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Challenging Reform: A Formerly Incarcerated Student Roundtable Discussion

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CHALLENGING REFORM: A FORMERLY INCARCERATED STUDENT ROUNDTABLE DISCUSSION

Footnote Forum Podcast, a CUNY Law Review Production

Colby Williams: Hello, hello, hello. Welcome to another episode of the Footnote Forum podcast, part of CUNY School of Law's *Law Review*.¹ This is our podcast version of the Footnote Forum, the digital version of our *Law Review*, which is a journal we put out every year, twice a year usually. We have been bringing you podcast episodes for the last three years. We are happy to bring you another episode as part of our 25.1 Volume, which is our fall release 2021. The theme of Footnote Forum in Fall 2021 was "Challenging the Assumptions of Reform." We tried to print articles on our website from incarcerated or formerly incarcerated writers, and also from a professor who [works] in the public defense world. The idea of doing that was to ask ourselves: *What counts as legal scholarship? Is it just highly academic works that require a lot of research written by professors? Or can it also be based on lived experience?* When you have people who have been through the criminal legal system, maybe they are unable to research to support the things they have seen and the statements they're making with academic research, but they can tell you it's true because they have lived it. *Do we consider that scholarship in the same way we do the other stuff?* So, this fall, we have been running articles on our website that are either highly academic, very personal, or anything in between. We want to continue that theme in this episode of the podcast by bringing you a roundtable discussion from some of the formerly incarcerated students who are currently enrolled at CUNY School of Law. So, I am joined today by my friends.

Let's introduce ourselves! I am Colby Williams. I am formerly incarcerated. I am a 3L at CUNY School of Law, and I am a Footnote Forum Editor on *CUNY Law Review*. I have participated in Moot Court, done some internships. I am a friend, and a son, and a brother.

Phil Miller: And I am Phil Miller. I am a 2L at CUNY School of Law. I am also formerly incarcerated, and I have done lots of things, but

¹ See *Footnote Forum*, CUNY L. REV., <https://perma.cc/M7BW-8T8X> (last visited Dec 30, 2021).

we will probably get into some of those things as we go on. One more person is left to introduce themselves.

Jordan Sudol: And I am Jordan Sudol. I am a 3L at CUNY School of Law, and I am just a man.

Colby: Just a man?

Phil: Who's also . . . nice.

Jordan: I'm just a nice man.

Phil: Just a nice guy.

Colby: There are some others at our school. We have classmates and peers who've seen the inside of jails, seen the inside of prisons, have run-ins with the cops, maybe with immigration officials. So, this is not like—we do not have a monopoly on this subject. We're just the only people who could show up today for this podcast. We are going to try to bring you some valuable insight about our experiences as people who have had involvement with the criminal legal system but then went on to pursue a degree in law and who've now had involvement with the academic world in a law school. We are going to talk a little bit about why we think our experiences are valuable in that world; why we think it's going to serve us and the legal community as we move out into the job sector and hopefully get employed someday.

Hopefully we graduate. Hopefully we pass the bar. Hopefully we actually get jobs. So, we are going to bring all that today in an extension of, like I said, “What counts as legal scholarship?” [with a] focus[] on lived experience. So, I want to ask you guys to start off.

What made you want to go to law school? And, why do you think it has been a good decision or a bad decision so far?

Phil: I guess I'll answer that question first (chuckles). Thanks, Jordan. Um, I was actually trying to do the same thing to Jordan, but he made it more obvious (chuckles). So what made me want to go to law school? Well during my incarceration for—I was incarcerated in a New York State prison for 17 years and during that time I worked as what was called, what is referred to as a jailhouse lawyer.² And, doing that kind of

² *Jailhouse Lawyer Members: What is a Jailhouse Lawyer?*, NAT'L LAW.'S GUILD, <https://perma.cc/WM2B-8BC3> (last visited Dec. 30, 2021); see also CTR. FOR CONST. RTS. & NAT'L LAW.'S GUILD, *THE JAILHOUSE LAWYERS HANDBOOK: HOW TO BRING A FEDERAL*

work inside, helping guys challenge their cases, challenging the conditions of their confinement, I developed a passion for the law, and I became good at it. I began winning some cases, and it [the law] was something I wanted to pursue and just continue to excel at. At the time, I didn't know I could go to law school, so that was not my desire at the time. I didn't learn that until I read a newspaper article in 2005 that featured three or four attorneys in New York State who also had served time in prison, and when I read that article that's when it first dawned on me that I could actually pursue a career in law after prison.³

Once I had that idea in my head, it stuck with me and it made me want to become the best I could be at every legal thing I had—every type of legal work I could do whether it was divorce proceedings, child custody proceedings, criminal cases, civil cases, or 1983 actions.⁴ Whatever it was, I wanted to be really good at everything. So that stuck with me, when I finally got out, I got back into criminal justice work for a while, and I was still debating, still on the fence about going to law school because it was another three-year commitment. By the end of it all I decided that I have all this, this whole wealth of experience, and it would be a shame to have developed a skill and not pursue the degree that could allow me to practice these skills on the outside. And so, I decided to give it a go, and I am very happy that I did. I'm a 2L now and I'm almost—well I can't say I am halfway through the journey, I am almost halfway through the journey. I am enjoying it though, learning a lot and looking forward to graduating though and getting my degree so I can go practice. I want to cause some trouble in a good way.

Colby: For once.

Phil: Yea . . . (chuckles).

Colby: Jordan, what about you?

Jordan: What made me want to become an attorney? Well, I guess, you know, when I started college behind the wall,⁵ I just always knew, I guess, that a bachelor's degree was just never going to be enough or I was

LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON (Rachel Meeropol & Ian Head eds., 5th ed. 2010), <https://perma.cc/R4JX-N4FH>.

³ See, e.g., Reginald Dwayne Betts, *Could an Ex-Convict Become an Attorney? I Intended to Find Out*, N.Y. TIMES MAG. (Oct. 16, 2018), <https://perma.cc/7ATL-RRGH>.

⁴ 42 U.S.C. § 1983 (providing an individual right to sue state and local officials acting “under color of state law” for civil rights violations).

⁵ Nicole Lewis & Annaliese Griffin, *Life Behind the Wall*, MARSHALL PROJECT: THE SYS., no. 7, <https://perma.cc/JW3H-E6M4> (last modified Nov. 13, 2020).

never going to be satisfied with a bachelor's degree, so I was always looking for what's next. And then for me, Phil talked about seeing a news article about people who were formerly incarcerated becoming attorneys. I saw a *60 Minutes* piece a couple days after I got home about a formerly incarcerated federal inmate that won a case in the Supreme Court,⁶ and it really intrigued me and inspired me. I used to do some law work behind the wall.⁷ But my past experiences and then seeing that *60 Minutes* piece, I think the combination of the two really was what ultimately led me to apply to CUNY. I am going into my final year. It's been a long, long, long stretch, but definitely very excited that I did it, honestly even though I have not been excited about the last two years of school. Now in the third year with clinic work, [I am] starting to experience the real reason [why] I came to law school in the first place.⁸ So I guess now I am embarking on that journey, you know. [This] definitely has re-sparked interest for me.

Colby: Great. I think for me, my law school origin story always feels a little less righteous than everybody else's. I had like a long period of probation,⁹ and I was just like, I found that to be very difficult. I was just, like, working to get by. You got to, got to have a job. You have to be there when [the probation officer] shows up. You need to be home when they tell you they are going to check out your residence. You need to be with their office when they tell you to be there. Pee in this cup when you need to, you know what I mean, it's just like, there's a lot and it felt like a lot to me.¹⁰ And I guess I got it in my head that I should not dream anymore. Like ambition, that's for other people now. You need to like figure out what's the best life for you within the limits that the probation office will allow you to live. It felt pretty restricting and then at some point—so you know I did okay. I got by. I worked hard, worked multiple jobs. I felt like my life was going pretty good, but I just didn't like hope for a lot or think about a lot. I just wanted to get through probation. I did not know what was going to happen next. And at some point, I was dating this woman who was finishing medical school. She did not have a criminal record, but still her and all of her classmates seemed like they just complained about it all the time. I found myself thinking like, “Man, I could do that. Your

⁶ Steve Kroft, *Meet a Convicted Felon Who Became a Georgetown Law Professor*, CBS NEWS: 60 MINUTES (July 20, 2019, 6:59 PM), <https://perma.cc/CE6M-ZTGW>.

⁷ *Id.*

⁸ See generally *Clinical Programs*, CUNY SCH. OF L., <https://perma.cc/577E-E8JP> (last visited Dec. 30, 2021).

⁹ See N.Y. PENAL L. § 65 (McKinney's 2021).

¹⁰ *Probation Drug Testing*, U.S. DRUG TEST CTRS., <https://perma.cc/8LQZ-74PY> (last visited Dec. 30, 2021).

life is not bad! You get to be a doctor after this! Like that sounds awesome. You get to do surgery or whatever. The world is your oyster. You are going to be making so much money!” And the thought just hit me, it was like the first time I found myself thinking I could do something like that. You know, I was like, “What if I, what if I do go to medical school? Why not? Am I allowed to do that?” I did not know, so I started looking it up. Turns out probably not allowed to go to medical school. I don’t think I am allowed to get a medical license, but that did make me dream a little bit.¹¹ “Well, what kind of school could I go to? What are the possibilities out there? Maybe I could do something, maybe I can dream again.”

And I found law school, and I searched online for “law school with a felony,” and I found, just like you guys, I found articles about people who are out there practicing: Tarra Simmons in Washington State; I found Shon Hopwood as well; [I also found] some people locally who work in public defense agencies here in New York City. And I just started calling and emailing them and asking them questions. Come to find out, there’s this whole network of people out there who have involvement with the justice system and are in law school or have graduated [and] practicing law, whatever. They turned me onto CUNY School of Law, which I had never even heard of; I am not from New York. There were students there that had organizations called FILSAA, the Formerly Incarcerated Law Student Advocacy Association.¹² I got their emails, got their phone numbers, and started calling them too, and one thing led to another. It was the first time I let myself think, like, “If I could do anything, what would I do?” And I hadn’t had those thoughts in a long time, since I was a kid. It felt like it was for me finally, like it was something I was going to do for me and for my family and for people like who, my friends, people who have been with me the whole time. I was like, “Yeah I am not just going to settle for whatever I can get. I am going to, like, I am going to go for something.” And that set off, like, a lot, most of it was in my head, but it was, like, I finally saw a path to freedom in a lot of ways that was really good for me. I think it’s been a good decision, too. You know I think I got to meet a lot of people, got opportunities that I never thought I would get,

¹¹ See N.Y. COMP. CODES R. & REGS. tit. 8, § 28-1.2 (2020) (explaining that evidence of criminal convictions in applications for professional licenses is subject to an investigation); see also BUREAU OF EMS, N.Y.S. DEP’T OF HEALTH, POLICY STATEMENT NO. 15-04, CERTIFICATION OF INDIVIDUALS WITH CRIMINAL CONVICTIONS (2015), <https://perma.cc/LWK7-LBNR> (explaining convictions of certain misdemeanors and felonies make one ineligible for EMS certification).

¹² Chrissy Holman, *Formerly Incarcerated Law Students Advocacy Organization (FILSAA) and Their Path to the Legal Workplace*, CUNY SCH. OF L. (Dec. 3, 2020), <https://perma.cc/3DR3-BCVX>.

and I think the work's going to be fulfilling, which brings me to something else I'd love to hear from you guys about.

The work is fulfilling to me because I feel like I bring some experience to the table that other people can't bring. So far with your internships, with legal work you did before law school, whether it was behind bars or not, can you talk just a little bit about your experience and how it has enriched your practice or your view of the practice, or even your classroom experience during law school?

Jordan: So, I don't know if it's really enriched—I don't know if my past experiences have enriched law school yet. At least not yet anyway, right because your first two years are really mostly classroom based.¹³ You take a midterm and then you take your final and the class is done. So now I'm hoping with clinic and being able to do interviews and meet, you know, real people that have real legal issues, you know, I think it's going to bring back a lot of feelings of just being on that “other side of the table.” You know, knowing what it's like to be involved in the legal system. So, I think once I get to start experiencing those experiences then I feel like my past will help, not enrich me but I hope to enrich my clients' lives, you know and make them even better. And I guess—there was a study I remember reading about in undergrad and it pretty much boils it down to—it was a study done on formerly incarcerated [people] that went on to go to college and graduate and overall most of the goals of the formerly incarcerated that go on to become college graduates was just to enrich the lives of others; it was just to give back.¹⁴ And I think ultimately, that's my goal. It's not even for myself, you know, it's just for others and I think, you know, I want to enrich others' lives because of my past experiences.

Colby: How do you think that'll happen, like, just by being an attorney who brings some compassion to the table?

Jordan: I don't think it's as simple as that. I think it's about finding a balance in your work life and being able to do things that you really believe in. You know those kinds of causes like—it's not about money. It's just about, you know, helping others. That's honestly what I go back to. And how do I help others? Well, I guess in one sense is being the best attorney that I could possibly be and fighting as hard as I possibly can,

¹³ See *What You Can Expect from Your Law School Experience*, LSAC, <https://perma.cc/3NJN-C647> (last visited Dec. 30, 2021).

¹⁴ Lucius Couloute, *Getting Back on Course: Educational Exclusion and Attainment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Oct. 2018), <https://perma.cc/AGF5-RA3X>.

but I think there's also—and it has nothing to do with clients—but it's just finding that legal work that really fulfills you, and I think you need a combination of both.

Phil: I don't know if I can say that my prior experience while incarcerated has enriched my law school experience, but I can say that it has made some things easier for me in law school. For example, I was the instructor of a legal research course inside, so when I took legal research here at the school, at CUNY Law, it was like, literally the easiest class I've had of all my classes so far.¹⁵ Same thing with criminal law, because I had worked in that for so long. Other classes that were easier were LEDP (Liberty, Equality, and Due Process).¹⁶ The amount of reading made it very hectic. It was difficult because of the amount of work that was required, but the concepts that were discussed were things I had a lot of experience in.¹⁷ Even now, the class I have is Constitutional Structures, so far there has been no new material introduced to me because I've encountered these things many, many times before, so it's made my law school experience a little bit easier in that regard.

In terms of “enriching,” there was something else I wanted to say, I cannot remember it right now.

Colby: What about internships¹⁸ or in practice, maybe your career before law school?

Phil: The word “practice” just triggered it. So, again, it's not really enriching. While I was doing legal work inside of prison, it was very hands on, you learn the cases, learn how to apply them, and you go in for specific results. What I learned in law school was what supplements that, such as the policy behind decision making, why certain rules are the way they are, why certain laws are the way they are, so that was missing from before, but I learned that in my classes now, policy, and that's probably the biggest piece that was missing before so now I have like a complete picture.

¹⁵ Legal Research is a required course for all first-year students and trains students in “basic legal research tools, as well as effective and efficient research methods for devising strategies to find cases, statutes, regulations, and secondary authorities with both hard-copy and computer-assisted legal research tools like LEXIS and Westlaw.” *First Year Required Courses*, CUNY SCH. OF L., <https://perma.cc/P5CK-A7E6> (last visited Dec. 30, 2021).

¹⁶ Liberty, Equality, and Due Process is a first-semester course taught at CUNY School of Law and covers equal protection and substantive due process rights doctrines.

¹⁷ *First Year Required Courses*, *supra* note 15.

¹⁸ *Summer Fellowships*, CUNY SCH. OF L., <https://perma.cc/W3RV-MBPM> (last visited Dec. 30, 2021).

I know in your 3L year, you end up in a clinic where you have hands-on practice to start making these things, to bring them to fruition, but I've had that [experience] prior to law school so mine is a little in reverse.¹⁹ So law school is just really filling in the gaps in many ways because I went from practice to theory almost instead of starting with theory going into practice.

In terms of internships, did it make it more rewarding or enriching? Well, I had one internship so far over the summer. Dare I say what it was? It was actually a corporate law internship, and I loved it. It was great. It was a lot of work, and I learned a lot. Again, I don't think my prior experience while incarcerated made that experience more enriching. I loved [my internship] for what it was. Everything that I learned there was something new. There were areas of the law that I never thought of looking into, like what's the liability of long-term carbon dioxide storage and leakage,²⁰ you know, stuff like that. All types of things.

Colby: Cool.

Phil: It was a great learning experience.

Colby: Maybe this is like the same question but rephrased a little differently. How do you think your experience with bad attorneys is going to change the way you approach your practice and hopefully be a good attorney?

Phil: That's a good question, I can ramble first—Jordan, if you want?

So, my experience with bad attorneys was extensive and because of that, I am determined to be the kind of attorney that gives his client the best representation possible. The representation he or she is constitutionally entitled to.

I found that in my prior work and in my own case too, a lot of attorneys don't give the amount of attention necessary for their client. And it might be because they're overloaded; they might have too many clients all at one time or too many trials at one time, so they really can't give a hyper focused approach to any one case.²¹ That really can be to the client's detriment, and I don't want to be that kind of attorney. I want to be the one who's willing to listen to what the client has to say, explore

¹⁹ *Clinical Programs*, *supra* note 8.

²⁰ See Michael Faure, *Liability and Compensation for Damage Resulting from CO₂ Storage Sites*, 40 WM. & MARY ENVTL. L. & POL'Y REV. 387 *passim* (2016).

²¹ See Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://perma.cc/CRQ6-VQXH>.

new possibilities, new arguments, find the way to win, or get the best possible outcome for this client, always. In my own particular situation, I had a trial attorney—or an attorney who was supposed to be a trial attorney—tell me that all we could do was take a plea, a plea of guilty, and that he would need to charge more money. Even though he had been assigned by the court, he would need some more money to actually think of going to trial.

The whole time I wanted to go to trial because I thought I had an arguable case. You know, I could have lost too, but at the time, I was willing to take that risk, but my attorney was like “No, I don’t even have time to prepare for trial, so we can’t even talk about that: plea only.”

Meanwhile, I had a co-defendant who was also arrested with me, and his attorney said, “No, we should go to trial. I think we can win.” So, his attorney took his case to trial. Mine said, “No, we’re going to take a plea. We can’t win [a] trial.”

Colby: And his [attorney] was also 18-B, appointed by the court?²²

Phil: Yes, assigned by the court.

Colby: Not even making more money for the effort.

Phil: Yep, and they literally had the same evidence against us both. In the end, to keep the story short, my co-defendant’s attorney won trial. My co-defendant was found not guilty on all counts, and meanwhile my attorney forced me to take a plea, because he refused to investigate, or prepare for trial to begin with. So same case, same evidence, same everything, two vastly different outcomes.

I spent much of my incarceration challenging my own case while trying to help others at the same time. And, it was difficult. I ended up getting a judicial hearing, an evidentiary hearing, in 2013 (finally), but even then, the judge was super biased in favor of my old attorney who came to testify at the hearing.

You could tell that for every little break that happened—like a five-minute break—my old attorney went back into the chambers with the judge and you can see them through the open door like shaking hands, patting each other on the back, joking around and laughing and then come

²² N.Y. CNTY. LAW § 722 (McKinney’s 2021) (“The governing body of each county . . . shall place in operation throughout the county a plan for providing counsel to persons charged with a crime . . . who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense.”).

back out and get back on the stand. I'm like, "What? What the hell. Like this should not be allowed."

Colby: It's tough, because you're in law school now, plus you have years of experience in all this and so you know the ins and the outs of this whole thing, but at that time you were young, and you didn't know any better. Like, you got an attorney, and you just do what they say.

Phil: Yeah, exactly. That's one of the worst things is when you first enter the system, you really don't know what's happening. You literally only have your attorney as your lifeline.²³ So you are going to believe almost anything that attorney says. And, if that attorney does not want to do any extra work, there is nothing you can do nothing force them to do it. And, because you also don't know what the standards are for effective representation at that time, you don't know if what your attorney is doing is actually enough or if it's something that's actually going to be detrimental to you.²⁴ Like, you just don't know. It was a terrible disadvantage to not be knowledgeable about law when I was a teenager and also getting arrested at the same time. Now, I have a lot of knowledge, from real life experience, from helping other people and law school on top of that. I wish I had my brain back then, when I was 19.

Colby: Jordan, what about you? What experience with attorneys makes you want to be a different type of attorney?

Jordan: So, my experience from my attorney—I paid her like \$15,000 for a plea, but the question you asked, I think, is something that actually goes with the whole prison environment and that's reputation, right?

So, in law, as in prison, it's always about building a reputation, right.²⁵ So, I didn't come to law school to be a shitty lawyer. I've seen plenty of shitty lawyers. I've seen guys, you know, guys' cases, guys' discoveries have plenty of mistakes. And so, you know, I was always worried about my reputation in prison, and just like I'm always going to be worried about my reputation as an attorney. That's something that has to, you know, especially starting out, it's going to have to be cultivated,

²³ Dina Sayegh Doll, *Criminal Justice Reform Requires Bolstering the Public Defender*, BLOOMBERG L. (Oct. 26, 2021, at 4:01 AM), <https://perma.cc/5XET-KG47>.

²⁴ Geoff Burkhardt, *Public Defense: The New York Story*, CRIM. JUST., Fall 2005, at 23, 25-26, <https://perma.cc/BXP3-YZ3S>.

²⁵ See Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment* 77, 83 ("From Prison to Home" Conference Jan. 30-31, 2002), <https://perma.cc/TP8L-L98P>.

and I just think hard work and diligence, honestly. I think your clients can feel that. Just having a sense of empathy, just always be reminded that you were in the “other seat” at one point. So, I think if you can just really do those two things, I don’t think you would be a shitty lawyer.

Phil: What kind of lawyer was it?

Jordan: A poop lawyer.

Colby: Okay, so I get asked quite a bit to talk to prospective students or, you know, to have a relationship with our admissions department (a lot of people get it I’m not, you know, not like explaining, I guess) to speak on why law schools—which [are] historically this, elite, exclusive environment that only some people have access to—why they should open more seats up to formerly incarcerated people or to justice-impacted people in general, people with lived experiences in all different walks of life.²⁶

Do you guys have any thoughts about that? Like, why was it a good idea for our school to accept you as a student? As we maybe advocate, mentor, look toward future classes, and maybe people are listening to this, and just like us, they’re finding out for the first time that they could go to law school. Why should these schools open their doors to students like us? What do we bring to the table that’s unique, and why does [the lived experience] matter?

Phil: The lived experience is what’s unique. I think it goes back to something Jordan mentioned a few minutes ago about empathy, from having to sit on the other side of that table as a client and to go through these experiences. By having that first-person perspective, you know what it’s like, you know what they’re going through, and you can identify with them, empathize with them.²⁷ You also know the kind of representation you wish you might have had while you were on that side of the table. So, knowing these things, from having gone through them, I think can make you a better attorney. By including more people who have been impacted by the system that people are trying to change, I think it can actually cause a type of change that people in those situations really

²⁶ Formerly Incarcerated Law Students Advocacy Association, *Law School Admissions Office Talks About Criminal Records*, YOUTUBE (Oct. 29, 2020), <https://www.youtube.com/watch?v=7jhFBqA24qw&t=31s>.

²⁷ Kelan Lyons, *From Prison to Practice: Connecticut Man Hopes to Start Bar Association for Formerly Incarcerated Lawyers*, CT MIRROR (Aug. 2, 2019), <https://perma.cc/X92S-C5ET>.

need, rather than all the change being suggested from people [on the] outside of it who have never gone through those types of struggles.

I mean tons of people can help and can fight and advocate for changes, but it's different when their life has been perfect in every way, and they have not had the same struggles. They're great to have [as] allies and [they] can do a lot of good,²⁸ but it's something different when you get someone who's actually going through the fire and has come out on the other side and can say, "All right, now I also want to be part of the change, because I bring an insight and a perspective that's different from what others can bring." Again, I think it makes you more empathetic and willing to go the extra mile for whoever it is you're trying to help in the courtroom. I think that's why more law schools should allow formerly incarcerated people, and any other person who has gone through struggles of any type into law school.

Colby: There's a time when it's like, you don't want to talk about bad stuff from your life in your application for a school, for a job, or whatever. It sort of feels like maybe the time is coming when people who are reading those applications and selecting who gets in and who doesn't, should look for the struggles you've gone through and maybe the times you failed. In my opinion, if you are able to write about stuff like that ways that bad decisions you've made or things that have been done to you or, you know, just bad things that have happened in your life, and you are able to write about how you've overcome those obstacles, what you did afterwards, who you are now, how that fuels your fire—I think that says a lot about your character. It shows resilience, it shows a level of strength that maybe other applicants don't have.

I just thought—I always try to tell people in these events when we're asked to talk on this, I always try to say that's what you should be looking for in applicants. You want to know what kind of student can make it through law school and then make a name for themselves in the legal field, look for people who have resilience, look for people who have strength, look for people who have proven that already. I don't think that checking that box²⁹ should get your application thrown out.³⁰ I think that

²⁸ See, e.g., *Criminal-Justice Reform*, WE ARE NEW YORK VALUES, <https://perma.cc/L5SX-JRJA> (last visited Dec. 30, 2021).

²⁹ Anna Ivey, *Character & Fitness Addendum: Criminal and Disciplinary Disclosures on Law School Applications*, ANNA IVEY CONSULTING (Oct. 13, 2021), <https://perma.cc/2UCB-NY54>.

³⁰ Scott Jaschik, *Admissions Choices*, INSIDE HIGHER ED (Nov. 4, 2019), <https://perma.cc/YLL4-CZ6F> (discussing study finding "that colleges are more likely to reject applicants who report felony convictions even for minor felonies. At colleges with high crime rates, officials were more likely to reject [B]lack students.").

should put you to the front of the line or get [someone to read your application] anyways.

Phil: Yeah, I agree, that's good. I wish more employers did things like that, because when they do, do things like that, your application and what you're writing about yourself can set you apart from other people because they realize you have gone through struggles, and you have [put] an extra effort to achieve or to get where you're at today. I think those are qualities that are easily transferable to any type of position, so any employer should want those things, but there are also a ton of employers who don't sit down for conversations like that. So, when you try to explain things like that, they might still attach a certain stigma to the information you are sharing. They would say, "Oh, (automatically) this guy cannot be trusted because he's got a conviction on his record." So, that's another thing that has still not disappeared.³¹ The stigma is still there. There's still plenty of employers who are discriminating, but I do wish there were more who are like the type you were just describing. I also think it's up to us as formerly incarcerated people and law students and advocates *et cetera* to try to push that change and bring awareness to these issues and show people, employers particularly, the ones that don't hire from incarcerated people, that we are trustworthy. You're not defined by your past and you can still do great things. And, you know, you deserve to be given a chance. I think more employers need to hear that message and see people have actually succeeded because then if they see it happening in practice elsewhere, they might be more inclined to do it in their own companies.

Colby: I have some specific [examples of] what you were just talking about. It reminded me I have some really specific moments in my life. Where I broke a lot of people's trust and that's true, but then I have like more than ten years after that, where every day I showed up as like the most dependable guy on the job, the most dependable friend, etc. And I feel like it is true you see a conviction and it does say something about me there's some, there's some negative things about me. And who I've been, you know, like, I've let people down like, I've hurt people, etc., but you see like the timeline there and anything that's happened after that. That says a lot of good things about me too. Like you guys, other applicants. So, I do, I totally agree with what you're saying that there's

³¹ See DALLAS AUGUSTINE ET AL., WHY DO EMPLOYERS DISCRIMINATE AGAINST PEOPLE WITH RECORDS? STIGMA AND THE CASE FOR BAN THE BOX, UCLA INST. RES. LAB. & EMP. 1, 4-7 (2020), <https://perma.cc/FC4T-C7SZ>.

like, there's more to the story than checking a box and that saying everything there is to say about you.

Phil: Yeah, so a lot of work to do in that area.

Jordan: Yeah.

Phil: To get past, to reduce the effect of the stigma that exists because of the felony conviction or any conviction.

Colby: So, we're talking about what we bring to the table, to the practice of law, the empathy. Specifically, like, I think about, I'm sitting with a client who's offered a plea deal. And I know what I'm asking when I'm asking him to take it or not take it, you know. What about when you get into some sticky situations like because of your experience with attorneys, with plea negotiations, also with prison. Let's say you're a defense attorney, now just put yourself out there, and a client is offered a plea deal that if you were in his shoes you wouldn't like, and then he's offered a chance to snitch to get himself off the hook. Now there are a lot of attorneys who are just looking for that "W" ["win"] and it may be in this guy's best interest to avoid prison and to make that decision, but because of your lived experience, this is a—this is an ethical law ethics hypo, right, that a lot of people are asked in school. But because of your lived experience, it's a different calculus because you know what you're asking either way there. So, you don't have to talk specifically on those issues.³²

But the question is: exactly what goes through your mind when you imagine yourself with a client someday and knowing what you're asking them to agree to one way or another.

Jordan: So, this brings me to a conversation that I had a while back with Marc Ramirez³³ right when he was talking about, you know, what was I interested in doing when I got out of law school. And he broke it

³² See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 52-54 (2001) (discussing the five habits, in part, in the context of attorney-client relationships in which lawyers shared similarities with their clients and calling on attorneys to understand that "an important component of cross-cultural competence is to recognize that all similarities and differences have the same degree of importance in all settings.").

³³ See Marc Ramirez, BRONX DEF.'S, <https://perma.cc/ETW4-LZ6P> (last visited Dec. 30, 2021).

down into two parts really: state public defender³⁴ [and] federal public defender,³⁵ right? He was like, “As a state public defender you’ll be taking a lot of pleas now. Like, you know, I don’t know if you’re comfortable with copping a lot of people out.”³⁶ He was like, “But if you work as a federal public defender,” he was like, “you’re going to have to deal with snitching a lot because the feds have all the evidence already.”³⁷ That’s why they brought the case. So as a federal public defender, you’re going to be dealing with a lot of telling. And I don’t know if you’re alright with that.”

I guess the short answer is I don’t know if I’m alright with that. So, I know the ultimate goal has to be the client and what’s best for the client, right.³⁸ So if an offer was brought for my client to possibly bring information on somebody else, you know what, I have to relay that information to the client, and you know what, something like that, I would do my best to just be real matter of fact about it. “This is what they want. And it’s up to you.” If they want my advice, I’d be more than willing to give my advice—

Colby: Yeah. That’s something you bring that a lot of attorneys don’t. They can’t turn to their average attorney and say, “But if I do Option A or B, what does it mean for me?” But you can tell them.

Jordan: I can, and I can tell you that in the State of New York, they have snitch hunters in prison, like, that’s a real thing. I also don’t want to scare them from making a decision that might be best for them, too. I just want to be as matter of fact about it. I don’t like it, but it is a part of lawyering.

Colby: Do you think that it’s at least good that you can tell them more of the story? From your own expe[rience], just seeing what it’s like inside, where the average attorney may not, they might just be trying to get them to do what’s best for them and not be able to give them all—

³⁴ See *Federal Versus State Work*, U. MICH. L. SCH., <https://perma.cc/2BN6-U7L9> (last visited Dec. 30, 2021).

³⁵ See *Id.*

³⁶ See N.Y. STATE ASS’N OF CRIM. DEF. LAW. & NAT’L ASS’N OF CRIM. DEF. LAW., *THE NEW YORK STATE TRIAL PENALTY: THE CONSTITUTIONAL RIGHT TO TRIAL UNDER ATTACK* 15-16 (2021), <https://perma.cc/B9NA-Y4Y5>.

³⁷ See Daniel Donovan & John Rhodes, *The Prisoner’s Dilemma Becomes the Lawyer’s Dilemma: To Be a Zealous Advocate or a Judas Goat?*, 35 MONT. LAW. 8 (2010)

³⁸ See N.Y. STATE RULES OF PROF. CONDUCT, Rule 1.1 *et seq.*

Jordan: Well, I think the problem is that I don't want to scare them away from not telling when it would be, right, because I haven't seen too many good instances of somebody telling in prison and it ended up being good. You know, or they weren't housed in another part of a prison, not in general population³⁹ because they can't live anywhere else.⁴⁰ So there's a lot that goes into telling behind—you know, it's more than just being in a courtroom and pointing a finger. There's a lot of potential repercussions that come from it. So, I guess I don't feel no way, I guess, more or less about snitching because they're not telling on me, or any of my loved ones or friends, and it's a part of the job. So, I just want to just try and step out from myself and just be as matter of fact about what the court is looking for.

Phil: Yeah, I pretty much agree with Jordan. That's a tricky question because, you know, the lived experience is definitely, you know, something you're not gonna to forget. It's going come into your mind if you ever do have a client who has the option to cooperate with, you know, the prosecutor. Again, it should be a decision the client's gonna have to make. I'll try to counsel the client, give them some pros and cons about what it could be. A lot of people will try to avoid jail or prison at any cost, and so, they will not—there will probably be many people who don't have any problem dealing with working with a prosecutor and that way. And as officers of the court, attorneys are, you know, upholding the Constitution and supposed to provide constitutionally adequate representation and that includes doing whatever, you know, is in the best interests of the client.

I don't think I could tell the client, "No, you can't do this." Only time I think I might say, "No, don't do it," is if I feel that there's a really good chance we could win trial or hold out for a better plea. Without that component involved, I would definitely try to advocate—if I'm negotiating the deal on behalf of the client, I'd definitely have to try to advocate for some deal that does not include that particular component that way everyone is happy and the client—the client's life is a little more safe going forward, and his relatives, *et cetera*. Because you know, there's definitely retaliation in cases like that, against people who testify against other people. And that's a very real thing. And I think any attorney who

³⁹ Ryan M. Labrecque, *The Use of Administrative Segregation and Its Function in the Institutional Setting*, in NAT'L INST. OF JUST., RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS 49, 49 (2016), <https://perma.cc/H86R-WBTZ>.

⁴⁰ Jacob Gershman, *Why Life for 'Snitches' Has Never Been More Dangerous*, WALL ST. J. (June 20, 2017, 8:00 AM), <https://perma.cc/N442-QZ6H>.

thinks it isn't and just focuses only on the client, which you should do, but without knowing the real-life consequences that come after that.

Colby: And they're focused on the moment, not like what's best for them and maybe doing a little more time and not, you know, having a safer time of it. Not just winning today.

Phil: Yeah. But even though I personally wouldn't do it, like I wouldn't say, "Oh yeah, go do that." In that particular client's case, if that's the offer I have to share with them. I have to give it to him and let him decide and just give him some pros and some cons. Assess the strength of our case versus the prosecutor's case and see what he or she wants to do. That's definitely a tough question. Tough issue.

Colby: I can already tell you did good on the MPRE (Multistate Professional Responsibility Exam).⁴¹

Phil: I don't know if I did good.

Colby: Saying all the right things.

Phil: I passed it. It was good enough.

Colby: Good, good, good.

Phil: I've told you about in the past, about David Huck,⁴² about when I did the research for him. I sent a letter to the attorney and his attorneys wrote back and said, "No, this issue has no merit. I'm not going to include it in the brief." And so, because of the Judicial Department he was in, I think the Third or Fourth Department,⁴³ the rules there in that court are that once your attorney files a brief you can file a pro se supplemental brief within—I don't know if it's 30 days or 45 days after the attorney

⁴¹ *Multistate Professional Responsibility Exam*, NAT'L CONF. OF BAR EXAM'RS, <https://perma.cc/BB3P-DDA9> (last visited Dec. 30, 2021) ("The Multistate Professional Responsibility Examination (MPRE), developed by NCBE, is a two-hour, 60-question multiple-choice examination that is administered three times per year The purpose of the MPRE is to measure candidates' knowledge and understanding of established standards related to the professional conduct of lawyers.").

⁴² See generally *People v. David Huck*, 1 A.D.3d 935 (4th Dept. 2003).

⁴³ Judicial Departments are four divisions of counties and courts within the State of New York. See *Court Administration: Overview*, N.Y. STATE UNIFIED CT. SYS., <https://perma.cc/Z9S5-V9BA> (last visited Dec. 30, 2021); David Huck's case was in the Fourth Judicial Department. See *People v. David Huck*, *supra* note 42.

filed his main brief.⁴⁴ Whereas in the First or Second Department, you'd have to ask permission from the Appellate Division⁴⁵ to file that supplemental brief, but up there you didn't have to, you can just file it as a matter of course, after the attorney files his brief. And so that guy, David Huck, when I tried to help him—I did help him—but in the beginning, I didn't want to do the work and so I gave it to his attorney, but I did the research, drafted a legal memo, and sent it to his attorney, and that's when the attorney wrote back and said, "No, this has no merit. I'm not going to include it." And so, I was like alright, well that's it, he doesn't want to do it. David Huck was like, "No, come on, Phil. If you said it's a good issue, then it's a good issue. I trust you. I need you to do something with this." I'm like, "Damn it, no." My time was already filled up. I had—I was kind of too busy to really help him any further. But I also couldn't resist the urge to not let this go, because I did know that the two issues—I found two issues I thought were good—I didn't want them to just fall to the wayside and not be argued anywhere because his attorney thought they were bad issues.

So, I said, "All right. Fine." So I did the pro se supplemental brief for him. On those two issues; one was a repugnant verdict issue and the other one was, not sure what it would be called, but it was like a legal impossibility. They used the wrong predicate felony to sustain a felony assault charge and the two charges, the underlying felony count they used was not allowed to be used as a predicate felony for the main charge because the intent elements were different. And so, I did the brief for him, the supplemental brief, filed in court, and a few months later the decision came back. And you got the decision, the first half of the court's decision talks about the attorney's main brief, and it says this issue the attorney raised has no merit, so I reject this one. Then it goes "turning now to the supplemental brief, blah blah blah, we believe this has merit. We're also going to review it in the interest of justice because it was an issue that the trial judge missed, the prosecutor missed, the trial attorney missed, so no one preserved it on the record for appellate review at all. But in New York there is an interest of justice component to appellate review that allows courts, the Appellate Division specifically, to review issues that were not preserved in lower court."⁴⁶ So I had to also include a separate argument for that in this brief and they agreed and said, "Okay, this issue is serious enough. We will exercise that power to review without it being

⁴⁴ 22 N.Y.C.R.R. § 1250.11(g)(2) (2019) (allowing a pro se supplemental brief to be filed within 45 days after counsel has mailed to the defendant a copy of the brief filed with the N.Y. Appellate Division, Fourth Department).

⁴⁵ *Id.* at § 1250.11(g)(1).

⁴⁶ N.Y. CRIM. PRO. L. §§ 470.15(3)(c), (6) (McKinney's 2021).

preserved.” And then they reversed the conviction on the legal impossibility issue I was just discussing. And so, when that conviction went out the window—he had a 14 to life sentence on that conviction—and it was gone like that. And that’s a case where I was a prisoner.

I learned a lot myself. I helped this guy put together the brief, mailed it in for him, and everything. And he had a paid attorney. I mean, it wasn’t paid, but he was assigned by whatever the public defender was in that area.

So, someone who’s been practicing law for many years told me that this issue could not help this client, so he wasn’t going to raise it, so he didn’t raise it. Luckily, I knew what I was talking about, and I raised it anyway and that’s what got him the reversal. But had he not met me, or had I not done the work, he would have still been sitting in prison with a 14 to life sentence because his attorney who went to law school, did all the stuff, passed the bar and helped other people, decided that this issue wasn’t worth arguing. That’s the kind of thing you’re not going to see in a law journal because I was a prisoner doing this. You’re not gonna see that in a book somewhere. So that’s definitely an example I think of lived experience that can constitute legal scholarship. There’s so much [that] went into that and also opens the door on all types of legal problems about attorneys being able to issue spot correctly and knowing when what issues do have merit and when to include an issue even if you think it doesn’t have merit or could be somewhat meritorious. There was no reason for that attorney to say no to that issue; he only raised maybe two or three other issues in his brief.

Jordan: Sounds like the kind of attorney who wouldn’t listen to you just because you were an inmate.

Phil: That’s another thing, too. So yeah, so a lot of attorneys, what’s the word?

Jordan: Pompous asshole?

Colby: They dismiss you. They’re dismissive.

Phil: Definitely very dismissive of anyone who does not have a law degree telling them how to practice. And so when he got the letter from me I’m sure he looked at it and was like, “This dude is locked up. My client should not be listening to anybody who’s locked up. I’m the attorney. I know how to do my job.” That kind of thing. That’s always present with attorneys.

Jordan: Jailhouse lawyers⁴⁷ will give you wrong information sometimes.

Phil: Yeah. And I know a few of them who do. I would never recommend people to them at all. I was very upset at the quality of some people's representation because of that.

Colby: That's a great example of why maybe it's important for the Footnote Forum this semester to put the idea in people's minds in the legal world that legal scholarship may just be more than academic scholarship. It could include lived experience because if we're all just elitist and writing off people because they don't have the same education as me or the same resources as me—

Phil: Or access to the same law review or a law review at all.

Colby: We lose out, we're losing something right now. It's not like we're keeping somebody out for our own gain, we're actually losing valuable information that can lead to a client getting his life back.

Jordan, Phil—thanks for doing this with me. Appreciate you guys. Thanks for being at the school. Thanks for being in my life. To our listeners, thanks for tuning in again. We're gonna try to bring you another episode in the spring. A whole different topic, a whole different host probably. So, subscribe to that Footnote Forum *CUNY Law Review* podcast.

Jordan: Smash that like button!

Colby: Smash the like, share with all your friends, and this is sponsored by Squarespace. No, just kidding. All right, we're out.

⁴⁷ See, e.g., *Jailhouse Lawyer*, WIKIPEDIA, <https://perma.cc/XJ9C-MYRB> (last modified Oct. 17, 2021, 10:51 AM).