders in this whole world of
13 restoration of rights and status after conviction, and
14 New York is our last stop. So we are pleased that you
15 all took the time to come and talk about this very
16 important topic with us.

17 The way that we operate is that we're going
18 to give each of you five to ten minutes to give us sort
19 of the benefit of your thoughts by way of an opening
20 statement, and then we've got lots of questions. The
21 way that we do our questioning is that one of us leads
22 the discussion, and to the extent that there's time,
23 when that portion of the questioning is done, the rest
24 of us are going to have an opportunity to question as
25 well.

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2 For the purposes of this discussion, Geneva
3 Vanderhorst is going to be the person -- I can't see
4 her, but I'm hoping she's there -- is going to lead the
5 discussion. And so at this point, I will turn the
6 floor over to you, and I guess maybe, Ms. Shlosberg,
7 you should start.

8 DR. SHLOSBERG: Sure. Thank you very much
9 for having me. I'm very pleased to be here. Just a
10 little background, I got my Ph.D. in criminal justice
11 at John Jay College. I have a master's degree in
12 forensic psychology. I currently work as a professor
13 at Fairleigh Dickinson University, where I teach
14 courses on reentry and reintegration, among other less
15 interesting courses such as criminology and these other
16 courses. I have also been doing program evaluations
17 for an alternative to incarceration program at the
18 Kings County District Attorney's Office where, you
19 know, it's a drug treatment program whereby if they
20 successfully complete, then their record gets wiped
21 clean.

22 My primary research area is wrongful
23 convictions, and I've written and published a few
24 articles on expungement and how it applies to wrongful
25 conviction. However, I do think it's relevant to the

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2 broader discussion at hand just to give you, you know,
3 a little snippet about my research. Again, I looked at
4 individuals who had been wrongfully convicted of
5 crimes, and among my sample, about one-third still have
6 evidence of their wrongful conviction on their record.
7 In other words, their record was not expunged. Among
8 that group, they were almost twice as likely to have a
9 post-exoneration offense. In other words, you know,
10 recidivism is much higher for individuals that had
11 their records not expunged. The reason I think that is
12 so important is because -- well, besides the fact that
13 there's issues that they shouldn't have had the record
14 to begin with -- it doesn't matter if guilty or
15 innocent, still having a criminal record has
16 far-reaching consequences. The biggest one being able
17 to go out and obtain employment.

18 Right now, I'm doing a qualitative review
19 that kind of explores that because my research was
20 primarily quantitative. I did some regression analysis
21 while controlling for a large amount of other factors
22 that we know are related to recidivism. Expungements,
23 while controlling for other factors, still jumped out
24 as those who had an expungement, it acted as a
25 protective factor against reoffending. That's how I

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2 find it to be relevant. I'm also in the process of
3 trying to work out some sort of pilot project. I don't
4 know how successful it will be, but hopefully to do a
5 pilot project with nonviolent offenders in Kings County
6 to see if we can do some sort of experimental design of
7 expungement among certain offenders, but that's in its
8 very early stages. That's just a plan of mine. So I
9 guess I will stop there because I could keep going for
10 hours on the topic.

11 MR. JONES: Thank you very much.

12 Mr. Acevedo.

13 MR. ACEVEDO: I won't be much longer. I'll
14 try not to be much longer anyway. I'm an attorney in
15 private practice here in New York City. I'm probably
16 one of the last few general practitioners left in New
17 York. In the legal field today, most people tend to
18 specialize, especially at bigger firms like this. I've
19 been practicing law now in New York City for 16 years.
20 I do a lot of different things, but the bulk of my
21 practice is two things. I do lots of criminal, trial
22 and appellate work primarily at the federal level but
23 lots of state work, too, and the second thing I do a
24 lot of is I represent ex-offenders who experience
25 discrimination either in the job place or with various

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2 think they played a large role in me getting admitted
3 to the bar.

4 But I mention law school for this reason. I
5 was even discriminated by the law schools during the
6 application process. One particular law school said --
7 it was the very first law school that responded to my
8 application. They said they would accept me if I went
9 to their summer minority enrichment program and
10 finished the program with a C or better. I approached
11 them, and I said, well, how did you pick me? Was it
12 based on my last name or was it based on my academics
13 or something else? Something else being my record.
14 And they said, well, we don't have to answer that
15 question. I told them, well, it can't be based on my
16 academics because I have a perfect 4.0 through 178
17 credits. I said I did very well on the LSAT obviously
18 or you wouldn't be talking to me. I said so what is
19 the criteria for me to finish your minority enrichment
20 program? Because I feel like I don't need to be
21 enriched any more than I had been enriched. They said
22 it's a take it or leave it proposal. So I left it
23 fortunately, but I got into many other law schools who
24 were very generous.

25 I should say on the other side of that coin,

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2 one particular law school extremely prestigious
3 throughout the country called me in to interview me and
4 said, listen, before we start, we want to tell you
5 we're not here to question you about your background.
6 We're not concerned. We're here to make sure you know
7 if you accept our invitation, you're going to be going
8 to school with a bunch of people who were born with
9 silver spoons in their mouth, and you may not feel
10 comfortable. So they took a whole different approach,
11 and I loved that, but I didn't go there. I went to
12 Fordham.

13 So I come to you today at this table, I
14 think, with a unique perspective in this respect. I'm
15 an ex-offender. So I know what it's like to go through
16 that. I've been in jail. I know what it's like to be
17 discriminated against. I know what it's like to make
18 that transition. That transition from prison life
19 where everything is regimented to the streets is
20 extremely difficult. When I got out, I didn't know
21 what a fax machine was. I had never used an ATM. Cell
22 phones I didn't know. It was, you know, disruptive at
23 best and scary. So it's hard to make that transition.
24 Critical in that transition process is employment, and
25 if you can't get a job, if you can't stay busy, if you

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2 can't support yourself, that recidivism rate is going
3 to go right up, as Amy said, because that record will
4 follow you.

5 Now, in this post-9/11 world, you can no
6 longer hide your record. It's not like the old days
7 where you lie on your job application. Somebody says,
8 we like them anyway. We're not going to spend the
9 money for a background check. Everybody runs checks on
10 you today, but it's particularly troubling when DCJS
11 themselves are selling rap sheets to potential
12 employers for nominal fees. So it's very, very
13 difficult to escape that background, and if you can't
14 get around that background, you're going to have to
15 learn how to deal with it with potential employers and
16 licensing agencies. I used to give a training in
17 prison entitled How to Turn Your Liabilities Into
18 Assets, and it taught people how to use their
19 backgrounds, because they couldn't get rid of them, to
20 their advantage.

21 For instance, you know, three-quarters of
22 everyone in prison has a substance abuse problem. So
23 you go to the head of the line if you are applying for
24 a substance abuse counselor. Youth counselors, I
25 applied for those, went to the head of the line because

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2 I knew what it was to be a troubled youth. I was a
3 troubled youth. So you have to pitch that to
4 employers.

5 Having said that, by and large, you can't
6 shake the stereotypes. They're too engrained. A lot
7 of employers will not let you in the door once they
8 hear you have a troubled background, and even if you're
9 in the door, I had a case just this past week where a
10 woman had worked for someone for five years and had
11 been promoted to a manager in a retail chain, and the
12 agency implemented these background checks. So the
13 first time she had to go through a background check,
14 and they came up with an old conviction, and they fired
15 her. She never lied about it, but they fired her
16 despite the fact they knew she was a good employee, and
17 she had already risen through the ranks. So it's
18 troubling. I think the most troubling thing about it
19 is that it never ends. It's ongoing. So no matter how
20 much you perform and how much you accomplish, you never
21 can shake those stereotypes in certain people's minds.

22 I want to give you two quick examples, and
23 I'll end on that. I was recently involved in a
24 matrimonial case, and I don't by choice do
25 matrimonials. They are nasty by and large. They bring

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2 administrator for an estate worth over \$150 million.
3 He's involved in probate court in Arizona because
4 that's where the guy died, but the guy was originally
5 from New York. So my client has an Arizona lawyer
6 handling the probate matter, as he should, but one of
7 the people challenging the estate is the very law
8 school who questioned me and told me I should go to
9 that minority enrichment program. So there's got to be
10 a God that put me on this case, got to be. So that New
11 York entity, that law school made a motion for summary
12 judgment here in New York in federal court based on
13 diversity and what have you. They wanted to hire local
14 counsel. Arizona counsel wanted to hire local counsel
15 who had tried cases and was familiar with the federal
16 court. So my client said, I got the perfect guy for
17 you. He's tried many cases. He's not bashful. He
18 knows the players. He's a former federal clerk in the
19 Southern District.

20 The lawyer flies in to interview me, asks
21 all these questions. I was even amazed that I could
22 answer most of them, and then at the end, I could see
23 he's pretty pleased. He says to me, I have one other
24 question that's unrelated to this. Do you mind? And,
25 of course, I knew what the hell it was, but my client

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2 you've established yourself somewhat, but I find that
3 not to be the case.

4 But I remind you that I am the rare,
5 fortunate exception because I can still go beyond that.
6 I'm self-employed. I make an okay living. Most of my
7 clients don't have that advantage, and there needs to
8 be something put in place that has real teeth that can
9 protect clients and get them in the door with potential
10 employers, get them licensed so that they can become
11 productive citizens again. There's no point in having
12 a prison system whose one of the goals and objectives
13 is to rehabilitate if we're not giving people second
14 chances. It just doesn't make sense. Thank you for
15 your time.

16 MR. JONES: Thank you. Is it Wiese or
17 Wiese?

18 MR. WIESE: Wiese.

19 MR. JONES: Mr. Wiese.

20 MR. WIESE: Good afternoon. My name is
21 Jesse Wiese. I'm a policy analyst for the Justice
22 Fellowship. I just can't tell you how encouraged I was
23 to hear about this endeavor that you all are taking. I
24 was fortunate enough to sit in on the D.C. hearings,
25 and I was so excited about it I literally begged

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2 Angelyn to let me testify in New York City. But I just
3 think it's excellent the way, the approach that you're
4 taking here. You're not just looking at one
5 jurisdiction. There are so many jurisdictional quirks
6 in this issue. I think by you going across the country
7 and just getting a composite view, I think is
8 excellent.

9 Just some background on me, I'm afraid that
10 Mr. Acevedo here basically stole my story, except he's
11 a little more successful than I am at this point. I've
12 spent seven and a half years in prison. I was arrested
13 when I was 21. I had worked in reentry as well, and I
14 graduated magna cum laude from law school. I think I'm
15 going to juggle some hats here since I am representing
16 the Justice Fellowship. So I'll probably put on a hat
17 and take off a hat throughout this thing, but I do want
18 to be brief because I really want to get your
19 questions. I think that's probably the most important
20 piece of this whole thing. So I just want to be brief,
21 but I kind of want to talk briefly about kind of my
22 areas where I've been exposed to on this issue.

23 First, I just wanted to talk about, you
24 know, reentry. I covered reentry in Iowa for a program
25 where I covered about 100 men. There's nothing that

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2 managed to maneuver myself through some of the most
3 dangerous avenues in our culture for seven and a half
4 years without getting into an altercation. I'm pretty
5 sure I'll be okay here.

6 Anyway, so I ended up graduating. I knew
7 the whole time I was in law school the Character and
8 Fitness Board was before me. I knew I was going to
9 have to do something. I was trying to meet as many
10 people as I could. I was networking as strong as I
11 could, and I presented a strong case for the Character
12 and Fitness Board in Virginia. In Virginia, you have
13 to prove by clear and convincing evidence that you have
14 the moral character and fitness to practice law, which
15 is actually a pretty high standard, as you all know,
16 but I was able to do that. I did prove by clear and
17 convincing evidence to the Moral Character and Fitness
18 Committee. Unfortunately, the Virginia Board of Bar
19 Examiners unanimously overturned that, and so it's an
20 interesting -- I think it's a great microcosm of what
21 we're up against in our society.

22 You know, one of the things I was challenged
23 with the most when I walked into prison, it wasn't
24 necessarily that there were more black people than
25 white people or Hispanics. It was that I was from

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2 conviction and how we ascribe their worth to their
3 criminal conviction. I mean, this is really a human
4 dignity issue and that is -- and I wanted to just echo
5 what Glenn Martin was saying earlier. That said, I'll
6 close. I'd really like to hear any questions that you
7 guys have. Thanks for your time.

8 MR. JONES: Thank you very much. Geneva.

9 MS. VANDERHORST: I want to thank each of
10 you for making yourselves available. I'm going to try
11 to keep my questions focused on expungements,
12 certificates of relief, ways to transition from
13 wherever you start off, whether it's probation, parole,
14 or being in a facility like going through reentry,
15 and one of the things I've noticed in your bios for
16 Mr. Wiese and Mr. Acevedo is that you didn't mention
17 anything about expungements or certificates of relief.
18 Did either of you encounter those kind of mechanisms,
19 and if so, were they at all helpful? Did you know
20 about them, and how did you learn about them? That's
21 four questions in one.

22 MR. WIESE: I had heard about them.
23 Unfortunately, in Iowa, they do not have a certificate
24 of rehabilitation. I had become very familiar with
25 certificates of rehabilitation at my current position

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2 at the Justice Fellowship. I testified for a bill in
3 Maryland for a certificate of rehabilitation recently,
4 which was very interesting actually because the
5 prosecutor's office vehemently opposed it. He wanted
6 to rename it because he thought by using the word
7 "rehabilitation," it would invoke some federal -- that
8 a person could walk into federal court and gain some
9 kind of status that he didn't have before. It was
10 absolutely ridiculous.

11 But my concern -- I testified for that bill.
12 I'm for the idea. My issue with certificates of
13 rehabilitation is they generally have no teeth. We
14 give employers tax incentives to hire people with
15 criminal convictions, and most employers won't take
16 advantage of those tax incentives. A little piece of
17 paper is going to do very little to incentivize them to
18 hire people. So there are some states that if you can
19 give the certificates of rehabilitation some teeth --
20 so, for instance, if you can create a presumption that
21 overcomes occupational licenses, so if you get this
22 rehabilitation, then it automatically puts you on an
23 even scale, if you will, regarding occupational
24 licenses when you apply.

25 I think those are the types of things that

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2 There is no expungement in New York by and
3 large, which is interesting because there is
4 expungement in New Jersey, a bordering state. And I
5 have a case that just was heard in the appellate
6 division, where I have a client who had a conviction
7 expunged in New Jersey, and that very same law school
8 that discriminated against me and that is involved in
9 the probate, they discharged him after three successful
10 semesters. They discharged him from the law school
11 because they said he did not disclose on his
12 application the original crime of arrest. He did
13 disclose the expunged conviction. There's no question,
14 but he didn't disclose the crime of arrest. By the
15 way, an arrest in and of itself, as you know, has no
16 bearing. What the heck is the point of that?

17 New York law protects applicants from
18 employers asking about arrests, but this particular law
19 school said that they had a policy that distinguished
20 between drug sellers and drug users. So if someone was
21 arrested for a drug sale, they wouldn't have let him
22 in. Whereby if he was convicted of a drug possession,
23 which he was, they would let him in. So it's really a
24 mind-boggling argument, and I had to spend quite some
25 time with the trial court trying to explain to the

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2 in a supply and demand society. I mean, nobody is
3 fighting that people with criminal convictions get
4 jobs. Many people are fighting for veterans to get
5 jobs and other people. So, I mean, it's a cultural
6 dynamic that we really have to change the language. We
7 have to change how we talk about it, but yes, I agree.

8 On expungements, I think expungements are
9 great. I do think people are concerned. I think
10 somewhat you have to address the legitimacy of their
11 concern. Although, I think you have to parse it out.
12 I mean, people are driven mainly by fear. In a world
13 of evidence-based practices, where everybody is talking
14 about evidence-based practices right now, and if you
15 want to look at there's an article by -- I can't
16 remember his first name -- by Blumstein, I think, who
17 actually says -- you know, he kind of charts out based
18 on the crime, how long you've been out, basically your
19 recidivism rate goes back to the rest of society. So
20 if we can use that to talk to insurance companies,
21 where employers are really putting the kibosh to people
22 because they can't get insured because the insurance
23 company said you can't hire anybody with a felony
24 conviction. They're not going to insure you. So if we
25 can create some kind of evidence that people will look

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2 at, some kind of scientific proof, I think it will
3 really be helpful. So when you look at expungements,
4 you can say, well, you were arrested for this crime at
5 this age. If you don't do anything within five years,
6 seven years, three years, whatever it is, then your
7 record can be expunged. I think that's a reasonable
8 approach to approach it.

9 MS. VANDERHORST: I want to bring in
10 Ms. Shlosberg and particularly your article on The
11 Expungement Myth, and really talk to all three of you
12 on solutions. Even if expungements worked, we still
13 have an issue with private data mining companies who
14 aren't really being held responsible for the accuracy
15 of the records that they issue on background checks.

16 In an ideal situation, what would you
17 suggest? First of all, I guess, whose role would you
18 suggest would bear the responsibility of making sure
19 that those things are accurate? Is it the companies?
20 Is it the judges who need to go back and check and see
21 what's being put in by the clerks? Is it the FBI or is
22 it federal legislators or local legislators, and then
23 what should decide whose role it is to actually make
24 that happen? What would you suggest that they actually
25 put in writing that has to be followed, particularly by

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2 private companies?

3 DR. SHLOSBERG: What I found in my research,
4 I went through a commercial data provider in order to
5 run the background checks on the individuals in my
6 sample. You know, you pay them money. They give you
7 the information. Within 48 hours, I had my rap sheets.
8 They actually get their information from the individual
9 county courts. So I do know of cases where even if
10 it's been expunged on a state level or a county level,
11 it still does show up, but from what I understand, if
12 it's wiped from the federal, state, local repositories,
13 it's not going to show up because the commercial data
14 providers are getting their information from those
15 sources. However, that's only in my experience. As
16 you can imagine, there are hundreds of companies that
17 do that type of work. So the one company I went
18 through, that's how they got their information, and the
19 few companies I researched, you know, that's how --
20 they go right to the source to get their information.

21 The issue is, as I mentioned, it's not
22 accurate. You know, there were several cases in
23 which -- I wasn't even looking for this in my
24 particular research, but there were several cases in
25 which even the charges and the dispositions just

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2 weren't correct. So you have to think, you know, if
3 you got this straight from the source, where is this
4 mistake coming from, right? So you know, it's very
5 inaccurate, you know, on all levels. I think that
6 these companies should be held liable for that, but,
7 you know, how do you do that? I don't know.

8 MR. ACEVEDO: I would police it at the front
9 end in the court, and here's how I would do it. Just
10 about all my clients who are ex-offenders that have
11 discrimination issues, one of the first thing I do is I
12 get them to sign the papers so I can get their rap
13 sheet on the state and federal level. In my
14 experience, three out of every four rap sheets have
15 mistakes on them. I don't mean typos, significant
16 mistakes.

17 So you need to catch these problems when
18 they occur, and the way I would do that -- it's
19 interesting. The prison system in New York, when an
20 inmate goes to prison, they have a time computation
21 clerk who gets the judgment and figures out to the day
22 when they're going home, when they're seeing parole.
23 You can fight with them for weeks over two days, three
24 days, arrest, bail time. So they pay so much attention
25 to detail when it comes to that. I would require the

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2 if you pay attention to detail. I don't think it's
3 like this big, legal mind. I think it's paying
4 attention to detail. People don't care because of
5 who's involved. That's the problem. Who cares? The
6 person is no good. He's going to jail anyway. So I'd
7 police it at the front end.

8 MS. VANDERHORST: We have a pretrial agency
9 in D.C. that's responsible for doing that. So when an
10 individual attorney goes and talks to the case manager
11 and says, where did you get this record because I have
12 something else that says this isn't accurate, then
13 you're giving them a hard time, which means your
14 client's case is likely to be called last because
15 you're telling them to go back and check the accuracy.

16 Even at the other end, when you get into a
17 presentence report, judges will delay sentencing for
18 months because you said the probation officer who did
19 the interview got the accuracy of the records wrong.
20 So your client is sitting in jail for another two,
21 three months waiting for sentencing because you
22 complained about the accuracy of records.

23 MR. ACEVEDO: I agree, and I've experienced
24 that. Perhaps the resolution is to put it on a
25 separate track. After the case is over, you have

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2 separate people dealing with it outside the -- like if
3 you have a discovery issue in a civil case, it goes to
4 a magistrate. So the judge doesn't hear the settlement
5 talk. So have a separate track is my suggestion. And
6 all of this involves money, but it's a big issue. It
7 really is a big issue. If you put it on a separate
8 track, you might be able to resolve it.

9 MS. VANDERHORST: One last question
10 particularly with expungements. In my district, in my
11 area, when a judge signs an expungement order, it is a
12 court order. What do you think about having private
13 companies held in contempt when they don't go back and
14 follow the judge's order to make sure those records are
15 cleared?

16 MR. ACEVEDO: The problem with expungement
17 orders in my experience is they list who the order is
18 directed to, the probation department, the sheriff's
19 department. I agree. There should be a clause in
20 there. Everybody else in the world, it should be like
21 a release in a civil case, forever and for all times
22 each and every individual born and unborn and their
23 prodigy. It should apply to everybody. It should
24 apply to every single body. Because what's the point
25 of having an expungement if it doesn't apply? But you

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2 got to take that one step further because expungements
3 do not apply to the bar. The bar specifically says we
4 want to know about all convictions, even if expunged.
5 Now, that's not fair in my opinion. Why isn't it a
6 level playing field?

7 You know, listen, I say this all the time.
8 Lawyers basically have bad reputations for a reason,
9 for a reason. People didn't create this. It's because
10 people have bad experiences with lawyers, and I'm not
11 saying lawyers are crooked. By and large, they're not,
12 but, you know, the bar should be held to the same
13 standard as everybody else. People should be given a
14 second opportunity, and I think you should apply it at
15 that level. If it's expunged, it's expunged. It
16 shouldn't be reviewed by anybody.

17 MS. VANDERHORST: With that, I'm going to
18 turn it over to my other colleagues.

19 MR. JONES: Thank you. I know that there
20 are a number of questions, but before we get to those,
21 I'm going to exercise the Chair's prerogative, and
22 there's a gentleman at the end who wanted to make a
23 comment about expungement. I'm going to just ask you
24 to put your name on the record and make your comment in
25 a loud voice.

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2 MR. COLLINS: My name is Rick Collins. I'm
3 the Co-Chair of the Sealing Committee of the Criminal
4 Justice Section of the New York State Bar, and a member
5 of the Special Committee on Reentry. So all of this is
6 what we've been looking at as a committee of the bar
7 for the last two years, and the need for expungement or
8 some type of sealing within New York State is so long
9 overdue, it's unbelievable.

10 We're having problems moving it through.
11 There's resistance by a number of factions, district
12 attorneys for one, some factions within business for
13 another, and the media has never been kind to the idea
14 of either expungement or sealing. And I'd like to kind
15 of ask what your thoughts would be on the claim by the
16 media that if expungement, as Mr. Acevedo said, applies
17 to everybody, what would be the obligation of the media
18 to either redact or to alter information?

19 So, for example, somebody gets arrested. It
20 hits the news. There's newspaper articles. There's
21 television reports about this person's arrest,
22 potentially maybe even reports about their conviction.
23 Now, the years go by. They live a law-abiding life.
24 Through expungement or sealing or whatever mechanism,
25 that now gets expunged. It may be that in a background

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2 check by checking the databases of law enforcement, it
3 won't show up, but what about a Google search that just
4 goes back? Should there be an obligation by the media
5 then or some mechanism by which the media is obligated
6 to go back and remove in some way from the Internet
7 repository, at least, that information?

8 MR. JONES: Thank you. Mr. Acevedo.

9 MR. ACEVEDO: That's a law school exam
10 question, right?

11 MR. COLLINS: It is, but it's a practical
12 question because we're dealing with that issue.

13 MR. ACEVEDO: No, I understand. I'm joshing
14 you, but it pitched the First Amendment against
15 particular individual's rights. I got to tell you, as
16 much as I love to defend my clients and their rights,
17 I'm a big advocate of the First Amendment as well, real
18 big. I feel that even the biggest idiots in the world
19 should speak their minds because it allows the public
20 to see that they're idiots. That's key.

21 So my initial, my gut reaction -- you might
22 find this unusual coming from me -- I'm a little
23 hesitant to tell people to go back and change news
24 stories, but I know it happens because this particular
25 guy I represent who was thrown out of -- I won't say

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2 the law school -- who was thrown out of law school, the
3 way they got onto him was through a Google search
4 because they vetted him for a hedge fund job. He's a
5 big-time accountant.

6 So it is a concern, and I don't have a
7 solution. Maybe when the order is issued, the press is
8 required not so much to retract those, but to issue a
9 new thing saying here's the result, but that would
10 defeat the purpose too because then it would be out
11 there. It is a tremendously good answer, and I guess
12 in law school, no matter which way you answer, you get
13 credit. I would have to add -- now that I think about
14 it, I would have to lean toward getting them to do it
15 because if you can't do that, then what's the whole
16 purpose of the order?

17 So I would have to look at the big picture
18 and the purpose of the expungement statute, and I think
19 that in that limited case, the public's right to
20 know -- they know. So that's the answer. See, how you
21 write these things in law school, it comes to you.
22 That's the answer. The public already knows. They
23 know because there was an initial story issued. They
24 read it. So the First Amendment was satisfied. Do
25 they have to remove it? That's okay because the First

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2 Amendment has been addressed. The First Amendment
3 right doesn't go on forever. At a certain point, even
4 the First Amendment has restrictions. So I think
5 that's my answer. I would make them pull it based on
6 the expungement order.

7 MR. JONES: Larry.

8 MR. GOLDMAN: Let me say something, and, you
9 know, I'm particularly addressing the two lawyers. And
10 it's not terribly often frankly that I am all that
11 proud to be a lawyer or about the bar, but one, the two
12 of you make me proud to be a member of the same
13 profession, and two, I'm kind of proud that the bar --
14 and I'm sure you went through varying degrees of hell
15 to get to be lawyers, but you made it.

16 Let me ask about other professions. You
17 know, the bar has at least some mechanism and some
18 whatever you want to call it, forgiveness,
19 consideration, whatever, but what about doctors,
20 stockbrokers, accountants, other white collar
21 professions? Do those people who are convicted ever
22 get to go into those professions or are there lifetime
23 bars? Are there ways out?

24 MR. WIESE: I can just speak anecdotally, I
25 guess. I mean, I told myself -- and by the way, I

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2 didn't get licensed by the way, but, you know, they
3 weren't going to license me. I was just going to go
4 get my M.D., but I decided against that after walking
5 out of law school. But no, I thought about getting a
6 realtor's license, for example, a broker's license,
7 and, you know, you have to have a hearing as well.

8 But I don't think there's anything to the
9 level of scrutiny that you have to go through as far as
10 the bar puts you through. I will say that I had
11 multiple hearings during my bar vetting, and the last
12 one I had was very similar to a parole board hearing.
13 They're very similar. So it was a very interesting
14 experience, but I don't think there's any profession
15 where they license you, where they require a character
16 and fitness question, you know, to answer. There's not
17 that high of a threshold.

18 MR. ACEVEDO: I've represented a number of
19 people in many professions, lots of people in the
20 medical profession. I strongly encourage you to look
21 at who's treating you based on the people I've
22 represented. I do now, but here in New York, there are
23 high barriers. I had an extremely adversarial hearing
24 that lasted days for someone who was trying to be
25 licensed as a master social worker and who had a number

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2 of convictions. He prevailed by the way. I've
3 represented women and men who try to get nursing
4 licenses.

5 The scrutiny may not be as tough as the bar
6 because I've testified -- I didn't have a lot of
7 problems with the bar getting in to tell you the truth,
8 but I think my situation is different for a couple of
9 reasons. Number one, I had a lot of influential people
10 backing me, not by choice. I'm antisocial by nature.
11 These people, I just ran into them in the course of my
12 travels, and they supported me. So that was helpful.

13 Number two, I had a federal clerkship coming
14 out of law school. I was on law review in law school.
15 I had a public interest fellowship, and I had a federal
16 clerkship in the Southern District of New York. So
17 when I interviewed for the bar, I think the person
18 interviewing me -- and I don't really know. He was
19 definitely a conservative Republican because I looked
20 him up, but I think in his mind, he was thinking I'd
21 hire this guy with his credentials. So I didn't have a
22 hard problem getting in.

23 The big factor, probably the biggest factor
24 was I was married to a lawyer, and, you know, you're
25 not allowed to submit affidavits from family members

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2 Connecticut case in which a woman is suing the media
3 because her expunged record showed up in Google, and
4 this was a column by Bill Keller.

5 I want to know what -- you say the
6 certificate doesn't have any teeth. Now, let's just
7 for a moment, what would give a certificate teeth in
8 all of your view? Let's just put aside the expungement
9 thing for a moment and think about -- because we've
10 been talking about the difference between forgiving and
11 forgetting. It's been a debate since the 1960s. Put
12 aside forgetting for a moment, what would you do to put
13 teeth in a kind of pardonish-looking remedy? Could I
14 have all three of you think about that?

15 DR. SHLOSBERG: I need one more minute to
16 think it through.

17 MR. WIESE: Well, I think for me it's what
18 Mr. Acevedo said, I guess, in New York. It has to do
19 something. It has to do something. So if you have all
20 these restrictions in administrative law or
21 occupational, you know, whoever is saying you can't do
22 this because of this or you have to prove something,
23 whatever you got to prove, you got to prove by whatever
24 evidence that you have the character and fitness or
25 this is no longer an issue for you, that that piece of

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2 paper, that certificate of rehabilitation or whatever
3 you want to call it has to erase that.

4 MS. LOVE: Well, the certificate of
5 rehabilitation or CRD, whatever, in New York does, in
6 fact, eliminate the absolute legal bars so to that
7 extent --

8 MR. WIESE: To that extent, it has teeth in
9 my opinion.

10 MS. LOVE: It has teeth. Now, what
11 additional teeth would it need in order to qualify, in
12 your view, as an effective relief mechanism?

13 MR. WIESE: I like that. I don't have
14 access to any of that. So I think that is a great way
15 to start. I would like to know accessibility. Who can
16 apply for these things? Is it just nonviolent
17 offenders? Is it violent offenders? Who can apply?
18 How many people can actually get in and get this
19 relief?

20 MS. LOVE: Anybody. There are certain
21 waiting periods, and as Mr. Acevedo pointed out, if you
22 have more than one conviction, you have to go a
23 different route, but there are no eligibility
24 exclusions in New York as there are in some states.

25 MR. WIESE: Yes, there are.

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2 MS. LOVE: But I've heard so many people
3 talk about what's wrong with the New York certificates,
4 and I'm still kind of trying to grope at what exactly
5 is wrong. Because they are known in other parts of the
6 country as kind of a poster law, a poster remedy as
7 effective. I've heard New York lawyers say they're
8 pointless, useless, do nothing. What is the problem
9 with them? How could they be fixed?

10 MR. ACEVEDO: Listen, they're a piece of
11 paper, and they do not do anything by and large to
12 affect people's perception of what an ex-offender is.
13 That's the problem. The problem is the public
14 perception, the newspapers, the TV. We are a
15 media-oriented society. So we see all of these things.
16 We don't see any stories about people who are
17 successful coming out of the system.

18 MS. LOVE: Well, tell your story. There are
19 a lot of stories.

20 MR. ACEVEDO: You give me a movie deal, I'm
21 happy, but as long as Al Pacino plays me. The key, in
22 my experience, is to get somebody a job, to get them
23 housing when they come out, to get them to do something
24 where they feel that they're constructive. I don't
25 think there's anything -- and listen, I'm the eternal

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2 optimist. I don't think there's anything you can do to
3 fix those certificates per se. They didn't do very
4 much in my life, but what you could do, and this is
5 thinking like a lawyer. People will respect other
6 things if there is a penalty to pay.

7 So if the penalty would be, you know, if
8 discrimination is proven against an ex-offender and
9 they're allowed to recover monetary damages. Because
10 by and large in New York, when you sue under one of
11 these provisions, Correction Law or Executive Law, you
12 don't really have monetary damages because how can you
13 quantify? You really get some kind of finding like the
14 employer has to reconsider your application or
15 reinstate you. You may get some backpay, but maybe
16 there should be a provision where there is shifting
17 attorney's fees. There's incentive for the attorneys
18 to take them, to bring these cases to prevent
19 discrimination. You know, it works under 1983 actions,
20 but I'm not so sure here.

21 MS. LOVE: Let me just follow up with one
22 final thing. What if you had, for example, a full
23 pardon from the governor? How would that be?

24 MR. ACEVEDO: It worked for Steinbrenner,
25 didn't it? Didn't he get a full pardon?

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2 MS. LOVE: I handled that case.

3 MR. ACEVEDO: Well, I'm sorry. I didn't
4 know that.

5 MS. LOVE: I was in the Department of
6 Justice.

7 MR. ACEVEDO: I mean, a full pardon would
8 work but it --

9 MS. LOVE: Stop, time out. Do you really
10 think a full pardon would work and why? What's the
11 difference between a full pardon and a certificate?

12 MR. ACEVEDO: I'll tell you based on reality
13 here's the difference. If you have the juice to get a
14 full pardon, people know you're connected. By and
15 large, the doors will open for you. I hate to sound
16 cynical, but I'm not cynical.

17 MS. LOVE: Just one second because I just
18 really do want to follow this up with you. There are
19 states in this country that have operational,
20 functional pardon programs that are available to
21 ordinary, little people that do not have juice, and
22 we're about to hear from one in the next panel from
23 Connecticut.

24 What if you had a full governor's pardon
25 that was not necessarily, you know, linking you to

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2 George Steinbrenner's case or Armand Hammer, who was
3 another one coming up at the same time, would that
4 work? I don't get what the difference is between that
5 and the certificate. Is it who gives it?

6 MR. WIESE: It's the culture. It's the
7 message.

8 MR. ACEVEDO: I think that's exactly right.
9 That's a good answer. It's the culture. It is the
10 message if you get it at a higher level. The solution
11 is not so much worry about what these various
12 certificates and what they're awarding you. The
13 solution is to have programs in place, real programs,
14 which give people real meaningful jobs and transition
15 them.

16 I'm asked all the time to sit on boards, and
17 I do occasionally, but I tell this to every board I sit
18 on. I am not interested in systemic solutions. I'm
19 not. I don't mean to offend any of you. I'm not. My
20 role in life is to help somebody today. So I'm
21 interested in that one particular ex-offender,
22 transitioning him out the door.

23 New York State doesn't have any halfway
24 houses. The federal system has halfway houses.
25 Although, they're not stellar models, but at least

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2 there's transition with respect to prison, street, and
3 the whole social thing. We need to have real halfway
4 houses, where we set up industries, where people have
5 jobs, good jobs, not jobs that are just funded with a
6 grant, real skills.

7 If you have real skills, you can get a job.
8 I don't care what your background is. If you have real
9 skills, if you're an Ace auto mechanic, people don't
10 care. If your transmission doesn't work, they don't
11 care if you have a robbery conviction as long as you
12 can fix the car.

13 MR. JONES: I've got to stop you, Margie.
14 Vicki.

15 MS. YOUNG: I have one question -- is it
16 Mr. Wiese?

17 MR. WIESE: Wiese, yes.

18 MS. YOUNG: So it said that you were denied
19 by the Virginia Board.

20 MR. WIESE: Yes.

21 MS. YOUNG: And is that something that it's
22 open that you could go back and apply again or is it
23 pretty much the message is, you know, forget it or --

24 MR. WIESE: Well, they left it open. I can
25 reapply in two years. I almost appealed it to the

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2 Virginia Supreme Court, but I'm going to wait my next
3 go-around. So I'm going to wait two years. If I get
4 denied again, I'm going to take it up. So they did
5 leave the door open.

6 MS. YOUNG: If somebody else has a question
7 right now.

8 MR. JONES: Penny.

9 MS. STRONG: I have a question following up
10 on the -- as Margie has questioned and other people
11 have pointed out -- the issue with the certificates
12 versus the full pardon because we've heard from other
13 people formerly incarcerated that some sort of ceremony
14 and some sort of closure is important. One of the
15 people on the panel earlier today said, you know,
16 standing up and pleading guilty or being sentenced in
17 front of a judge, something similar to that.

18 So if the certificate doesn't do that, just
19 sort of a brainstorm, is there some other sort of
20 judicial proceeding, administrative proceeding that
21 would fulfill that type of ceremonial function? You're
22 done. You've been rehabilitated. You've been
23 punished. It's over. Or, as with the certificate,
24 just one last thought, is that emphasis on it too much,
25 and you just want the erasure?

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2 MR. WIESE: I'll comment real briefly on the
3 ceremony. I think the ceremony is key. I think what's
4 also key is who's doing the ceremony. I go back and
5 forth on whether I think it should be a ceremony by the
6 court or whether it should be a ceremony by the
7 community. I think maybe there should be two, right?
8 I think that's one thing that's lacking, and I'm a big
9 restorative justice guy. So I would like to see the
10 community get more involved.

11 If the community would come together and
12 say, listen, we realize that you violated the trust of
13 our community. You're coming back into our community.
14 We realize that you've taken the steps necessary.
15 There has to be some proving of rehabilitation and some
16 effort on the person's part, but we recognize that
17 you're doing that, and we are welcoming you back into
18 this community.

19 And what that means is that we will give you
20 a job. We employ people here. So we are welcoming you
21 back. You've served your time. You paid your debt.
22 You gave your pound of flesh. This is a finality
23 session. So I think that's critical. I think it's
24 critical because it will help shift our culture. We've
25 got to change our culture. Otherwise, we will not get

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2 very far in this.

3 MR. JONES: Elissa.

4 MS. HEINRICHS: No.

5 MR. JONES: Chris.

6 MR. WELLBORN: I'm good.

7 MR. JONES: Jenny.

8 MS. ROBERTS: Yes, I do have a question.

9 Thanks. I'm trying to remember. I think, Mr. Acevedo,
10 you had mentioned the front-end cleanups with having
11 some kind of court personnel reviewing rap sheets, and
12 I wonder if you could speak -- maybe all of you could
13 speak to this, about the role of defense counsel in rap
14 sheet reviews and in other -- you're calling them
15 front-end, but for the defense lawyer, the criminal
16 defense lawyer, they're sort of back-end because they
17 come after -- maybe not rap sheets, but other things
18 that might come after the criminal case is over, such
19 as some of the matters that you handle or a housing
20 matter that's related. So if you could just speak to
21 the role of the criminal defense lawyer both in rap
22 sheet review and in other so-called collateral issues.

23 MR. ACEVEDO: It actually can come before
24 the case is over because it becomes pertinent at bail,
25 and at bail, you have the rap sheet. So there should

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2 dates don't match up with dispositions. Then you have
3 a conversation with the client, and basically by and
4 large, they can tell you, no, that's not what happened.
5 Hopefully, at the front end, you could spot some of
6 these and get at least some of them fixed.

7 DR. SHLOSBERG: Would you rely on the
8 client's word, though, about disparities?

9 MR. ACEVEDO: Listen, I would rely --
10 contrary to most people think -- most people think that
11 the criminal defendants are not astute, not clever, not
12 with it. My clients are about as slick as can be. I
13 don't mean slick in a bad sense. I mean, they could
14 help me all day long if I had problems. When you are
15 an experienced veteran in the criminal justice system,
16 you have an amazing ability to survive, to navigate, to
17 remember all of these things. So I've learned over the
18 years to rely on my clients. You will have clients
19 with substance abuse and mental health issues where
20 you'll need assistance from other entities, but that's
21 to be expected, but by and large, I would rely on the
22 client.

23 MR. JONES: We are unfortunately out of
24 time. Thank you very much. This has been a very
25 useful, and very informative, and very enlightening

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discussion for us. Thank you.

MR. ACEVEDO: My pleasure.

MR. WIESE: Thank you very much. I appreciate it.

DR. SHLOSBERG: Thank you.

MR. JONES: We're going to take a 15-minute break and reconvene at 2:30.

(Whereupon, a short recess was taken.)

MR. JONES: Welcome. We are happy to have you and looking forward to an interesting discussion. I think you have seen a little bit of how we work. So I'll give you the short version.

MS. TINDILL: Actually, I haven't.

MR. JONES: You haven't?

MS. TINDILL: No.

MR. JONES: Well, I'll give you the medium version.

MS. TINDILL: Okay.

MR. JONES: We are going to give each of you five to ten minutes to tell us a little bit by way of an opening statement about yourself and the work that you're doing. After that, we have lots and lots of questions that we have for you, and we're interested in having a fairly robust discussion. And as always, we

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2 are limited by time, and we always seem to run out of
3 time. So the way that we work is that one of us will
4 lead the discussion, the conversation, and for the
5 purposes of this discussion, that will be Penny Strong.

6 To the extent that there is time when she is
7 finished, the rest of us will ask whatever questions we
8 might have, and we'll take it and see where it goes
9 from there. I trust that this is going to be another
10 in a whole day now, a series of very interesting and
11 very enlightening discussions. So I'm going to stop,
12 and I'm going to really leave it up to you all to
13 decide who wants to go first.

14 MS. TINDILL: I'll go first.

15 MS. WHITING: There we go.

16 MS. TINDILL: Good afternoon. My name is
17 Erika Tindill. I am the Chairperson of the Connecticut
18 Board of Pardons and Paroles. Thank you very much for
19 inviting me here. I'm happy to share my experiences at
20 the board with you and am excited about the results of
21 this study. So in Connecticut, the governor does not
22 have the authority to grant pardons. That is vested in
23 my agency. That power was delegated to my agency by
24 the Connecticut legislature hundreds of years ago. Our
25 governor has never had the authority to grant -- well,

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2 that's not true. This power was delegated to my
3 agency.

4 The pardons board has not always been a part
5 of -- together with parole. That is a 2004
6 development. Prior to that, pardons in Connecticut
7 were handled by an attorney from his basement with his
8 wife as his assistant. It's a long story, just as some
9 background. So that authority is with the pardons
10 board. There are currently five pardons officers in
11 the unit. I have a manager in the unit. I have one of
12 the officers and manager will be here shortly, and an
13 office assistant, and they process give or take 1,000
14 applications a year.

15 In 2010, for example, we had 925
16 applications. We have about a 50 percent grant rate,
17 and as you may or may not know, Connecticut is one of
18 the few states where you can receive a full
19 expungement, a full pardon, or we have a provisional
20 pardon, which is also called a certificate of
21 employability. It does not erase your record, but it
22 simply states to employers or landlords or licensing
23 agencies that you have been through our process and
24 have been vetted by the board and have been granted
25 this provisional pardon.

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2 The provisional pardon statute is from the
3 2006 legislative session, and interestingly in my state
4 in 2006, the pardon application and the applicant, that
5 information is confidential. That was written into the
6 statute. It is not in the statute that established the
7 full pardon. So I figured it was an oversight. Who
8 knew? Who would have thunk? The thing that completely
9 erases your record, there's no language about
10 confidentiality. The one that doesn't is confidential.

11 It came up this year because one of our
12 local reporters filed a FOI complaint against my agency
13 because I refused to give over the information. In my
14 opinion, if we had decided that we are going to legally
15 forgive people for past crimes, then it doesn't make
16 any sense if someone from the Hartford Courant can get
17 that information, either while they are applying or
18 after they received a full expungement of their record
19 and put it all over the front page of the news. Then
20 why are we spending the money to give pardons? So that
21 is still pending, that legislation. Fingers crossed.
22 Our session ends on June 5th.

23 I'm an attorney. My predecessor was also an
24 attorney, but the Chairperson of the Board of Pardons
25 and Paroles, there's no requirement that that person be

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2 an attorney. I don't know. You don't need to
3 necessarily hear about my background. You won't have
4 questions about that. Oh, there are seven board
5 members. Sorry. The board members, we are all
6 appointed by the governor in the state. I am the only
7 gubernatorial appointee that serves on both the pardons
8 side in the hearing division and the -- I'm sorry --
9 the paroles side and on the pardons board. All of the
10 other members who are appointed have to serve
11 exclusively either on the pardons board or on the
12 paroles side.

13 We sit in panels of three. There are eight
14 hearings a year in different parts of the state that
15 are held in courthouses. We have a prescreen session
16 prior to the hearing. So in other words, we generally
17 have about 100 give or take applications per session.
18 So as you can see, it's exactly 100. It's 800 a year.
19 Out of that 100, we each individually read the files
20 that are prepared by the parole officers in the pardons
21 unit, and we decide if we are going to grant a hearing.
22 So the application -- the pardon is not decided at the
23 prescreening. The hearing is, and people have the
24 right to apply every year if they choose to do so.
25 There is no fee for a pardon in Connecticut. To apply,

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2 you do however have to pay a \$50 fee to the state
3 police to run an official record and do the
4 fingerprinting. I think that's it. That's five
5 minutes probably.

6 MR. JONES: Thank you. Well, we'll come
7 back to you. Thank you.

8 MS. WHITING: I'll go next. I'm Judy
9 Whiting. I'm the general counsel at the Community
10 Service Society. We've been around for 170 years.
11 We're not particularly known for our reentry work, but
12 I'm hoping to change that. That's not the general
13 focus of the organization. We've been trying to
14 alleviate poverty in New York City ever since we
15 started. We started by giving coal to people, food and
16 shelter. We've moved on in a lot of different ways.
17 Our focus now is helping people move up and out by
18 getting well-paid jobs.

19 So we work through legislative work. We
20 have policy work that we do. We publish research
21 papers. We have some very distinguished people working
22 with us. We have a health unit that helps people deal
23 with health disparities, and we are the entire
24 ombudsperson or ombuds agency for the entire State of
25 New York. If you have a problem with your insurance

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2 company, you can call one of the many agencies that
3 contract with us to provide advice.

4 And we have a small legal department that I
5 also head in addition to doing all the general counsel
6 stuff, which is a lot of contracts mostly, and our
7 legal department has probably for the past several
8 years focused exclusively on helping people with
9 conviction histories because if we're going to be
10 helping people, you know, get out of poverty and get
11 jobs, the obvious barrier that you know so many people
12 face is employment discrimination based on conviction
13 history. So we thought there was a real need to
14 address that.

15 So our legal department does that in a
16 variety of ways. We litigate. We do a lot of
17 administrative advocacy. We go to a lot of hearings.
18 We do a lot of informal stuff over the phone, get
19 people's jobs back after some initial phone
20 conversations and letters. We work on individual
21 lawsuits on behalf of clients. We're part of a
22 nationwide class action that's suing the Census Bureau
23 for its hiring practices in the last census that we
24 believe violated Title VII of the Civil Rights Act. So
25 we do that, and we work as part of a large group of

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2 reentry advocates across the state. People who sat in
3 these chairs earlier today and probably yesterday as
4 well are part of our coalition. We work to, in some
5 cases, draft legislation; in other cases, try to figure
6 out ways to push and prod to get legislation passed
7 that will alleviate certain barriers to reentry for
8 people with conviction histories.

9 So one of the reasons, I think, I'm speaking
10 here today is that our legal department has recently
11 started a project that we call -- just renamed it the
12 Next Door Project. What it is is a project where we
13 help people get, understand, clean up and move forward
14 with their New York State and FBI records of arrest and
15 prosecution rap sheets. So we actually have -- our
16 operation is a little different than some because we do
17 very individual work with our clients, and we are able
18 to do that because we work with very specially picked,
19 trained, retired, senior volunteers. Our agency
20 actually set up the RSVP Program way back in the '60s.
21 We still oversee it for New York City, and we draw from
22 RSVP for our volunteers.

23 We train them very specifically. It's a
24 very lengthy training, and they're very highly
25 supervised to help people, you know, who come in to us

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2 happened, and that's for a variety of reasons ranging
3 from if they got a lot of their convictions as a result
4 of pleas taken at arraignments.

5 In New York City, arraignments go like this
6 (indicating). I remember there were speed requirements
7 almost for attorneys who work as public defenders. I
8 remember a court reporter saying to me when I was
9 making bail applications, hurry up, hurry up. It's
10 that kind of thing. So things move so quickly in the
11 criminal defense world in New York that sometimes
12 people have misunderstandings. They sometimes also
13 think they were convicted of their arrest charges or
14 they think that something that resulted in their going
15 in and going out without a fine or prison time or jail
16 time was not a conviction, and in fact, it was. So
17 there are a variety of misunderstandings. So we help
18 to correct those.

19 We help people develop ways to talk about
20 their conviction history at a job interview and an
21 employment situation. So we help coach them with what
22 kinds questions they'll be facing, what the right
23 answers are for those questions. We don't feed them
24 the answer, but we tell them if you're asked if you
25 have a felony conviction in the past seven years, in

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2 fact, you don't. You may have thought you did, but in
3 fact, you don't. You may have three misdemeanors, but
4 they're not felonies. We go very carefully through and
5 talk about that.

6 The other thing that our volunteers do is
7 they find mistakes in rap sheets, and they are rampant.
8 I think we've been doing a project now that's been
9 funded by New York City through funding that's going to
10 go through the end of June to help people who are on
11 probation or from the homeless system or somehow
12 connected with the Department of Correction to go
13 through our process, get their rap sheets, understand
14 them, fix mistakes, and move on, apply for certificates
15 if they're eligible.

16 I think our quick take on it is that at
17 least 55 to more like 60, 65 percent of the official
18 New York State rap sheets fingerprint-based have
19 mistakes on them. None of these are mistakes that the
20 client made. They're mistakes that, you know, as
21 Roland Acevedo was saying, things that the clerks
22 didn't do right, you know, buttons that weren't pushed,
23 things that didn't happen correctly, that people
24 wouldn't know about otherwise. And, you know, we help
25 them fix those mistakes, and it's not always easy to

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2 fix those mistakes.

3 The biggest one we see is that an arrest is
4 reported. Somebody is fingerprinted. The prints go to
5 Albany. That arrest information is there, but then
6 there's no information about what happened with the
7 case. That happens in New York. That's a particular
8 problem on a FBI rap sheet. I think a study was done
9 in 2009 based on old data, but it was done by the
10 federal government found that at least 50 percent of
11 entries on FBI rap sheets are incomplete. So New York
12 is pretty good about sending their data in, but even on
13 our rap sheets, we see incomplete data. We also see a
14 number of cases that should have been sealed that
15 aren't, and we see others -- you know, somebody was
16 convicted of petty larceny, but somehow numbers were
17 transposed, and the rap sheet has them convicted of
18 murder because they got the numbers wrong when somebody
19 was typing. We see that too on the list frequently.
20 So our volunteers working with us very carefully help
21 people to correct those mistakes.

22 The hardest one that we find to correct is
23 the police department when they have arrested somebody
24 and decided, you know, we're not going to deal with
25 this. They let them go at the precinct or before the

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2 D.A. has had a chance to decide whether or not they're
3 going to prosecute. A lot of times they will do what
4 they're supposed to do, which is send in a notice to
5 the state saying this arrest has been voided, but many
6 times, they won't. So an arrest will appear on
7 somebody's rap sheet with no other information.

8 The only way that I found to correct that is
9 to call the guy I know at the NYPD, and if I didn't
10 know the guy at the NYPD, who I found out through some
11 serendipitous way, I wouldn't be able to correct it
12 because there's no official way for -- our clients
13 couldn't do it on their own. A lot of advocates can't
14 because they don't know the guy at the NYPD. So people
15 are walking around with -- as Patricia said, she had a
16 client who was denied a licence for an open case from
17 1968. We have lots of clients who have these open
18 cases. They're really just arrests that never went
19 anywhere, but they're sitting there. So we have that
20 problem. So we see that huge number of mistakes.

21 What we also do is we help people get a
22 sample commercial background check. This is not always
23 successful because we go with one of the biggest
24 companies out there on the theory that if somebody has
25 applied for a job, it's likely that one of the big-box

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2 stores has used this background check company and will
3 have the data on this person and can report it back.
4 If that hasn't happened, then this background check
5 company won't have anything, and there won't be any
6 kind of background check to see. We want people to be
7 able to see what one of these things look like, if
8 possible. It's not always possible, but when it is,
9 it's important because if we think rap sheets are bad,
10 those commercial background checks are horrible.

11 I haven't found a company that I would
12 recommend. They're probably out there, but there are
13 at least 600 of them. They range from the big guys,
14 LexisNexis, all the way down to retired sheriffs in
15 their basement, sounds kind of familiar, who are
16 reviewing records that range from actual public records
17 all the way down to doing a Google search and getting
18 somebody to pay for it. So the quality of these things
19 isn't so great sometimes, and they are confusing in the
20 way they report them.

21 I had a situation once where a client's --
22 it said scope of search, felony and misdemeanor, and
23 underneath it listed all of his disorderly conducts,
24 which are not crimes in New York. Shouldn't have been
25 there anyway. We also see background checks that show

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2 each count of an indictment as a separate crime, things
3 like that or it will say sex offender, and the next
4 page, it will say search negative. So they're really
5 problematic, and people rely on them for such important
6 things.

7 There was talk about why aren't these guys
8 regulated? In fact, they are. Our office does bring
9 litigation based on violations of the law that these
10 people are regulated by, which is the Fair Credit
11 Reporting Act. Background check companies that operate
12 commercially are consumer reporting agencies. The
13 reports they create are consumer reports, and they are
14 required to follow certain procedures so that their
15 reports are accurate and up-to-date. And, you know, we
16 find that they don't always do that, and so we are able
17 to get good results for our clients sometimes who have
18 been seriously harmed by these bad background checks.

19 One example is a guy who had a common name.
20 The background check that was run by a rather big
21 company came back with his stuff and then some other
22 guy's stuff from Pennsylvania, and you think, okay,
23 he's got a common name, whatever. But if you looked at
24 the stuff from Pennsylvania, you could see that it said
25 abated due to death. So obviously, it wasn't our

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2 client's stuff, but nobody had done the checking that
3 was required to make sure that that rap sheet was
4 accurate and up-to-date, and the client was turned down
5 for employment as a result.

6 So not only are background check companies
7 required to make sure their records are accurate and
8 up-to-date, but federal law requires that if an
9 employer is going to use a background check, a
10 commercial background check, in whole or in part to
11 make an employment decision or take an adverse
12 employment action, they have to give the person the
13 background check in advance of doing the deed and give
14 the person a chance to look at the thing. You talk
15 about it to see if there are mistakes or maybe they'll
16 be able to say that is me, but this is what I've done
17 since then or whatever, but employers almost never do
18 that. So we sometimes also bring claims against
19 employers, you know, as an added claim when things go
20 wrong to say, by the way, you violated this federal law
21 because they did. So I could keep on going, but I
22 probably talked your ear off. So I'll let you go.

23 MR. JONES: Thank you.

24 MS. BIGLER: My name is Esta Bigler, and I'm
25 the director of the Labor and Employment Law Program at

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2 the Cornell School of Industrial and Labor Relations.
3 Our school was founded after World War II because
4 soldiers would be coming back from the war, and the
5 idea was that because of the War Labor Board, there had
6 been pent up demand with respect to increased wages,
7 and the idea was to prevent commercial disruption. It
8 was so that collective bargaining and labor unions
9 would be able to work to ensure that we would have an
10 easy transition into the new workforce. The school has
11 obviously grown and changed since it was first
12 established.

13 I work in the New York City office. Our
14 school is divided between the Ithaca campus, where
15 people can get a bachelor's degree, a master's or a
16 Ph.D. I got my bachelor's degree there, and the New
17 York City office, we have other offices around the
18 state where we do essentially adult education, and we
19 do have a master's program running out of New York. I
20 established the Labor and Employment Law Program
21 approximately seven and a half years ago when the dean
22 said to me, we don't have a footprint in labor and
23 employment law. Most our graduates are labor and
24 employment lawyers, and nobody comes back to us. We
25 don't service our loans. We don't do anything with

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2 respect to labor and employment law. So that's what he
3 told me to do. So that's what I have done.

4 One of the areas that has become very
5 important to me is the area of criminal records. I do
6 lots of programs on the National Labor Relations Board.
7 I do programs on Title VII. I was, by the way, a labor
8 lawyer. I represented unions. I also did Title VII
9 litigation specifically with respect to gender
10 discrimination. So I come to this with sort of an
11 interesting background, and I was first introduced to
12 this topic really with respect to race discrimination.
13 I ran a conference several years ago. Margie was at
14 the conference. She actually moderated the panel at
15 which we looked at race, criminal records and
16 employment. So that's sort of the lens through which I
17 looked at this.

18 So I come here to talk a little bit about
19 negligent hiring and a study that we did last summer.
20 When any employer hires -- and I will tell you that my
21 husband owns a small business. So I hear about this
22 all the time -- she is taking a calculated risk that
23 the individual, the person that she is hiring is best
24 suited for the position, but there is a fear, and there
25 always is a fear that you are wasting your money by

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2 hiring someone. That fear gets heightened when an
3 employer hires someone with a criminal record.

4 We know you've been talking about it all
5 day, and I guess yesterday as well that obviously the
6 process of integration into the community relies on
7 employment. One study showed that 98 percent of the
8 people who violate probation or parole are unemployed
9 at the time of the violation. Another study which
10 we've done showed that if a person is employed, there's
11 a 58 percent reduction in recidivism if they are
12 employed. So this is really important, but employers
13 worry about hiring people with a criminal record, and
14 what they often talk about is negligent hiring.

15 Because of the job I have, I'm also on all sorts of HR
16 lists. I get HR lists for educational programs all the
17 time, and every two or three days, I'll get one that
18 says, negligent hiring, how to protect yourself against
19 a negligent hiring claim. So employers are petrified
20 by this.

21 We do know that SHRM did a study in which 55
22 percent of the employers said the reason that they do
23 criminal background checks is their fear of negligent
24 hiring, and so this becomes especially problematic
25 since the criteria for negligent hiring is very unclear

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2 and direction, we decided to take a closer look at
3 negligent hiring. Now, as I said, it's a common law
4 tort. It's inconsistent. It's very hard to get a
5 specific definition because you have to go state by
6 state, court by court. What does reasonable care mean?
7 What is foreseeable risk?

8 Obviously, though, the kernel that is
9 consistent in all of this -- and I am not, let me be
10 clear, a tort lawyer. So I had to learn some of this
11 to get into this area -- is really the question is the
12 failure to use reasonable care in selecting an employee
13 where there is a foreseeable risk to a third person.
14 So the question is a foreseeable risk. So there's
15 usually a charge of negligent hiring where there's a
16 causal link between the employee's past. So that's
17 where you get to the issue of criminal records, and any
18 subsequent behavior which is harmful to a third party,
19 the employer will be held liable if she should have
20 been able to prevent, should have been able to prevent
21 the action, the incident, from happening with more
22 careful screening before hiring of the person. There
23 are other negligent torts which are brought, which go
24 to negligent retention, supervision, bad training, but
25 they're all essentially looked at with the same lens.

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2 In order to make our study more manageable,
3 we decided to focus only on New York State. Obviously,
4 we have 50 states with courts all over. We decided
5 that since we live in New York State and we're a New
6 York State school, we would focus on our state. So the
7 initial consideration in all the negligent hiring
8 instances was whether the employee was acting within
9 the scope of his or her employment when the incident
10 occurred, and that would make the employer liable. The
11 five factors that the courts in New York look at is the
12 connection between the time, place, and the occasion
13 that the "bad act" or incident occurred; the history of
14 the relationship between the employer and the employee,
15 what kind of history they have together; whether the
16 act which caused the problem is commonly done by the
17 employee; the extent of departure from normal methods
18 and performance; and whether this was one that the
19 employer could have anticipated. So that means the
20 employer really has to know, and since one of the ways
21 that they do know is by doing a background check, which
22 Judy had laid out are often so incorrect, or obviously
23 checking records.

24 We decided that we would look at three
25 levels of analysis for the cases. One, the likelihood

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2 that the employer would get sued for negligent hiring;
3 two, that he would be held or she be held liable in a
4 negligent hiring lawsuit; and where does the criminal
5 background check or where does the criminal history
6 come into these cases? Our results show -- I'll give
7 you a little prescreening here -- negligent hiring
8 cases do not occur frequently enough for any employer
9 to be worried about them. So this is the big sell
10 about negligent hiring, that they do not occur, and it
11 is not a reason to discriminate based on criminal
12 records. It certainly should not be the primary reason
13 to conduct background checks by 55 percent of the
14 employers.

15 What we found looking at cases from 1990 to
16 June of 2012, so that's the period that we were looking
17 at. We found 126 reported cases that include some
18 element of negligent hiring, 126 cases. The defendant
19 won, which means he or she was not found guilty of
20 negligent hiring, in about 31 percent. The plaintiffs
21 succeeded in about 25 percent. They settled in about
22 24 percent. The rest we couldn't figure out what
23 exactly happened in the case. Just to put these
24 numbers, 126, in some kind of perspective here, we went
25 to New York State, and we looked at the number of

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2 reported, number of employees and the number of jobs to
3 just get a ballpark figure here. From New York State
4 records, we discovered that there are 8,442,101
5 employees in this state, and the reporting employers
6 are 588,115 units. Well, even at a very surface
7 level -- I don't do regression analysis -- would show
8 you that this is not a big issue, but they've made it a
9 big issue.

10 So then we dug a little deeper to see if we
11 could analyze the risk of employer liability in these
12 cases. What we found is a total of 41 cases out of the
13 126 where there was some remote claim of negligent
14 hiring. People throw everything in these cases. You
15 know, it's like throwing spaghetti up against the wall
16 and what's going to stick when you write a complaint.
17 So if the case at all mentioned negligent hiring, we
18 counted it because we didn't want to lose anything. We
19 wanted to make sure that we were as thorough as we
20 possibly could be.

21 After analyzing the language of the case
22 summaries -- and by the way, that's what we used. We
23 used case summaries. We tried to actually get the
24 complaints, and we went to the law firms to see if we
25 could get them. Most of these cases were old, and they

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2 tell you what we found in this state. Just tell you
3 about a little bit about the methodology that we used
4 because I just think it's important. We basically used
5 verdicts and settlements from Lexis to look at all of
6 the cases. That's what we used. The student carefully
7 analyzed every case summary to see whether we could
8 pinpoint that it was negligent hiring. Sometimes they
9 put a negligent hiring case in a wrongful death case or
10 some other cause of action. So they just throw the
11 kitchen sink in. So that is essentially what we found.

12 I got into this because of the prevalence of
13 race discrimination and the number of African-American
14 and Hispanic men who get arrested, and that's sort of
15 the lens that I have been looking at this. I don't
16 have any records with respect to the use of negligent
17 hiring with respect to race, but I wouldn't want to
18 leave you without saying that that's a lens that we
19 always have to keep in mind because we do know that
20 African-American and Latino men are arrested and
21 convicted at much higher rates than whites. We know
22 that in drug cases, African-American and Latinos are
23 arrested and convicted at much higher rates in the
24 usage of any of the research shows. So there is a lens
25 that gets used here with respect to criminal records

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2 and race that should not be ignored. Thank you.

3 MR. JONES: Thank you very much. Penny.

4 MS. STRONG: Thank you. Ms. Bigler, good
5 afternoon. I have some questions for you about that
6 study. Was that published in a particular or
7 disseminated in any way to SHRM or any employers?

8 MS. BIGLER: Not yet. I have to admit to
9 you that the study was done last summer, and I had been
10 so busy with everything that I had been doing that I
11 had been promising David that I would edit it and that
12 we would get it out so that it could be widely
13 distributed. The fact that you invited me here today
14 to present forced me -- I'm pleased that you did. You
15 forced me to sit down and begin to edit it and put it
16 in a form that could be published. So the plan is to
17 do that. I just haven't had the time, but thank you
18 for making me do it.

19 MS. STRONG: In the context of doing that
20 study, are you familiar with certain states that
21 actually do provide civil immunity for hiring of
22 formerly incarcerated? Can you speak to that?

23 MS. BIGLER: Yes, thank you. I didn't want
24 to go over my time. In New York, 23-A of the
25 Correction Law makes it illegal if you are guilty of

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2 and good conduct, the bearing, if any, that the
3 criminal offense would have on his ability or her
4 ability to carry out their duties because that goes to
5 licensing, and eight, the legitimate interest of the
6 public agency to make sure that the safety of people in
7 the general public are protected. So that would go to,
8 for example, I would think somebody who perhaps works
9 with the population who couldn't defend themselves. So
10 that's what eight goes to, but the employer has to go
11 through all eight factors to get the protection of
12 23-A. I can't answer with the respect to other states.
13 I just don't know.

14 MS. STRONG: In the context of the study or
15 any other work that you've done, does that mean
16 anything? Is that meaningful for employers in New York
17 who are hiring and hopefully hiring the formerly
18 incarcerated?

19 MS. BIGLER: I don't think most employers
20 know of the protection of 23-A. I just don't think
21 they know. So it's meaningful only if you know about
22 it. Certainly, a good public relations campaign would
23 be an excellent vehicle for people to begin to
24 understand that they do have this protection, but my
25 guess is that most people don't know that they have

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2 that protection.

3 MS. STRONG: I have one last question about
4 this study that you did. How many of the, if you will,
5 offending acts of conduct involve new crimes or was it
6 just, if you will, bad behavior in terms of negligent
7 hiring? Was it always tied to a new crime or were
8 there just behaviors or acts that were committed by the
9 employees that led to liability?

10 MS. BIGLER: Well, what we did was we
11 included both because we wanted to err on the side of
12 inclusion. So we didn't make any distinction between a
13 conviction or incarceration and having a record and
14 what would be considered a bad act, where someone had
15 misbehaved or maybe had some other problem. We
16 included everything, especially when we began to see
17 how small the numbers were. We wanted to err on the
18 side of inclusion as opposed to exclusion. So we
19 didn't separate those two.

20 MS. STRONG: Switching gears for a little
21 bit, you indicated that you did a lot of representation
22 of unions in your previous practice. Do you have any
23 experience with how they're reacting to the new EEOC
24 guidelines in terms of disparate impact in terms of
25 minorities or in general what their union policies are

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2 regarding people who are formerly convicted or
3 incarcerated?

4 MS. BIGLER: Well, I can certainly tell you
5 that some of the unions, especially those that work
6 with low-wage workers, are very concerned about
7 protecting the rights of people who have a criminal
8 record. Some of the conferences that I've run and
9 programs that I've run, certainly some unions have been
10 very involved; SEIU, for example, the Local 32BJ that
11 represent people who work in buildings, for example,
12 clean buildings, et cetera.

13 In the construction field, construction
14 unions have been very good in admitting people with a
15 criminal record, and I just had a notice about the
16 AFL-CIO doing something. I didn't really have time
17 before I left the office about this. So I think this
18 is an issue that's become a larger issue with respect
19 to the labor movement, especially as they try to reach
20 out and increase their membership and reach out to
21 African-Americans and Hispanics.

22 MS. STRONG: All right. Thank you.
23 Ms. Whiting, I wanted to ask you, we were speaking
24 earlier about the fact that not only does New York
25 State have anti-discrimination laws with people who

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2 have been convicted, but the City also has a body of
3 anti-discrimination laws. Can you address how both
4 bodies of law are working on any reforms that you think
5 would be appropriate?

6 MS. WHITING: Yes. We use both the City and
7 the State Human Rights Laws when we litigate against
8 employers who have discriminated against our clients.
9 Our State Human Rights Law is one of the oldest in the
10 country, I think. It's been around since the '70s, and
11 it prohibits discrimination against people with
12 conviction histories. It lays out questions that
13 employers can't ask and things like that. So it's
14 pretty strong. The problem with the State Human Rights
15 Laws is that attorney's fees are not among the
16 remunerated. So the private part is not used very
17 much. The City Human Rights Law on the other hand has
18 a lower threshold in terms of number of employees that
19 are covered by it. Businesses, size of businesses need
20 to have fewer employees, and it has the right to retain
21 the attorney's fees. So we're a nonprofit. It's not
22 the biggest thing for us, fees. It's not foremost in
23 our minds, but it's a stronger law, and we tend to use
24 it some.

25 As I mentioned, we do have a Title VII case

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2 pending. It's a big nationwide class action against
3 the Census Bureau. We've had a couple of individual
4 Title VII cases. We tend to -- it's easier for us to
5 use the State and City laws. It's quicker and cleaner.
6 The remedies might not be so good, though, as compared
7 to some of what you might get in a Title VII setting.

8 MS. STRONG: Are you able to get emotional
9 damage or emotional stress remedies in terms of those
10 types of cases or is it purely monetary compensation?

11 MS. WHITING: I have not tried to get
12 emotional distress damages. You might be able to, but
13 I think it's limited. I think probably you would be
14 more likely to get it under the City law than the
15 State. The problem with the whole regime is that if
16 the employer who has discriminated against you is a
17 public agency, a government agency of any kind, your
18 remedies are very strictly limited by law in New York
19 State. You can't just go into court and say, I'm
20 bringing a plenary action to enforce my rights under
21 the law. Your remedy is to bring what's called an
22 Article 78 proceeding, which is a proceeding that has
23 very short time limits and has very strict pleading
24 requirements. It's pretty much all done on the papers.
25 No one really ever appears, except in unusual

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2 circumstances.

3 And if you win -- and I used to bring a lot
4 of these because agencies were really, really doing bad
5 stuff some years ago -- the best thing you get out of
6 it -- and sometimes it's more than a year after you
7 bring your very strictly time-limited case. You get
8 wonderful decisions saying how your client was like the
9 best whatever, whatever, and how could they do this to
10 him. It's insane, and yes, we know it's arbitrary and
11 capricious. And employers, you must go back and
12 reevaluate him based on 23-A. Well, great, even though
13 I've asked for damages that were, you know, consistent
14 with this and I've asked for other things, that's the
15 best remedy I've ever gotten is reevaluate consistent
16 with my opinion. Well, great, and a year has gone by.
17 The job is long gone, and usually, my client has moved
18 on to other things also. So it's a pretty hollow
19 remedy when your employer is a government agency here
20 in New York.

21 MS. STRONG: So can they also plead
22 qualified immunity as any sort of defense or not?

23 MS. WHITING: Not under these laws.

24 MS. STRONG: I noticed that there's also a
25 provision under the New York State law that supposedly

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2 if an individual is turned down and the reason is the
3 conviction record -- because they can't use an arrest
4 record, correct, at all?

5 MS. WHITING: They are not allowed to ask or
6 consider arrests that didn't lead to a conviction or
7 that led to a sealed violation conviction, a youthful
8 offender adjudication or something that was terminated
9 favorably to the accused.

10 MS. STRONG: Right. There are other
11 qualifying convictions that they can use, but then
12 they're supposed to give a statement of the reasons to
13 the applicant, Section 754, and how does that work? Do
14 people know enough and are employers providing those?

15 MS. WHITING: If you are someone with a
16 conviction who's been turned down for a job or not
17 hired, you have a right to send a letter to the
18 employer under Section 754 saying, within 30 days, tell
19 me why I wasn't hired. So you get a variety of
20 responses to those letters. A lot of times, you don't
21 get anything back, and then so what do you do? A lot
22 of times, my clients just say forget it. We're not
23 doing anything.

24 Sometimes we get a letter back saying we
25 found someone more qualified. That's probably the

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2 employer's safest dodge. Every once in a while, and
3 it's really rare, really rare, we get somebody who
4 says, we don't hire people with criminal records.
5 Well, in that case, it's a very valuable service
6 because then we can go to town. That's somebody who, I
7 think, we would prevail against if we brought
8 litigation, but it's a limited remedy.

9 MS. STRONG: Turning to the issue of
10 background checks, what suggestions do you have in
11 terms of any again legislative or, in particular,
12 federal fixes that we need? I know you and I discussed
13 the fact that in 1994, under the Fair Credit Reporting
14 Act, the seven-year limit was lifted, and could you
15 discuss how that has impacted that very important area?

16 MS. WHITING: Well, as we were saying when
17 we talked on the side, it used to be the Federal Fair
18 Credit Reporting Act mandated that commercial
19 background check companies not report criminal
20 convictions that were more than seven years old. That
21 used to be the law, and a lot of states adopted their
22 own Fair Credit Reporting Act modeled on that law that
23 are still in effect, but then I believe it was 1994. I
24 could be wrong. It was in the mid-'90s, Clinton era,
25 that law was changed. Now, there's no bar on reporting

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2 criminal convictions. You can report them as far back
3 as you can find the data. We have clients who have
4 stuff in there from the '50s that are reported from
5 time to time.

6 So it's a big lift, but wouldn't it be nice
7 to reinstate the seven-year limit? It's a number
8 that's based on the Bible. At least at the time, it
9 wasn't based on research, but now, there is research
10 that show, that people have talked about it throughout
11 the day and probably yesterday conducted by Professors
12 Blumstein and Nakamura that show that after a certain
13 period of time, I think the average is between four and
14 eight years depending on the conviction history, your
15 likelihood of reoffending is the same as someone who
16 has never been arrested. So if we could use that data
17 to somehow find a way to shut off the reporting of
18 criminal convictions, we'd be in a lot better shape.
19 Sealing would also help, but we didn't talk about
20 sealing.

21 MS. STRONG: Are you aware of any states
22 that do put a time limit on it?

23 MS. WHITING: There are some states that
24 still have the seven-year time limit, and New York does
25 too actually. There's a little relic in our law that

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2 says if you're applying for a job that's going to pay
3 \$25,000 or less, there's a seven-year limit. That's
4 often in breach, and with each passing year, there
5 aren't too many \$25,000 a year jobs left.

6 MS. TINDILL: Can you live on that in New
7 York? I'm not from New York, but I'm pretty sure that
8 that's not possible.

9 MS. WHITING: Right.

10 MS. STRONG: Thank you. Ms. Tindill, I have
11 a question about -- I got on your website, which is
12 very impressive, and saw that you have the three
13 different types of relief, and it sounds like your
14 agency is very well-organized. You have a wonderful
15 mission statement. Some people are working very hard
16 in a critical area.

17 With the provisional pardons, that sounds a
18 lot like the certificates of relief here in New York
19 that a lot of people have given the opinion are not
20 effective. Can you speak to any differences? Are they
21 the same, and are they working most importantly for the
22 citizens that you award them to?

23 MS. TINDILL: No, no, no, I think the answer
24 is. So the Central Connecticut State University has an
25 Institute For Municipal and Regional Policy that did a

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2 very small study. This is 2013. I want to say in 2008
3 or '9, very small study, not a very -- I won't say a
4 very good study, but small.

5 MS. WHITING: Robust.

6 MS. TINDILL: Yes, nice word. That was
7 inconclusive. It showed that about half of the
8 people they -- don't ask me about the methodology, but
9 they asked people who had received provisional pardons
10 and followed them for a period of time and tried to
11 figure out was this helpful or in what ways or was it
12 not? Half the people said yes. Half the people said
13 absolutely not. I can tell you anecdotally,
14 anecdotally. We have not studied it at my agency, but
15 we get calls from people. And I ask often when I'm at
16 a hearing when I'm interviewing people to decide
17 whether they should receive a pardon because they then
18 had a provisional pardon and are now asking for a full
19 expungement, and I ask them if it's been helpful.
20 About half of the time, they say no.

21 What happens is -- and I made this very
22 small change. It didn't require legislation or an act
23 of God or anything. It was just a simple policy change
24 on my part. So the certificate that you get that's
25 signed by me lists in the provisional pardon all of

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2 your offenses and their docket numbers. We got lots of
3 comments about this was what ruined me because when I
4 presented the certificate, the person was like, oh, you
5 did. So what I decided to do after hearing that a
6 number of times was just remove it, just take it off.
7 So now, you get one without it on there and an official
8 letter that says here's what you've been provisionally
9 pardoned for, but personally from my perspective, I do
10 not believe they are helpful, and here's why.

11 Number one, because you can get your record
12 fully expunged in Connecticut. That's number one.
13 Number two, in 2006 when this legislation came about, I
14 don't believe that the right people were at the table
15 and engaged in the formation of this public policy. I
16 think employers have no idea. What is this, and what
17 am I supposed to do with it? Somebody says, well, I
18 have this provisional pardon. First of all, part of
19 the problem may be the nomenclature. Is it a pardon or
20 is it not a pardon? Because again, we have full
21 expungement in Connecticut. So I don't think the
22 employers understand what they are, and I also don't
23 think the applicants really get the effect of it and
24 how they're supposed to utilize it and what it's
25 supposed to do. You know, I personally believe that

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2 either we're going to erase someone's record completely
3 or don't bother because the stigma remains.

4 MS. STRONG: Question here, what if you have
5 an individual who has multiple convictions and perhaps
6 they're either a sex offender or they've got a series
7 of violent offenses, would the provisional pardon work
8 well there, where there's political forces or victims
9 showing up? I noticed victims can come and speak or,
10 you know, the prosecutor is showing up. So is it
11 workable for those types of cases?

12 MS. TINDILL: They may be the people who
13 find them the most helpful. We also don't pick and
14 choose your record. We don't pick off a larceny or a
15 criminal mischief or a burglary and say, okay, we will
16 expunge this part but not this part. It's either -- we
17 look at your entire record, and we're either going to
18 grant you a provisional pardon on your entire record or
19 full expungement on your entire record, but I do
20 think --

21 And we have pardoned sex offenders. We have
22 pardoned people with murder and manslaughter charges.
23 We have refused to pardon people with lesser charges
24 because of the nature of what they did, but there isn't
25 the ability to sort of separate those out. But I think

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2 for people with sex offenses, the fact that anyone can
3 see it, if we're not distinguishing between urinating
4 in public or snatching a five-year-old off of the
5 playground, the stigma is the same damage. So I
6 personally don't think provisional pardons are helpful.

7 MS. STRONG: There's something in your
8 website about a provisional pardon. Does it encompass
9 an out-of-state conviction also?

10 MS. TINDILL: No. We can only pardon for
11 Connecticut convictions. We do however consider
12 out-of-state convictions. So oftentimes, people come
13 to us, and we explain at the application and at the
14 hearing it's only for your Connecticut convictions, but
15 if they have, you know, this many Rhode Island
16 convictions and this many in New York, we can't pardon
17 them. But we let them know that if we give you a
18 pardon, it's only for your Connecticut convictions, but
19 it also has caused offenders to not get the Connecticut
20 pardon because we see that they've been quite busy in
21 other states.

22 And our focus as a panel is, you know, is
23 this person the same offender that committed whatever
24 is on their record? The onus is on them to explain,
25 describe and prove to us quite frankly that they are

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2 not. I think sometimes people believe that they have
3 to go to church and get married, have perfect children
4 and buy homes, and it's not that. We have to know that
5 you've actually been rehabilitated, and there are no --
6 you'll notice from our website there are no
7 hard-and-fast rules, which is unsettling for a lot of
8 people.

9 People want to know why is it that this
10 person got one and this person didn't, but the
11 discretion is completely within a panel of three, which
12 if you think about it, sometimes it's unfair because if
13 you know Judith and Erika are on this panel, then maybe
14 I have a shot. It's a majority vote. Only two people
15 out of the three have to vote. I have been outvoted.
16 Even though I'm the Chair, I only get one vote, and I
17 don't -- as much as I would like to sometimes, I don't
18 overturn. I don't have the power to overturn a vote.
19 So you have to convince two people on the panel that
20 you are now a law-abiding, productive citizen, who have
21 committed things in the past but are deserving a
22 provisional pardon or an expungement of your record.

23 MS. STRONG: How does a pardon that's
24 conditional with a condition work? Do you have a
25 situation where victims of, if you will, more serious

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2 or softer crimes do appear and make a personal
3 appearance and recommendations that they put in for
4 conditions that are adopted or implemented?

5 MS. TINDILL: Victims do appear, and they
6 are assisted by victim advocates who work for our
7 judicial branch. Our judicial branch has an Office of
8 Victim Services. And under our statutes, two victim
9 advocates are on loan to my agency. So they are
10 physically housed in my agency and work on our behalf,
11 but don't belong to the agency. They assist victims
12 who either choose to appear in person to make a
13 statement or write a victim impact statement or give
14 something in writing to the board for their packages.

15 I have not experienced a victim give a
16 condition. They usually either say -- they usually
17 talk about the impact that it's had and whether or not
18 they agree or disagree with this person being pardoned.
19 You know, it carries weight, but we don't deny a pardon
20 based on the fact that a victim appeared or wrote a
21 statement or called the victim advocate, and that we
22 have information that said this person is really
23 opposed. And victims aren't always opposed. We've had
24 victims that end up marrying the offender. It's
25 compelling when she comes in or he comes in. It's the

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2 next-door neighbor that he beat the snot out of, but
3 we're good now. Go ahead, give him a pardon. He's a
4 good guy. You know, we've loaned each other things.

5 So I haven't seen victims give conditions.
6 Generally, the conditions we give are around gun
7 permits and gun ownership. I can't think off the top
8 of my head any other condition. Sometimes we will give
9 you a full pardon, but we will not restore your right
10 to own a gun.

11 MS. STRONG: What's the remedy if they
12 violate the condition and have a gun; they lose the
13 whole pardon?

14 MS. TINDILL: Well, no. That's interesting.
15 The revocation of pardons is something I've sort of
16 been struggling with because how do you undo that once
17 I signed off on the certificate and checked it off, and
18 they've used it? What we have to do is go back and
19 notify all the agencies, here's the police report,
20 here's the conviction, this person has committed
21 another crime, but once we've granted a pardon, you
22 received that pardon. We don't revoke them, unless
23 it's between the time when you have the hearing and the
24 decision has been made, and we've checked off all the
25 boxes.

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2 pulled that file, and we added that to the pile of
3 failures, but for her statement, we wouldn't have known
4 that. You asked me something else about the
5 conditions.

6 MS. STRONG: Let me ask you this. I'll
7 bypass that because this will be my last question so
8 everyone else can ask you as well. There has been some
9 talk from people who have given testimony who are
10 former offenders about the need for a ceremony or some
11 sort of closure before a judicial body or a body like
12 yours, an entity. Then we also had testimony from a
13 woman who received a full pardon in Chicago, which she
14 waited years for, but it just arrived in the mail.

15 So how do you notify people that they have
16 received a pardon? Do you think that there should be a
17 little more ceremony or an in-person award with a
18 certificate? Do you have any opinions?

19 MS. TINDILL: I have never considered that.
20 One of the reasons why certificates of rehabilitation
21 have been through our legislature three years running
22 now is because it takes so long. One of the complaints
23 is the pardons board, they only get about 1,000 a year,
24 and it takes them months -- it takes about a year from
25 the time you pick up an application and fill it out to

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2 get to your hearing to actually get your pardon. That
3 takes too long. People need jobs now, now, now.
4 Again, we are making sure that if we give you a pardon,
5 we notify everybody. So later on, somebody can't go
6 back and say, oh, here it is because that sort of
7 defeats the purpose.

8 So the way people are notified is they are
9 told once their application is complete. Your
10 application is complete. Here's the process. They're
11 told about the prescreen. If they make it through the
12 prescreen, they are granted a hearing. We also have
13 administrative grants as well, where a 1950 burglary
14 for this 80-year-old who's now getting a pardon because
15 he wants to die without it on his record. We don't
16 make him fly in from Florida to the hearing to explain
17 what happened in 1953. So we also do that, but after
18 the hearing, they're told it takes a number of weeks to
19 process this. You will not get your decision today,
20 and then they get a letter with a signed -- it's an
21 official little certificate. I think people are quite
22 happy with it. I get letters thanking me and naming
23 their firstborns after me. They're just so happy.

24 You know, I suppose a little ceremony would
25 be helpful, but honestly, I think that what people need

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2 is that piece of paper that allows them in Connecticut
3 to check off I have never been arrested or convicted.
4 In Connecticut, they can do that. I have never been
5 arrested or convicted of a crime, felony or otherwise.
6 That's ceremony enough, I think, for Connecticut
7 offenders. I think they would like us to grant more,
8 more often, earlier, sooner. You know, if I could
9 double my staff, maybe that could happen, but we have a
10 pretty efficient system going with the few people that
11 we have.

12 MS. STRONG: Thank you.

13 MR. JONES: Elissa.

14 MS. HEINRICHS: I have a question about the
15 private background companies. I guess the question
16 goes to, as far as their obligation to maintain updated
17 and accurate records, what's the legal standard for
18 that? What's the due diligence? What's required, and
19 are there cases where courts have said -- has it been
20 discussed in case law, I guess, is my question?

21 MS. WHITING: There are cases. I can find
22 them for you. I'll give you my card afterwards, and I
23 can send them to you. The company needs to have
24 procedures in place to make sure that the records that
25 they produce, I think, are strictly accurate and

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2 up-to-date. So there are cases out there where
3 companies don't have those procedures in place.

4 On the other hand, there are companies who
5 have great procedures and got some bad public records
6 data, and they are not liable for having violated the
7 Fair Credit Reporting Act. The New York State Court
8 System sells the data to them that's inaccurate, and
9 they have systems in place to check to make sure
10 everything as far as they know is accurate and
11 up-to-date. They may not be responsible for what the
12 furnisher gives them, but there's some liability.

13 MS. HEINRICHS: Do they have an obligation
14 to go directly to the court or are they allowed to go
15 to a company maybe that's farther removed from the
16 court?

17 MS. WHITING: They do not have an obligation
18 to go right to the courts, but some of the big ones
19 have -- there are big sort of data furnishers out there
20 in the credit sphere as well as in the public records,
21 you know, criminal records sphere that sell the data to
22 the big companies. So there is no actual obligation
23 that they go to the courts, and I think most of them
24 don't. I'm sure back before the age of computers, they
25 actually did go to the courts. You would see what we

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2 into the state system to see where they go. You know,
3 they're tracked in the system, what their charges were,
4 what their conviction charges were and when they're
5 getting out, when they will be paroled. So it's very
6 limited data. What if you have misdemeanors, whatever,
7 but that information used to, before we got a law
8 passed actually, sit on the DOCCS Inmate Lookup for the
9 rest of his life. You could have left the custody of
10 the state 20 years ago, that would still be there. So
11 anyway, Westlaw was using that, which is not, I would
12 say, a reliable source of public data to get criminal
13 records information for employers who are paying good
14 money for it.

15 MS. HEINRICHS: One last question on that.
16 Is there any legislation that you're aware of that is
17 seeking to limit the sources of information that
18 they're relying upon?

19 MS. WHITING: I don't know of any
20 legislation that would limit it.

21 MS. HEINRICHS: Pending, anything proposed
22 actually?

23 MS. WHITING: Don't know of anything right
24 now.

25 MS. BIGLER: I would just add that many of

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2 the companies maintain their own databases, and so they
3 have their database. So if the employer finds out --
4 the employee finds out that there's going to be an
5 adverse action to their application for employment and
6 they clean up their problem with this company, that
7 doesn't mean that all the other companies who maintain
8 private databases get the information. So you're in a
9 situation where you cleaned up one company, but there
10 are 600 other companies out there. So really, there is
11 no central clearing house, which is part of the
12 problem.

13 MR. JONES: Chris.

14 MR. WELLBORN: I want to follow up with
15 that. I've had clients who have had their charges
16 dismissed. In South Carolina, we've gone through the
17 process of getting their records expunged, which under
18 South Carolina law, theoretically, they're able to
19 answer, no, they've never been arrested, but they apply
20 for apartments. I had one person apply for an
21 apartment. A company used one of these private
22 screening things and up pops the record. We had a
23 major row over it because it was still showing as
24 pending, even though it had been expunged because of
25 the private database. They hadn't followed up.

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2 MS. TINDILL: That's because South Carolina
3 takes longer than Connecticut.

4 MR. WELLBORN: But here's the thing. It
5 really doesn't matter what's going on with the NCIC and
6 what's going on with the state record if the private
7 data isn't updating their database. So really, it's
8 not a state issue. It's a private company issue. The
9 reason I bring that up is because one of the concerns
10 that had been raised before amongst some of us who are
11 on this committee is that, yes, you can legally say
12 I've never been arrested as a matter of state law, but
13 what does that mean to an employer who's hiring you
14 when they know, yeah, you can say that legally, but you
15 flat-out lied to me on the application. That concerns
16 me as a factor of potentially employing you. That's a
17 concern that I have, and for those of you that are in
18 the employment end of things, I'd just like you to
19 address.

20 The other thing, if somebody would take this
21 up, is what do you do about the companies like
22 mugshots.com, who have all this stuff out there and are
23 charging -- and they'll tell you if you want it removed
24 because it should be removed as a matter of accuracy,
25 they're going to charge you a fee. Is there any

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2 legislation that anybody is aware of in any state
3 pending to make that particular form of extortion,
4 which is what I think it is, illegal?

5 MS. WHITING: I think a number of
6 legislators are looking at it. I don't know if there's
7 any pending legislation about mugshots.com. A lot of
8 people are concerned about it. It's just an extortion
9 ring, as you say, and I know that privately there are
10 some organizations and law firms that are looking to
11 see what the litigation solution is to mugshots.com.

12 Can we say that somehow they're violating
13 the Fair Credit Reporting Act? Someone has a theory
14 that they are. Is it some kind of tort that we can --
15 is it defamation? The private attorneys are looking at
16 going after it, and it wouldn't surprise me if some of
17 the bigger regulators, the FCC, et cetera, are trying
18 to find ways to go after these guys, but they have a
19 very smart business model.

20 MR. WELLBORN: So going to the issue from
21 the employment standpoint, I've never been arrested
22 because I've got a pardon, but guess what, we know
23 you've been arrested because we Googled you and found
24 an old newspaper article from some paper or we went to
25 our inaccurate credit reporting service, and they still

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2 have it. How do we address that?

3 MS. TINDILL: The ways we've addressed it in
4 Connecticut -- and I wish Andrew Mosley was here
5 because he has been -- he knows more than I do about
6 how our pardons unit has dealt with the private
7 companies. We know it to be a problem. I do know that
8 I have fielded a request from someone who either
9 misplaced their certificate or there was a question
10 like, you know, I remember this case because my
11 daughter goes to college in that town and given the
12 case, and they couldn't find their certificate. So I
13 used that. We could go look it up and give them the
14 official certificate, and that has solved the problem.
15 But I can't speak to cases where the employer says,
16 look, I'm not hiring you because I know this person has
17 been arrested. I don't care.

18 MR. WELLBORN: Well, it's not --

19 MR. JONES: Chris, I have to stop you. I'm
20 sorry. I apologize.

21 MR. WELLBORN: That's all right.

22 MR. JONES: Geneva.

23 MS. VANDERHORST: I had a question actually
24 for Ms. Tindill particularly since you're coming from a
25 probation -- I'm sorry, a parole board background. Not

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2 so far in New York hearings, but in some of the other
3 hearings that we've had in the last couple of years, we
4 had a bit of discussion on whether classifying sex
5 offenders would be helpful, particularly for young
6 people who are 16, 17, anywhere from 16 to 25, the
7 Jack and Jill type cases versus the more predatory
8 cases.

9 Do you have any opinion on classifying sex
10 offenders, and do you think it would be helpful
11 particularly given your comments that you all have, at
12 least in Connecticut, provided pardons to sex
13 offenders? Do you think it would be helpful for them
14 to get more pardons or more to get jobs?

15 MS. TINDILL: I do think it would be more
16 helpful. The cases that we grant tend to be the Romeo
17 and Juliet, Jack and Jill cases where the panel is
18 going, you know, really? The wife comes in. They've
19 been together since they were 13 or whatever it is.
20 The current board tends to look quite favorably on
21 those sorts of sex offenses where the person can show
22 rehabilitation. It's not for one that -- so the short
23 answer is yes, I do think classification would be
24 helpful.

25 I think that in general, though. I think

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2 a pardon, is never getting a pardon, but he keeps
3 applying because he has the right to apply. But his
4 sex offense is different from the guy who came in with
5 his now-wife or the kid who -- we had a kid recently
6 who experienced incest and sexual abuse in his
7 childhood, and at age 17 was tried as an adult for a
8 sex offense and now would like a pardon. He will
9 likely -- not this time around probably, not enough
10 time has passed, but he will likely get a pardon
11 because --

12 And we have a lot of information about these
13 people by the way. We don't just have the police
14 report and their version of this is what I did. We
15 have something called a PSI, a presentence
16 investigation, which is a family background and
17 history. We have police reports. We have a
18 requirement that there be three letters of character
19 references, recommendations.

20 When I go out and do public outreach, I tell
21 people it's not all that compelling that your mama
22 wrote a letter. I know what my mother would say if I
23 killed somebody, you know. I want to hear from your
24 ex-wife, the neighbor that you had the issue with. You
25 know what I mean? The ones that are really compelling.

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2 So we have letters of recommendation. We have
3 employers write in. We have people say, if you give
4 him this pardon, he will have this job or he will have
5 this promotion. I just cannot. Corporate won't let me
6 or the boss won't let me. We get those letters, and we
7 have a lengthy application that asks you to discuss all
8 of your offenses and describe it.

9 So we have lots of information that we
10 consider in totality, and we weigh, in our professional
11 judgment, things more heavily, but the sex offenses we
12 look at to see is this sex crime, is this offense
13 something that we believe this person is sufficiently
14 rehabilitated for or is this something so heinous or so
15 outrageous that we believe people should know that
16 you've committed this crime.

17 MR. JONES: Larry.

18 MR. GOLDMAN: Let me ask. I have two
19 questions dealing with civil law from different
20 aspects. First, Ms. Whiting, I am thinking of the
21 possibility of the trial lawyer, not the criminal
22 defense lawyer, who may or may not have contributed to
23 threatening or frightening people to take steps against
24 sexual harassment, frightening people against failing
25 to hire people because of sexuality or gender and the

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2 effect they've had.

3 Is there any available forum or a
4 possibility of damages significant -- you mentioned the
5 Human Rights Law essentially that you're doing great
6 work because probably private lawyers aren't going to
7 do it. Is there anything going against those employers
8 who basically do not hire people violating 23-A to make
9 it attractive to civil lawyers to bring suits?

10 MS. WHITING: I wish I could say there is
11 the attorney's fees, but there isn't. To make it
12 attractive to civil lawyers to bring suits --

13 MR. GOLDMAN: And they are very greedy.

14 MS. WHITING: Well, they need to make a
15 living, and they need to pay their bills. So I
16 understand that. To bring a suit under the City Human
17 Rights Act, yes, there is the incentive of attorney's
18 fees. Under the State law, that's not there. If you
19 are not going to be getting attorney's fees, it's
20 probably not great for you.

21 MR. GOLDMAN: Unless you could make a class
22 action somehow out of that.

23 MS. WHITING: Right. You can try that.
24 Also, as someone mentioned, we have the good fortune to
25 have an attorney general in New York right now who's

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2 looking very carefully at these organizations that just
3 settled against Quest Diagnostics, one of these big
4 blood test companies that had a de facto flat ban on
5 hiring people with conviction histories. They got a
6 settlement. They had to pay the cost of the
7 investigation and pay what was called restitution. I'm
8 going to have to figure out how that works. So
9 there's -- employers might be looking at that sort of
10 activity against them. You know, there are some
11 incentives not to do that sort of thing, but there are
12 not unfortunately that many incentives to bring cases
13 under the New York State Human Rights Law.

14 Title VII is another matter. If you're
15 somebody who's well-versed in Civil Rights Law and have
16 the ability to bring that sort of a lawsuit, you can
17 recover damages and people do. There are some good
18 incentives for those attorneys.

19 MR. GOLDMAN: Let me ask Ms. Bigler
20 something. You mentioned essentially you found ten
21 cases that are whatever, that dealt with successful or
22 semi-successful --

23 MS. BIGLER: The nexus between negligent
24 hiring and criminal records, the nexus between the two.

25 MR. GOLDMAN: That's pretty good statistics,

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2 but as sometimes lawyers here, I don't want to be one
3 of that ten. What is the possibility, one, of private
4 insurance and, two, the State of New York backing up
5 23-A by providing some sort of insurance to employers
6 in that situation if they're accused of negligent
7 hiring?

8 MS. BIGLER: I can't imagine the state
9 providing insurance for negligent hiring. I just don't
10 see it. I don't see the State of New York providing
11 that.

12 MS. WHITING: There is the federal bonding
13 program.

14 MS. BIGLER: Yes, there's the federal
15 bonding program. That is true.

16 MS. WHITING: There is, as you said, the
17 New York State negligent hiring law, which is actually
18 separate from 23-A, but it says that if you can
19 document that you have followed 23-A when hiring
20 somebody, the presumption is that if you are later sued
21 for negligent hiring, that record will not come into
22 litigation. So that's a pretty good protection, but as
23 you know, not a lot of people know about it.

24 MS. BIGLER: It's only a presumption. So
25 presumptions can be overcome.

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2 MR. GOLDMAN: Is a bonding source available?

3 MS. BIGLER: Not that I'm aware of any.

4 It's just, as you point out, the bonding program. I'm
5 not aware of any private insurance at all that you can
6 get with respect to negligent hiring. You know people
7 buy insurance for Title VII violations. So you can,
8 and I don't know whether they would include that, but
9 certainly, I'm very aware that many major employers,
10 Cornell University among them, has insurance involving
11 Title VII litigation. So, for example, if the
12 university or other major employer is sued, actually
13 the insurance company actually sits in the trial. I
14 have no idea whether they will cover negligent hiring,
15 but I will check because it's a really interesting
16 question.

17 MR. JONES: We are going to run out of time
18 now. A couple of more people have questions. So I
19 want to make sure we get to Margie.

20 MS. LOVE: Just a very quick one I wanted to
21 ask Ms. Tindill. We've had a continuing theme here in
22 our hearings for the last almost two years about the
23 sort of tension between forgiving and forgetting as the
24 approach to relief. There has been a lot of skepticism
25 expressed about the whole notion of expungement,

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2 erasure, whatever you call it, disappearance,
3 forgetfulness as opposed to a full pardon, and many
4 states, I would say probably most states do not include
5 an expungement feature.

6 MS. TINDILL: Most do not.

7 MS. LOVE: Most do not, right.

8 MS. TINDILL: Most states you can get
9 pardoned, but it doesn't go away.

10 MS. LOVE: Right. Now, tell me about this
11 "going away" because that's what is sort of our concern
12 here that it really doesn't go away. That's because
13 it's been out there, it's out there, and in most
14 jurisdictions, it remains on the record for law
15 enforcement, for example. I know it doesn't in
16 Connecticut.

17 MS. TINDILL: Yes, and also courts retain
18 records for a certain amount of time, but remember the
19 idea, I think at least in Connecticut, our view is that
20 what we're worried about are employers and landlords.
21 You know what I mean? There has to be some mechanism.
22 If we care about this, we decided there needs to be a
23 mechanism to allow the stigma to be removed. The only
24 way you can do that is keep the record from view, if
25 you get a full expungement, from almost everybody.

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2 Like the Department of Corrections in
3 Connecticut, once you come in, let me tell you, you
4 come in as Mickey Mouse, you stay Mickey Mouse. It
5 doesn't matter that your name is John Doe, and this is
6 your date of birth. This is who you are, and that
7 stays forever and forever, amen. The truth is you can
8 mark off I've never been arrested or convicted, but DOC
9 has that record. I would imagine certain strands of
10 law enforcement, security has that record, but I can't,
11 as an employer or a nosey citizen or a neighbor, go in
12 anywhere and find it.

13 MS. LOVE: But many employers, for example,
14 are given access; employers with sensitive positions,
15 with vulnerable populations. So I'm just saying that
16 there's been a lot of concern about expungement as a
17 remedy, and I think there are those who would say that,
18 for example, a full pardon would be a restoration of
19 status, if you will, too, even without -- I mean, I did
20 federal pardons for a number of years, and there's
21 never been any federal expungement. A presidential
22 pardon has always been thought of as a cool thing to
23 have.

24 MS. TINDILL: And very hard to come by.

25 MS. LOVE: Increasingly so, unfortunately.

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2 Have you had any problem with expungement as something
3 that's only an illusory remedy?

4 MS. TINDILL: I believe we have had
5 situations where someone had a full expungement, and
6 one of these private companies leaked it. I believe
7 so. Also, someone pointed out that if it's a case that
8 hits the local media, now with Google -- I mean, the
9 Internet has changed -- you know, 9/11 changed the game
10 with all these background checks, and certainly, the
11 Internet has changed the game in terms of access and
12 getting around the regulations or statutes, but
13 Connecticut has a pretty good -- I mean, I think we've
14 been very lucky in our experience with that. I think
15 the cases you can name, you might be able to name on
16 less than one hand. It doesn't happen often, which is
17 why it takes us so long, because we work to erase and
18 scrub and clean it up and make sure, because the whole
19 point is that that stigma is what prevents people from
20 moving on. When I tell you people have moved on, they
21 have moved on. They have started businesses. They are
22 consultants.

23 So sometimes this is a challenge. I ask
24 them, so you don't need a pardon. You're doing better
25 than me. Why do you need a pardon? Explain to me why

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2 you need me to vote to give you a pardon. They are
3 very eloquent in their discussion of it is the stigma.
4 It is my kids in school. It's this cloud hanging over
5 my head, and with this piece of paper in my hand --
6 they never say the ceremony -- with this piece of paper
7 in my hand, that will make it better. Some version of
8 that. I get it all the time.

9 It's about that stigma. It's not just about
10 a sheet of paper that says you're pardoned, but
11 everybody can look it up, which is why I proposed this
12 session that we add the language to the full
13 expungement, which clearly doesn't make any sense.
14 Essentially, then we should save the state my \$6.3
15 million budget because we're spinning our wheels if
16 somebody can get a hold of it, and the expungement is
17 on the loose. The full expungements are very
18 successful, and if your wife can be quiet in the police
19 report, then the Chair won't know that you were doing
20 great until you got here.

21 MR. JONES: We are out of time, but I want
22 to give my Co-Chair, Vicki Young, an opportunity to ask
23 a question, if she has one.

24 MS. YOUNG: No, I'm okay.

25 MR. JONES: We are out of time, and this has

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2 lived up to its advance billing, and it has been every
3 bit as informative and interesting for us as we knew it
4 would be. Thank you very much for taking the time to
5 do this. We appreciate it. We're going to take a
6 15-minute break and reconvene at 4:15.

7 (Whereupon, a short recess was taken.)

8 MR. JONES: All right. We're back in
9 session. Welcome. It's a pleasure to have both of
10 you.

11 MR. HYMAN: Good to be here.

12 MR. JONES: We are excited to hear your
13 presentations, and we have lots of questions for you.
14 I think you both have been here for some portion of --
15 at least the last panel of the day. So you know how we
16 operate, but I will tell you nonetheless. We will give
17 each you of somewhere in the neighborhood of about ten
18 minutes to give us the benefit of an opening statement,
19 tell us a little bit about yourself and the work that
20 you do, and then we have lots of questions, as you can
21 see.

22 There's never enough time. We always run
23 long, but we endeavor to pick your brains as much as
24 possible in the time that we have. And so for the
25 purposes of this discussion, Chris Wellborn is going to

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2 lead the discussion, and to the extent that there's
3 time, the rest of us will then have an opportunity to
4 query you as well. So having said that, I'm going to
5 turn the floor over to you. I'll leave it to the two
6 of you to decide who goes first.

7 MR. GILLISON: I'll pass right to you.

8 MR. HYMAN: Jackie. Where's Lonnie? All
9 right. I'll start. I have to say that this is an area
10 of law that I -- my name is Steve Hyman, as you can
11 see. I'm with the firm of McLaughlin & Stern. It's a
12 private law firm, and I've done over my career a lot of
13 criminal law and have now been doing -- not now, for
14 the past 20 years have been doing employment law as
15 well. So I have what I guess you would call a
16 subspecialty. I have to say that this is a new area of
17 post-conviction remedy and dealing with it that I have
18 not had to deal with a whole lot. So I asked my
19 colleague, Jackie Gerrald, who's a partner of mine at
20 my firm to help. So I did some research.

21 MR. JONES: Let's have her pull up. Pull up
22 to the table, Jackie.

23 MR. HYMAN: We did some research on this as
24 well. When I say I have not come across it, the only
25 thing that I've had to deal with in the years of doing

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2 welfare, the public welfare, property or individual.

3 And my experience with that is it's a
4 standard without a definition, which then brings me to
5 the issue of the employer, where I think the employer
6 is in a terrible quandary in New York. That is, on one
7 hand, they can't discriminate. So they have to try to
8 decide whether or not there's a direct relationship of
9 the crime to the work being done. What does that mean?
10 And then or that the individual's conviction poses an
11 unreasonable risk to the public welfare. How does an
12 employer determine that? So that the employer would
13 more likely be inclined not to hire somebody because of
14 that risk.

15 Add to that, that we also have a theory of
16 law in New York that Jackie has been great in finding,
17 and that's called negligent hiring, which I know came
18 up in the previous, which means that an employer who is
19 willing to go and take somebody is subject to being
20 held accountable for putting someone in a position
21 where they cause harm to another. How does an employer
22 determine that? We found recently two cases; one,
23 where there was a robbery case and the court -- armed
24 robbery -- the court said, no, that's not an
25 unreasonable risk. And another one where there was a

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2 then I'll turn it over to you -- that say I better in
3 favor of sealing and/or not expungement -- we haven't
4 gotten that far. New Jersey has that -- that at least
5 an individual if the record is sealed, at some point
6 then there is the opportunity to say I have never been
7 convicted, and that thus takes the burden off the
8 employer and gives the employee the opportunity to do
9 it. The one thing that this sealing or expungement
10 will do is it will put the burden on the courts and the
11 system to determine whether or not an individual should
12 be allowed to dispense with his or her prior
13 conviction. Rather than making the employer make that
14 decision, a court would make that decision in some kind
15 of hearing as it does for the certificate of relief
16 from civil disabilities.

17 So I hope that this panel, which I think is
18 doing great work, will accomplish something that needs
19 to be done in New York, can push that kind of
20 legislation, so that hopefully people can move on with
21 their lives, as one would want them to. Thank you.

22 MR. JONES: Thank you. Mr. Gillison.

23 MR. GILLISON: Thank you. My name is
24 Everett Gillison. To give you a little background on
25 me, I currently hold the titles of both Chief of Staff

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2 is in public safety because all of that is in my
3 domain, but now, somebody keeps reminding me even
4 though you were just named Chief of Staff a year and a
5 half ago, now the entire government is under your
6 control. So you can really start taking more resources
7 from other areas, and I started doing that when we're
8 talking about the employment side and our Deputy Mayor
9 For Commerce because we have to have a holistic and
10 integrated approach to dealing with what I think is
11 about a third of the people that exist in the City of
12 Philadelphia, persons who have records in one way or
13 another.

14 So let me give you a little bit of
15 background. I come in and say, okay, I know that one
16 of the first things that needs to happen is that we
17 have to get real. In city government, rubber hits the
18 road usually with the Mayor's office. So you have
19 to kind of -- if you're going to talk the talk, you got
20 to walk the walk. So we did the Ban the Box lift.
21 That was something that people said, you know, will not
22 be done in Philadelphia. We had great support from
23 City Council, great support from the Mayor, and we did
24 that.

25 We started Reintegration Services for

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2 Ex-Offenders, RISE, which was something the previous
3 administration had done, but theirs was pretty much
4 emphasizing soft skills and referrals to various
5 agencies in order to get people jobs, but I knew that
6 you can't just refer somebody. You have to have
7 performance measures that actually develop jobs, and
8 it's that aspect that I've said I'd rather see a
9 smaller number of people, and get them jobs, and keep
10 them, and be able to prove that recidivism can go down,
11 therefore not having the next victim be started because
12 of a recidivist action. So we've been emphasizing
13 quality work and also follow-up for one year after the
14 person comes through our doors.

15 We also ended up -- the Mayor ran on and
16 worked with City Council in order to put together
17 something known as the PREP Tax Credit. I heard in the
18 other panels talking about tax credits don't seem to
19 have that much of an allure. I can tell you that
20 that's absolutely true in the beginning. It's taken
21 five years of time and effort, but we started with a
22 \$10,000 per year tax credit for every ex-offender that
23 a -- I'm sorry. I have to correct my own language. We
24 don't call them ex-offenders anymore. The language
25 truly does matter in this area. They're returning

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2 citizens, and thinking about them as citizens gives you
3 a different way of thinking about what rights they
4 should have. So our RCs or our returning citizens we
5 believe should come through the door and have their
6 opportunity for employment like anyone else. There are
7 all these job training programs that are both mandated
8 and funded by federal government, but if you look at
9 the statistics, as I have, you'll see that even though
10 a lot of people walk through the doors, they don't
11 really get the same services because everybody looks at
12 the fact that they have a record.

13 So in RISE or in our office, we actually
14 subcontract an expungement clinic that is part of now
15 municipal government. We are trying to aggressively
16 get the word out that, yes, you can get your record
17 expunged with help. So we set that up as part of the
18 assessment tools. We also assess for literacy and
19 everything else, and since the prisons come under me, I
20 now have all my assessment tools starting in prison so
21 that we can begin working on someone as soon as they're
22 involved with an arrest to find ways to keep them from
23 being arrested again and dealing with the harsh reality
24 of a third grade -- which is what most of them are
25 dealing with, most individuals who are in custody that

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2 we have have third grade and fourth grade educations.
3 Some of our earlier individuals who are -- some of our
4 citizens who are juveniles are dealing with first grade
5 educations functionally. We have to get them addressed
6 earlier even more so now, but dealing with these things
7 and actually telling someone this is where you're
8 assessed at and giving them the reality of the journey
9 that they're going to have to walk with all the
10 disabilities that are going on is part of what I think
11 good lawyering should be about.

12 And what I think we have to do is provide
13 that tool to our judges and D.A.s who are all part of
14 our coalition here along with the police chief and the
15 prisons chief and everyone else. When we meet and we
16 discuss these things, we put all these things on the
17 table, and over the last five and a half years, we've
18 placed a little bit less than 700 to 1,000 people in
19 jobs. We have a recidivism rate between 4 and 10
20 percent, depending on the classification, which beats
21 the 65 percent recidivism rate that we calculated and
22 had maintained over -- we have seen whenever you don't
23 have these supportive services going forward, and we
24 also know that by dealing with these folks, we know
25 that they need certain other matters, such as housing.

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2 know, uniforms, and everybody would say, I'm an
3 ex-offender. I'm a good employee and this is where --
4 I just want to provide for my family like everyone
5 else. That's the discussion we have to get to at a
6 certain point, and that's where we have to move our
7 culture. But I'll be glad to sit down and take
8 questions. I think I've enjoyed the rapid discussions
9 that the questions provide. So I'll stop at this
10 point, but thank you for inviting me.

11 MR. JONES: Thank you very much. Is it
12 Coplen?

13 MS. COPLEN: Yes.

14 MR. JONES: Ms. Coplen, before you start,
15 I'm going to ask you to shift over as far as you can to
16 the right so we can get you on camera and take your
17 name tag with you. Thank you. If you just give us
18 five to ten minutes by way of sort of an introduction
19 and opening statement and thoughts, that would be
20 great.

21 MS. COPLEN: Okay. I'll give you as many
22 minutes as I can. I am Lonnie Coplen, Director of
23 Sustainable Construction Programs with McKissack &
24 McKissack. We are a construction management and
25 at-risk construction firm. For the last two years,

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2 we've taken very decisive steps to get into the at-risk
3 business, and what that means is we are holding
4 contracts at this point. So we are responsible for
5 profit and loss on construction projects. McKissack is
6 owned by Cheryl McKissack. It's a family business.
7 It's 100 years old. She's an African-American woman
8 who's again grown this business very decisively in the
9 last ten years. It's a 100-year-old company that's
10 grown fairly quickly.

11 When Angelyn and I spoke about our
12 willingness to participate in this, my feeling was I'm
13 not sure that we really have too much to add to the
14 conversation, except that we're one of the many
15 companies or maybe fewer companies in the construction
16 space that are willing to not start with no when it
17 comes to hiring the formerly incarcerated or, I like
18 that, returning citizens. We need to be a whole lot --
19 we need to be very, very careful about the language we
20 use as well.

21 So our policy is such that we won't start
22 with no, but our business is very competitive. So we
23 make money when we are able to offer clients a very --
24 or at least a competitive or lowest cost. We do work
25 in a low-bid environment for a specific service. What

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2 we've been trying in the last 18 months to do is create
3 entry-level positions that will consider these
4 folks with these -- I want to say special backgrounds,
5 maybe that -- returning citizens for it because that's
6 where we find it fits for resumés very, very often.

7 One of the things that we're also dealing
8 with since 2008 is a market that is filled with
9 experienced people from the construction business
10 without prison histories who are unemployed. So when
11 I'm looking at a pile of resumés and I have a resumé
12 that clearly has 15 years of experience in the
13 construction market that ended in 2008, and I know what
14 happened there, I'm comparing that with the resumé that
15 has a different type of experience over the last 15
16 years, I happen to know what that is. For the most
17 part, that is an interviewee, and that skill set comes
18 very through, and I'll tell you what, that skill set
19 also is people skills. If that's something that we're
20 able to take and embrace, there's a fit, we'll give
21 that some preferential treatment because that's a
22 service we're doing in the community.

23 However, if I can't place that resumé and I
24 can't -- often the jobs we have, we pass the cost of
25 that employee onto the -- as you all know, you're

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2 lawyers, about billable hours, we pass that cost
3 directly onto our clients. That's one of the troubles
4 that we've been facing for those in the CM world, the
5 construction management world. If I want to take one
6 of my employees that are returning citizens and put
7 them in the care of a client where we provide support,
8 they may very well have a policy that says -- that
9 prevents them from taking those folks into their
10 environment. So that's one of the struggles that we
11 face.

12 I know one of our recent employees who has a
13 criminal record, he and I did an ad campaign for the
14 State of New York under Governor Cuomo's Work for
15 Success program. Is anybody familiar with that? So
16 this is a program that, as far as I can tell, is
17 publicizing the importance of giving these folks a
18 second chance, and so my colleague, Arnold, and I,
19 after he agreed to do this -- this is a funny story.
20 Am I going into my five minutes yet?

21 MR. JONES: You're fine.

22 MS. COPLEN: There are two parts to this
23 story I want to tell you. I had decided early on I'm
24 not going to do any of this sort of work unless Arnold
25 is okay with it. My friend, Arnold, who has a prison

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2 record, if he's okay with me talking about his
3 experience, then I'm going to do this. So I called him
4 over the weekend that we got the request from the
5 Governor's office that came through a connection at
6 Fortune Society. Arnold said, okay, let's do this. We
7 forgot about it. We did an interview. We understood
8 that the material from that interview would be put in a
9 brochure, and it would be the subject of a press
10 conference. And the whole idea is to demonstrate that
11 this is an important to thing to do, and there are
12 people out there willing to do it. Will you try to
13 give somebody a chance?

14 Two weekends later, I get a phone call from
15 the Governor's office saying, all right, are you ready
16 to be on the subway? They're going to put an ad on the
17 subway. Fine with me, but the next phone call was --
18 and that's not what we signed up for. The next phone
19 call was to Arnold. Arnold, what do you think? 11
20 million people are going to see you and me on the
21 subway. Well, Lonnie, I guess it's my duty. And I'll
22 tell you what, I am embarrassed to say I thought that
23 was a neat thing for him to say. I called -- I wrote
24 back and said, are you sure? We talked for 45 minutes.
25 They went ahead and did that, that ad, and we agreed

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2 that we would use just both of our first names. He
3 didn't want to have his last name in, and if he didn't,
4 I'm not going to be the white woman sitting next to the
5 black man, you know. So we were Lonnie and Arnold in
6 this ad, and it wasn't until six weeks later that I
7 woke up at 3:00 in the morning thinking I wonder if
8 Arnold did that because I'm his boss. You know, that's
9 a conversation we'll continue to have. He's actually
10 an extraordinary human being. So we do continue to
11 have those conversations.

12 But the other end of that story with the
13 Governor's office and that ad we did was that we're
14 trying to find places for people like Arnold within
15 McKissack because we are serious about this commitment
16 to the extent we can be given that we operate in a
17 competitive environment. So one of the contracts I'm
18 an executive on is providing at-risk or, pardon me,
19 on-call construction management services to various
20 types of state agencies, and that state agency manages
21 design and construction for state projects. So I
22 picked up the phone to our friend at the Governor's
23 office who had arranged this advertisement for us, and
24 I asked him, what's the deal with the Governor's
25 administration? Which of the organizations know about

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2 this program, Work for Success, which the Governor
3 feels is a priority? So much so that we're all on the
4 subway trains because I'd like to approach the state
5 agency and ask if they'd be willing. Well, why don't
6 you wait a bit, he said, because we're not really sure
7 that that can work. So I thought that was another --
8 we feel pretty strongly that's something we're going to
9 go ahead and follow up on, and just ask that there be
10 some very serious consideration since there has been
11 serious consideration of this issue so far.

12 MR. GILLISON: Absolutely.

13 MR. JONES: Thank you. Chris.

14 MR. WELLBORN: Thank you. Good afternoon.

15 I'd like to start with Mr. Gillison. We heard in
16 San Francisco from a very, very interesting gentleman
17 named Ronald Davis, who's now the acting mayor or was
18 the acting mayor of East Palo Alto, which is a pretty
19 depressed community across the bay. He had been the
20 former police chief, and one of the things among many
21 things that he emphasized to us was that in a community
22 where there was not a lot of economic viability, where
23 things were tough, it was a tough neighborhood, that
24 from a purely law enforcement, public safety
25 standpoint, it made nothing but sense for law

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2 enforcement especially to be involved in this
3 reintegration process.

4 So that's one of the things I'd like to ask
5 you about is, is your law enforcement community in
6 Philadelphia on board culturally? Because that's the
7 term he used was one of the biggest problems he had was
8 talking to his cops and saying, this is going to make
9 your life a lot easier to be connected to these folks
10 because they want to be connected to the community, and
11 if you're connected to them, they're going to see you
12 as an ally, and it's going to make law enforcement a
13 lot easier in the community. Is that something that
14 you have noticed or seen going on in Philadelphia?

15 MR. GILLISON: The answer is yes, and I
16 wholeheartedly agree with his assessment, which is why
17 Commissioner Ramsey, Charles Ramsey, who is the police
18 chief, when we came in together, one of the things that
19 he was looking at me saying, so I'm reporting to a
20 public defender, very interesting. I was at first
21 very, very ceremoniously dismissed by the head of the
22 FOP because they knew that I was bringing ideas that
23 were going to be probably a little different than what
24 they had previously thought about. I can tell you
25 today and through all of the things that we've gone

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2 through over the last five years, not only does the
3 police commissioner wholeheartedly agree, the FOP head
4 wholeheartedly agrees.

5 We have started something called both RISE,
6 Philadelphia RISE, or PhillyRising, which takes and
7 places the police department and the guy on the beat,
8 who's the guy that I knew for the most part, and also
9 the detectives in homicide, I gave them the opportunity
10 to be empowered and put city services at their beck and
11 call, so that when they are assigned to areas in a
12 particularly high crime area, those officers need to
13 have a way to get some street credibility themselves.
14 I was dealing with years of mistrust. We will still
15 have mistrust between police and community until we
16 find a way to bridge that trust, and PhillyRising for
17 me was my answer as well as having the police officers
18 understand that their success in driving crime down in
19 their assigned areas is going to be to understand who
20 are the parties that are really causing the trouble and
21 to provide a different way for them to exist. So by
22 having RISE and having police officers understand that
23 you can go up to someone now in Philadelphia and say, I
24 know what you're doing. I know you don't -- I can run
25 after you forever, but if I really want to help you,

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2 take my card. This is my name, my badge number, go
3 down to this agency. Let them do all the assessments
4 on you, and let them get you a job.

5 Now, jobs over the last five years have been
6 pretty difficult to get, but we started with the hope
7 of various foundations. We used the Goodwill model of
8 having a secured, managed area. So guys with no skills
9 at all were able to walk in and begin the process of
10 getting paid day one and doing not only forklift
11 operating, I was only getting people certificates that
12 actually led to national certifications because I
13 wanted them to be marketable. All this other BS that
14 was going on, where you go in and you say to the
15 state -- it used to be in our jails where you could
16 sign up for certificates that meant absolutely nothing.
17 I had to get buy-in from people who are actually
18 providing jobs. That's why I was trying to push the
19 tax credits so hard, and when the commissioner of
20 police understands that, and he can see that I don't
21 have to chase after this guy anymore because he's
22 working, that culture within the department begins to
23 change.

24 So I agree with that assessment. I
25 wholeheartedly understand that it takes mayoral

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2 that's one of those longer lifts that we have to deal
3 with. I will say that while we have very great
4 relationships with our state legislature, there is
5 something to the urban versus rural dichotomy in
6 Pennsylvania. I know that I have a fellow
7 Pennsylvanian here on the panel, and I'm sure she
8 understands what I'm talking about or at least alluding
9 to. I'd like to make sure that I can provide what I
10 call realistic solutions right now, and that's one of
11 those things that I've -- so I have not pursued that.

12 MR. WELLBORN: Along those lines and
13 addressing the realistic solutions, have you guys
14 started to keep statistics so that later you can go
15 with evidence-based stuff to the legislature?

16 MR. GILLISON: Yes, absolutely.

17 MR. WELLBORN: Next thought, has anybody
18 given any thought in Pennsylvania because I'm sure this
19 has got to take up police time too, such as Halloween
20 night and everything else, of categorizing the sex
21 offenses so that again the people who were peeing on a
22 tree after drinking at a ball game aren't lumped in the
23 lifetime registry situation with real predators?

24 MR. GILLISON: I can tell you that the state
25 legislature has gone out of its way to do the

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2 numbers of crimes and letting people do what they
3 normally do over history and solving these things on
4 their own.

5 MR. WELLBORN: Shifting over to the prison
6 side, the approach to the folks -- we're obviously
7 looking at this not just from the standpoint of people
8 who are being released from prison and coming back in,
9 but the vast majority of the folks that never go to
10 jail but they're getting convicted of misdemeanors that
11 create these bars and major problems for them.

12 Is anybody going in and hitting them at the
13 first juncture when they're initially arrested, they're
14 sitting in jail and addressing then the issues of these
15 are places you can go, when you come back into your
16 community, this is who we want you to go see versus
17 just the traditional probation model, where they just
18 hand you a flyer and say good luck?

19 MR. GILLISON: I actually came up to
20 New York. Rikers Island, that was one of the prisons
21 that I visited when we were investigating our public
22 safety. Instead of going to lot of places my other
23 deputy mayors go to, I go to jail to see what their
24 programs are, and I stole an idea here because there's
25 really no shame in stealing great ideas. I require

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2 folks at RISE to go and we set up in the prison, and we
3 offer not only a way -- this is the jail. This is
4 before you're -- you're just held prior to going to
5 court. 75 percent of the people that I have on State
6 Road, which is where the majority of my prisons are
7 located, are people who are being held prior to going
8 to court.

9 I take that opportunity to make sure that
10 they not only get flyers, but that social workers who
11 are working for the city and in corrections are
12 providing them with alternatives to what they're doing.
13 We are TABE testing as much as possible. Although, I
14 have to put more money into computerizing the TABE
15 testing so we don't have to keep marking it up by hand.
16 We started doing that. We do it in terms of 200. So
17 we can provide a way forward, an assessment while the
18 person is in jail, while they might be there for drug
19 offenses and/or other matters. There's some guys that
20 are in there for murder and shooting and gun charges
21 and everything else.

22 I'm trying to provide them -- you don't have
23 to be in the life. There is another way, but you got
24 to know who you are first. My first responsibility, I
25 think, is to make sure these individuals know who they

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2 are, what are their strengths, what are their
3 weaknesses. The fact of the matter is they're just as
4 scared of being where they are, not knowing what the
5 outcome is going to be for their lives, and I don't
6 want them just flushing their entire life down the
7 tubes, making rash decisions, and therefore, I have to
8 get them to understand who they are and whose they are
9 so that I can make sure that they can go forward,
10 talking to their lawyers, talking to their social
11 workers, talking to their families who still haven't
12 given up on most of them. So they can put themselves
13 in better positions. We do that behind the walls, and
14 that's a requirement of my RISE office when we're
15 working with that. So we have the preadjudication and
16 actually post.

17 Now, I'm working with the state correctional
18 parties to see about people who are coming back to
19 Philadelphia so that I can do the same and provide the
20 same way. We're trying to get a data link between the
21 State Department of Corrections and Philadelphia.
22 About 54 percent of the people in the state
23 penitentiary are citizens that are coming back to
24 Philadelphia at some time. So we have to be a lot more
25 integrated with our data and our communications if

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2 we're really going to be successful.

3 MR. WELLBORN: I'd like to address -- the
4 last thing I'd like to ask you about is the NIMBY issue
5 and initially on sort of a microcosmic level and then
6 more expansive. When you get the NIMBY pushback, is
7 that something that you feel or that you're getting
8 support from your police chief or your police
9 commissioner or the line officers as far as coming into
10 those communities and dealing with those folks and
11 saying, look, this makes you safer?

12 MR. GILLISON: The police -- again, I don't
13 have any problem with the police. The person that
14 I'm -- the parties I'm having problems with quite
15 frankly are sometimes my allies on some other issues.
16 For example, drug treatment is needed. You got to have
17 drug treatment stay in communities if it's going to
18 work. I am a strong believer in the fact that you get
19 less parties -- if I can get day reporting centers.
20 The more incarceration that -- it has already shown,
21 and I've lived over the last 30 years in criminal
22 justice. The more time you spend in jail, the more
23 damaged you get. So the bottom line is that you got to
24 end up having ways of keeping linked to family and
25 friends together.

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2 is where he's coming back. 95 percent of the people
3 are coming back to the same communities that they left.
4 Let's build a justice and a corrections facility.
5 That's what it is. So I'm not going to hide behind the
6 fact that it's a day reporting center. I fought that
7 fight in court and lost. It's a corrections facility.

8 I'm trying to help rehabilitate people.
9 That's one of the ends of justice. I want to do it,
10 and I want to do it in the community, but community
11 members, the very same ones that talked to me about
12 racism in the criminal justice system and we only want
13 to overpopulate jails in order to make sure that
14 suburban folks get jobs, they won't put them in the
15 area where they are basically needed, and that's a
16 fallacy. I bring it out everywhere I go. I'm the
17 uncomfortable guy in the room because now I have
18 credibility on both sides, and I say you've got to give
19 this up. You need to put -- the least restrictions
20 should be the key in helping people correct themselves,
21 and employers need to know that guys can get to work
22 not from State Road, which is up in the far northeast
23 of Philadelphia, but from the neighborhoods where
24 they're actually going to be working, which is where
25 they're living. That's the way it has to be. We can't

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2 compromise on that, and we've got to push back on
3 NIMBY, and that's just the bottom line.

4 Now, I've been doing what I've been doing
5 five and a half years, and I still haven't been
6 successful. It's not going to deter me, and even when
7 my term is up when the mayor -- we're term limited by
8 two terms, and we're at the last two and half years
9 now. I will pass the torch on. This is a marathon.
10 This is the cultural shift. I'm just one party in
11 this, and I think with more voices, we can make a
12 change that will matter.

13 MR. WELLBORN: One last question, and that
14 is now on sort of a macrocosmic level on NIMBY.
15 Ultimately, we're going to be, as I'm sure you're
16 aware, compiling a report that's going to be released,
17 and the concept is we're going to try and really do
18 something that makes a difference. As we've asked a
19 lot of other people, is this something if we took this
20 on the road, so to speak, to use our Chairman's
21 favorite term, would you feel comfortable testifying in
22 other states or in front of other groups of people
23 about what's been going on in Philadelphia and the
24 success rate?

25 MR. GILLISON: Actually, I've been doing

1 PROCEEDINGS

2 that for a while, and I think Angelyn tried to get me
3 to come to Washington. I told her I'll be there. I go
4 wherever. I mean, I've taken the model that we had
5 started in Philadelphia. I've been to about six states
6 now. I've been invited to come to Dallas because they
7 think this is a great way of marrying employers and
8 providing the supportive services, I mean, what's
9 really needed.

10 Employers are afraid. I always tell
11 everybody everybody is afraid. So we have to deal with
12 the fear where it is. The employers really just want
13 -- I found it wasn't just the \$10,000 tax credit
14 because I wasn't getting anybody to take it at first,
15 but once I said to them I'm not leaving. My office --
16 and this is the Mayor's Office of Reintegration
17 Services for these folks is who we are. We're not
18 leaving. We're going to provide the supportive
19 services. If you have a problem, you don't have to
20 call that person. You don't even have to call the
21 probation officer. Call the office because we
22 establish relationships. We will make sure the guy
23 gets in. The gal gets out, gets to work, make sure
24 they know. Because when I go through my introduction
25 to them, I tell them I need Jackie Robinsons now. This

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2 is a cultural shift, and every last one of you who get
3 hired, if you mess up, you are killing the next guy
4 behind you. Well, they say, that's a lot of pressure.
5 Well, that's what life is about. This is a fear
6 situation. If you mess up, you're going to end up
7 having a problem. The success stories is what I enjoy.

8 I had a guy who started in our cooking class
9 that we did just as a way with ShopRite, who's been a
10 great partner with us. ShopRite is a grocery store in
11 Philadelphia, great partner. They didn't even take the
12 \$10,000 credit. They were doing it because they said
13 it's the right thing to do. The guy ended up making
14 sure that he passed a safe food handling course, got
15 his certificate, had a flair for cooking, put him
16 through another course. He ended up graduating from
17 that. The guy then left. He was making \$9 an hour.
18 He left that, and he got promoted, promoted. He went
19 through the Goodwill piece. He was getting \$13 an
20 hour. He applied for and got into a local university
21 because that's all I can say. He's now the head chef
22 at the local university, and they know he's a returning
23 citizen, but they didn't care because he had the
24 skills.

25 This is a market-based economy. We've got

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2 to stop thinking we can just fill it with folks that
3 don't have real skills. We provide people to really
4 show their skills. They can make it for themselves.
5 Now, he is going to be part of the campaign that I'm
6 going to start because they're willing to say this guy
7 has been the best employee that we've had. He doesn't
8 miss days of work. He comes to work. He's energetic.
9 People love him. So what he had a problem in the past.
10 His skill is what makes the difference today, and
11 that's how we're going to win this war.

12 MR. WELLBORN: I'd like to shift over to
13 Mr. Hyman for the employer/employee piece, and again,
14 we've got this whole concept of negligent hiring and
15 the fear, whether founded or unfounded, about what a
16 major problem it is from an employer's standpoint. I
17 spent a little bit of time looking at my state, which
18 is South Carolina, and there have been a couple of
19 cases, but most of them have been just completely
20 denied by our Supreme Court in terms of the negligent
21 hiring aspect.

22 MR. HYMAN: That's not New York.

23 MR. WELLBORN: I understand, but here's the
24 question I have. Somebody comes in theoretically.
25 You're advising a client. Let's say an employer, and

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2 there that says that will protect somebody from a
3 negligent hiring suit?

4 MR. HYMAN: Well, there is mixed law in
5 New York about whether or not the employer has the
6 obligation to even look. There are some case law that
7 says there is no common law duty for an employer to
8 check out a criminal record, for instance, but even if
9 one does, if the record is sealed, the employer, I
10 believe, would have almost a complete defense, that if
11 it's sealed, how can -- and you can't ask about it,
12 then how can the employer be held liable for
13 negligently hiring somebody who then commits a crime?

14 MR. WELLBORN: Let me go one step further.
15 I mean, this is the era of Google, and I can see
16 somebody making an argument that, gee, all they had to
17 do was hit Google and up would come up 15 hits showing
18 this person had been arrested for A, B and C or the
19 employer was given actual notice by somebody who works
20 in the company or somebody who knows him who says, I
21 know that guy. He was accused of rape back in 1963.
22 Again, under those circumstances, I'm just curious what
23 your analysis would be regarding any potential
24 negligent hiring.

25 MR. HYMAN: I think it's a complete defense.

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2 I'm trying to put it to the individual who has been
3 arrested, which we do have in New York, returned to the
4 status. I don't know of a case -- and Jackie did more
5 research than I did on this -- of an individual being
6 held -- an employer being held liable for not knowing
7 about somebody's arrest. Now, of course, arrest is not
8 conviction, but a conviction that's sealed or better
9 yet expunged, then it would be in the same status as if
10 it never happened. An employer is not under -- I'm
11 sure Lonnie can talk to this better than I can -- under
12 any duty to keep checking records and Googling. One
13 can take at face value what the employee says, and the
14 question is can the employee say I've never been
15 convicted. The employee can say that. There is no
16 reason that the employer can't rely on that.

17 MR. WELLBORN: Would it give anybody from an
18 employer's standpoint -- and perhaps Lonnie can answer
19 this as well -- a little bit more comfort if there was
20 something actually enacted in the state legislature in
21 Albany that basically gave an employer immunity under
22 those circumstances from a negligent hiring suit?

23 MR. HYMAN: The answer to that would be yes.

24 MR. WELLBORN: Is there any movement to do
25 or to enact such a law, anybody talk to any

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2 legislators, anybody propose anything like that?

3 MR. HYMAN: I haven't seen anything in the
4 proposed legislation that's been in New York State,
5 anything that dealt with that issue. They're really
6 dealing with it from the returning citizen point of
7 view, not from the employer point of view.

8 MR. WELLBORN: Ohio has a concept that they
9 issue a certificate of employability, which is
10 different than a certificate of relief from
11 disabilities, the licensure issue. The certificate of
12 employability is something that they do within the --
13 issue within the system itself when someone is
14 incarcerated, and they're taught a skill. And
15 basically, they get something showing, look, this
16 person is graduating from prison with this particular
17 skill, and they can take that to future employers. Is
18 that anything that exists either in New York or
19 Pennsylvania to either of your knowledge?

20 MR. HYMAN: New York has the certificate of
21 relief, and it has the certificate of good conduct, but
22 in each instance, the underlying acts still are
23 available. So long as they're available, an employer
24 has the right to use them. The difference with sealing
25 or expunging is it takes away the acts. Even though it

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2 may be found on Google, which will create a whole other
3 series, I'm sure, of cases, but the fact is that once
4 it is a removed item from the record and it can't be
5 used, the underlying facts themselves are no longer
6 available to be used.

7 Did you kill -- did you engage -- one of
8 them is cocaine. You know, did you take cocaine? I
9 guess from the point of view there would be interesting
10 issues, as I'm saying this, what happens when the
11 employer may have a question, did you ever use drugs?
12 I guess the answer is does the sealing take away the
13 fact that you used the drug? I mean, I can't answer
14 all the questions. I don't think even legislation can
15 answer it, but we can take steps to get there.

16 MR. WELLBORN: Sure. I guess what I was
17 getting at from employability is -- let's address
18 Lonnie. You guys are obviously looking for people who
19 have certain skill sets because it doesn't do you any
20 good to have somebody who's just unskilled labor to
21 come in and work at your company unless you're really
22 hiring for a big project.

23 Is that something if New York had such an
24 animal, where somebody could come out of the system and
25 say, look, and be certified by somebody who's actually

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2 got some credibility as far as certifying them, that
3 they're a skilled carpenter, a skilled mason or a
4 skilled joiner, whatever it may be, that that would be
5 something that --

6 MS. COPLEN: Without a doubt, absolutely.
7 Of course, we have union constraints, and that's the
8 bigger problem.

9 MR. GILLISON: That's a bigger issue.

10 MR. WELLBORN: I'll turn it over to anybody
11 else.

12 MR. JONES: Geneva.

13 MS. VANDERHORST: No.

14 MR. JONES: Penny.

15 MS. HEINRICHS: Did you skip me?

16 MR. JONES: I'm sorry. I didn't see you.

17 MS. HEINRICHS: Quick question.

18 MR. JONES: I apologize.

19 MS. HEINRICHS: No problem. I want to ask
20 about Philly's Ban the Box. Has it extended yet to the
21 vendors and contractors for the city or is it only city
22 agencies?

23 MR. GILLISON: It's everybody.

24 MS. HEINRICHS: Good, good. Another quick
25 question for you. You know from being in the

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2 defender's office that Philadelphia has the worst
3 record, in my opinion, for clearing up criminal
4 dispositions. You were here when we were talking --
5 our other panelists were talking about cleaning up the
6 rap sheets. I know our system has changed in the state
7 over the last few years. You're in a position to make
8 sure Philadelphia really takes care of it because
9 they're making a mess of our criminal record. Can you
10 do something about it?

11 MR. GILLISON: Well, that's one of those --
12 the answer is yes, I should be able to. I can tell you
13 that within the agency, we actually have written
14 contracts not only with CLS but with other groups that
15 come in and help expunge records and clean up records.
16 The hard thing is that you have to be able to really
17 push the judiciary, who is the party that's really the
18 guardians of this, to act on it. You can flood the
19 expungement court and motions court with a lot of
20 requests to clean up records, in other words, only have
21 on the record the convictions and not anything else.

22 You know, I've had to have a lot of
23 discussions with the police who are always saying,
24 well, you know, sometimes when you take away the
25 context, if you only have a DUI conviction and yet you

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2 didn't know that part of all of that information was
3 the fact that there was a kidnapping charge or a luring
4 charge or whatever, that needs to be explained, and you
5 should put that on the individual to explain in the
6 next context.

7 MS. HEINRICHS: If I can just clarify, I'm
8 talking about the disposition unreported.

9 MR. GILLISON: Unreported.

10 MS. HEINRICHS: Yes. That particular code
11 is often seen with Philadelphia, and the docket, you
12 know, you can't handle that, but as far as cleaning it
13 up so that when the docket is moved through and there
14 is something to be reported, I think that would be
15 within the municipality rather than the state.

16 MR. GILLISON: That is true. I think that
17 we're actually making progress there. You know that in
18 our administration, we worked to get the Clerk of
19 Quarter Sessions completely removed as a separate
20 agency, and we've now eliminated the Clerk of Quarter
21 Sessions, and it's now just within the court's
22 function. The courts have now taken that
23 responsibility, computerized matters and are putting
24 everything into CPCMS, which is the statewide data
25 bank. So instead of having two or three different

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2 entry points, police, Clerk of Quarter Sessions and the
3 court itself, we now literally just have the one that
4 matters.

5 So I think that is cleaning up a lot of
6 those matters. I will go back and see if that's still
7 the biggest problem that we've been dealing with for
8 such a long time, but I think that by eliminating some
9 of these old institutions that exist just because they
10 exist and bringing it into a modern era, that we should
11 be able to handle that. Data systems that are being
12 upgraded, I mean, I'm spending an awful lot of money on
13 computers and computer systems, data sharing, building
14 data warehouses so that we can scrub each other's
15 systems. So we're actually operating from one.

16 The next big one is I want to have
17 Philadelphia being able to talk to the state because as
18 someone else, I think, said on a different panel, the
19 Department of Corrections is a whole different ball
20 game, and you have to be able to understand that if you
21 came in as Mickey Mouse that first time, you're still
22 known as Mickey Mouse whether or not you have your
23 a/k/a together. That's who you're known as. I think
24 we need to be able to change that to make sure that we
25 are providing matters.

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2 One of the ways I'm doing that is returning
3 citizens need identification in order to access all
4 kinds of benefits, to access services, to access
5 housing, to access jobs. We are working with PennDOT
6 to do non-driver's licensing for returning citizens
7 when they leave the state. I'm trying to get
8 Philadelphia to be part of the approved counties so
9 that we can use the same data, and we will be able to
10 have returning citizens getting their non-driver's
11 license IDs upon leaving the prisons after serving
12 their county sentences.

13 If I can get that through, I think I will
14 probably get about 65 percent of the people who are
15 leaving after serving their counties, they'll have
16 their ID when they leave the prisons. That will help
17 them in getting their meds. That will help them in
18 proving who they are, where they are, getting their
19 emergency check. All of that they'll be able to do.
20 It's those kinds of simple data things that we should
21 be able to address, but it's just a massive data
22 conundrum.

23 And it's all about funding. I've taken part
24 with the mayor, and we had to cut \$2 billion out of our
25 budget over the last five years. It had to come from

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2 somewhere, and I'm one-third of the budget. So we have
3 a \$3.4 billion budget. One-third of that budget is
4 under my control as Deputy Mayor For Public Safety with
5 police, fire, prisons, homeland security, reentry
6 services for returning citizens, all of that, DEA,
7 courts, public defender. All of that money comes from
8 a billion dollars that is the public safety area, and
9 making these changes means you have to make hard
10 choices, but that's what being executives allows us to
11 do.

12 MR. JONES: Penny.

13 MS. STRONG: I have a question for
14 Mr. Gillison. In terms of the terminology, returning
15 citizen, how long has your office used that, and where
16 did that come from?

17 MR. GILLISON: We started originally with
18 the ex-offender matter and nomenclature. That was five
19 years ago in 2008 when we first started. We left that
20 and we were at -- I go to a lot of conferences with my
21 friends, and they began to understand that labeling was
22 the key -- is one of the parties that allow people to
23 be seen as true, you know. I think the person asked
24 the mayor and I, when have I become less than ex? I
25 mean, why do I always have to be an ex? We started

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2 thinking about that and saying, you know, ex means that
3 you'll never get to be. You're always an ex-offender,
4 and we said we have to deal with that somehow.

5 Wayne Jacobs, he's part of the -- he's been
6 helpful in our moving on not only Ban the Box, he's a
7 representative, and you're going to have Tyrone here, I
8 think, tomorrow. Tyrone Werts is a guy that I worked
9 with when he was serving life up in Graterford. We
10 started really talking about how individuals needed to
11 be seen a little bit more than just ex-offenders, and
12 that community came up with the fact that they were
13 returning citizens, and the mayor and I -- he said, we
14 don't need to be in the labeling business, but we at
15 least need to advance that we are trying to seek a
16 change. So we've adopted that language to make sure
17 that we understand that there is a time that you've
18 done what you've done. It's over, and we have to move
19 on.

20 If you're a citizen of the United States,
21 you should have certain rights and privileges, and
22 that's what you are. You are a citizen. If you're
23 going to be a returning citizen having been away -- one
24 of the things that one said was, well, I didn't go
25 anywhere. I just got probation. And I said, yeah, but

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2 whether you knew it or not, as soon as you got
3 probation, you left. I think you know that because you
4 can't get a job. So now, let's get you back in, and
5 let's stop this nonsense, and let's work on the hard
6 things, expungements, you know, getting you up to
7 speed, some real skills and dealing quite frankly with
8 my union friends, who I think need to take a bigger --
9 they always were the vanguard early on in the '60s and
10 in the '70s, early '70s of welcoming. Right now, quite
11 frankly, a lot of them are still in the it's who you
12 know business, and it's okay to be an ex if you're in
13 the family, but if you're not in the family, you still
14 got barriers. So I'm trying to get all my returning
15 citizens to have one level playing field here in order
16 to go forward.

17 MR. JONES: Vicki.

18 MS. YOUNG: Mr. Gillison, given that you
19 were a criminal defense attorney for 20, 25-plus years,
20 what do you envision the either role or what can the
21 criminal defense bar do in the vision that you've been
22 discussing of RISE and returning citizens, and what do
23 you tell people before they became a -- well, as they
24 were on their way to being an ex-offender before they
25 returned?

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2 MR. GILLISON: I can tell you that I would
3 not have been able to be as effective in this
4 particular path had I not had the support of both the
5 district attorney's office, who were my -- obviously,
6 we've known each other and worked together in the
7 courtrooms from the time we started as baby A.D.A.s and
8 baby PDs all the way to where I am now. The District
9 Attorney Seth Williams in Philadelphia has been a
10 champion for being smart on crime, and he understands
11 that this is part and parcel of what is happening in
12 this area and the same thing with criminal defense
13 lawyers at the defenders and others.

14 We have to raise our game as criminal
15 defense lawyers. There has to be more education
16 required. I know people groan when I say you've got to
17 go back and do more than 13 hours of CLE that's
18 required because there are so many things you have to
19 be aware of when you're advising someone on what
20 they're going to do with their life. We have to be
21 aware of immigration status. We have to be aware of
22 literally what this conviction will mean and still be
23 able to counsel people through that what you did is
24 what you did, but if you follow the prescriptions that
25 we have here, we'll be able to get you through and not

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2 just say that it's now part of the system, the court
3 system's job to make sure that the record is correct.
4 It's part of the criminal defense lawyer's job to make
5 sure that his client, once convicted is convicted of
6 the right things, and that when it's certified by the
7 Clerk of Quarter Sessions --

8 When I was trained in the '70s, because I
9 started off as a social worker for six years before I
10 quit, went to law school and came back. When I
11 started, it was your responsibility to see what the
12 commitment sheet said. You don't do that anymore. I
13 think that's a pox on our role as criminal defense
14 lawyers. That you have to take the time. I know that
15 -- I've been in courtrooms when I had to handle 50
16 cases. Now, everybody tells me we can only handle 25
17 at a time. When I was doing it, it was 50. I had to
18 see and get copies of every last one of those
19 certifications to make sure they were right. Why did I
20 do it? Because the clerk of courts, once you got to
21 know them -- and I think that's one of the problems we
22 have is we want everything to be done by a computer,
23 and we don't want to talk to one another. I got more
24 done by just saying hello, how are you, please and
25 thank you from clerks who at the end of the day trusted

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2 my judgment, which is what my clients were doing also.

3 That's what we ended up having to do. I
4 think that we are not passing on the best traditions of
5 our positions as lawyers when we don't emphasize that
6 criminal defense lawyers do that. I know that people
7 will groan and say, well, why I got to worry about the
8 collateral consequences of convictions? Guess what,
9 that's what you do. If you don't like, I used to tell
10 people when I was training them, get the hell out.
11 That was just me.

12 MR. HYMAN: I would just add, as a defense
13 lawyer, which I once was like Larry still is, the
14 defense bar, I think, would be very instrumental in the
15 expungement, sealing, and it's an arena that should be
16 pushed more as we represent to individuals what's going
17 to happen to them five years down the road, eight
18 years, ten years, and having the expungement and the
19 sealing records and having a defense bar that's
20 interested in and pushing for that would be helpful. I
21 mean, that seems to me to be a real step forward that
22 has to be taken, and the defense bar should be a part
23 of that.

24 MR. JONES: We are out of time
25 unfortunately. It's the end of the day. Mr. Gillison,

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P R O C E E D I N G S

I think you just launched your campaign for 2016 for mayor. We are happy to loan you the videotape if you want to make campaign commercials, but thank you all. This was really wonderful and a great way to end the day. We are recessed until tomorrow at 9:00 a.m.

(Whereupon, at 5:31 p.m., the hearing was adjourned.)

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C E R T I F I C A T E

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

I, HELEN SHUM, a Notary Public for and within the State of New York, do hereby certify:

That the above is a correct transcription of my stenographic notes.

I further certify that I am not related to any of the parties to this action by blood or by marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 7th day of June, 2013.

HELEN SHUM

**Transcript Edits
New York Hearing
Day 2**

Patricia Warth

Page 74, line 21, the word “specific” should be “disparate.”

Amy Shlosberg

On page 109, line 14-15, omit "less interesting."

On page 111, line 5, omit "kings county."