APPENDIX

PARTNERS IN JUSTICE COLLOQUIUM TRANSCRIPT

I.
THE CURRENT STATE OF OFFENDER RE-ENTRY AND COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS

JUDGE ROBERT G. M. KEATING: As Dean of the Judicial Institute, I would like to welcome you today to the *Partners in Justice* colloquium. I think it's obvious from the program and from the website that an enormous amount of work went into this program once the Chief Judge identified the issues and the theme. I particularly would like to thank Randy Hertz of N.Y.U. Law School; Norman Reimer, President of the New York County Lawyers' Association; Juanita Bing Newton, the Administrative Judge in charge of Access to Justice Initiatives as well as the Criminal Court of the City of New York; Robert Mandelbaum from the Chief Judge's office; and Joy Beane from the Judicial Institute. They have just done an enormous amount of work and a fabulous job in putting this program together.

Just a brief word about the Institute, because many of you haven't been here before. This opened about two years ago after about a decade of perseverance and tenacity by the Chief Judge. And in the period since we have opened, we have offered programs to over six-thousand judges and over twelve-thousand non-judicial personnel, both here and around the state. Our charge from the Chief Judge has been not only to do continuing judicial education but also to explore the way our court system has tried to address old problems with new solutions in the area of problem-solving courts, including domestic violence courts, as well as to address issues now evolving or brand-new, such as the science of DNA, e-discovery, and bioethics.

Many of these programs at the Institute highlight the incredible transformation that's gone on in our court system over the last decade under Judge Kaye. During that time, New York has become an acknowledged leader in a wide range of court initiatives that utilize both innovation and collaboration. In order to ensure that this collaboration continues today, it's my privilege to introduce an extraordinary leader and a catalyst for both change and a more accessible system of justice, the Chief Judge of the State of New York, Judith Kaye.

CHIEF JUDGE JUDITH S. KAYE: Thank you, Bob. Welcome all to the Judicial Institute. Faced with an agenda that's crammed to the brim with great people and great presentations, I thought long and hard how best to use the precious few minutes I have been allotted from your day to introduce this utterly spectacular, first-time-ever-in-the-history-of-the-world colloquium, that brings together clinical law professors, practicing lawyers, and great judges. Given the obvious high level of preparation that has gone into the program, simply expressing thanks to all of the planners and all of the participants—which is the thought that tops my list—could easily consume my minutes here. So at the outset, let me just take a minute to reaffirm what Judge Keating has said and pay special tribute to the Judicial Institute staff. That includes Sue Nadel, Joy Beane, Valorie Perez, and Theresa Daniel. And the core planning group, starting with Dean, Judge, whatever title he chooses to use, Robert Keating. Fantastic job, Bob, thank you so much for what you have done. And Judge Juanita Bing Newton, Professor Randy Hertz, Norman Reimer, and my astounding law clerk Robert Mandelbaum, who is everywhere, for having transformed an idea into an extraordinary event.[1]

JUDGE JUANITA BING NEWTON: It's my pleasure to be the moderator of this morning's plenary session. I am not going to say more than to introduce the panelists because they are known to all of us. This panel mirrors the other panels throughout the day, where we team up a judge, an academician, and a practitioner to bring different perspectives to the issue of collateral consequences of criminal convictions.

Debbie Mukamal will speak first. Professor Gerald López will follow. And then Judge Fern Fisher will wrap things up. We have asked each panelist to speak for fifteen to twenty minutes so we will have at least one half hour remaining at the end of the program to answer questions and engage in a bit of dialogue.

I want to share with you a letter I received last week from a Westchester attorney that puts this all in context. He wrote, "To Whom It May Concern, I enclose for your consideration three copies of certificates of disposition referring to my client. Although these convictions were supposed to be sealed, each and every one of them has been obtained by and listed in this man's credit reports,

1 Eds.: the remainder of Chief Judge Kaye's opening remarks have been omitted and incorporated into her Introduction to this issue.

which have been obtained by his former employer and prospective employers, as well as his housing manager." So how did this conviction for disorderly conduct get to the point where it's on the credit rating, and in the hands of the housing manager, and other places? That letter reminds us that collateral consequences are not just an academic question, but very real in the lives of real people. With that I turn the microphone over to Debbie Mukamal.

DEBBIE A. MUKAMAL, ESQ.: I want to start by thanking Chief Judge Kaye, Judge Keating, Judge Newton, and the organizers of today's very important discussion. I know there are a lot of folks in the room who do this work on a daily basis, and I want to acknowledge that many of you could be sitting up where I am sitting and giving this overview.

I am charged with trying to provide a brief overview of what the collateral consequences in New York are for people who face a criminal record, and who have a criminal record, and to put in a larger national context where New York lies in the range of legal barriers that people face as a result of an arrest record or conviction record.

It's an extremely exciting time for us to be looking at the range of collateral consequences that face people with criminal records. As many of you know, there are close to 650,000 people leaving prison every year, and another twelve or thirteen million who are going in and out of local jails. And the impact of these consequences is faced not only by those people but also by their family members. There are growing numbers of really important initiatives around the country trying to address these issues. A lot more legal service providers and public defenders are taking this on as part of the work that they do. There are two law school clinics, including one at N.Y.U., focused exclusively on offender re-entry issues. And there is a growing amount of litigation trying to look at whether or not these consequences have gone too far.

So I want to start with brief remarks about some of the general themes, and then dive right into the specifics. A lot of my subject today comes from work I did with my colleague at the Legal Action Center, Paul Samuels, who is in the audience. And it comes from a report we did cataloging what the barriers are in the areas of employment, public housing, eligibility for public assistance and food stamps, voting rights, eligibility for driver license privileges, parental rights, and access to records.

I think we can look, for example, at driver license privileges. In 1992, Congress passed a law, the Department of Transportation and Related Agencies Appropriations Act of 1992,[2] which required states to do one of two things. States could enact or enforce a law revoking or suspending the driver license privileges of people convicted of any kind of a drug offense for six months or more; alternatively, states could submit a written certification to the Department of Transportation indicating that the Governor and the State Legislature had

2 Pub. L. No. 102-143, 105 Stat. 952.

opted out of that legislation. In the absence of doing one of those two things, the state would lose ten percent of its federal highway construction funds.

When you look at what that law is, I think it shows us what some of the themes are, which are that many of the consequences that face people with a criminal record do specifically target drug offenders. Like here, the law involving the driver license, the law that implicates people convicted of a drug offense—both drug misdemeanors and drug felonies. It is a law, like many others, that was passed by Congress in the 1990s, presumably when we were tough on crime and trying to wage a war specifically on drugs. These laws often are tied to the receipt of federal financial incentives. And here, with the driver license law, you see a state that does not comply with the law loses ten percent of federal highway construction funds, which is quite a large amount of money for a big state like New York. Also, many of these laws, when they are derived from a federal law, give the states an opportunity to either adopt the law fully, or to modify the law, or to opt out of it completely. Usually federal law requires the state to affirmatively pass legislation and opt out of the law. And here with the driver license privilege law, you see that a state has to affirmatively pass legislation in order to opt out of federal law, but they are nevertheless given the opportunity to do so.

Many of these collateral consequences, when they are federal in nature, and even state in nature, are passed without any sort of significant debate in the legislature, and they are often tied to and sneaked into budget bills. So there is not really a tremendous amount of discussion of what the implications of them are, or about the effect they are going to have on an individual's ability to reenter society, or the implications for their family members. The final closing sort of theme is just that there is no single compendium within a state or the federal code that brings all of these consequences together in one place. For an individual who has been convicted and is then reentering society, for family members, or for the lawyer who represents that person—it's very difficult to get a global context about what these consequences are, even though they pervade many aspects of an individual's life.

So what are some of these consequences? The first area I want to talk about is employment and an individual's ability to get employment. I think it's compelling, given the letter you received about access to records and how that affects someone's ability to get a job. And again, much of this information comes from the report we did, which is available on the Legal Action Center's website.[3]

In the area of employment, what we largely found is while there are some jobs that clearly an individual could not get because of a criminal record, mostly in the area of public employment, we found there is largely an absence of regulation prohibiting discrimination against someone based on the use of a

3 *See* http://www.lac.org/pubs/gratis/employment_discrimination.pdf (last visited Apr. 6, 2006).

criminal record. In the absence of having a state law or regulation, most states are essentially permitted to use arrest information as well as conviction information when deciding whether or not to hire someone.

In the area specifically regarding arrest information, most states—thirty-seven states—again by the absence of regulation, permit employers to ask about and consider arrests that did not lead to a conviction. Here I am making a very big distinction between an arrest and a conviction or finding of guilt. So in those states, an individual who has been arrested is largely asked about that on an employment application and an employer can consider that information.

I think that we realize oftentimes with the way people are often charged with higher crimes than they end up getting convicted of, many times people have more arrest records than they may have convictions. So an employer's ability to look and consider that range of information can definitely inhibit that person's ability to get a job. In New York State, our Human Rights Law makes it illegal for employers to both ask about and to consider a criminal record. So we are one of those thirteen states that does not permit the use of arrest information.

We also looked at how employers are allowed to use conviction information. And again, we saw that there was an absence of regulation about the use of conviction information by occupational licensing agencies as well as public and private employers. And what we found is there are only five states, New York being one of them, that prohibit out-and-out discrimination based on conviction information by private employers. In forty-five states, there is no such regulation. And essentially in those states, when an individual checks off the application, "Yes, I have been convicted of a crime," an employer could really do nothing else but put that application aside.

There are more regulations in the area of occupational licensing and public employment, but again, it's the majority of the states that do not have any such regulation. When there is such regulation as in New York, what essentially is required is that the decisionmaker, that being the employer or occupational licensing agency, assess whether or not there is a relationship between the job the person is seeking and his or her conviction record. And if there is a direct relationship, the employer is permitted to deny that person a job.

In addition to those regulations, there are also a growing number of specific jobs that people with criminal records are prohibited from seeking and jobs where employers are required to conduct background checks and if a conviction record comes up, depending on what it is, to deny that person a job. Those occupational restrictions exist at the state level as well as the federal level. And a number of additional restrictions have been enacted since September 11th, as part of the Patriot Act, in occupations like airport security, the transportation of hazardous waste materials, and port workers.

And I think many people may be aware there was a lot of attention here in New York paid to an individual who trained as a barber in New York State

prison and came out and sought a barber license and was told because of the conviction record, he was unable to obtain that license. He is currently on public assistance and awaiting an appeal of whether or not he will be able to get a barber license. That mirrors what happens in many other states, where people are trained for jobs in plumbing or electrical engineering, and then go out and try to get a license and are told they can't because of the conviction record.

Here in New York, we have about 100 occupations where an individual may be denied a job because of a conviction record; or as a practical reason, because of a lack of ability to show good moral character. Many state licensing agencies use the fact that the individual has a conviction record as evidence that the person lacks good moral character.

There has been some litigation in this area. I think Pennsylvania gives us a good example in a case called *Nixon v. Commonwealth.*[4] The State deemed an occupational restriction that would be imposed upon people trying to get jobs in the home health care industry to be overly broad, and deemed it unconstitutional as violating the due process right to pursue a lawful occupation in the state of Pennsylvania. In that case, convictions for library theft made someone ineligible to work in the home health care industry. In most of the other areas we looked at, there was actually an affirmative bar imposed upon someone who has a conviction record, by either the state or federal government.

The next area I will talk about is the eligibility for public assistance and food stamps. That was part of the 1996 Federal Welfare Law, which included a small provision that was debated for I think thirty seconds in Congress, that barred an individual for his or her entire lifetime from ever being eligible for the receipt of cash assistance or food stamps if the person was convicted of a drug felony after 1996 when the law got enacted. States were given an opportunity to opt out or modify that restriction if they wanted to, but in the absence of the state's doing so, an individual would be barred for life from ever receiving public assistance and food stamps.

Several states have opted out of that legislation—including New York—about twelve states have done that; and about seventeen states have modified the ban in some way. In those states, what happens usually is that individuals who have completed or participated in drug treatment, or a certain period of time has passed since the conviction occurred—those people would remain otherwise eligible for obtaining public assistance and food stamps. It's an issue to keep in mind in terms of the implication it has on families. The rest of the household remains eligible for public assistance and food stamps. The amount of money the household gets just gets deducted for the individual not able to receive those benefits.

Restrictions on student loans. This is an area that's actually governed just by federal law. As part of the Higher Education Act of 1998, provisions were

4 576 Pa. 385, 839 A.2d 277 (2003).

included to deny student loan benefits to people who were convicted of a drug offense, both misdemeanors and felonies. That was part of an effort to make sure that those who were receiving student loans were not using their student loan money to purchase drugs. But unfortunately, the way the law was written, it covers not only those convicted of drug crimes while they are in receipt of student aid, but also those who are convicted and later on go back to college and try to get student loans to fund their education. The length of suspension for eligibility to obtain assistance depends on both the type of conviction—if it's a misdemeanor or felony—and how frequently it occurs. This is an area again where I think Congress is going back and seeing that the law may have been overly broad. And there have been a number of efforts to introduce legislation to actually reform this law.

I'd like to touch on access to criminal records and housing. I think we heard this morning about what the implication of access to criminal records may be on families. What we looked at in our report was whether or not the stigma of having an arrest or criminal record, how long that would be. And we found in most states—forty states—an individual who has been arrested ordinarily can have that arrest sealed. There are often problems, though, with sealing and whether or not anyone actually retains access to that information. But in most states, a conviction record—that is, a misdemeanor or a felony—cannot be sealed or expunged.

When an individual has had a record sealed, ordinarily the state law is explicit in saying that the individual may deny the existence of the record if asked about it on an employment application. So that usually is actually very direct. A growing number of states are also making criminal records available directly on the Internet. This is in addition to the 450 or so private consumer companies that now make criminal records available on the Internet. And those are made available through Departments of Parole, Probation, and Corrections.

In New York State there are two ways for an individual to gain access to someone's criminal record information. The website of the Department of Correctional Services makes some information available about those who have been incarcerated. And information is made available through the Office of Court Administration ("OCA"). For a fee of fifty-two dollars, an individual can obtain the criminal record information of a neighbor, a prospective employee, or a prospective tenant. And it does not require the consent of the subject for the individual to pull that information. And unfortunately, the OCA database also, I think, includes some sealed information. So it's something that—it includes part of the area in New York which is most fuzzy—violation records, which get sealed at one level but are not sealed at the court level. And that creates some of the problems. But twenty-eight states now make criminal records available on the Internet.

Quickly, I will end with housing laws, and that's an area that will be touched on later today. Again, in 1996 and 1998, there was a lot of activity in

Congress in the 90s—1996 and 1998—to clean up public housing complexes. And to address the war on drugs, there were a number of provisions added to the federal housing laws that affect people who have both arrest and criminal records. What those laws essentially did was to create two categories for local public housing providers for where there needed to be mandatory denials.

So now an individual who has been convicted of the production of methamphetamine on public housing premises is lifetime-barred from living in public housing, as well as the household of an individual that includes an individual who is subject to a state lifetime sex offender registry. It's not all sex offenders, only those who are required under state registry to be listed for their entire lifetime. In those cases, public housing authorities are required to deny those individuals admission into public housing and Section 8 housing.

The laws in Congress in the 90s also created a very broad category where they said local public housing authorities may deny admission to anyone who is engaged in any drug-related activity, any violent criminal activity, and any other criminal activity that may adversely affect the health and safety of the public housing premises for a reasonable period of time. Congress was silent about what a reasonable period of time was, and it was left to the public housing authorities to decide what would be reasonable. Given how broad that provision is, most public housing authorities will run the background check required by law, do an initial denial to anyone who has been convicted of any kind of crime, and then allow that person to appeal the decision. And in the absence of adequate legal services, many times those individuals will just be denied housing.

Another provision of that law that affects the conversation we are having today is the impact that that has on families. Individuals who return home from prison have a very hard time going back to live with their family members who live in public housing because they put the entire family at risk of being evicted if that family allows someone who has engaged in criminal activity to live with them. So that is an area that certainly should be part of the discussion we have today.

And now I should probably wrap up and leave it to my colleagues. If people have additional questions they can be addressed later. Thank you.

JUDGE NEWTON: I have learned from jurors that sometimes you need to take a breather after receiving a vast amount of information. Does anyone have a question they would like to ask Debbie right now?

Well, I have a question I would like to ask. Could you just give us an idea of what some of the rationale was behind the food stamp provision? What was the thinking behind denying someone food stamps forever? Is this a shift in responsibility from the federal to the state government? Is there some undercurrent of information that's not jumping out at me; a general rationale?

MS. MUKAMAL: With the food stamp provision, many states—even if they go along with the ban on receipt of cash assistance—will still allow the

person to be eligible for food stamps. And I think that's a recognition that people still need to eat, they just don't want to give people money that could be used for buying drugs. But most of these provisions, I would suggest, probably have come with some good intention but are overly broad and are not getting at the need to look at some of these consequences on an individual basis—when you have those individual consequences, whether or not they are appropriate to an individual and the circumstances of their life and the kind of criminal record they have.

JUDGE NEWTON: Thank you. Next will be Professor Gerald López.

PROFESSOR GERALD P. LÓPEZ (NEW YORK UNIVERSITY SCHOOL OF LAW): Good morning. I work at N.Y.U. under Randy. And thank you to the Chief Judge and to Randy for hosting this conference and for inviting me. I thought maybe I should change what it is I planned to say to something else today, and I don't quite know the reason. But maybe being disoriented on the various highways I took trying to find my way here, as a Californian who still doesn't drive in New York, may well be at the heart of it.

I, along with some other people and with a great deal of help, launched the Center for Community Problem Solving at N.Y.U. And we do a lot of work with low-income, of-color, and immigrant communities, principally in New York City, but across the state, and in many ways across the country. And that's the product as much as anything of the fact that I am very old and know a lot of people across the country and that I am from the other side of the country. Our approach to work, whether we do economic development, health work, or work with people coming out of prisons and jails, reflects an effort to say that we lawyers, however important, are only one of the many problem-solvers, no matter what area it is we are operating in. And what we do in our individual practices is inevitably shaped by the institutions of which we become a part.

And the degree to which we are effective is typically not nearly as well measured as it should be, leaving us no matter how much we care to be accountable, to be far less accountable to our clients and to one another than perhaps ought to be the case. I don't think there is a decent, much less wonderful, lawyer out there who thinks that's the way it ought to be, but it is the world we inherited and it may be enormously difficult to change.

When we think about working with people coming out of prisons and jails, I think if anything, all those challenges may be even more difficult than in other areas. And when I think of the approach that our Center takes as an effort both to do decent work with particular individuals and to change how we do that work, then in no other place can I think of the direct relationship of how it is we approach what we do and my childhood experiences.

When I was a kid growing up in the 1950s and early 1960s in East Los Angeles, a part of L.A. that was the place for Latinos, almost exclusively Mexicans, we were a place without formal democratic powers because it was an unincorporated part of Los Angeles County, and because we were Mexican.

And it was a place where the rather unusual and strong-minded idea of what policing should entail focused principally on us as well as the Black, Chinese, and Japanese communities in the greater metropolitan Los Angeles area.

For those of you who don't know L.A., it was a place that prefigured perhaps in perverse ways to the very idea of close community policing; that you hassle people at each and every moment, hoping that by virtue of rousting them, you will come up with some excuse to make them angry. And if you can make them angry, you engage them in a system that more often than not takes them off the streets in the name of safety.

There were a great many people in my mangled household who found themselves subject to this form of policing. Some had papers and some did not. Some were second or third cousins, at least according to family lore, and some were much closer, not the least of whom was my older brother, ten years my senior, in some ways a parental figure, who by the time he was sixteen was both a heroin addict and running in one of L.A.'s early street gangs. When he was eighteen and locked up, he began going through a cycle of places such as San Quentin, Folsom, and Soledad, as a dyslexic who had not yet been diagnosed and couldn't read or write and couldn't understand; and as a junkie who managed to find junk easier inside than outside; and as a kid utterly confused by both his own anger and what it was doing to his family, particularly his mom and dad. The remarkable thing is that nowhere along the way, with the exception of individuals, did he find any help. That is, no one with any systematic power ever thought it was appropriate to ask what is it that you faced and what help, if any, have you gotten, and what do you think of that help.

Meanwhile, back home I remember as a kid the deep consternation on the part of my immigrant mother and father. They came from a small mining town in Arizona in search of jobs. And I think the last thing they ever understood to their death, and my mom died only a year-and-a-half ago, was what it was like to be transported from a small Arizona town after coming from Mexico to a metropolitan area like East L.A. So for years, we told stories about who my brother was and where he was. He wasn't in the joint; he was driving a truck long distance. Or he was taking care of horses. All of which he had done at one time or another, but not while he was locked up.

Meantime, they too were never asked what the hell problems do you face; what help, if any, do you get; and what do you think of that help. And as confused and overwhelmed and frankly full of rage as I was as a kid, both honoring my mother and father and continuing to love my brother deeply, the one thing that made no sense to me was that all these overlapping systems, apparently so good at what they were doing, never had the common sense to ask people like my brother who were locked up, or like my mother and father who were dealing with the problems of having someone locked up in their families, what do you face; and what help, if any, can you find; and what do you think of that help. Meanwhile when I did finally—at a slightly older age, teen years—

start working with various people who did work with people in prison and coming out of prison, we never called it re-entry. And we never had terms like collateral consequences. The remarkable thing is that almost to a person, these women and men would say that no one would ever ask what they were doing or what challenges they faced with service providers and lawyers or anything else, and what, if anything, they would change.

All that led me to wonder deeply what it was we thought of when we did problem-solving work, whether we were lawyers or anything else, and what it was we thought of in trying to imagine these overlapping systems that people faced. Not from on high when deciding what policies they should bring into being, or how to implement or effectuate policies effectively if they thought they had policies that made sense, but what the whole fractured world looked like from the point of view of those people on the ground, either desperately scared though desperately happy about coming out of the joint, or desperately trying with all their might to do something on their behalf, but without enough resources to do it well or without enough coordination to do it with others who might be doing something that was overlapping.

I didn't have a keen understanding of how to think about problem-solving or systems that overlapped. But it did seem to me that whatever we inherited that told us that to do things in some kind of atavistic way, happy to put to use whatever skill set we have but somehow too overwhelmed with our day-to-day work to understand how well it fits with the work of others, was deeply understandable and profoundly mistaken. So I have tried over the course of my thirty years to figure out if we can practice better each and every day. Whether or not we can collaborate with the people with whom we work for in the client community—and with other service providers, and with people above, below, and on the side of us—and if we could ever hold ourselves accountable to some qualitative and quantitative measures that would tell us whether what we did was actually effective. And if it somehow improved on life's curve, something about the people with whom we were working or something about the quality of services we were providing.

When I came to New York, I was a great admirer of its energy and of the people I knew, and I knew nothing of life on the streets here. I had read probably thirty-something years of stuff on New York, but that's not the same as being here. And in anticipation of trying to found the Center, I decided I should try to understand more from the ground up, places where I might find myself working with others, to see if I could lay the groundwork to hold myself in the Center accountable in ways that I would find justified. So I decided to pick six neighborhoods, not that they are the only neighborhoods to take a look at but they are meaningful ones: Bedford-Stuyvesant, Bushwick, Lower East Side, Chinatown, Harlem, and East Harlem. And the point was to ask the people who lived and worked there what they were facing, what, if anything, they did to satisfy problems, and how happy they were about it.

And after a great deal of help and a great deal of work, some extraordinary, on the part of many people who had nothing but incredible energy and expertise to offer for no money, we ended up interviewing over 2000 people who lived in these neighborhoods and researching and interviewing over 1300 organizations, public, private, and civic, who served them. A big section of this research had to do with people coming out of prisons and jails. What we discovered was, in many ways, not something that would surprise you today. That is, if you take virtually any realm of social life, those coming out of prisons and jails or those living with arrest records, they have a heightened sense of how deep their problems are, how frequently they face them, and how lost they are about where to go to get help. Indeed, more frequently than not, even when they recognize they have problems, they don't do anything about them. They lump them. They don't think there is somebody out there to help them or somebody they can find that will be able to help them even if they are in that line of work. And when they do look for help, they typically go to friends and relatives in their own communities, who in turn do not particularly turn to professionals but to other friends and relatives. And then, finally, way down the list of things, they turn to people like us. In some sense it's not a surprise that they don't face these problems, or that when they face the problems they turn to friends and relatives, because it's not entirely clear that we don't do the same thing. You don't jump to professional help when you have problems.

But there are additional reasons it seems that they do this, all of which are implicated today when you think about the question of collateral consequences and what role, if any, the judiciary, in particular, should play in order to enhance our capacity to do away with those that are adverse, that have no role in life, and to lessen the effect of others that will be justifiable but exaggerated in their implementation. Because for most of these people, the extraordinary thing is that they have very little idea of what it is they are confronting when they come out. They are, with some exceptions, enormously poorly prepared for so-called re-entry while they are in the joint, or in jail. And once they come out they feel isolated.

Those who feel most connected are typically those who have HIV/AIDS or some kind of heroin addiction for which there are more programs than there are for something else, and who therefore think they have somebody else to go to for not only those problems but also others that they feel may well be related. Everybody else feels, on average, enormously isolated in ways that lead them to think, if I have problems I don't know how to define, and if I'm supposed to do something about them, I don't know where to go to do that.

As Debbie was saying, how do you get an ID? Nothing is harder in New York than getting an ID coming out of prisons and jails. You need an ID to get an ID. And the only ID you ever have is the one they take when they release you. Literally walking through the steps that are legally defined for getting IDs is not only a prerequisite, but something that is very hard to map.

The paradox is that it's not hard to map just for those coming out of prisons and jails, but when we interviewed the 1300-plus service providers, the overwhelming majority of them can't map the same process themselves. You can find an isolated number that can tell you this is what you do to get welfare, but most others feel utterly lost in the description of it; they don't know the road maps.

Here is the further problem, one that you probably all know but too infrequently talk about. Even the people in New York City with the best Rolodexes around—I think of one woman in particular who has been working in this field for thirty years who I think everybody treats, with good reason, as maybe the best person in New York City working with men and women coming out of prisons and jails—and she said frankly to me, though off the record and not quotable: "However great my Rolodex is, it is pathetically inadequate even for my client population, and nobody else has a better one."

So that for all the talk for at least some twenty-five years now, that we ought to be coordinating and collaborating more richly, most of us spend time coordinating and collaborating at conferences just like this. Whereas in the day-to-day operation of changing the institutions—tiny to large—in which we work, it's almost unthinkable what it would take to do our job and decide to redefine it to coordinate with a wide enough range of people so that the limited resources out there would not be squandered, and squandering is the last thing to do in a world where there are too few resources to begin with.

What we have tried to do at my Center has been both ambitious and utterly inadequate to the task. We tried to pick out areas where people need connections, and those out there who actually offer those services and provide a bridge. And there have been gaping holes that we have tried to step in ourselves, although too frequently I think with too little. For example, there is no greater need than for a simple directory of what it is that people face and where there are people with help. So, first, we have spent approximately eighteen months now developing what we call a re-entry guide, which in a month will be published, that does nothing more than offer in great detail and as accurately as we have been able to manage through 1300 interviews, what's out there by way of help, offered by whom, for what kinds of people.

Remember the importance of this. The overwhelming majority of people whom we interviewed coming out of prisons and jails don't go to professionals for help. And those professionals whom they do go to for help disproportionately insist that they themselves don't know where to go, except for a tiny list of good friends or, as you all know, the throwaway referral. The kind where you say, go see them, but if it was really your daughter you were talking about, you know damned well you have no idea what they do or how well they do it. Standard referral practices by most of us across professions.

Second, in those areas where there is a great deal of talk and a great deal of need for coordination—take something like housing for which there is no greater

need than in the City of New York for all people, put aside people undertaking the process of re-entry—there is a great deal of energy and a great deal of necessity to coordinate it. We tried to join something called the Roundtable, which I think has done an extraordinarily good job despite challenges that remain. They have tried to gain understanding of the need for empirically based claims about what exactly the problems are, and linking them to policymakers wherever it is they happen to sit in the worldwide area of systems that govern housing and say, look, if you are looking at sensible ways to improve the state of affairs, here is what the evidence tells us that the problems are, as opposed to what we are imagining the problems are if we continue with the policies we have, or the implementation—that five minutes permits us to talk about.

Wherever we find ourselves as professionals or non-professionals, in the public, the private, or the civic realm, it does seem to me that both the hardest thing to do as we grow older, and yet the most elementally important thing that we could ever be up to, is to recognize that if we are in this room and someone thought we were important enough or expert enough to be here, the key to that status is not to come to the conclusion that we know so much that people should actually listen to what we have to say and hear us ask questions. It is that we know enough so that we are learning constantly each day how inadequate what we know is to the task. And that we are comfortable and confident enough to admit what expertise we have may well be important, but unless it's combined with what a lot of other people know and with what a lot of other people are willing to do if they are willing to improve not only what it is that they do in their practice but what their organizations are up to, then we have some fighting chance of actually effectively and accountably going after problems that we claim to care about and care about deeply.

Obviously I have something beyond a professionally-vested interest in thinking about a sixty-five-year-old brother who, with me, just lost his mom last year; who still is a junkie, still in a methadone program; who is as lost as he is found on any particular day; who sometimes works and sometimes doesn't; and who still sometimes dreams, however counterfactually, that it may well be that he can actually live a life that is worthwhile.

But his chance of living a life worthwhile not only turns on his capacity at his age to get his act together, but also turns on the capacity of the people who live and work in L.A., and who deal with people like him, to get their act together. So for all the many people I know in this room who I think of as quite extraordinary, I think each and every day, particularly at conferences like this, that our real job is to try to manage how we can actually get our act together even more than we have before in a world where people facing the challenges of those coming out of prisons and jails need just that if they are going to have any chance at all.

JUDGE NEWTON: Gerry, when you told your story, I remembered that when I was in college, I took a test in the Daily News called, "Are You

Literate?" I said that with all this money my family is paying for college, I'd better be literate. So I took the test and, lo and behold, I failed it. Who knew that there was no such thing as the Department of Unemployment? Witness your story, that most of us don't know what it is that we don't know in order to make the necessary steps to re-entry.

Judge Fisher has asked me repeatedly, "Why am I on this panel? I don't do criminal law." But as we know, these issues leap up off the page of the criminal text onto the civil text. And Judge Fisher manages what is probably the largest civil court in the world. I asked the Judge to share with us how these collateral consequences affect her court, both in terms of policy and in terms of operation.

JUDGE FERN A. FISHER: Before I actually talk about what Judge Newton asked me to talk about, I want to echo something that Professor López said with respect to prisoner re-entry and the inability to find housing.

It is difficult enough for someone without a prison record to find affordable housing in the City of New York. But with a conviction, it is very difficult to find housing—public or private housing. And I learned this sitting in on a task force on homeless prevention, that these individuals are landing in the homeless shelters in great proportion. And children coming out of foster care are now the largest growing population in the shelters, which means a lot to us in society. It costs more to house one in a homeless shelter than in a regular apartment. And that takes away resources from other individuals that need shelters, such as victims of domestic violence and families that are also subject to homelessness. So I just wanted to address that before I move on. That's something we have to grapple with as a society.

Why am I here? I am here because I am the Administrative Judge of the Housing Court, and it is the largest housing court in terms of filings in the country. We have 360,000 filings each year. And I want to give just a general context to the court before I move on to the particular issue at hand: Of the 360,000 filings, about 165,000 actually make the calendar. Of those 165,000 cases, ninety to ninety-five percent of tenants are not represented by counsel. And about eighty to ninety percent of the owners are represented by counsel. So there is a disparity in terms of access to justice in the court, and that's the subtext, the larger picture here.

But how do collateral consequences of criminal conviction affect my court? It happens typically in public housing—the New York City Housing Authority, which constitutes about a third of our filings, they have a very large calendar in our courthouse.

A typical case is a grandmother who, because of circumstances and with no other alternatives, has raised her grandchildren because often both parents are incarcerated or dead from something like drugs, or HIV, or AIDS. And the grandchild is arrested or convicted for some type of crime, sometimes off the premises and sometimes within the apartment. The grandparent is a senior citizen. He or she, usually she, requires a guardian *ad litem* because he or she is

quite elderly and quite frail and invariably will not agree to exclude the grandchild from the home. Because for all purposes, it's a child that that grandparent has raised for many, many years.

That individual has not received counsel at the administrative hearing at the New York City Housing Authority and invariably will not have counsel in Housing Court. We are able to provide guardians *ad litem* for these individuals, but that is not the full story here. These kinds of cases require counsel and, invariably, because of the cutbacks in Legal Services and Legal Aid and other public legal service programs, invariably that individual is not going to have counsel. And what happens to that person in court varies depending on the circumstances and depending on the Housing Authority. But if evicted, where does that person go? And there are usually other grandchildren involved, not just the one convicted or arrested. And they end up going to a shelter and the inevitable spiraling-down effect of going to a shelter is very, very difficult.

And we can talk about that for a while, but obviously once one finds their way into a shelter, children have difficulty going to school, and if you are a senior citizen it can be very traumatizing, and it's difficult to find employment if you are in a shelter. It is hard to get up in the morning and go and look for a place if you are living in a shelter. And the difficulty of getting housing and getting out of that shelter is huge.

So the problem is not as big as it used to be, but we do have the problem in Housing Court with respect to people in public housing. And unfortunately, we don't see much of a change in terms of the ability to obtain counsel. So today, when we are talking about holistic lawyering and unbundling legal services and the use of law students and law clinics to address social needs, we will think about the grandmother with the grandson who has been convicted of selling drugs, who cannot get an attorney and is subject to eviction, and possibly may end up being evicted through my court and ending up in a homeless shelter. And that should be sort of the jump-off point for today's discussion.

JUDGE NEWTON: Thank you, Judge Fisher. Any questions for our panel? Judge Zayas.

JUDGE JOSEPH A. ZAYAS: Ms. Mukamal, you said that New York statute permits the use of a conviction, a record of conviction, but only if the conviction directly relates to the employment. Does that statute also apply to violations—disorderly conduct or harassment—not considered criminal convictions?

MS. MUKAMAL: The way the law is written, it's technically—correct me if I'm wrong—it really is for any conviction record. A violation is not a criminal offense so I think the understanding is that because a violation is less serious than a misdemeanor or felony, it shouldn't be part of that statute. But the way the statute is actually written, Article 23 of the Correction Law, it's unclear whether or not a violation would be covered.

JUDGE NEWTON: Other questions?

PROFESSOR VANESSA MERTON (PACE UNIVERSITY SCHOOL OF LAW): I want to address a question I guess primarily to Professor López. It's interesting; I work with, among other things, the Women In Prison Project associated with the Correctional Association and the Osborne Association. I wonder in your work, your survey, if you have found a pattern of government versus non-governmental organizations, in terms of the attributes you are looking for in capacity to coordinate and breadth of creative solutions and so forth. Because my unofficial observation over the last thirty years working in the metropolitan area has been astonishing—how it is that the Correctional Association and the Fortune Society and the Osborne Association with much fewer resources seem to be much more effective than the governmental organizations such as Probation or Parole at accomplishing something for this population. And similarly, working with the Women In Prison Project, it's astonishing how much more a fairly uncoordinated group of volunteer pro bono attorneys struggling with the insanity of the system with regard to foster care and the rights of children, how much more they seem able to accomplish than the Administration for Children's Services that logically is deemed to be the government agency supposed to accomplish the same benefits.

JUDGE FISHER: I want to go back to something that happened in Housing Court. We had a case where the tenant of record, who was the grandmother, died, leaving the grandchild, who had lived in the apartment his entire life and was now a young adult. And the Housing Authority refused to give the apartment to that grandson because he had taken a bicycle when he was a younger teenager.

JUDGE NEWTON: And this was not a conviction, just something they had on record?

JUDGE FISHER: Yes.

JUDGE NEWTON: I've seen those cases as well.

Let Professor López answer Professor Merton's question on why does it seem that private attorneys, legal service attorneys, do a better job than government entities.

PROFESSOR MERTON: I was trying to make it a little more subtle than that.

JUDGE NEWTON: When you are on the bench, you just want to know what the question is.

PROFESSOR LÓPEZ: I don't have the same confidence that you do for good reason about either New York City or the State because I don't think I have been here long enough to confidently make claims about either the history or contemporary patterns of the kind of broadly defined civic sector versus the public sector in terms of the willingness to be accountable or the capacity to be ingenious.

But if you ask me what I have discovered so far, then with greater frequency you are right. You will find organizations with fewer resources than we

typically think of as available to the government, often doing things more inventively and trying to leverage what it is they have done inventively into something like a better systematic approach. But here I want to be very blunt. I don't think that's the norm even among the group that you are now talking about, any more than I think it's the norm among private actors or any more than I think it is the norm in government.

And interestingly, among a tiny handful of quite extraordinary people who have been government actors who we have discovered, they are particularly quite closeted and they think of themselves as doing something that their department or the organization does not want them doing. And they will tell us a great deal both about institutionally what the arrangements are that affect everyday practice, and how they try on the sly to get it by or over them, often in coordination with somebody else. And the trouble is, whether it be the government or the private or civic sector, why is it that those who inventively and with a great deal of guts discover something and build upon it, won't be seen as the characters providing something like the prefiguring of where it is that the organization ought to be going, as opposed to people acting out in ways that they themselves have to closet in order to sustain their very livelihood?

And second is something which I am sure you are aware of even more richly than I am, and I am much more aware of it in California, a place that I know well. We have talked now for years about how foundations give grants and people talk all the time about sharing best practices. It has become second nature to say those words. We are pathetic at it. If you systematically talk about the degree to which we'd rather deeply share what it is that we do that might really work well, warts and all, we don't do that. We are very clever about writing grants that highlight what works without highlighting what may not work in the same thing. We know how to write short blurbs that go on websites and in weekly magazines, but that's not the same as the extensive kind of sharing about stuff that's inventive and seems to have some real traction in terms of getting something done that has not been previously done.

So there is a contrast that there may be between realms, and the phenomena about why is it that the people who are most inventive think they have to be secretive about the very things they are best at; and why it is we talk a great game about sharing best practices, but haven't kind of developed a practice where it's built into what we do and not thought inconsistent with service work to describe it deeply enough for somebody so they can understand it on its own terms so they can decide for themselves if it is as valuable as you think it happens to be.

JUDGE NEWTON: Thank you, Professor López.

ANTHONY L. SOUDATT, ESQ.: Increasingly cities and states are enacting laws that prohibit sexual offenders from not just being within places like schools and libraries, but even congregating or coming in contact within a half of a mile or a quarter of a mile. How do we begin to balance the fears of communities,

especially in light of recent cases—these high profile cases where repeat offenders are coming out and committing crimes again—with the ability to let these offenders come back into society. Especially if you look at someplace like New York City, where there is a school on nearly every corner.

JUDGE NEWTON: Who would like to take that question? Nobody? Maybe I can identify someone in the audience who would like to answer the question. That's a tough question.

Maybe you could tell us how this kind of exclusion has been addressed in another context, Ms. Mukamal. I know you have done a lot of studies and looked at it broadly. Is there an answer by looking at something else—employment, licensing, or something else?

MS. MUKAMAL: There are best practices in terms of looking at transitional housing. In New York City, the Fortune Society runs transitional housing for people returning from prison. And in Washington State, they have been looking at providing transitional housing for sex offenders, specifically for that population. I think communities are struggling with it and there are communities that are trying to be a little more inventive around the country. But the sex offender population is probably the most controversial, difficult, challenging population for us to think about helping. And I really admire the advocates who are working on those issues. That delicate balance is very difficult. And we have to bring, I think, to the conversation, the victim community when we have any of these conversations as well.

JUDGE NEWTON: Any other observations? All right. Thank you. Tough question. Good answer.

NORMAN L. REIMER, ESQ.: I'll identify myself as a defense lawyer. And I want to focus on the issue that I think is an underlying concern with everything we are talking about today. I think perhaps there are two suggestions or ideas that I would like to get your reactions to, which focus on Judge Kaye's invitation that we think about tomorrow.

The issue that I want to raise is awareness—public awareness and offender awareness about collateral consequences of conviction and ultimately of incarceration. It seems to me from my own experience that we have a hard enough job getting the public to understand the severe prison penalties which have existed with some amelioration in the drug area, and that continue to exist and become even more draconian with each more high-profile case and new law that gets passed.

I don't think we have even scratched the surface of advising the public. So one of the thoughts that I would like people to think about, comment on, is the idea of using the resources of the court and even the bar, through its various local and state associations and perhaps other sources of funding, to produce materials that could be made available broadly to the community, like schools, and through a variety of mechanisms so people begin to understand this. And second, closely connected to the idea of that is offender awareness, and to at

least raise the possibility that as a part of the plea process, it be a responsibility of the defense lawyer, prosecutor, and court to in effect create an impact statement so that there is some assessment of what the collateral consequences may be, that flow from a particular disposition.

Now I am well aware of the difficulties and I am well aware of the concerns of the court system, frankly, and many of the participants in it, in moving the cases along. And this does tend to slow things down. But I can tell you as a defense lawyer that I have been very slow personally in recognizing the array of consequences that flow from various dispositions. And I am concerned that all of us—especially in the courts that are dealing with the highest volume—are so concerned with doing our job in the criminal context, that we are almost willfully blind to what the other ramifications are.

So I have thrown those two ideas out there, whether the panel responds or others do.

JUDGE FISHER: I am going to speak for Judge Newton on this. She may not want to pat herself on the back. But we all need to start with judges, so judges know what some of the consequences are. And to Judge Newton's credit, she has brought in a Housing Court judge to speak to Criminal Court judges about how taking a plea may affect an individual's public housing. So that I think you start with the judges and then move on to the public.

JUDGE NEWTON: Thank you. Judge Roberts?

JUDGE BURTON B. ROBERTS: I've listened to Norman and I come to the conclusion that a great deal of the problem exists with drug offenses. And apparently a part of the problem is solved with respect to predicates. In Bronx County, for example, there are close to 1000 people charged as second offenders with drugs—selling drugs or being an addict or a combination of both. And they are permitted to take a berth in a residential-treatment center through TASC for eighteen months. And if they complete that sentence, they would then be discharged and their case would be dismissed.

Now why does that not work for first offenders? Because they have no incentive to do that. But they could have an incentive if we had legislation stating that a first felony offender dealing with narcotics from a B felony on down entered into—and was an narcotic addict—entered into a program such as this, that in eighteen months his conviction would be wiped off the slate. And he could then apply for those various jobs without saying he was convicted of a narcotics felony and would be able to get those jobs.

It appears to be a simple solution because the predicate felony success that we have had in Bronx County—and we started with a goal of only twenty-five cases a day and it became 600 or 700 cases—it works seventy-two percent of the time; they don't come back. And I think that the public can buy it and I think we would be able to help somebody that's a first offender.

JUDGE NEWTON: I see Judge Ward smiling. I know you agree with that 100 percent as a presiding judge.

JUDGE LAURA A. WARD: I do a drug court for first-time felony offenders and it works.

MS. MUKAMAL: I wanted to make a comment about informing the defendant at the time of plea. There are two people in the audience, Jeremy Travis and Susan Hendricks, who served on an ABA [American Bar Association] task force that dealt with collateral consequences. And as part of that they came up with a series of recommendations dealing with these issues and things like making sure collateral consequences are codified in a single section of a federal or state code, and informing the defendant at the plea, and making sure there was an opportunity for the judge or administrative body to modify those collateral consequences in accordance with the individual circumstances. And I know those standards were codified by the ABA so it's consistent with that body.

PROFESSOR LÓPEZ: Nothing would be more important than pulling together and indeed arguably making mandatory all consequences—both seemingly monumental, like capacity to vote, and seemingly inconsequential, like capacity to get an ID—as part of whatever tribunal has jurisdiction over anyone, so you are picking a good one at the time that you find yourself before a court.

And the problem, of course, is not only that's it's difficult to find, which is why there can be task forces to pull them together so they are not randomly scattered through too many sections to even have an idea, but they are lengthy. It's really a phenomenally lengthy thing. The things that normally get listed as collateral consequences are only the high-profile versions of all the stuff people face on a day-to-day basis. I could not be more with you.

Your two comments run in opposite directions and deliberately so. There are two people in the audience that are terrifically knowledgeable, Manny Vargas and Nancy Morawetz, about what the collateral consequences are if you happen to be an immigrant taking a plea. I have spent all my life caring about what the collateral consequences are of criminal convictions and pleas of migrant populations. And I remember remarkably, roughly eighteen years ago, the first time in California any lawyer took up the task of trying to get other defense lawyers to think very hard about that. I lived and worked on the border in San Diego and still it was not a part of what we were thinking about.

There was a wonderful woman at a place named the Immigration Legal Resource Center—the first in the country I think—that tried to make it a campaign. And I think it mattered a lot. But to show you how difficult it is, I think Manny's and Nancy's job remains as challenging today as Kathy Brady's was fifteen years ago, helping us to understand just what's implicated, and helping us to sort through with our clients whether or not it makes sense to plead to something.

Let me make a flip comment, a somewhat contradictory comment about what seems to be our nature both individually and institutionally about learning

the consequences of anything we do. I remember with great strikingness [*sic*] when the so called palimony case was decided, *Marvin v. Marvin*,[5] if you remember roughly what that was about. As a result of *Marvin*, we now know that there are various ways, even when there is not a formal relationship, that one should be obligated to the person with whom he or she lives and the things that follow from that. I thought that the only thing odd about that was that nobody who got married ever understood the consequences of a marriage ceremony in California. And I did a study because I said it's enormously important that *Marvin* was decided. The great paradox of that is that those of us who go through formal marriage have no idea what the consequences are. We looked to pull together, to look at the code and find where all the consequences lie, and what all the consequences are of deciding to marry. And some of them are wonderful and some of them are otherwise.

What I tried to then do is to say: why is it that people who issue licenses don't require everybody who is applying for a marriage license to have to listen to the consequences of marriage? I was quite sober about that. And the point was only to say: look, it's a remarkably powerful institution. It can be lovely and it can be devastating. It ought to be available to all of us rather than just some of us. And it ought to be available understanding what it is. I don't think I ever ran into a single Californian, including divorce lawyers, who could have told you all the consequences of entering into matrimony.

So there is something beyond simply not knowing what the collateral consequences are, in our nature and institutionally: "Hey, don't tell me, I don't need to know, get me out of here or get me into this, whichever." So either re-entry or exit is both a reason to hurry and to not slow down and pay attention to what could be the phenomenally life-changing consequences from either entering into something or leaving it. And we haven't done a very good job of slowing ourselves down generally.

Your second point strikes me as almost up to the boss. There are radically too few resources in trying to get any campaign started about helping people to understand how law works in our lives. We just don't do it. In law schools we are pathetic, and we have improved over the past thirty years, but we are bad overachievers about doing what we might to help people understand the ways in which laws permeate what we do, whether we know it or not.

So to take on the larger campaign to try to help people understand—look, when you force through the criminal justice system through a quick snatch, through a not terribly discretionary prosecution, through an insistence upon some plea because some plea is going to be insisted upon—that all kinds of things follow from that old person's or young person's life once they are engaged, not the least of which is some repetition, then you have no idea what it is that you are so in favor of that you think makes us safe.

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5 18 Cal. 3d 660, 557 P.2d 106 (1976).

The idea that most people I have known who for the first time were entangled in the criminal justice system were already hard is nuts, but here is a truth: no matter how less than hard they were going in, the one thing I want to let you know after fifty-six years of hanging with these people is they come out a lot harder. So if the idea of safety is what's implicated both in making certain there is a plea and in all the consequences that follow, then we ought to be much more careful about understanding what that is. Because if you think when they come out it's the best thing of all not to house them and employ them, then you don't understand human nature.

JUDGE NEWTON: Let's try to get two more questions.

JEREMY TRAVIS, ESQ. (JOHN JAY COLLEGE OF CRIMINAL JUSTICE): I want to push this discussion one more step to see how ambitious we are. I think the idea that came out of the ABA task force that Gerry and I served on is sort of unobjectionable even though it might be difficult—that collateral sanctions should be codified, put in one place so as in other punishments, they are discoverable. And at the time of plea or disposition, that the defendant is assured and we are assured that the defendant has been made cognizant of the consequences of that plea through asking counsel the question: "Have you and your client spoken about this?" So that at least at that time there is full notice of the consequences. Difficult but unobjectionable and fairly straightforward, and the idea that the ABA gave it a blessing gives it some added oomph.

The next question follows on the opening remarks of Judge Keating and Judge Kaye, which is a jurisprudence question: which court in the court system might we envision should have the responsibility for routinely reviewing those punishments? Debbie mentioned a number of cases, as did a number of speakers, where some other court was called upon, or conceivably could be called upon, to tailor the continuing collateral consequences. So if you think of them, as I do in one of my writings I'll talk about, it has to be thought of as criminal sanctions, even though we tend to dismiss it and call it civil disabilities.

So I think the more ambitious question is once we impose these punishments, is there a role, a problem-solving jurisprudence, for a continuing single point of contact for review of these sanctions as they fall on people long after the time of plea or long after someone is out of prison. In other places, I proposed the idea of re-entry courts as a way of doing this, as a way of acknowledging that this is punishment, and therefore building a jurisprudence that says with the problem-solving court, up to the point of certificate of relief from disabilities, should have continuing obligation for the imposition of this punishment and the tailoring of it to deal with the consequences.

JUDGE NEWTON: Would one of our panelists like to answer that question? Or anyone in the audience? Yes, Judge.

JUDGE ESTHER M. MORGENSTERN: I sit in one of the problem-solving courts and I thought that I had a handle on it. And naturally a case that I had

showed me otherwise, where I did the criminal case, family issues and the custody. And then the defendant, who was doing the batterer intervention program missed two sessions. My policy is if you miss two sessions, you are going in. I put him in for ten days for violation of the conditional discharge—not a crime, a violation. And then Homeland Security sent him home. And we had no choice. And he had custody of the children.

JUDGE NEWTON: Because of the ten days?

JUDGE MORGENSTERN: Because he was in. Once he was in, INS [Immigration and Naturalization Service], Homeland Security, attached a warrant and we had no control. So here it was worked out; he was doing the batterer program because he had been a batterer. He had custody of the children and things were working well. But he violated one of the conditions and he was removed from the jurisdiction and we were back at square one. So in problem-solving, it never would have come up for us that he had an immigration problem. It was not discussed or part of a disposition. So we have to think of it even beyond what we are doing in our part, when we are trying to take care of all of the issues.

JUDGE NEWTON: So that was a classic example where in the criminal case someone should have said if you are an undocumented resident, you should be aware of these consequences.

JUDGE MORGENSTERN: He had custody of his children and he was in a program and it was working until he was taken out of my jurisdiction. I had no say in the matter.

JUDGE NEWTON: Well, that's got a buzz in the audience, just as our time is up. Judge Ward, I see your hand up, because this implicates what judges do in the courtroom.

JUDGE WARD: Even when you think that the defendant is being completely open and honest, they don't understand that having a green card isn't going to necessarily keep them here. And so sometimes even questions we ask them don't elicit the correct answers because they don't understand the terminology either.

JUDGE NEWTON: And what's the role of the attorney? Judge Elkins.

JUDGE LEE H. ELKINS: I am well aware of the unintended consequences of problem-solving. But my question to the panel is to what extent does the certificate of relief against disabilities help along the lines of what Judge Roberts is saying? We do have legislation. To what extent does it help to remove all the bars that you mentioned?

MS. MUKAMAL: It removes all the automatic bars that would otherwise result from having a conviction record in New York. And I think getting to Jeremy's point, part of the beauty of having it tied in one court is, right now at sentencing a judge can order a certificate of relief from disabilities. And that's very useful for someone who is serving their sentence out in the community because if they are in a job where they need to be licensed, they can retain the

license and continue working.

The certificate can also remove the bar that would otherwise result from having a voting restriction as well. It's a mechanism that other states around the country are looking to New York as an example. In Ohio, the sentencing commission is also looking to introduce a certificate to remove all automatic bars that would result from a conviction in the areas of public housing, welfare, employment, and such.

JUDGE NEWTON: One more question.

PROFESSOR ELLEN C. YAROSHEFSKY: It seems that whatever solution we come up with, it's either going to be incumbent on defense lawyers or judges or some civic organizations to deal with the problem. What is [sic] left out here is [sic] the prosecutors. There are very few prosecutors here. It seems that part of our discussion may be re-conceptualizing what the prosecutors' goals should be. They ought to be educated and take into account these concerns when they are thinking about prosecuting people. So I encourage people to do that as well.

JUDGE NEWTON: You are almost out of your seat.

UNIDENTIFIED JUDGE: There are many prosecutors that have been defense counsel or County Court judges. It seems that there is a scale of formality. As we know, in order to have a plea withstand review in terms of determinate sentences and post-release supervision, we have an affirmative obligation to make sure there is a knowing and intelligent waiver of the consequences as part of the plea. It depends where you want to put each of these consequences on that continuum of formality. Is there something that is just best practice or good practice that any good defense attorney should discuss with his or her client? Is there an affirmative obligation that you want to assign to a District Attorney in terms of making sure it is part of their, for lack of a better expression, script with respect to the allocution that will withstand appellate review?

And that's the most empowering methodology for us as judges in terms of having some accountability ourselves and holding both sides of the criminal equation responsible, including the Department of Probation. Perhaps there should be a section in the pre-sentence investigation report that at least touches on discussions they have with defense counsel bringing to bear what the possible consequences are.

JUDGE NEWTON: Thank you. Please join me in thanking our wonderful panel.

II.
HOLISTIC LAWYERING: DOES HOLISTIC REPRESENTATION MAKE FOR GOOD POLICY, BETTER LAWYERS, AND MORE SATISFIED CLIENTS?

ROBIN G. STEINBERG, ESQ.: "Holistic lawyering" is a simple concept, and yet it is a revolutionary movement in the indigent defense world. Defenders do not represent "cases" or defend "charges." We represent the people behind those charges and cases—people who come into the criminal justice system with a wide range of social service, civil legal service and criminal defense needs. Traditional defender offices, no matter how well intentioned or effective they might be at defending "cases," do not move beyond the four corners of the criminal complaint or indictment. In contrast, holistic lawyering accepts responsibility for addressing the wide range of needs a client brings with her and for working with clients in a way that results in better case dispositions and better life outcomes for clients and their families.

How does it work? Holistic lawyering is interdisciplinary, community-oriented and client-centered. The collaboration of criminal lawyers, civil lawyers, investigators, and social workers makes possible a full and meaningful assessment of a client's social service and legal needs. Today, when a criminal arrest or conviction sparks a host of civil legal consequences from deportation to eviction from public housing, addressing these issues is critical. Further, many clients come into the system with significant social service needs. An arrest, conviction, or incarceration further destabilizes the client and her family. Social workers team with lawyers to create effective social work interventions, legal strategies, and life goals. Holistic lawyering depends upon a meaningful understanding and collaboration with the client, her family, and her community. Team members, community partners and clients work together to devise a joint strategy that works best for the client and that empowers the client to make her own choices.

Holistic defender offices are clearly not the answer. We are simply part of the puzzle. Today, there is a lot of conversation about problem-solving, problem-solving in the courtroom, problem-solving strategies at prosecutors' offices, and problem-solving on the defender side.

We are an important piece to this, but in many ways we hold a role in the system that is very different. We have a relationship with the client that begins when these systems begin to come together and devastate a client, his family, and his community. In some ways, defenders are best situated at that moment to assess what the needs are initially and begin to address them.

We believe strongly at our office, and others do as well, that presence in the community where our clients live and work is very important. And as such, we are present physically in the client community, and we engage in collaborative

projects with the community: providing youth development programs; running voter registration drives; and organizing campaigns that address issues that arise amongst our clients. We are vigilant about keeping our ears open to the voices in our client community about how we can best respond to the things they define for themselves as being most critical.

So it's not about our coming in and defining for the client what the problems and solutions are. It's about listening and about hearing clients and giving them a voice and an opportunity to be heard so we know where to expand our services.

The Bronx Defenders has a Civil Action Project, supervised by McGregor Smyth. He is here with me today, and he is probably the last person in the world who needs to hear more about holistic lawyering. But we started working with our clients on a number of the civil consequences to their arrests several years ago. And we were doing a great job. We were working with our clients in the criminal defense context, in the immigration context, in the civil rights context, in the housing context. But we were troubled.

We were troubled, because we kept hearing from client after client and from survey after survey, and from community needs assessment after community needs assessment, that they really needed help in family court. What was really devastating to so many of our clients was not just the criminal justice or the immigration consequences or the housing, but it was the separation of their families in Bronx Family Court. Children in the Bronx are being removed at a higher rate than any other borough in the City of New York, and our clients needed our help.

At the time, our office did not have the internal capacity to address these issues on a broader scale. But instead of turning our clients away, we saw it as an opportunity to collaborate with the community and address a need they identified—strong advocacy in family court. Today, The Bronx Defenders has a unit dedicated to representing parents in family court, and we are fighting hard to grow that project.

Our experience with that project, and with so many others throughout the years, gets to the heart and soul of what being a community holistic defender is. It's more than challenging lawyers, social workers, and other advocates to work together in a collaborative way for clients. It's interacting in a very significant and meaningful way with the clients and with the community, and it's learning from and responding to them.

So I hope that we have a lot more discussion about these issues as we continue to talk about holistic lawyering. Tony?

PROFESSOR ANTHONY C. THOMPSON: You should never talk before or after Robin when much of your conversation is how you got to holistic lawyering. I work for Randy Hertz, who is in the back of the room, the Director of Clinical Programs at N.Y.U. And lest you think all Randy does is come to California to get lawyers, let me say that I started my practice in California for many years, but was convinced that New York wouldn't be all that different.

The other two people I want to talk briefly about are Robert Mandelbaum and Steve Zeidman, who in my first year coming to New York—I had been to New York once before on New Year's Eve—were great tutors and oriented me toward the unique aspects of the criminal defense bar in New York. And I taught a criminal defense clinic the first year. After that, because Randy is very persuasive, I proceeded to teach a prosecution clinic for six years. And the focus of that clinic was community prosecution. I brought in people like Manny Vargas to talk to prosecutors about being concerned about immigration consequences to people coming before the bar.

When we talk about pedagogy and holistic lawyering, in listening to Gerry this morning, the thought was we have to talk about our own history—a bit about the personal, the political, and the professional. And for young people today, among the most difficult concepts in teaching the lawyering aspect of what we do are the profound stigmas that attach to being called before the judge in a criminal court. And so the pedagogy for holistic lawyering is inclusive of the role of the lawyer as litigator, the lawyer as facilitator, and the lawyer as collaborator. And then again, what was mentioned this morning was this huge divide, this civil and criminal divide. And in thinking about how we begin to teach holistic lawyering, I thought a great deal about where all of that fell in. I point out that in teaching a prosecution clinic—Steve and Robin are an exception to this—but none of my defense friends would ever speak to me again. Vanessa Merton was the only person who did speak to me again, but she also had a clinic in the building.

I want to say that my journey to this work was influenced a lot by many people in this room. Jeremy Travis, I have called at times "the grandfather of re-entry." But he says, "You don't have to go back quite that far; I can just be the father." And Paul Samuels, who created a space for someone like Debbie Mukamal to work, who was a graduate of our law school, really did create an atmosphere to think differently about what we teach.

All that is to say that I teach a re-entry clinic that focuses almost completely on the collateral consequences of criminal conviction. It gets, as you would imagine, a broad array of student interest. You know you get the students who want to be prosecutors, who bought the argument that prosecutors need to know about collateral consequences. And you get the students who want to be housing lawyers, who understand the profound implications for lawyers to know about it in a civil context. And then you get the straight, good-old "true-believer" public defender students, who have been convinced by the work of Lenny Noisette and Robin Steinberg that they need to be aware of the collateral consequences that happen.

But I want to talk a bit about where I've come from, to talk about my pedagogy. Twenty years ago, I made the decision to use my law degree to be a public defender. At Harvard Law School they pushed their graduates to select law offices with national reputations. But even then I didn't like to be told what

to do. I decided to go back home and work in a very small office in Northern California. It had a significant population from Latin America; indeed, my mother emigrated from Panama to this community. It had a significant population from Southeast Asia and a large African-American population.

It was known nationally for one thing: it had the highest per capita murder rate for a city its size. So actually it did have a national reputation. Representation was defined by the number of cases you opened and closed. The office was lawyer centered, and the lawyers who rose to the top were those who built a reputation of success in the courtroom. I managed to do well in the courtroom. I had taken trial advocacy and I tried cases in law school and in practice, and I did my best to hone my skills in the courtroom. But when I look back to my ten years in that office, the thing I am most proud of is what happened outside the courtroom. I knew and understood that community I grew up in. I attended community meetings and knowing that community allowed me to know and serve my clients better. I could be a better lawyer in the courtroom, but more importantly, I could be a better lawyer for my clients in the community. I saw part of my role was taking the time to help the jury see my clients as people and not simply a personification of the charges that were there. And I could be a better lawyer in the sentencing phase and in the plea-negotiation phase because of my collaborations in the community.

What motivated me to think this way was that I knew but for the grace of God, there went I. I knew people in the community. I represented my classmates from high school. And I began to think that there was a way we could actually think about and teach that interest and that concern. I made the decision—if you fast forward—I made the decision to leave that practice and I came to New York and I heard names like Conrad Johnson and Lenny Noisette, who were doing interesting things in collaborating with the community, and Conrad with technology. He had computers back when they had squirrels inside them and you threw a nut in there and they ran. At that point, I wanted to begin to think about how we could address issues of collateral consequences earlier on. How we can maybe move earlier in the food chain with students. And, as you can imagine, there was not a lot of student interest. Students said, "Let me get this right: you are not a civil professor and you are not a criminal professor; you are talking about these things called collateral consequences?"

But gradually an interest and a constituency built up within the law school. New York is a fabulous laboratory for clinical teaching. The profound problems allow for creative thinking on the part of students. My law school, as much as I love it and adore it, like many, many other schools, was funneling all its preparation, thinking, and course work into traditional forms of advocacy. The principal operating assumption seemed to be courtroom skills were all that mattered. But much of what was and is of actual importance to the person whom these lawyers represent was left outside the conversation. It was left outside the materials and outside the casebooks.

When we step back and ask why, we all know law schools—their simulations and everything. They pay little attention to the client as a person. It really is about the case or the law of the case. And in law schools, their primary interest was to be this kind of trial lawyer, TV lawyer. So many of us in clinical education approach teaching with an eye toward making representation more effective and meaningful. We want to talk more about the life of the client. When we talk about holistic representation, the clinical model is really a wonderful model to use. It relies in part on planning, execution, and reflection. And for young people, it's a great way to begin thinking about this business in a different way.

In the planning stage, exposure and experience to the literature of the role of defender and the role of lawyer, as well as conventional notions of the beginning and end point of representation, is helpful. I've brought judges in. Judge Newton heard a presentation from two of my students challenging how we do child support and the fact that these huge arrearages tend to drive people underground in the employment sector. And information and ways that lawyers for the poor are funded, and the limitations on funding that offices like Robin's get—that it's case based and not issue based. And the extent to which lawyers should bring other experts in to work with the client.

I am trying to teach and trying to get across to other young teachers that lawyers have a very important role as litigators, but they also have a very important role as counselors-at-law, kind of an old-school notion of what we do. And also that there is a facilitative role attached to client service in the community, to familiarize and to sensitize the community.

The planning aspect of this work often begins with lessons about difference. Unfortunately, we are still very much a socially, economically, and politically segregated community. People of different races, ethnicities, and colors don't see one another. So talking about holistic representation begins with the conversation often about difference. In the execution phase, I focus a great deal on simulation before engaging the students in live-client fieldwork experiences. I would like to say that this was my model, but I stole this from Tony Amsterdam, a colleague who cares very much that students do a trial run before they actually represent clients.

By dealing with simulations that emphasize holistic representation, students begin to model that behavior. As they get actively involved with clients and communities, they recognize the need to be in touch with family, with schools, with churches, with non-profits and other folks in that community to get a better understanding of how their clients got to them, as well as what are the issues that are facing their clients, what are other services in that community, and what resources are there that we can draw on to connect the clients. I have been fortunate because in New York City there are a great deal of people working with the issue of re-entry. So we have been able to tie these students in with very cutting-edge initiatives. An important component of teaching is to have

students reach beyond conventional lawyering and engage them in reflective practices, and that we try to do in clinical courses.

As I look around this room, there are clinical professors who have been in this business much longer than I have. And I appreciate reflection as a teaching tool. In my own classroom, we focus on reflective learning, preparing to do an activity, doing it in simulation, reflecting on the outcomes, then doing it in the community, and then debriefing with the client, myself, and other collaborators. We have engaged in a wide variety of clinical efforts. We represented clients facing employment and housing termination based on their prior criminal records, advising government agencies, and, as I mentioned before, speaking with judges about issues that we believe they should be aware of.

Collateral consequences in re-entry have been wonderful vehicles to teach and think about holistic lawyering. By and large, other than immigration, trial courts have no legal obligation to inform the defendant of collateral consequences of a conviction during plea bargaining and sentence. Due process requires only that the trial court inform defendants of the direct consequences. Accordingly, not only judges but also trial lawyers have been reluctant to take on this additional burden.

My students are engaged in conversations with a wide variety of service providers to help determine where we can engage collaboration and meet clients' needs. Holistic representation offers an opportunity to develop a more meaningful connection with the client, but the method is not without some danger. One of the dangers with this problem-solving design is that students want to solve the client's problem. Today there is too much of a tendency to say that, in particular, criminal cases don't go to trial, so students don't need trial skills. Tipping in that direction is just as dangerous as tipping in the direction that I started with. It's very important that young lawyers have confidence in their trial skills, and have confidence in their abilities in the courtroom so that they don't too quickly grasp at alternative dispositions. Holistic representation is important to give disenfranchised clients a voice in the community and the court.

Thinking about holistic lawyering, there is a danger in conflating community-based lawyering. I think we are fortunate in this community to have Robin and Lenny with offices that are both centered in the community, but they are aware of the challenges of having community input. A number of public defender offices in the past—the Roxbury Defenders and the Hunter's Point Defenders' offices—have thought about and started conversations about holistic lawyering. So we really are coming back to a discussion that has been in place for over thirty or forty years.

There are two things that I thought were important to highlight before I sit down. One is who is missing in this conversation. Judge Newton, when my students made a very passionate presentation to her, said this is great but you need also to talk to legislators. So one of the groups of people that are missing in the room are legislators. Second, of course, the difficult piece is the clients.

To have client input in this conversation is critical. And one of the factors, as we go forward and think of provocative ways to collaborate among judges, clinical professors, and practitioners, is we need to make sure that policymakers and clients are both at the table.

Finally, let me say to you that the energy and the enthusiasm of young people to embrace this issue of collateral consequences in re-entry is [sic] growing. I look at my clinic applications and Randy says if you just do a litigation clinic, more people would be there. But the numbers are up and people are concerned about the issue of collateral consequences. I do want to say too that institutions of higher learning are beginning to create space for people like us who want to address issues and holistic pedagogy that really discusses the whole client. And I have been fortunate to have the space at N.Y.U. to do that. The University of Maryland has a program. And my classmate at Albany has had a couple of conversations with me to start a program there. And I think, as we go into questions and answers, one of the things I would be interested in is comments from the judges who in many respects are grounded in the community but feel some of this tension. Judge Townsend mentioned it, saying, "I can only be a judge, I don't want to be a social worker." I hear that in the context of lawyers all the time. I want before we run out of time to leave some time for questions and answers. But I want to thank you and my colleagues that I see. It's good to see so many of you again. Any questions?

QUESTION: I know how you feel about holistic lawyering. I am wondering how you feel about holistic judging in this context. Let's say one of the lawyers in your clinic successfully persuades a judge to let a defendant out of rehab on the condition that he cooperate [sic] with a certain program or school every day. Shortly after letting the defendant out, he doesn't go to school or the program, and the judge's reaction is: "You are violating the conditions and I am going to remand you temporarily to make a point." What would your advice be and how would you advise your lawyer with respect to that issue?

PROFESSOR THOMPSON: First, I think that the issues of holistic lawyering in a courtroom are very different, and I have actually written an article a little critical—I'm glad Judge Kaye is not around—of the problem-solving courts. I'm concerned about structure. I think pre-plea courts have a different implication than courts which say you don't have to plead in order to access services. I'm obviously critical of one versus the other. But I would tell my student who is representing that client that they shouldn't wait; if I have done my job in teaching that student in a classroom, when they get to the courtroom, after the simulations, with the judge, the first time that they are hearing about their client's not participating in going to school or drug treatment—that information had better not be from the judge in that courtroom, because they are going to hear from the judge first and also from me when they get back to the law school.

I think part of holistic lawyering is being connected and being an early warning system when you begin to hear failures. So one of the differences I

think that you will see here—I hope that you will see—as we get more students out with this kind of training, they are not going to come to the court and hear for the first time that their client hasn't been going to school. They are going to have a relationship with the school and a relationship with the program.

As for the teaching of the lesson, you know, it's an individual case kind of decision. But the thing that concerns me is too often young lawyers are hearing for the first time about the lack of participation when the judge says I am going to lock you up.

MS. STEINBERG: I hope that every lawyer is able to have the sort of relationship with their clients that keeps them informed of the successes and failures of their clients. But let's assume that that were not possible for each client. Public defenders have many, many clients they are representing at the same time. And sometimes, particularly if a client has gone astray, it is hard to get all of the information.

What judges and defense lawyers may have in common is that we are often asked to make very, very hard decisions based on very little information. But what holistic lawyering sort of imagines for you, as the judge, is that we have a team of people who are equipped to find out why what's going on is going on. At its best, holistic lawyering provides a context for a client's actions: context for why my client is not going to school or to his program. What's going on in my client's home, family, workplace, life has an impact, but without the connections of a team of advocates on his side, our client's story may only get partially told in the courtroom.

Without this information, as a judge, I know you would be uncomfortable making a decision about the course of someone's life. But I believe holistic lawyering envisions putting that client's situation within a broader context for you, the judge, and helping you to make more appropriate, more just decisions.

PROFESSOR PHILIP GENTY (COLUMBIA UNIVERSITY SCHOOL OF LAW): The question that I have is about the tensions among your respective roles as judge, clinical professor, and practitioner, and your comparable goals in the issues that you have discussed: problem-solving courts, a comprehensive community-based approach to lawyering, and collateral consequences of re-entry. Let me take the issue that you were talking about. I know that you know, dealing with law schools including ours, that you talk to someone really interested in setting up a program: "Send students and they will get this great experience." And we will say, "What are you going to do?" "Oh, we are going to hold classes and keep it very reflective and teach them about prosecution and defense and all these interesting issues." And the reaction, understandably, from somebody in your position would be, "I have got a lot of cases. I don't need extra bodies. If you are going to give us somebody to handle the cases and augment our practice, that's great. But I'm a little less interested in subtleties."

And then maybe you go to the judge and the judge says, "Look, that's a great goal. But what I am really interested in doing is putting at least some of

your clients in prison because I disagree with your position." So I wonder how you think about the partnerships with law school clinics and with judges, when there may be some real tension in our respective roles and how we approach the cases.

MS. STEINBERG: I think that there are lots of tensions. You are quite right. And with respect to the interaction with law schools, I guess I'm still so focused on indoctrination at this point that I probably more think of clinics as an opportunity to get students from law school into an office that's doing this work in a different way, and then hopefully sending them back into the world, and having them push the places they wind up in and the people they work with ultimately in this direction.

So that collaboration seems natural in many ways. The students that have worked with us during the year in law school or in the summers do certainly come for a while and then go away. But I have to tell you, the most heartening moments I get are when I get an e-mail from somebody in New Orleans who says, "You may not remember me, but I worked in your office six years ago, and I was deeply moved by the notion of a broader vision of criminal defense." And she goes on to tell me that she just received a grant to set up a program down there. Bringing people into your office to learn with your advocates does actually have sort of incredible results.

Now, collaboration with judges is complicated. The goals are not the same. And in many ways, because we are focused on advocating for clients, there are moments that those things will come into conflict.

But I also have to say that I am of the belief that the more information judges have about the clients and who they are and how they are doing, the better it is for clients. In some ways, the worst position our clients can be in is to appear in front of judges as virtually nameless, faceless people on a docket.

So there is quite a bit of room for discussion and collaboration in terms of information sharing and putting the client's life in perspective; it takes away from them being reduced to a docket number and charge. And it almost always works to the clients' advantage in my experience.

JUDGE JOEL L. BLUMENFELD: I sit in Kings County Problem-Solving Court. I found that until I read the materials in preparation for coming here, I don't think I was aware of all the collateral consequences that the people we are trying to help out should be aware of. I know in the last nine months I've sat in the Part, I have seen people lose jobs, and I have seen people lose housing. We understand now in hindsight that these things exist. Ideally, I would love to see people coming to the problem-solving court without necessarily having to take a plea. And when you get the energetic students that come in, and we are working together, and all sorts of confidences have been waived, I find they have really benefited by the collaboration with law students.

PROFESSOR THOMPSON: Let me just mention that I have set up three or four clinics since I have been in New York. And I'll tell you that we can never

honestly approach a service provider or a public defender and say we are going to do something about your caseload. Students just can't handle enough cases to impact that at all. You know as I do that public defenders in this city as in other cities are dramatically underpaid. So what we can do is—by offering them the opportunity to work with students—give them some optimism, some other kind of energy that we can bring in.

With regard to courts, you raise an interesting question; I hadn't thought about it in that context. I did training for Attorney General Reno—a roundtable for judges—around the beginning of these drug courts. The judges learned that relapse was a part of recovery. And the judges were like, we learned something, and now we are done. But listening to this judge talk about the nuance of what you learn, there may be some other ways that I think we can collaborate with judges that I think are interesting.

But I think it's hard to sell that we are going to do anything more than good PR, and bring some excitement about working with young people in the office. And for those lawyers who want to be law professors, giving them an opportunity to do some one-on-one and some two-on-one teaching.

QUESTION: I liked hearing you mention the lack of legislators here. And I wanted to ask both you and Robin to comment on this. Is there room within holistic lawyering or within law school clinics for the legislative piece? It seems to me that we thought we were all pretty smart when we said that re-entry began at arrest. But the truth of the matter is that re-entry may begin or end with legislation or regulation. Every day—as recently as April 1st—we have seen doors close to people in the employment context. Every day there is a new piece of legislation. So no matter how well informed the public defenders are, no matter how many consequences we begin to deal with, there will be more and more every day.

Today there will be fifty, and next year the checklist will be sixty. It seems to me that we need to go to the heart of the problem, which is if we as lawyers recognize that we have created almost insurmountable barriers, that we need to begin a rollback in the legislation, and we need to rethink with the Legislature what we have done with the laws to date. And shouldn't there be a re-integrative impact statement that has to be analyzed with each new piece of legislation?

PROFESSOR THOMPSON: A couple of things. One, I remember telling Jeremy Travis that I was starting a re-entry clinic. He looked at me and I did not know if he was amazed or he thought I was out of my mind. But I had him come and talk to my clients, because he had this wonderful experience of being appointed by the President of the United States, to talk about the role of the Executive Branch. One of the things my re-entry clinic talks about is that you are not limited to courtroom advocacy. So media advocacy is a component of what we do, and legislative advocacy is a component of what we do.

The Speaker's Legislative Counsel comes and talks to my students and they pitch proposals to him that they have researched and done quite a bit of work on.

In addition, we do something that's a little odd; we do foundation pitches. We have foundation leaders come from the community and the students pitch proposals in teams. The reason for that is that I want them to think more broadly about their role as advocate. So when they look at problems with re-entry and think the judge can't do anything for us here, they can think, We can go to the Legislature, we can go into the community and do some advocacy.

So the answer to your question is, legislative advocacy has to be a component of what we are doing here. With all due respect to Judge Kaye and Randy and the folks who organized this, I think it was such a huge step to get practitioners, law professors, and judges together. They were not going to reach too far. But I do think there is a role for the legislature to be involved.

JUDGE SHARON S. TOWNSEND: My involvement is on the family-justice side of things. The federal government has recognized the model similar to what Robin was talking about in terms of co-location of services for victims of domestic violence. And there were grants from the Violence Against Women Act to fund family-justice centers that would have under one roof people who specialize in immigration, housing, employment, public assistance, medical care, and counseling issues. Anything that that person who walked in the door and had been a victim of domestic violence might need with regard to any of those issues.

So I think that there is some awareness at some level that this is a model that should be fostered in the community. I agree with you, though, that on a statewide level, there are still too many things not cross-systemed [sic] or not looked at in this holistic manner, which makes it very difficult at the local level to make this happen.

PROFESSOR JANE M. SPINAK (COLUMBIA UNIVERSITY SCHOOL OF LAW): I wanted to follow up on really the two last questions and answers. You three are obviously strong supporters of holistic lawyering as well as problem-solving courts in their place. And it seems to me who is missing are the legislators as funders, and the other funders who are not here. Because, as we know, despite the fact that we are thinking about lawyering differently in the Family Court context and in the Criminal Court context, the funders don't think about it differently. Funders continue to fund individuals and cases. So how does the judiciary get the funders to think differently or how do the practitioners get the funders to think differently so that we actually can deal with collateral consequences, not in the one model court part that's funded, or not in the one Family Court practitioner that is able to act because she got a funder to do it, but in a much more broad way?

JUDGE TOWNSEND: Again, the judge has a difficult role in dealing with funding issues. It's prohibited by our ethical rules that we are not really supposed to engage in funding issues. However, at the same time, I strongly believe that the judiciary, as Judge Kaye has done, has to be a voice that the legislature will hear loud and clear that we are changing the way we do business,

system reform, best practices, and that they have to in turn respond to that by funding across systems. And that is something that I have engaged in, that conversation, again on a local level in my own community. And I think it has been heard. And that's again the role of the judge, to convene that group of people, and funding is part of the conversation. I just can't be the one that's asking for the money per se.

MS. STEINBERG: You have absolutely raised the critical point. And I don't have the whole answer. If I did I would not be spending half my time trying to fundraise.

The truth is that government still, like you said, sees at least public defense as a very limited, very narrow type of representation. So, anything we do above and beyond that, we have to raise money for outside the contract with government.

Because I am eternally optimistic, I hoped that government and private funders would be moved by the obvious cost savings on all the levels that result from being able to address early and effectively the broad array of problems that clients bring in with them.

If I have in my office somebody to do the Family Court work, someone to deal with the immigration consequences, someone to worry about the housing, somebody to access social services for the clients, then the short-term cost of those resources is greatly outweighed by the long-term benefit to society of improving the lives of thousands of people. Not to mention that providing people with the services they need early on and in a way that is sensitive to their experience is simply the right thing to do.

But somehow that's not persuasive enough. Your question is a great one, and I struggle with it each day. I would ask everybody here to think about ways that we can persuade those who have control over resources. And think about who our partners might be in effectively convincing funders to support models like the one we've described here.

JUDGE SHIRLEY TROUTMAN: I'm a judge in the Erie County Court, and I also serve as the judge in our City Court. And we have specialty courts; we have programs that have been created. And our Public Defender's office is set up differently than around the state. They don't do Superior Court defense work. We have an assigned counsel program. Mr. Robert Lonsky, who is sitting across from my right, he assigns lawyers to handle cases at the felony level. But what I would like to bring up is this: there are wonderful programs that come up with alternatives to incarceration so people can avoid getting a criminal conviction. But what seems to have occurred is that the funding source is being provided for victims, but not the defendant. In the holistic sense, it is difficult for the lawyers because they are not getting the funding.

For instance, they will say in the case of Domestic Violence Court, that's going to be placed in the Buffalo City Court, the prosecutors will apply for grants, and they want to seek money to support hiring lawyers, social workers,

and all of that. On the other side, the public defender hears this mandate but their funding doesn't seem to be increased to deal with the different way in which the courts are going to approach the traditional justice system. So I question you, Robin, how has it been for you, trying to get government to see that [it will] "pay now or pay later." We have kids, for instance, on the local level—the violation of petit larceny. They are youthful offender-eligible. If services can be provided in an aggressive way, versus the cost of incarcerating them for the rest of their lives, one would argue programs would be significantly less. What have you experienced and what has the reception been with respect to pitching such an argument?

MS. STEINBERG: The first thing people always ask when I talk about what I do is, "Do you have an evaluation? Do you have statistics? Do you have data?"

And my answer is no. We have lots of anecdotal information, and we have some information that we have been able to pull from our case management system over the years.

But we have tried in various places to get funding to actually do an evaluation that would reap what we think are the results we might want to see—results that give us concrete ways to talk about the positive results and the cost savings.

Unfortunately, we have not found support for that evaluation from government or private sources yet. But I still believe that a thoughtful evaluation of models like holistic lawyering that actually do provide cost savings would be much more persuasive to the sources of that funding for services.

You raise an important point with the problem solving courts and specialty courts. There is a lot of grumbling among the defense bar about the problem solving courts. People say: how could defenders be against problem solving courts; they are trying to provide a broader service to clients.

And there is a lot of good to say about these courts as well, but one of the biggest problems that we have is that as these courts get created and funding goes to the prosecution and to the court system, the people who are consistently left out are the defenders and their clients. Yet we are continually asked to staff yet another part, and our clients are again asked to engage with yet another system.

You know that the lawyers are already stretched, going to thirty-two different court parts on any given day. And now there are nine specialty parts that we now have to go to as well. Yet there is not an increase in funding for public defenders or any specialized training to respond to those court parts. Our limited access to resources and the continued neglect of our clients' needs for services hampers our ability to participate in these courts in constructive ways and to be partners in the problem solving.

We have time for two more questions.

JUDGE TOWNSEND: How about law students doing that evaluation?

JUDGE BURTON B. ROBERTS: I was both a District Attorney in the

Bronx and Chief Administrative Judge. And I get the feeling listening to this that the District Attorney's office is the source of all evil. The District Attorney is doing his job, also engaging in this holistic work, and looking into the background of the person charged with the crime, and trying to see that justice is done.

I was fortunate enough to have as my District Attorney when I was Assistant District Attorney, Frank Hogan. And I know that everyone in that particular office, they are seeking justice as much if not more than the various defender groups that exist. And the District Attorney's office—if it's worth its salt—is also going to assist in looking into the background of the defendant and trying to be of service to him. I think what the Bronx Defenders does is good. And it certainly helps with the grandmother in the housing project to see that she doesn't lose her apartment because her grandson stole a bike. And I think all that is good. But I think you have to recognize, and the people that work for you have to recognize, that the District Attorney's office is not the source of all evil. The District Attorney's office is doing a job and quite often develops a set of fact situations that result in a person walking out of that courtroom.

PROFESSOR THOMPSON: Let me say one thing and then we have time for one more question. Let me say in the same way that Judge Townsend talked about judges saying, "I'm a judge and not a social worker," and Robin has seen lawyers reluctant to come in with the holistic mentality saying, "I don't want to be a social worker." I am on the faculty of the National District Attorneys Association's American Prosecutors Research Institute. And when I try to talk to prosecutors about community prosecution and holistic lawyering—at least the analogue to those components are them saying, "We just need to get people to come in as witnesses and victims." You have to buy into it. And in the same way some judges and some defense lawyers are reluctant to do that, you have to understand that prosecutors have a reluctance at times as well. But the general point is: to the extent that prosecutors drop deep roots into a community, they do a better job. That's just the reality. We have time for one more question.

JUDGE ELMA A. BELLINI: I sit in the Integrated Domestic Violence Court, Monroe County. And I think that what you said about the legislators is accurate. Before I became a judge I was in the Public Defender's office for ten years. Since I've taken charge of Integrated Domestic Violence, it's become abundantly clear that it's an educational issue. It's not just the legislators that need to be educated, but it's the community and perhaps the victim groups. We work very closely with the victim groups, and I am not saying that's a bad thing; that's a very good thing. One of the biggest problems that I have in my particular court is—and this is why I think dissemination of information to the victim groups is so important—but I have victims coming back more times than I would like, in order to testify. And they have to come back because we can't get the staff from the Public Defender's office. So really to make some of these problem-solving courts work, we have to get the victim groups to understand that a very important part of it is the defender, and they need just as much

representation, whether the holistic or the traditional style, as the prosecution or the victim. And so I think it's a really important point perhaps to understand.

PROFESSOR THOMPSON: Good point. And we'll end on that point. Thank you very much.

III.
COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: PUBLIC HOUSING, IMMIGRATION, EMPLOYMENT, FEDERAL SENTENCING ENHANCEMENTS, MANDATORY SURCHARGES AND FEES, AND THE SEX OFFENDER REGISTRATION ACT

PROFESSOR CONRAD A. JOHNSON (COLUMBIA UNIVERSITY SCHOOL OF LAW): I am here to talk about what we are going to be doing in our group. The housing group will talk about two issues. One is collateral consequences on housing issues, and the second is the broader issue that brought us together, which is how we collaborate as judges, practitioners, and academics going forward and sharing information.

As to collateral consequences and housing, this is a big area. I'm going to touch on only a few of the areas. It has often been said that the collateral consequences in housing are the harshest of the consequences. I realize this isn't a competition, and everybody else is going to say the same thing. But if it were, just so you know, we would win.

Imagine what it would take to restart your life after you have been released from prison. You realize very quickly that having a home is the foundation upon which that life is going to be built. Having a home is essential for survival, for human dignity. It affects many areas of life and society. At a basic level, it's your shelter from the storm and a place where you can keep yourself whole and keep those you care for whole. It is your sanctuary, a place for your belongings and a place where education takes place and where folks go to be educated. It is a place where you have access to community resources.

I think about the role of housing and family and I thought about Judge Fisher's remarks, that we should keep the grandmother and grandson and the bicycle and homelessness in mind. I am reminded that because of the current public housing authority policies, there are many family members who are forced to sign agreements excluding family members from residing in the home or even visiting. We know that when housing becomes unstable, families become unstable. Beyond family, obviously your home has a great effect on your employment. It's hard to get a job if you don't have a firm address. Coalition for the Homeless is one group we work with in my clinic. They provide P.O. boxes, e-mail addresses, and phone numbers for folks to call, so the folks who are working with them have a way of trying to get a job.

Beyond employment and family, we see that the home is often the locus for political action, your connection to community causes, voting, and the like. It's also a place where you input your finances into a broader economy of your community. Those returning from prison are often on their own. They can turn to the private sector for housing, but typically they find that the housing is too expensive or just unattainable for them because of their criminal records.

During my time at the Legal Aid Society, public housing was a refuge for folks in that position and that is no longer the case. The public housing authorities have traditionally had the power to regulate bad behavior. But beginning in the 1980s and moving forward since then, Congress has imposed stricter enforcement and screening requirements, which culminated in what is called the One Strike policy. The roots of this policy took hold during the late Reagan-Bush years and continued through the Clinton administration. This is truly, in my view, a bipartisan failure of leadership. It got its name from the State of the Union Address in January 1996 that Bill Clinton made in which he announced a One Strike policy. Thereafter, Congress enacted the Housing Opportunity Extension Act of 1996, and QHAWRA, the Quality Housing and Work Responsibility Act of 1998. In addition, HUD issued, and I'm quoting, "one strike and you are out" screening and eviction guidelines for public housing authorities in April 1996. There are some variations on this, but there are some basics that we can take forward in this little overview. One is that under these laws, some folks are banned for life from housing. Everyone convicted of a felony is banned for five years. And local public housing authorities are given wide discretion to decide how to create a safe environment.

As a result, tens of millions of Americans are excluded from public housing who have been convicted of misdemeanors or other non-violent offenses that bear little or no connection to tenant safety. And people who have just been arrested without any further action, never convicted, are excluded from public housing. Again, Judge Fisher's analogy of the bicycle is one that we should keep in mind.

In another paper, I was reading interviews with the folks in South Carolina's public housing authority, where most people they denied, they denied because they had not paid video rentals or had been convicted of shoplifting in the distant past. In Pittsburgh, jaywalking or passing a bad check were considered reasons to deny someone affordable housing.

In *Department of Housing and Urban Development v. Rucker*,[6] the Supreme Court upheld the eviction of several elderly tenants for criminal activity engaged in by household members without their own knowledge. To make matters worse, during the One Strike era, public housing authorities were encouraged—and I am quoting from the One Strike guide—"to take full advantage of their authorities to use stringent screening eviction procedures." This encouragement took the form of ratings through the housing assessment system that rewarded public authorities for strictly enforcing these rules. And in some Orwellian twist, the higher your grade, the more latitude you were given to create other kinds of enforcement mechanisms.

Ostensibly, safety is the root of these policies. But safety was a concern before One Strike policies. And in the pre-One Strike days, the housing

6 535 U.S. 125 (2002).

authority tried to maintain safety based on your conduct as a tenant. If you acted up they tried to get you out. Post-One Strike, their restrictions are based on assumptions about the way you will act, not about your actual conduct. No doubt safety is an important goal; it's a sensible administration of housing authorities. There is no doubt that some prior offenders continue to pose a threat to public safety. But in my view, policy at the public housing authorities are the blunt instrument and has been wielded in ways that make no sense and has excluded people who should not be excluded who present no risk and who have legitimately turned their lives around.

And ultimately this costs money. Today in our holistic group, we were trying to quantify these costs. But it is interesting that some of these costs have been quantified. Let me give you a sense of the numbers before we get to the quantification. There are 4000 public housing authorities in this country. They provide affordable housing to 6.5 million Americans. According to the FBI, 13.7 million people were arrested in 2002; 6.9 million adults were either incarcerated, on parole, or on probation by the end of 2003. There are over 13 million ex-felons—6.5 percent of the male adult population, according to the FBI. And according to the Bureau of Justice Statistics, at present rates one in fifteen persons born in 2001 will go to state or federal prison in their lifetimes. Just to give you a sort of visualization of that, given the number of people attending this lunch, that would be all the people at that table and that table. I pick on that table not just because Randy is there and I think there is a possibility for criminal behavior, but just to give you a sense that two of these tables, according to these statistics from a reliable source, will wind up in prison during their lifetimes. Just thought I'd tell you that.

So public housing has been a huge safety net. But it is one that is disappearing and it is one whose disappearance will lead to homelessness at a huge cost for us. Judge Fisher said that in her court, which is the busiest court in the country, homelessness is often the result of people being unable to access a home or being evicted from a home as a result of their prior criminal activities, or the belief that they will engage in criminal activities. We know from our homeless population studies that half the people who are homeless have criminal records. Of course, that doesn't mean that they were all evicted or denied housing because of their criminal records, but we see that public housing authority policies have a significant impact on homelessness.

In New York City alone, 4.6 million dollars has been spent building and maintaining a network of emergency shelters. It costs 36,000 dollars a year to house in a shelter one homeless family, and 23,000 dollars to house an individual. In addition, there is a wide array of indirect costs for homelessness, including hospitalization for the mental and physical maladies plaguing the homeless population; longer stays in hospitals; disruptions in education; family disintegration, which results in increases in costs in foster care and increases in domestic violence; and finally higher incarceration rates. The bottom line: preventing homelessness saves money. Homelessness is an expensive

proposition for the people who are the subject of homelessness and for all of us in society. It's regrettable enough that it stems from a conscious set of policies on the part of public housing authorities. And it is a crime when these consequences result from our own ignorance of collateral consequences of convictions.

That is a segue to talk about the second thing we are going to do in our meetings. In our session we are going to talk about how we collaborate on a macro level. As we talked about in the holistic section earlier this morning, we are talking about the difference between treating cases and treating people. We all probably have some degree of guilt in having a case mentality. Lawyers handle cases, judges dispose of cases, law professors teach about cases.

And as we unpack collateral consequences, we come up hard against the notion that we are not dealing with cases but dealing with people. From my perspective as a teacher and one who has spent a lot of time thinking about technology and information-sharing, this is a problem of information-sharing. So we are hoping that in your session, in addition to talking about the substantive area that drew you to this session, you will also talk about how we collaborate on an ongoing basis. Randy is going to host a closing session and each group is going to have a representative at that closing session and we are hoping that each group will not only talk about the collateral consequences and how to address them in their particular area, but also give some thought as to how we collaborate going forward, because that is the greater mission today.

And now I want to introduce Manny Vargas, who is going to talk to you more about immigration.

MANUEL D. VARGAS, ESQ. (NEW YORK STATE DEFENDERS ASSOCIATION, IMMIGRANT DEFENSE PROJECT): There are two things going on in the immigration area. One is the harsher laws, enacted mainly in 1996, as to who gets detained and deported because of criminal convictions and in later immigration proceedings. The other is the greater enforcement focus of the federal government.

The federal government is pouring a lot of money into the enforcement of these immigration detention and deportation laws, and is also sharing information about criminal records of individuals between states and Immigration that have increased dramatically in recent years. Just to give you a sense of what's going on in recent years, let me go over the number of people detained and deported in the past twenty years. In 1983, just a little over twenty years ago, 863 people were deported from the United States based on criminal convictions—less than 1000. In 2003, the last year for which there are statistics, 39,600. So in other words, over a twenty-year period, the number of people detained and deported based on criminal convictions has increased over forty times. And this counts only people whom Immigration cited as deportable because of criminal convictions. It doesn't include all the people who may have been deportable for other reasons but came to the attention of Immigration

because of a criminal case.

But the story isn't only a story of detention and deportation. It's also a story about the people who are at risk of detention and deportation. Obviously, detention and deportation from this country, exile from this country, is sort of the ultimate barrier to re-entry. You are no longer here and not in society. This takes immigration consequences a little bit out of the rubric of some of the other consequences we are talking about today. But the other aspect of what's going on with immigration is the risk of detention or deportation for those folks who are not identified by Immigration for detention or deportation – folks who, because their offenses were so minor, didn't have any custody time, so Immigration doesn't know about them yet, at this point yet anyway. But because their past convictions were not even deportable offenses at the time they were convicted, you know they may be out there in society and trying to be re-integrated.

But the risk of detention and deportation prevents those persons from trying to legalize their status if they are not here legally, or if they are here legally, from getting documentation of their immigration status. And they may lose their green card for fear of approaching Immigration because of a past criminal conviction, or fear of any approach to the government for benefits, for a driver license, or whatever—the fear that the person might, because of how harsh these laws have become, put themselves at risk of being placed in detention and deported from the country. And obviously this disincentive to do all these things is a major barrier for re-entry for non-citizens with past criminal convictions.

So let me give you a brief overview of what it is that makes one subject to these harsh detention and deportation consequences under the current immigration laws. This is going to be a very brief overview. This is a very complicated area of law. I was listening to a presentation this morning about some of the other consequences—that these other consequences could be based on whether the offense is a felony offense or whether the offense is a drug offense, and, if so, you suffer that particular consequence. This area is a lot more complicated because the federal immigration law has its own concepts that may differ from how the state classifies an offense or how the state describes an offense.

But some of these immigration categories—the three main consequences I want to talk about: deportability, that is, what subjects somebody who is here lawfully to deportation; inadmissibility, which is what subjects somebody to removal who is not here lawfully but may have a chance of legalizing his or her status in the future; and ineligibility for citizenship, that is, you are here legally and want to try to become a full-fledged citizen at some point and what are the criminal barriers to that.

The deportation grounds: Very quickly, (1) controlled-substance offenses—almost any controlled-substance offense except for one minor exception for one-time possession of less than thirty grams of marijuana. Next, (2) the

immigration law's concept of "crimes involving moral turpitude"— what may constitute crimes-involving-moral-turpitude offenses are fraud, deceit offenses, intent-to-cause-injury offenses, and most sex-related offenses. Crimes involving moral turpitude cover a lot of criminal offenses. (3) Firearm offenses also make you deportable. And (4) domestic offenses, such as domestic violence offenses, crimes against children, and violations of orders of protection.

And then (5) there is the other major deportation ground. Some of you may have heard of it—an immigration term of art called "aggravated felony." You'd assume that if your particular offense may fall within one of these other grounds and then rises to what constitutes an aggravated felony, then that term covers something pretty horrible and it must be a pretty serious offense. But "aggravated felony" has been defined and interpreted to include not only felonies that may not be so aggravated, but may include even misdemeanor offenses. Many misdemeanor offenses can also be deemed aggravated felonies. And the issue with your offense falling into this category is that you are subject not only to detention and deportation, but probably mandatory automatic deportation. No matter what the equities in your case are, no matter what evidence of rehabilitation you have, and no matter what family ties and how long you have been in the country, if your offense falls within the aggravated-felony category, you are subject to mandatory detention and deportation. So that's deportability.

Then there is this concept of "inadmissibility" that applies to those who don't yet have lawful status and want to try to legalize their status. You are inadmissible for (1) any controlled-substance offense, without even one exception, and it's unwaivable, and (2) the crime-involving-moral-turpitude concept comes up again for inadmissibility for those trying to get legal status.

And what about ineligibility for U.S. citizenship? If you have been convicted of an aggravated felony—that term crops up again—you are forever ineligible for citizenship. So somebody here with a green card who has been here a long time, if their conviction is deemed an aggravated felony, which could be a misdemeanor, no matter what, you can never become a U.S. citizen.

Some other criminal convictions may also bar the ability to obtain citizenship and the benefits that come with citizenship—like being able to vote and bigger access to government benefits, et cetera—for a five-year period of time. Or, if you spend over 180 days in jail or prison, you can be barred for five years from obtaining citizenship.

And finally in this brief overview—and this is important especially for the judges in the room to hear—what counts as a conviction for immigration purposes is broader than what New York State calls a conviction. This is also a result of the 1996 laws that enacted a definition of what constitutes a conviction for immigration purposes that include not only formal judgments of guilt, but also deferred adjudication dispositions where there is some plea or admission of guilt plus some penalty or restraint ordered by the court.

Now we have been hearing a lot about drug treatment courts and domestic

violence counseling and diversion programs. Think about it. Do you have an up-front guilty plea plus the court ordering the person to participate in a drug counseling program or domestic violence counseling program? That plea of guilty is potentially signing your own deportation order. And this is something that I would like for the breakout session to discuss because it is something that I think could be addressed in New York State, in the collaboration that we are talking about today.

There are fairness and justice issues raised by these laws. The paper I submitted to this conference included some of these issues that I thought these laws raised. We have just been focusing on a couple. One, what we have been talking about a little bit today already is that non-citizens often don't know the immigration consequences of choices they make in criminal proceedings. And, unfortunately, here in New York that's an issue. And two, I think there has been increasing awareness over recent years but still many in the defense community don't take the responsibility to advise non-citizen defendants regarding immigration consequences.

We do have in New York a requirement of state law that judges in felony cases provide warnings regarding immigration consequences. But, of course, one problem is that it may well be that it is in some of these misdemeanor cases, or even violation cases, that someone most needs to hear that there are immigration consequences—potential immigration consequences—to the plea. Furthermore, the New York statutory provision doesn't have any remedy if you were not given a warning by a judge.

A second problem is how the case law has developed in New York State when immigrants have gone into court to try to vacate or withdraw their guilty pleas because they were not properly advised regarding immigration consequences of the plea. The law of New York is that, if the defense lawyer gave you affirmatively wrong information about immigration consequences, then you can possibly withdraw your guilty plea later if you can show prejudice. But if the defense lawyer doesn't say anything—doesn't give you any warning about what may happen later in immigration proceedings—that has been found not to constitute ineffective assistance of counsel. And think about what the message is to defense lawyers about where the case law is now—that as long as you don't give wrong information, just don't say anything, then you won't have a court later find that you have given ineffective assistance.

And there is also the issue of immigration consequences that are often unintended, as in the context of drug diversion or counseling programs, where I would say that perhaps all the parties in the case didn't know or intend for deportation to result from that person's up-front guilty plea without regard to what he or she later did in a program. And even in some cases—using the domestic violence context as an example—the victim who may be relying on that defendant to provide child support or alimony may be interested in a conviction and an order of protection, but not necessarily the deportation of

the defendant.

To return to the concept of what the barriers to successful re-entry are, obviously detention and deportation are complete barriers to re-entry. But going back to those who have not been detained and deported but who are at risk of detention and deportation, it may bring about a disincentive to participate in some of these rehabilitative programs. The risk may also be a disincentive, as I mentioned before, for New York immigrants to get their proof of status, to apply for a driver license, to secure employment or schooling, or to seek medical care in some cases, because of the risk that bringing themselves to the attention of the government may disclose a prior criminal conviction and land them in detention or removal proceedings.

Let me leave it at that. I think maybe that's enough food or fodder for the breakout session. Next up is Paul Samuels, Director and President of the Legal Action Center.

PAUL N. SAMUELS, ESQ.: Thanks, Manny. First and foremost, I would like to say publicly in front of all of you here what I had a chance to say privately to Chief Judge Kaye. Thank you so much to Chief Judge Kaye and Judge Keating and to everybody who put this wonderful and critically important program together for setting it up in a way to better air essential issues and figure out how we can move forward.

The Legal Action Center, my organization, was founded thirty-one years ago to focus precisely on what we are talking about today: the collateral consequences and civil disabilities of people with arrest or conviction histories, and people with alcohol and drug histories—those two being quite intertwined. So it's very exciting for us to see this August gathering focus on such important issues, and ones that we have being working on for a little while. You heard in Debbie Mukamal's overview this morning the basics about employment. So I thought what I would do is spend a couple of minutes going into a little more detail and depth about what the situation is, and what the law and policy is in New York. And also—because I learned from my mentor, Arthur Liman, the founding twenty-five-year chair of the Legal Action Center, to always take the advantage whenever you have the chance to get your licks in—to make a few recommendations about things we might want to think about going forward in our breakout sessions, and afterwards about how we might be able to move even further forward in this area.

I would never argue with a professor, I also learned that. So I certainly won't say that employment is more important than housing or certainly immigration. But I would say that these three issues are the most important for people with criminal records. Obviously, as Manny talked about, if you are going to get deported that's the number one issue. And if you are still going to be here, housing and employment are equally critical and the most critical for people to be able to live their lives.

We are not just talking about legal rights; we are talking about somebody

being able to eat and have a place to live. But it also goes beyond that to personal and social and community terms. People need to feel that they can provide for themselves and their families if they are going to be able to successfully reenter; otherwise, and studies have shown this repeatedly, if people don't feel that they can get a job, then they are much more likely to re-offend and end up costing us much more money, endangering public safety and ending up back in the criminal justice system. So there are important societal reasons to move forward on improving re-entry and employment, not just the somewhat narrower, but still important, legal issues.

In terms of the law, before I talk about New York law, I think it's important to mention that there is some case law out there that talks about the impact and the effect of Title VII in this area. There are some cases that have found that, because of the disproportionate number of African-Americans and Latinos both arrested and convicted, employers who have screening procedures that prohibit the employment of people with an arrest or conviction history run the risk of violating Title VII's prohibition on discrimination on the basis of race and ethnicity if the procedure they are using does not in any way bring into bear a business necessity. In other words, if there is just a flat bar on someone being employed if they have an arrest or conviction history without a tie to business necessity, that could be a violation of Title VII. And the EEOC guidelines reflect that view as well.

Under New York State law, New York was the first state in the Union to pass a law of the kind that Debbie described this morning regulating the employment of people with criminal records. By our study, there are about fourteen states that have those laws. New York's is, in our judgment, still the best. It's the oldest but the best. It has a direct relationship test. It also says that if someone would create an unreasonable risk to property or to safety, that too is a legitimate reason for employers to refuse to hire somebody. But if there is no direct relationship, and if there is no direct threat to property or safety, then it is illegal for employers to refuse to hire someone based on a criminal conviction.

The statute that I am describing, Article 23 of the Correction Law, lays out eight factors that the court has to look at in making that determination. And these are the kinds of factors that you would consider and would think would be obvious: What was the nature of the offense? Is it related to the job? How long ago was it? Does it create a threat of safety? And also, looking at the individual offender, the person seeking the job, have they demonstrated rehabilitation, and what have they done to show that despite the criminal conviction, they are rehabilitated and able to do the job?

It is also important and worth dwelling on for a moment that the statute further states that one of the eight factors that an employer and the court have to focus on is the public policy of New York State that it is important to hire people who have conviction records. And that's worth paying attention to because it elevates this issue beyond what is an important step that an employer has to take

of evaluating this particular individual's background, conviction, and ability to do the job. The issue also needs to be looked at through the lens of the public policy of the state—that it is important to hire people who are qualified and for whom there is no direct relationship or threat to safety created by the conviction.

The statute, as I said, we believe is the best one in the state and in the country. But there are not a lot of people who know about it. And one of the things we can certainly all think about moving forward together is how we can get the word around to employers and others and also to those of us who work in the criminal justice system that there is this remedy available. But it's not used nearly as often as it could be.

Also discussed this morning, as Debbie mentioned, is that New York has certificates of rehabilitation. People can get very confused by these. There are two different kinds: certificate of relief from disabilities and certificate of good conduct. They have the same impact for the most part. The only difference is that depending on how serious the person's conviction record is, they are eligible for one or the other. And the procedures are somewhat different, but the impact is the same. As Debbie mentioned, they serve the very important purpose of eliminating automatic bars to employment or licensing or other disabilities created by statute. They also create a presumption of rehabilitation. Insofar as rehabilitation is one of the eight factors in Article 23, getting a certificate of relief can be of assistance to people as they move forward. But again, the existence of the certificates—let alone how to get them and their importance—is not well known or understood.

Just a couple of other areas I wanted to quickly cover. We also discussed a little bit this morning the topic of sealing records. New York does not have expungement of criminal arrest or conviction records, but there is sealing for people who are arrested but the arrest is terminated in their favor. That can be sealed and now that is automatically sealed. And the records are not available at the court level or at the state level—the DCJS [Division of Criminal Justice Services] computer. But violations are sealed at the DCJS computer level but not the court level, and that issue was discussed earlier. New York is not one of the states, however, that allows, once someone has a conviction, to be able to seal that at any time. There are a number of states that do—not a lot, but some—but New York does not. So no matter how long a period of time has passed and no matter how minor the conviction, it can never be sealed in New York. And that is something that the legislature has been discussing for a while. In one of his earliest proposals, Governor Pataki proposed what was called the CADAT program—the idea of conditionally sealing some drug offenses, meaning that they would be sealed unless the person was arrested and convicted again down the road. And that's something that we certainly might want to think about trying to move forward with in New York.

And related to that is what employers can ask about. Employers are not allowed under the Human Rights Law to ask about arrests that did not lead to

conviction, nor are they allowed to ask about sealed violations. Oddly, because of the fact that it came earlier, the youthful offender statute, while it seals youthful offender adjudications, does not prohibit employers from asking about them or using them. And that's another glitch that we have identified in the statute that might make a lot of sense for the legislature and Governor to consider fixing. Because we do know from experience, and I see a lot of heads nodding, that this ends up having a lot of impact on people that got YO [youthful offender] adjudication. And everybody is under the assumption that they can never be used, but in fact technically they can be. And it obviously doesn't make sense to those of us working in this area.

QUESTION: But do you think it makes sense with SORA [the Sex Offender Registration Act]? I know with SORA they can look at the YOs for the recidivists, and studies have shown that the YOs are very significant.

MR. SAMUELS: Let me be clear that what I am focusing on is the civil collateral consequences. There are certainly different issues that come up if the person is rearrested and the law enforcement system wants to look at the records. I think that issue can come up also in the issue that was discussed earlier about violations—if somebody is convicted of a violation but it's sealed. The reason that it was done that way—the court record remains but it's not on the statewide computer—is for that kind of reason. That, to us, makes sense. There may be times that the criminal justice system and the law enforcement system need to have access to records; but not—from our perspective—if someone is trying to get a job or find a place to live and they have never been rearrested. It's sealed and then it's bouncing back.

QUESTION: Well, it will also count toward the point assessment. I mean these are collateral consequences because it counts toward the point assessment in terms of the registry.

MR. SAMUELS: This can be one of the issues we could discuss in more detail in the workshop that's coming later. Let me close by saying that partnerships are important, and it is extremely important to bring all of us together. We talked about—in an earlier session—that there are some other partners we need to bring into this. And one I would urge—and we might not normally think about as lawyers trying to forge working relationships with—but that is employers and unions because employment issues involve them more directly than anybody else. Their concerns, their issues need to be heard and also there are opportunities to educate them.

So thank you very much. And let me introduce Judge Phylis Skloot Bamberger, who will discuss federal sentencing enhancements, mandatory surcharges and fees, and the Sex Offender Registration Act.

JUDGE PHYLIS SKLOOT BAMBERGER: I am going to start with fees and surcharges because I think those are the consequences that are political issues and legislative matters and we could probably do more about them than about any of the other consequences set out in my papers. And change, of

course, requires an engagement of the legislature. These fees and surcharges are mandatory. Judges believed that they were discretionary, but we were told that that was not correct, and the legislature in fact passed a statute precluding waiver and remission.

These fees and surcharges are the mandatory surcharge, which has been raised four times since it was first enacted; the crime victim assessment fee, which has been raised four times since it was enacted; the sex offender registration fee; the Town and Village Court fee; the DNA fee, which is fifty dollars and a recurring cost on every conviction; and—the latest of these multiple costs and fees—the supplemental sex offender registration fee, 1000 dollars. So while the other fees were 250 dollars or less, this last one is quite enormous.

The consequences to the defendant sentenced to prison are great. In the process of sentencing people, very often the only statement made in the allocution of the defendant at the time of sentence is, "Can you waive the fees and surcharges?" This is in recognition of the fact that funds for payment of fees and surcharges will come from prison commissary accounts. The consequent loss of the availability of commissary accounts in the prison is devastating to a prisoner. It reduces the small amount of choice available to a sentenced person. My reading of the legislative history of these fees and surcharges indicates that there was no concern about this result. The focus was on these payments as a money-generating device and that is what is important. Indeed, the original legislative memorandum reflects that the purpose of the fee and surcharge was to require that people who are convicted pay for investigations and information collection in the criminal justice system.

Up until February 16, 2005, the fees and surcharges did not apply to youthful offender adjudications. Now that's changed. They all apply to youthful offenders, with the exception of the supplemental sex offender registration fee. The statute is unclear about that because it makes no mention of that fee in any of the enabling or procedural statutes. It is unclear whether *ex post facto* principles apply or whether remission or waiver applies. The twenty dollar crime victim assistance fee can be waived for youthful offenders if the judge finds that it would be unstabilizing or difficult for the fee to be paid. It's only twenty dollars; and the relief is minimal when considered in the context of all the other fees and surcharges.

The statutes have included an effective date for fees and surcharges. The courts have held that the amount in effect at the time of the crime is what is applicable. *Ex post facto* principles need not be applied.

If a convicted person is ordered to pay restitution and that restitution is paid prior to the time of sentence, then the mandatory surcharge and crime victim assistance fee are not imposed. However, if the defendant offers to pay the money in restitution at the time of sentence, or even shortly thereafter, the judge must impose the mandatory surcharge and crime victim assistance fee and then

the incarcerated or otherwise sentenced person must sue the State for return of the money.

The payment by defendants who are serving prison terms of ninety days or less can be made at the clerk's office and they can use a credit card with a small administrative fee. At the time of sentencing, if the sentence is sixty days or less, the judge must give the person who is about to be sentenced a document stating that if the person has not paid the fees and surcharges within the sixty-day period, the sentenced person is to report to the court on the next working day after the weekend after the sixty days in which the sentence was imposed.

The judge can allow installment payments after a hearing to determine whether it would be unreasonable to require the sentenced person to pay the money in a single payment. In many jurisdictions, the clerk's office will not accept an installment payment. Judges can order installment payments in an amount that can be paid by the sentenced person, which is binding on those implementing the payment procedures.

If the defendant does not pay the amount of money, and, after a hearing, the judge determines that it would be a hardship for the sentenced person to pay, the judge can convert the order for the surcharges and the victim fee to a civil judgment. That order is treated as one made pursuant to the CPLR [Civil Practice Law and Rules]. It is a judgment and it comes up on credit ratings, when looking for a job, and whenever the finances of the sentenced person have to be determined.

If a person refuses to pay the fees and surcharges after a finding by the judge that payment is not unreasonable, a fifteen-day prison term can be imposed. However, the statute contains an incomplete sentence, so it could be read to mean that the person has to be given an opportunity to make the payment before the prison term is imposed. But that seems irrational, because if the money was paid, there is no point in putting the person in jail for not paying the money even if the person could have paid earlier.

If a person is sentenced to a prison term of more than sixty days, there is no summons issued by the sentencing judge and the money is deducted from the commissary account of the individual who has been sentenced. If the person is released from prison and the money still has not been paid, the procedures will consist of those used for fees and surcharges as already explained. It's a little difficult to figure out how that's going to happen. Presumably, a warrant would be issued for the non-payment of the fees and surcharges at some point after the person is released from custody on completion of a prison sentence and is either on post-release supervision or parole or some other form of supervised release. The defendant would be returned to jail and have to be brought back before the judge, who would have to issue a civil judgment.

My second paper for this conference dealt with the Sex Offender Registration Act. The statute requires the classification of those convicted of designated crimes into three risk levels —one, two, and three—which are to

reflect the risk of the defendant's committing another crime in the community. The issues arising under this statute fall into three categories: the required procedures for the designation, including the guaranteed right to counsel; the information to be collected for the registration; and the availability of the collected information to the public.

At the time of sentence, the judge is to certify that the defendant is a sex offender and notify the defendant of the obligations under the statute. The judge can conduct a non-jury hearing to determine if a factor required by the statute to bring an offense within one of the listed crimes is proven by clear and convincing evidence. The judge can also consider any request that the defendant be designated as a sexually violent offender, a predicate sexual offender, or a sexual predator. The defendant has to challenge that designation at the time of sentence. If a nonincarceratory sentence is imposed, the judge must determine the risk level at the time of sentence and have the defendant actually register in the courtroom and supply the required information.

If a defendant is sentenced to a prison term, within sixty days prior to the defendant's release date, the Sex Offender Registration Board must give to the court a risk assessment document. The risk assessment document resembles the federal sentencing guidelines forms. The form has been filled out by a member of the Sex Offender Registration Board and sent to the judge, and the judge must make a determination as to whether or not the offense level recommended by the Board will be the one that the judge will accept. Any documents used by the Board must be given to the defense for examination. The judge has to hold a hearing. The defendant has a right to appeal from a finding made by the judge.

A level-one or level-two inmate or prior offender has to register annually for ten years from the date of the first registration.[1] Level three requires registration for life; it requires a verification of the convicted person's address every ninety days; and it requires in-person verification of employment. The convicted person must report any change of employment or address within ten days. Vehicle ownership registration and use must be supplied. The information required as a consequence of a level-three finding also includes any aliases, Internet accounts, and screen names, and the filing of a photograph and fingerprints. The convicted person must report to the Board any institutions of higher education with which he or she will be associated in any capacity. The Board must also be informed whether the institution has housing facilities that will be used by the level-three convicted person.

Access to information. Well, all the information can go to other registries. There are federal registries and every state soon will have a registry. Anybody can get some information by dialing a specific 1-800 number which is listed in

[1] Effective January 18, 2006, SORA was amended to provide that a level-one sex offender must register annually for twenty years. Level-two inmates and prior offenders became subject to lifetime registration, with first-time level-two offenders eligible to petition for relief from the duty to register after thirty years. *See* L. 2006, ch. 1, §§ 3, 5.

the statute. A caller can get the name and the risk level—one, two, or three—from the Board. The person making the call has to provide identification, indicate whether he or she is over eighteen, and provide the reason for wanting the information. However, there is nothing in the statute which would indicate how that information could be confirmed, or who receives it, or what record has to be kept of it.

With respect to convicted persons in risk levels two and three, the information can be revealed to any institution with a vulnerable population, and presumably that's any school, religious institution, or any place of employment that has young people in it. Institutions with vulnerable populations can themselves disseminate the information. There is a provision in the statute which says that the information is not to be used to harass, intimidate, coerce, or affect the life of the person about whom the information is given. With respect to risk-level-three prior offenders, the information can be sent to law enforcement agencies and is available on the DCJS website.

The third written paper that I prepared deals with federal sentencing enhancements. There really isn't very much to say about the federal enhancements. Federal enhancements of sentencing can be based on state convictions. The federal crimes with potential for enhanced sentences are weapon laws, crimes involving sexually explicit material, drug crimes, and illegal re-entry into the United States. There isn't very much that we can do about this. This is the federal law. The lawyer who represents the defendant in a federal case can litigate issues of whether or not an underlying conviction is within the definition allowing enhancement to take place.

Traditional lawyering will result in resolution of many of the issues that come up in connection with fees and surcharges, sex offender registration, and federal sentencing enhancements. Some effort can also be made to change by legislation the state laws on fees and surcharges.

A. Immigration

JUDGE CHERYL E. CHAMBERS: I have to tell you that in my life as a judge, I always have to be neutral. But any time I have an opportunity to compete, I'm always ready for it. I want you to know that we are going to have the best recommendations of these various breakout sessions. So we have got to get right to it.

I want to introduce the people who are here. You already met Manuel Vargas, who is Senior Counsel with the Immigrant Defense Project of the New York State Defenders Association, and also an adjunct professor at CUNY Law School. Also here with us is Professor Gemma Solimene, Clinical Associate Professor of Law at Fordham University School of Law.

I have to admit that my knowledge of immigration is very limited as a judge in the way that it is probably for many judges in the sense that at the time I am taking a felony plea, certainly as a part of my allocution I warn persons who are immigrants that the taking of the plea could result in some kind of jeopardy to their immigration status. But of course today we want to focus on what we can do with the resources that we have, and what we can do with maybe some of the resources that we don't have to inform or in ways prevent immigrants who are indigent from suffering collateral consequences without their knowledge of the possible consequences.

What we will do, or at least Manuel Vargas did, was he came up with a number of hypothetical situations which actually present, in various forms, some of the collateral consequences. And we are going to be making recommendations on how we might be able to prevent some of those collateral consequences. So I am going to actually turn it over immediately to Mr. Vargas who will go through some of the hypotheticals and we will get through it and get those recommendations down. Mr. Vargas.

MANUEL D. VARGAS, ESQ.: Okay, we thought these scenarios might help to focus our discussions and our coming up with some recommendations. So let me jump right into the first one. This is a defendant charged with a marijuana offense. He has a prior marijuana violation, agrees to plead guilty to marijuana possession, a misdemeanor or even just a violation. He is a lawful permanent resident green card holder. He is here legally and has been in the U.S. a long time. The day after his plea, a detainee is served and he is issued a notice to appear for removal proceedings. It turns out that the plea/conviction/misdemeanor/violation makes him deportable, and under the immigration laws, some of which I talked about upstairs at lunch, the government is alleging that this second marijuana conviction is in fact an aggravated felony, despite its being a misdemeanor or violation under New York law.

And the reason for this is that the federal law defining aggravated felonies

looks to which drug offenses would be felonies under federal law. And under federal law, a second possession offense can be treated as a felony. So the Government would then argue that this second marijuana offense—even as a violation, which, as you know, isn't even a crime under New York State law—constitutes an aggravated felony under the immigration laws.

The defendant was not given any warning by the judge regarding the potential immigration consequences, was not given any advice by counsel, and had no idea regarding the potential negative immigration consequences.

So that's our first scenario to bring up the issue of how to ensure that indigent immigrants understand the immigration consequences or choices they make during criminal proceedings, including the choice to plead guilty or not.

PROFESSOR GEMMA SOLIMENE: Let me point out by way of reminder Manny's comments at lunch that the term "aggravated felony," at least for immigration purposes, would mean that despite anything—despite the length of the person's time in the United States, family ties, rehabilitation, the fact that the crimes were considered by some at least to be minor crimes—would really have no effect on whether or not the person could stay in the United States. He essentially would be mandatorily deported, because there would be no relief for that person under immigration laws.

MR. VARGAS: Okay. Any ideas?

UNIDENTIFIED SPEAKER: It seems there is a responsibility of three institutions to advise this person of the consequences before a plea is taken. One is the Assistant District Attorney in terms of what that plea is about. They have the responsibility to do that. They may not want that responsibility because they may have to change what the person is charged with. The other is the court. Presently I think there is a proposal about the court's responsibility to make sure that a plea is voluntarily made and part of that is what the immigration consequences are and I think a checklist is available. And the third is the defense counsel. It should be their responsibility as well. So all three entities have the responsibility to make sure that it is a knowing and voluntary plea.

JUDGE CHAMBERS: So you talked about judicial warnings, prosecutorial warnings, as well as defense counsel warnings.

UNIDENTIFIED SPEAKER: With respect to prosecutorial warnings, there is the sense of the prosecutor's interaction, not the responsibility piece of it but the fact that we want to be careful about what we impose on prosecutors in terms of communications with defendants. And so I think we need to be really careful what we put out.

UNIDENTIFIED SPEAKER: I think one of the problems with warning-based solutions, even though they are incredibly important, is that for this kind of violation or conviction, the system in the Criminal Court simply moves so rapidly and there isn't a lot of time and space to think about these kinds of consequences. So I think part of what's needed is some sort of structural reform or incentive or something so that the court is giving space for people to figure

out these consequences so that the defendant isn't improperly pressured to take a plea with take-it-or-leave-it offers and other kinds of, you know, threats which may be very hard to create the space to figure out consequences.

JUDGE CHAMBERS: Are you suggesting that a person should be warned at the earliest stage in case you need an opportunity to adjourn the case in order to get proper advice? When procedurally are you talking about?

UNIDENTIFIED SPEAKER: I think it needs to happen earlier. I don't feel I understand the Criminal Court system well enough to understand what all the pressures are that are created around dispositions. I know there are a lot of pressures but I don't know all the forms they take. But I think there is some need to change the culture of the court in some way to make it possible for there to be meaningful consideration of consequences and alternative dispositions. There might be an alternative disposition and you would need that space to create that opportunity.

UNIDENTIFIED JUDGE: As far as alternative dispositions, the hypothetical you posed for the person who is convicted of an offense, violation offense and another violation offense, that's the type of situation that doesn't necessarily require speed. In other words, if the defense lawyer is in a position or should be in a position to advise his or her client about the possible consequences, that's the type of thing you can negotiate with the judge or the district attorney. I don't think the district attorney really would care that much necessarily whether or not someone pleads guilty to a marijuana violation again or disorderly conduct. But in those types of situations, even though it's true that in Criminal Court things move very quickly, you can stop the flow of Criminal Court in situations where I think the defense lawyer originally has the obligation to find out what the consequences are and then to speak to the prosecutor and then to the judge. Because, frankly, as a judge who sat in many of these cases, it doesn't really make that much of a difference to the court, and I don't think it makes much difference to the prosecutor, what the plea is as long as there is a plea to satisfy the prosecutor.

JUDGE LAURA A. WARD: Just to take it one step further, not to play devil's advocate here, but if you have a person who has three convictions for 240.20 [disorderly conduct] because they have two previous arrests and maybe two of them show up on the "RAP" sheet; there comes a point where the prosecutor is going to say we have given this person two or three breaks. And the problem is—I think the problem is basically we have to change the federal aspect of this. If a person is being considered to be mandatorily deportable for a marijuana offense—because sitting in Criminal Court, and I just finished a week of night court—all the defendant hears, no matter what you say to them, is either "I am getting out tonight" or "I am not getting out tonight." You can speak to them until you are blue in the face and they don't hear anything when they are in front of you. I don't know what happens in the back with the defense lawyers when they go talk to them. But it's so quick and it has to be because of the

volume. So I think perhaps in this scenario, the issue is lobbying the federal government to make a change.

UNIDENTIFIED SPEAKER: I think we should consider imposing the obligation on defense attorneys, the obligation to find out what the person's immigration status is as part of the holistic representation. And I think you have an obligation as defense attorney to your client to learn about the potential consequences and to fully advise the person so they can make a known choice. And maybe they would take a plea anyway, if the prosecution was not giving them alternatives. But I think this could be incorporated into the canons of ethics, that this kind of information should be discovered.

UNIDENTIFIED SPEAKER: I have a practical suggestion. Since CLE is mandated, maybe it should be mandated among the requirements that defense attorneys who are in the best position to advise their clients and the only people who can advise their clients, should be mandated to listen to Manny to have an understanding to know if something is an aggravated felony.

UNIDENTIFIED SPEAKER: Access to expertise is critically important and it does need to be mandated in some form or fashion so that the attorneys can offer the proper advice. And it would have to, judging by what he said this morning and what I know for myself, this training would have to be ongoing because it changes over time.

JUDGE ABRAHAM CLOTT: Speaking from the point of view of a Criminal Court judge who is a former federal defender in the federal defender practice in immigration consequences for a large aspect of the practice, I find in Criminal Court that I often don't know that the defendant is an alien. And I often realize that neither the prosecutor nor the defense attorney knows either. By searching through the "RAP" sheet, I can find the place of birth and raise the issue. And I also know—not only from Manny's presentation but certainly from prior knowledge—that the law is very complex and is often changing and changes are made retroactively. So my suggestion would be that cases be flagged up front by a CJA [Criminal Justice Agency] screener, or whatever, as an alien defendant. And that those cases not be handled [sic] in the normal course, but that specially trained attorneys, both from the prosecutor's office and from the public defender's office, focus on those cases. Because in fact it is unrealistic to expect, given the number of practitioners in the courtroom and the number of cases, that all the lawyers are going to have a sufficient level of expertise to give advice on the immigration problems.

MR. VARGAS: Just to address that, one concern that might be raised with that is the identification of the individuals as non-citizens might be misused or abused by certain actors in the criminal justice system. So while I think it would be great if more attention was paid to this issue in the criminal courts, I would raise that concern about the public identification of particular defendants as being non-citizens. Others may have other thoughts on that.

I just want to throw out, on the suggestion of CLEs for defense lawyers, I

wonder—I don't know the answer to this question—for the assigned counsel certification process and what happens with that, is there any possibility that collateral consequences generally and immigration consequences particularly, for my parochial interest, could be part of that certification, if that is done or that could be done?

PROFESSOR SOLIMENE: It's not done. I guess it could be done.

UNIDENTIFIED JUDGE: I want to raise the issue of what is a defendant's option if he is not taking the plea, if he is going to trial and then he is convicted, and this is before us and we do many a day, are we then going to stop the whole process and say in this case we are not going to even deal with a plea negotiation until an immigration attorney is consulted? The cases have to be pleaded or they are going to trial. And it has to be looked at, the collateral consequences. But again, the prosecutor wants to move forward and the court wants to move forward.

PROFESSOR SOLIMENE: Part of the question in terms of a collaboration with the immigration attorney, if that is what is going to happen, is sort of what plea. It doesn't necessarily mean that the whole system has to stop or that it's necessarily going to change in that the person is ultimately going to trial, although that might be the person's choice. Some of this is what plea might be best under the circumstances. And sometimes even a particular subsection, a plea to a particular subsection of a violation of the Penal Law, will make all the difference. But it's the knowledge that is necessary to understand that and know that, and the ability to actually make that clear in the record of conviction that the person was actually convicted of one particular subsection as opposed to another.

JUDGE CHAMBERS: Or less than a certain amount of drugs also, which I know from certain pleas that I have taken, where there has been an actual finding and we have put on the record what exactly was in the lab report. So we made sure if anyone did get a copy of the plea minutes, it was clear that this was not going to be a problem in the future for immigration purposes.

JUDGE FELIX J. CATENA: If we are talking about knowledge and awareness on the part of the defendant, I gather—and if this is not the case, then it should be—I have got to believe that when you apply to enter a country in the application process there have got to be warnings all over the place that you are subject to deportation. And if not, shouldn't that be the focus? Otherwise, it's too late. We throw so much at a defendant. "You know the district attorney has to prove beyond a reasonable doubt all the elements of the offense. You have the right to remain silent." "Yes, yes, yes, yes." They "yes" us to death. And then they leave the courtroom and they don't have any idea what we are talking about. And if they don't know from the get-go that if they are convicted twice, they are subject to deportation—No? Why not?

PROFESSOR SOLIMENE: I think that goes to the question of other ways to inform people prior to the point where they reach court. Because lots of

people obviously don't come into the country in the normal ways. Many people come in as children and there are all kinds of issues like that. But there are two things. One is, thinking back to the panel this morning and Gerry Lopez talking about how do you find out what the community needs—the flip side is how do we get more of that information into the community so it becomes more of the common knowledge, just like other aspects of the criminal defense or the Family Court system are much more common knowledge because people have had lots of experience with it. The other is we haven't talked about technological means to expand people's exposure. Can there be a way to keep this—to put this information onto websites to make it accessible? Like in Housing Court, the things for tenants are now accessible. Ways to just try to permeate the information, as well as the issue of obviously trying to teach the people, the defense attorneys, the prosecutors, and the judges.

UNIDENTIFIED SPEAKER: One of the things that we do in Brooklyn is we have community outreach programs and we bring in people from the community and discuss some of those issues. As you said, generally that information is out there. In fact we brought in clergy to talk about immigration consequences so that they would have ready information. And we gave information out so they would know what to advise their congregants.

UNIDENTIFIED SPEAKER: In Family Court, there is an organization that sets up a table and lets people come into the court with legal information. It's run by an organization that doesn't work for the court system. And most of the people that come into Family Court can stop by there and pick up different folders and things that give different information. So that's another way. For example, in the Bronx there are a large number of people who come into Family Court for a lot of different reasons but may well be dealing with this immigration issue in another court besides Family Court. So I'm seeing that as another kind of access to information.

UNIDENTIFIED SPEAKER: Speaking about supplying information to defendants, perhaps some defendants taking a plea for the first time are not told of the consequences of what may happen if they continue engaging in the same course of conduct. Because we are talking about people who are not particularly well-educated, who go through the system and take a plea and the situation resolves. And it may well be that they think if I do this again, it will be the same course of conduct. And now it's the second time and, boom, things are totally different. So I wonder if that stuff goes on where people are not told what will happen if they do this again.

JUDGE WARD: I just want to give you one example. It just happened to me this week in night court. Just this week I had a defendant who came in on a Monday and got a marijuana ACD [adjournment in contemplation of dismissal]. And I explained to the defendant just like this: this means it's adjourned in contemplation of dismissal. You are entitled to one of these in your lifetime. If you get arrested again, you will be pleading guilty to either a violation or a crime

if it's marijuana. And I asked him, have you ever received this before? And he said no. And I explained that it would get kicked back from Albany.

Thursday, this guy came back with a marijuana arrest. The DA said we are offering him a marijuana ACD and I looked up and said, "Wait a minute, weren't you here the other day?" "No, I was not here before." That's just what I said to him and I don't think I could have made it any simpler. I think the problem is that the criminal justice system is so fast and we speak so quickly and a lot of times judges don't even look up in arraignment, which is a terrible thing to say because I watch some of my colleagues do that. But I think and I personally believe that education is the key and going out to the schools is the key.

I don't know how many of you guys have kids in their twenties, but my step-kids do not smoke cigarettes and they have designated drivers. It's about education. When I was in college and we got new cars—I can't believe I am still alive today, you know. And I see this with my drug court defendants. They don't have the education to know they should not do it. And I think that's something that the courts might think about doing—partnering up with schools, clergy; sending judges out. Schools, public schools are constantly looking for things to try to stop it there and to send this information out.

UNIDENTIFIED SPEAKER: I think with regard to the question of technology, I think one of the challenges there is—because you're talking about immigration and you have a bucketful of people coming from different places with different languages—it presents a challenge in trying to translate the information and make sure you do it accurately in all those different languages. But furthermore, I think the ideal solution would be to have a single portal, a website, otherwise you get the situation where you may have thirty websites for thirty different languages, but that creates the challenge of keeping those thirty websites up to date because the information changes.

PROFESSOR SOLIMENE: It's interesting to me because I have never done anything but be a legal services lawyer, now in a clinical program, but I still have legal services-type of clients. And in terms of their means, and even immigration, all these things now with e-filing and doing all kinds of things, it always struck me that most of the time, as much as we have moved in the technological means, that most poor people do not have access to computers. So this is a great idea and I think it will definitely help, but it certainly can't be and won't be the solution since this is not the way that poor people access information. So that's something to kind of keep in mind, even if we were able to meet all the challenges that you have raised in terms of getting information out there in all the languages that people speak.

MR. VARGAS: Can I ask a question about—because we have so many judges in the room—about the judicial responsibility here? I think, you know, education is obviously one of the main things we have to do here. But even if it's only thinking in the interim until there is better information and knowledge about the immigration implications, what is it that judges can do to try to make

sure that people understand, you know, without necessarily identifying which defendants appearing before them are non-citizens.

JUDGE LEE H. ELKINS: As a practical matter, if you are trying to allocute every defendant coming before you, taking a plea and arraignment on collateral consequences of pleas, it has to come from the defense attorney and with the protection of the attorney-client privilege, so that the defense attorney can find out if the person is susceptible to deportation. So you want the attorney-client privilege to protect the information. And we don't have time to allocute every defendant regardless, right?

MR. VARGAS: Is there anything that judges can do to encourage that attorney-client communication?

UNIDENTIFIED SPEAKER: With the canons of ethics, that's one way we can do it. We have an obligation through ethical standards.

JUDGE CATENA: How about asking the defendant are you a United States citizen; is there a problem with that?

MR. VARGAS: This is the issue I raised before as to whether or not you want non-citizens to be identified in the courtroom.

JUDGE CATENA: Isn't that the idea? If you are not a citizen, to ask that, before I take your plea, are you a non-citizen? I don't understand what the problem is. If we are trying to hide it, aren't we back with the same problem? Let's not hide it. Let's get it out in the open.

JUDGE CHAMBERS: In the alternative, you could say if you are not a United States citizen, this is what could occur.

JUDGE CATENA: Right. Get it on the record; get it out in the open. I have had it on the record where they have said, "No, I am not, can I have a minute to talk to my attorney about that?" And I say, "Yes, sure." They come back in and either they have worked it out or they haven't. I mean if we've got to get this out in the open, I don't understand why we are trying to hide here. Why do we have to hide it? I'm lost there.

JUDGE CHAMBERS: I think we'll take one more question and then move onto the next hypothetical. Go ahead.

PROFESSOR NANCY MORAWETZ: I guess the way that this gets enforced in most other states with a larger number of the population is either through statutory advisal [sic] requirements or through case law that will allow *vacatur* of pleas. And New York is not really in the mainstream of states, despite that it has one of the largest immigrant populations. I wonder from the judges' standpoint, isn't there a way in which having some kind of enforcement mechanism, as unpleasant as it is to have the possibility of a plea vacated, wouldn't it in a sense be better because it would be a way of monitoring if defense lawyers are living up to their obligations?

UNIDENTIFIED SPEAKER: Why not create an immigration book where simply the punishment is so drastic that they slow down the administration and in the long run you are going to know that the defendant will be told what the

consequences are, and must be told not only by the judge but by the defense counsel as well. It's going to slow it down, but it will certainly enhance the justice of the situation.

UNIDENTIFIED SPEAKER: I want to ask Manny, What are the privacy issues that you are most concerned about in terms of this being public? Is it that information will get to the feds and the client will be deported regardless, or is there more to it than that?

MR. VARGAS: Some defendants will not have legal status or won't have proof of their legal status. And in this day and age where there is a lot of interaction between the criminal justice system and Immigration, it could lead to people being identified to Immigration who either don't have legal status or can't prove their legal status. And that raises a lot of issues about whether or not it should be the role of the criminal justice system or law enforcement to be identifying who is deportable for the federal government to enforce.

UNIDENTIFIED JUDGE: Those of us who sit in Criminal Court now, especially in domestic violence cases, have to factor into the equation or not the fact that everyone who goes to Rikers Island is checked immediately for immigration status, and that the entire family is up the creek in a situation where the victim may have wanted him to get a program but that he be home to support the family. That's affecting how judges look at bail consideration, and is affecting sentencing. Because now we are told that Probation—if we recommend probation or order a probation report—if they are aware of the fact that the defendant is undocumented, they are not going to recommend probation, and in fact they are going to report it. So now the sentence is to many judges: we'd better give a conditional discharge. So to have CJA take that kind of information, they don't want to be in that position because reporting from agencies that receive governmental help is a requirement for almost everyone across the board. And we are factoring it into sentencing and into bail consideration.

UNIDENTIFIED JUDGE: Before I issue an order of visitation to someone who is undocumented and they take that child with them, if this is going to be the topic we are discussing, there would be no unsupervised visitation to anyone who is undocumented. So we try not to go there. If the other party agrees, we issue visitation. So it's a very dangerous thing to start asking these questions.

JUDGE CHAMBERS: CPL [Criminal Procedure Law] 220.50(7), the section that requires us to warn defendants in felony cases, actually is going to be repealed September 30, 2005. So one of our recommendations could be that that would be reinstated. And I don't know whether or not you would like as a group to recommend more teeth, but for me, I'm still a judge and I don't know if I want all those motions to vacate judgment. But at any rate, I don't know if you want more teeth. Because certainly the state of the case law now is that if you don't warn them, nothing happens. Certainly if defense counsel, as Manny said this morning, if they give no advice, nothing happens. But if they give bad

advice, it could mean *vacatur* of the plea.

UNIDENTIFIED SPEAKER: The real problem is with the misdemeanor plea. Because in a felony situation, most defendants are not going to necessarily decide whether to plead guilty or not depending on collateral consequences of the plea. The time involved is really what's going to determine whether or not they plead guilty. It's the misdemeanor pleas that are the most dangerous, because everyone agrees that the consequences are so way out of line with what anyone ever wanted to happen with that case. I personally think a judge has to give those warnings. But I think the real obligation is on the part of the defendant's lawyer to know what the situation is and then to try to convince the judge and the prosecutor to change the plea so that the consequences are less extreme.

JUDGE CHAMBERS: I think we should go on to our next hypothetical. Wait, one more comment. Randy.

PROFESSOR RANDY HERTZ (NEW YORK UNIVERSITY SCHOOL OF LAW): I think from what people have been saying, it sounds to me that there are not only consequences to the defendant if this information about the immigrant status is known, but also, as Judge Elkins said, even if there were, the defendant would be afraid to disclose it publicly because the defendant would not know. And that's why Judge Elkins pointed out that the attorney-client privilege is so important. And I think you can put together a grab-bag of front-end remedies and back-end remedies.

Nancy's point was that there is a back-end remedy in other states as it should be in New York. And if information was not provided by defense counsel, that should be a basis for voiding the plea for ineffective assistance of counsel. A front-end remedy would be that defense lawyers would be trained. And I second the motion that Manny should provide CLE training to all these lawyers. But in addition, what the judge can do is a thirty-second job of asking defense counsel, "Have you advised your client of all their rights and have you inquired about their immigration status pursuant to attorney-client privilege, and provided them with whatever information they need to know about potential immigration consequences?" That takes thirty seconds. The defense lawyer now answers yes or no. If the defense lawyer answers, "Yes, I have," and it turns out later that they have not, well that is a basis for voiding a plea because now defense counsel has misrepresented that on the record. Maybe yes, maybe no. But at least I think defense lawyers will be a little bit more careful about giving this advice if they know they are going to be questioned by the judge.

UNIDENTIFIED JUDGE: And I think you have an ethical obligation, and if you are making it grounds for vacating a plea, it leaves you vulnerable. And frankly, it's possible that you can build in a defect that you can later invoke if you don't like the outcome. And I have a problem with that approach. But certainly your suggestion was an excellent one. We can ask on the record if a defense attorney has fulfilled the obligation. And I think we should

strengthen the obligation.

JUDGE ESTHER M. MORGENSTERN: May I interject something too? I think another thing we can do is—maybe the federal government doesn't realize the unintended consequences of immigration law. Sitting in Family Court, I see families split up by mandatory deportation now that the hardship rule has been repealed. And it's hard for me to believe that even the most hardhearted senator who is interested in our security would want families split up and the breadwinners shipped back to their countries. What we might want to do is for all of us to collect information about the impact of these policies on the families that we see in the Criminal Court and Family Court and other places, and essentially file a Brandeis brief with Congress saying: look, this has unintended consequences that we don't think you considered, and we believe you should reconsider this or at least provide a hardship exception in all of these cases.

UNIDENTIFIED SPEAKER: Making that pitch to the two senators from New York would be very useful because neither of them has seen this as a significant issue.

JUDGE CHERYL CHAMBERS: That's why I think it's important to inform the district attorneys, because I don't think in many instances prosecutors intend to have these consequences. And once they are aware of it, they will come up with a disposition that satisfies some of the requirements that need to be met. Let's go into the next hypothetical.

MR. VARGAS: The next issue, one that I think you identified, pertains to the conflict between some federal government policies and what they are doing in the immigration area. Say a defendant is charged with a domestic offense—sounds a bit like the scenario you described this morning. He is offered domestic violence counseling and an alternatives-to-incarceration program, and his defense lawyer asks that the guilty plea not be required up front or that the court decline to actually enter an order ordering the person to participate in the domestic violence counseling program. And the reason the individual's lawyer may do that is to avoid the definition of conviction that I talked about at lunch. What are the thoughts people have, particularly judges, as to whether or not this is something that judges would be willing to work with or that we can make recommendations around? The idea being that you are being asked to do something different from what you usually do in a case in order to prevent the harsh consequences of the immigration law from applying.

JUDGE MORGENSTERN: Studies seem to conclude that the batterer-intervention programs per se really don't help. What does make a difference is the fact that the defendants know they have a potential jail term over their heads and they are compliant. They need to come back to the court and show proof they are attending. And if they fail to attend, they are going to do jail time. So that's weakened if we say go to the program, "but." But if it was presented in the way that you are saying, that the person has collateral consequences that would overwhelm the whole family, I would look at it differently. In my case I

didn't know he would be deported, or the family would lose the father, who had custody. And it was awful.

MR. VARGAS: In the State of Washington, an arrangement has been worked out where it's not actually the judge entering the order to participate in the program, but a contractual agreement between the prosecution and the defendant. And it's believed that that arrangement, for example, would avoid the definition of conviction because it's not the judge and it's not the court actually entering the order.

UNIDENTIFIED SPEAKER: And failure to comply would result in a jail term as well—is that what you are saying?

MR. VARGAS: Failure to comply would, I guess, result in the prosecution's going back to court and presumably then the court would enter an order, whatever it is going to be, whatever sentence.

UNIDENTIFIED JUDGE: I think as a general proposition, judges on the misdemeanor level are more than interested in being flexible in these kinds of situations. What you touched on, though, is the problem that the prosecution is not going to want to have invested all this time where the guy is going to the program and not have something at the end of it. So there would have to be something that would handle that part of the issue.

UNIDENTIFIED JUDGE: What if we were to take a plea and have them allocute to all the facts and then not say, "I accept your plea." If they fail, the plea is then entered because they allocuted to everything and you have gone through all the rights and said everything you want and you have a record of everything, but no plea has been taken.

MR. VARGAS: I love creative thinking, but the definition of conviction includes not only a plea but also an admission of the essential elements of the offense.

UNIDENTIFIED SPEAKER: We need to change the federal law, that's clear.

MR. VARGAS: I'll raise the final scenario. This raises another issue of what happens after the criminal case, and if there is anything that could be included in our recommendations to address an issue such as a non-citizen defendant being represented by a criminal defense counsel who believes they have worked out a plea and paid attention to the immigration consequences and issues. They believe they have worked out a plea maybe that avoids deportability and/or preserves the possibility of a waiver for the individual, but it's an issue on which the federal government may disagree. It's still an open, unresolved issue, but the defense lawyer has helped that person retain an argument. But then later that person in immigration proceedings is unrepresented. There is no right to counsel paid for by the state as there is in the criminal justice system. The person has no legal counsel or legal information to raise the claim on his or her own. What, if anything, can we recommend about this problem of immigrants not having legal representation and information after a criminal case?

UNIDENTIFIED SPEAKER: Just to follow up on that, you heard the collective gasp downstairs when you said thirty-nine thousand is the number this year, or for 2003. Can I just ask you what you know about how many were represented in New York or nationwide?

MR. VARGAS: The majority of people are unrepresented in removal proceedings. And what people should know is that a lot of New York immigrants get detained outside of New York State in other state and county jails and other states that the federal government contracts with, and often in places where there are virtually no non-profit legal services available.

JUDGE WARD: One of the problems is that I am constantly getting letters from defendants in Louisiana telling me that's where they are and can I help them because they took a plea in my court. The big problem is that they leave the state and there is very little that we can do once they are pulled out at that end.

JUDGE CATENA: Notice in the application. Nobody likes that idea.

PROFESSOR SOLIMENE: Sometimes you have situations where people are coming in as infants and young kids. And so the notice in some sense to the parents isn't necessarily going to be translated to them. I think that's one very common way that notice is not necessarily going to be translated.

JUDGE CATENA: How many kids have we deported that have committed felonies?

PROFESSOR SOLIMENE: The issue really isn't necessarily that the kids are being deported. They are non-citizens who have been here since they were children and are now committing felonies as young adults or adults. And unfortunately for them, I can't—Manny and I have been at this for over fifteen years—I can't begin to tell you how many clients are looking at me like: what are you talking about?

JUDGE CATENA: There has to be more responsibility on INS to get that to the people applying to get into this country. That would seem to me to solve a lot of the problem here. There is no contact between INS and people trying to get into the country, for years? I mean, there is a process, right?

PROFESSOR SOLIMENE: No, once you come in, unless you want to naturalize, there is no reason to have any contact. You know if you are admitted as a permanent resident, you have a green card. That's it. You come in and you have been deemed to be admissible to the United States. You come in to the United States and unless you are now in the criminal justice system, there is no reason to have any contact unless that person goes to naturalize.

MR. VARGAS: I take it Tom is addressing generally the educational effect of addressing that in communities. And that definitely is a part of the solution here. I was thinking about when we came up with this last scenario and some of the discussion this morning about holistic representation in legal services offices or in law school clinics, whether or not there is a role to be played under the concept of holistic representation to ensure that immigrants who may have

arguments—defenses to removal coming out of criminal proceedings—are able to pursue them in later immigration proceedings.

UNIDENTIFIED JUDGE: Is it possible for the Criminal Court to certify that it is the opinion of the court that this is not a mandatorily deportable offense?

MR. VARGAS: No, they don't care. The concept called "judicial recommendation against deportation"—some judges may remember those—those were eliminated. Individuals were allowed, if they chose to do so during plea allocutions, to represent what their understanding was of the implications. And if it turned out later that the federal government interpreted that differently, then maybe that person might have some recourse.

JUDGE CHAMBERS: One of the things—getting back to the responsibility of defense attorneys—I would like to see all public defenders have at least two attorneys on staff that are trained—seriously trained—in these issues so they can serve as resources. And in the District Attorney's office, it would make sense to have somebody on the prosecution team who would also be effectively trained on some of these issues so they have a resource. You could call them and find out what the unintended consequences of a particular plea would be.

UNIDENTIFIED SPEAKER: I think all the discussion about mandatory CLE is very good. I think one of the problems is that even if you have really well-trained criminal defense lawyers, and even if you have an immigration expert, the total time that an attorney spends with a client is five minutes in the back. And the total time that the defendant stands in front of the bench when the plea is being negotiated, allocuted, and sentenced upon, is sixty seconds on average. And if fifty percent of the cases are disposed of in arraignment, there is no time for meaningful counseling. So you can have all the qualified counselors available, but the culture of moving cases and keeping the system cranking them out—if we are concerned about true counseling and true advocacy—people have to start thinking about slowing things down so people really can avail themselves of counsel.

JUDGE CHAMBERS: We all know in arraignments, things are moving so fast. And I don't know if you can make such an informed decision because they are really just trying to get out.

UNIDENTIFIED JUDGE: Sometimes they don't hear anything except "remand" or "ROR" [release on recognizance]. Those are the only words understood in arraignment. And "do I have a surcharge?"

IV.
IDEAS EMERGING FROM AFTERNOON BREAKOUT SESSIONS FOR STRATEGIES FOR COLLABORATIONS AMONG THE JUDICIARY, LAW SCHOOL CLINICAL PROGRAMS, AND THE PRACTICING BAR ON ISSUES OF SOCIAL JUSTICE

PROFESSOR RANDY HERTZ: For those of us who don't work full time in the area of collateral consequences and offender re-entry, probably a lot of you are feeling the same way I am, which is totally depressed. Because we have heard this incredibly useful, detailed information. And for those of us who don't work in the area, we have learned a lot more than we thought possible today and all of it is incredibly depressing.

What we want to do now is try and lift your spirits a bit and send you out on a more hopeful note. I want to return to Judge Kaye's initial speech and the challenge she made to us this morning. She said to us she hopes that we emerge at the end of the day with not just a sense of satisfaction about what we have learned, but a real agenda and concrete suggestions for how to continue our collaborations and expand in other areas.

Now in this short wrap-up session, we can't possibly do all that we would like to do in terms of suggesting ideas for the future. But what we can do is make a commitment to work together for the future and to reach out to other people in our respective communities and constituencies. The judges can reach out to other members of the judiciary. The practicing lawyers can reach out to other members of the bar associations. The clinical teachers can reach out to other clinical teachers, and equally important, reach out to non-clinical faculty and deans to bring them into this broader collaboration. We have all heard about the other groups that should be part of the collaboration: legislators, clients, prosecutors. We should bring them all in and figure out some way to continue to work together. And it may be that the way to do it is to form some sort of ongoing working group that would serve as a coordinating body for this broader collaboration in which we are engaged. And not just in one area of the law, but all areas of the law. Because if there is one thing that has become most clear today, it is that these three groups—the academy, the practicing bar, and the judiciary—have a lot of say to each other and can work together incredibly effectively to address issues of systemic reform, and that we should be able to do that in other areas of the law.

Now, one of the virtues of the breakout sessions was that we were able to have small groups. But the disadvantage was that people could not hear what was said in the other sessions. So we have asked representatives of each session to come here and present a short list of suggestions that grew out of their session. We are going to hear from each one of them and Judge Corriero is going to begin.

JUDGE MICHAEL A. CORRIERO: First of all, let me say that I have had several epiphanies today. The breakout session that I was involved in had to do

with employment issues. And I have had the good fortune over the last several years to attempt to resolve the cases of fourteen- and fifteen-year-olds who are accused of very serious crimes. It seems to me that we are really at the beginning of the issues that many offenders face with respect to collateral consequences of their behavior. And one of the suggestions that Paul Samuels made that I thought was extremely significant and applicable to this very vulnerable category of young offenders that come into the court, was the idea that the drug cases, for example, could be conditionally sealed based upon the performance of the offender in whatever program was appropriate. And it was mentioned during our session that this particular concept could have equal applicability when you're talking about offenders as young as fourteen or fifteen years of age coming into the criminal justice system.

Another suggestion was, I believe by Judge Zayas, that we should make sure that when we grant youthful offender treatment, for example, we mean that it is sealed and that sealing should occur to the extent that it doesn't appear whatsoever on the record of a youthful offender.

Several other suggestions involved the use of law students in clinical programs to become involved in discharge planning of many offenders, once they are about to be released to institutions—to identify the issues and the problems they are going to confront and develop a strategy, a protocol to overcome them during the course of the six months to a year that they will be back into the community. We also thought that we could utilize law students in identifying those offenders who were denied youthful offender treatment, who had perhaps a first felony conviction but never applied for either a certificate of relief from disabilities or a certificate of good conduct. And perhaps we could, by identifying them, bring applications back before the sentencing judges, and in an appropriate case the judge could retroactively grant or suggest some kind of solution to the issues of the defendant, depending upon his demonstration of his willingness to cooperate and conform his behavior.

In addition, we talked about perhaps setting up a fund to provide fees for those willing to work in applications pursuant to Article 23 of the Correction Law to demonstrate that individuals who are denied licenses because of conviction really ought to have gotten one, and perhaps the relationship between the conviction and the denial of the license really is not a statutorily, rationally based denial.

There were also recommendations to actually make sure that arrests were not reflected on "RAP" sheets of offenders—arrests that ended in acquittals or other dispositions that did not involve a decision on the merits. All too often in reviewing a "RAP" sheet, we see arrests and we presume that perhaps these arrests may have led to conviction, and this affects the crystallization of a plea offer or sentence. And we have to make an effort to eliminate those records when in fact they are not based upon a decision on the merits.

So we have a lot of work ahead of us and I think Randy's suggestion of

continuing the dialogue is so important. And I, for one, would certainly volunteer to participate in that discussion.

PROFESSOR HERTZ: Next we are going to hear from Judge Bamberger on behalf of the issues of federal sentencing enhancements, mandatory surcharges and fees, and the Sex Offender Registration Act.

JUDGE PHYLIS SKLOOT BAMBERGER: In our group we learned about other fees and charges which are imposed but which were not the subject of the earlier discussions. Many upstate counties impose a thirty dollar fee on probationers to be paid to probation departments for the cost of probation supervision. The State imposes similar fees although they are not enforced vigorously. There was discussion of litigation to limit or correct the adverse effects of these consequences, which are not only unknown to the defendant at the time of a plea or sentence, but also generally unknown to the lawyers, except if they have had direct experience with them. That litigation would likely take the form of a CPLR Article 78 proceeding, rather than a class action.

The second item that we talked about was arranging for the payments of restitution so as to avoid the imposition of fees that convicted persons can then reclaim only by suing the State. This effort would involve an interfacing of the Probation Department, the lawyer for the defendant, the defendant, the complainant awarded restitution, and, presumably, the judge.

With respect to SORA, it was suggested that the determination of the level of risk, or at least a best guess as to what it would be, should be done either at the time of the plea negotiations or at the time of sentence so that the defendant would have some idea of what the level might be. It was the view of people who spoke that the SORA effects are really direct consequences of a conviction, not collateral ones, and so should be made part of the plea or other disposition arrangements. And that it should be the duty of the lawyer to learn this information, and of the judge to confirm the facts and risk level, so that the defendant is aware of the consequences to him or her.

As a global concern, the group asked whether there was some way that we could have more effective and direct communication with the Legislature. With such communication, bills affecting the courts and its constituent groups could be discussed prior to the time the bill was presented to the Legislature for passage. In these discussions, difficulties in enforcement, administration, cost, and the effect on the individual who is affected by such a bill would be examined and resolved to the best advantage of all. One of the examples showing the need for this joint examination of legislative proposals was the administration of SORA, which is not set out in the statute, and consequently each of the counties and communities appear to use their own rules and regulations for administering SORA registration, collection of information, and access to the information. Some may actually be in violation of the statute, but none is controlled by administrative features included in the statute by the Legislature.

PROFESSOR HERTZ: Professor Gemma Solimene is going to report on the

breakout session on immigration.

PROFESSOR GEMMA SOLIMENE: Let me start by quoting what Randy said in his comments during the session—that he thought there ought to be front-end remedies and back-end remedies enacted. And I think many of the solutions and things we came up with ended up being solutions that would work both at the front end and the back end. There was a general consensus that access to information on all levels was probably one of the most important things we need to do and provide, at least in an immigration context, even before entry into the criminal justice system. And that would involve collaboration with communities and getting more information out into the community through technology and through partnering with clergy and schools and the like.

A couple of other things mentioned were educating and lobbying the federal government. It was recognized that many of these problems and issues result from the federal government's changes in the law, which do not take into consideration some of these harsh consequences. As a result, we thought that since there were so many actors and players throughout the system (including Family Court, Criminal Court, and the like), there should be a place where we are collecting information across the board from all the players and providing that information to Congress. Someone in the audience specifically noted that our two senators in New York thus far have not necessarily seen this, the immigration consequences, as the real issues that they are. And that it would be important for us in New York to really get that information out to our senators.

Further, requiring that these really be ethical obligations on defense lawyers seemed to be something that most people taking part in the session really thought was important. Some of the ways to do that would be to have mandated CLE for defense attorneys. And there was also talk about doing something for the assigned counsel certification process that would require those who are on those panels to have some kind of training.

Recommendations with respect to judges included having Criminal Court judges, for example, ask defense attorneys on the record whether they have advised the defendant of all their rights and whether or not they have inquired about the immigration consequences. At the very least, this would hopefully make some defense attorneys pause, if nothing else. However, there was recognition that since the area is complicated and ever-changing, more holistic lawyering will be necessary and there should be people effectively trained in these areas working with the criminal bar to really give more information.

I think in terms of systemic change, someone after the panel really raised a good question and one of the recommendations came from that. It was sort of a question of why in an area where we have a large immigrant population—New York—what creates justice, and is the justice system really designed to deal with this? And in the session we recognized that there was a need for structural reform. The fact of the matter is that the criminal cases move so rapidly and the system is based upon the ability to do that. There has to be assistance from the

court to give time for meaningful consideration of the consequences. It's nice to have the information, but if you are essentially able to talk to the defendant five minutes before and there could be immigration consequences where they could be deported, that isn't going to give them the time needed to meaningfully think about these things and make their choices.

PROFESSOR HERTZ: Professor Johnson is going to report on the housing session and in accordance with the view that technology has a big part to play in this, he is going to show us a bit of his technical wizardry.

PROFESSOR CONRAD A. JOHNSON: I want to thank John Simonetti and the rest of the staff here at the Judicial Institute for what they have done to help produce this colloquium for all of us. And I think we owe them all a round of applause.

We are not using technology for its own sake. If you saw my handwriting and knew of my encroaching senility, as my wife does, you would know why she says, "You need to work with something that has a memory, so why not a computer?" Here is what we have come up with. These are recommendations; that is not to say we achieved consensus on all these recommendations. But many of these suggestions are things about which most people in our group agreed and some are more controversial than others. I will show them to you.

There was the idea that we ought to have orders of eviction reviewed by folks in the public housing authority before they become final and affect people's lives. We ought to fund and build expertise in defender offices around issues of collateral consequences. And as sort of a corollary to that, there might be a funding stream developed that would allow criminal defense attorneys to continue their efforts in civil cases that manifest as the collateral consequences of the work that they were doing. And that might encourage folks to both build expertise and provide service.

Obviously a lot of this is based upon a need to gather and share data about collateral consequences. I know in the holistic group earlier today, a lot of the folks said that we need to document this more and get the word out more and document a lot of the difficulties for folks that were unintended. This is one of the more controversial ones—before you ask what we were thinking or drinking—the idea was that you might want to deal with collateral consequences before they become collateral consequences and, for example, think about a moratorium on pleas, think about a reduction in arrests, and talk more broadly about policies that make collateral consequences so important. Obviously, education of all stakeholders is important—thinking about judges, practitioners and academics as well.

Disclosures. There was the idea that it's sometimes good as a baseline to develop expertise among the bench and the bar about collateral consequences. But there are times you debate as a litigator whether or not you need to share that information with the court and with the other side. And there should be developed some set of protocols to protect information so you can get at the

underlying good you want to do without hurting your client's cause.

Obviously a right to counsel. This was the least controversial of the suggestions that were made and came up a lot with folks. And not just a right to counsel in Housing Court, but a right to counsel—or at least the availability of counsel—to attack the underlying administrative proceedings that often you are unable to collaterally attack in Housing Court; that often folks don't know that they have a right to or don't do well in. And we note that the success rates in the challenges have been very high, but the representation rate in those challenges is very low and therefore the net effect is that folks are getting hammered.

Judge training—of course we were thinking about doing that. And having the Housing Authority in the room from our perspective would be a useful thing. And Judge Acosta lamented that we did not have more folks here from there, which is not to lay blame at your door, but just a wish that we had them in the room as a simple matter of fact.

Continuing jurisdiction of collateral consequences by courts, and at least some recordkeeping with regard to the litigants and judges about what they intend by what they are doing in the working out of a case so that the Housing Authority ultimately could understand that they should use their discretion to forward those goals and not cut against them by creating unintended consequences.

And finally, digital information-sharing. We will say—and I will make this offer to everyone here, and Judge Kaye said we should think about tomorrow and we should continue the dialogue. And there are lots of ways in which it is tremendous to have a place and facility like this to come to. But a lot of judges and practitioners need information at their fingertips and can't always be physically present. Those of you who are aware of the excitement around *Blakely v. Washington*[7]—sentencing guidelines—a lot of judges were turning to blogs and other online applications that informed them in ways that print media could not. So we are volunteering, at the suggestion that clinics do something more to help, to help the Judicial Institute think about the use of technology to share information, and to create more education around not just this issue but other issues as well.

PROFESSOR HERTZ: So we have come to the end of today's session but also a beginning—a beginning of the enterprise in which we should all be engaged, working together to solve these problems and many other problems. The first step in solving any problem is to understand it. And what we have done today is to achieve a deeper and better understanding of the very complex issues that exist in this area of the law. As Conrad said, we are going to use digital means to educate other groups and disseminate this information through the ways that he described and also on the website that the Judicial Institute has created. We will also use more old-fashioned methods. As Judge Kaye said this

7 542 U.S. 296 (2004).

morning, we are going to publish the proceedings and the papers in the *N.Y.U. Review of Law and Social Change*. So we are all going to work together and it will require a lot of work on all of our parts and also on the parts of the other people we bring into this. And I am hoping that we create some kind of coordinating body.

But our work for today at least is done. So I would like you to join with me in thanking the following people: Chief Judge Kaye, Judge Newton, Judge and Dean Keating, and his staff, which includes Joy Beane, Sue Nadel, Valorie Perez, and Damaris Torrent. And also Norman Reimer and Robert Mandelbaum. Please join me in thanking them. And finally, I want to thank all of you for being so generous with your time and investing so deeply in this enterprise. I look forward to working on these issues with all of you in the future.