

OUR CRIMINAL JUSTICE SYSTEM IS A BEAR TRAP^Δ

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It is important that we closely examine the criminal justice system. This term can be considered an oxymoron because the criminal justice process punishes people being pulled in from the very beginning. It is a system that has components to it that have nothing to do with justice. I start with that because there is a sense of doubt in my head about what justice means when I step into court with my client for the very first time for an arraignment, and the government professes readiness for trial. It is not uncommon to hear at the time of arraignment before there has been any investigation by the district attorney's office or any assignment of the case to an assistant district attorney, that the people answer, "ready for trial." At this early stage of the process, I am not dealing with guilt or innocence, I am speaking about ensuring the rights of the individual who has been in the custody of law enforcement, anywhere from 4 or 5 hours to two days or more.

The reality is that at this stage of the process, this person has not yet had a chance to speak to a lawyer, has not had the opportunity to speak with their mother or father if they are 15, 16, 17, 18 years old, has been lied to, has been denied basic human rights, like going to the bathroom when they really need to go to the bathroom, and the system uses that disconnection as leverage. This person has been told they are lesser than because they have been accused of something or are sometimes not accused. The system treats this person like an animal, not a human being, by most people responsible for their care and custody; this person comes into the arraignment box and is told they

^Δ This is a transcript of the opening remarks delivered by Frederick Brewington at the Touro College Law School Journal of Race, Gender, & Ethnicity 2019 Symposium, "The Plight of the Wrongfully Accused: a discussion of Legal Issues Arising from the Trial of the 1989 Central Park Case and the Exonerated Five." The symposium discussed the legal issues raised by the Central Park Five case, race, and criminal justice. The transcript was lightly edited by the panelists and *Journal* staff to make the transcript more reader-friendly. The original audio recording of Mr. Brewington's remarks is available at: https://videos.tourolaw.edu/media/1_s5xm0i9k.

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are charged with a crime. That is the first time they get to hear the charges against them, and the people who are in charge of pursuing justice in our system, the prosecutors for the government, tell that person, “We are ready to try you right now.”

It is a lie. And one of the things that makes you know it is a lie is when you, as defense counsel say, “I am ready for trial too,” and I will tell you that this is what usually happens, the prosecutor’s reply, is “you mean, you are waiving your motions.” A good defense attorney, however, does not “need motions, all we need is to get this case to a jury because “the people” are lying just like a rug.” But this reality is one that many, many people face, not only in Suffolk County, but all across New York state and in other places. Because of the People’s speedy trial responsibilities, they find that they have to lie during the first stage of a criminal proceeding in front of a judge. This does not include the police and what they do and how they handle things. I am talking about an officer of a court who stands up in front of a judge on the record and says these words, “People ready.” Nobody challenges that. There is a bit of injustice that happens when the criminal process starts in that way.

Let’s step outside the arraignment process and talk about the human beings involved because what we often do, instead, is look only at statistics. It is very important to look at all the components of the criminal justice system, including the number of forced confessions. That is all critical. But it is also crucial to examine what the system that we created does to the individual, who is pulled into it, and who is punished from the very beginning. They could be as innocent as daybreak, but everything they come in contact with tells them that they are as guilty as nighttime. What do we do about that?

Well, I’m going to turn this around for us because looking at these young men called the Central Park Five, who are on the cover of tonight’s program, and what took place for them was a crime against them. Their story is the one that got told. But there are very few people with the ability, the notoriety, the wherewithal, the money, or the patience to push back against the system coming down on them like a ton of bricks. There are so many people who are lost to this system and are scarred for life because they got pulled into the criminal justice system.

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Let's talk about how the system affects them. You are required to come to court; if bail is set and you can reach it or if you are not allowed bail and you are remanded, you have to go to court no matter what.¹ Either way, your liberty is in jeopardy. For example, if your court date is at 9:30 on a Monday, you cannot decide to go to an amusement park instead. You are not at liberty to do so. You are an encumbered person. The reality is that because you have certain responsibilities to come to court. In the criminal justice system, after a while, more specifically after the 15th, 16th, or 17th time returning to court, any person would say “I am tired of this,” “I can’t take this anymore,” “I just want out of this, what is the best thing that can come out of this,” “I’ll plead to anything as long as I don’t have to go to jail.” Bullseye, because once you are pulled into that system and are being punished in that way, you become worn down. It is a process that is meant to wear you down.

Most folks involved in the criminal system looking for justice do not have the capability, financially² or intellectually, to figure out what is going on or how they are gaming you.³ The reality is most people will say, “I will take the misdemeanor, I am not going to jail, I’ll be okay.” Let me tell you what happens when a young black man takes a misdemeanor plea when he is 18 and later tries to get a government job at 30. He can’t feed his kids, because he will come face to face with a person, who happens to be a very nice person, who won’t hire him because of that record. But it is not against that person making hiring decisions, it is about the 18-year-old who was told “to take the plea, and we will get this done with, you do not have to come back here anymore,” and as a result, they become marked and damaged goods. Their ability to make it through life in a way that is going to be common and understood to everybody else will be like speaking another language.

¹ The remarks were made in November 2019, before New York implemented the bail reform measures. It remains to be seen how bail reform will alter these procedures and outcomes. Taryn A. Merkl, *New York’s Latest Bail Law Changes Explained*, BRENNAN CENTER FOR JUSTICE (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>.

² See generally US: *Criminal Justice System Fuels Poverty Cycle*, HUMANS RIGHTS WATCH (June 21, 2018), <https://www.hrw.org/news/2018/06/21/us-criminal-justice-system-fuels-poverty-cycle>.

³ See generally Donavyn Coffey, *Why do people confess to crimes they didn’t commit?*, LIVE SCIENCE (Feb. 15, 2020), <https://www.livescience.com/why-people-fasely-confess-to-crimes.html>.

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Then there is the anger factor. When you talk to a young African American man who is tired about being set apart over and over again and who is pulled into the system, he is not going for “it” anymore. He decides “I’m tired” and determines “I’m angry.” As a result, he falls into the trap.

Has anybody seen a bear trap? It is big, and if a bear goes in, it is anticipated that in a trap, a bear is going to be a bear. When the bear goes into the trap, the trap will close. The criminal system is a bear trap. It anticipates that people will act out and act up. That they will fall prey to the impatience that is built into the system, and as a result of that, they are going to move in a way so that the trap will come down on them. But bear traps are not made to catch patient mice. And if a bear trap is set, but you carefully and meticulously and patiently work to try not to spring that trap, there is a likelihood that you will come out of the bear trap without it taking off your arm.

That is something I talk to my clients about. Because sometimes we have to go back to court, 15, 20, 30 more times, and wait for that 30-30 speedy-trial clock to run out.⁴ Sometimes we have to make motion on top of motion and be the person that pisses people off. In my office, we have a saying, “You know how well you did today based on the people you pissed off.” Because if you are in a situation that says wait a second, this person has rights, this person does not need to be treated like a piece of furniture or treated like someone’s indentured servant, this person has rights that you are bound to respect, no matter what, you are never going to be popular.

When you push the envelope even more and require people in the system to do their job, not more than their job, but to do their job and hear what they have to hear, they do not like it most of the time. Because the reality is that if there is a sense of justice to be found any place in this process that has pulled so many unwilling people into it and made innocent people into guilty people, if anything is going to happen there, people have to be made uncomfortable with the decisions they make about how they treat other people. They might not have a conscience, but that is on them. Making them have to find an itch that they can’t scratch is important in this process. Think about it. An itch that they just can’t scratch. But it is okay for you to be that itching

⁴ N.Y. CPL § 30.30.

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powder. It will create circumstances that will make you understand and make them understand that for all those people who are part of the system and for whom you may say there is a presumption of innocence, that, in reality, it is my job to prove their innocence. If I depend on the people to honor the presumption of innocence, my client is going to jail. Instead, the defense must take it upon themselves to carry that burden, and it is a weighty thing, herculean at times.

That weight gets heavy and as heavy as it gets for the lawyers, imagine how heavy it gets for those who know they didn't do the thing that they are being accused of. When you say over and over again, "I didn't do that," or "I did sign that but they told me if I did it will go well with the judge and they lied to me," or when they say, "I was someplace else, and I was not there, but nobody wants to get involved and support me." Or "All the people that were my boys are not my boys anymore." All the people that said, "I got your back," now have somebody else's back. This system goes on and churns people turning them into mincemeat.

My point here is that we have a vicious system within our own country, within our state, that is beating people up to the point where we wonder why people are getting pulled into all kinds of messes. It is because when you take so much abuse, and you see it happening over and over again, at some point, it becomes a norm for you. You come to expect that will happen to you as well. As a result of that, you get, "I don't care," when you really do care. Or you get the response, "Well, I'll just do my time, and it will be over with." Not when you are 19, and you are going to be 30 someday, hopefully. This process pulls people from our communities into this system so that they become fodder for a criminal industrial complex that is built on young people. I like to reference Michelle Alexander, author of *The New Jim Crow*, who makes clear that this plan is not happening simply by serendipity or happenstance. There is a plan because a system such as ours needs to have someone to step on.⁵ It needs to have someone to build on; it needs someone to maintain it.

Does anybody know the budget of a local upstate area whose primary industry is prison? Do you know what the laundry contract for

⁵ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press 2010).

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that prison is? The laundry contract is 1.3 million dollars for the laundry that they send out.⁶ Do not tell me that this is by mistake because, in that area, (I am not going to tell you who got the contract; you can figure it out for yourself), there is a diabolical component to the criminal justice system that goes well beyond locking people up. There is an undergirding need to have the prison industry and the money it produces ongoing. But we cannot forget about people in our community and the most vulnerable individuals who won't be able to pull themselves out of the system. The black and brown communities in New York State and across this country, remain and have been for almost 300 years, the fodder that feeds the system.

It may be tough to talk about it, but I will tell you, young lawyers, whether you are going to be a prosecutor or a defense counsel, or whether you will be a plaintiff's lawyer or working in insurance. As we face the future, it is your job and responsibility to engage in conversation that will make the issues that affect us through a racial component of our society part of a regular conversation. The discussions should arise, not only when we have a symposium, but we should constantly challenge everybody to ask, "Why are you doing that to her? And why aren't you doing that to him?" Because when we start to look at these numbers, and 35% this and 85% that, the reality is, it is a vicious system that punishes you as soon as you get in it. And that is by design.

⁶ See generally Christian Henrichson, Joshua Rinaldi, et al., *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, VERA INSTITUTE OF JUSTICE (May 2015), <https://www.vera.org/downloads/publications/price-of-jails.pdf>.