

## 52 Sonja Starr

Hello and welcome to Episode 52 of the decarceration nation podcast about radically reimagining America's criminal justice system. I'm Josh Hoe, among other things I'm formerly incarcerated, a freelance writer, a criminal Justice form advocate, and the author of the book writing your own best story, addiction and living hope. We'll get to my interview with Sonia star in just a second. But first the news.

There was a lot going on last week, we got a terrible Supreme Court decision more or less justifying torture and death penalty cases. Justice course it seemed to think that what mattered wasn't the plan, the pain that was brought to someone being executed with the amount of pain that would have been acceptable at the time of the framing of the Constitution. He even made references to hangings and firing squads and seem to think that that was an acceptable solution. We also got a groundbreaking Department of Justice report exposing the brutality, death and sexual abuse, rampant sexual abuse in the overcrowded and understaffed Alabama Department of Corrections. Things were apparently so bad that the Department of Justice gave Alabama 49 days to make serious changes, or they were taking the court on a boat full of Eighth Amendment challenges. In other words, it hasn't been the greatest week of all time. You know, a little bit depressing. But I'm hopeful at least that something good will come out of this Alabama report. And that, you know, well, I don't even know what to say about the Supreme Court right now. So I'm trying something new this week, I had to see you know, as I said before, I'm interviewing Sonja star who's a professor at the University of Michigan, law professor at the University of Michigan. And she's done a lot of groundbreaking research on different elements of the criminal justice system. And our discussion was so wide wide ranging than I thought it would be easier to break it up into some more bite sized parts, I felt like that. Putting it all in one interview would be again, probably way too long, and probably take away some of the impact from the different things that she's covered. So I'm breaking it up into two episodes. So now let's get to part one of my interview with Sonja star.

Sonja star is a professor of law and the CO director of the empirical Legal Studies Center at the University of Michigan law school. Before coming to Michigan law professor stars taught at the University of Maryland School of Law, and spent two years at the Harvard Law School as a flamenco felt felt follow and lecture on law. Professor stars clerked for the honorable Merrick Garland of the US Court of Appeals for the DC circuit, and for the shared appeals chamber of the International Criminal tribunals for Rwanda, and the former Yugoslavia in The Hague, between these clerkships. She was an associate with the Goldstein and help firm in Washington DC, a firm specializing in USA Supreme Court litigation. Professor star earned her JD from Yale Law School where she served as senior editor of the Yale Law Journal, and was awarded the American Bar Association's annual Ross student writing prize. She's also the first person I've ever interviewed on this podcast that I knew well before I was ever impacted by the criminal justice system. So hello, Sonia, and welcome to the decarceration nation podcast.

Hi Josh, it's great to be here.

That's a pretty powerful resume, I have to say, You've come a long way since we first met. So we got to know each other when you were an undergrad at very successful college tomato at Harvard. How did you get from your undergrad all the way to the Hague?

Um, well, when I went to law school, I actually got really into international human rights work, and especially international criminal law, and ended up and did some war crimes investigation or, and, and then, you know, just ended up hearing of a job opening at these war crimes tribunals and the Hague. And went there. And it was a really great experience. But eventually, I came back here, and I realized that there are many really important human rights issues in the United States as well. And those have been my my primary focus for my my academic career.

So before we jump, particularly in the criminal justice system, that is, yeah. So before we jump into that, though, can Is there anything you could share about working on the tribunals for London, Yugoslavia as a former international relations person that that piqued my interest a little bit?

Sure. Well, it was it was it was a great experience. The those tribunals are now they're now closed, because they were meant to be temporary tribunals that were responding to atrocities that took place in the 1990s, they ended up being a little less temporary, then plan to the proceedings stretched out for for a very long time. And so when I left the Hague in 2006, I thought they were going to be closing in a few years, in fact, took till till last year. But but but, you know, they are, in many ways similar. It's like, in some ways, similar to to us, criminal courts, they have a lot of similar procedural issues similar. Similarly, they are kind of regular criminal courts dealing with with defendants are charged with you know, they were the prosecution has to prove the elements of crimes etc. A difference is that they, you know, rather than that, the defendants being, you know, the little guy up against the state, often the defendants were representatives of their respective governments, and were people in power. And we're basically being charged for for abuses of that, of that power of Of course, there were there were lots of different defendants who played we played different roles in different kinds of atrocities. But But yeah, it was, you know, my role I wasn't out there in the field investigating cases, I was a lawyer working, working with judges on, on trying to resolve the legal issues in the case in the cases. And it was exciting, because it was a very new area of law. There haven't been very many historical examples of trying to use criminal justice as a way for holding people accountable for mass atrocities. And so it was, you know, a really eye opening and formative experience to to be part of one of those limited efforts.

I probably people would probably be mad at me if I didn't also ask what it was like to clerk for Merrick Garland?

Well, he's wonderful. I mean, that was, that was really that was my first job out of law school and a truly, truly formative experience in my my professional career, he is a prince of a guy, he would have been a great supreme court justice. And, you know, we can all we can all be sad that he isn't. But he is, you know, making the most of his leadership of the of the of the DC circuit. And it was just a pleasure to learn from somebody who was such a such a brilliant lawyer, really, at the time when I was just a baby lawyer.

So we're mostly here to talk about your recent paper with JJ Prescott about brought index punishment. But you have also done some other research, they want to at least introduce you did some important research on Ban the Box legislation, what did you discover?

Well, unfortunately, this findings that we discovered on and Ban the Box, this was work that I did with, with my co authors, Amanda Hagen, who's now an economics professor at Rutgers University. And what we did was we carried out a very big experiment, one of these fake job application experiments where we spent 15,000 fictitious job applications to businesses in New York City and New Jersey, before and after they adopted Ban the Box legislation, and we randomly varied race as well as whether people had a criminal record. And otherwise, the differences and the applications were only superficial, essentially, people had identical qualifications. And I guess, to some extent, our findings were supportive of the premise underlying pan the box in that we showed that, in fact, when employers had the box, when they had access to criminal record information, they were much less likely to call people back who had criminal records. And beyond the box did cause employers in fact, to remove the box. So in that sense, it opened doors for people with records. The bad news in our findings, was that employers Well, well, it seemed to open doors for people with with criminal records. It seemed to close other doors in that employers started to racially discriminate it at much higher rates. So before beyond the box, in the companies that were affected by the on the box, that is they had a criminal records question before the law, and then they removed it afterwards. So at those companies before Ban the Box, white applicants got 7% more callbacks and after band, the box, they got 43% more callbacks, then then Black applicants remember these are identical black applicants. So we can pretty confidently say that the reason that they were getting more callbacks was because of race, but that that effect was way bigger after ban the box and that I think the this our theory for why that's true, is that employers essentially, if you don't provide them with criminal record information, there's a risk that they will use stereotypes, racial stereotypes as proxies for who they think has a criminal record. And so there's lots of research on implicit biases. That that suggests that that it's there are widely held mental connections that people make between race and criminal records, and that those are actually wildly exaggerated relative to the actual difference in the in the rate at which people have different racial groups have criminal records. But but so it's it seems like employers were relying on these very exaggerated stereotypes and and in many cases, just refusing to call black candidates back. So it seems like white people, white applicants with records, were the primary beneficiaries of Ban the Box, while black applicants without records paid paid the price?

I don't it's been a while since I've read that paper. But does it? Did you in subsequent years? Have you thought about any other corrective that might be able to deal with that are? You know? So? you know, because the alternative is obviously not good, either. Right?

Yeah. So So I mean, I think that people have asked what what do you think about ban the box now, and I think it's it's really important as as my ex management work makes clear, to try to find ways to open doors to people with with records. And so I hesitate to say that it's just a bad policy, because obviously what's going wrong, his employer racial discrimination, which is itself illegal, but but just wishing that employers wouldn't racially discriminate is also easier said than done. laws against it for decades. And yet, there's lots of proven difficult to enforce. There's some simple things that I think could make it harder for employers to do the thing that we observed them doing like, for example, you we're talking about people about, like the applications that we sent, they were in online job applications. So it's like decisions being made, not on the basis yet anyway, of an in person interview. So the first screen of these applications is based on just looking at the information submitted online, well, if the box can be removed from that, then criminal record like that is if the criminal record information can be removed, then we don't see why any racially identifying information couldn't also be removed at at that stage. And and I think that the most important racially identifying information is the that is the name of the applicant, and also probably their home address. So in our experiment, we, we use the name as the signifier of race, because employers don't usually actually ask about race, but but at least half of Americans have regionally distinctive names. So So we think it would be helpful to at least I think I'll speak for myself, that it would be helpful to to use a ban the box like strategy to get at racial discrimination directly, but that that hasn't been nobody has done that and done it done an empirical test of that that's something I would I would love to study in the, in the future. And then otherwise, you know, I, I think in some ways, like maybe employers incentives have to be changed, so that they aren't as afraid of hiring people with criminal records in the first place. And whether that's like a public education campaign, or efforts to you know, in some cases, employers may be afraid of negligent hiring lawsuits if the laws were changed to be more favorable to employers who hire people with records, to protect them from those kinds of lawsuits. That might be helpful. I don't know there's there's there's a lot of possibilities. But you know, I don't think there's, there's not going to be like a magic bullet answer to this problem. I don't think because, you know, the the problem of underlying racial discrimination and the problem of of employer suspicion of people with records, those are pretty deeply culturally ingrained problems. And so legal, quick fixes, maybe maybe hard to find.

So we talked briefly, when I ran into in DC about your research around risk assessment tools, I usually say that the question should be a risk assessment is more or less biased than discretion alone, but you kind of had a different take on that. Did you want to kind of talk about that for a second?

Well, I mean, so right, so my writing on risk assessment has been pretty critical. In particular, what I've been critical of is risk assessment tools that incorporate factors that I think are basically improper bases for treating people differently in the criminal justice system. So some

risk assessment tools include a whole bunch of socio economic factors, for example. So things like do you are you are you unemployed? If you are employed? Do you make only minimum wage? Like if Have you had unstable unemployment over the years? Have you had difficulty paying your bills? Have you had housing instability? And then things about your family? Like, does anyone in your family have a criminal record? Even Have you been a victim of a crime in the past, and none of those things, have anything to do with your criminal responsibility or anything specific about you that would make you risk here, but statistically, of course, people who live in poverty and are more likely to probably to commit crimes, because many crimes are mediated by by poverty, and they're also probably more likely to be caught, if or if they do commit crimes, because they may live in more heavily police neighborhoods. And so statistically, it's probably true that those things are predictors of crime, but that doesn't make it a legitimate basis for sentencing somebody for longer or denying bail, etc. And so, see, so so there's a common response to say, Well, yes, but if we provide these instruments, at least their scientific and they replace the unguided discretion of judges, which is itself likely to be discriminatory. And I guess I have a couple of responses to that. One is that it's not obvious that providing the instruments actually does displace the underlying discriminatory tendencies of judges, to the extent that those tendencies exist, right. And it is possible that they, it just compounds them, because judges and almost all the contacts where risk assessment is being used, still have discretion, they're just given risk assessment to inform the exercise of that discretion. And so if the risk assessment is biased in a direction, that is essentially the same as the direction that their underlying biases are, it may just confirm them and cause them to go, if anything further in that, in in that direction. And then the other thing is that, like, I just don't think we should think of ourselves as locked into a forced choice between a existing system that's bad and another system that formally locks in consideration of, of improper factors, right, like, normally we're used to thinking of discrimination against the poor and, and other forms of discrimination in the criminal justice system as being things that we want to stamp out right like that, you know, we we try to train judges to, to avoid and other actors in the criminal justice system. And even though it's difficult to stamp out, to me, it can't be the solution to just like, lock it in place in an algorithm, especially because then when you give the results to those judges, you're giving the stamp of scientific approval that comes from the state on those results. And just and and just allowing the, the the judge to just say, Oh, well, you know, science says this, and so so I'm going to rely on it and not really questioning where it where it comes from. And I also think that some of the factors in risk assessment, it's not obvious to me that judges using their own unguided discretion actually do treat them as as aggravating factors. So in sentencing in particular, where judges take into account a wide variety of punishment concerns, right? So one reason you might punish is because you are afraid that the defendant might commit more crimes in the future. And another is because you just think they did something wrong, and they deserve to be punished. But judges who highly emphasize what did the person do wrong? And what do they deserve? Often treat factors like socio economic disadvantage, as mitigating factors not aggravating factors, right there reasons why you might understand where a defendant was coming from if they turned to dealing drugs to support themselves, for example. And and so if they, you know, if they didn't have a housing stability, for instance, or if they grew up in a in a, you know, family that that was living in poverty, etc, those things might might help

to, if not completely, excuse at least it to help to explain some of their choices. And so and I think there are plenty of judges who do treat those sorts of things as if anything mitigating, whereas the risk assessment instruments because they're statistically correlated with crime, flip the sign on those things, right. They they ensure that that judges at least are being encouraged by the state to consider those those factors as as aggravating factors that should increase the sentence.

And nowl my take, I've rarely seen an article about ban the box or about risk assessment tools that did not highlight some of the excellent research that Sonia star has done. It was a pleasure to discuss her earlier research whether but just to highlight next week, I also talked with her about her newest research, very good paper that she wrote with her co worker, Professor JJ Prescott, about the benefits of broader and automatic expunged meant. Next week, I'll share that discussion about this groundbreaking research. I believe it can be some of the most important research that I've ever seen on this topic, because it makes the case that broadening expunged, and making it automatic actually reduces crime and reduces recidivism. In other words, making for broader set asides and expunged laws reduces crime and recidivism, it's actually a crime fighting tool. So for those who aren't familiar with experiment is a legal process through which formerly incarcerated people clear their criminal records. In many states, the expansion processes is currently incredibly limited. In my own state of Michigan, the only people who qualify or people with no more than one felony, or two and two misdemeanors. And that's not even totally correct because several fan of felony cup categories are disqualified from MCs punishment, which means that even if you only had one felony, but it was the wrong kind of felony, you'd be disqualified. Now, this might still sound good to you, but it kind of misunderstands the nature of charging documents. it you know, it's incredibly rare even in the area of in the era of plea bargains for someone to be charged with just one felony. A friend of mine tells the story of being at a recent experiment fair were over 200 people showed up and only seven of those people were eligible for punishment or what we call in Michigan a set aside. So next week, Sony and I will finish our conversation talking about this important new recently, so I hope you will check it out. As always, you can find the show notes or leave us comment decarceration Nation com and make sure to check out our new t shirts, sweatshirts and hats. If you want to support the podcast directly, you can do so from patreon.com slash on pirate satellite, which is actually the name of my other blog. You can support us by leaving a five star review from iTunes or like us on Stitcher, Spotify. A special thanks to Andrew Stein who does the editing and post production for me and Robert Alvarez has been helping with the website. Also remember that you can sign up for our newsletter which comes out every week on Wednesday by going to the website as well. Thanks so much for listening to the decarceration nation podcast. See you next time.