

CHOKEHOLD

POLICING BLACK MEN

Paul Butler



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to be as free as white people. The system is now working the way it is supposed to, and that makes black lives matter less. That system must be dismantled and the United States of America must, in President Obama's words, be "remade." The final chapter of this book suggests a beginning. But first I want to give some practical advice to African American men who find themselves in the snares of the Chokehold.

If You Catch a Case: Act Like You Know

If you are an African American male, police and prosecutors are waiting for you. Watching and regulating the conduct of black men is a major part of their work. Cops are eager to stop and frisk you. They are looking for a reason to arrest you. This will improve their reputation on the force and their precinct's numbers on Compstat, a management system used by major police departments to track crime. If they make enough stops and arrests, they might make detective. Prosecutors too are working to enroll you in the system. When I did that work I got the most credit for winning convictions, which I obtained mainly by forcing defendants to plead guilty. If the judge sentenced somebody to substantial time in prison, I got high fives all around the office.

This is how the Chokehold works. But there are things that you can do to disrupt its grip. You should resent having to do these things. They severely curtail your rights as a citizen of the United States, and as a free human being. The final chapter of this book is about how to bring down this entire system.

In the meantime, if you want to avoid getting caught up in the snares of the Chokehold, here is a guide to navigating the system. And if you do catch a case, here is advice from a former prosecutor about how to manage the criminal process. And not just any prosecutor, but an African American male prosecutor who has had the same kind of bad interactions with the police as many of my brothers. I've been stopped and frisked by cops more times

than I can count; I have been thrown against a car by police twice; I have been arrested, and I have been prosecuted myself, for a crime that I did not commit. I beat my case and if what I did can be of any use to anyone else who has caught a case I am happy to share it.

HOW TO NOT GET STOPPED

If the police want to stop you, they can almost always find a reason. Remember, under the “reasonable suspicion” legal standard that allows the police to detain you temporarily, you do not have to be doing anything illegal. As a practical matter, “reasonable suspicion” can be anything that strikes the police as unusual or that makes you stand out. In addition, in cities like New York and Baltimore, courts have found that if cops don’t have a reason to stop you, they can just make one up—with little fear of consequences.¹

So the task is to make the police not want to stop you, to cause them to lose interest in you, to turn yourself into the invisible man. There is some obvious stuff: Don’t drink alcohol or smoke weed in public places. Don’t ride in a car or hang out on the street with people who might have guns or drugs on them. Understanding that cops use low-level misdemeanor offenses as a way to catch black men, you have to exercise proper caution.² No riding a bike on the sidewalk. As an African American man, you are better off peeing in your pants than urinating outside.

But you already know those things. Most of what attracts the police to you is subtler. Here are some other things that are suspicious to the police. These tips come from police officers and defense attorneys. I don’t mean that these factors provide legal reason for the cops to stop you. Rather, they draw attention. They extend the hard stare to active surveillance.

Three or more black men in a car at any time
Black man in a new or late-model car
Black man in a black SUV

Black man in a car with tinted windows
Black man with a white woman
Black men in a group laughing too loudly
Black men play-fighting or joking around physically
Black men raising their voices
Black men in any sort of disagreement or argument
Black man running fast
Black man in a hoodie
Black man with low pants
Black man with a T-shirt that says “Black Lives Matter”
“Racial incongruity”—a legal term meaning being in a
place where members of your race usually are not

The law of stop and frisk enforces a conformity about race but also restricts any kind of standing out from the crowd. “Suspiciousness” is an ideological bundle of sticks. It discourages acting different from everybody else, looking weird, or not living up to a police officer’s expectations about how a black man should act. The cops don’t only enforce the criminal law; they also enforce the politics of respectability.

Many will rebel. The black teenagers with their pants hanging down their behinds know that it makes the police look at them extra hard. They do it anyway, in the name of free expression. Mad respect. But if you do not want to deal with the cops you must understand that the country African American men live in is not free.³ So basically don’t stick out. And if you are unfortunate enough to attract the attention of an officer, you must find a way to send the message, without a word, that you are safe. There is a specific way you should, as an African American man, look at a cop. You want, just by your gaze, to communicate respect and deference, but not fear, which is interpreted by the police as a sign that you are guilty of something. You have to demonstrate not only that you are safe but also that you are compliant. This is an actor’s trick. Of course when a cop is trying to decide whether you should be detained, you are afraid. And, to preserve your own

sense of self-worth, you should not actually feel compliant. What is required, though, is a performance, to keep you safe. The gaze is everything. Practice at home or with a friend.

It is usually not a good idea to run or otherwise attempt to evade cops. As discussed in chapter 3, this gives the police a legitimate reason to stop you, even if they did not have one before. Indeed the only situation in which you should even consider running is if you know you have contraband on you, or you know the cop does not like you, and you think that if you run, you will not be chased. In Baltimore, for example, the word on the street is that the cops don't chase most people who run.⁴ That is why Freddie Gray took off when he saw the cops. He didn't have anything illegal on him; he probably just did not feel like being bothered that day.

So, again, if the practice of your hood is that the cops don't chase folks, running might occasionally make sense for a brother. But even in those places, unless you have contraband, it's probably safer to take your chances with staying put. Running will, at minimum, draw the attention of the police to you, and for an African American man that is never a good thing.

HOW TO PREVENT A STOP FROM TURNING INTO AN ARREST

None of the above worked and you have been stopped. There's still a good chance things will work out; most stops don't turn into arrests. Here's what you can do to be one of the lucky ones.

The following tips apply to people who get stopped by the police in public. If the cops come to your house with a warrant for your arrest, you're going down. Skip ahead to the section about how to find a good lawyer. But most people get arrested on the street, following a stop. And, drum roll please, here is some rare good news for black people about the police. In cities where studies have been done, African Americans who are stopped are less likely to be arrested than white people.⁵ This is because the police frequently use any dumb excuse to stop a black person, whereas

they are more likely to stop a white person for something that actually is suspicious, and which leads to an arrestable offense.

Okay enough good news, now back to the regularly scheduled programming. Much of what you think about how the police are supposed to treat you is wrong. No, they don't have to tell you why you are being stopped. If you end up getting arrested, they do not even have to explain what crime you are being arrested for.⁶ If you get patted down, they don't have to get someone of your same gender to do it. A female cop can frisk a man, and a male cop can frisk a woman. In twenty-four states, if cops ask for identification, you have to produce it, or you get arrested. These states are listed in the endnotes.⁷

These tips for avoiding arrest are not foolproof. If the cops want to arrest you, maybe because they have a quota to meet, they will. However, if it's just a routine stop for a petty misdemeanor, the cops usually don't care too much about letting you go. It's not like they think they would be letting a hardened criminal loose. As we have seen, police stops don't have much to do with public safety.

The most important thing you need to know is this: A stop is a masculinity contest between you and the police.⁸ You must let the cops win. It's all about machismo, regardless of whether the cops are male or female. They are stopping you to demonstrate their dominance of the street. Here's how you pretend like you acquiesce:

Address the police as "Officer," "Sir," and "Ma'am." Never raise your voice. Don't make jokes or communicate any kind of irreverence. Do not let the police provoke you—even if they are treating you with contempt. Unless the police start hitting you, do not ask bystanders to record the stop. Don't object if people are recording, it's a good thing, and you should do the same thing for another brother or sister. But at this moment, when you are trying not to be arrested, if you yell for someone to start recording, it will make the police angry. This is not a time for civil liberties. This is a time for being dominated by the state, and acting like you like it.

The cops will ask you a bunch of nosy questions, like "Where

are you going?” and “What are you doing?” and “Who do you know around here?” They will want you to name names and provide addresses. They usually ask how many times you have been arrested, and if you are on probation or parole. Say as little as possible, but answer the questions they can find out by running a computer check.

Never admit to any offense other than a traffic infraction. If you actually committed the traffic infraction, admit that. But any criminal offense—regardless of whether you did it—you should remain silent. It’s just like you hear on TV: anything you say can and will be used against you.

Police lie. It’s perfectly legal.⁹ If they have separated you and your friend, and they tell you your friend has implicated you, do not believe them. If they say, “Just admit you broke the law and we will not arrest you,” do not believe them. If they say they know you were acting in self-defense or that somebody just gave you the drugs to hold, do not trust them.

It is best not to assert too many rights. If you are not sure whether you actually are being detained, politely ask, “Officer, am I free to go?” If they say “no,” don’t ask them what their reasonable suspicion is. Do not, at this point, ask to see an attorney (you don’t have a right to one during a stop anyway). Do not ask if their body camera is on. Don’t ask why they are touching your private parts or going in your pockets. Never tell cops, “You can’t do this.” It sets them off, and, under the law of the streets, yes, they can.

Here is one major exception to the recommendation that, during a stop, you do not assert your rights. If you have contraband in your possession—illegal drugs or a gun—and the cops ask if they can search, you must politely say no. This may seem obvious, but police claim people who are carrying say “yes” all the time.

Can that be true? Not always. Sometimes, in court, the police say there was consent and the defendant says there was not. If there is a credibility contest between the police and a defendant, judges almost always believe, or pretend like they believe, the cop. You, the black suspect, do not get the benefit of the doubt.

But, according to police officers that I trust (not necessarily trust on the street; I mean I trust them to give me the real deal), it's quite common for people who possess illegal materials to agree to be searched.¹⁰ This is stupid, don't do it. My cop friends theorize that the suspect consents because he thinks that if he says "yes" the police will not actually search him, or thinks that when the cops find the contraband, they will give the suspect a break because he consented to the search. None of this is true.

There is some information you can volunteer that might make a difference. If you have a close family member or friend who is a police officer, let them know that. "Close" meaning you know his or her cell phone number by heart and you can tell the officer to call that person right then and there to vouch for you.

If you have a job, let the cop know. Ask if you can show them your work ID. The same goes if you are a student.

For men, crying almost never helps, and often makes things worse. Women, particularly white women, have more latitude but even then it depends on the officer. It should be reserved as a last resort, when the officer is opening up the handcuffs.

IF YOU ARE ARRESTED

As far as cooperating with the police to get them to let you go, game over. They are not going to unarrest you. Everything from this point on is adversarial. The cops are officially out to get you. Your job is to give them as little to work with as possible.

This starts with being physically 100 percent submissive. Your tone should remain quiet and respectful, even during the more invasive search of your body and your immediate surroundings that the police are allowed to do once they have arrested you. Don't threaten to call the chief of police, your city councilperson, the NAACP, or the local news. Hold your hands out for the handcuffs. Bow your head down to get in the squad car.

Your performance has now become more difficult because you are angry and even more frightened. But things will get much

worse if you pick up a charge of resisting arrest or assault on a police officer. That's usually a felony, even if the crime you are being arrested for is a misdemeanor. Being taken into custody for a low-level offense is extremely unpleasant and inconvenient but odds are, even if you are convicted, you will not go to prison, unless you have several other convictions under your belt. And there is still a possibility that the prosecutor will drop the charges after the arrest. But if you catch a charge of resisting arrest, all of that goes out of the window. You might as well start deciding what you are pleading guilty to.

To avoid that additional charge, understand that cops can be sensitive, even prickly, when it comes to their own personal space being invaded. Ironic, I know. But any physicality on your part can be misinterpreted.¹¹ So when you are arrested, you have to communicate to the police that your body is theirs to work with.

Supreme Court Justice Sonia Sotomayor, in a biting critique of the Court's case law, outlined what happens next at the jail: "The police officer can finger you, swab DNA from the inside of your mouth, and force you to shower with a delousing agent, while you lift your tongue, hold out your arms, turn around, and lift your genitals. Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination by employers, landlords, and who ever else conducts a background check."¹²

Probably the most famous Supreme Court decision of all time is *Miranda v Arizona*.¹³ Everybody knows that when you get arrested, the police read you this warning:

- 1) You have the right to remain silent.
- 2) Anything you tell the police can be used against you in court.
- 3) You have the right to an attorney.
- 4) If you cannot afford an attorney, the government will provide one for you.

But these rights don't work the way you think. Technically the police do not have to read you your Miranda warnings. To be precise, if they want to introduce any of your post-arrest statements in a trial, they are required to first give you the Miranda warnings. They usually do. But if they don't give you the warnings, it's not like that's a get out of jail free card. It just means that they can't use your statements in court. And, thanks to the Chokehold, there are several exceptions that allow un-Mirandized statements to be used.¹⁴

In any event, don't talk. Let me put that more strongly. Shut the fuck up. Don't admit to anything other than what can be found on your driver's license. It does not matter if you are innocent. Every time they ask you a question about what happened say, "I invoke my right to a lawyer."

This is the hardest rule to follow. When I was arrested, I did not follow it myself. I should have known better, but I thought, as an attorney, I could talk my way out of it. Plus I was innocent. So what happened after I made my case to my arresting officer? My lawyer ass was locked up and taken to the holding cell along with all the other black men who had been arrested that day.

When you assert your right to counsel, do not expect the cops to get you a lawyer. They never do that. Honestly if you said to the average police officer, get me an attorney, she would have no idea what to do. All *Miranda* requires is that if you invoke your right to counsel, the police have to leave you alone. That is why it is so important to claim your right to a lawyer. The Supreme Court has said that if you only invoke your right to silence, the police can badger you by, under certain circumstances, going back later to ask if you have changed your mind.¹⁵ But if you say you need a lawyer, the police aren't supposed to say another word to you about your alleged crime.¹⁶

WHO SHOULD YOU CALL?

In many jurisdictions you don't have a right to make a telephone call. That's an urban myth. But at some point after you are booked—which means driven to the police station or courthouse, mug shot taken, fingerprinted, searched once again—the police usually let you make a call. To whom should you direct it?

If you already have a lawyer, or have the knowledge and financial resources to get a good one immediately, call that person. He or she can try to get the prosecutor to delay filing charges until the lawyer does a quick investigation of the case. This usually does not work, but it is worth a shot. But most people charged with crimes are poor and they do not have an attorney on retainer. In that case call your mother. Or your partner, sibling, or best friend. The person who is going to stop everything to address the mess your life has just become. They need to do what they can to try to get you out of jail as soon as possible. The longer you sit in jail, the worse your outcomes are likely to be.

Special shout-out to mothers, partners, siblings, and best friends: go back and read the section in chapter 2 about how many outstanding warrants there are. Those warrants are for people who failed to appear in court. If you had bailed that person out, you just lost your money. Don't hock everything you own to raise bail for a person you don't have confidence will actually show up in court. Yes, I know the guy who is locked up will be pissed. But if you think that there is a significant risk he will miss the court date, it makes not only his situation but also your own worse. The Chokehold is insidious. This is how it tears families apart.

When a person gets a call that someone they care about has been arrested and is locked up, the natural inclination is to go to the police station. This is a bad move. The cops are not going to let a visitor see the dude prior to his appearance in court. But if it's a serious case, and the mother or girlfriend shows up at the station, a detective might try to interview her, asking questions like, "Did you see your son last night? Where did your boyfriend tell

you he was going?" Just as anyone who has been arrested should never talk to the cops, anyone who is trying to help the guy should also not talk to the cops. Nothing good can come of it.

Here are the three things a person can do that are most helpful for someone who has just been arrested:

- 1) Call a lawyer right away; in addition to telling the lawyer what you know about the case, tell her every good thing you can think of about the person who has been arrested, including whether he has a job or is in school, is close to his family, attends church, and is active in the community. All of this will help the attorney try to get the guy released.
- 2) If there are witnesses to the arrest, put together a list of their names and contact information. Do not interview the witnesses yourself and never write down anything they have told you, because the prosecutor could try to subpoena any statements you have recorded. Just give the names of the witnesses to the defense attorney.
- 3) Show up at the courthouse for the "arraignment." That's the hearing where the formal charges are read and, by law, it has to happen within forty-eight hours of the arrest. The defendant will know you are there, but make sure the defense attorney knows who you are. You are there to provide moral support to your dude, and for the judge to see you when she is trying to decide whether to set bail or release the dude pending trial. The fact that somebody showed up for the defendant sometimes makes a difference to the judge.

PUBLIC DEFENDERS VERSUS PAY LAWYERS

Many people think of public defenders as inferior lawyers. I get a lot of emails and calls from people charged with serious crimes who think their case is going down because the judge appointed a public defender to represent them. They automatically assume a private attorney is better. Sometimes loved ones of

people in this situation are willing to do whatever it takes—like mortgaging their house—to retain a pay lawyer. This is often a terrible idea.

Public defenders are often the best lawyers you could have. If you are a poor person charged with a felony in the District of Columbia, the Bronx, or San Francisco, pray that the judge appoints the public defender to represent you. Other jurisdictions where you are most likely better off with a public defender include Harlem, Oakland, Philadelphia, Miami, West Palm Beach, Seattle, and the states of New Hampshire and Colorado. And if you are charged with a federal crime, most federal public defender offices will provide you with top-notch representation.

There are some kinds of cases that public defenders have more experience with than any other lawyers, including serious felonies like homicide and robbery.

When I was a young lawyer, I worked at what is probably the best white-collar criminal defense firm in the country. If I was charged with tax evasion or making an illegal campaign contribution, I would hire that firm. But Mike Tyson, the former boxing champion, made a mistake when he retained that firm to defend him against rape charges. That's not a crime that the attorneys there had much experience with defending.¹⁷ Tyson was convicted, and sentenced to six years in prison. It's hard to know whether he would have had a different outcome if he had been represented by an attorney with the background of a public defender, but experience certainly makes lawyers better, and public defenders have more practice defending street and violent crime than lawyers at fancy law firms do.

Of course not every public defender is great. When they don't do a good job, it is often because their offices don't get the resources they need. In any event, most poor people are not represented by public defenders but rather by court-appointed lawyers. These are private attorneys who support themselves by taking these kinds of cases. Many are excellent lawyers who have the

same kind of experience and local courthouse knowledge as public defenders.

But some of them are awful. If you get appointed one of the lousy ones, you are screwed. You have no choice in the lawyer the judge appoints. If you complain, it is extremely unlikely that the judge will appoint another attorney to represent you. Your options are limited. If the charges are serious, this is the time to consider hiring a pay lawyer. For many people charged with crimes, however, this is not a realistic option.

Hope that you live in one of the few places where appointed lawyers earn a decent wage. One study found that a 1 percentage point change in the wage gap between appointed attorneys and private lawyers reduces the probability of being found guilty by about 4 percentage points. Hope also that your appointed lawyer is not a rookie. The same study found that attorneys with just one more year of experience won sentences for their clients that were five months shorter.¹⁸

Let's keep it real. If you have major concerns about your appointed lawyer, and you can somehow pull together the cash to pay an experienced lawyer big bucks to represent you, you should hire that lawyer. One study found that defendants represented by private lawyers received sentences that were three years shorter than those represented by public defenders.¹⁹ It may be that prosecutors offer better deals to those clients because they think private lawyers will spend more time on the defense than lawyers who mainly represent poor people.

If you are in a position to retain a lawyer, you should interview him or her just the way you would anyone else you are hiring to do important work for you. Make sure the person has experience in criminal cases, and that he or she knows their way around the courthouse where your case is being heard. Ask the attorney how long it takes her to return calls to clients, and how she keeps clients up to date about developments in their cases. Get the names of three people she has represented in criminal cases and call

those people for a reference. If the attorney cops an attitude about any of this, that's a good sign you should not hire him or her. These are the kinds of questions that rich people ask when they select a lawyer, and you should expect the same quality of service. Trust me, brother, there will be times when it will feel like everybody else in the courtroom assumes you are guilty, and most people outside the courtroom too, and you need a defense attorney who treats you with the respect you deserve.

Some brothers still suffer from the mind-set that it's better to have a white lawyer, or a Jewish lawyer. The theory is that those attorneys are more connected, or better at coming up with defenses, or that judges and juries will like them better. This is white supremacist hogwash. There is no evidence to support the claim that lawyers of certain ethnicities or faiths get better outcomes for their clients. Of course you want an attorney who will be a good negotiator with the prosecutor and who has a proven track record. It's just that being white or Jewish is not a good proxy for that skill set.

Be clear that I am not saying that race and gender don't matter in the courtroom. Every chapter in this book suggests that they do matter, hugely. The point is that the Chokehold means the odds are against you, and you need a defense attorney who is going to fight like hell. It's silly and counterproductive to make group-based assumptions about which lawyers will do so, based on their race or religion.

There is, however, one situation in which a lawyer's race or gender might tip the scale in favor of hiring her. Depending on what crime you are charged with, you might need to prove to a jury that you are not a racist or sexist. A man who is prosecuted for sexual assault, for example, might be better off represented by a female defense attorney.²⁰ A white person charged with a hate crime against an African American might select an African American lawyer. Even in these cases, gender and race should not be the only consideration. It's just that if you are lucky enough to have a choice in who represents you—and most people charged with

crimes are not—and you have a jury trial, your lawyer's gender or race could help send the right message to the jury.

BE THAT NEEDY CLIENT

Jeff Adachi runs one of the best criminal defense firms in the country. He is the elected public defender in San Francisco. Adachi is a brave man. He took the Harvard implicit bias test, which demonstrated that he has unconscious prejudices against African Americans. He admits the same is probably true for the lawyers who work for him, as it is for most attorneys, and it might impact the way they represent black defendants.²¹ Adachi is taking steps to reduce the bias, like having his lawyers get to know their clients as people and asking themselves whether they would treat a case differently if the defendant were white.

But most lawyers are not so proactive about their prejudices. They don't even know they have them. How can you make sure that your attorney is representing you the same way he would a white dude? This is not just an issue for appointed attorneys. Even pay lawyers sometimes don't devote the necessary resources to your case.

You have to motivate your lawyer. You do this in two ways. First, you make sure the lawyer knows you as a person and hopefully likes you. Attorneys take an oath to represent all their clients zealously, but zeal is a difficult commodity to distribute in equal portions. If your attorney finds you rude, disrespectful, or irrational, she may not go to the mat for you the way you need her to. If, however, you show her photos of your children or discover you are both NBA fans, she will remember something about you other than what happened on one of the worst nights of your life.

Second, you must be demanding. If enrolling the attorney as your friend is the carrot, the stick is being vigilant about the specific things she is doing to give you the best representation at every stage of the process. Yes, it's checking up on her, but your lawyer should be okay with it as long as you don't come across like

you think she is part of a conspiracy to lock you up. Just let her know you are extremely anxious, as anyone should be when their freedom is in the hands of a prosecutor or judge.

There are certain things that an excellent defense attorney should do. They are what criminal defense lawyers do for rich people. Unless there is some really good reason that she carefully explains, your lawyer should do these three things for you:

- 1) If you are being held in jail, your lawyer should file a motion for your release. She should ask the judge to dismiss the charges. Your lawyer will lose. Judges almost never drop charges that prosecutors have brought, in part because the “probable cause” legal standard for bringing charges is relatively low. But many judges will allow a hearing, which means that a police officer or other witness will have to testify under oath about the circumstances of your arrest. This gives you and your attorney information that you otherwise would not have about the strength of the prosecution’s case.²²
- 2) Ask the prosecutor for “discovery” and “Brady.” “Discovery” is information about the case that the prosecution is required to turn over at some point before the trial. The rules and timetable vary depending on the jurisdiction, but it usually includes a list of the prosecution’s witnesses, any statements they have made, and police reports pertaining to the arrest. “Brady” is any evidence the police or prosecutors have that is favorable to you and relevant to whether you will be found guilty or not guilty. Under the law, the prosecution has an obligation to share this with you, but of course it’s up to them to decide whether it meets the criteria.²³ As you can imagine, prosecutors tend to be stingy with what they disclose. And even when they illegally withhold evidence prosecutors are rarely sanctioned. As federal judge Alex Kozinski wrote in 2013, “Brady violations have reached epidemic proportions in recent years.”²⁴ But your lawyer

should still ask because if you have an ethical prosecutor, he might hand over evidence that has the potential to set you free.

- 3) Hire an investigator. Otherwise the only version of the facts is going to come from you and the police. In the experiences of many people who have been charged with crimes, including me, the police lie. Some witnesses, especially so-called snitches who are cooperating with the prosecution in return for some favor, often lie as well.²⁵ A good investigator can interview witnesses who might have another version of what happened. In my criminal case, my lawyer hired an investigator who was a former D.C. cop, and some officers were willing to talk to him even though they never would have talked to my lawyer.

WHAT TO TELL YOUR LAWYER

Your lawyer probably will not ask you if you are guilty. She does not need to know and she does not want to know. But she does have to be aware of what the evidence against you is. Based on what you tell her, and what the prosecution is required to reveal about its case, she will put together a defense.

She does not personally have to think you are innocent in order to defend you. What attorneys call “factual guilt” means that you committed the offense you are charged with. A good defense attorney does not much care if this is true. “Legal guilt” means that the prosecution proved, beyond a reasonable doubt, that you committed the offense. There is often a wide gap between factual guilt and legal guilt, and effective defense attorneys exploit that gap to win your case.²⁶

At the same time, your attorney cannot allow you to testify in court to something that you have told her is not true. She risks losing her law license if she sponsors perjured testimony.²⁷ So, for example, if you have previously told her that when you saw the police coming, you threw the weed out of the car window,

you cannot, at trial, testify that you never had any weed, unless, for some reason, the facts have become clearer in your mind. If that is the case, let your lawyer know that what you told her at first was inaccurate. But even if you did toss the weed, this does not mean that you have to plead guilty. You can still go to trial. Your lawyer would probably advise you to exercise your Fifth Amendment right not to testify, and she would try to poke holes in the government's case, for example by attacking the credibility of the police. This is the good part about the criminal justice system not being an actual search for truth, and you may as well make it work for you.

GOING TO COURT: A STYLE GUIDE

When I was a prosecutor we used to laugh at the way some defendants dressed for court. They made our jobs easy because they looked guilty. They wore baggy pants, white T-shirts, gold chains, or some other urban style that you might see teens wearing on the subway. That is not a good look if you are trying to avoid going to jail. Even "casual Friday" outfits like nice jeans or khaki pants and sneakers hurt your case.

When a black man has his fate in the hands of a judge or jury, he needs to wear a suit. The District of Columbia Public Defender Service, one of the best in the country, has a closet of jackets and ties for its clients who don't own them. At a minimum, male defendants should wear a nice pair of slacks and a button-down shirt. And my public defender friends swear by polished shoes for their clients. Judges and jurors notice things like that.

If you have braids or locs, cut them off. They'll grow back. You need prosecutors and judges to exercise whatever mercy their miserly hearts can muster. You do this by getting them to relate to you. People who become prosecutors and judges are conservative, socially if not always politically. Don't distract them with hair that offends their parched standards of respectability. It's hard enough getting them to see past your black skin.

SHOULD YOU SNITCH?

The prosecution might offer you a deal if you help them make a case against somebody else who they want to lock up more than they want to lock you up. The first thing you need to figure out is if you accept the offer, are you going to “get got” or is somebody in your family going to “get got.” If cooperating with the government puts you or your loved ones in jeopardy, do not do it. It’s a hard-knock world out there, and the truth is the prosecutor is more interested in winning his case than he is in protecting you. If he cared that much about you, he would not be prosecuting you in the first place. You are in the best position to assess the risks, and if you have any doubt about your safety, turn the offer down.

If you think that you can cooperate with the prosecution and be safe, then you need to make sure that the deal is worth it. Ask your lawyer exactly what difference it would make in your case’s outcome if you snitch compared to if you don’t snitch. Sometimes the most the prosecutor can do is recommend to the judge that you get a reduced sentence. Your defense attorney should indicate, based on her experience, how likely it is that the judge would follow the prosecutor’s recommendation.

Finally, you should help the prosecution only if you think it’s the right thing to do. Sometimes people cooperate because they think the person the prosecution is going after really did something wrong and deserves punishment. In general, however, the way the prosecutors use snitches can be a little bit lazy and a little bit sleazy. Prosecutors are not sure they have enough evidence to get a conviction, so they basically bribe someone to be a witness. If the deal is good enough, some people are tempted to lie. Studies show that one of the most common reasons for wrongful convictions, including in death penalty cases, is dishonest testimony by snitches. You don’t want to participate in this unsavory practice unless you can tell the truth. You never want to put another brother or sister in prison by lying about their guilt. But the

irony is, as discussed next, sometimes you might want to lie about your own guilt, in order to go home sooner.

SHOULD YOU COP A PLEA? THE TRAGEDY OF KALIEF BROWDER

Kalief Browder was an innocent man. An innocent man who should have pled guilty. Then he might still be alive.

Kalief was sixteen years old when he was arrested for robbing a man of his backpack in the Bronx, New York.²⁸ Kalief had been walking home from a party when NYPD officers stopped and frisked him. The victim, who was sitting in the police car, first said Kalief had robbed him that night, and then changed his mind and said it hadn't been that night, but two weeks prior. Still Kalief was arrested, and bail was set at \$3,000, which his family could not afford. And so he sat in Riker's Island, the notorious New York City jail.

For almost three years. The trial kept being delayed. During two years of this time, Kalief was held in solitary confinement. Kalief always insisted on his innocence. At one point, after he had been locked up for more than two years, the prosecution offered him a deal: If he would plead guilty to two misdemeanors, the judge would sentence him to time served, and he could go home that day. Kalief said he could not plead guilty to a crime he had not committed. His specific words to the judge were "I'm alright."²⁹

But Kalief was not "alright." Videos from the jail security cameras show him being brutally assaulted, once by a group of inmates and another time by a prison guard. After he had been incarcerated for more than one thousand days, the prosecution summarily dismissed the case.³⁰ Kalief finally went home. But the two years in solitary confinement had changed him, as it changes virtually everyone who suffers it. Kalief had a hard time coping with life on the outside, just as he had not been able to cope on the inside. On the morning of June 6, 2015, Kalief tied bedsheets

to his neck and jumped to his death from the second story of his mother's home.

Read the tragedy of Kalief Browder as a cautionary tale. Sad and repulsive as it may seem, for some people, pleading guilty might be the best decision, even if they did not commit the crime. The presumption of innocence is just words on paper. Many people, including many judges and jurors, think if you have been arrested you are guilty. This makes going to trial risky, especially for African American men. Prosecutors exploit this bias when they plea-bargain by not really giving the defendant much of a break. They know that if you go to trial and lose, you will get a lot more time than if you had accepted the plea—even if the plea offer is not generous.

For this reason, almost everyone who is prosecuted for a crime ends up pleading guilty. Ninety-five percent, to be exact. If you think that you get a raw deal because you are African American, you are correct. Virtually every study has demonstrated that white men get better plea offers than black men. But prosecutors have so much discretion it will be virtually impossible for your lawyer to prove you are getting treated worse because you are black, even though everyone knows it's true.³¹

IF YOU GO TO TRIAL

I understand why Kalief did not want to plead guilty because I felt the same way. When I was arrested, the prosecutor offered me "diversion," which meant that I could do community service and then the case would be dismissed. But to be approved for diversion, you have to admit you committed the crime. Since I had not committed the crime, I could not bring myself to do that, and so I went to trial. To make that decision, I used a kind of cost-benefit analysis that I would recommend to you.

You and your lawyer should make an informed decision based on the risk of conviction if you go to trial, and what the

consequences of being found guilty would be. The main consequence is usually more jail time than if you pled guilty. Technically, it is unconstitutional to punish people for exercising their right to a jury trial, but this right is meaningless. If the vast majority of defendants did not plead guilty, American criminal justice would grind to a halt. There are far too many criminal cases for all of them to go to trial, which presumably would be the result if there were not a severe penalty attached to losing. Michele Alexander, who wrote *The New Jim Crow*, wrote an op-ed in the *New York Times* suggesting that if many more defendants started exercising their right to a jury trial, it would create a productive chaos in the criminal process system that would force lawmakers to deal with mass incarceration.³²

As a prosecutor, I bluffed about the strength of the government's case all the time. Your lawyer should be able to assess the strength of your defense compared to other cases she has tried. She will tell you that you never know what a jury is going to do, and she is right. But if you have confidence in her skills as a trial attorney, and she thinks you have a decent case, you should seriously consider going to trial.

Like Kalief, I am an African American man, but otherwise I had a lot of advantages that he did not. I retained the best lawyer in the city, a former public defender named Michele Roberts. We hired a former police officer as our investigator, and as far as we could tell, the prosecution didn't have a strong case. We thought my chances of being acquitted were very good. My jury was predominately African American. We would make sure they knew that I was a well-educated lawyer. It is the kind of thing that should not matter to a jury, but any experienced trial attorney will tell you it actually does. You have to present yourself as the kind of black man who does not belong in jail.

At my trial, we also had character witnesses testify who were high-status members of the community. Your attorney should try to do the same for you. A minister, teacher, or neighborhood elder who knows you well can help the jury see you as a human being

and not the black thug the prosecutor is doing his damnest to invoke.

If I lost my case, the consequences of conviction would have been personally devastating. I would have lost my job as a prosecutor, and it would have been difficult to find another job as an attorney. On the other hand, even if I were convicted, it was very unlikely that I would have been sentenced to prison for a first-time misdemeanor.

I was innocent as well, but that was not the most important thing. Innocent people get convicted in criminal court every day. And, every day, guilty people get set free.

The truth is that most defendants who go to trial lose. In recent years state prosecutors have won 85 percent of their felony cases and almost 90 percent of their misdemeanor cases.³³ Federal prosecutors lose only one out of every ten cases.

The numbers change some depending on the jurisdiction. The conviction rate has averaged approximately 84 percent in Texas, 82 percent in California, 72 percent in New York, 67 percent in North Carolina, and 59 percent in Florida.³⁴

If you decide to go to trial, the next big decision is whether you should take the stand. It's your call, but listen carefully to your attorney's advice. If you have serious prior convictions, she will probably advise you to take the Fifth. Even if you don't, she will be concerned that the prosecutor's cross-examination will make you look guilty. As a prosecutor, I was really good at this. If the defendant was an African American male, and pretty much all of them were, I would get up in his face, or at least as close to him as the judge would let me, and try to set him off.

I would ask the defendant a series of detailed questions about his testimony designed to throw him off and make it look like he was lying. I was good at this because I did it every day. The defendant, on the other hand, did not have much experience in criminal trials and he was already stressed out because his freedom was on the line. Just know that an effective trial lawyer can make even an innocent person look guilty.

So I guess it was poetic justice when, during my own trial, the prosecutor tried the same tactic with me. The damn thing is it almost worked. He got me so worked up during his cross-examination that I became surly and aggressive when I answered his questions. I fell directly into the trap he had laid for me. During a break, my lawyer told me to lose the attitude. For the remainder of the cross, I was cool and collected, or at least that is what I tried to convey to the jury.

If you do take the stand, it's time for the performance of your life. You should practice your testimony in advance. Ask your attorney to go through the questions she is likely to ask you and the questions the prosecutor will probably ask on cross-examination. If the jury perceives you are lying, they will hold that against you. Borrow a trick that cops use and look at the jury, not your lawyer, when you answer her questions. Don't use street slang. It's okay to be nervous but you have to be calm and polite to everybody, even the prosecutor. During the prosecutor's cross-examination, you just want to get in and get out. Don't say any more than asked. If a question can be answered "yes" or "no," that is the only answer you should give.

You have to make the judge or jury care about you. It helps if your partner, mother, and grandmother are sitting in the front row, as conservatively dressed and well mannered as possible.

You have positioned yourself so that whether you get convicted depends on how you come across to the twelve people in the jury box, but a "not guilty" verdict is not the only measure of success. All you need is at least one juror to take your side, and then there is a hung jury, which basically means you won. The prosecutor can bring the case again, but unless it's a serious charge, they usually do not. And if your lawyer pokes enough holes in the government's case, the jury foreperson might come back with those magic words: "Your Honor, we the jury find the defendant not guilty." Good luck, brother.

IF YOU LOSE

Sorry, my dude. A lot of brothers have been in this situation. At the moment, more than 500,000 to be exact.³⁵

SENTENCING

Have people show up. Your parents, relatives, and friends. Probably not young children, because the judge might feel like you are trying to manipulate her, or that you are a poor parent to expose them to your sentencing. See if you can get former teachers, employers, and faith leaders to write letters. You will probably get to make a statement. As always, practice in advance. Express regret and contrition.

SHOULD YOU APPEAL?

You're probably going to lose. Your chances of winning on appeal are even less than your chances of winning at the trial level. The prosecution wins almost 90 percent of criminal appeals.³⁶

CONCLUSION

If this chapter reads like a nightmare, it is because that's exactly what the criminal system is for an African American man. You have no rights that a cop is bound to respect. You do not live in the same country as a white person. That has to change. *Chokehold's* final chapter discusses the revolution brothers desperately need.