

E 44 Joe Luppino-Esposito

Hello and welcome to Episode 44 of the Decarceration Nation podcast about radically reimagining America's criminal justice system. I'm Josh Hoe, among other things, I'm a formerly incarcerated person, a freelance writer, a criminal justice reform advocate, and the author of the book *writing your own best story* addiction and loving hope. And a few minutes we'll get to my interview with Joe Luppino-Esposito.

But first the news last week, I asked a question about people's favorite criminal justice reform books. And this resulted in a pretty good crowd source list, I will make sure to include it in the show notes. So check it out if you're interested in trying to check out a few good criminal justice reform books.

Obviously, the largest news of the week has been the insane cruelty that was being perpetrated by the Bureau of Prisons at the Metropolitan Detention Center in New York, in Brooklyn, New York. For those who haven't been paying attention, the MDC lost power for much of the last week during the polar vortex, and for some reason, instead of fixing it, they love prisoners locked down without light, heat or hot food during one of the worst pulled snaps in decades. Look, I usually do my rant at the end of the show, but I want to take a few minutes here to talk about this the MDC is a federal Detention Center, which means that is the federal equivalent of what most of us know as a jail. In other words, most of the people who are detained there either have not yet had a trial or were sentenced to one year or less of time for a crime. There is little excuse for people who have not even been found guilty of any crime to be kept in such horrible conditions. And it's really hard to fathom what was going on here and why they couldn't fix the electricity or the heat for almost an entire week. Unfortunately, most likely once the light and heat are for sure back on and we've heard that they are back on now. But there's still some doubt about the heat. And supposedly, like said that happened last night. Most people will go back to their normal routine and figure all is better. But it's my friend Cathy Morris was explaining all day yesterday on Twitter. This facility is awful with or without power, and has been awful for a long time calling into question being called into question for everything from brutal conditions to sexual abuse. And perhaps equally important in every state. In the United States, there is a jail or there are jails just as bad as the MDC. As I've mentioned before, here, in Michigan, there's the McComb county jail, a place that is so terrible that 19 people have died there since 2012. Unfortunately, I got to spend some time there myself. Prisons are terrible too. But compared to prisons, jails, because they are usually run by counties are less transparent, have less funding and are even more generally even more brutal. So we really hear about them. This needs to end and we need to keep the story alive. Let me give you a small example of why when the ordeal was over, Congressman during Adler said the following lights are back on at the MTC, Brooklyn excellent news. I promise to look into why this happened. Ensure that the Bo p makes necessary improvements. So there is not a repeat of these horrendous

conditions. We must treat inmates with dignity and respect, which sounds great, except the inmate is a pejorative term the opposite of dignified and respectful. In addition, while he says he promises to look into why this happen, and ensure that the VIP makes the necessary improvements. So there's not a repeat of these horrendous conditions that suggests that these horrendous conditions were the only reason to look into the problems at the MTC, which is clearly not the case. I hope I'm wrong, and then he will look a lot deeper. But we need to keep this this idea of reform, consistent with the idea of reform for incarcerated women and for people in prison.

The last thing here I want to say is thank you to all the folks who protest protest outside the MBC throughout this crisis. I've said for a long time now that the only silver lining the mass incarceration is that it is mass incarceration. This is one of the best recent examples of our regular folks, folks who just have a friend or family member inside of jail, or who are just so fed up with our criminal justice system grinds people up and spits them out that they stood together together for days and said no more. This is going to increase over time departments of correction should understand going forward, that while press outlets might continue to fall for their propaganda, the stories will no longer work on a larger and larger percentage of the population as mass incarceration has meant that one out of every two people has a family member who is incarcerated, it means that less and less of us will fall for the nonsense that's coming out of departments of corrections, we need to demand that prisons and jails are no longer allowed to remain black boxes. These things happen because jails are largely kept in the dark. And not just I don't mean that just because of what happened this weekend. This week, transparency will stop department of corrections or county administrators from giving us the classic trio of answers:

Number one, it didn't happen.

Number two, it was all the fault of the incarcerated folks.

Number three we need. If we really want to fix this. What we need to do is clamp down on the incarcerated people's ability to communicate with the outside world which coincidentally is the only way all of us on the outside find out what is really happening inside these houses of horror because they don't let any information out.

Okay. I think it's very important that we keep this issue in the main I think it's very important that we remember on the finale of things that we're trying to reform that jails are often the worst of all the things going on in corrections to the States. And I think it's really important that we don't let the energy dissipate from all the people around the country and all the people who stood outside in the cold letting the people inside that jail know that we care about them.

Okay, let's get to my interview with Joe Luppino-Esposito of the due process. Institute.

Joseph Luppino-Esposito currently works at the new process Institute. Before joining the due process Institute. He served as the manager for federal initiatives for right on crime and the Texas public policy foundation as the visiting legal Fellow at Heritage Foundation to work on over on the over criminalization project analyzing federal criminal laws. It was at Heritage where Joe first studied the extent of the problem the overuse and misuse of the criminal law that he continues to work on today with the Due Process Institute just fixed is a graduate of Seton Hall University School of Law, where he was editor in chief of the circuit review legal journal. He received a BA from the College of William and Mary, where he also co founded the campus newspaper.

Joe, Welcome to decarceration Nation podcast.

Thanks for having me.

Yeah, so why don't we start by asking people to flush out their bio a bit how did you get from Seton Hall School of Law to the work you're doing now?

Yes, I actually I always had an idea that I wanted to be involved in Washington, somehow I wasn't exactly sure I wanted to do it. And as I was leaving law school, I had a great opportunity to join the heritage foundation through a fellowship working on this issue. And for me, you know, I'm I'm coming from the right side of the aisle, it was an opportunity to work with Ed Meese, who was obviously a big piece of the Reagan administration, I thought, you know, this is a really good opportunity to work on an issue that I had a lot of things then I actually went into law school intending to become a prosecutor. And when I started looking at the system and working in various different aspects, you know, Attorney General's office, a homicide unit, and Newark and working drug court in Bergen County, New Jersey, I thought, you know, there's a lot more to be done here. And this is a really good opportunity to work with folks who obviously had seen both sort of the, the white hat side and also the defense side and working across the aisle and figuring out these big issues that seemingly everyone had agreed on and started with this over criminalization piece and this mens rea, and criminal intent part of that equation.

And that's an interesting bridge, because you and I got to know each other a little by working together to help pass the first step act. Luckily, we were on the winning team. Lots of lots has been happening between since then, including the bar hearings, the release of the compassionate release guidance, and, of course, the shutdown. Do you have any thoughts about implementation with the first step back?

Yeah, absolutely. You know, I'm hoping, you know, we're seeing a few things here and there, that there are some difficulties, and particularly on a good time credits, it looks like that might have been a drafting mistake that we're hopefully the the folks in administration

will find a way to take care of that part of the problem, of course, is that we're in the middle of the shutdown. So even some of those markers in had they been working diligently on them, it's still going to be very difficult for them to make, of course, that's called comfort for the folks who are in prison. But I think that if they kind of keep working through this, and they're continue to work with advocates, and continue to work with the folks in the administration who are really pushing for this, we can get some some good changes done sooner rather than later. But I think it's important for all of us to keep an eye on the implementation. I think for too often, a lot of folks in Congress in particular, like the past law, say, look at what we did, and they just assume everything is working perfectly Well, again, I guess, especially at the same time, folks on the right are very quick to say, well, government isn't working properly. So let's make sure it is working properly. And let's make sure that the the laws that we pass actually are going into effect and actually doing what we intend them to do.

And do you have any thoughts about how we might be involved in or people listening or whatever might be involved in trying to keep the spotlight on the issue?

Yeah, I mean, I think a lot of what we've been seeing so far, I know you did a podcast not too long ago, I guess, last week or the week before talking about this, and really just keeping the pressure up with legislators, particularly the people who were very involved in passing the law both on the left and the right and in the house, in the Senate to make sure that these things are moving forward. And really just kind of keeping the pressure up social media wise, and just in the media as well, because I think, you know, mainstream media in particular, was very interested in this sort of marriage between the left and the right on this issue, I think it's something that they will want to return to, especially as we remain in conflict on so many other issues, I think it will be important for us to make sure we have a handle on it. And that, you know, I think people in general will be interested to see how this actually works out. And particularly for advocates, it's important for us to make sure that this is done, right. Because I think a lot of the pushback in some states that we will see, especially for my work with right on crime we saw often was at a bill would pass and something would go wrong somewhere. It was it was not accomplished the way it was intended. And suddenly now, it's very easy for the opposition to say it's all a failure, look at what you've done, when it was done the attention to do that. So we want to make sure that everyone's on top of that and getting the right news out there of what's going on.

Yeah, I think you and I are kind of a product of that strange marriage.

Right.

So any goals for what some have been referring to as the next step back from your perspective?

You know, I think from this issue, different ways to look at it. I mean, I think in a lot of ways, the next step is the implementation it is making sure all of the committee's are filled all of the the the systems are set up correctly, when it comes to the way they do the the the earn time credits that the program is actually accomplished. So that's a bit of a cop out answer. I know, but I think that is so important that we make sure we get that. So I think that's sort of a step one and a half, I guess you can say, second step, just looking at the political realities, I think it will be a lot of things that are a little more niche issues that are a little more discreet, that are not sort of this big, bold, comprehensive reform. And look, I love that as much as the next guy. But I think the political climate is not going to allow for another big comprehensive bill. And frankly, you know, when we look and we have this idea that we need to do giant comprehensive bills, that's where they take 10 years I would rather start have this workout things that we can all agree on left, right or otherwise and say, Look, this is a problem, let's fix it. So some of the things we're looking at, obviously not to jump to transition but obviously some things in criminal intent that I think are good for left and right that we want to talk about today. But then also things like acquitted conduct sentencing, where for someone who goes to trial, you know, if they are found not guilty on several of the charges, but found guilty on even just one charge, a judge can take into effect all of the charges as relevant conduct. So that's a problem that I think seems very obvious the folks on the left is being problematic. But it was also a big problem for folks on the right, including Justice Scalia, who said, you know, this is a case that they would want to take up and unfortunately, no such case ever then that were never able to grant cert on any cases relating to that, and we're hoping excuse me, that there are some cases that are coming up now that will address those issues. So we're looking forward to that. And if it's not done by the courts will start looking to the legislature to work on that issue. So I think those are two sort off the top of my head that I know our I don't want to say small, but obviously they are smaller than doing something like the first step act where you're creating a whole new system. These are things that I think a lot of people have been aware of as problems for many years. I think everybody can work on those to get those done.

Alright, so let's kind of move to the intent question. I think before I got arrested, I had a lot even though I was fairly well educated in at least constitutional law, I was a, you know, I had by rose colored glasses kind of smashed through the process. that a lot of ways I think one thing that most people probably believe is that the law is kind of inherently just and that if we haven't done anything wrong, we can't be found guilty of a crime. So let's start with what I'm sure most people listening will think sounds a little mystifying, could you demystify the concept of Mens Rea? What is Mens Rea?

So if he had sort of technical and Latin on us here, a crime traditionally is made up of two, it's the mens rea, which is the intent and the actress Reyes, which is the bad action. So the whole concept of it is to avoid putting people in prison for accidents. I think that's sort of the

most common way of putting it. And it's been said before, by Justice Holmes, that even a dog knows the difference between being kicked and being tripped over. So that's essentially what we're looking at here. We don't want someone who has accidentally done something, you know, even just like the idea of a car accident, right? It's an accident, you don't probably intend to hit someone, as you make a turn if you intend to, obviously, then it's a crime. And we have different levels of intent for different crimes, I think, take it to the most obvious example, which is not what we're talking about, generally, in this area when we talk about reform, but to just give a good example, there's first degree murder their second degree murder, and there's manslaughter. And I think people, you know, watching one episode of Law and Order, you understand that entirely. That's exactly what we're talking about. When we talk about men's rights, criminal intent, what is that level? What should it be? I think this sort of the holistic and the philosophical thought of what ought to be based on the crime, and then how is that written? How is it determined? And how will judges and prosecutors interpret that when it comes to actually prosecuting people?

Okay, so somewhere along the line, we used to believe that people had to intend to commit a crime or at least that that was a major factor in determining criminal intent. And over time that is changed. Can you talk about the erosion of the hard and fast principle that people had to have intent?

Absolutely. So I think there's sort of two problems with why we've gotten to the place we are today. One is simply just bad lawmaking. I think for a lot of cases, we see this in in so many contexts, that somebody in Congress or legislature or even, you know, a town council says, we have this problem. And to wait, the way I want to show that I'm tough about it is that we will make it illegal, we will make it a criminal issue, not a civil issue, you know, not a fine, not not some other penalty, we will make a criminal that shows I'm serious about it. And if they don't know, and they don't have a rule, or anybody checking on them, particularly, you know, if it is a town Councillor, a state legislature where they may only have one staffer if any staffers at all, they're just going to say x is a problem. And therefore, x is now illegal. If you do X, it is illegal, it does not account for that being an accidental act. And there's plenty of those and, you know, thousands of contacts or something is not going to be intentional. So some of it is just bad while making. And I think some of it is also just the idea when, particularly in the federal context, where Congress has really advocated a lot of their law making to agencies and departments, and they say, look, we find that this issue is a problem, we think these three or four things are really obvious, and then they'll put something in to the effect of anything else that the agency determines is important for the enforcement of this law. Essentially, they can go ahead and create that law and do it through the regulations. And it'll all refer back to the the main law that is put into the code that says that it's punishable by X, Y, and Z. And if there's that a clear term there. And if the agency goes a bit far afield from sort of the core issues, you certainly have something that's a lower level of intent than was really intended by Congress and now you have a regulation

that really is going to be difficult for someone to find that they are now we're going to be held to a very low standard of and those standards depending on how they're interpreted, it comes down to the word you know, I think some people would say, Oh, well, if you knowingly do something that that means you intended to do it. Well, one of the examples that we can use this saying, Well, did you knowingly, you know, put something in the mail, for example? Well, I knowingly put it in the mail. I didn't know what I put in the mail was fraudulent, right? This is sort of the classic mail and a wire fraud statute. So you knowingly put it in the mail? Well, Is that sufficient to say that you knowingly committed this act if you're not applying knowingly to the fraudulent piece of the form that you put in the into the mail? And that's where things get a little tricky. And that really gets down to a lot of technical legal issues of Judge interpretation. And house Elsa prosecutor wants to be when pursuing these issues.

Okay. I personally remember sitting in my lawyers office after I'd been arrested. And I was like, well, this looks really bad. And it did, but I said, Well, I do I do have some, you know, some some thoughts on affirmative defenses. And I started launching into, you know, kind of the reasons why I theoretically, you know, I did what I did, and I look up in the middle of it, he's just shaking his head, and I'm wondering what's going on. And he goes, you know, there's this thing called strict liability law. Yeah. So I quickly learned that affirmative defenses in certain contexts don't really matter that much. Can you explain a little bit about how this has become such a part of our criminal code?

Absolutely. Right. So there are some things when it comes to strict liability that Congress has decided, look, we want this to be strict liability, we want to say, even if you do it by accident, too bad, it is a crime. Now, when we've talked about some reforms, there have been some issues talking about, well, if they affirmatively do so, that's one issue. But you know, we want that discussion to really be there, you know, whether it's in the legislative record for just to look at, or just in general, you want society to have that conversation to say, is this really something we want to say, no matter if you mean to do it or not, it is a crime. And I think there are a lot of things we talked about a lot of the the issues that are sort of inherently wrong for the issues that we've sort of the side of the society are wrong. So inherently, whether you want to talk biblical, or otherwise, people know, taking someone else's life is wrong, you know, use whatever, whatever it means, and belief or non belief you have, I think everybody, for the most part agrees on that. But when it comes to, oh, well, releasing this type of, you know, or better yet, I should say, you know, helping out a migratory bird and keeping in the cage because you're you're reviving it back to health isn't necessarily inherently wrong. Now, we want to have a conversation about why it's wrong, and to what level that should be wrong. But unfortunately, we don't really have those conversations, we just have these laws that are used a very vague term or an overly broad term to talk about a criminal action. And next thing you know, you have the stories of, you know, a nine year old girl who found a bird hurt in her yard from a cat and a try to nurse

back to health and suddenly somebody from you know, fish and wildlife is now moving into make a criminal action against her. And it's, it's preposterous that's not what we intended to happen here. strict liability is becoming an issue because we don't have the conversation on a wider scale to talk about what's inherently wrong. And what everybody knows is wrong, versus what we've decided this society is wrong and therefore should just be no matter what happens if you do it by accident or otherwise, you're going to be found guilty of it. So I think it gets to the greater issue of talking about mens rea, in general, of how broader these terms and how much do we really want to make this a criminal action versus a civil action?

Yeah, so I think a lot of times, I think of it in the terms of your part of the social contract or at the core of the social contract for me, is the idea that individual liberty should never be suspended lightly. I kind of feel like that's what sets the United States apart in that it doesn't just limit people's power. It didn't just limit people's power in regards to a sovereign it limited a sovereign power in regards to the people do you feel like the current makeup of the Supreme Court because any hope that will kind of move in a different direction in terms of kind of laws?

You know, I think so justice Gorsuch in particular has been very strong on these issues. He is sort of a no nonsense a bit more libertarian leaning when it comes to those issues. We haven't seen too many of those come up yet, since he's been on the court. But I do think in general, he is going to be leading the way on those issues. I think a lot of ways I mentioned before, Justice Scalia was a leader in many of those issues. I think that would surprise some folks on the left, you know, there were a lot of issues regarding search warrants and other issues that he was really a leader on. And like I mentioned earlier on this issue of acquitted conduct sentencing, you know, the Confrontation Clause, a number of different issues that I think are not traditionally seen as conservative, but if you do catch terms that you did, which is what I tried to do, particularly for my side of the aisle to say, look, taking away someone's liberties is a serious thing and we need to do it carefully and really understand that, you know, you know, you know, just saying we're putting them away for a few years because that's what we ought to do. That's something it's not just well Oh, it's not for it's not for 30, it's just for a couple couple years is still still good amount of time of someone's life and it's taking away their liberty and we should take that seriously.

So that brings us to legislative Mens Rea reform mens rea reform would you like to talk about what's going on in this area right now?

Yeah, absolutely. So we have seen a few bills come up over the years. And it really traces back I mean, obviously it traces back to the times where we're talking about these things in Latin terms. But more recently where we've been dealing with these issues. It's been on the context of over criminalisation in general and what's going on now in Congress when it comes to money reform and criminal intent reform is a few different issues. And it traces

back to the over criminalization report that was done by the National Association of criminal defense lawyers and the heritage foundation about 10 years ago. Now, they took a look at the issue and looked at the different terms of mens rea, in criminal intent that were found in the hundred and 14th Congress, I believe it was urging the hundred and 12 Congress. And they recognize that a lot of things that were being done was simply a lot of crimes are being proposed by members of Congress, and some of them with absolutely no regard to intense and a good number of them are actually put into law in that session of Congress. So members on both sides of the aisle, in particular, Jim Sensenbrenner, Republican from Wisconsin, and Bobby Scott, a Democrat from Virginia, and we're behind the over criminalization Task Force. And they looked at these issues, both from the regulatory system from sort of the street crime side, really from from every angle to say, what laws are putting into effect that are overly broad and things that should not be crimes and things that should be crimes, they should be better defined by their intent set standards. So more recently, we've seen a few different ideas pop up of how to deal with this, there were some pieces and in the early form of eventually became the first step Act, the sentencing reform or corrections act that talked about counting all the crimes in the code I think it's good and bad when we look at those that idea because at least in the past, it has been found to be impossible for Congress or the sentence Sentencing Commission or really anyone to be able to count all of the crimes that are in the federal code. So it's obviously a problem when it comes to notice for the average citizen of what it's actually a federal crime. So that's one angle and we've looked at it on the other one that's been pushed more recently is on the idea of the fault mens rea up and what this does is say that if a crime that is in the code has not been written to specifically say, we intend this to be one of those strict liability crimes in which we do not care what your intent is, if you do what you are guilty, and we've decided that's what we're doing. If it does not have that level of intent for either the crime itself or one of the elements of the crime, a certain level of intent will be applied to that element or to that crime. And that's varied. Some states have done this, Ohio and Michigan. Most recently, Texas has had the statute on record, I think, since 1992, or 9093, when they redid their criminal code. So other other states have it inherently in there to kind of protect against somebody not paying attention and letting something go into effect that does not have a level of intent. So that's what we've been doing most recently. And I think the other aspect that sort of touches on this, and I think it's definitely something that appeals to both sides of the aisle is the type of action that's been done in Minnesota, in particular, where they've done things like an Ansel where they've gone through, I think, a day or two at the end of every session and have said, Look, we have a lot of laws in the books that have not been used for a very long time, let's just take them off the books, it's just good housekeeping. And we don't want some overzealous prosecutor or whoever out there to say this is a crime, we're going to go after you for it. And frankly, no one has known about it, and no one has used it for decades. So I think that's another thing that they haven't looked at in Congress. yet. I think that's something that's definitely worthwhile, it'd be quite a bear to do at the federal level, because of all the estimates of how many crimes that are. But I think it would

be good housekeeping. And it's something that folks about sides of the aisle can get behind. Because know, we can take a little bit here and a little bit there from from different areas where people have more interest and that they're more familiar with it. And let's just go ahead and do it and really clean up the code and figure out ways that we can get rid of some of these silly laws that really shouldn't be crimes at all. And if anything should be civil penalties, and even that sometimes seems to be a stretch when you when you take a second look at these issues.

And that kind of gets us to some of the criticisms of Mens Rea reform. The first one is what you were just talking about. I think some people feel that by focusing on kind of the laws that, as you just said, are sort of silly and never really get used that you don't ever get to their real reforms that need to happen. Do you have any thoughts about that?

Yeah, you know, it's very unfortunate. And I don't know exactly when this happened. But I recall, you know, when I was at the Heritage Foundation, I was there for a year long fellowship from 2011 to 2012, and it was pretty universal left, right and otherwise, that we need to have mens rea reform. You know, there wasn't particularly, you know, one form of it that I think everybody had gotten behind, but it wasn't because it was a conflict, it was just a matter of figuring out, you know, the best strategy at some point that changed and it was a really unfortunate context change were it suddenly became that mens rea, and criminal intent reform is only for white collar crime. I don't know if that was just that folks on the right, we're sort of overzealous and talking about the ideas of regulations being the problem and that the agencies were creating new crimes. That sounds more like a a white collar context. But in no way with any of these reforms, I'm talking about focus solely on regulations are solely on white collar crimes, this would really be taking a look at the system as a whole. And that includes drug crimes. I mean, we see in the context of conspiracy law in particular, where someone who is going to be a low level offender, a lot of the folks that we've talked about the first step back then end up getting caught up as part of the conspiracy charge, and whether they were aware of it or not, they are suddenly now being hit with a much larger penalty, because they have been found to be have the intent to be part of that conspiracy. And that is unfortunate that it seems like folks in the left have gotten off of this because they've decided that this is an environmental issue that this is some sort of Republican plot to, you know, just throw out all of the environmental laws. What's particularly funny about that, especially in the default mens rea context is that most of the crimes that people are found guilty of in the environmental context already have a level of mens rea on them, we can certainly debate over if it's strong enough or not, but they will not be affected by default mens rea a bill so it's unfortunate that the conversation is going that direction. But I'm hoping that the conversation does change because we've seen groups, including the Federal Defenders say that we do need this change, we we need something to to change when it comes to criminal intent reform. And it's not just an environmental issue. They're saying a lot of the people that base serve as feral defenders who are indigent and

get hit with these federal crimes are going to really benefit from a change in the law. And and that's something that we want to work for, and particularly where I'm at now, at the due process Institute. Our whole goal is to work on issues where the left and the right can come together. And I think this is one that had always been a wherever it was on the same page, and I really want to get back to that.

So yeah, the regulatory part of it, you know, and I'll ask another question about that in a second. But there's also the I think, what the fear is, is that, you know, if we get rid of, you know, if we spend our time and like you said, an uncertain that people will get rid of the less controversial things like it's illegal to walk a dog across the street, and not so much about the other parts of it, I mean, I get what you're saying about the regulatory part. But is there a kind of weird, perverse incentive for people who would engage in this kind of process to tackle the really low hanging fruit and then say, See, we reformed the code and move on?

And that's certainly possible. I think it is, it's part of a holistic approach, you know, for example, in Minnesota, it wasn't a one time thing they did it, they do it every single year. So again, maybe that's a lot to ask of Congress. But I think when I when I think about these things, I have that in mind that would be part of what's what that overall package would be. And if you look in the I guess would be the hundred and 14th Congress when Bob Goodlatte put forward a Jim Sensenbrenner put forward several bills in regard to this as part of a much wider package regarding sentencing and prison reform. They were doing things like clean up the code, which did have, you know, sort of the top 20 worst ones that we've all heard about, you know, misappropriating the image of Smokey the Bear, that type of stuff was on the list that, okay, these are the ones we've been making fun of for years, that's at least take care of those. But then they also had things regarding default methods, right. And other pieces as well to say, look, this isn't the only way we want to handle this, we want to handle as much of this as we can, and bite off as much as we think we can chew. And I think that was the intention of the over criminalization task force as well to say, look, there's a lot to handle here, let's take down as much as we can, and figure out the best way to handle it. And I think in a lot of ways, the count the code type issues where we actually go in and try to figure out what crimes are out there, we do need to some degree to get a lot of these pieces on the table. So I think, you know, cleaning up with a default mens rea term is a very good first step. And then at the same time, we're trying to draw out everything that's out there, because I think a lot of the opposition we got, particularly from folks on the left was saying, you got to go tell us what what the problems are when it comes to default meds, right? Well, I don't think that onus should be on sort of the the advocates on this, that onus should be on the government, you need to prove your case. And whether it's your case of convicting people under these laws, sort of in this larger philosophical term. Or if it's in the in the courtroom, you need to prove your case, we do not need to say it just has to be easier for government to prosecute people. So why would we make these changes, it was a very weird position here, coming from folks on the left. And that's something I hope that is

not again, and when I say the left, it's not everybody, of course, I think the people who have their eyes on really the civil libertarian issues and civil liberties have always understood that this is a problem, no matter what the crime is, it shouldn't matter if it's a white collar contacts or a drug crime context. If it's wrong, it's wrong. That's something that we want to kind of return to and say this, it doesn't matter what the crime is, if there is not a level of the fault mens rea, it just says, you are guilty. And we don't, we didn't really have any thought about strict liability, we just decided you ought to be guilty for this thing that's wrong. And let's let's go ahead and fix that first. And then and then try to take a bigger approach to say, let's really tackle what the drug crimes ought to be, and what all these other levels of intent ought to be for the various street crimes, regulatory crime event environment, the crime, whatever it is,

A second critique is kind of one that in a sense, we already talked about a little bit because you said that there are certain crimes that you know, we decide are kind of above the, the need for Mens Rea. And one weird let me give you a crazy example. There is a guy in Illinois who has been in prison for over 30 years without ever been convicted of a crime because of kind of the idea that social safety kind of pre dominates. And so that's one example. Civil commitment, for instance, seems to me to me one example of a law that we've put outside of even the idea of culpability. And so I think one of the criticisms maybe have been read, mens rea reform is that it leaves a lot of the most controversial or should be controversial parts of the fight for kind of fundamental Liberty concerns on addressed Is that fair?

You know, I can see that that argument. But I do think that once you start the conversation, I think this is sort of the same argument we had with when it comes to the first step at once you start this conversation and recognize and people who are totally unengaged on this, whether it's a member of Congress or a member of the public, if they have not been engaged in this issue, they may not even understand, you know, the facts of the case. And what we're really bringing forward as a problem. I think, doing the initial reforms, we say, look, there is this lingering problem that is pervasive throughout the system. Let's figure out how to start pulling that back in you suddenly get people more interested in it. And then you can engage people on the finer points and the more controversial points and you know, if that's where people split, that's where they split, but I think we're not even having that conversation to have a split if we don't start the conversation somewhere at the larger level where we're saying look at this is a problem let's start tackling it sooner than later.

Okay, and a professor Benjamin Levin wrote a piece that's coming out in the next I think month, he actually ends up concluding with you but I thought he put this part of the problem pretty well, so I'm going to read it and then kind of direct a question. "The first critique of mens rea reform is simply that misses the point. Understanding this critique and evaluating it's worth requires us to appreciate and agree on what the point is. That is what's wrong with

the current state of affairs of us criminal law, there are many answers to that question. Perhaps it is the astronomical prison population, perhaps it's the length of sentences, perhaps it's dramatic racial associated socio economic disparities at each stage of the criminal process. Perhaps it's the sheer number of criminal laws, perhaps it's the violence and militarization increase associated with policing or perhaps it's the economic cost of operating the partial state list represents only a sample of issues that reformers agenda might address. And as I've argued elsewhere, figuring out what problems we are concerned with is essential to meaningful discussion about criminal justice reform. But even without drilling down to the first principles, it should be easy to see that mens rea reform probably is not directly responsive to many of those concerns." Well, men's real reform could still be a good idea, even if that were true, is anything of what he says fair here?

You know, I think in some ways it is. But I would argue that, again, I think there is a greater problem. When we talk about these issues. I think like you stated perfectly earlier, that we have to really analyze how and why we are taking away someone's liberty and it is a first principles thing for me to say, these issues are so important that we need to understand why we've decided that this is a problem and what sort of in someone's heart and what's in someone's mind, and that gets to the core of what we're talking about here. You know, there is there are two parts of a crime right there. Like I mentioned before, the actress race the action and the men's Raya, those are both conversations that can be held separately and together because of the actions themselves obviously, some people will say, look, the action of dealing drugs is not a problem because drugs should not be illegal Well, that's that's coming decision about the actors radius. But at the same time, if you have a case, you know, like we've seen before, where someone thinks they're dealing in marijuana, but they're actually dealing methamphetamine they didn't know was in the package that they were with the courier for, well, you know, as some of the crimes are changing, we've decided that the actress Reyes of marijuana isn't as bad well, then we solve the problem of mens rea, than that we need to refer back to it because that will not solve all the problems in that that particular case. So as much as I mentioned before, that I want to, especially in this Congress take on some of the niche issues, I do think that there is still a holistic approach, or at least a holistic conversation that we need to have regarding these issues. And mens rea really needs to be a part of it, because otherwise, we're not getting to the issue of what constitutes a crime versus what constitutes something that ought to be a fine or really no penalty at all.

So you already talked quite a bit about this, but I want to give you one other I just want to make sure you get every every chance to talk about this because the the criticism you hear the most about mens rea reform is that it's a Trojan horse, which is really designed to roll back the regulatory state. I think most famously, Elizabeth Warren put out up a paper about this, I assume you probably have more to say about this?

when it comes to taking on the regulatory state as a as an issue of mens rea. Yeah, I've certainly heard that argument before. I think what it gets to really is what we're trying to talk about is that we want Congress you know, that the elected representatives to be making the laws, we do not want this to be a bureaucratic issue, we don't want it to be an issue where the lawmakers and your accuracy are actually not the lawmakers, but rather the bureaucracy are working on putting people in prison. That's not what this ought to be about. And whether it comes from that context, whether it's giving more power to DOJ to make that determination, or whether it's giving EPA or power to make the determination either way, that's wrong. It should be the people who are accountable to the public who are who are going to be the ones that are actually passing laws that are hopefully seriously considering the idea of taking away someone's liberty. And that's just simply saying, we'll leave it to somebody else to go clean up our mess, because we just we've been told this is important, and we'll let the experts decide how to how to handle it. So c So I think that's really I know for most people that work on this issue, that's really the core of what what they want to talk about what they want to tackle here.

Alright, so one last kind of, well, extra two last questions but the last one about directly about mens rea, when we were working on the first step back that was kind of surprised at one point when Tom Cotton suggested an alternative which was total mens rea requirements. I thought there was a little odd since his it seemed to me that it would be more likely to ensure that many of the same drug dealers that he was terrified of are scaring everyone about would likely to get out it would make it more likely it seems to be that they would get out because they wouldn't have had an intent to distribute fentanyl. Is it possible that Tom Cotton came upon stumbled upon a good idea for once in his life here?

Yeah, you know, absolutely. I mean, you know, I I guess credit word is do here. He does have a very good idea when it comes to talking about mens rea reform I mean, obviously in the last last several Congress's Senator Hatch has really been the leader on that, at least on the Senate side. And, you know, there is there is a need for somebody to kind of pick up that mantle and have that conversation if that's Tom Cotton, that that's fantastic. I mean, I'm happy to to work with his folks again, and work on this issue, because it is so important and it is an issue where Yes, I mean, I can certainly sit down with them and let them know that that that is something that could happen. But again, you know, I mean, he he may turn around and argue and say, no, that ought to be a strict liability crime. And, you know, that's going to be different, let's change the law and make it that well, let's, let's have that conversation. And obviously, I would disagree, but I think in general, if we want to have that conversation about what these terms ought to be, let's go ahead and do it. And I think that's what that's really what my goal is, when I talk about these issues. I know from the due process Institute, that that's what we want to do is say, this is such a large problem, we've never really had this conversation to look at what these levels of intent ought to be for the various crimes that matter what context they are in, let's do that, let's have that

conversation. And let's clean it all up and really consider what ought to be a crime and what ought to be a civil penalty or otherwise.

So one of the weaknesses of doing this format is that I'm not really an expert on all the issues that we discuss. I just try to read up as much as I can. So at my last question, is usually to ask what we were that whoever the expert is, what are some what is the question I should have answered? I should have asked

I guess the one question I would say that would be helpful to ask is, why is it that Congress has given away this power? And why have they sort of delegated to the agencies? I think that is a bigger question about lawmaking. In general, that's a problem, which I think doesn't get brought up so much. In this context, it is sort of more of your libertarian conservative leaning topic, because at some point, the administrative state has become a problem. And I don't want that to make it sound like this is some sort of attack the regulatory state issue. But in general, we really for Congress, to be more effective as a lawmaking body that I think would not have such a low approval rating, no matter who's in charge, you know, every couple years, we look at this, and it's always bad. And it always gets worse. And it doesn't seem to matter who's in power of Congress has decided to some degree, it's good, right, that we want to make sure the experts are looking at these issues. So the agencies do have a role in that regard. But they've gotten to the point where they have these sort of write offs at the end of bills that say, they can just go ahead and enforces however they please the problem has been that Congress has just delegated too much authority to people who are not accountable to the public. And that is a especially concerning in the criminal context. And that's something we need to really focus on from folks. I think it's been something that's picked up by folks on the right because it is seen as a regulatory state, you know, air quote, issue, but it is such a huge problem for every context, particularly in the criminal contacts that we have just decided that we are going to let the agencies decide what they're going to do, and not make them accountable to anybody vs. Congress can very easily say, I can't believe they're doing that over there without remembering that they are the ones that gave them the power to do it. And it is so important, particularly when it comes to criminal law, that they're just ignoring that fact. And that's something that I think people on both sides of the aisle should really be focusing it on and recognizing that government has gotten too large in this context. And they are going after everybody civil liberties, no matter what crime they've been accused of committing.

Well, I really want to thank you for taking the time to do this and sharing your knowledge and for being a guest on the podcast. Thanks so much.

Yeah, thanks so much for having me. I love the podcasts and happy to be a part of it.

Yeah, thanks again. Talk to you later.

Thanks.

And now my take. As I mentioned before, I kind of did my rant at the beginning instead of at the end. So I'm going to end with something that I saw on Twitter from Miriam Kaaba, who is someone I have a lot of respect for

“10 million arrests a year, 11 million people cycling through us jails each year, 450,000 currently in jail, because they are too poor to pay up pay bail, 1.5 million people in US prisons, 70 million people with criminal records, millions of people deported yearly. Hashtag land of the free.”

Now I'm still not 100% sure how I feel about Mens Rea reform. But I know I loathe strict liability laws It's seems like the arguments against reformer fairly weak and the reasons for reform are fairly strong, which probably means sadly, in this politically polarized world. Nothing good will happen here. However, we need to do whatever we can to unify and change the system. We need to stop putting so many people people away and we need to help get as many folks out as we can. Those statistics by that Merriam shared above are staggering. Especially in a country that at least purports to be a place where freedom and liberty are supposed to thrive.

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