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# The Right to an Attorney Is Not Enough: Steps to Rid the Criminal Justice System of Its Poverty Tax

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# THE RIGHT TO AN ATTORNEY IS NOT ENOUGH: STEPS TO RID THE CRIMINAL JUSTICE SYSTEM OF ITS POVERTY TAX

*Sarah Lustbader\**

Introduction .....	1407
I. Two Systems of Justice.....	1409
A. Arrest.....	1409
B. Bail Hearing.....	1411
C. Pending Case .....	1414
D. Plea Negotiations .....	1416
E. Aftermath.....	1418
II. Closing the Gap: Proposals .....	1419
A. Arrest: Stop Creating Criminals.....	1419
B. Bail Hearing: Stop Incarcerating Poverty .....	1422
C. Pending Case: Stop Dragging Criminal Defendants to Court.....	1425
D. Plea Negotiations: Create Alternatives to Incarceration for Everyone.....	1426
E. Aftermath: Ban Collateral Consequences .....	1426
Conclusion.....	1427

## INTRODUCTION

“You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you.”<sup>1</sup> When we hear this phrase

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1. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); see Alex McBride, *Landmark Cases: Miranda v. Arizona (1966)*, PBS: THE SUPREME COURT (Dec. 2006), [https://www.pbs.org/wnet/supremecourt/rights/landmark\\_miranda.html](https://www.pbs.org/wnet/supremecourt/rights/landmark_miranda.html) [<https://perma.cc/SH25-M4YL>].

recited to a suspect during an episode of *Law & Order*, we assume that justice will be done, equally and fairly, no matter the circumstances. Whether the suspect has been arrested for a serious felony or for a trivial violation, whether he is guilty or innocent, white or minority, rich or poor, employed or unemployed—in all of these cases, the criminal justice system will work swiftly and fairly to find the truth, with minimal inconvenience and cost to the accused. In practice, this is far from the truth: many people who have been accused of any crime—even a victimless crime or a crime they did not commit—suffer severe consequences that impede their livelihoods and disrupt their lives while serving no appreciable public interest. And those adverse consequences fall disproportionately—in some cases entirely—on the low-income people that the criminal justice system should be committed to protecting. Generally, those attorneys who pursue public defense as a calling do so for this reason: they know that even with an attorney, the odds are stacked against indigent criminal defendants. But many are surprised at just how stark the contrast can be. For this Symposium marking the fiftieth anniversary of David Caplovitz’s seminal work, *The Poor Pay More*,<sup>2</sup> I draw on my experiences as a public defender in the Bronx to elucidate how criminal charges—and in particular, low-level charges—can prove far costlier in time and dollars for indigent defendants, and how this phenomenon can keep the poor in poverty.

This Essay imagines the paths of two individuals, each arrested for misdemeanor drug-possession.<sup>3</sup> It follows Joe, an indigent, thirty-year-old black man, and Richard, a middle class, thirty-year old white man, through identical drug possession cases and traces the ways in which their cases—and the costs involved—diverge due to the race and wealth differences between the two men.<sup>4</sup> The Essay tracks the cases through arrest, bail hearing, pendency of the case, plea negotiations, and aftermath. I conclude by proposing five changes to state-level criminal law, procedure, and policy, one at each stage of the case, that can help ease the poverty tax inherent in criminal cases: (1) eliminate policing practices that pull low-income people into the criminal justice system; (2) encourage judges to make individualized

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2. DAVID CAPLOVITZ, *THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES* (1967).

3. A misdemeanor is a minor offense that is punishable by no more than one year in jail. N.Y. PENAL LAW § 10.00(4) (McKinney 2017). Non-criminal violations are lesser offenses that are punishable by no more than fifteen days in jail. *Id.* § 10.00(2)–(3).

4. These hypotheticals are based on my observations, made primarily while working as a public defender in the Bronx.

bail assessments tailored to what families can afford; (3) get rid of the requirement for all criminal defendants to appear in court on each of their court dates; (4) create meaningful, affordable, and feasible alternatives to incarceration that do not require defendants to pay for their freedom; and (5) ban all but the most essential collateral consequences of criminal convictions.

## I. TWO SYSTEMS OF JUSTICE

### A. Arrest

Joe's chances of being arrested are markedly higher than Richard's, regardless of culpability. Joe is a person of color in the South Bronx, in the poorest congressional district in the country.<sup>5</sup> Richard is a white man who lives a few miles away on the Upper East Side of Manhattan, in the wealthiest congressional district.<sup>6</sup> Stops and searches by the police that lead to arrests are an uncommon occurrence on the Upper East Side and rarely target white people in any neighborhood, but they are an everyday occurrence for people of color in the South Bronx.<sup>7</sup> Police on patrol in the South Bronx may conduct a stop that leads to Joe's arrest. In addition to increased police patrols and stops, there are several other police practices that are far more common in low-income neighborhoods than in wealthier ones. First, an officer may spot discarded drugs or drug paraphernalia

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5. *See Bronx Cheer: Seeking Votes in America's Poorest, Most Democratic District*, THE ECONOMIST (Apr. 14, 2016), <https://www.economist.com/news/usa/21696938-seeking-votes-americas-poorest-most-democratic-district-bronx-cheer> [<https://perma.cc/2KY5-H3DJ>].

6. *See* Kelsey Warner, *Where Are the Richest Voter Districts in the U.S.?*, BUS. 2 CMTY. (Apr. 14, 2016), <http://www.business2community.com/government-politics/richest-voter-districts-u-s-01516219> [<https://perma.cc/U5T3-9V7S>].

7. In 2013, a federal judge found the New York Police Department liable for a pattern and practice of racial profiling and unconstitutional stops in heavily policed neighborhoods, including the Bronx. *See generally* *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). In another decision, following a preliminary injunction hearing in a related stop-and-frisk case focusing solely on police stops made in the Bronx, the court found:

[W]hile it may be difficult to say where, precisely, to draw the line between constitutional and unconstitutional police encounters, such a line exists, and the NYPD has systematically crossed it when making trespass stops outside TAP buildings in the Bronx. For those of us who do not fear being stopped as we approach or leave our own homes or those of our friends and families, it is difficult to believe that residents of one of our boroughs live under such a threat. In light of the evidence presented at the hearing, however, I am compelled to conclude that this is the case.

*Ligon v. City of New York*, 925 F. Supp. 2d 478, 486 (S.D.N.Y. 2013).

on the ground and charge a passerby with possession of those drugs or drug paraphernalia.<sup>8</sup> Second, Joe might be approached by an undercover officer posing as an addict looking for a fix.<sup>9</sup> If Joe directs the undercover officer to a dealer and facilitates a small drug deal, he can be charged with felony-level drug sale, even if he never sold or even possessed drugs.<sup>10</sup> Joe is far more likely to be arrested than Richard, even if Richard routinely walks around with a substantial amount of controlled substances, and Joe never does.<sup>11</sup>

If he is arrested, Richard can call one of several attorneys he knows. He could call his sister, who is a civil lawyer, or his college roommate who became a prosecutor. That attorney can invoke his rights to the police,<sup>12</sup> thereby halting any police questioning, and can come to the precinct to witness any lineup or other procedures, voicing any objections to the process and generally acting as an additional pair of eyes, warding against abuses of police authority. Joe, on the other hand, counts no lawyers among his family or friends, and although his brother liked the public defender he was assigned for a minor arrest last year, he does not have her phone number on hand. Police are therefore free to question Joe and try to get him to make an inculpatory statement. Because he was arrested in New York City, Joe does not receive representation until his bail hearing, which means that he does not benefit from legal counsel while detained by police.<sup>13</sup> Even though he denies the charge of drug possession, the officers manage to make him nervous enough to trip

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8. As a public defender in the Bronx, I encountered a number of individuals who were arrested and charged under similar circumstances.

9. See Joseph Goldstein, *Undercover Officers Ask Addicts to Buy Drugs, Snaring Them but Not Dealers*, N.Y. TIMES (Apr. 4, 2016), [https://www.nytimes.com/2016/04/05/nyregion/undercover-officers-ask-addicts-to-buy-drugs-snaring-them-but-not-dealers.html?\\_r=0](https://www.nytimes.com/2016/04/05/nyregion/undercover-officers-ask-addicts-to-buy-drugs-snaring-them-but-not-dealers.html?_r=0) [https://nyti.ms/2kBHn7L].

10. *Id.*

11. Police have been found to conduct unconstitutional stops in the Bronx in particular. See, e.g., Joseph Goldstein, *Police Stop-and-Frisk Program in Bronx Is Ruled Unconstitutional*, N.Y. TIMES (Jan. 8, 2013), <http://www.nytimes.com/2013/01/09/nyregion/judge-limits-nypd-stop-and-frisk-program-in-bronx.html> [https://nyti.ms/VIEa2z].

12. See *People v. Rogers*, 48 N.Y.2d 167, 170 (1979) (“[O]nce an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel.”).

13. In New York, defendants are entitled to representation beginning at arraignment. N.Y. CRIM. PROC. LAW § 180.10(3) (McKinney 2017). However, recent cases have shown that this right has not always been honored in practice. See *Hurrell-Harring v. State*, 15 N.Y.3d 8, 20–21 (2010) (“Recognizing the crucial importance of arraignment and the extent to which a defendant’s basic liberty and due process interests may then be affected, CPL 180.10 (3) expressly provides for the ‘right to the aid of counsel at the arraignment and at every subsequent stage of the action . . . .’”).

over his words when explaining where he was headed when the police stopped and arrested him. The prosecutor can later use that misstatement during a bail hearing to make Joe appear suspicious. Joe also does not have the benefit of an attorney's presence for any part of identification or other pre-booking procedures. Even before the case has begun, police have a greater opportunity to create a case against Joe than Richard.

### B. Bail Hearing

The bail hearing, an early court appearance during which the charges are read and the judge makes a bail determination, presents the clearest difference between Richard's experience and Joe's. Richard will almost surely walk out of court and fight his case from the outside, while Joe may be forced to spend weeks, months, or even years<sup>14</sup> in jail while his case is pending. The most obvious reason for this is that Richard's friends and family have more cash readily available to pay any bail that might be set. Depending on the judge, the jurisdiction, the prosecutor, the defense lawyer, and on Richard and Joe's respective prior experiences with the criminal justice system, a judge might release them on their own recognizance or might set bail of several thousand dollars. In most other states, defendants are not guaranteed an attorney at all during bail proceedings, so unless they have a private lawyer or the locality chooses to provide public defenders at that stage, they are not represented when bail is determined.<sup>15</sup>

But let us suppose that, despite all this, bail is set equally. The judge sets bail at "\$2000 bond/\$1000 cash" for both Joe and Richard, meaning that they can bail out by paying \$1000 in cash or by getting a bond worth \$2000. Richard can easily get any number of friends or relatives to withdraw \$1000 and, if they post it at the courthouse, he can be released directly from court before being taken to Rikers Island. At the end of his case, assuming Richard has not absconded, the court will return about ninety percent of the posted bail. Richard is a software engineer at a successful start-up firm. When he is arrested, he calls his boss and says he needs to take two personal days

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14. See William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013), <http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html> [<https://perma.cc/VML4-CT59>] (studying fifty-four marijuana misdemeanor cases and showing many cases lasted well over a year, none of which received a trial).

15. See Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23, 23 (2016).

for an emergency. No questions are asked, and his pay and employment are not affected. Richard rents his apartment from a private landlord, who never finds out about his arrest, and by next year, he will own his own apartment.<sup>16</sup>

Joe has no bank account, and most of his friends and family work off the books and don't use banks, either. No one can afford \$1000 to pay his bail in cash. His family and friends might be able to gather the \$200 to \$600 that would be needed as collateral to get a bail bond for \$2000, but it will take some time.<sup>17</sup> It would also require one or two people who work on the books to prove their income and agree to pay the entire bond should Joe run off. For many in Joe's position, it is not easy to find someone with a regular paystub who is willing to front the collateral and to be liable for the full amount. Even if he does convince his brother's girlfriend, who is a teacher, and his cousin, who drives a taxi, to sign off on his bond, the bail bondsman will keep thirty percent to forty percent of the collateral at the end of the case. For a small bond, like this one, the bondsman will often keep the entire collateral. And in many cases, bail bondsmen require defendants who bail out with bonds to wear monitoring devices such as ankle bracelets, and charge hundreds of dollars monthly for the use of those devices.<sup>18</sup> These costs can add up to far more than the bail that was initially set—the cash payment that Richard made.

If the judge sets bail that Joe cannot afford, the prospect of incarceration will create a strong incentive for him to accept the first plea bargain offered by the prosecution,<sup>19</sup> even if that offer requires him to serve some jail time or would give him a criminal record. Richard, fighting his case from the outside, will have time on his side and can wait the months or years it takes to get to trial or to receive an acceptable offer from the prosecutor. In at least one jurisdiction,

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16. Because Richard, unlike Joe, is able to pay any fines or fees that are imposed in his case, his credit score is never affected, allowing him to get a mortgage.

17. A survey conducted by the Federal Reserve in 2015 found that forty-six percent of adults could not cover an emergency expense of \$400 without selling something or borrowing money. BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2015, at 1 (2016), <https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf> [<https://perma.cc/5L6J-Y2WV>].

18. See Eric Markowitz, *Chain Gang 2.0: If You Can't Afford This GPS Ankle Bracelet, You Get Thrown in Jail*, INT'L BUS. TIMES (Sept. 21, 2015, 7:55 AM), <http://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283> [<https://perma.cc/Q9MU-FVB2>].

19. See HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 2–3, 31–34 (2010).

Joe may choose not to bail out, even if he is able to, because it could create the automatic presumption that he is not eligible for a public defender.<sup>20</sup> Joe knows that even if his family can scrape together bail money, he certainly cannot afford the services of a private attorney. In Joe's case, his family could not come up with \$1000 cash, but eventually paid \$400 to a bail bondsman, who explained that he had to charge twenty percent collateral and not the usual ten percent because it was not a big enough bond to justify his time with only a \$200 collateral. When two other bondsmen said the same, Joe's wife simply paid the \$400, knowing she probably would not get much, if any, of that collateral back. Luckily, the bondsman did not obligate Joe to wear—and pay for—an ankle monitor

Joe is more likely than Richard to lose out on income even if he is released without bail or manages to bail out. He is a dishwasher at a restaurant, and although he has a good relationship with his supervisor and his co-workers, the policy is to dock pay for two unexcused absences, and to terminate employment upon the third. According to that policy, if the arrest-to-arraignment process takes two workdays, Joe will lose two days of wages. If it stretches into three, however, he will be fired.<sup>21</sup> His supervisor will be sad to see him go, but he will also be able to replace him quickly. City and state employees, and those who need licenses, have it even worse. New York has over 100 licensing systems for various occupations, and an arrest can trigger immediate suspension of that license, which can result in job termination, even if case is later dismissed and the person is never convicted.<sup>22</sup> In addition to losing his job, Joe runs the risk of losing his apartment, even if he is never convicted of anything; arrests

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20. See, e.g., OKLA. STAT. tit. 22, § 1355A(D) (2017).

21. See McGregor Smyth, "Collateral" No More: *The Practical Imperative for Holistic Defense in a Post-Padilla World . . . Or. How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 163 (2011) [hereinafter "Collateral" No More] ("[E]ven short-term detention not only creates inordinate pressures to plead guilty but can have drastic immigration and employment outcomes."); McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 481 (2005) [hereinafter *Holistic Is Not a Bad Word*] ("Poorer defendants are disproportionately affected by this phenomenon, as they are more likely to have jobs without vacation benefits, flexibility, or labor protections.").

22. *Holistic Is Not a Bad Word*, *supra* note 21, at 496 ("When a client lives in subsidized housing . . . is a public employee or has an employment license . . . defense attorneys should take note. In all of these cases, the client is likely to have an ancillary civil or administrative proceeding pending at the same time as the criminal case."); see also Julie Dressner & Jesse Hicks, *A Marijuana Arrest*, BUZZFEED NEWS (Dec. 8, 2013), [https://www.buzzfeed.com/jdressner/a-marijuana-arrest?utm\\_term=.pe0vn5A11M](https://www.buzzfeed.com/jdressner/a-marijuana-arrest?utm_term=.pe0vn5A11M) [<https://youtu.be/MEzZSDKOV4>].



often trigger termination proceedings in publicly funded housing.<sup>23</sup> In administrative hearings, standards of proof are often lower than they are in criminal court.<sup>24</sup>

### C. Pending Case

During the case, both Joe and Richard will be obligated to make regular court appearances approximately once every six weeks. These court appearances might take anywhere from one to eight hours. Unlike for civil litigants, they are not optional. When they arrive at their respective courthouses at 9:00 a.m., as they are instructed, Richard and Joe are confronted with a security line that regularly extends outside and down the block, regardless of the weather. After making their way through security, each finds the courtroom and is told to wait. Both are surrounded by chaos: attorneys calling out for clients, weepy parents craning their necks to catch a glimpse of an incarcerated son or daughter, and court officers barking commands at defendants and their families who pack the benches in the courtroom—“take off your hat,” “stop whispering,” “no reading allowed.”

The similarities end there, however. For Richard, court dates will impose far less of a burden. He takes taxis to and from court to make sure he is on time. He has a nanny for his infant son and his wife has flexibility at her job that allows her to care for the child in a pinch. His supervisor does not question his occasional absence or lateness. Richard’s attorney shows up immediately, as Richard’s case is the only court appearance she has scheduled that day. She spends half an hour talking to him outside the courtroom, and, because the clerk can see that Richard has a private attorney, he lets them jump the line, putting him before everyone represented by a public defender. During his appearance before the judge, his attorney and the prosecutor decide on another day to return to court to continue proceedings. Richard walks out of the courthouse and is on his way to work by 10:15 a.m.

Joe waits in the courtroom, abiding by the no-phone, no-reading rules. He sees one case called after another. An hour passes, and Joe begins to worry he is in the wrong place, but he cannot use his phone to call or text his attorney. Finally, at 10:45 a.m., he sees his attorney rush in and call out his name. Unlike Richard’s attorney, she must appear on ten cases in four separate courtrooms that day, and Joe’s

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23. “Collateral” No More, *supra* note 21, at 149.

24. *Id.*

courtroom is the second one she gets to in the morning. She calls his name along with two other names, and asks Joe and her two other clients to come talk to her outside the courtroom, where she speaks to each of them for approximately two minutes each. She explains to Joe that the prosecution has not yet made a plea offer in his case, nor have they provided any discovery, so there is not much to do today except ask the judge to set a schedule for her to file legal motions and choose another date to return to court. She explains this, asks if he has any questions, and signs him up on a list all within those two minutes. Joe takes his seat again in the courtroom and listens to case after case called before the judge. He sees no trials or hearings. He hears one or two people plead guilty to misdemeanors or violations. He hears the prosecutors state over and over that they are not ready to proceed to trial, and a few defense attorneys say the same.<sup>25</sup> Mostly he hears scheduling discussions. The majority of time before the judge, it seems, is spent deciding on a date to return to court that works with the attorneys' and the judge's schedules.

At 1:00 p.m., just as he is sure that his turn must be coming up, Joe hears the court officer announce that the court will take its lunch break and resume at 2:15 p.m. Everyone seems to groan simultaneously. As attorneys and clients file out of the courtroom, Joe finds his lawyer and asks if he really needs to come back in the afternoon, given that this will surely mean taking an entire day off of work. His attorney nods in sympathy and says that if he does not return to court, the judge will likely issue a warrant for his arrest. Joe trudges outside, kills an hour without eating because he has no appetite, and comes back early, only to sit on a bench and wait. The judge returns to the courtroom at 2:40 p.m., and his case is finally called at 3:15 p.m. The appearance lasts for ninety seconds.<sup>26</sup> He leaves with a slip of paper in his hand reminding him to return to court for his next court appearance, six weeks later. The appearances alone are enough to make him want to plead guilty. He tries his

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25. The *New York Times* conducted a comprehensive investigation into court delay in the Bronx in 2013. See William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013), <http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html> [https://perma.cc/S2PP-F97D] (“For years trials have been postponed every week because there were not enough judges. But less compelling reasons are also sufficient, including prosecutors’ vacation plans and defense lawyers’ birthdays. Even excuses like a backache and a picnic were deemed sound enough to keep the courts waiting.”).

26. For an excellent description of the grueling process of calendar days and court delays in New York City criminal courts, particularly applied to misdemeanor cases, see DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER’S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* ch. 9 (2006).

boss's patience every time he asks for time off, and because he does not know for sure when he will return to work in the afternoon, he must take a full day off each time. He loses a day's salary for every appearance. He is unable to reliably pick his children up from daycare in the afternoons when he goes to court and has to impose on a neighbor. When he asks his attorney how much longer the case will drag on for, she smiles apologetically and says it could be months or, if he insists on a trial, years. Joe wonders how many more of these court dates he can afford, or stomach.

#### D. Plea Negotiations

Both Richard's and Joe's cases are set for trial after two court appearances, during which the defense files an omnibus motion requesting pretrial hearings, the prosecution opposes them, and the judge grants the defense's motion. Even when the case is scheduled for trial, however, neither defense has received any discovery from the prosecutor, who is not obligated to provide the bulk of discovery until right before trial.

Richard and Joe both face the same misdemeanor drug possession charge, which carries a maximum sentence of one year of incarceration.<sup>27</sup> Although Richard has not received discovery from the prosecution, his private attorney is able to investigate the case fully, so that he is not entirely in the dark. The court dates are more manageable for him, and he does not feel pressured or desperate to put the case behind him. The collateral consequences of a conviction for a low-level drug offense do not threaten to upend his life: he does not live in public housing, he does not have a government job, and he does not receive government benefits. Unlike many low-income New Yorkers, Richard relies on the private sector; he is far less entangled with government programs than someone like Joe, and therefore has far less to fear when facing criminal conviction.

Not knowing the strength of the evidence against him, and knowing that if he goes to trial and is convicted, he faces up to a year in jail plus all of the collateral consequences,<sup>28</sup> Joe gets nervous. His attorney, a dedicated and caring public defender, cannot fully investigate his case because her few investigators are occupied with more serious felony cases. The regular court dates begin to wear on him. His boss is losing his patience with his absences. Joe begins to

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27. N.Y. PENAL LAW § 220.03 (McKinney 2017).

28. See N.Y. PENAL LAW § 10.00(4) (McKinney 2017); *infra* notes 33–36 and accompanying text.

consider taking a plea bargain, any plea deal that would not send him to jail. He even begins to consider the idea of taking a deal that *would* involve a short stint in jail, or one that would permanently give him a criminal record.

Assuming that Joe and Richard meet certain eligibility requirements, such as a lack of a criminal record, both might be eligible for a diversion program, which would allow for their charges to be dropped or reduced upon completion of a treatment program. However, these programs are often costly in time and dollars, and indigent defendants often have a harder time completing the programs successfully for reasons entirely out of their control.<sup>29</sup> In my practice, several of my clients who entered court-mandated inpatient programs told me that the conditions they encountered were only slightly better than those at Rikers Island. I saw clients, fully engaged in court-mandated treatment programs, struggle or fail for reasons having nothing to do with their willingness to comply. One had to borrow from several family members, friends, and his girlfriend to afford the twenty-five dollars per treatment session that was charged. Another, months into an inpatient drug treatment program during which he had remained completely sober, requested permission to leave for the day to see his children. After visiting with them, he stopped in at the courthouse to meet with his case manager because he wanted extra support and guidance. Because he made the extra stop at the courthouse and did not return to the program directly after seeing his children, the program took away his privileges, mandated additional time, and nearly ejected him altogether.

When defendants fail to complete their programs successfully, they face a previously negotiated jail alternative, which is often significantly more time than would have been offered in the first place. These alternatives are put in place to create a strong incentive to comply, but often end up punishing those who are poor, disorganized, or suffer from addiction or mental health issues. One client of mine, charged with felony drug sale for facilitating a small drug hand-off with an undercover officer, turned down a nine-month jail offer and instead embarked on a program. When he relapsed, he failed the program and was sentenced to the jail alternative, which, in his case, was three and a half years in an upstate prison. After he was released, he relapsed again.

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29. See Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html> [<https://nyti.ms/2hEi1kG>].

If Richard does not want a formal diversion program, he might ask the prosecutor for the chance to plead to a lesser charge if he completes a drug treatment program on his own. Richard, who has excellent medical coverage, and, if he really needed to, could afford to pay out-of-pocket, has more options than Joe.<sup>30</sup> Richard may be able to take a medical leave from his job to complete it if it is an inpatient program, or request a modified work schedule if it is an outpatient program. He might also find a program that meets on nights or weekends. Joe, covered only by Medicaid, would have far fewer options and might have to choose between his job and the program, as many are held during the week when he has work. Even if Joe finds a Medicaid-covered program that meets outside of regular work hours, his schedule is subject to change with little notice, and chances are high that he would end up having to either miss work or fail out of the program.<sup>31</sup>

The prosecutor may give Richard and Joe the option to pay a fine instead of completing a drug program. Of course, this option will be more readily available to Richard than to Joe. Unable to afford a drug program or pay a fine, Joe is more likely to accept a jail sentence. Ironically, the jail time, like the drug program, may ultimately cost Joe his job and end up being more expensive than it would have been for Richard.

### E. Aftermath

Let us assume that Joe and Richard both resolve their cases via plea bargain, as the overwhelming majority of defendants do.<sup>32</sup> In addition to a costlier sentence, Joe stands a good chance of having to accept a higher criminal charge than Richard. He may have to plead guilty to a misdemeanor—resulting in a criminal conviction—instead of a non-criminal violation, which is more likely for Richard. The reasons for this are similar to those above: Joe is more likely to feel pressure to take a plea early because he is incarcerated, or, if he is not incarcerated, because repeated court appearances are expensive and

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30. Although many addiction treatment programs accept insurance, offer some financial aid, or have financing options, many remain out of reach for the uninsured or for those on Medicaid. See *Cost of Drug and Alcohol Rehab: Understanding the Cost of Rehab*, ADDICTION CENT., <https://www.addictioncenter.com/rehab-questions/cost-of-drug-and-alcohol-treatment> [<https://perma.cc/3D3V-T4FP>].

31. See LONNIE GOLDEN, ECON. POLICY INST., BRIEFING PAPER NO. 394: IRREGULAR WORK SCHEDULING AND ITS CONSEQUENCES (2015), <http://www.epi.org/files/pdf/82524.pdf> [<https://perma.cc/Z5JZ-G2PB>].

32. See *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (noting that ninety-four percent of state defendants and ninety-seven percent of federal defendants plead guilty).

stressful for him. He therefore might not have the luxury to wait for an acceptable offer, which often comes months or years after a case is opened. Richard can afford to wait.

The higher charge would mean more collateral consequences for Joe. The quantity and scope of collateral consequences attached to criminal convictions have proliferated in recent years. This is due in part to new rules that bar people with certain convictions—often low-level convictions—from certain benefits such as housing, employment, student loans, child custody, and immigration status.<sup>33</sup> It also owes to the increased ease with which arrest and conviction records can be obtained by private and government parties.<sup>34</sup> According to Professor Michael Pinard, collateral consequences “burden individuals long past the expiration of their sentences and . . . individually and collectively, frustrate their ability to move past their criminal records.”<sup>35</sup>

Joe’s criminal record might make it impossible for him to stay in his apartment, which he rents through the New York City Housing Authority. In New York, misdemeanor convictions exclude a person from public housing for either three or four years, depending on the severity of the misdemeanor.<sup>36</sup> A conviction might make it difficult for him to keep his job or to find a new one; if he is not a citizen, it could make him deportable or keep him from naturalizing. In New York and most other jurisdictions, higher charges come with higher fines and fees, which, if Joe cannot afford them, will count against his credit. Richard, facing lower fines and fees, can pay them easily, preserving his credit score.

## II. CLOSING THE GAP: PROPOSALS

### A. Arrest: Stop Creating Criminals

One concrete change we can implement to make Joe’s story more closely resemble Richard’s would be to eliminate policing policies that ensnare low-income people who pose little or no risk to society.

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33. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 *STAN. L. REV.* 611, 621 (2014).

34. *See id.*

35. Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 *J. CRIM. L. & CRIMINOLOGY* 1213, 1214 (2010).

36. This period begins when the individual has completed their sentence, assuming he or she has no further convictions or pending charges. *See* JOHN BAE ET AL., VERA INST. OF JUSTICE, *COMING HOME: AN EVALUATION OF THE NEW YORK CITY HOUSE AUTHORITY’S FAMILY REENTRY PILOT PROGRAM* 9 (2016).

This includes hot spot and broken windows policing, which focus police efforts on poor neighborhoods and minor offenses.<sup>37</sup> Broken windows theory,<sup>38</sup> which holds that preventing quality-of-life offenses such as drinking in public, turnstile jumping, and vandalism can help maintain order and prevent more serious crime, was implemented as a policing strategy in New York City in the 1990s by police commissioner William Bratton and mayor Rudolph Giuliani.<sup>39</sup> Misdemeanor and violation arrests increased sharply.<sup>40</sup> According to Human Rights Watch, in 1989, half of arrests in New York City were for felonies.<sup>41</sup> Twenty years later, almost three-quarters, 72%, were for misdemeanors.<sup>42</sup> Most of those arrested for misdemeanors, 82.4%, were black or Hispanic.<sup>43</sup> In Manhattan during 2016 alone, police arrested nearly 25,000 people for fare evasion—usually, jumping the turnstile in the subway—a policy that has recently come under scrutiny by prosecutors for its disproportionate impact on low-income people.<sup>44</sup>

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37. See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 292 (2009) (“Many of [the] costs are externalized, born by individual arrestees, their families, their communities, and the larger community of taxpayers to the extent that arrests and criminal records lead to further arrests, incarceration, or un(der)employment.”); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297–300 (2011) (discussing the significant collateral consequences of minor misdemeanor convictions); see also Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1062–66 (2013); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1331–37 (2012).

38. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465> [<https://perma.cc/NHE5-URLW>].

39. See Reuven Fenton, *Bill Bratton Still Believes in ‘Broken Windows’ Policing*, N.Y. POST (June 24, 2016, 1:16 AM), <http://nypost.com/2016/06/24/bill-bratton-sill-believes-in-broken-windows-policing> [<https://perma.cc/8HJF-M98M>]; William Wan, *Does New York City’s ‘Broken Windows’ Policing Work?: New Report Says No*, WASH. POST (June 22, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/06/22/does-nypds-broken-windows-policing-work-new-report-says-no> [<https://perma.cc/FF8K-MSUV>].

40. For an analysis of misdemeanor arrests in New York City, see Kohler-Hausmann, *supra* note 33, at 614.

41. See HUMAN RIGHTS WATCH, *supra* note 19, at 10.

42. *Id.*

43. *Id.* In the Bronx in 2016, only thirty-one percent of adult arrests were for felonies. See N.Y. State Div. of Criminal Justice Servs., *Adult Arrests: 2007–2016, Bronx* (Feb. 17, 2017), <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/Bronx.pdf> [<https://perma.cc/W7M9-8HT3>].

44. James C. McKinley Jr., *For Manhattan Fare Beaters, One-Way Ticket to Court May Be Over*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/nyregion/subway-fare-beating-new-york.html> [<https://nyti.ms/2urQNmM>].

We can also eliminate most entrapment-like arrest policies, which we might call “created crime.” Created crimes are those offenses that never would have occurred if not for police involvement. They include sting operations, wherein undercover officers pose as prostitutes or as patrons and try to get civilians to agree to a sexual transaction before making an arrest, and “buy and bust” drug operations, wherein undercover officers posing as drug users target individuals who appear to them to be users—very often, poor people of color—and ask them to facilitate a small drug sale.<sup>45</sup> The target then finds a street-level dealer and facilitates a deal between the undercover and the dealer, after which he or she is promptly arrested for drug sale (as opposed to mere possession).<sup>46</sup> Much of the time, only the facilitator is arrested, not the dealer.<sup>47</sup> These sting operations target individuals in low-income neighborhoods and tend to ensnare some of society’s most vulnerable members—in these cases, drug users and sex workers. These people are often indigent addicts whose criminal behaviors harm them more than others. Targeting people to catch them in acts that otherwise would never have taken place is tremendously costly for police departments, and therefore taxpayers, requiring many officers’ labor, as compared to patrol arrests, which usually require only one or two officers.<sup>48</sup> Further, they create the very real possibility of enticing people into addictive and illegal behaviors that they may have worked hard to avoid.<sup>49</sup>

In my experience as a public defender, I have seen more than one individual relapse after long periods of sobriety because of a “buy and bust” sting operation. One client, an immigrant in his mid-fifties, described the drug set-up upon meeting me through the bars of central booking soon after his arrest. He then put his head in his

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45. See Goldstein, *supra* note 9.

46. *Id.*

47. *Id.* (“The big underlying question is why a nine-person buy-and-bust team did not follow [the defendant] to the dealer where he got [the drugs] from . . . . Everyone [on the jury] was scratching their heads, wondering what the heck is wrong with our system.”).

48. *Id.* (“One juror said that what troubled the jury the most was that a nine-person narcotics squad—which included two undercover officers, several investigators and supporting officers—would bring a case against a single addict.”).

49. A defendant in a Manhattan buy-and-bust case told a reporter:

For him to put the money in my hands, as an addict, let me tell you what happens . . . . I like to think I could resist it, but I’m way beyond that. My experience has shown me that 1,000 times out of 1,000 times, I will be defeated.

*Id.*



hands and said, “Now I’m in jail, *and* I’m relapsed. Now what?” Another client, a middle-aged woman, told me that her husband of fifteen years had recently left her, so she had been in a particularly vulnerable mindset, financially and emotionally, when an undercover officer pulled up in his car, lowered his window, and solicited sex from her in exchange for money. Police departments, in short, should eliminate policies that disproportionately pull indigent and vulnerable people into the criminal justice system, especially those who pose little or no danger to society.

### B. Bail Hearing: Stop Incarcerating Poverty

Arraignments, or bail hearings, need not cost indigent defendants more than wealthy ones. First, everyone should have legal representation at a hearing when bail is decided. People who are represented by an attorney are two and a half times more likely to be released without bail being set than those without counsel.<sup>50</sup> Further, defendants representing themselves might unknowingly waive certain rights or foreclose certain defenses, making their cases less successful later on. Equally important, judges must stop allowing people to sit in jail throughout their cases simply because they cannot afford to pay bail. An analysis of income data and bail data by the Prison Policy Initiative revealed that the median bail bond amount in the United States equals eight months of income for the typical detained defendant.<sup>51</sup> Seventy percent of people in jail have been convicted of no crime; they are simply waiting for pending cases, most of which involve non-violent accusations, to be resolved.<sup>52</sup>

If a person is held in jail during the pendency of the case, her chances of pleading guilty increase significantly, as do her non-bail court fees.<sup>53</sup> A study conducted over the course of a decade in New

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50. See Douglas L. Colbert et al., *Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2001) (summarizing an eighteen-month study in Baltimore, Maryland).

51. See BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 3 (2016), <https://www.prisonpolicy.org/reports/incomejails.html> [<https://perma.cc/9DYT-SW2C>].

52. See PETER WAGNER & BERNADETTE RABUY, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2017 (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html> [<https://perma.cc/6XJ5-MRVR>].

53. One Philadelphia study found that “pretrial detention leads to a 13% increase in the likelihood of being convicted, an effect largely explained by an increase in guilty pleas among defendants who otherwise would have been acquitted or had their charges dropped.” See Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 17–18 (Jan. 12, 2017) (unpublished manuscript),

York City concluded that pretrial detainees were more likely to be convicted, to be sentenced to incarceration, and to receive longer sentences than those who were not detained pretrial.<sup>54</sup> Specifically, this study found that among defendants accused of misdemeanors, those who were released after a bail hearing were convicted fifty percent of the time, those who were incarcerated on bail for part of the pendency of their cases were convicted sixty percent to seventy percent of the time, and those who were detained for the entire pendency of the case were convicted ninety percent of the time.<sup>55</sup>

We need individualized bail assessments based on actual information about what defendants can afford, so that bail can serve its intended purpose: to create a meaningful incentive for people to return to court during their cases. After all, the purpose of bail is to ensure that people will comply with court obligations until the case is finished, while remaining in the community; it is not to incarcerate low-income people on the basis of an as-yet unproven accusation.<sup>56</sup> For Joe, putting up \$200 is a stronger incentive to return to each court date than a bail of \$2000 would be to Richard. Judges should conduct an inquiry and determine, based on a person's employment and their family's resources, what an appropriate sum might be to make sure he returns to court, if any bail is needed at all. In the vast majority of cases, people return to court because they are required to do so, and they do not need any external incentive.<sup>57</sup> Releasing people without

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<http://www.econ.pitt.edu/sites/default/files/Stevenson.jmp2016.pdf> [<https://perma.cc/V9LN-ESP3>]. The study also found that “[p]retrial detention also leads to a 41% increase in the amount of non-bail court fees owed and a 42% increase in the length of the incarceration sentence.” *Id.* at 1. Another controlled study, conducted in Kentucky, reached similar conclusions. See CHRISTOPHER T. LOWENKAMP ET AL., ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_state-sentencing\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf) [<https://perma.cc/W82K-658V>].

54. See MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., DECADE OF BAIL RESEARCH IN NEW YORK CITY 115, 127 (2012), <http://www.nycja.org/library.php> (follow “Download” hyperlink beside “A Decade of Bail Research in New York City”) [<https://perma.cc/R2MM-X4MW>].

55. *Id.* at 116.

56. See *How Courts Work: Steps in a Trial*, A.B.A. DIV. FOR PUB. EDUC., [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/bail.html](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail.html) [<https://perma.cc/4XRO-RWDC>] (“Bail is the amount of money defendants must post to be released from custody until their trial. Bail is not a fine. It is not supposed to be used as punishment. The purpose of bail is simply to ensure that defendants will appear for trial and all pretrial hearings for which they must be present.”).

57. In New York City in 2011, among defendants who were released either on their own recognizance or by posting bail, eighty-six percent appeared at every court

bail, or setting affordable bail to serve its original purpose, would eliminate the need for low-income people to be removed from their lives, spend their cases in custody, feel tremendous pressure to plead guilty, or lose vast sums of money to bail bondsmen.

Some jurisdictions, notably New Jersey,<sup>58</sup> Maryland,<sup>59</sup> Chicago,<sup>60</sup> and New Mexico<sup>61</sup> have implemented wholesale reforms to their bail system, some of them eliminating cash bail altogether. New Jersey has replaced monetary bail with a risk assessment system, whereby defendants are assessed for likelihood of flight and new criminal activity, not ability to pay.<sup>62</sup> Politicians<sup>63</sup> and judges<sup>64</sup> have, in many cases, helped to spearhead these new measures. Indeed, it seems that this idea is moving from the fringes to the mainstream. One marker of just how lucrative it is for bail bondsmen to extract money from those who cannot afford their bail is how fiercely the bail bonds industry is fighting these efforts with lawsuits and political pressure.<sup>65</sup>

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date. See N.Y.C. OFFICE OF THE CRIMINAL JUSTICE COORDINATOR, CRIMINAL JUSTICE INDICATOR REPORT 3 (2013), [http://www.nyc.gov/html/om/pdf/2013/criminal\\_justice\\_indicator\\_report\\_summer\\_2013.pdf](http://www.nyc.gov/html/om/pdf/2013/criminal_justice_indicator_report_summer_2013.pdf) [<https://perma.cc/C56Z-PRC9>].

58. See generally Memorandum from Christopher S. Porrino, N.J. Att'y Gen., to Dir., Div. of Crim. Justice (May 24, 2017), [http://nj.gov/oag/newsreleases17/Revised-AG-Directive-2016-6\\_Introductory-Memo.pdf](http://nj.gov/oag/newsreleases17/Revised-AG-Directive-2016-6_Introductory-Memo.pdf) [<https://perma.cc/9ADV-GPM8>].

59. See Michael Dresser, *Maryland Senate Passes Bill to Pare Back Court's Bail Rule*, BALT. SUN (Mar. 22, 2017, 3:16 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-bail-reform-senate-20170322-story.html> [<https://perma.cc/PY5S-5LMK>].

60. See Andy Grimm, *Latest Move in Bail Reform: Chief Judge Replaces All Bond Court Judges*, CHI. SUN-TIMES (Sept. 15, 2017, 5:42 PM), <http://chicago.suntimes.com/chicago-politics/latest-move-in-bail-reform-chief-judge-replaces-all-bond-court-judges> [<https://perma.cc/Z4JP-F5BS>].

61. See Associated Press, *NM Voters Pass Constitutional Amendment on Bail Reform*, KOB4 (Nov. 8, 2016, 11:29 PM), <http://www.kob.com/new-mexico-news/nm-voters-pass-constitutional-amendment-on-bail-reform-crime-prison-sentencing/4313409/> [<https://perma.cc/CPZ2-RD7C>].

62. See Porinno, *supra* note 58, at 10.

63. See Casey Tolan, *Kamala Harris, Rand Paul Introduce Bail Reform Bill*, MERCURY NEWS (July 20, 2017, 4:21 PM), <http://www.mercurynews.com/2017/07/20/kamala-harris-bail-reform-rand-paul-bill-congress> [<https://perma.cc/DE2Y-SV8U>].

64. See James C. McKinley, Jr., *State's Chief Judge, Citing 'Injustice,' Lays Out Plans to Alter Bail System*, N.Y. TIMES (Oct. 1, 2015), <https://www.nytimes.com/2015/10/02/nyregion/jonathan-lippman-bail-incarceration-new-york-state-chief-judge.html> [<https://nyti.ms/2klsFy2>].

65. New Jersey Governor Chris Christie has commented, “[t]he bail bonds community has made a fortune over the years predominantly on the backs of poor people in New Jersey.” Sergio Bichao, *'Freezing Crook' Arrested Day After Release—But Christie Defends Bail Reform*, N.J.101.5 (Feb. 13, 2017, 8:31 PM), <http://nj1015.com/freezing-crook-arrested-day-after-release-cops-say-but-christie-defends-bail-reform> [<https://perma.cc/9ELE-2Z5G>]; see also Alan Feuer, *New Jersey Is Front Line in a National Battle Over Bail*, N.Y. TIMES (Aug. 21, 2017),

### C. Pending Case: Stop Dragging Criminal Defendants to Court

One clear change we can make to create more equity during the pendency of criminal cases is to stop requiring defendants to be present for each court appearance. Civil litigants generally are not required to be present and it is unclear why court appearances should be any more necessary for criminal litigants.<sup>66</sup> Judges might require appearances on certain court dates, such as those on which a plea is anticipated or a case is set for trial, but there is no reason for defendants to be present for other appearances, such as when decisions are made on legal motions filed by attorneys.<sup>67</sup> For low-income clients whose lives and schedules are at times more chaotic and less predictable than those of middle- or upper-class defendants, getting to court can be challenging through no fault of their own.<sup>68</sup> A judge once refused to believe that my client, an elderly woman who had recently suffered a heart attack, was late to court because the elevator in her public housing complex was broken and she could not walk down the twelve flights of stairs. The judge issued a warrant for my client's arrest. Once we provided proof that the elevator was indeed broken, the judge vacated and expunged the warrant. It can be difficult for judges and prosecutors, who are generally not as low-income as the indigent defendants they see every day, to understand the challenges that are inherent in daily life for them. The consequences of those misunderstandings can be disastrous for defendants. Sparing defendants the burden of missing a day of work

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<https://www.nytimes.com/2017/08/21/nyregion/new-jersey-bail-reform-lawsuits.html> [<https://nyti.ms/2viV4tL>]; Victoria Prieskop, *Bail Bondsmen Say New Mexico Supreme Court Ruined Them*, COURTHOUSE NEWS SERV. (July 31, 2017), <https://www.courthousenews.com/bail-bondsmen-say-new-mexico-supreme-court-ruined> [<https://perma.cc/58U6-7HGW>]; Ryan J. Reilly, *Dog The Bounty Hunter and a Top Conservative Lawyer are Trying to Save the Bail Industry*, HUFFINGTON POST (Feb. 23, 2017, 7:37 PM), [http://www.huffingtonpost.com/entry/bail-industry-unconstitutional\\_us\\_58adf025e4b05ca474a04011](http://www.huffingtonpost.com/entry/bail-industry-unconstitutional_us_58adf025e4b05ca474a04011) [<https://perma.cc/8SC9-R3UW>].

66. See David Feige, Opinion, *Waiting and Waiting . . . for Justice*, N.Y. TIMES (May 1, 2013), <http://www.nytimes.com/2013/05/02/opinion/waiting-and-waiting-for-justice.html> [<https://nyti.ms/YfjQqV>] (arguing for criminal defendants to be excused from most routine court dates).

67. Common legal motions in misdemeanor criminal cases in New York include motions for a judge to dismiss a case, to exclude or admit certain evidence, or to order pre-trial evidentiary hearings.

68. The frustration of navigating a low-level state criminal charge has been well documented. See generally, e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1992) (studying case processing in Connecticut courts and concluding that the real costs to defendants in low-level cases are not the sentences imposed but rather the costs incurred by being processed through the system, such as lost wages and bail bond commissions).

or finding childcare for each and every court date over a period of months or years would allow them to fight their cases instead of feeling coerced into accepting a plea bargain.

#### **D. Plea Negotiations: Create Alternatives to Incarceration for Everyone**

As has been well documented, our criminal justice system is no longer a trial system; it is primarily a plea system. Approximately ninety-five percent of criminal cases end in plea bargains and that is especially true for low-level state charges such as the ones considered above.<sup>69</sup> The options available to defendants when considering a plea bargain are therefore of paramount importance. Defendants often accept whatever plea bargains are offered to them—either because they have accepted responsibility for the offense or because they cannot afford for the case to continue any longer. Those in the latter category may be forced to accept an incarceratory sentence when meaningful alternatives to incarceration, such as rehabilitation programs or the payment of fines, are unavailable to them. If we want to create a more equal system, one where the prisons and jails are not filled disproportionately with low-income people, we must create meaningful alternatives to incarceration and make them accessible to all. This means programs that are fully funded, have flexible hours, and do not require insurance. For every option that allows defendants to pay to resolve their cases, instead of suffering through incarceration, we should require that a free, flexible option be offered as well.<sup>70</sup>

#### **E. Aftermath: Ban Collateral Consequences**

Finally, the vast majority of collateral consequences should be banned. Collateral consequences affect the poor disproportionately because they limit access in particular to government programs for low-income people, the very people for whom many of these programs were created and the people who rely on them most to live, work, study, and put food on the table. These include student loans,

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69. See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty> [<https://perma.cc/EWT7-QZK9>].

70. It should be noted that those charged in New York City are relatively more fortunate than those in other jurisdictions, as funded alternative-to-incarceration programs are available in all of the boroughs, although they are not available to every criminal defendant in every case. See, e.g., *Operating Programs*, CTR. FOR COURT INNOVATION, <http://www.courtinnovation.org/projects> [<https://perma.cc/3V43-PV6S>].

public housing, public-sector jobs, and welfare.<sup>71</sup> The Supreme Court has held that public housing agencies can evict tenants for drug-related activity of *non-tenant* relatives or guests, regardless of whether the tenants knew, or should have known, about that activity.<sup>72</sup> This means that a low-income family of four, living lawfully in public housing, can be made homeless because, unbeknownst to them, a cousin comes to visit, carrying two Percocet pills in his pocket that were not prescribed to him. Of course, for those living in non-subsidized housing, there is no such risk.

Most collateral consequences have no relation to the offenses they accompany. A conviction for marijuana possession in New York, for example, can disqualify a person from public housing for several years and can make a non-citizen deportable.<sup>73</sup> Those consequences that do seem tailored to the conviction, such as those for sex offenses, have been widely criticized by those on the left and the right for being tremendously restrictive, unduly harsh, and ineffective at preventing future harm.<sup>74</sup>

### CONCLUSION

For both Richard and Joe, getting arrested and facing criminal charges was painful, degrading, and scary. But the footprint it left on Richard's life was smaller and more contained. The night he was arrested was one of the worst nights of his life; he tried to get some

71. See Eli Hager, *Six States Where Felons Can't Get Food Stamps*, MARSHALL PROJECT (Feb. 4, 2016, 7:15 AM), <https://www.themarshallproject.org/2016/02/04/six-states-where-felons-can-t-get-food-stamps> [<https://perma.cc/GY4M-U7W9>].

72. See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002).

73. See BAE ET AL., *supra* note 36, at 9.

74. A DOJ-funded study conducted in New Jersey compared sex offense trends during the ten years before and after the implementation of Megan's Law, both a federal law and an informal name for state laws, requiring law enforcement to make information about registered sex offenders available to the public. See KRISTEN ZGOBA ET AL., U.S. DEP'T OF JUSTICE, *MEGAN'S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 2* (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf> [<https://perma.cc/ZVT2-NP2K>] ("Megan's Law has no effect on community tenure (i.e., time to first re-arrest) . . . no demonstrable effect in reducing sexual re-offenses . . . no effect on the type of sexual re-offense or first time sexual offense[, and] no effect on reducing the number of victims involved in sexual offenses."); see also, HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S.* 3 (2007), <https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> [<https://perma.cc/H3QF-J4DD>] ("The evidence is overwhelming . . . that these laws cause great harm to the people subject to them. On the other hand, proponents of these laws are not able to point to convincing evidence of public safety gains from them."); Eli Lehrer, *Rethinking Sex Offender Registries*, 26 NAT'L AFF. 52, 54 (2016) ("Current registries are too inclusive, are overly restrictive, and end up hurting some of those they are intended to help.").

sleep on the metal benches in central bookings, he declined a cheese sandwich and carton of milk, opting for hunger, and waited to see his attorney in court. With a clean record, a private attorney, a steady job, and relatives in the courtroom to support him, Richard was quickly released on his own recognizance—that is, without any bail being set. Over the following eight months, he appeared on his case six times. He did not mind these appearances, as they only took a couple of hours and he never lost out on wages or annoyed his boss or co-workers by attending. Before each appearance, his attorney and her investigator worked to gather evidence, research the relevant law, and negotiate with the prosecutor. Initially, the prosecution offered to reduce the criminal misdemeanor charge to a non-criminal violation if Richard would complete a brief outpatient drug program of his choice. He was willing to do a treatment program, and could afford to, but he preferred a less onerous sentence. He asked his attorney to keep pushing for a non-criminal violation without a treatment program. Eventually, upon presenting some of her investigator's findings to the prosecutor, his attorney prevailed. Richard pled guilty to a non-criminal violation of disorderly conduct,<sup>75</sup> paid \$120 in court surcharges,<sup>76</sup> and left. His job, his housing, and his life remained intact. A source of embarrassment at first, the arrest later became a story he told at parties.

For Joe, the costs were higher. The arrest and arraignment were painful and degrading, especially because he did not have access to an attorney until he reached court. With no one to advocate for him, Joe made an ill-advised statement to the police. Joe's wife wanted to come support him at his arraignment, but she was working the night shift when he went before the judge, and she did not have the flexibility to leave. Without any family in the courtroom to vouch for him, and after the prosecutor used his statement to the police against him, Joe was already in a worse position than Richard, even before the judge set bail. Cash bail allowed Richard to buy his freedom quickly, but for Joe, because his family had less money on hand, bail was costlier. Joe was taken to Rikers Island, during which time his wife paid over \$200 to cover childcare so that she could go to work. It took his wife four days to collect enough money for collateral, get a bond, and wait for the bail bondsman to bail him out; at that point, Joe was released. Luckily, Joe was a valued employee, and his boss let him return to work after missing four days without pre-approval.

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75. N.Y. PENAL LAW § 240.20 (McKinney 2017).

76. N.Y. CRIM. PROC. LAW § 300.10 (McKinney 2017).

Joe appeared on his case three times, and each time he lost a day of wages. Without access to the evidence against him, knowing that he faced up to a year of incarceration, with his boss's patience wearing thinner with each day of work he missed, and with no end to the case in sight, Joe decided to take a plea. He knew that a drug treatment program was out of the question for him, given the expense and his variable schedule, so he decided to take the only other offer available to him: pleading guilty to the top charge, criminal possession of a controlled substance, a Class A misdemeanor, and a sentence of time served.<sup>77</sup> Unlike the disorderly conduct charge that Richard accepted, the misdemeanor would give him a permanent criminal record, would put his public housing in jeopardy for years, and would come with higher surcharges—which, if he failed to pay, would count against his credit—but he knew he could not hold out any longer for a better offer or for trial. Making the case end was the only way to keep his job and his housing intact for the time being. As for what would happen in the future, he had to cross his fingers and wait.

In our current criminal justice system, Joe pays more. He pays more in higher odds of being arrested; in his likelihood of being incarcerated throughout his case for inability to pay bail; in costs owed to bail bondsmen, childcare providers, and lost wages; in life disruptions such as interference with employment and housing; in time spent waiting in court for each scheduled court appearance; in constrained options for resolving the case; and, when alternative resolutions fall through, in having a criminal conviction for the rest of his life. If New York implemented the above proposed solutions, Joe would not face a higher likelihood of being arrested simply for living in the Bronx; he would not face the possibility of being held on bail without being convicted of any crime; he would not have to lose a day of wages, and possibly his job, each time his case was scheduled in court; he would have an equal opportunity to participate in programs that provide alternatives to incarceration; and he would not risk losing his job, his home, and his other benefits simply because he was charged with a crime. In short, the process of misdemeanor criminal justice would be less coercive for Joe, leaving him freer to avail himself of his constitutional rights, including his right to a trial and his right to remain silent. Joe would still have a harder time finding decent jobs and housing, and a dollar to Joe would still be worth much more than a dollar to Richard. Still, at the very least, our

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77. N.Y. PENAL LAW § 220.03 (McKinney 2017).



criminal justice system would stop charging poor people more simply for the crime of being poor.