

# Inaugural 2021 Menard Family Lecture on Drug Policy and Criminal Justice

## UNDERSTANDING DRUG SENTENCING SYMPOSIUM

Thursday, October 7, 2021 | 12:30 – 2 p.m. EDT | Zoom

### Panelists:

Eric H. Holder, Jr., 82nd Attorney General of the United States

Piper Kerman, Social Justice Advocate and Author

The Honorable Maureen O'Connor, Chief Justice of the Ohio Supreme Court

The Honorable Algenon L. Marbley, Chief U.S. District Judge for the Southern District of Ohio

### Moderator:

Douglas A. Berman, Professor and Newton D. Baker-Baker & Hostetler Chair in Law, Director, Drug Enforcement and Policy Center, Moritz College of Law, The Ohio State University

## TRANSCRIPT

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00:00:04.650 --> 00:00:10.500

Holly Griffin: Thank you for attending the inaugural 2021 Menard Family Lecture on Drug Policy and Criminal Justice.

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00:00:10.889 --> 00:00:18.810

Holly Griffin: The event is part of the Understanding Drug Sentencing Symposium organized by the Drug Enforcement and Policy Center at The Ohio State University Moritz College of Law

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00:00:19.590 --> 00:00:32.040

Holly Griffin: and the Academy for Justice at Arizona State University Sandra Day O'Connor College of Law, with help from Professor Mark Osler at University of St Thomas Law School and Dean Jelani Jefferson Exum at University of Detroit Mercy School of Law.

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00:00:32.670 --> 00:00:39.750

Holly Griffin: The event is made possible by a generous gift from the Menard Family and Menard Inc. Before we begin, we have just a few notes we'd like to share with you.

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00:00:40.440 --> 00:00:44.970

Holly Griffin: First, to streamline the appearance of the event today, we suggest that you hide non video participants.

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00:00:45.330 --> 00:00:52.140

Holly Griffin: To do that, click on the three dots at the top right corner of any participant box that has their video off and click hide non video participants.

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00:00:52.680 --> 00:00:59.220

Holly Griffin: Second, we want to draw attention to the Q and A function at the bottom of the Zoom window, you may submit questions at any time during the presentation.

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00:00:59.880 --> 00:01:09.870

Holly Griffin: Third, please note that auto generated transcription has been enabled for the event. To change how you view the automated transcription or to hide it, click live transcript in the menu at the bottom of your Zoom window.

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00:01:10.470 --> 00:01:17.010

Holly Griffin: Finally, this event is being recorded. The recording will be made available on the event page and social media channels as soon as possible after the event.

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00:01:18.240 --> 00:01:26.400

Holly Griffin: Follow us @OSUlawDEPC to stay up to date on our research, programming and future events. Thank you again for joining us and we hope you enjoy the event. Doug.

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00:01:29.310 --> 00:01:39.240

Douglas Berman: Thank you Holly and thanks to all the panelists and attendees, so excited and eager to talk quickly with my introductory remarks, so that we can get to

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00:01:39.720 --> 00:01:50.430

Douglas Berman: the heart of our discussion today with Attorney General Holder, as well as Piper Kerman and Chief Justice Maureen O'Connor and Chief Judge Algenon Marbley, truly

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00:01:50.730 --> 00:01:58.560

Douglas Berman: an all star panel we have here. I want to begin by kind of highlighting that this is part of a broader conference about

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00:01:58.890 --> 00:02:06.540

Douglas Berman: drug sentencing that we're excited to be hosting here at the Ohio State University Moritz College of Law through the Drug Enforcement and Policy Center which I.

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00:02:07.140 --> 00:02:12.780

Douglas Berman: help run. We are also aided greatly by the Academy for Justice at the Arizona State

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00:02:13.200 --> 00:02:20.160

Douglas Berman: University Sandra Day O'connor College of Law and just so thankful to all the folks involved in making this all happen, and particularly grateful

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00:02:20.670 --> 00:02:31.170

Douglas Berman: to our guests today as part of the Menard Lecture. As Holly mentioned, this was made possible by a generous gift by the Menard Family and Menard Inc and here we have a chance to

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00:02:31.620 --> 00:02:41.670

Douglas Berman: talk with with folks who have so many important perspectives on on our system. I was excited to play a role in putting together a conference on drug sentencing because, for the

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00:02:42.060 --> 00:02:49.410

Douglas Berman: gosh 30 years I've been following sentencing, which is just an incredibly challenging endeavor. I think the judges and justices will

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00:02:49.860 --> 00:03:00.300

Douglas Berman: speak to just how hard sentencing is, in the drug arena especially. It seems like some of the hardest and sometimes the ugliest aspects of our criminal justice system, come to the fore

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00:03:00.780 --> 00:03:07.440

Douglas Berman: and the people we have here to speak from their perspectives to share their view on these issues is is

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00:03:08.190 --> 00:03:14.970

Douglas Berman: so very exciting. We're going to start with the 82nd Attorney General of the United States. I'll introduce each of the speakers very briefly

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00:03:15.300 --> 00:03:24.390

Douglas Berman: before giving them a period of time. We've asked the Attorney General and Ms. Kerman to go, you know 15 minutes or so with introductory remarks and then have

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00:03:25.110 --> 00:03:36.360

Douglas Berman: the Chief Justice and the Chief Judge respond in kind, and then hopefully have some time for some broader Q and A. The Q and A is open for for weighing in and I'll try to moderate that effectively.

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00:03:37.650 --> 00:03:43.200

Douglas Berman: Attorney General Holder, among other things besides serving, I believe, is the third longest serving Attorney General from

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00:03:44.070 --> 00:03:49.920

Douglas Berman: February 2009 to April 2015, has had an incredible career at the Justice Department.

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00:03:50.640 --> 00:03:59.520

Douglas Berman: Previous to that, and I think some people don't remember though it's important for this context especially, that he was serving as a judge of the Superior Court for the District of Columbia

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00:03:59.970 --> 00:04:10.320

Douglas Berman: before stepping down from the bench to serve in the Clinton Justice Department, ultimately rising to Deputy Attorney General. And the amount of drug policy issues that came up in the federal system,

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00:04:10.950 --> 00:04:19.980

Douglas Berman: you know, both during the Clinton years and the Obama years are too voluminous to cover completely, and so I just want to sort of now hand the podium off to

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00:04:20.610 --> 00:04:37.350

Douglas Berman: Attorney General Holder and and ask him to share his remarks about kind of what he's seen and what he thinks about the work there that that's been done and that's still to do in in kind of advancing our criminal justice system with a particular focus on drug policy.

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00:04:38.610 --> 00:04:42.780

Eric H. Holder, Jr.: Alright, well thanks for that kind introduction Professor Berman, I'm really excited to be,

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00:04:43.710 --> 00:04:54.570

Eric H. Holder, Jr.: you know, with all of you today to talk about drug sentencing policy specifically and criminal justice, more broadly. I mean, I think this topic is very important.

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00:04:54.960 --> 00:05:04.320

Eric H. Holder, Jr.: And it has informed you know much of my personal, as well as my professional life. I've grappled with drug sentencing policy,

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00:05:04.980 --> 00:05:10.200

Eric H. Holder, Jr.: the criminal justice system and the seemingly you know elusive concept of justice

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00:05:10.920 --> 00:05:25.380

Eric H. Holder, Jr.: throughout my career, both as a line prosecutor and as a judge as the Professor said, as the deputy Attorney General as the Attorney General of the United States. You know, in short, I think that I think that we can be

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00:05:26.400 --> 00:05:36.510

Eric H. Holder, Jr.: cautiously optimistic about where we're going with regard to drug policy but, as you know, with most assertions by any lawyer what I've just said,

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00:05:36.990 --> 00:05:49.080

Eric H. Holder, Jr.: the analysis that you know that I'm sharing, really kind of depends. It depends on the continued engagement of a dedicated citizenry we have seen arise

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00:05:50.340 --> 00:05:57.300

Eric H. Holder, Jr.: and focus on the criminal justice system as a result of what we saw happen in this country back in 2020. How long will that last?

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00:05:57.870 --> 00:06:05.940

Eric H. Holder, Jr.: Do we have a moment in 2020 or do we actually have a movement? It depends on the commitment and dedication, I think of

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00:06:06.660 --> 00:06:17.010

Eric H. Holder, Jr.: young people here and across the country to continue to raise these these these broad questions, and also to demand answers about policies, about laws, about individual cases.

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00:06:17.850 --> 00:06:29.310

Eric H. Holder, Jr.: It depends on our willingness to hold our leaders accountable, it depends on the political and moral courage of those leaders and whether or not they willing to demonstrate

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00:06:30.420 --> 00:06:43.830

Eric H. Holder, Jr.: that political and moral courage and then act upon it. It depends on our willingness to engage in an honest, honest and open dialogue, and it depends on our our steadfast

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00:06:44.670 --> 00:06:51.930

Eric H. Holder, Jr.: commitment to continually striving for, you know for that more perfect Union that our constitution, that our founding documents

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00:06:52.740 --> 00:07:00.030

Eric H. Holder, Jr.: contemplate. You know, despite all of these all of those variables, again I'm cautiously optimistic after witnessing,

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Eric H. Holder, Jr.: really, I think what, the extraordinary amount of activism and engagement of the last couple of years.

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Eric H. Holder, Jr.: And I go back beyond 2020 on a trip to talk about that activism, I think first following the election of President Trump.

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00:07:13.170 --> 00:07:22.860

Eric H. Holder, Jr.: And then you know going through the racial reckoning that we saw in the wake of George Floyd's murder and the other events of 2020. You know, I believe that we are

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00:07:23.580 --> 00:07:34.710

Eric H. Holder, Jr.: as a nation, at least now, I think we're willing to do the work, but we have to stay engaged and we have to stay committed, because there is, there is really significant work still to do.

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00:07:35.130 --> 00:07:45.600

Eric H. Holder, Jr.: And there's not a lot of time in which to do it. I mean history has shown that the attention span of our nation, I think the attention span of any nation, the period within which meaningful

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Eric H. Holder, Jr.: societal change can occur it can be very short. And I can't overemphasize the importance of of young people, young people unburdened by the baggage of prior generations.

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00:07:59.130 --> 00:08:10.560

Eric H. Holder, Jr.: And with consequential memories, I think that they ultimately will drive the change that it is that we need, we saw a disproportionate numbers of young people in the streets in 2020.

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00:08:10.920 --> 00:08:17.730

Eric H. Holder, Jr.: Those I think are going to be the foot soldiers for the kinds of policy changes that that we need. It is um,

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00:08:18.660 --> 00:08:24.210

Eric H. Holder, Jr.: it's to me painfully clear that our criminal justice system is in need of substantial reform.

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00:08:24.720 --> 00:08:38.580

Eric H. Holder, Jr.: Let me just share a little background, maybe kind of, you know, to level set here and a few numbers to kind of orient us. In June of 1971, so you know we're talking about 50 years ago, President Nixon,

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00:08:39.480 --> 00:08:50.700

Eric H. Holder, Jr.: now I think, you know I'd say infamously, declared a war on drugs, a war on drugs. In the decade following that proclamation from about the mid 1970s to mid 1980s

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00:08:51.240 --> 00:09:02.310

Eric H. Holder, Jr.: America's incarceration rate doubled, doubled, from about 150 per 100,000 to about 300 per hundred thousand. So the incarceration rate doubled in about a decade.

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00:09:02.820 --> 00:09:14.130

Eric H. Holder, Jr.: Over the following decade it doubled again, in 2008 our national incarceration rate peaked at 755 per 100,000. Now remember,

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00:09:14.730 --> 00:09:26.970

Eric H. Holder, Jr.: we started out at about 150 per 100,000 before the war on drugs, in 2008 we're up to 755 per hundred thousand and it's, it's steadily declined, you know, since 2008.

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00:09:27.720 --> 00:09:39.540

Eric H. Holder, Jr.: By the end of 2019 the incarceration rate was about 630 per hundred thousand. Now that meteoric rise in our prison population was largely driven by the criminalization of drugs.

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00:09:40.110 --> 00:09:49.170

Eric H. Holder, Jr.: One in five incarcerated people are serving time for a drug offense, 20%. Even considering the steady decline since 2008,

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00:09:49.680 --> 00:09:56.670

Eric H. Holder, Jr.: America imprisons a higher proportion of its population than any other country on the face of this planet.

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00:09:57.390 --> 00:10:06.120

Eric H. Holder, Jr.: And other country, China, Russia, doesn't matter, any other country and by far. I mean incarceration rates in Western Europe are less than a quarter of the US rate.

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00:10:06.750 --> 00:10:16.200

Eric H. Holder, Jr.: In England and Wales there are about 130 inmates per hundred thousand, in France about 90 per 100,000, in Germany about 70 per 100,000. The bottom line,

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00:10:16.830 --> 00:10:26.070

Eric H. Holder, Jr.: which probably comes as a shock to no one in this audience, we have an incarceration problem. Now, we do have a rising crime problem that has to be dealt with,

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00:10:26.490 --> 00:10:32.820

Eric H. Holder, Jr.: but we also have an incarceration problem and that incarceration problem is driven in part by the legacy

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Eric H. Holder, Jr.: of the war on drugs. It's an issue that I witnessed firsthand as a judge on the DC Superior Court in the late 80s and the early 90s.

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Eric H. Holder, Jr.: That was a time in Washington DC when we were considered the murder capital of the country, the city was awash in drugs and drug related violence.

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Eric H. Holder, Jr.: But being a judge on that court and dealing with that issue in the way that I was forced to deal with it,

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00:10:58.860 --> 00:11:08.370

Eric H. Holder, Jr.: that issue drove me from the bench. I decided that I could not continue to be obligated by law to sentence countless numbers of people,

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00:11:08.760 --> 00:11:19.890

Eric H. Holder, Jr.: almost all of them young black men who should have been the future of Washington DC, you know, to prison for extended periods of time over nonviolent drug offenses.

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00:11:20.670 --> 00:11:33.720

Eric H. Holder, Jr.: I decided that I could no longer have my hands tied by what I felt unwise laws and policies. So I wanted to be back in the game of shaping policy and, more importantly, making decisions about how policy is carried out

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Eric H. Holder, Jr.: and affects people's lives. And luckily I was given an opportunity. When,

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Eric H. Holder, Jr.: when we took office in 2009, President Obama and I made it a priority to move the needle on reducing incarceration. And prior to that,

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00:11:48.930 --> 00:11:58.500

Eric H. Holder, Jr.: I had made a determination when I left the bench to become a US Attorney in Washington DC to be in a policy position so that I could make determinations about who got charged,

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00:11:59.040 --> 00:12:09.690

Eric H. Holder, Jr.: for what offenses and what sentences we would be asking for in the US attorney's office appearing before the court where I had been a judge. But in 2009 when President Obama and I

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00:12:10.560 --> 00:12:20.220

Eric H. Holder, Jr.: take office we again make it a priority to try to move that needle on reducing incarceration. I initiated something we call the the smart on crime initiative,

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00:12:20.910 --> 00:12:33.090

Eric H. Holder, Jr.: directing federal prosecutors to charge and to incarcerate fewer low level drug offenders. I said that what we ought to do is focus our limited law enforcement resources on the most serious dangerous criminals

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00:12:33.600 --> 00:12:39.960

Eric H. Holder, Jr.: and to provide support to returning citizens to lower rates of recidivism. I thought that that would

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00:12:40.380 --> 00:12:47.610

Eric H. Holder, Jr.: make us more effective at fighting crime and also reduce the costs that were associated with the criminal justice system.

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00:12:47.940 --> 00:12:56.760

Eric H. Holder, Jr.: We tried to put partisanship aside, we prioritized, prioritized good policy by working with really some unlikely allies during that that time period,

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00:12:57.090 --> 00:13:03.420

Eric H. Holder, Jr.: like Koch Industries, elements of the TEA party to attempt to reform and to humanize our criminal justice system.

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00:13:03.960 --> 00:13:08.850

Eric H. Holder, Jr.: It was a time in our history, it was one of those moments, as I was talking about before,

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00:13:09.420 --> 00:13:15.990



Eric H. Holder, Jr.: where people from the left part of the political spectrum, people from the right side of the political spectrum kind of came together

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00:13:16.350 --> 00:13:25.140

Eric H. Holder, Jr.: and said, you know what, we need to do something about our criminal justice system. People coming at it for different reasons, for people on the right largely saying it was a failed government program, people from the left

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00:13:25.830 --> 00:13:33.780

Eric H. Holder, Jr.: focusing on the societal impacts, the the moral implications of the policies that we had in effect.

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00:13:34.320 --> 00:13:39.390

Eric H. Holder, Jr.: I think those efforts, in fact, I know, statistically, and so, so that the efforts did actually move the needle.

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00:13:39.930 --> 00:13:51.240

Eric H. Holder, Jr.: President Obama was the first president since Jimmy Carter about 36, about 36-40 years before, the first president to leave office with a declining crime rate

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00:13:51.720 --> 00:14:01.920

Eric H. Holder, Jr.: and a smaller federal federal prison population than he inherited. So think about that, reduce the number of people in federal prison and had a declining crime rate at the same time.

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00:14:02.850 --> 00:14:12.990

Eric H. Holder, Jr.: That momentum and that rare bipartisan coalition lead to, lead to some reform but not enough. And you're all familiar with that saying about you know, two steps forward,

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00:14:13.740 --> 00:14:20.880

Eric H. Holder, Jr.: one step back. Well, I think true to that statement, the progress that we made during the Obama administration ran headlong

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00:14:21.360 --> 00:14:30.360

Eric H. Holder, Jr.: into the backwards, and I think discredited policies of President Trump and his Attorney Attorneys General Jeff Sessions and in Bill Barr.

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00:14:30.930 --> 00:14:43.080

Eric H. Holder, Jr.: You know they reversed substantial parts of what it is that we tried to do and reimposed some outdated and I think you'll find it, policies from the past.

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00:14:43.680 --> 00:14:52.800

Eric H. Holder, Jr.: The problem of overincarceration seems easy enough to grasp conceptually but it's complicated by a couple more issues that I think are inextricably

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00:14:53.430 --> 00:15:03.840

Eric H. Holder, Jr.: linked to the issues of federalism and race. Reform efforts cannot only be directed by at the White House, Congress and the Justice Department. There is a limit to what

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00:15:05.100 --> 00:15:09.510

Eric H. Holder, Jr.: a presidential administration or the leadership in the Justice Department can accomplish on its own.

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00:15:10.020 --> 00:15:17.310

Eric H. Holder, Jr.: We have to engage as well our state and local leaders because 90% of Americans prison population is in state and local prisons.

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00:15:17.910 --> 00:15:29.490

Eric H. Holder, Jr.: And second we can't talk about criminal justice, drug sentencing policy or reform as if it exists in a vacuum. We must also contend with the outside role that race race

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00:15:30.030 --> 00:15:39.210

Eric H. Holder, Jr.: race has played and continues to play in criminal justice and in America. You know the nation's made real progress over the years

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00:15:39.720 --> 00:15:47.760

Eric H. Holder, Jr.: with regard to racial matters, but race is still an issue that drives policy and racial insensitivities are found in all facets of American life.

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00:15:48.210 --> 00:15:54.780

Eric H. Holder, Jr.: It should not be a shock that in a nation where we see racial disparities in housing, education,

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00:15:55.290 --> 00:16:04.230

Eric H. Holder, Jr.: healthcare, the electoral process, we also find racial disparities in the criminal justice system. Of course we're going to find them there, that's part of the problem

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00:16:04.620 --> 00:16:14.880

Eric H. Holder, Jr.: of the American nation. We have racial disparities, that system does not, the criminal justice system does not and has never existed outside of the society of which it is a part.

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00:16:15.480 --> 00:16:20.280

Eric H. Holder, Jr.: People of color are over represented in prison. In 2018

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00:16:20.610 --> 00:16:32.700

Eric H. Holder, Jr.: blacks were 33% of the sentenced to prison population, despite making up only about 12% of the US adult population. Hispanics account for about 23% of inmates, make up about 16% of the adult population,

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00:16:33.090 --> 00:16:39.060

Eric H. Holder, Jr.: whites accounted for only 30% of prisoners, despite making up 63% of the adult population.

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00:16:39.420 --> 00:16:48.630

Eric H. Holder, Jr.: I don't share those statistics with you to suggest that we need to lock up more white people. That's not what I'm saying. Every person in prison is an absent member of a community that needs them.

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00:16:49.080 --> 00:16:55.320

Eric H. Holder, Jr.: An absent father, daughter, uncle partner. I share those statistics, because it reveals that we have a problem with,

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00:16:55.800 --> 00:17:03.480

Eric H. Holder, Jr.: with different communities being policed and criminalized at disproportionate rates. Everyone in this room, probably understands that despite

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00:17:03.990 --> 00:17:12.360

Eric H. Holder, Jr.: similar rates of drug involvement in drug use the criminal justice system disproportionately incarcerate incarcerates people of color by staggering margins.

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00:17:12.720 --> 00:17:24.840

Eric H. Holder, Jr.: Between 1983 and 1997 the number of African Americans sent to prison for doing drugs, for, for drug offenses increased more than 26 fold relative to a sevenfold increase for whites.

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00:17:25.440 --> 00:17:32.430

Eric H. Holder, Jr.: Thoughtful scholars, like Michelle Alexander, here at Ohio State have highlighted the role that race plays in criminal justice system and hopefully brought

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00:17:33.210 --> 00:17:44.100

Eric H. Holder, Jr.: that conversation, I think, to the mainstream. But simply put, we can't come to ground on a solution on criminal justice or drug sentencing without having a real sober conversation

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00:17:44.490 --> 00:17:54.540

Eric H. Holder, Jr.: about this nation's racial history, racial present and racial future. So it's a conversations I think we're beginning to have, but we must be dogged and we have to continue to push through

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00:17:55.140 --> 00:18:10.500

Eric H. Holder, Jr.: what is, you know discomfort, an understandable understandable emotion that the topic of race elicits so that we can improve together. That conversation is going to force us to ask really hard questions and to confront some difficult truths. We must never forget that, in the search for

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00:18:11.760 --> 00:18:16.890

Eric H. Holder, Jr.: criminal Justice that, as the majority of our people, in our most distressed communities,

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00:18:17.160 --> 00:18:25.710

Eric H. Holder, Jr.: and remember that the majority of people in our most distressed communities do not engage in criminal activities and they are disproportionately the victims of crime. Individual responsibility

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00:18:26.100 --> 00:18:32.700

Eric H. Holder, Jr.: and penal accountability at it, you know at what level, it should be set, must also be a part of this conversation.

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00:18:33.360 --> 00:18:41.640

Eric H. Holder, Jr.: I'll end here, you know, Phil Jackson became head coach of the Lakers in 1999 for all you basketball fans, he brought with him a legendary assistant coach, guy named Tex Winter.

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00:18:42.660 --> 00:18:50.070

Eric H. Holder, Jr.: From the start of the NBA preseason till the end of the playoff that season 1999, Winter insisted on watching every play of every game

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00:18:50.430 --> 00:18:55.380

Eric H. Holder, Jr.: with the then 21 year old Kobe Bryant. Each session took four hours, four hours, and they

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00:18:55.890 --> 00:19:05.040

Eric H. Holder, Jr.: reviewed every move in painstaking detail. And that year the Lakers went on to win the NBA championship and Kobe credited those sessions with making him a better basketball player.

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00:19:05.730 --> 00:19:11.400

Eric H. Holder, Jr.: Well, maybe that's not a great analogy, but I think we got to review in really painstaking detail how we, as a nation have arrived

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00:19:11.820 --> 00:19:19.530

Eric H. Holder, Jr.: at the place that we are. Film doesn't lie, history doesn't lie, and we have to be honest in our assessment of ourselves. Conversations, like this one

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00:19:19.860 --> 00:19:28.410

Eric H. Holder, Jr.: that we're having today are vital, but we've got to move from conversations to action. And I believe that we have to be honest, clear eyed,

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00:19:28.980 --> 00:19:34.080

Eric H. Holder, Jr.: we have to have a true assessment of our nation's criminal justice system if we're going to try to make it better, more just

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00:19:34.500 --> 00:19:42.480

Eric H. Holder, Jr.: and have a better nation. You know we fight over terms for political reasons, you know now we're talking about, fighting about critical race theory.

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00:19:42.930 --> 00:19:48.030

Eric H. Holder, Jr.: But look, we got to face the truth that unless we have a complete and accurate understanding of our history

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00:19:48.660 --> 00:19:56.970

Eric H. Holder, Jr.: we can never have the future that we all deserve. So look, I'm under no illusions that the work, you know, can be done quickly, change doesn't happen

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00:19:57.570 --> 00:20:09.720

Eric H. Holder, Jr.: overnight. But my optimism again lies in young people who're going to continue to inspire activism and drive change. So I'm hopeful that we will continue to progress. The road to justice at times

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00:20:10.170 --> 00:20:15.570

Eric H. Holder, Jr.: will seem steep but we've got to remain tenacious, we got to have the conversations that we're having here today.

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00:20:16.320 --> 00:20:19.890

Eric H. Holder, Jr.: This is the work I think that can be done, this is the work that must be done.

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00:20:20.400 --> 00:20:32.640

Eric H. Holder, Jr.: We'll all going to have a role in crafting you know, the better criminal justice system and in doing so we will create you know, a better America. So I'm looking forward to our conversation and the

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00:20:33.450 --> 00:20:37.650

Eric H. Holder, Jr.: question and answer period that will have, so I will turn it back to you, Professor Berman, thank you.

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00:20:38.820 --> 00:20:44.220

Douglas Berman: Thank you so much Attorney General Holder, sports metaphors always make my heart sing and

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00:20:44.850 --> 00:20:51.150

Douglas Berman: my students as well. I appreciate, especially the the the turn towards younger generations that don't always know,

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00:20:51.390 --> 00:20:56.040

Douglas Berman: they haven't seen all the highlights, and so, when we try to present the history in class and we explain why,

137

00:20:56.280 --> 00:21:02.100

Douglas Berman: I'll continue to highlight well the Attorney General says we got to look over the film and meticulous detail to understand

138

00:21:02.400 --> 00:21:07.470

Douglas Berman: how to get where we're going to. And so, so those remarks were really wonderful and thank you so much for sharing them with us and

139

00:21:07.950 --> 00:21:12.090

Douglas Berman: we'll get to Q and A after we hear from our other speakers. Now turning to Piper Kerman,

140

00:21:12.540 --> 00:21:20.370

Douglas Berman: whose name should be familiar to many. She, of course, is the author of the best selling memoir Orange is the New Black: My year in a women's prison.

141

00:21:20.940 --> 00:21:26.610

Douglas Berman: That experience and and the Netflix show that was made on the basis of it,

142

00:21:27.030 --> 00:21:36.720

Douglas Berman: maybe I'm going too far to say that Piper invented Netflix, but she certainly played an incredible role through her memoir and her continuing work. And now of course she's

143

00:21:37.020 --> 00:21:43.230

Douglas Berman: an advocate who's done just an incredible amount of work to be invested in criminal justice reform and

144

00:21:43.710 --> 00:21:54.540

Douglas Berman: working with folks who are justice-involved. And so without further ado, the floor is yours Piper and I think you have some slides that we have set up so we'll make sure we get to that when you'd like us to.

145

00:21:55.380 --> 00:22:12.960

Piper Kerman: OK, thank you Doug, I appreciate it. Hello, all my Ohio folks I'm very sad that I can't be with you as a former resident of Columbus. I lived in Ohio and taught in two of the state prisons for more than four years and I miss y'all.

146

00:22:14.640 --> 00:22:21.540

Piper Kerman: I believe I'm here to provide the chickens-eye-view on some of the points that Attorney General Holder just made.

147

00:22:22.530 --> 00:22:35.010

Piper Kerman: My own education in US drug sentencing policy and schemes began in 1998 when two federal agents knocked on my door or rang my doorbell in New York City

148

00:22:35.880 --> 00:22:47.280

Piper Kerman: and let me know that I had been indicted in federal court in Chicago. And I was indicted, I, five years prior I had been in a relationship with someone who was involved with narcotics.

149

00:22:47.910 --> 00:22:56.100

Piper Kerman: And now I had been indicted under conspiracy law, under drug conspiracy law, so familiar to everyone who's familiar with

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00:22:56.610 --> 00:23:07.170

Piper Kerman: the 50 year set of policies, known as the war on drugs. I am sort of pressed to say focused on sentencing, as opposed to all of the impacts of drug policy

151

00:23:07.680 --> 00:23:22.140

Piper Kerman: in this country but uh, but we can at least take sentencing as a starting off point. It was a really steep painful learning curve for me to learn about mandatory minimum sentencing guidelines and the fact that

152

00:23:23.340 --> 00:23:32.430

Piper Kerman: my own punitive punishment and accountability would be tethered into drug weight rather than my own actions.

153

00:23:33.870 --> 00:23:46.680

Piper Kerman: I was very fortunate, I was fortunate, because I was able to pick up the phone and call a friend of mine who was clerking for Judge Constance Baker Motley and say I am in real trouble.

154

00:23:47.280 --> 00:24:06.270

Piper Kerman: And to get help finding an attorney. I was able to hire an attorney to represent me and that attorney was a former US Attorney themselves. And and I had heard had a good working relationship with you the US A who was handling my case.

155

00:24:08.130 --> 00:24:23.430

Piper Kerman: All of those things were a reflection of my socio economic status, my ability to pull down on those connections and that kind of information in a very difficult moment for me as a criminal defendant in the federal system.

156

00:24:24.330 --> 00:24:31.110

Piper Kerman: And I ended up walking into prison to serve a mercifully short 15 month sentence

157

00:24:32.490 --> 00:24:49.560

Piper Kerman: more than a decade after I committed a crime. Right, the crime of carrying a bag of money from Chicago to Brussels, I ultimately pled guilty, not to conspiracy, but to money laundering and you know, access to counsel helped me mitigate the penalties that I would face.

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00:24:50.640 --> 00:24:59.010

Piper Kerman: That said, you know going to prison is a terrible experience as many of you who are listening or watching me know.

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00:25:00.480 --> 00:25:12.090

Piper Kerman: But what I found very rapidly is that I was in a cohort of women behind bars who were overwhelmingly serving time due to drug offenses or drug related offenses.

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00:25:12.690 --> 00:25:22.560

Piper Kerman: And that many of the women who I was doing time with had remarkably similar stories to mine. You know brief contact with,

161

00:25:23.430 --> 00:25:37.440

Piper Kerman: you know, the underground economy of narcotics, things like wire charges for passing along a message to a spouse or a grandson. I vividly remember

162

00:25:37.740 --> 00:25:50.460

Piper Kerman: a tiny Latinex woman who came in at about the same time that I did who was very frightened who had received a four year sentence for a drug related wire charge for giving a nephew a message,

163

00:25:51.090 --> 00:26:02.070

Piper Kerman: a telephone message. So I walked out of prison with a clear sense that what I had witnessed, even more so than what I had experienced personally,

164

00:26:02.580 --> 00:26:14.580

Piper Kerman: was a grave injustice. And I really reflected on the difference in terms of access to counsel and the different results in my sentencing in comparison with many of the other women's sentencing.

165

00:26:15.000 --> 00:26:25.320

Piper Kerman: The vast majority of those women who had faced much harsher penalties than my own short sentence were black, brown or poor, and/or poor.

166

00:26:26.400 --> 00:26:38.580

Piper Kerman: So those things were all true so I'm going to pop up a few other talking points so that you can wrap your heads around this a little bit better.

167

00:26:40.500 --> 00:26:41.370

Piper Kerman: One second.

168

00:26:50.880 --> 00:26:52.980

Piper Kerman: I want you to meet Ramona Brandt.

169

00:26:54.090 --> 00:27:06.630

Piper Kerman: Ramona Brandt served time in the same prison that I was incarcerated in in Danbury Connecticut. And her case was prosecuted in the 1990s, about the same time that my case began.

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00:27:07.350 --> 00:27:19.500

Piper Kerman: I never met Ramona while we were both incarcerated in the same prison though, because Ramona received a life sentence for a crime remarkably similar to mine.



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00:27:20.280 --> 00:27:32.700

Piper Kerman: I instead met Ramona at the White House, when President Obama commuted her sentence and several other people who were serving harsh drug sentences in 2015.

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00:27:34.770 --> 00:27:46.500

Piper Kerman: He commuted Ramona's sentence and she was freed after serving 21 years of that life sentence for a first time non-violent drug offense.

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00:27:47.670 --> 00:28:01.320

Piper Kerman: Ramona's two children were three and four, when she was sent away to prison, she was released in 2015 and she got two years of freedom with her family before she passed away

174

00:28:02.370 --> 00:28:08.910

Piper Kerman: in sleep one night, she she was gone too soon. And I am

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00:28:09.690 --> 00:28:19.980

Piper Kerman: very, very grateful that President Obama chose to commute her sentence and to use his clemency power, not only in Ramona's case, but in the case of many other

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00:28:20.610 --> 00:28:27.720

Piper Kerman: federal prisoners. However it's hard for me to tell this story without feeling very, very angry.

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00:28:28.410 --> 00:28:36.270

Piper Kerman: It's important for everyone who's listening, it's important for all law students and practitioners to

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00:28:36.810 --> 00:28:47.700

Piper Kerman: really grapple with the fact that these stark racial disparities that we see in the criminal legal system, and specifically around drug offenses but also in other cases,

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00:28:48.360 --> 00:28:54.090

Piper Kerman: are not a bug. These are not a bug in the system, this is a feature of the system.

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00:28:54.900 --> 00:29:07.080

Piper Kerman: And criminal legal policy around drugs, not only in the 50 year term of the quote unquote war on drugs but stretching back further, has always been grounded in racial control.

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00:29:07.560 --> 00:29:17.820

Piper Kerman: Racial control of black people first and foremost, but also in racialized control related to sometimes foreign policy with China or with Mexico.

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00:29:19.290 --> 00:29:29.970

Piper Kerman: These are not, these are not errors in the system, these are fundamental parts of the system as it was designed and as drug sentencing has always functioned in this country.

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00:29:31.320 --> 00:29:47.400

Piper Kerman: I hope that Ramona's face stays with you and that her story stays with you, because these are life and death consequences in most literal terms. I turn for a moment, as we think about drug sentencing to,

184

00:29:48.810 --> 00:29:54.600

Piper Kerman: to the opioid crisis and the overdose crisis which all Ohioans should be well aware of.

185

00:29:56.460 --> 00:30:10.410

Piper Kerman: You know Ohio has had one of the most significant overdose crisis's for years. I believe in 2020 it had the fourth largest of all states ahead, it was number four in terms of overdose deaths,

186

00:30:11.310 --> 00:30:21.060

Piper Kerman: which is tragic. So for those of you who have been following the saga of the Purdue Pharma and the Sackler family, you may know that

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00:30:21.450 --> 00:30:42.090

Piper Kerman: just last month in September, in bankruptcy court, in the federal bankruptcy court, this long standing press to hold accountable the manufacturers and the people who profited from Oxycontin and its aggressive marketing and aggressive distribution throughout this country

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00:30:43.380 --> 00:31:02.970

Piper Kerman: that there was a settlement agreed to. That's a settlement in which the Sackler family who owned Purdue Pharma, now in bankruptcy, will pay \$4.5 billion. The Sackler family took in excess of \$10 billion in profit out of Purdue Pharma.

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00:31:04.860 --> 00:31:11.280

Piper Kerman: I know that the DOJ is objecting to the settlement, I don't know what ultimately will result in

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00:31:12.390 --> 00:31:18.450

Piper Kerman: in in how this case is disposed of, but I just want to point out very firmly

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00:31:18.870 --> 00:31:31.020

Piper Kerman: that it is exceptionally unlikely that anyone in the Sackler family, or anyone else at Purdue Pharma will ever be held accountable in the way that Ramona Brandt was or even in the way that I was

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00:31:31.350 --> 00:31:38.190

Piper Kerman: for my past actions that contributed to other people's substance use disorder and addiction.

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00:31:39.000 --> 00:31:59.190

Piper Kerman: I want to drive this home because I think we need to be honest, we need to disabuse ourselves of the notion that our current drug sentencing policies are intended in any way to ameliorate drug addiction and substance use disorder. That's not what they do.

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00:32:02.040 --> 00:32:21.750

Piper Kerman: And to to to bring that home really clearly, we are 50 years in on the policies of the quote unquote war on drugs, which has always been a war on people, our own people, it has always been a war focused on communities of color and most especially on black people.

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00:32:22.830 --> 00:32:29.610

Piper Kerman: We know that 50 years in billions and billions of public dollars spent

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00:32:30.780 --> 00:32:41.850

Piper Kerman: this past year, we had the highest overdose rates in in the time that we've been measuring this. These policies simply do not work in terms of

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00:32:42.510 --> 00:32:58.920

Piper Kerman: public Health, they do not work in terms of public safety either. That's often the claim, is that, you know, our drug policies, you know contribute in some way to public safety, but I think we really need to disabuse ourselves of that notion.

198

00:33:00.180 --> 00:33:18.030

Piper Kerman: The medical community clamors for different approaches. The medical community clamors for us to spend our very precious public dollars on a whole host of interventions which do not involve the criminal legal system.

199

00:33:19.260 --> 00:33:32.070

Piper Kerman: And I would say that decriminalization is really the only logical approach and the only moral approach to where we currently find ourselves as a nation.

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00:33:33.060 --> 00:33:51.390

Piper Kerman: Decriminalization of drugs, which is happening, is happening in Portugal, the first state in the country Oregon by ballot measure passed decriminalization of possession of drugs, and that is exciting.

201

00:33:52.410 --> 00:34:04.680

Piper Kerman: But decriminalization is really the floor, in my opinion, in terms of changing the way that we deal with drug policy in this country. I want to just leave you with

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00:34:05.550 --> 00:34:21.300

Piper Kerman: a point about decriminalization before I turn the floor back, and this is from scholar Ruth Wilson Fillmore who may be familiar with some of you an amazing scholar publisher of the Golden Gulag and many other

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00:34:22.560 --> 00:34:29.460

Piper Kerman: fine works on the criminal legal system and the possibilities of abolition. And Ruth Wilson Gilmore points out:

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00:34:29.880 --> 00:34:43.470

Piper Kerman: "The way the system works is to move the line of what counts as criminal to encompass and engulf more and more people into the territory of prison eligibility, if you will.

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00:34:43.920 --> 00:34:55.470

Piper Kerman: So the problem, then, is not to figure out how to determine or prove the innocence or worthiness of certain individuals or certain classes of people,

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00:34:55.890 --> 00:35:16.530

Piper Kerman: but to attack the general system through which criminalisation proceeds." The issue is let's get everybody who's been criminalized together and figure out how we can undo this state of affairs. I really appreciate being invited today and I miss

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00:35:16.710 --> 00:35:19.500

Piper Kerman: desperately all my Ohio folks. So

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00:35:19.980 --> 00:35:25.830

Piper Kerman: I hope to be terrestrial with you all soon and I'd love to hear from the other panelists.

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00:35:26.610 --> 00:35:33.150

Douglas Berman: Thank you, thank you so much Piper and terrestrial is a great term for us in this context, and we miss you in Ohio as well and

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00:35:33.420 --> 00:35:40.200

Douglas Berman: you have an open invitation, under any circumstances to come on back and we'll we'll happily host you again and those remarks were were very meaningful. And I'm,

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00:35:40.530 --> 00:35:49.980

Douglas Berman: I'm giving a forewarning to Attorney General Holder, because the decriminalization as a floor theme is what I'm going to want to return to when we get to the the Q and A section. But first we have

212

00:35:50.610 --> 00:36:02.790

Douglas Berman: two chiefs to hear from and I'm incredibly excited and incredibly grateful, in fact, I very much like that Attorney General Holder mentioned federalism, so I feel you know, particularly astute to have

213

00:36:03.570 --> 00:36:13.710

Douglas Berman: the Honorable Maureen O'Connor, the Chief Justice of the Ohio Supreme Court to introduce now. She's the first woman to lead the Ohio judicial branch, she's made all sorts of

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00:36:14.100 --> 00:36:21.150

Douglas Berman: justice system reforms the centerpiece of her nearly decade in the role of Chief Justice and I know has been

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00:36:21.660 --> 00:36:37.530

Douglas Berman: really pioneering critical sentencing work among others here in Ohio in recent years. And so I'm extraordinarily grateful that she's able to join us and now it's her turn to kind of speak to the work that she's been doing and her perspective on these challenging and important issues.

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00:36:45.810 --> 00:36:53.100

Maureen O'Connor: Thank you, thank you, Professor Berman, thank you for the invitation. I'm honored to be on this panel with such distinguished members.

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00:36:54.060 --> 00:37:14.100

Maureen O'Connor: And I'm honored at the hundred and 79 people as I looked down on my screen that have signed on to listen to what is being said, which means you're interested in the topic. As a justice, you know as a member of the State court,

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00:37:15.390 --> 00:37:25.380

Maureen O'Connor: invariably cases will come before me and they will be challenging the sentencing, both for drugs and for other, our sentencing scheme here in Ohio,

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00:37:25.860 --> 00:37:40.740

Maureen O'Connor: our statutes, both for drug convictions, as well as other convictions. So I am not going to address the sentences, sentencing statutes and you know, to speak on whether or not they're fair, whether or not...

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00:37:43.230 --> 00:37:53.310

Maureen O'Connor: Because I have to deal with their application and I have to deal with how they were applied below. So what I can say is any solution

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00:37:54.150 --> 00:38:03.450

Maureen O'Connor: to this problem that persist with sentencing in our state and across this country has to be a collaborative solution.

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00:38:04.230 --> 00:38:16.230

Maureen O'Connor: We know, of course, constitutionally both the US Constitution and the constitution here in Ohio the legislature creates statutes and the executive branch, obviously,

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00:38:17.070 --> 00:38:36.840

Maureen O'Connor: signs those statutes into law and then they become effective. And those are what governs what I do for a living as a member of the judiciary and the 722 other judges in the State of Ohio. Interestingly, when we look at statistics about the case loads and we look at

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00:38:39.450 --> 00:38:43.680

Maureen O'Connor: those statistics for the federal court versus the state courts,

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00:38:45.330 --> 00:38:58.860

Maureen O'Connor: what is being said and what is being demonstrated, is that the State courts now hear about 96% of the cases that are filed in this country.

226

00:38:59.280 --> 00:39:12.210

Maureen O'Connor: And those are across the board, civil cases and criminal cases alike, and so I point that out, and not to say geez are we overworked because that's not the case at all.

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00:39:15.510 --> 00:39:26.670

Maureen O'Connor: What I say is that the vast majority 96% of the cases or so are dealt with in the State courts, that is why, if there is a reform

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00:39:27.030 --> 00:39:39.270

Maureen O'Connor: of sentencing laws, it's not just something that has to happen on the federal level, which is so often the focus and the consideration. It's important there too, don't get me wrong but state court

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00:39:39.810 --> 00:39:59.970

Maureen O'Connor: leaders and our legislators and executive branch have to all be involved with this, not only in Ohio but across you know across this country. What I can say is that you know we often have cases that challenge the law, that challenge the application and

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00:40:01.680 --> 00:40:17.610

Maureen O'Connor: the outcomes. And is there a problem, yes, we do see a problem. Is it a problem along racial lines? That seems to be what we are seeing and some of the evidence, the statistics out there would

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00:40:18.870 --> 00:40:24.420

Maureen O'Connor: suggest that in Ohio and across across this country.

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00:40:26.040 --> 00:40:31.320

Maureen O'Connor: It's not unique to drug sentences and that's an important feature to remember here.

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00:40:32.760 --> 00:40:53.670

Maureen O'Connor: You know, to quote the Ohio Sentencing Commission and I'm just going to give you by way of background that the Ohio Sentencing Commission is a statutorily created Commission whose purpose is to examine issues related to the criminal justice system, and in particular the sentencing commission,

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00:40:55.200 --> 00:41:06.840

Maureen O'Connor: sentencing issues. Right now there's a movement afoot, and I think it's well placed that this this or this commission be renamed to be the Ohio Criminal Justice

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00:41:07.590 --> 00:41:24.480

Maureen O'Connor: Commission because its its scope should be much broader than just dealing with sentencing issues, but for the time being we're dealing with sentencing issues and we're dealing with sentencing issues in a very unique way, but before I get to that I want to quote us something from

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00:41:25.800 --> 00:41:30.180

Maureen O'Connor: the Ohio Sentencing Commission. You know, recognizing that

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00:41:31.230 --> 00:41:46.980

Maureen O'Connor: our sentencing laws have become so complex in recent history since the mid 90s here in Ohio. You know 25 years ago, in 1996, we had what was called Sentence Bill Two.

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00:41:47.640 --> 00:41:51.870

Maureen O'Connor: Legislature enacted this type of

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00:41:52.560 --> 00:42:02.520

Maureen O'Connor: determinant sentencing structure called a presumptive system requiring minimum sentences with judicial discretion from a range of possible possible punishments.

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00:42:02.820 --> 00:42:07.200

Maureen O'Connor: Today, the reality is that we're suffering from suffering from the cumulative effect

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00:42:07.680 --> 00:42:23.490

Maureen O'Connor: of tinkering with sentencing structures on limited data sources and on a crime by crime basis. It is time to acknowledge the need for a realistic, dedicated, and long range evaluation of criminal sentencing.

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00:42:24.000 --> 00:42:30.210

Maureen O'Connor: The commission has developed, and I'm going to go on to talk about, what in Ohio we have been doing

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00:42:31.800 --> 00:42:37.710

Maureen O'Connor: over the past year, I would say in conjunction when I say we,

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00:42:39.150 --> 00:42:47.640

Maureen O'Connor: my using the power of my position is Chief Justice partnering with the Sentencing Commission and

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00:42:49.140 --> 00:42:57.390

Maureen O'Connor: partnering then with with other organizations, most importantly, the University of Cincinnati. Putting together

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00:42:58.350 --> 00:43:12.000

Maureen O'Connor: the initial stages of a right now is a sentencing data platform where we will collect in Ohio the information about every sentence that is handed down

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00:43:12.660 --> 00:43:22.410

Maureen O'Connor: for a felony in the State of Ohio. That is something unique, something that's never been done before. I don't think it's been done in any state

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00:43:22.800 --> 00:43:47.190

Maureen O'Connor: in this country. But it's an initiative that we have begun, it is a collaborative effort and in order to have this sentencing data platform, we have to have the cooperation of all of the 300 and some felony sentencing judges in the State of Ohio. Right now, I think we have

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00:43:48.210 --> 00:44:11.550

Maureen O'Connor: 30 some judges that are willing to pilot this program and pilot it with success. So we're very optimistic that this sentencing data platform will become a reality, and when I say a reality, it will have enough support that the Supreme Court will mandate the use of the

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00:44:13.050 --> 00:44:14.610

Maureen O'Connor: the sentencing data

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00:44:17.250 --> 00:44:32.310

Maureen O'Connor: forms, so that the data that I spoke to you about can be collected. Now what's the, what's the point of collecting all this data, you know, I have a document before me the Ohio sentencing data platform data elements, and these are the elements that would be

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00:44:32.940 --> 00:44:43.260

Maureen O'Connor: collected from a document generated by the sentencing judge. And it runs four pages, four pages of

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00:44:44.280 --> 00:44:47.340

Maureen O'Connor: data points that would be collected to what end -

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00:44:48.510 --> 00:45:12.150

Maureen O'Connor: to the, to the end of research. To be able to take a look at the sentencing data, take a look at the method of conviction documents and then have those documents be searchable so that academicians, you know, the legal community, whomever would be interested in our sentencing

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00:45:13.350 --> 00:45:35.550

Maureen O'Connor: in the State of Ohio would be able to come up with actual data to show, you know, one item another item, whatever. I think too often what we have in the criminal justice system is anecdotal information, and that makes for great newspaper articles and,

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00:45:37.140 --> 00:45:38.190

Maureen O'Connor: you know, news

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00:45:39.420 --> 00:45:51.930

Maureen O'Connor: news items, etc, but we can't operate an entire criminal justice system based on anecdotal information or the unfairness to one individual



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00:45:52.620 --> 00:46:03.210

Maureen O'Connor: over you know, that is lucky enough are fortunate enough to received some publicity about their sentence whether it's a sentence that occurred

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00:46:03.960 --> 00:46:15.420

Maureen O'Connor: or whether it's years down the road and they're languishing in prison and what's to be done about that. That's, that's not what what is going to move the needle here in Ohio.

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00:46:17.520 --> 00:46:30.390

Maureen O'Connor: What's important is that, again we have solid irrefutable data that comes from the Court itself in order to demonstrate what the patterns of sentencing

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00:46:31.710 --> 00:46:45.720

Maureen O'Connor: are in Ohio and what are the underpinnings of the data. And when I say that this data collection, will take into consideration things like name, date of birth, gender, ethnicity, race, the current zip code.

262

00:46:46.650 --> 00:46:53.730

Maureen O'Connor: You know, case information, all about everything there is about the case, including the prosecutors name,

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00:46:55.440 --> 00:47:04.500

Maureen O'Connor: the Defense attorneys name, you know the type of Defense representation, you name it. Anything that happens in the courtroom is going to be taken down,

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00:47:05.040 --> 00:47:18.660

Maureen O'Connor: the method of conviction, everything about the offense and then here's the important thing that I think that is often missing from a discussion on inequities of our criminal justice system and that's the.

265

00:47:19.110 --> 00:47:36.210

Maureen O'Connor: the background. The history of the defendant and when that information is collected as well there'll be a complete picture and we will be comparing apples to apples and oranges to oranges. And the data data

266

00:47:38.220 --> 00:48:01.380

Maureen O'Connor: are meaningful and they can be relied upon by the research community in order to answer whatever question the research community community decides, they want to know about the criminal justice system and sentencing in the State of Ohio. This is something that I have supported,

267

00:48:03.240 --> 00:48:22.860

Maureen O'Connor: you know, for a long time for for a very long time. But it's not just limited to collecting data on how our judges sentence felons in the State of Ohio and when I say sentences as you know mentioned it's all sentencing for all felonies not just drug related.

268

00:48:24.600 --> 00:48:28.830

Maureen O'Connor: But my vision doesn't stop there, I have a vision that

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00:48:29.940 --> 00:48:42.060

Maureen O'Connor: we will collect data, this detailed type of data, that will span the entire encounter with a criminal justice system that will begin with the arrest of the

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00:48:43.080 --> 00:48:53.310

Maureen O'Connor: the offender, the defendant, the individual, the decision by the police officer and go on to what happens post arrest. Look at

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00:48:53.940 --> 00:49:06.270

Maureen O'Connor: the actions of the prosecutor's office, how they charge the crime and all of the nuances around that to then what happens to that individual pre trial,

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00:49:07.260 --> 00:49:20.130

Maureen O'Connor: are they released what, if so, what are the conditions of release of pre trial or are they detained, if so, what what's the reason for the detention. As we all know, bail,

273

00:49:20.730 --> 00:49:34.500

Maureen O'Connor: the intent of bail is to release people from detention not keep them in. I think we've kind of skewed that in this country and bail has been considered and recognized as a method to keep people behind bars

274

00:49:35.250 --> 00:49:48.090

Maureen O'Connor: pending the outcome of their case. In my view and and certainly this is the correct view, I think, according to the case law and interpretation, is the bail, the the

275

00:49:49.050 --> 00:50:11.190

Maureen O'Connor: the imposition of bail is to protect the community, and if there is a defendant, who is a flight danger to keep that person confined until the disposition of the case. So if the person is a danger to the community, danger to the witnesses, danger to the victims, etc.

276

00:50:12.660 --> 00:50:26.070

Maureen O'Connor: or there's a flight risk, you know, of course, bail is is appropriate. But beyond that there's there's a lot of other alternatives to bail, and we need to, of course, identify

277

00:50:26.760 --> 00:50:37.080

Maureen O'Connor: and use those in our court system. So we would look at that we would look at the you know all the data points for that, then what happens during the how the cases disposed of

278

00:50:39.030 --> 00:50:54.210

Maureen O'Connor: by the judiciary, you know, the role of the prosecutor, the role of Defense attorney what happens at trial, what happens, maybe in a plea. However, it is you know if it's gone before the grand jury and there is a Nobel, in other words, there is no

279

00:50:57.030 --> 00:51:11.850

Maureen O'Connor: indictment and the case is dismissed, you know what happens under those circumstances. And then we get into the sentencing, but then we also have to take a look at what happens post sentence, those that are on Community control those who are

280

00:51:13.260 --> 00:51:29.310

Maureen O'Connor: sentenced to prison, then we look at recidivism rates, so this is a big picture of data collection, that I envision being done here in the State of Ohio. It will take time we're doing it incrementally, the sentencing

281

00:51:30.030 --> 00:51:49.290

Maureen O'Connor: portion is being done now, because that's an extremely significant part that will answer a lot of questions about the fairness of our system here in the State of Ohio and how is the the system affects again people across the entire state.

282

00:51:50.820 --> 00:52:01.830

Maureen O'Connor: I want to you know talk about one thing that that has been mentioned in the two previous you know presentations, which by the way, I found very interesting and excellent.

283

00:52:04.440 --> 00:52:12.990

Maureen O'Connor: General Holder mentioned that the people you know that we saw that that were protesting this past summer

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00:52:14.700 --> 00:52:26.160

Maureen O'Connor: about the, George Floyd but also there's so many other so many other reasons for protest, he called them foot soldiers and how they have to be active and I couldn't agree more.

285

00:52:26.910 --> 00:52:37.920

Maureen O'Connor: And then, Ms. Kerman mentioned people who are affected by the criminal justice system, not just you know people who have been incarcerated, people who been charged, but people who are affected. And you know

286

00:52:38.400 --> 00:52:52.140

Maureen O'Connor: that goes well beyond folks who are you know actually charged with offenses getting active and what can they do. My suggestion, my plea is that they register and they vote.

287

00:52:53.370 --> 00:53:19.260

Maureen O'Connor: Because this is a population that doesn't necessarily have the economic sway that other segments of our population has, although, taken together, if it was organized certainly would. But the political power, and when I say political power can only be demonstrated at the polls and

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00:53:20.520 --> 00:53:28.620

Maureen O'Connor: that's right the foot soldiers, the people are affected the disenfranchised now need to register to vote.

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00:53:29.520 --> 00:53:43.680

Maureen O'Connor: No matter what your age, but particularly of those 18 to 30 who have such a low percentage of participation in our voting system. In Ohio we vote for our judges.

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00:53:44.280 --> 00:54:01.860

Maureen O'Connor: And that's not the case in all States but, for the most part, I think, in about 38 of our States there's some sort of public input about either a retention of a member of the judiciary, or, as we have an Ohio a head to head election.

291

00:54:03.780 --> 00:54:10.410

Douglas Berman: I do want to make sure we have time for for all other folks Chief Justice but you're of course million percent right not surprising that

292

00:54:10.830 --> 00:54:15.150

Douglas Berman: the head of our elected judiciary is encouraging folks to have their political voice heard,

293

00:54:16.020 --> 00:54:25.770

Douglas Berman: you know, through through the ballot box. And I also wanted to say and that's why I wanted to jump in to your points about the importance of data. We've seen this at the federal level that we we ultimately got

294

00:54:26.160 --> 00:54:37.170

Douglas Berman: the first stage, you know at the time that Attorney General Holder was was Attorney General. In 2010, we got the change in the crack powder disparity largely driven by

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00:54:37.680 --> 00:54:44.790

Douglas Berman: the data that the US sentencing Commission collected and highlighted the racial disparities and the skew that that hundred to one disparity had created.

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00:54:45.060 --> 00:54:52.650

Douglas Berman: That's been changed the 18 to one. Data again is driving the conversation trying to move Congress to equalize crack and powder sentencing and

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00:54:53.250 --> 00:54:59.250

Douglas Berman: you know that, the the work that you're doing to try to ensure that Ohio has the data it needs to have thoughtful

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00:54:59.820 --> 00:55:07.170

Douglas Berman: informed reform efforts is is so greatly appreciated and as are your your broader comments as well. I want to make sure we have a chance

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00:55:07.710 --> 00:55:20.130

Douglas Berman: for our unelected judiciary to to chime in. Chief Judge Algenon Marbley who's been a federal judge here in the southern district of Ohio for almost 25 years since 1997. He's been

300

00:55:20.580 --> 00:55:24.000

Douglas Berman: the chief district judge for more than two years now and

301

00:55:24.390 --> 00:55:34.950

Douglas Berman: grateful that he can also join us share his remarks on these topics. Also, again apologies Chief Justice to jump in, I want to make sure we have time for a little Q and A at the end, too, and there's so much to talk about and

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00:55:35.250 --> 00:55:39.300

Douglas Berman: grateful for your involvement and now for the chief judge to share his thoughts.

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00:55:40.170 --> 00:55:54.060

Algenon Marbley: Thank you, Professor Berman and actually I was rather enjoying Chief Justice O'Connor views particularly on voting because I share in her views of wholeheartedly.

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00:55:54.780 --> 00:56:09.000

Algenon Marbley: I want to echo a couple of things, however, that General Holder said. And, most importantly, is that, and this is, this dovetails to what the Chief Justice was saying.

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00:56:10.890 --> 00:56:12.390

Algenon Marbley: As judges,

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00:56:13.710 --> 00:56:26.100

Algenon Marbley: the chief and and to greater extent I am restricted by what I can do so we rely heavily on policymakers, legislators.

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00:56:26.940 --> 00:56:41.040

Algenon Marbley: But the audience that we have are indeed the foot soldiers and they have the capacity to affect change and so it's important that they not only hear this conversation

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00:56:41.760 --> 00:56:52.200

Algenon Marbley: but they act on this conversation. And to the Chief Justice is point you act on it at a threshold level by going out

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00:56:52.560 --> 00:57:07.980

Algenon Marbley: to vote and to make sure that your voices are heard. Not only by protesting, which I think is a very effective manner of having your voices heard, but also at the ballot box. What I wanted to begin with, though, is

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00:57:09.090 --> 00:57:12.960

Algenon Marbley: a point that we owe a debt of gratitude

311

00:57:14.040 --> 00:57:19.830

Algenon Marbley: to President Obama and General Holder who changed the tenor of the narrative

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00:57:21.060 --> 00:57:36.270

Algenon Marbley: around the issue of drugs from a criminal justice perspective to a treatment perspective. So the President and General Holder did as much to shift the paradigm

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00:57:36.810 --> 00:57:49.800

Algenon Marbley: as Robert Martinson did in 1974 with his paper What Works in which he contended that that rehabilitation and treatment, which was the

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00:57:50.250 --> 00:58:02.880

Algenon Marbley: justification underlying sentencing and rehabilitation at that point that failed to produce the desired results. And that caused a paradigm shift from

315

00:58:03.720 --> 00:58:22.290

Algenon Marbley: rehabilitation to more punitive measures to the incarceration to the mass incarceration that the public intellectual Michelle Alexander set forth so clearly in her seminal work. So

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00:58:23.310 --> 00:58:24.480

Algenon Marbley: in considering

317

00:58:25.860 --> 00:58:28.050

Algenon Marbley: what Professor Berman

318

00:58:29.670 --> 00:58:30.930

Algenon Marbley: discussed with me,

319

00:58:31.980 --> 00:58:35.880

Algenon Marbley: I think the drug sentencing must be reformed.

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00:58:37.350 --> 00:58:43.830

Algenon Marbley: It I don't think and I don't know whether we would ever be able as a nation

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00:58:44.910 --> 00:58:47.940

Algenon Marbley: to move entirely away from

322

00:58:49.080 --> 00:59:05.850

Algenon Marbley: the criminalization of certain drugs. Certain drugs such as heroin, fentanyl, methamphetamine, cocaine will probably always have some criminal element to it and will always be criminalized to a certain extent.

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00:59:07.110 --> 00:59:11.400

Algenon Marbley: But drugs such as marijuana probably will not.

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00:59:12.540 --> 00:59:19.080

Algenon Marbley: So I was thinking about this in terms of what can we do and what can judges do

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00:59:20.310 --> 00:59:46.620

Algenon Marbley: as reformers without being labeled as judicial activists. And foremost in such reformation, I believe, should be elimination of mandatory minimums. As Professor Berman alluded to moments ago, the First Step Act would do certain mandatory minimums and that First Step Act represents

326

00:59:48.150 --> 01:00:14.340

Algenon Marbley: kind of the beginning of a shift back to where we were and to rehabilitation law. And as as much as the data is borne out as cited by General Holder there I'm just gonna I'm not gonna review all of this data I'm going to review some limited data, however, to bear that out. In fiscal year 2019,

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01:00:15.570 --> 01:00:32.880

Algenon Marbley: for example, the average sentence for drug sentencing was 77 months. 96% of those sentences were prison sentences and of those 96%, over 65%.

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01:00:33.930 --> 01:00:44.760

Algenon Marbley: were convicted of a of an offense carrying a mandatory minimum. Though, because of substantial assistance, save the bell or both,

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01:00:45.210 --> 01:01:02.220

Algenon Marbley: over half of those mandatory minimum were relieved of the full extent of the penalty. But what is noteworthy, and this goes to General Holder's point is that when you look at the relief for from mandatory minimum penalties by race,

330

01:01:03.960 --> 01:01:31.470

Algenon Marbley: Hispanics got the highest number of about 61%, whites got 37% and blacks again with the lowest percent of those who got relief from mandatory minimum. So as General Holder said, as the Chief Justice acknowledged, there still remains problems along racial lines. That problem has not gone away.

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01:01:33.450 --> 01:01:40.020

Algenon Marbley: And, and we before we can remedy the problem we have to in fact acknowledge the problem.

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01:01:41.040 --> 01:01:43.650

Algenon Marbley: In the southern district of Ohio, for instance,

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01:01:45.060 --> 01:02:11.490

Algenon Marbley: which covers 40 of Ohio's, 48 I'm sorry, of Ohio's 88 counties, 33% of of all criminal offenses are drug offenses with heroin and fentanyl the primary drugs being implicated. That's different from the national picture that we see because nationally

334

01:02:12.690 --> 01:02:15.330

Algenon Marbley: methamphetamine is the

335

01:02:16.440 --> 01:02:39.480

Algenon Marbley: drug most often implicated in criminal sentencing. So in addition to the elimination of mandatory minimums I think that we need to look at more alternatives to incarceration and that's going to require a concomitant increase in federal spending on drug treatments.

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01:02:41.730 --> 01:02:47.610

Algenon Marbley: You see it on both the Federal and State level, the advent of drug courts and.

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01:02:49.530 --> 01:02:50.520

Algenon Marbley: What I saw,

338

01:02:52.110 --> 01:02:56.490

Algenon Marbley: was after the period that General Holder alluded to, when

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01:02:57.720 --> 01:03:00.840

Algenon Marbley: crack was in its haydays,

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01:03:02.250 --> 01:03:02.760

Algenon Marbley: the

341

01:03:03.960 --> 01:03:09.360

Algenon Marbley: narrative was about the criminality associated with cocaine.

342

01:03:10.560 --> 01:03:25.470

Algenon Marbley: Then you saw the advent of the opioid crisis, that narrative changed and the narrative changed from criminalization and the criminality associated with cocaine

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01:03:26.250 --> 01:03:42.240

Algenon Marbley: to the opioid crisis representing a public health epidemic. And I agree with that, but I also believe that crack and powder was a public health issue.

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01:03:44.100 --> 01:03:49.170

Algenon Marbley: For whatever reason, and I think that it is directly linked to race,

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01:03:50.430 --> 01:04:06.240

Algenon Marbley: there was a different perception of cocaine, which it was believed at least was used mostly in the inner cities and by African Americans and opioids which

346

01:04:08.820 --> 01:04:22.980



Algenon Marbley: was a significant problem, it reached epidemic proportions in southern Ohio, but it did not involve African Americans and other communities of color

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01:04:23.580 --> 01:04:37.320

Algenon Marbley: to the extent that cocaine did. But, whatever the case, the benefits are palpable and we are now in a position where we are looking at it through the lens of

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01:04:38.640 --> 01:04:45.900

Algenon Marbley: a public health crisis and we are going, we are, we are evolving to a

349

01:04:47.550 --> 01:05:12.150

Algenon Marbley: treatment model. I know that many of the judges on my court are now resorting to treatment alternatives rather than incarceration and you see that more often than not in let's say supervised release revocation hearings when the defendant who is has been out on supervision has

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01:05:13.350 --> 01:05:14.490

Algenon Marbley: dropped dirty urine

351

01:05:15.930 --> 01:05:24.780

Algenon Marbley: involving a wide variety of drugs, more often than not it's marijuana, but it still involves opioids and the like and we see

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01:05:25.590 --> 01:05:47.250

Algenon Marbley: a great general patterns in addiction. And in those instances, I and many of my colleagues are looking at alternatives, sending them to halfway houses and other facilities that can treat addiction, because that is the underlying disease that more often than not fuels the relapses.

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01:05:48.630 --> 01:05:49.710

Algenon Marbley: A third

354

01:05:53.190 --> 01:06:00.660

Algenon Marbley: type of reform that we can grapple with and get our head around is greater reductions

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01:06:01.080 --> 01:06:09.270

Algenon Marbley: in sentences for drug crimes, especially possession cases where it's apparent that the defendant is not a distributor but merely a user.

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01:06:09.780 --> 01:06:21.240

Algenon Marbley: Again, we need to since the sentencing guidelines are no longer mandatory we can vary, I think that it's important for sentencing judges to look at

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01:06:22.200 --> 01:06:34.170

Algenon Marbley: these crimes for what they are. They're crimes almost by necessity, fueled by addiction, so there have to be alternative, we need to look at reduction

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01:06:35.220 --> 01:06:41.250

Algenon Marbley: in sentences to meet these changing demands. And finally,

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01:06:42.690 --> 01:06:50.880

Algenon Marbley: The Feds need to align themselves with the States with respect to marijuana laws. I think that the trend throughout

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01:06:51.900 --> 01:07:08.640

Algenon Marbley: the nation is that many, if not most States allow medicinal marijuana and those states that don't yet have recreational marijuana are trending that way, and they have significantly decriminalized

361

01:07:10.260 --> 01:07:19.050

Algenon Marbley: marijuana. So I think that it's time for the Feds to get on board and with that Professor Berman those are my opening remarks.

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01:07:19.140 --> 01:07:30.390

Douglas Berman: Wonderful, thank you chief judge and and I think the whole tableau of comments has has beautifully, you know, not just discussed a range of drug policy and drug sentencing issues,

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01:07:30.750 --> 01:07:39.330

Douglas Berman: but it's really gotten to I think a critical question that I'm going to turn back to Attorney General Holder to get his take on. As to kind of which

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01:07:40.860 --> 01:07:48.300

Douglas Berman: branch, you might put it that way, kind of has the has the greatest levers of change moving forward, especially you know whether it's a focus on

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01:07:49.080 --> 01:08:00.030

Douglas Berman: racial and gender and socio economic issues that you spoke about, that that Piper spoke about you know, the Chief Justice of Ohio has been using data to try to move the conversation forward for reform.

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01:08:00.990 --> 01:08:07.920

Douglas Berman: Chief Judge Marbley spoke about what you know he thinks he can do as a judge, without being accused of being activists. But especially if,

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01:08:08.370 --> 01:08:10.920

Douglas Berman: and maybe I'm wrong to assume this, but there's at least

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01:08:11.430 --> 01:08:27.510

Douglas Berman: some sentiment toward decriminalization, whether it's you know marijuana alone, whether it's a range of drugs, or at least you know, maybe just decriminalization I believe President Biden has spoken about nobody should go to jail, simply for using a drug. Is it,

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01:08:28.530 --> 01:08:36.390

Douglas Berman: we have to wait until enough people vote and convince Congress that's the way to go. Arguably, you as a prosecutor, as Attorney General,

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01:08:36.930 --> 01:08:48.240

Douglas Berman: quasi decriminalize some federal marijuana offenses with you know the the Cole and Ogden memos you know, indicating a low priority for those who are compliant with state law.

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01:08:49.170 --> 01:08:55.140

Douglas Berman: I'm tempted to say you were a progressive prosecutor before we were talking about progressive prosecutors, but it does seem as though

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01:08:55.440 --> 01:09:03.690

Douglas Berman: many are thinking at the state level, maybe even at the federal level that we can't wait for the legislature to get it done. It's for prosecutors,

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01:09:04.110 --> 01:09:12.750

Douglas Berman: there was a mentioned about the Ohio Sentencing Commission, I'm on record being very grumpy that we don't have a functioning US Sentencing Commission but you know they are another

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01:09:12.990 --> 01:09:22.500

Douglas Berman: potential engine of reform, and you know whether it's the decriminalization floor that Piper spoke of and I'll let her chime in as well on this question

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01:09:22.860 --> 01:09:28.770

Douglas Berman: after you speak, or even it's just you know some of the racial issues that you, you focused on you know,

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01:09:29.070 --> 01:09:34.560

Douglas Berman: is it up to Congress and Congress only to get this done or are there roles to be played, especially by

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01:09:34.860 --> 01:09:45.600

Douglas Berman: prosecutors by other actors in the criminal justice system. Defense attorneys I don't want to leave them out, I think they they're always advocating for reform, but you have a vision for what can be done, especially

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01:09:46.050 --> 01:09:53.790

Douglas Berman: if the goal fundamentally is to move away from criminalization responses to these issues and move towards more public health approaches.

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01:09:54.900 --> 01:10:03.420

Eric H. Holder, Jr.: You know, I think that, given the nature of the problem and the impact that the problem has and the solution to the problem.

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01:10:03.840 --> 01:10:13.230

Eric H. Holder, Jr.: Or the problem itself being you know, the way in which we enforce our our drug laws, this really requires an all hands on deck approach it's not enough to think that you know

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01:10:13.710 --> 01:10:25.050

Eric H. Holder, Jr.: the executive branch can do it by itself, although it should play a role. The legislature has got to play a significant role, certainly, legislatures, and I included in that Congress as well as State legislatures need to do more than they have done.

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01:10:25.560 --> 01:10:36.900

Eric H. Holder, Jr.: I think judges have to play a larger role. And I understand the judges are in a different different you know, a difficult position, the Chief Justice, the Chief Judge, you know, I think clearly well intentioned

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01:10:37.920 --> 01:10:49.290

Eric H. Holder, Jr.: people and and mindful of you know, the roles that they can play and their, their need to be seen as neutral. And yet I think, with all due respect, I think that they're in some ways, people who,

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01:10:49.770 --> 01:10:56.700

Eric H. Holder, Jr.: you know, have the most relevant information to share, the experiential information to share. And so I think the judges, need to be

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01:10:57.300 --> 01:11:09.240

Eric H. Holder, Jr.: a part of the process as well by speaking out in the way that the chief judge and the Chief Justice have done today, to do, have more of them doing that in more more forums. Clearly the legislature

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01:11:10.170 --> 01:11:21.840

Eric H. Holder, Jr.: has got to get, you know, get off this notion of, you know, you show you are tough on crime by passing more draconian sentencing laws, whether it's regarding, I think as the chief judge,

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01:11:22.200 --> 01:11:32.340

Eric H. Holder, Jr.: Chief Justice, was saying, whether it's with regard to, you know, narcotic offenses or or criminal offenses more more generally. So yeah there needs to be reform there.

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01:11:32.820 --> 01:11:41.100

Eric H. Holder, Jr.: The executive branch has huge amounts of discretion in deciding how to enforce the laws that Congress, or the state legislators give to

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01:11:41.580 --> 01:11:49.170

Eric H. Holder, Jr.: the executive branch. That's why the charging memos that I issued while I was Attorney General, we tapped into that use of,

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01:11:49.680 --> 01:11:58.800

Eric H. Holder, Jr.: that use of discretion. So I think, you know, all of the branches, have to be engaged and all the branches should be engaged, I mean this is a problem

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01:11:59.250 --> 01:12:07.350

Eric H. Holder, Jr.: that, you know, as I said, we started, we started before, I have started to focused on the start of the war on drugs 1971. If you think of the lives

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01:12:08.220 --> 01:12:21.060

Eric H. Holder, Jr.: ruined, the amounts of money expended, efforts that could have been done in different ways that have got could have gotten us to a better result, I think it's this requires a whole of society

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01:12:22.200 --> 01:12:30.630

Eric H. Holder, Jr.: effort. Now, with respect to decriminalization, we are clearly on the path to decriminalizing marijuana, you know, it's going to happen, we are on that glide path now.

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01:12:31.470 --> 01:12:36.720

Eric H. Holder, Jr.: I have a more difficult time trying to think about the decriminalization of other drugs

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01:12:37.410 --> 01:12:50.460

Eric H. Holder, Jr.: given the fact that you see the negative impact that the use of these drugs has on people individually and then individuals banding together, a negative impact on society at large. You know,

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01:12:50.940 --> 01:13:01.110

Eric H. Holder, Jr.: would we legalize heroin, would we legalize the use of opioids out of a non prescription setting? I mean there are societal harms there's anything, have to be.=

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01:13:01.470 --> 01:13:09.120

Eric H. Holder, Jr.: have to be dealt with. But the question is, we don't need to send these, set these penalties way up here, you know penalties can be

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01:13:09.900 --> 01:13:21.180

Eric H. Holder, Jr.: substantially lower, more discretion to judges to deal with the defendant who is right in front of them, and I would echo also what with chief judge said. You know these mandatory minimums, these legislative

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01:13:22.320 --> 01:13:30.960

Eric H. Holder, Jr.: mandated mandatory minimum sentences, I think should largely be done away with. You know, I think that handcuffs

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01:13:31.260 --> 01:13:45.300

Eric H. Holder, Jr.: you know, good, well intentioned, just like the Chief Justice, the Chief Judge and substitutes, you know, a political, injects a political component into the criminal justice system. And when you do that, you almost always end up with them, you know, with negative results.

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01:13:47.160 --> 01:13:55.860

Douglas Berman: I've got one quick follow up, and with Piper in mind, and one of the things that she mentioned, and then I'll turn to her and the rest of the panelists if they have opinions, although I know the judges may feel a little less comfortable.

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01:13:57.120 --> 01:14:02.610

Douglas Berman: Great all hands on deck, but it seems like all the political hands on deck are still pretty far behind the people.

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01:14:02.910 --> 01:14:14.250

Douglas Berman: Right, we've, it was entirely initiative that led to medical marijuana reform and it took a while before the legislature followed suit, it was entirely initiatives that led to full recreational marijuana reform.

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01:14:15.000 --> 01:14:19.260

Douglas Berman: Piper mentioned in Oregon we've now got decriminalization that was done by initiative as well.

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01:14:19.560 --> 01:14:27.780

Douglas Berman: Do you think there's something particular about drug reform or maybe kind of a move away from criminalization where politicians, those kind of inside the system,

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01:14:28.410 --> 01:14:38.070

Douglas Berman: can't fully see or the politics skew their sense of how much at least from the outside, it appears that people want dramatic change, not just tinkering.

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01:14:39.090 --> 01:14:50.700

Eric H. Holder, Jr.: Yeah I mean, you know, it's all about the politics, you know, a politician doesn't want to be seen, or labeled as being soft on crime. You know that is just, that's something that is hard for

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01:14:51.360 --> 01:15:00.570

Eric H. Holder, Jr.: you know, for for a politician to deal with. We've got rising, a rising homicide rate now in the country, and so you know you already starting to see

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01:15:01.500 --> 01:15:12.570

Eric H. Holder, Jr.: discussions about how we deal with that and almost inevitably that's going to mean you know more mandatory minimum sentences in some form or fashion, because politicians want to be able to show that they are

410

01:15:13.140 --> 01:15:21.360

Eric H. Holder, Jr.: trying to keep the American people safe and doing it in a way that they have the tools to do. They don't think of doing the things that are, you know, that are...

411

01:15:22.260 --> 01:15:33.450

Eric H. Holder, Jr.: They think about short term, as opposed to long term things, you know, putting in place drug treatment centers, anti violence, you know measures, a whole variety of things that will show

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01:15:33.960 --> 01:15:40.680

Eric H. Holder, Jr.: progress over over some time. They think in terms of election cycles, you know in Congress two years, senate six years,

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01:15:42.000 --> 01:15:54.240

Eric H. Holder, Jr.: and administration, you know, four years. And so the politicians, I think are very frequently behind when it comes to criminal justice matters, behind where where the people are.

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01:15:55.770 --> 01:16:09.840

Eric H. Holder, Jr.: So you know it means that as the Chief Justice was saying, you know, citizens have in some ways the ultimate check here, and that is to raise their voices, raise the consciousness of the people who represent them.

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01:16:10.410 --> 01:16:24.570

Eric H. Holder, Jr.: Both in terms of protesting, demonstrating going to going to you know their legislators, and then voting. Make this, make this a voting issue that will distinguish you know one opponent from the other, one party from from the other.

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01:16:25.470 --> 01:16:29.850

Eric H. Holder, Jr.: So they the people have to be a part of this, of this effort as well.

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01:16:30.930 --> 01:16:38.550

Douglas Berman: Piper, I'm wondering if you have a sense of, you know you mentioned the Oregon initiative there's certainly talk of additional decriminalization initiatives, but it does seem like

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01:16:38.970 --> 01:16:42.630

Douglas Berman: on this, in this one area of the marijuana history already showing us that there's this

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01:16:42.990 --> 01:16:50.850

Douglas Berman: sort of very slow uptake among politicians of what seems to be a very strong sentiment, you know whether it's a red state or a blue state, it seems like the politics

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01:16:51.420 --> 01:16:56.040

Douglas Berman: isn't isn't driving this from the people, and do you think there's something about drugs do you think there's something about,

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01:16:56.430 --> 01:17:09.210

Douglas Berman: you know, is it just the old you know, nobody wants to be soft on crime, or is there even a unique challenge on these kinds of topics to move to that decriminalization floor, which you so powerfully advocated ought to be our frame.

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01:17:10.170 --> 01:17:23.310

Piper Kerman: I think it's important to remember that both elected policymakers and also a wide host of practitioners within the criminal legal system draw benefit from the status quo.

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01:17:23.970 --> 01:17:34.920

Piper Kerman: So the status quo is clearly not working, we have 50 years of these drug policies, we have higher rates of addiction and suffering related to substance use disorder.

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01:17:35.280 --> 01:17:50.430

Piper Kerman: We have more of our own people in prison and jail and having cycled through the system than any other country in the world, any society in human history. This is a failed set of policies and yet it's a status quo which,

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01:17:51.900 --> 01:17:59.100

Piper Kerman: you know, all practitioners within the criminal criminal legal system and many elected policymakers remain profoundly attached to.

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01:17:59.430 --> 01:18:07.830

Piper Kerman: And that is because they draw benefit from it. And in some cases that you know, most of the most concrete sort of financial benefit, but it's also personal power.

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01:18:09.240 --> 01:18:18.240

Piper Kerman: And so that's why I think there's such a significant gap between the sentiment of, you know, all kinds of different segments of

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01:18:18.690 --> 01:18:32.970

Piper Kerman: the American public. I have visited 49 states in this country and people come out and want to have substantive and empirically informed conversations about, specifically about

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01:18:33.390 --> 01:18:45.510

Piper Kerman: drug policy and about changing the way that we contend with these public health questions and removing these public health questions entirely from the criminal legal system.

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01:18:46.860 --> 01:18:57.840

Piper Kerman: But yeah, there's there's a big gap, and I think the reason is because the people who draw benefit, and particularly the people who are literally sort of soaking in it every day

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01:18:58.230 --> 01:19:07.170

Piper Kerman: have a very difficult time, imagining what their own lives would be like if we did things differently when it comes to drug policy and criminalization.

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01:19:11.430 --> 01:19:17.520

Douglas Berman: Any of the judges want to jump in? I know it was a, it was a question about why the politicians are so out of touch.

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01:19:18.150 --> 01:19:30.330



Douglas Berman: And do, Chief Justice O'Connor, you're, you're you're a little bit of a politician, but much more a jurist, so just, a you know, a feel for whether or not you know the day to day politics, even as it affects, you know, the work in the courtroom.

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01:19:30.690 --> 01:19:31.380

Algenon Marbley:

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01:19:31.440 --> 01:19:40.680

Algenon Marbley: I don't mean to interrupt Professor Bourbon, but one thing I do want to say before the Chief Justice weighs in on this goes back to what

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01:19:41.910 --> 01:19:44.460

Algenon Marbley: General Holder said that, he's exactly right.

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01:19:45.630 --> 01:19:52.320

Algenon Marbley: As judges, we have the same role in this space, as we do in the development of the common law.

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01:19:53.400 --> 01:20:03.930

Algenon Marbley: As we develop the common law we we write on our views on precedent, etc, and over a course of time

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01:20:04.830 --> 01:20:14.340

Algenon Marbley: rules, laws change. Not statutory laws, but interpretive law changes, as Strauss outlined in his book The Living Constitution.

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01:20:15.060 --> 01:20:24.480

Algenon Marbley: And what I see as a sentencing judge is reflected in my opinions and sentences. And that's a course if you look,

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01:20:25.290 --> 01:20:36.390

Algenon Marbley: statistically, at what we as sentencing judges do that establishes the type of pattern that policymakers can seize upon to change the policy.

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01:20:36.780 --> 01:20:54.870

Algenon Marbley: So we aren't strictly limited to what the legislators and policymakers do because, for instance, we have available to us, the option of sending someone for treatment, also send someone to prison in a great variety of cases.

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01:20:55.290 --> 01:21:07.950

Algenon Marbley: So if the data collected by the Sentencing Commission, which is the federal counterpart to what the Chief Justice has established, then perhaps there are well intentioned

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01:21:09.120 --> 01:21:17.220

Algenon Marbley: policy makers, well intentioned legislators or legislators who are willing to look at the facts, who will then say,

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01:21:17.550 --> 01:21:31.740

Algenon Marbley: these are the trend lines, this is what the judges are seeing, this is what sentencing judges have seen as boots on the ground. Perhaps we should pay attention to this, perhaps the better cause, the better solution is to

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01:21:32.490 --> 01:21:49.230

Algenon Marbley: look at the treatment model, as opposed to the purely punitive model. So we do have a role, and we can affect change, but in the same way judges affect change the development of the common law.

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01:21:50.790 --> 01:21:53.670

Algenon Marbley: That's, that's all the point I wanted to make Chief Justice.

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01:21:54.720 --> 01:22:02.370

Maureen O'Connor: Thank you. Well you know, sometimes problems get solved or I guess get addressed, I was gonna say not necessarily solved,

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01:22:04.080 --> 01:22:14.280

Maureen O'Connor: when you can explain the cost benefit of doing something. And you know, for no other reason the cost of incarceration,

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01:22:15.600 --> 01:22:16.590

Maureen O'Connor: to society,

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01:22:17.910 --> 01:22:30.030

Maureen O'Connor: you know, is overwhelming, it's unsustainable, and I mean the economic costs of keeping people locked up is unsustainable. And I think that,

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01:22:31.590 --> 01:22:34.410

Maureen O'Connor: that, you know, for no other reason you know,

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01:22:35.160 --> 01:22:47.550

Maureen O'Connor: that resonates, that resonates with legislators and and that's some of the data that needs to be you know put forth about the the actual costs involved here. And then that gives them a reason

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01:22:48.360 --> 01:22:55.500

Maureen O'Connor: to say, you know the taxpayers don't want to foot this bill, you know we're not going to do it,

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01:22:56.070 --> 01:23:15.960

Maureen O'Connor: we will change the system, etc. But that's not good enough if there's not resources developed or devoted I should say, to treatment, where it's needed in the Community. Not you know a court-ordered treatment, you know it's you know demonstrated statistically, that the highest you know referral

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01:23:17.640 --> 01:23:29.550

Maureen O'Connor: institution is, are the courts and people go for treatment because the courts force them to go for treatment. And just the nature of the treatment eventually it,

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01:23:30.270 --> 01:23:33.990

Maureen O'Connor: it's either going or it's not going to take as far as a success.

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01:23:35.070 --> 01:23:47.280

Maureen O'Connor: So you know there's another role for the courts there, but again directing people to treatment, diversion programs so they're not even charged with a crime, if they have a low level drug offense.

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01:23:47.550 --> 01:23:54.150

Maureen O'Connor: That they're diverted to a treatment program and they're not burdening the Court, they're not burdening of you know, the

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01:23:55.380 --> 01:24:03.630

Maureen O'Connor: criminal justice system, etc. But there is a certain amount of cost to that and the cost benefit has to be

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01:24:04.890 --> 01:24:16.320

Maureen O'Connor: explained and then embraced by those that you know, make the statutes. Now yes, courts can divert you know people for treatment, but

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01:24:18.300 --> 01:24:38.010

Maureen O'Connor: so often, too often the waiting list is is awful. And people, you know, suffer and sometimes people die waiting for treatment and that's that's a true that's a true occurrence in the world of drug treatment.

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01:24:38.040 --> 01:24:44.670

Douglas Berman: That's certainly true, and so, sadly breaking my heart, we only have five minutes left and I'm going to try to circle back to

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01:24:45.060 --> 01:24:52.710

Douglas Berman: Attorney General Holder's metaphor of kind of watching replays or you know digging into the past, so that we can be in a position to,

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01:24:52.980 --> 01:24:58.110

Douglas Berman: to move forward in the future well. And so I'll kind of have an open question, whoever wants to chime in can jump in

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01:24:58.410 --> 01:25:06.900

Douglas Berman: as they, as they wish. You know, what bit of, particularly sort of either criminal justice history or drug history in particular in the criminal justice system,

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01:25:07.260 --> 01:25:13.260

Douglas Berman: Would you want to make sure and encourage, hopefully, some of my students are are signed in and and we'll listen to this, just

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01:25:13.650 --> 01:25:23.580

Douglas Berman: a little bit of history that you either think you know might not get the attention it deserves or might not even be known that you think those who care about moving forward effectively

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01:25:24.660 --> 01:25:32.220

Douglas Berman: should be sure to be aware of. Piper I'm tempted to say, well, they should just read your book and that's the obvious history that you've that you've captured for all of us, but

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01:25:32.640 --> 01:25:40.500

Douglas Berman: you know I'm putting you on the spot, to think of to think of something to highlight, but hopefully you all might might have a thought. I have one or two but they're my own

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01:25:41.100 --> 01:25:46.200

Douglas Berman: parochial interests for sure which I'll happily share but but eager to hear others, you know what

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01:25:46.920 --> 01:25:59.490

Douglas Berman: looking back, especially those folks we want to have vote, we want to have them register, we want to have them be part of the process. You know my students are 22-24 years old, there's a lot of history that they're not aware of, or you know don't have

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01:26:00.690 --> 01:26:09.090

Douglas Berman: guidance to make sure they look at, I'd love to hear from from the panelists of you know, history that you know about that you want to make sure that people take a look at.

474

01:26:10.350 --> 01:26:23.610

Piper Kerman: I would jump in first and just entreat people to start with the question of why is the, why is substance use criminalized in the first place in this country and how far back does that go because it goes much further back

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01:26:24.090 --> 01:26:39.690

Piper Kerman: than Nixon and you know the 1970s. And it is deeply tethered to control of you know communities of color within this country and also directly connected to foreign policy with both China

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01:26:40.140 --> 01:26:51.000

Piper Kerman: and also at our southern border. And that has predated sort of the the crime spike of the mid 20th century, so the roots go very deep

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01:26:51.870 --> 01:27:03.750

Piper Kerman: in terms of why decisions were made to criminalize the uses of certain substances and not others. And of course we're all familiar with, you know, the history of alcohol prohibition and its failure.

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01:27:04.860 --> 01:27:16.080

Piper Kerman: But I would encourage folks to go way back so they really understand where these provisos, which are so deeply rooted now culturally for us where they come from.

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01:27:17.460 --> 01:27:36.240

Algenon Marbley: I would ask also, as as, as a corollary to what Piper said, as you look at that history, look at the history of policymaking and how policymaking tracks that and and specifically look at how

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01:27:37.710 --> 01:27:50.160

Algenon Marbley: it has been treated differently in different communities. And the best example is the most recent example of how cracking powder were treated compared to how this opioid

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01:27:50.520 --> 01:28:01.770

Algenon Marbley: crisis had been has been treated. It was criminal and now it's public health issue and I believe that all of it amounts to a public health issue, so please continue to

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01:28:03.000 --> 01:28:10.350

Algenon Marbley: further that narrative so that we can have concrete policies and remedies for those caught up in the system.

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01:28:18.540 --> 01:28:22.290

Eric H. Holder, Jr.: Well, you know I'd say this, you know we're dealing here with

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01:28:23.820 --> 01:28:27.420

Eric H. Holder, Jr.: man-made problems that are susceptible to,

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01:28:28.500 --> 01:28:37.860

Eric H. Holder, Jr.: you know, man made and women made solutions. These things didn't come to us like you know on tablets from you know

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01:28:38.640 --> 01:28:47.070

Eric H. Holder, Jr.: from from a mountain. I mean, these are problems that we have created. They are long, these are long time problems that we have but that doesn't mean that they can't

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01:28:47.670 --> 01:28:53.040

Eric H. Holder, Jr.: be changed. You know, Dr. King said that the arc of the moral universe is long and it bends towards justice.

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01:28:53.520 --> 01:29:01.620

Eric H. Holder, Jr.: But here's the deal, it doesn't bend on its own, it only bends when people like the folks who are on this call they put their hands on that arc and pull it

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01:29:01.920 --> 01:29:09.780

Eric H. Holder, Jr.: towards justice. And that's something that we can do, and so I hope that we would leave this with a sense of optimism, a desire to be engaged.

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01:29:10.470 --> 01:29:18.570

Eric H. Holder, Jr.: You listen to that Chief Justice and what she said, I think that is so critical. You know, if you want to just deal with this on a pure economic basis

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01:29:18.990 --> 01:29:32.100

Eric H. Holder, Jr.: and show that you know we spent a whole bunch of money that maybe we didn't have to spend and if we didn't spend as much we can get better results, you can find ways in which you can engage the left, the right on these issues.

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01:29:33.240 --> 01:29:41.460

Eric H. Holder, Jr.: Have policy reflect the desires of of the people who, I think I think you're right Professor Berman are little further advanced than,

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01:29:41.820 --> 01:29:54.090

Eric H. Holder, Jr.: you know, than too many policymakers. But change is possible, but the change is not going to happen on its own. You know positive change is not promised, it is only as a result of involvement, sacrifice,

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01:29:54.930 --> 01:30:03.480

Eric H. Holder, Jr.: engagement. And so, if we do that we can get to, we can get to that that better place. And that's why I said I'm cautiously optimistic, because I don't think young people

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01:30:03.930 --> 01:30:12.630

Eric H. Holder, Jr.: have exercised the power that they have. The biggest voting block in the country right now is is young people. They need to get to the polls and, obviously, then you need to fight

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01:30:12.930 --> 01:30:24.090

Eric H. Holder, Jr.: and make the system fair. You know, do away with voter suppression, gerrymandering all those kinds of things, but voting and being involved in the system and focusing on this issue can bring about the change that I think we need.

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01:30:24.690 --> 01:30:30.420

Douglas Berman: Well, on that positive note and seeing the clock is is two o'clock I'm just gonna say thank you to all the panelists. A really

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01:30:31.320 --> 01:30:41.010

Douglas Berman: spectacular discussion covered so many issues. I'm so grateful for all of you for for taking the time today I wish we had 10 more hours but but we've got a full panel and I'm just again

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01:30:41.460 --> 01:30:48.000

Douglas Berman: incredibly happy you were able to take 90 minutes out of your day and talk about this. Sorry to the Q and A folks, we can't, we can't cover it all but but

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01:30:48.360 --> 01:30:51.570

Douglas Berman: thanks so much to Attorney General Holder, Piper Kerman,

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01:30:51.930 --> 01:30:57.720

Douglas Berman: Chief Justice O'Connor and Chief Judge Marbley. It's just been an absolute treat to have a chance to hang out with you this afternoon and and I

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01:30:57.960 --> 01:31:08.820

Douglas Berman: hope we can find some way to do it again, hopefully in person before too long. So thank you so much, and be very well have a great afternoon everybody, and thank you all the attendees for for sticking with us for 90 minutes, really appreciate it.

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01:31:09.930 --> 01:31:10.410

Maureen O'Connor: Thank you.