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Go to Trial: Crash the Justice System

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Columbus, Ohio

AFTER years as a civil rights lawyer, I rarely find myself speechless. But some questions a woman I know posed during a phone conversation one recent evening gave me pause: “What would happen if we organized thousands, even hundreds of thousands, of people charged with crimes to refuse to play the game, to refuse to plea out? What if they all insisted on their Sixth Amendment right to trial? Couldn’t we bring the whole system to a halt just like that?”

The woman was Susan Burton, who knows a lot about being processed through the criminal justice system.

Her odyssey began when a Los Angeles police cruiser ran over and killed her 5-year-old son. Consumed with grief and without access to therapy or antidepressant medications, Susan became addicted to crack cocaine. She lived in an impoverished black community under siege in the “war on drugs,” and it was but a matter of time before she was arrested and offered the first of many plea deals that left her behind bars for a series of drug-related offenses. Every time she was released, she found herself trapped in an under-caste, subject to legal discrimination in employment and housing.

Fifteen years after her first arrest, Susan was finally admitted to a private drug treatment facility and given a job. After she was clean she dedicated her life to making sure no other woman would suffer what she had been through. Susan now runs five safe homes for formerly incarcerated women in Los Angeles. Her organization, A New Way of Life, supplies a lifeline for women released from prison. But it does much more: it is also helping to start a movement. With groups like All of Us or None, it is organizing formerly incarcerated people and encouraging them to demand restoration of their basic civil and human rights.

I was stunned by Susan’s question about plea bargains because she — of all people — knows the risks involved in forcing prosecutors to make cases against people who have been charged with crimes. Could she be serious about organizing people, on a large scale, to refuse to plea-bargain when charged with a crime?

“Yes, I’m serious,” she flatly replied.

I launched, predictably, into a lecture about what prosecutors would do to people if they actually tried to stand up for their rights. The Bill of Rights guarantees the accused basic safeguards, including the right to be

informed of charges against them, to an impartial, fair and speedy jury trial, to cross-examine witnesses and to the assistance of counsel.

But in this era of mass incarceration — when our nation's prison population has quintupled in a few decades partly as a result of the war on drugs and the “get tough” movement — these rights are, for the overwhelming majority of people hauled into courtrooms across America, theoretical. More than 90 percent of criminal cases are never tried before a jury. Most people charged with crimes forfeit their constitutional rights and plead guilty.

“The truth is that government officials have deliberately engineered the system to assure that the jury trial system established by the Constitution is seldom used,” said Timothy Lynch, director of the criminal justice project at the libertarian Cato Institute. In other words: the system is rigged.

In the race to incarcerate, politicians champion stiff sentences for nearly all crimes, including harsh mandatory minimum sentences and three-strikes laws; the result is a dramatic power shift, from judges to prosecutors.

The Supreme Court ruled in 1978 that threatening someone with life imprisonment for a minor crime in an effort to induce him to forfeit a jury trial did not violate his Sixth Amendment right to trial. Thirteen years later, in *Harmelin v. Michigan*, the court ruled that life imprisonment for a first-time drug offense did not violate the Eighth Amendment's ban on cruel and unusual punishment.

No wonder, then, that most people waive their rights. Take the case of Erma Faye Stewart, a single African-American mother of two who was arrested at age 30 in a drug sweep in Hearne, Tex., in 2000. In jail, with no one to care for her two young children, she began to panic. Though she maintained her innocence, her court-appointed lawyer told her to plead guilty, since the prosecutor offered probation. Ms. Stewart spent a month in jail, and then relented to a plea. She was sentenced to 10 years' probation and ordered to pay a \$1,000 fine. Then her real punishment began: upon her release, Ms. Stewart was saddled with a felony record; she was destitute, barred from food stamps and evicted from public housing. Once they were homeless, Ms. Stewart's children were taken away and placed in foster care. In the end, she lost everything even though she took the deal.

On the phone, Susan said she knew exactly what was involved in asking people who have been charged with crimes to reject plea bargains, and press for trial. “Believe me, I know. I'm asking what *we* can do. Can we crash the system just by exercising our rights?”

The answer is yes. The system of mass incarceration depends almost entirely on the cooperation of those it seeks to control. If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation. Not everyone would have to join for the revolt to have an impact; as the legal scholar Angela J. Davis noted, “if the number of people exercising their trial rights suddenly doubled or tripled in some jurisdictions, it would create chaos.”

Such chaos would force mass incarceration to the top of the agenda for politicians and policy makers, leaving them only two viable options: sharply scale back the number of criminal cases filed (for drug possession, for example) or amend the Constitution (or eviscerate it by judicial “emergency” fiat). Either action would create a crisis and the system would crash — it could no longer function as it had before. Mass protest would force a public conversation that, to date, we have been content to avoid.

In telling Susan that she was right, I found myself uneasy. “As a mother myself, I don’t think there’s anything I wouldn’t plead guilty to if a prosecutor told me that accepting a plea was the only way to get home to my children,” I said. “I truly can’t imagine risking life imprisonment, so how can I urge others to take that risk — even if it would send shock waves through a fundamentally immoral and unjust system?”

Susan, silent for a while, replied: “I’m not saying we should do it. I’m saying we ought to know that it’s an option. People should understand that simply exercising their rights would shake the foundations of our justice system which works only so long as we accept its terms. As you know, another brutal system of racial and social control once prevailed in this country, and it never would have ended if some people weren’t willing to risk their lives. It would be nice if reasoned argument would do, but as we’ve seen that’s just not the case. So maybe, just maybe, if we truly want to end this system, some of us will have to risk our lives.”

Michelle Alexander is the author of “The New Jim Crow: Mass Incarceration in the Age of Colorblindness.”