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## Diary of a Civil Public Defender: Critical Lessons for Achieving Transformative Change on Behalf of Communities

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**DIARY OF A CIVIL PUBLIC DEFENDER:  
CRITICAL LESSONS FOR ACHIEVING  
TRANSFORMATIVE CHANGE ON BEHALF OF  
COMMUNITIES**

*Runa Rajagopal<sup>\*†</sup>*

|  |     |
|--|-----|
| Introduction .....   | 876 |
| I. Lesson 1: Myth Versus Reality – Crime Is Not What You<br>Think It Is .....    | 881 |
| A. Criminality and the War on Drugs.....   | 885 |
| B. Bias by Police, Prosecutors, and Judges in the Criminal<br>Court Process..... | 887 |
| II. Lesson 2: Poverty Is a Pipeline to Systems Involvement .....                 | 890 |
| III. Lesson 3: No Civil Consequence Is “Collateral” .....                        | 893 |
| IV. Lesson 4: We Need a Civil <i>Gideon</i> .....                                | 896 |
| V. Lesson 5: We Are All Defenders.....   | 899 |
| Conclusion.....  | 901 |

**INTRODUCTION**

I am a *civil* public defender.<sup>1</sup> When most people think of public defenders, they do not think of me. They think of overworked,

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<sup>†</sup> In its nineteenth year, the Civil Action Practice is the largest, most comprehensive, integrated civil practice in a public defender office in the country. The Bronx Defenders was founded in 1997 and serves over 28,000 people per year.

underpaid, under-resourced criminal defense attorneys who have too many cases to count; they think of the attorneys who bargain guilty pleas on behalf of their clients, and who struggle to remember one client from the next. They picture the “meet ‘em, greet ‘em, and plead ‘em” approach — all taking place in criminal court.

As a public defender who engages in holistic defense,<sup>2</sup> I work utilizing a model that centers clients and acknowledges the forces that drive people into criminal court and other legal systems. Holistic defense requires collaboration across disciplines to serve clients beyond an accusation, and to mitigate against the instability that results from an arrest or other systems involvement.<sup>3</sup> Our clients are people, not just cases. Our focus is to radically transform how people are represented in the legal system, and to create lasting change for the communities we serve.

Civil attorneys and advocates like me work with criminal defense attorneys, social workers, investigators, family attorneys, immigration advocates, community organizers and other partners to offer vital

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1. A public defender is defined as an attorney appointed by the courts and provided by the government to represent and advise those who cannot afford to hire a private attorney, typically in criminal court. *See Public Defender*, BLACK’S LAW DICTIONARY (10th ed. 2014).

2. Refer to The Bronx Defenders’ website for further reading on holistic defense. BRONX DEFENDERS, <https://www.bronxdefenders.org> [<https://perma.cc/DA3S-DTFR>]; *see generally* Robin G. Steinberg, *Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013); J. McGregor Smyth, *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42 (2009).

3. “Systems” or “justice” involvement are used interchangeably in this Essay and refer to deprivations that may occur in addition to an arrest. These terms expand the definition of criminal justice involvement to be inclusive of other courts, administrative fora, and legal systems and recognizes the processes other than criminal court that trap people and communities. For example: “child welfare” cases where a parent is accused of abuse or neglect in family court may lead to the separation of a child from her parent and lead to other consequences. *See, e.g.*, Larissa MacFarquhar, *When Should a Child Be Taken from His Parents?*, NEW YORKER (Aug. 7, 2017), <https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents> [<https://perma.cc/G2BM-TR5Q>]. Another example includes immigration cases where accusation of a crime can result in loss of status, or, in extreme cases, deportation. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 365 (2010) (recognizing the “severity of deportation—’the equivalent of banishment or exile,” and deciding that those accused have a Sixth Amendment right to be informed of the potential enmeshed consequences of a criminal conviction). Yet another example: eviction proceedings based on a drug activity can lead to loss of a home or displacement and is driven by police and prosecutors in civil courts. *See, e.g.*, Scott D. Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York’s Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 551 (2008).

information and creative solutions to our clients who are experiencing overwhelming crises. Working together with our clients, we fight to ensure their voices are heard and their humanity is acknowledged. I am a part of a growing group of non-criminal advocates *redefining* what it means to be a public defender. As holistic practice continues to gain recognition for its results,<sup>4</sup> there is also greater acknowledgement that we need a diversity of roles and expertise to best serve and impact communities most affected by poverty, inequity, mass criminalization and mass incarceration.

As a public defender in civil spaces, I regularly bear witness to the extended reach of systems involvement. By “systems involvement,” I mean that when individuals stand accused of a crime, they are swept up in far more than the criminal court process alone.<sup>5</sup> Rather, they are also trapped in a web of other, equally oppressive legal systems that may affect their ability to keep a job, a home, their government benefits, their possessions, their children, or even their right to remain in the country.<sup>6</sup> In addition to facing criminal penalties, fees, fines and the loss of liberty, less understood are the host of civil punishments, sanctions, disqualifications and forfeitures a person who stands accused will almost certainly experience, sometimes in perpetuity. All that is needed is an accusation to trigger sometimes insurmountable consequences stemming from law enforcement contact. Regardless of whether a person fights the case, is found not guilty, pleads to a lesser charge, or gets the charges dismissed, that individual and those closest to them will suffer the unquantifiable

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4. A ten-year study found that the implementation of The Bronx Defenders’ holistic public defender model in the Bronx helped clients avoid 1.1 million days of incarceration, reduced incarceration rates by sixteen percent, cut pre-trial detention by nine percent, shortened sentence length by twenty-four percent, and saved New York taxpayers an estimated \$165 million on housing costs alone. See James Anderson et al., *The Effects of Holistic Defense of Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 823 (2019).

5. See MacFarquhar, *supra* note 3; Levy, *supra* note 3, at 822.

6. See MacFarquhar, *supra* note 3; Levy, *supra* note 3, at 822; see also Amanda Geller, *The Process Is Still the Punishment: Low-Level Arrests in the Broken Windows Era*, 37 CARDOZO L. REV. 1025, 1054–55 (2016); John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, 19 FEDERALIST SOC’Y REV. 36, 38–41 (2018); see also Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 18–19 (2014); Wade Askew, *Keeping Promises to Preserve Promise: The Necessity of Committing to a Rehabilitation Model in the Juvenile Justice System*, 20 GEO. J. ON POVERTY L. & POL’Y 373, 373 (2013) (discussing increased recidivism in the juvenile justice system caused by a system-wide approach of focusing on punishment over rehabilitation).

costs and irreparable harms of justice involvement in their lives far beyond their criminal case.

In addition to seeing the ways in which criminal justice involvement leads to what is referred to as “collateral” civil consequences, every day public defenders also witness the impact of structural barriers and institutional forces. Poverty, racism and inequality are roadblocks to basic and critical civil necessities like stable jobs, affordable homes in safe environments, quality education, healthy food — the list goes on. These roadblocks, in turn, drive people into connected, oppressive legal systems that devastate and ruin their lives. This harsh and unjust reality means that a low-income Black person living in the Bronx is more likely than a middle-class white person on the Upper West Side to be arrested, prosecuted in criminal court, have contact with the child welfare system, face an eviction, be subject to deportation, or face the abuse of any number of other types of interrelated systems involvement — just because of what they look like, how much money they have, and where they live.<sup>7</sup> Our clients often become our clients due to the fact that they are poor, Black or Brown, and living in a particular neighborhood.

Based on the information, data, research, scholarship, advocacy, and powerful stories of those affected, there are efforts at every level — federal, state and local — to reform policies and practices, as well as to address and reverse the consequences of criminal injustice.<sup>8</sup>

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7. MEREDITH PATTEN ET AL., TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK 1980 TO 2017 76–77 (2018); Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. SCH. L. REV. 1331, 1349, 1351, 1364–65 (2012); see also Oksana Mironova, *Addressing the Eviction Epidemic—Analysis of 2017 Data*, COMMUNITY SERV. SOC’Y (Sept. 12, 2018), <http://www.cssny.org/news/entry/addressing-the-eviction-epidemic-2017-analysis> [<https://perma.cc/E4U5-4X4G>] (reporting that three predictors of high eviction rates in a neighborhood are “high rates of severe rent burdens; a high share of black tenants; and a high share of Latinx tenants”); Erin Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. 23, 68 (2017) (discussing race-based disparities in treatment of families in the child welfare system).

8. See, e.g., N.Y.C. MAYOR’S OFFICE OF CRIMINAL JUSTICE, STRATEGIC PLAN FISCAL YEARS 2019–2021 (2018); BILL DE BLASIO, MAYOR’S TASK FORCE ON BEHAVIORAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM: ACTION PLAN, CITY OF NEW YORK (2014) (discussing these reform efforts specifically in New York City); Ben Max, *Cuomo, Legislators Agree to \$175.5 Billion Budget with Congestion Pricing, Criminal Justice Reform and Commitment to Public Campaign Financing*, GOTHAM GAZETTE (Apr. 1, 2019), <http://www.gothamgazette.com/state/8412-cuomo-legislators-agree-to-175-5-billion-budget-with-congestion-pricing-criminal-justice-reform-and-commitment-to-public-campaign-financing> [<https://perma.cc/3XCX-92UD>]; Julie McMahon, *New York Ends Cash Bail for Most: What It Means for People Charged with a Crime*, SYRACUSE.COM (Apr. 2, 2019), <https://www.syracuse.com/news/2019/04/new-york-ends-cash-bail-for-most-what-it->

However, we cannot achieve true criminal justice reform without an accurate and full picture of how these consequences affect individuals and their family members. This honest understanding must include the civil problems that drive people into criminal justice involvement, as well as the civil punishments, sanctions, and consequences that are a direct result of it.

With every person I have the great honor and privilege of defending, I learn about a new or different way these systems undermine their rights, attack their humanity, and set them up to fail. Many of the people we serve at The Bronx Defenders are trapped in a vicious cycle of court involvement without meaningful access to solutions that might change their circumstances.

However, through my work as a civil public defender, I have had the opportunity to meet beautiful and resilient people, who persevere under the most crushing and unfair conditions. I have worked with some of the most dedicated, innovative, relentless advocates, in service of communities and in the pursuit of social justice. This gives me hope and has helped me see that despite these distressing times, together we have the opportunity to build power and to challenge and change the conditions that keep the communities we serve poor and oppressed.

This Essay details the critical, awakening lessons I learned during my journey as a civil public defender.<sup>9</sup>

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*Denny was born and raised in the Bronx. In his late twenties, with a wife of three years, Denny recently became a father to a baby boy. He works as a security guard for a retail store not too far from the one-bedroom apartment he rents. Denny's income supports his family and barely covers all his expenses.*

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means-for-people-charged-with-a-crime.html [https://perma.cc/84UV-WQME] (discussing how elimination of cash bail for most misdemeanor and non-violent felony offenses in New York State will lessen the number of people required to spend time in jail); Tim Lau, *Historic Criminal Justice Reform Legislation Signed into Law*, BRENNAN CTR. FOR JUST.: COMMENTARY (Dec. 21, 2018), <https://www.brennancenter.org/blog/historic-criminal-justice-reform-legislation-signed-law> [https://perma.cc/H8NU-99Y7] (discussing how FIRST STEP, a bipartisan bill supporting criminal justice reform, will reduce some unnecessarily long federal prison sentences and improve conditions for offenders currently in prison).

9. All names and other identifying information have been changed to protect the privacy and confidentiality of individuals in the stories told here. The content, however, is entirely real.

*One Saturday night, he goes out with a friend to a party at a local bar.*

*A fight breaks out between two men and the police are immediately called. Though he was not involved in the altercation, Denny and others intervene to break up the fight. When the police arrive, a number of people are arrested, including Denny. He is handcuffed, detained, fingerprinted, and processed through the system. Denny has never been arrested before. He is charged with misdemeanor assault in the third degree. Once fingerprinted, Denny's information is sent to the Division of Criminal Justice Services. The New York Department of State, the agency that licenses him to be a security guard, is also notified of his arrest. Based on the arrest charges, Denny also receives a notice from the licensing office that his security guard license may be suspended or revoked.*

*Despite his criminal attorney's best efforts, the District Attorney's office will not drop the charges. Instead, they offer him a non-criminal disposition. Denny rejects this offer. He does not want to plead to any charge, criminal or non-criminal, as he believes he was improperly arrested. Denny pleads not guilty; because he insists on having a trial, Denny must return to criminal court. His case is adjourned for months at a time. It will take between one and two years for Denny to finally have a trial.*

*While Denny stands accused and awaits his trial in criminal court, his security guard license expires, and because his criminal case is open and pending, his license renewal is denied. Without his license, Denny loses his job at the retail store and cannot find another job as a security guard. He struggles to find alternative work. His wife, who is disabled and the primary child care provider to their baby, is also unable to work.*

*Without his work income and unable to access other income, Denny and his family fall behind on rent. Denny's landlord seeks to evict him and his family.*

*In just one moment, Denny's life is turned upside down.*

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## **I. LESSON 1: MYTH VERSUS REALITY — CRIME IS NOT WHAT YOU THINK IT IS**

We are only beginning to scratch the surface of understanding the magnitude of the harms that our ill-advised policies towards crime, policing, prosecution, and incarceration inflict upon poor

communities of color. There are over 10 million arrests in the United States each year,<sup>10</sup> at least two million people in U.S. prisons and jails, and approximately nine million returning citizens released from jails or prisons every year.<sup>11</sup> An additional 4.7 million people are on parole or probation,<sup>12</sup> and more than 70 million Americans — at least one in three — have criminal records.<sup>13</sup> Hundreds of millions of people have had some kind of contact with criminal court, and the bias and racial disparities that exist at every level of the system is appalling, to say the least.

To this day, when I identify as a public defender, after assuming I am a criminal defense attorney, I get the following responses: “How could you represent *those* people?” “You are helping murderers and rapists stay on the streets?” “Criminals are such bad people, why not help victims?” These attitudes reflect common myths about crime in our country that tend to be very disconnected from reality.

One of the most eye-opening lessons I have learned in public defense is the sheer subjectivity in how crime is defined, who is policed, prosecuted, and assigned criminality, and what behaviors and acts are criminalized. Most Americans might assume that the majority of crime is violent, like murder or assault, but Denny’s story demonstrates how a misunderstanding at a bar can lead to arrest. Entering a park after hours, a lovers’ quarrel, a roommate dispute, or some other ordinary moment can spiral out of control and land people in central booking. That one moment may lead to a conviction that then persists for a lifetime, creates barriers to having a normal, productive life and to being branded a “criminal.” This stands in stark contrast to the stereotype of high crimes, felonies, and homicides, and to the socially deviant, evil people that are portrayed in pop culture and the media.

Additionally, the mythical depiction of crime and the label of “criminal” denies the complexity of the person whose acts are criminalized. Whether “innocent” or “guilty,” behind every crime

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10. *One Every Three Seconds: Groundbreaking New Tool Provides Access to Valuable Data on Arrest Trends Nationwide*, VERA INST. (Jan. 31, 2019), <https://www.vera.org/newsroom/one-every-three-seconds-groundbreaking-new-tool-provides-access-to-valuable-data-on-arrest-trends-nationwide> [<https://perma.cc/8NEL-SETD>].

11. *NRRC Facts & Trends*, NAT’L REENTRY RESOURCE CTR., <https://csgjusticecenter.org/nrrc/facts-and-trends/> [<https://perma.cc/5CBL-KGH2>].

12. *See id.*

13. *See* Gabriel J. Chin, *Collateral Consequences*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 371, 372 (Erik Luna ed., 2017).



there is a story, a context, and a human being. Calling Denny a criminal who committed an assault ignores his reality; he is a young, hard-working father, husband and family man who needed an evening off and tried to stop a fight. Moreover, even for those who may very well be guilty of committing criminal acts, this permanent mark denies a person's ability to rehabilitate or to transform in the way every human being can and should have the opportunity to do so.

This fundamental misunderstanding of crime, the bias that exists in how we define crime, and the marginalization of those charged with crimes has implications beyond the criminal case, since it becomes a vehicle for imposing recurring enmeshed civil consequences and barriers to reentry that trap people in a cycle of systems involvement. In order to change this, we need to unpack and debunk our misunderstanding of crime and criminality.

Public perception of violent and high crime rates does not comport with existing data. The reality is that since the early 1990s, there has been a sharp decline in overall crime nationally and in most states and cities.<sup>14</sup> Violent crime, in particular, has declined by nearly fifty percent, and property crime has declined nearly sixty-nine percent.<sup>15</sup> Nationally, the majority of arrests are for non-violent, low level offenses, such as drug use violations or disorderly conduct, while

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14. See MATTHEW FRIEDMAN ET AL., BRENNAN CTR. FOR JUSTICE, CRIME TRENDS: 1990–2016 27 (2017), [https://www.brennancenter.org/sites/default/files/publications/Crime 20Trends 201990-2016.pdf](https://www.brennancenter.org/sites/default/files/publications/Crime%20Trends%201990-2016.pdf) [<https://perma.cc/PQ4Z-CDXV>] (listing statistics specific to New York); AMES GRAWERT & CAMERON KIMBLE, BRENNAN CTR. FOR JUSTICE, CRIME IN 2018: UPDATED ANALYSIS (Dec. 18, 2018), [https://www.brennancenter.org/sites/default/files/publications/2018\\_09\\_CrimeUpdate\\_V2.pdf](https://www.brennancenter.org/sites/default/files/publications/2018_09_CrimeUpdate_V2.pdf) [<https://perma.cc/2HQ6-VUN2>]; Philip Bump, *2017 Is on Pace for the Second-Lowest Crime Rate Since 1990—and Near-Record Low Murders*, WASH. POST (Sept. 6, 2017), [https://www.washingtonpost.com/news/politics/wp/2017/09/06/2017-is-on-pace-to-have-the-second-lowest-crime-rate-since-1990-and-near-record-low-murders/?noredirect=on&utm\\_term=.34772573e758](https://www.washingtonpost.com/news/politics/wp/2017/09/06/2017-is-on-pace-to-have-the-second-lowest-crime-rate-since-1990-and-near-record-low-murders/?noredirect=on&utm_term=.34772573e758) [<https://perma.cc/7MGB-J33Y>] (citing AMES GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, CRIME IN 2017: A PRELIMINARY ANALYSIS (July 19, 2017), [https://www.brennancenter.org/sites/default/files/publications/Crime 20in 202017 20A 20Preliminary 20Analysis.pdf](https://www.brennancenter.org/sites/default/files/publications/Crime%20in%202017%20A%20Preliminary%20Analysis.pdf) [<https://perma.cc/68R6-8R6K>]).

15. See John Gramlich, *5 Facts About Crime in the U.S.*, PEW RES. CTR. (Jan. 3, 2019), <http://www.pewresearch.org/fact-tank/2019/01/03/5-facts-about-crime-in-the-u-s/> [<https://perma.cc/656X-JDPH>] (citing FED. BUREAU OF INVESTIGATION, ANNUAL UNIFORM CRIME REPORTS, [https://www.fbi.gov/services/cjis/ucr/publications#Crime-in 20the 20U.S.](https://www.fbi.gov/services/cjis/ucr/publications#Crime-in%20the%20U.S.) [<https://perma.cc/VWP7-DB2Y>]; *National Crime Victimization Survey*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245> [<https://perma.cc/WL2J-CKEQ>]).

serious violent offenses account for fewer than 5 of arrests.<sup>16</sup> And though arrests for low level offenses are on the decline, disparities still exist in terms of who is arrested and what communities are heavily policed.<sup>17</sup>

Arrest and crime numbers do not change on their own, however — they respond to how crime is defined. However, what is deemed “criminal” remains subjective, is sometimes arbitrary and changes over time according to public opinion and societal norms, morals, and values. Consider, for example, that the manufacture, sale, and distribution of alcohol, the sale of tobacco, and gambling were all once prohibited and illegal, but now are legalized, though with restrictions.<sup>18</sup> Abortion at any stage was prohibited and criminalized in the mid-nineteenth century, until it was decriminalized by the early 1970s.<sup>19</sup> Voting by anyone not white and male was once a criminal act, as was any non-white person using a segregated bathroom for use by whites only.<sup>20</sup> These are only a few examples of behaviors and activities that were once criminalized but now are legal, that were once taken as obviously “criminal” and have since changed.

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16. See FED. BUREAU OF INVESTIGATIONS, U.S. DEP’T OF JUSTICE, 2017 UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, tbl.29 (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/persons-arrested> [<https://perma.cc/T7KC-7YT5>]. To calculate for the number of arrests due a serious violent offense, divide the number of arrests for a violent crime by the estimated total number of arrests.

17. See REBECCA NEUSTETER & MEGAN O’TOOLE, VERA INST. OF JUST., EVERY THREE SECONDS, UNLOCKING POLICE DATA ON ARRESTS: EMERGING FINDINGS (2019), <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings> [<https://perma.cc/AWY3-9HLV>]; see also Andrew Denney, *Report: Arrests for Low Level Offenses Declining in N.Y. but Disparities Remain*, N.Y. L.J. (Dec. 26, 2018), <https://www.law.com/newyorklawjournal/2018/12/26/report-arrests-for-low-level-offenses-declining-in-ny-but-disparities-remain/?sreturn=20190206213726> [<https://perma.cc/YQ7G-E86A>].

18. See Leslie Gielow Jacobs, *Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield*, 21 LEWIS & CLARK L. REV. 1081, 1085–91 (2017) (citing Dorie E. Apollonio & Stanton A. Glantz, *Minimum Ages of Legal Access for Tobacco in the United States From 1863 to 2015*, 106 AM. J. PUB. HEALTH 1200, 1201 (2016)); I. Nelson Rose, *Gambling and the Law – Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 95–98 (1992).

19. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); see also Mark A. Graber, *The Ghost of Abortion Past: Pre-Roe Abortion Law in Action*, 1 VA. J. SOC. POL’Y & L. 309, 313 (1994).

20. See Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1064 (2002); Elizabeth Ann Thompson, *The Long, Ugly History of Bathroom Segregation*, PROGRESSIVE (May 31, 2016), <https://progressive.org/op-eds/long-ugly-history-bathroom-segregation/> [<https://perma.cc/SY9A-JHUY>].

### A. Criminality and the War on Drugs

Never has this trend been more accurately evidenced than with the shifting drug policies in response to the War on Drugs. At times, drug use is criminalized and demonized; other times, it is treated as a social justice issue and public health crisis.<sup>21</sup> Once, users of marijuana, cocaine and heroin were treated like kingpin drug dealers and today some of those same drugs have been decriminalized, legalized, or treated with clinical responses. History shows that our approach depends on the communities we are policing. It has been noted that “federal drug policy, past and present, has functioned largely as a means to brand marginalized ethnic groups as deviant.”<sup>22</sup> Narcotics law historian David Musto observed that “[c]ocaine raised the specter of the wild Negro, opium the devious Chinese, morphine the tramps in the slums . . . .”<sup>23</sup>

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21. For examples of modern initiatives addressed to help cure the opioid epidemic, see, e.g., *New Hampshire Gets Nearly \$12M to Fight Opioid Epidemic*, ASSOCIATED PRESS (Mar. 21, 2019), <https://www.apnews.com/5d7551142292434e9b0e1f0ef2623751> [https://perma.cc/F3UA-RYR]; Felice J. Freyer, *In Rhode Island, Some Get Addiction Care at the Pharmacy*, BOSTON GLOBE (Mar. 12, 2019), <https://www.bostonglobe.com/metro/2019/03/12/getting-addiction-care-pharmacy/m1mceVILRXX1W9X3WdeOP/story> [https://perma.cc/C2JE-SXP3]; Press Release, U.S. Dep’t of Health & Human Services, HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis (Oct. 26, 2017) (on file with author), <https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html> [https://perma.cc/M9A9-KC8N]; DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW (Oct. 2006), [https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem\\_20061025.pdf](https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf) [https://perma.cc/M5SC-PSWM]; Kathleen R. Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria Over Crack*, 54 ALA. L. REV. 665, 677–84 (2003) (discussing historical changes in cultural attitudes towards cocaine as it became associated in the popular mindset with race and poverty, and on disparities in law enforcement treatment towards crack and powder cocaine); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 58 (2011).

22. Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 55 (1995)(citing RICHARD LAWRENCE MILLER, THE CASE FOR LEGALIZING DRUGS 100, 104 (1991)).

23. DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 65 (3d ed. 1999).

New York's Rockefeller Drug Laws set the standard for punitive drug legislation for the War on Drugs,<sup>24</sup> reflecting an ongoing practice of intentionally defining crime in ways that target people of color that sold drugs or used heroin, cocaine, and marijuana.<sup>25</sup> These 1973 laws, proposed by New York State Governor Nelson Rockefeller during mounting fear about drug addiction in America, were tough on crime, creating mandatory minimum fifteen-year-to-life sentences for possession or sale of small amounts of drugs, and served as a national policy model for punitive drug legislation.<sup>26</sup> The Rockefeller Drug Laws treated drug addicts, whom Rockefeller had previously described as only *potential* criminals, in the same way as major drug dealers.<sup>27</sup> Predictably, by the 1980s, the Rockefeller Drug Laws' expanded definition of criminal and associated laws led New York to incarcerate 375 of every 100,000 people in the state, more than it ever had before.<sup>28</sup>

The Rockefeller Drug laws found modern form in policies such as broken-windows policing that caused a drastic rise in arrests for possession of marijuana, in ways that exacerbated racial disparities.<sup>29</sup> Arrests for possession of marijuana in public in New York City increased from under 1,000 in 1990 to approximately 51,000 in 2000—52 of these arrests were of Black people, who make up less than 25 of the City's population.<sup>30</sup> All this despite research consistently showing that Black people do not use or sell drugs at substantially higher rates than white people.<sup>31</sup>

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24. See Brian G. Gilmore & Reginald Dwayne Betts, *Deconstructing Carmona: The U.S. War on Drugs and Black Men as Non-Citizens*, 47 VAL. U. L. REV. 777, 783 (2013).

25. See Johnson, *supra* note 22, at 56.

26. See Gilmore & Betts, *supra* note 24, at 788, 790.

27. See *id.* at 789.

28. See *id.* at 789–90.

29. The theory of Broken Windows was first envisioned by James Q. Wilson & George L. Kelling in a piece in *The Atlantic* in 1982, who saw “serious crime as the final result of a lengthier chain of events, theorizing that crime emanated from disorder and that if disorder were eliminated, then serious crimes would not occur.” See *Broken Windows Theory*, ENCYCLOPEDIA BRITANNICA (Dec. 14, 2018), <https://www.britannica.com/topic/broken-windows-theory#ref310129> [<https://perma.cc/7J7M-29QR>]; see also James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/VPA3-H2JY>].

30. Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 CRIME & JUST. 49, 65 (2015).

31. See *id.* at 65–67.

However, definitions of criminal drug activity have developed over time to enforce bias and target people and communities of color regardless of the facts or reality of crime. Compare the stark arrest statistics above with current discussions of the opioid crisis, which disproportionately affects white Americans — poor and rural, but also middle class or affluent and suburban.<sup>32</sup> There is no denying the role of race: that opioids is a problem in predominantly white communities creates an association that boosts support for preventative and treatment-based policy solutions, rather than criminalizing, policing and arrests.<sup>33</sup> Even in states that have legalized marijuana, we see the racial disparities persist, both in who continues to be policed and in who is able to profit from sales that were once criminalized.

### B. Bias by Police, Prosecutors, and Judges in the Criminal Court Process

Who is labeled a criminal and disparate criminal court outcomes are exacerbated by bias in discretion from police, prosecutors, and judges that oversee criminal cases. Studies show that people of color are more likely to be arrested than white people, especially for drug crimes, due to biases in law enforcement.<sup>34</sup> The effects of these biases follow people of color and expand throughout nearly every aspect of the criminal justice system. When people of color are arrested, more

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32. See Monica J. Alexander et al., *Trends in Black and White Opioid Mortality in the United States, 1979–2015*, 29 EPIDEMIOLOGY 707, 709 (Sept. 2018) (outlining opioid mortality rates by race); *State Health Facts: Opioid Overdose Deaths by Race/Ethnicity*, KAISER FAM. FOUND. (2017), <https://www.kff.org/other/state-indicator/opioid-overdose-deaths-by-raceethnicity/> [<https://perma.cc/6LRW-85TN>] (showing trends in opioid overdose deaths by race/ethnicity); Joseph Friedman et al., *Assessment of Racial/Ethnic and Income Disparities in the Prescription of Opioids and Other Controlled Medications in California*, JAMA INTERNAL MED. (2019) (examining how the current opioid epidemic is impacting predominately low-income white communities); *Opioid Misuse in Rural America*, U.S. DEP'T OF AGRICULTURE, <https://www.usda.gov/topics/opioids> [<https://perma.cc/UK7N-ZT6N>] (noting that the rates of drug overdose deaths in rural areas are surpassing the death rates in urban centers); Katherine M. Keyes et al., *Understanding the Rural-Urban Differences in Nonmedical Prescription Opioid Use and Abuse in the United States*, 104 AM. J. PUB. HEALTH e52 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3935688/> [<https://perma.cc/39HD-C6ZP>] (describing high increases in opioid overdose deaths in rural, as well as suburban areas).

33. See NAZGOL GHANDNOOSH & CASEY ANDERSON, THE SENTENCING PROJECT, OPIOIDS: TREATING AN ILLNESS, ENDING A WAR 5 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/12/Opioids-Treating-an-Illness-Ending-a-War.pdf> [<https://perma.cc/5PMZ-S9DK>].

34. See *id.* at 19.

of them are charged by prosecutors, which means that more of them either take plea deals or find themselves in criminal court. Discriminatory policing thus drives a brutal, discriminatory system.

Additionally, studies show that African Americans and Latinx people are twice as likely to be held on bail due to their inability to pay bonds than similarly-situated white defendants.<sup>35</sup> Other studies show that “African American defendants face higher bail amounts than white arrestees with similar criminal charges and criminal histories and, when race is combined with other legally relevant factors, African Americans have lower odds of non-financial release and greater odds of pretrial detention.”<sup>36</sup> Pretrial detention adversely impacts judicial determinations in criminal cases. Individuals held in pretrial detention are eighteen percent more likely to be convicted than those who are released on bail.<sup>37</sup> Individuals held in pretrial detention are also more likely to plead guilty and get worse plea offers.<sup>38</sup> This means that individuals held in pretrial detention are more likely to be incarcerated and serve longer sentences than those who are released, even though their charges and criminal histories may be similar.<sup>39</sup>

There is also a significant sentencing gap that favors white arrestees over otherwise-similar Black arrestees, when controlling for variables such as criminal history.<sup>40</sup> Research shows that prosecutors are twice

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35. Stephen DeMuth, *Racial and Ethnic Differences in Pretrial Release and Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 897 (2003).

36. Cynthia E. Jones, “Give Us Free”: *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 942 (2013) (citing John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, 29 JUST. Q. 41, 41 (2012) (examining 5,000 felony defendants in Ohio)).

37. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, STATE COURT PROCESSING STATISTICS: 1990–2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1, 7 (2007), <https://www.prisonpolicy.org/scans/bjs/prfdsc.pdf> [<https://perma.cc/6EAB-URP9>].

38. Juleyka Lantigua-Williams, *Why Poor, Low-Level Offenders Often Plead to Worse Crimes*, ATLANTIC (July 24, 2016), <https://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/> [<https://perma.cc/556C-EG72>].

39. E. Britt Patterson & Michael J. Lynch, *Bias in Formalized Bail Procedures*, in RACE AND CRIMINAL JUSTICE 40 (Michael J. Lynch & E. Britt Patterson eds., 1991); Shima Baradaran & Frank McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 555 n.275 (2012); Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 20 CRIM. JUST. POL’Y REV. 59, 59 (2014).

40. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 29 (2013).

as likely to pursue a mandatory minimum sentence for Black people as they are for white people charged with the same offense.<sup>41</sup> Criminologists have concluded that these racial disparities are largely the result of the excessive discretionary authority vested in judicial officials.<sup>42</sup> This is because of the few legal constraints and the lack of relevant background information on the accused, which leaves officials to rely on racial stereotypes and biases.<sup>43</sup>

All the above shows that who we deem to be criminals is not set in stone and that criminals are not a predetermined category. Rather, how we have defined crime in our laws and communities, and what we have chosen to criminalize, markedly shifts over time, both shaped by and shaping bias and discrimination.

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*Angela receives public assistance to support her children, Penny and Drew, who are seven and four. Through the social services agency, Angela receives cash assistance, a housing subsidy to pay her rent, and food stamps. Angela is investigated by the Administration for Children Services for neglect of her children, based on an unkempt home with vermin infestation, holes and lead paint, bad conditions that need repair both in her apartment and in her building. The landlord ignores Angela's repeated requests to make repairs. A petition is filed in Family Court and her children are removed from her custody.*

*Angela is fighting to get her children back, and continues to receive food stamps to buy food for them, though they are temporarily not in her custody. She receives notice that the Bureau of Fraud Investigations is investigating her for receiving 90 days' worth of food*

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41. See ACLU, RACIAL DISPARITIES IN SENTENCING: HEARING ON REPORTS OF RACISM IN THE JUSTICE SYSTEM OF THE UNITED STATES 2 (Oct. 27, 2014), [https://www.aclu.org/sites/default/files/field\\_document/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/141027_iachr_racial_disparities_aclu_submission_0.pdf) [<https://perma.cc/2WTK-LD4N>] (“One study found that Black defendants face significantly more severe charges than whites, even after controlling for characteristics of the offense, criminal history, defense counsel type, age and education of the offender, and crime rates and economic characteristics of the jurisdiction.”).

42. Starr & Rehavi, *supra* note 40, at 29; Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 187 (2005); Marcia Johnson & Lockett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J.L. & SOC. POL’Y 42, 48–49 (2012); Jones, *supra* note 36, at 943.

43. Jones, *supra* note 36, at 943.

*stamps while her children were not in her permanent custody. In addition to fighting her family court case and experiencing instability with her benefits, Angela now faces arrest and prosecution for felony larceny related to her receipt of food stamps.*

*By way of living in an unstable and poorly maintained apartment building, Angela and her children are caught in the web of systems involvement in Family Court, with the local welfare agency and in Criminal Court.*

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## II. LESSON 2: POVERTY IS A PIPELINE TO SYSTEMS INVOLVEMENT

In order to understand the scope of the American criminal justice problem and create meaningful, long-lasting solutions, it is vital to recognize the structural forces, institutional barriers, and broader context that lead to disproportionate policing, prosecution and incarceration, drives community members into systems, and labels them “Criminals,” “Defendants,” and “Respondents.” Targeted communities, like the ones I serve in the Bronx, illustrate how concentrated neighborhood poverty and long-term divestment of community resources lead to civil legal needs which go hand-in-hand with the drivers of criminal justice and other systems involvement.<sup>44</sup>

Folks in our community walk into our offices with a host of civil needs, a reflection of this divestment. Food insecurity, neglected rental housing with mold, lack of heat, vermin infestation and landlords who refuse to repair those conditions, inadequate safety net benefits with strict work rules, failing schools with excessively large classrooms and not enough teachers, too few jobs that pay a living wage; these are examples of needs people have that contribute to increased law enforcement surveillance and criminal court involvement.

Studies have shown a direct link between impoverished communities of color that lack resources and crime. Individuals who live in poverty are more likely to report a crime than people who do not live in poverty, more likely to be victimized, more likely to

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44. FPWA, ENDING THE POVERTY TO PRISON PIPELINE 10–22 (2019), <https://www.fpwa.org/wp-content/uploads/2019/04/FPWAs-Ending-the-Poverty-to-Prison-Pipeline-Report-2019-FINAL.pdf> [https://perma.cc/7GTT-KV3F] [hereinafter FPWA REPORT]; Jones, *supra* note 36, at 951.



experience violence and more likely to be arrested.<sup>45</sup> Having less or no access to wealth puts a strain on individuals and their families, and the added stress of living in poverty and trying to survive may lead people to commit crimes to get cash. In this sense, crime is a symptom of poverty, poverty is a driver of crime, and poverty *itself* is crime in certain communities.<sup>46</sup>

A problematic reality is then that poor communities are targeted, overpoliced, and over-criminalized, which has been the case in New York City:

Poor communities of color . . . experience a police presence that feels too much like an occupying army and too little like a police force committed to preserving peace, reducing fear, and maintaining order by protecting the lives of all citizens, regardless of the neighborhood in which they live, by treating them with courtesy, professionalism, and respect . . . [A]rrest practices in New York City are overwhelmingly racialized and geographically specific, imposing their burden and cost on a small number of neighborhoods and communities—all poor, marginalized, and overwhelmingly Black and Hispanic . . .<sup>47</sup>

Over-policing then leads to misplaced, discriminatory policies in poor communities, including the idea that mass arrests for minor offenses promote community order and a way to prevent more serious crime, known as broken windows policing<sup>48</sup> in New York City. New York, as a racially divided city with increasing income disparities and economic inequality, witnessed deteriorating public housing, a growing homeless population, inadequate social services, and underfunded and underperforming schools — all in the “most economically strapped communities.”<sup>49</sup> These same communities

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45. ERIKA HARRELL ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOUSEHOLD POVERTY AND NONFATAL VIOLENT VICTIMIZATION, 2008–2012 (Nov. 2014), <https://www.bjs.gov/content/pub/pdf/hpnvv0812.pdf> [<https://perma.cc/DCB6-CCEA>].

46. *See, e.g.*, Peter Edelman, Opinion, *How It Became a Crime to Be Poor in America*, GUARDIAN (Nov. 6, 2017, 8:34 PM), <https://www.theguardian.com/commentisfree/2017/nov/06/how-poverty-became-crime-america> [<https://perma.cc/4GTP-ZJSC>]; *see generally* FPWA REPORT, *supra* note 44.

47. Jonathan Oberman & Kendea Johnson, *Broken Windows: Restoring Social Order or Damaging and Depleting New York’s Poor Communities of Color*, 37 CARDOZO L. REV. 931, 940, 949 (2016).

48. *See supra* note 29 and accompanying text.

49. Oberman & Johnson, *supra* note 47, at 944; *see also* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 303–05 (1998).

became targets for zero tolerance policing when broken windows strategies were introduced and led to the rise of subjective “quality-of-life” crimes, that is, arrests for committing disorderly offenses in streets, parks, stores and other public locations.<sup>50</sup> These “policing and prosecution policies effectively criminalize race, poverty, drug addiction, and mental illness, while ‘tagging’ a growing class of young Black and Hispanic people in order to oversee and manage them, by repeatedly pulling them into the criminal justice system with low-level, non-felony arrests.”<sup>51</sup>

Clients like Angela live in communities that are targeted, and their lack of access to basic civil needs are then criminalized, trapping them a vicious cycle of poverty and justice involvement.

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*Jasmine, a bank employee, lives in an apartment with her two small children. She receives a federal housing subsidy, in the way of Section 8 assistance.<sup>52</sup> She is pregnant with her third child. One day, her partner is stopped by police in her apartment hallway on his way to visit her. He is searched. Marijuana is found on his person, and when asked where he is going, he points to Jasmine’s apartment. The police knock on her door, search her apartment and find marijuana in a drawer in one of the bedrooms. The police confiscate \$400 in cash lying on Jasmine’s dresser. Jasmine and her partner are arrested. The police contact child welfare authorities. Jasmine’s kids are removed.*

*While fighting her criminal case, Jasmine faces termination of her parental rights in family court. Jasmine’s partner is a non-citizen, and*

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50. K. Babe Howell, *The Costs of “Broken Windows” Policing: Twenty Years and Counting*, 37 CARDOZO L. REV. 1059, 1060–61 (2016) (citing Brett G. Stoudt et al., *supra* note 7, at 1331, 1340, 1364 app. III, 1365 app. IV).

51. Oberman & Johnson, *supra* note 47, at 949; see also Stoudt et al., *supra* note 7; Howell, *supra* note 50, at 1065–67; Sarah Ryley et al., *Exclusive: Daily News Analysis Finds Racial Disparities in Summonses for Minor Violations in ‘Broken Windows’ Policing*, N.Y. DAILY NEWS (Aug. 4, 2014), <https://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567> [<https://perma.cc/3TX6-HCV8>].

52. “Created by the Housing and Community Development Act of 1978, the Housing Choice Voucher program, also known as Section 8, provides assistance to eligible low- and moderate-income families to rent housing in the private market. Eligibility for this program is based on a family’s gross annual income and family size.” *About Section 8*, N.Y.C. HOUSING AUTHORITY, <https://www1.nyc.gov/site/nycha/section-8/about-section-8.page> [<https://perma.cc/CG3Z-EQJ6>].

potentially faces deportation. Jasmine receives notice that her landlord will seek her eviction from the apartment due to the drug related arrest that took place there. Simultaneously, Section 8 notifies her that her subsidy will be terminated. Jasmine then receives notice that her \$400 will be forfeited by the government. Due to missed days at work because of court dates and appointments, Jasmine has been given a warning and most likely will lose her job at the bank.

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### III. LESSON 3: NO CIVIL CONSEQUENCE IS “COLLATERAL”

As the number of people with criminal records that face barriers to reentry increases, the concept of a “collateral consequence” has gained a national profile.<sup>53</sup> If a direct consequence of a criminal case is defined as the sentence or fine (or sometimes both), collateral consequences have been largely understood to encompass the vast number of civil sanctions that may arise out of a criminal conviction.<sup>54</sup> These sanctions restrict social, economic, and political opportunities, including eligibility for public benefits, government-assisted housing, employment, student aid, military service, voting, jury services and, for non-citizens, deportation.<sup>55</sup> In fact, it is estimated that there are over 44,000 different collateral consequences scattered over federal, state, and local statutes across the country.<sup>56</sup> Collateral consequences have also gained attention in the judicial sphere. In *Padilla v.*

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53. See Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas> [<https://perma.cc/F4NQ-72F9>]; see also THE SENTENCING PROJECT, STATE REFORMS REDUCING COLLATERAL CONSEQUENCES FOR PEOPLE WITH CRIMINAL RECORDS: 2011–2012 LEGISLATIVE ROUND-UP (Sept. 2012), <https://www.sentencingproject.org/wp-content/uploads/2016/01/State-Collateral-Consequences-Legislative-Roundup-2011-2012.pdf> [<https://perma.cc/9YA9-ST5B>].

54. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–51 (2006).

55. Howell, *supra* note 50, at 1065–67; Oberman & Johnson, *supra* note 47, at 948 (citing MARGARET C. LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2013)).

56. National Inventory of the Collateral Consequences of Conviction, COUNCIL OF ST. GOV'T JUST. CTR., <https://niccc.csgjusticecenter.org> [<https://perma.cc/ZNW6-DH39>] (capturing over 44,000 separate collateral consequences in 50 states); see also Monica Haymond, *Should a Criminal Record Come with a Collateral Consequence?*, NAT'L PUB. RADIO (Dec. 6, 2014), <https://www.npr.org/2014/12/06/368742300/should-a-criminal-record-come-with-collateral-consequences> [<https://perma.cc/6XAY-2HYS>].

*Kentucky*, the Supreme Court held that to provide effective assistance of counsel, a criminal defense attorney must affirmatively provide individualized advice regarding, and seek to avoid or mitigate, civil ramifications that are serious, enmeshed and likely to occur from a criminal conviction.<sup>57</sup>

It is certainly positive that the focus on the civil sanctions of criminal convictions is growing. But the problem is that the word “collateral” indicates “secondary,” even though the millions of people affected suffer a primary loss.<sup>58</sup> Indeed, “[p]unishment is supposed to be proportional to the severity of the offense, but collateral consequences are often unmoored from such considerations, obscuring their true cost.”<sup>59</sup> Losing a home or a subsidy or even being deported is often a person’s primary concern, and using the term collateral is both a symptom of and vehicle for a self-deception that perhaps serves as a coping mechanism to block out the true magnitude of harm inflicted daily by the criminal justice system on families and communities.<sup>60</sup> So-called “collateral” consequences are often disproportionate to an arrest charge, and have long lasting harm.

While post-conviction collateral consequences and barriers to reentry after incarceration have garnered national attention, much more hidden are the multitudes of people who suffer drastic, disproportionate civil punishments without ever having been convicted of a crime. To suffer civil costs, no conviction is necessary. As civil public defenders, we see how clients who are legally innocent, like Jasmine, can lose children and partners, homes and housing assistance, face civil asset forfeiture and loss of employment. All of this was at risk for Jasmine before she even reached a third court date in criminal court. In fact, at the moment of her arrest, she was at risk.

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57. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); see also McGregor Smyth, *From Collateral to Integral: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 *How. L.J.* 795, 796–97 (2011) (noting that the holding of *Padilla v. Kentucky* has been interpreted to extend to other collateral consequences relating to criminal convictions).

58. Shaila Dewan, *The Collateral Victims of Criminal Justice*, *N.Y. TIMES* (Sept. 5, 2015), <https://www.nytimes.com/2015/09/06/sunday-review/the-collateral-victims-of-criminal-justice.html> [<https://perma.cc/434Y-59YC>].

59. *Id.*

60. Andrew E. Taslitz, *Destroying the Village to Save It: The Warfare Analogy (or Disanalogy?) and the Moral Imperative to Address Collateral Consequences*, 54 *How. L.J.* 501, 514–16 (2011) (explaining that self-deception helps individuals to avoid moral struggle).

This injustice applies to those with open cases,<sup>61</sup> those who are held in pre-trial detention,<sup>62</sup> and even those whose cases have been dismissed or who have been acquitted of charges.<sup>63</sup>

What is demonstrated by the countless stories of those affected by the criminal justice system is that the civil punishments they experience are anything but collateral.

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*Around President's Day, Teddy is in his car on his way to an electronics shop. With cash in hand, given to him by his mother from her social security income, he is going to buy a new television for the family. Teddy is expecting some great sales at the electronics store. He is stopped by police for having tinted windows. When he rolls his windows down and gives the officers his license and registration, they observe pills in the front console of his car. Teddy explains the pills are his wife's and are prescription, but the police arrest him anyway.*

*Teddy's car is seized, as is the \$700 in cash on his person. While fighting his criminal case, Teddy learns the police will seek to forfeit his car, and the District Attorney's office will seek to forfeit the cash.*

*Without his car, Teddy is unable to work, as he is required to drive for his job. Teddy has financed his car; though he is close to satisfying all of his payments to own the car, when the company learns of Teddy's arrest, they decide to terminate the financing agreement and revert title ownership of the car back to the company.*

*Teddy does not have the right to a lawyer in either of the civil forfeiture cases, though he is represented by a criminal defense attorney in his criminal case and despite the fact that these civil cases are all related to the arrest.*

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61. Shannon A. Cumberbatch, *Enforcement and Enmeshed Consequences: The Limitations of Conventional Criminal Justice Reform*, 52 WASH. U. J. L. & POL'Y 7, 21–23 (2016) (noting the many civil consequences that individuals with open cases face).

62. Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1423–26 (2017) (noting the adverse effects of pre-trial detention.).

63. Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. PA. J.L. & SOC. CHANGE 81, 85–88 (2017) (explaining that individuals who are acquitted of crimes still face social and employment stigma).

#### IV. LESSON 4: WE NEED A CIVIL *GIDEON*

When families are trapped in criminal and civil justice systems, they experience an undermining of their most fundamental rights. In the criminal justice context, the Supreme Court has found in *Gideon v. Wainwright* that the right to due process guarantees the right to adequate legal representation.<sup>64</sup> The civil needs that drive people into criminal court and the civil ramifications of criminal justice involvement can be severe and burdensome — but no equivalent to *Gideon* exists in the civil sphere.

Civil legal aid for indigent communities developed over the last quarter of the nineteenth century and came through private or municipally-funded legal aid societies.<sup>65</sup> The 1964 launch of the War on Poverty increased civil legal services to America's most indigent and needy families. However, with a poverty rate at fifteen percent in the United States — over 40 million Americans — and without a full right to a lawyer, a huge gap remains between the need for representation and what is actually provided to people fighting for basic life necessities such as a roof over their heads, physical safety, livelihood and the well-being of their families.<sup>66</sup> Judges, Bar associations, and other stakeholders have focused on this civil justice gap to increase equal justice and access to justice for poor and marginalized communities.<sup>67</sup>

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64. *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963).

65. See William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 242–46 (1998) (explaining the history of the development of legal aid services for indigent clients).

66. KAYLA FONTENOT ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2017 1–12 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf> [<https://perma.cc/AU54-S349>]; see also Justice Steve González, *Unmet Needs, the Future of Legal Practice, and Legal Services from Nonlawyers* n.6, A.B.A. (Aug. 9, 2017), [https://www.americanbar.org/groups/young\\_lawyers/publications/tyl/topics/law-practice-2050/unmet\\_needs\\_future\\_legal\\_practice\\_and\\_legal\\_services\\_nonlawyers/](https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/law-practice-2050/unmet_needs_future_legal_practice_and_legal_services_nonlawyers/) [<https://perma.cc/GR8S-5LEA>] (citing SOC. & ECON. SCIS. RESEARCH CTR., WASHINGTON STATE UNIV., WASHINGTON STATE SUPREME COURT CIVIL LEGAL NEEDS STUDY UPDATE (June 2015), <https://ocla.wa.gov/wp-content/uploads/2015/06/CLNS14-Executive-Report-05-28-2015-FINAL1.pdf> [<https://perma.cc/8DEF-Z4FR>]); see also LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 21–29 (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/HKN7-FKKS>].

67. ABA RES. 112A 1 (Aug. 7, 2006) (explaining that the American Bar Association adopted a resolution endorsing the right to counsel “where basic human

The unfortunate reality is that there are not enough attorneys and advocates to meet the growing civil needs of marginalized communities. Indeed, the rights of poor individuals are far less enforced in the civil justice system,<sup>68</sup> and so seem to disappear

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needs are at stake, such as those involving shelter, sustenance, safety, health or child custody”).

68. See *Status Map*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [https://perma.cc/8Z27-DQCK]. Absent a full constitutional right to a lawyer in civil cases, a civil right to a lawyer does exist for certain matters in particular localities. For example, three cities – New York City, San Francisco, and Newark, NJ – created a right to counsel for tenants facing eviction; Los Angeles, Philadelphia, Connecticut, and Massachusetts are currently considering passing similar legislation on the municipal or state level). *Id.* See also Amy Harfeld, *Twenty Years of Progress in Advocating for a Child's Right to Counsel*, A.B.A. (Mar. 22, 2019), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/spring2019-twenty-years-of-progress-in-advocating-for-a-childs-right-to-counsel/> [https://perma.cc/4SP5-3Z5T] (“State laws in all but about a dozen states now require some form of legal representation for children in abuse and neglect cases in at least some circumstances.”). See, e.g., *New Hampshire Restores, Protects Right to Counsel for Parents in Abuse/Neglect Proceedings*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS. (Oct. 1, 2015), [http://civilrighttocounsel.org/major\\_developments/138](http://civilrighttocounsel.org/major_developments/138) [https://perma.cc/H27L-CRF8] (noting that in 2013, New Hampshire reenacted a previously revoked right to counsel for parents accused of abuse or neglect under the state's Child Protection Act (citing N.H. Rev. Stat. Ann. 169-C:10(II)(a) (effective July 1, 2013)). Similar moves have been made with respect to introducing the right to counsel in guardianship proceedings. For example, in 2017, three bills were introduced in New York that would have required appointment of counsel for adults with developmental disabilities in proceedings to establish guardianship, but all three died in committee. See *Legislation: Guardianships of Adults with Developmental Disabilities*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS. (June 13, 2017), [http://civilrighttocounsel.org/major\\_developments/1138](http://civilrighttocounsel.org/major_developments/1138) [https://perma.cc/R532-Y365]; *New York Senate Bill 5842*, LegiScan, <https://legiscan.com/NY/bill/S05842/2017> [https://perma.cc/QB6E-3BN2]. All fifty states, except Indiana, recognize an unqualified right to counsel in civil commitment hearings, before an adult may be involuntarily hospitalized. *Status Map*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [https://perma.cc/8Z27-DQCK]. In Indiana, it is left to the judge's discretion. *Right to Counsel*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., [http://civilrighttocounsel.org/major\\_developments/324](http://civilrighttocounsel.org/major_developments/324) [https://perma.cc/PWT7-LEXY]. The trend has also gained some momentum in civil forfeiture proceedings. See, e.g., NEB. REV. STAT. ANN. § 28-1601(3) (West 2019); *Nebraska Authorizes Appointment of Counsel in Civil Forfeiture Cases*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS. (Apr. 19, 2016), [http://civilrighttocounsel.org/major\\_developments/1014](http://civilrighttocounsel.org/major_developments/1014) [https://perma.cc/U7K6-U9LW]. Pennsylvania and Illinois introduced bills, pending since 2017, that would create a right to counsel in certain civil forfeiture proceedings, while Delaware and Massachusetts introduced bills that would end civil forfeiture and create a right to counsel in criminal forfeiture proceedings. *Status Map*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [https://perma.cc/8Z27-DQCK]. Bills introduced in Arizona and Indiana that would have created a right to counsel in civil forfeiture proceedings died in committee. *Id.* Pennsylvania, New York, and

entirely. In fact, civil consequences that result from alleged criminal activity purportedly exist to “fight” crime without the same “cumbersome and time-consuming constraints” or constitutional protections of the criminal justice system, including the right to a lawyer, the right to the highest burden of proof, the right to speedy trial, the right to discovery, the right to a jury, the right against self-incrimination, the right to confront witnesses, the right against double jeopardy, the right against illegal searches and seizures—the list goes on and on.<sup>69</sup> In other words, as criminal justice protections increased, so did reliance on civil enforcement techniques as a means to persecute and control already targeted communities.

The awful gravity of what individuals and their families stand to lose when caught in the criminal-civil justice web cannot be understated. It is thus absolutely imperative that there be similar protections in the civil context as those in the criminal context, including the right to a lawyer.

In our practice, representing and advocating on behalf of clients facing civil punishments based on an arrest charge or other accusation, we experience every day the difference that a lawyer makes in defeating or mitigating against civil penalties and in helping to create access to basic civil needs. For real criminal justice reform, we need to have equal rights and protections in civil spaces.

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*Juana is 75 years old, a retired nurse, mother to four children and grandmother to nine grandchildren. She has lived in public housing*

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Massachusetts have enacted laws providing a right to counsel in sex-offender registration hearings. *Status Map*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [https://perma.cc/8Z27-DQCK]. Currently, New York is the only state that provides a right to counsel for immigrants in deportation proceedings. *New York State to Provide Counsel for All Detained Immigrants Facing Deportation*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS. (Aug. 1, 2017), [http://civilrighttocounsel.org/major\\_developments/1121](http://civilrighttocounsel.org/major_developments/1121) [https://perma.cc/7F2Y-ADKM]; *Status Map*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [https://perma.cc/8Z27-DQCK]. Finally, with respect to healthcare access, New Hampshire enacted N.H. Stat. § 151-I:2, which “permits a caring facility to petition the court for the appointment of a Special Medicaid Representative where the patient has not paid the costs of care and the facility believes the patient would be eligible for Medicaid.” *Legislation*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., [http://civilrighttocounsel.org/major\\_developments/1167](http://civilrighttocounsel.org/major_developments/1167) [https://perma.cc/C6SD-AEVC].

69. See, e.g., Mary M. Cheh, *Civil Remedies to Control Crime: Legal Issues and Constitutional Challenges*, 9 CRIME PREVENTION STUD. 45, 47, 53 (1998).



*for over 35 years. Juana's adult son, Ignacio, lives with her. Ignacio is disabled due to mental health impairments, specifically mood and depressive disorders. Ignacio helps Juana with her apartment, takes Juana to her medical and other appointments and keeps her company. Juana's apartment has deteriorated over the years; despite Juana's and Ignacio's numerous and best efforts to get the serious conditions repaired, they are unable to obtain assistance from her management office.*

*One day Ignacio sees a public housing employee who makes repairs around their development. He stops the employee and asks why he has not come to their apartment to make repairs and tries to convey the emergency nature of the conditions. The conversation escalates, the two exchange profanities and threats. Upset and triggered, Ignacio pushes the public housing employee. The police are called. Ignacio is arrested.*

*In criminal court, an order of protection is issued against Ignacio, preventing him from returning back home. Ignacio cannot afford to rent another apartment, and is not able to access the shelter system because he technically has a home address; he ends up couch surfing and sometimes sleeping on the subway. While Ignacio's criminal case is pending, Juana receives a notice that the public housing authority will seek to terminate her lease based on Ignacio's undesirable conduct. The housing authority gives Juana the option of permanently excluding her son from her apartment to avoid facing termination of her lease.*

*Without Ignacio, Juana loses her support in the apartment and struggles to take care of herself.*

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## V. LESSON 5: WE ARE ALL DEFENDERS

In addition to all of the above lessons, I see how intentional, communicative collaboration amongst advocates of differing expertise and across the criminal-civil divide can result in transformative outcomes for the people we serve. But even beyond this, I see how being a defender, no matter where one defends, means we are part of a larger movement for change.

At the Bronx Defenders, our model for holistic defense with integrated civil legal services allows for a person like Angela to defend against her family court case with representation from a family attorney who will work with a civil advocate and civil attorney to represent her on and address her welfare fraud and housing

condition issues. She will also have access to a criminal defense attorney in criminal court. When the cases are over, Angela can work with a community organizer to address the housing issues in her building that caused her initial court involvement. It means that Jasmine will not lose her children to foster care or her partner to deportation, will be able to keep her home and her housing subsidy as well as her money that was seized by the police, all because she has civil defenders by her side, representing her and working together to advise her criminal defense attorney. With a civil defender, Juana will not lose her public housing apartment and will be able to avoid having to permanently exclude her son Ignacio from her apartment. Teddy will get his car and cash back because he has a civil advocate fighting for transparency and accountability regarding the government's seizure of his property and in turn, he will not lose his job.

Working together, we need to understand the web of civil punishments that exist in order to grasp the full picture of criminal justice and systems involvement. Only through this can we stave off the systems' reach and change the reality that so unjustly and disproportionately punishes our clients and the targeted communities we serve. Funders, judges, practitioners, politicians, and many others must take the full picture into account — all have an opportunity to alter the injustices faced by people who are pervasively marginalized.

With this understanding, we must work hand-in-hand with the communities we serve and use our privilege to put the full force of the law behind a larger movement to build power and for equity and justice.

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*Denny connects with his criminal defense attorney from The Bronx Defenders, who works with him to prepare for his trial. Identifying the many civil problems that arose as a result of Denny's arrest and the instability it created, she refers Denny to work with one of her colleagues, a civil attorney. Through his civil public defender, Denny gains assistance with renewing his security guard license and is represented in his eviction proceedings. His civil defender also works with Denny to get assistance with applying for public benefits: nutritional assistance for his child, his wife and himself, as well as a special housing subsidy to make his rent affordable, and to pay the rental arrears he owed as a result of not being able to work. Gaining this stability allows Denny to push for a trial in criminal court, where he was fully acquitted of all charges.*

*With the assistance of his public defenders — civil and criminal — Denny and his family can get back to their lives.*

#### CONCLUSION

As civil public defenders, we venture into courts, struggles and conflicts where no constitutional right to a lawyer, and very few other protections exist to ensure fairness in process and justice on behalf of the people we represent. We fight for the basic necessities that are destabilized or deprived once an individual is criminally or otherwise accused. We are a growing group of social justice warriors changing the face of public defense. Working in partnership with our clients, collaborators, and co-conspirators, we are bridging the gap between criminal justice reform and civil justice to bring transformative change on behalf of communities. The people we serve deserve no less.