Episode 64 Somil Trivedi

Hello and welcome to Episode 64 of the decarceration nation podcast, a podcast about radically reimagining America's criminal justice system. I'm Josh Hoe, among other things, I'm formerly incarcerated freelance writer, criminal justice reform advocate and the author of the book writing your own best story addiction and living hope. We'll get to my interview with Somil Trivedi, a senior staff attorney in the criminal law reform project the American Civil Liberties Union in just a second, but first, the news:.

Crazy busy last few weeks after I got back from testifying at the jails and pre trial incarceration Task Force, I get invited to visit Parnall prison. This was my second time to go back inside and visit a prison, the Michigan Department of Corrections has been building out what they call vocational villages, which train people in prison for in demand careers, and then work on getting them hired prior to them being released. I personally saw people being trained in truck driving for lift driving carpentry, computer aided design, robotic masonry, computer programming, and even automotive automotive repair. It's always nice to get back and see the folks in prison especially to see them doing great things. Like what's happening in this program is always also really very stressful when I walk in and out of the gates. But on the whole, I do think the MDOC for inviting me back for the second time. And it's obviously I'm glad it was on a voluntary basis. I'm in general, a very big fan of the vocational village idea. My only issue with the concept is that it puts a large percentage of resources into preparing a small number of people for reentry. My hope is that over time, they will continue to build capacity. And with larger capacity and less investment in builds, they can start to broaden the program and include an even larger number of incarcerated people in the training. As you probably know by now, I believe that all departments of corrections should be heavily invested in creating good outcomes. From the very first day someone walks into prison, and that includes training them for careers, after incarceration and trying to get them hired building on ramps from prison into careers. There is no doubt that for the people who are allowed to participate in the vocational villages now, this is a life changing program. And I'm really excited that very soon, there'll be opening a vocational village at the one women's facility in Michigan, which is a huge deal and couldn't happen Quick, quick, more quick quickly enough.

Okay, I was also able to attend a great meeting of activists that were starting to organize around changing Michigan's felony firearm law, felony firearm is a sentencing enhancement that allows prosecutors dead to for a 10 year minimum mandatory to a charging document if they possess a firearm while committing a crime. Unfortunately, this law is heavily applied in only a few counties and not in many others, is also applied an extremely problematic and racially disparate manners. Even if that were not the case, sentence enhancements are generally unnecessary. long sentences are generally kind of productive, and productive does not as we've talked about a billion times on here, it doesn't generate good public safety outcomes. Regardless, the sheer volume of people who are serving long sentences in Michigan, Michigan has the longest sentences of anyone in the country. And we have truth in sentencing here to which has been a total disaster doing anything we can to reverse and change. You know, unnecessarily

sentencing enhancements, this is pretty important. And I hope we are successful and moving the ball forward on this. You would think that was it. But I was also able to attend a great nation outside meeting in Flint. Just yesterday, I've been to several committee hearings, the legislature, and later today, a huge new legislative package will be dropping in the house here in Michigan. If you follow me on Twitter, you'll see a lot more about this later today. And throughout the coming weeks. If you want to read my testimony, by the way, from the last jail and pre trial incarceration Task Force meeting, I'll include links to the testimony in the show notes on the website.

Okay, let's get to my interview with Somil Trivedi.

Somil Trivedi is a senior staff attorney in the criminal law reform project, working closely with the ACLU, his campaign for smart justice. He speaks and writes nationwide on criminal law and prosecutorial reform issues. And his work has been featured in The New York Times, LA Times on the marshal project, among other outlets. It's been nice enough to come on today to talk about the most recently concluded Supreme Court term. Welcome to the decarceration nation podcast Somil.

Thanks so much for having me.

I always ask the same first question. How did you get from wherever you started out to being a senior staff attorney at the ACLU, how did you become interested in the work and what was your journey?

So I've been interested in the work, you know, basically, since I stepped foot in law school, I had a really fantastic Criminal Procedure professor and, you know, the inherent power of the state to to deprive folks of liberty as something has been something that's fascinated me throughout my career, but I can probably pinpoint the exact moment where I decided to become an ACLU staff attorney, and that was May 10 2017, which is when attorneys at the Department of Justice received Jeff Sessions memo. That said, as a core principle of being a federal prosecutor, we must seek the most serious offense chargeable, and further seek the most serious penalty for that most serious charge. And I was just a couple months into being a federal prosecutor. And I was actually on detail to the United States Attorney's Office in DC, covering their misdemeanor docket. And there I saw pretty much a conveyor belt of young black men in DC, going to prison or otherwise, having, you know, the state exert control over them for some of the most tricky tax stuff. And I just, I didn't envision that the role of a process secure in that office, seeing this conveyor belt circulating around the courtroom, that are that that was our job, and that that would do the most justice for people or keep people the safest. And so while I immensely respect to the work of prosecutors, especially now, in an era where DOJ at the top has become so lawless, I immensely respect the prosecutors that are there for me, I just thought there's got to be a better way to approach the work of prosecution and our criminal justice system generally. So, you know, pretty much on that day, I decided that I was going to work outside the system instead of in it.

We've had kind of a weird period, I think you're calling it lawless of the top of the DOJ over the last, especially the last couple years. But it was pretty shocking, I think about a week and a half ago, maybe a week ago, when Attorney General Barr came out and kind of attacked, kind of more progressive moves and with prosecutors, and it's kind of come at the tail end of a number of attacks from the Department of Justice and kind of more moves toward a more liberalized criminal justice system. Do you have any thoughts about that?

I do. And I think I'm going to see this glass half full and say we're winning, we're scaring them. And we're winning. And it's, it's proven by the sort of unhinged fact, not fact, less attacks on on the work of you know, duly elected democratically elected local prosecutors who are not only reducing the prison population, their decarceration the nation, if you will. They're also increasing public safety and saving a ton of money. So their existence is proof that the bill bar approach of lock them up and throw away the key just doesn't work on any metric. And I think the more that we're seeing data come out of offices like Kim foxes and Larry Krasner is, the more scared they are. And I'll note that all these US Attorney's around the country with Bill Barr at the top sort of setting the tone, but these us attorneys that have come out and attacked the local prosecutors, let's see where they're coming from, you know, leveling in Boston, went after a judge for helping someone evade ice. You know, mix Wayne in Philly. Recently, we've had an issue in DC where Jesse Liu, the US Attorney here is fear mongering about the DC Council's attempt to to pass sort of second look, sentencing reform. All of these US Attorney's are in cities where there are progressive prosecutors winning elections, who are far more popular than they are and whose whose results are showing. And so I think, I think their desperation is showing when when they're, you know, these us attorneys, who are supposed to be a political are supposed to actually work with their local prosecutors to to curb crime and and create a more just system are lashing out in these perversely unprofessional ways.

Oh, I certainly hope that you're right. I have that take once myself, but I'm still always a little bit nervous about everything that's going on. So let's take it more. Let's take a little bit more toward the Supreme Court. Justice Ginsburg was just treated again, for cancer. We obviously had a very contentious last few appointments to the court, and several presidential candidates have suggested different ideas around the future composition of the court. Do you have any thoughts about either how we got to this point or about the appointment process going forward?

Well, you know how we got to this point, I think it was not until the very last few days of the court, which are not criminal justice based. I think you could say that it was a pretty quiet term overall. Right. Not a lot of blockbusters. And I think, I think that's the Chief Justice trying to take it down a peg or two, after sort of the heated confirmation battles. You know, he, as many of noted, is sort of a master tactician and a preserver of the institution. that argument can go a little far. And, you know, I think the Supreme Court under his stewardship has has, you know, tilted in many ways against against folks, disadvantaged folks, including criminal defendants. But, you know, I think the probably the most interesting part about this Supreme Court term is it does is that it does mirror what you're seeing on the presidential camp on the campaign trail, which is the criminal justice is having a moment. And, and you know, I say that having a moment, but it's

sort of having a public moment, but it's actually the result of years and years of hard work and by organizers and folks on the ground folks like you frankly. And it was all across I theological knowledge part is in, you know, groundswell, such that you can get a term where Neil Gorsuch widely considered such conservative can author multiple opinions upholding the rights of criminal defendants under sort of libertarian take. And, and, you know, I don't want to oversell what we've done so far, or undersell the work that we have to do, as you know, very well, we're not there yet. And we're still the world's largest incarcerated by far, and it's appalling. But I hope that, you know, we can talk about today, what we can talk about today is a few glimmers of hope. And and I think you're right to say that it's sort of echoed in what we see on the campaign trail right now.

Any thoughts in general about the about the new justices?

So, you know, I think the cases will talk about that today sort of show the the range, if you will, of the conservative block of the court. And I think even these two guys showed a lot of range, right? On the one hand, Kevin, ah, and I hope we talked about the flowers case in a minute cabinet authored a really, really important opinion on racial discrimination in flowers, the Mississippi, overturning a conviction based on racist, peremptory strikes of germs. Right. But Kevin also signed on to some fear mongering dissent about mandatory minimums and, and gun violence. And on the flip side, Gorsuch, like I said, authored two very important opinions on the limitations of the criminal law when it comes to supervised release. And, and again, mandatory minimums, where Kavenaugh wrote the descent, but also descended from that very case, Curtis flowers, apparently blinded to the obvious racism going on there. So I actually think it's too early in both of these men's careers at the Supreme Court to figure out exactly what lane they're in. But we did get some, some some indications. And I think I think it's going to make sort of criminal justice sport watching really fascinating for the next couple decades, because, you know, that one door opens, another one closes, and it's all very dynamic. And so but I, but I think there are, there are rays of hope for sure.

Okay, so let's start with some of the cases you weren't happy or weren't. Didn't think were positive first. So let's talk about Mitchell v. Wisconsin, there's a fourth amendment case, you want to talk a little bit about that?

Sure. Um, so briefly, and Mitchell, this would be Wisconsin, we had a drunk driver who pulled over whose car ran off the side of the road. And the police tried to conduct a sort of field alcohol test. It turned up inconclusive. And eventually the the driver ended up passing in and out of consciousness, as many drunk drivers do. And eventually was taken to a hospital were completely unconscious. And obviously, without giving any affirmative consent, his blood was in fact taken. And this was done all without a warrant. Right. And this is sort of part and parcel of the the lead a cane Fourth Amendment jurisprudence around warrants. Especially the exception for quote, unquote, exigent circumstances, right. And the argument here goes, we know that alcohol dissipates in the body at a rapid rate after drinking, and therefore it is akin to sort of destruction of evidence. So uh, warrantless blood draw of an unconscious person is is valid

under that, under that exception? And I think, you know, first of all, we need to, we need to assess the state of for the minute law, as I mentioned, I think the the number of exceptions have clearly swallowed the rule. And, you know, warrants are our central piece of the Bill of Rights, and they're a central check on government tyranny. And, and this case is just one in a long line of, of cases eroding that principle. So I think it's disappointing for that reason. It's also disappointing, because on the facts, the court didn't need to rule this way there. And they admit it actually, the majority opinion says, we're not actually ruling on this case, we're making a blanket decision that will have all unconscious blood draws, regardless of the actual exigency of the situation. And that's what exactly not what the court is supposed to do. Right. And the dissent points this out very clearly that, that actually the the facts of this case, there was there was no need to attend to any other elements of the crime scene. This person was, you know, taken to the hospital, the state actually conceded that they were no longer exigent circumstances, in this case, there was no one be harmed their own victims that are etc. And so the majority just skips over the the inconvenient facts of the case, to make a blanket rule that it that it felt like making. And and basically, because there's a long preamble about how important you know, drunk driving law and therefore YB Damn, so that's a disappointing one in this in this term.

What about this side? do that by obtaining a driver's license, you give implied consent to search? Was I reading that, right?

No, that's right. And that's the case in many, many states. And it's, again, just part of part of states attempts to curb drunk driving. And, you know, we can, we can and should talk about how commendable it is to try to curb drunk driving. And so that, but that's, I think, a step too far. And, and, you know, implied consent can be challenged in many ways. And I think this is one of the ways to think about it that that while it's while while a state has every reason to try to curb drunk driving, it goes too far when it skips over the requirements of the Fourth Amendment.

I think Justice Alito also made an argument about the warrant we're taking the time to get a warrant might be incompatible with an officers responsibility to save the folks in the accident. Did that resonate with you at all?

Well, again, it might resonate in a particular case, but it didn't in this one, the guy was safe, and they were no other victims are rounded, the police would have had to tend to so you know, for for a supposedly conservative, narrow anti activist, majority to do allied those facts and skip straight to the blanket rule was concerning.

Uh, did you see anything in particular in either Gorsuch or the Sotomayor defense that you thought we should talk about?

Um, no, I think that that about covers it. I think the takeaway from here is not only that it is deeply troubling that we would allow the state to puncture somebody's skin and draw their blood when they were unconscious. But also that we should be we should be very wary of courts who

say I want to I'm only going to decide things on the facts and not reach beyond them to decide future cases. I think that's a that's a sort of convenient Trello to achieve the result you want. And here, the majority wanted a different result. And so they decided not to be so so cabin, in principle, I think that's the takeaway.

Okay. And it's also you think, pretty consistent with the long line of things eroding the Fourth Amendment, correct?

Yeah, I think so.

So the second case that you that it's going kind of the not good direction is Gamble versus the United States. And this was a case about

So it’s Gamble v. Alabama it says the state court case that eventually got up to the Supreme Court is about what's called the dual sovereignty exception to the double jeopardy clause, and that is a lot of legalese. But let me break it down. So in this case, a man named Terrence gamble was Alabama State court for a drug possession.

I'm sorry, a gun possession charge.

Right.

Right.

Yeah, that's exactly right.

And he served one year since under his state prosecution. And then, lo and behold, the federal government, the Federal US Attorney's Office in Alabama swoops in charged him for the exact same conduct and gave him several more years. Right. And that would sound to me like double jeopardy, right? He's being prosecuted twice for the same damn thing. But that would be wrong, because the double jeopardy clause of the Fifth Amendment says you cannot be tried twice for the same quote, unquote, offense. But there's a sort of gaping exception to that rule. If the state government tries you, and then the federal government tries you or vice versa, and that's called the dual sovereignty exception. And the logic strained as it is, goes that if the state of Alabama passes a law, and then the federal government passes a law, even with largely the same elements, so a lot of gun and drug crimes basically follow the same elements at both the state and federal level, those are technically different offenses, because different soft ends, the state and the federal government passed them, and therefore the double jeopardy clause just doesn't apply.

Now, if I remember correctly, from my own experience, usually there's some kind of negotiation that happens between federal and state prosecutors over who's going to prosecute a crime. So

how do we get to the point where the state wanted to prosecute, the federal government wanted to prosecute, and they did it separately?

Well, so that's, that's a really good point. And I don't think the coordination is as clean as we would hope. In a lot of cases, I think the Jeffrey Epstein saga shows that as well. And I think it is done better, and they're coordinating better, that actually undermines the premise of the dual sovereignty exception, because you're giving up the ghost as to the as to whether you're different sovereigns, if you're actually cooperating as one to bring a single prosecution for a single set of circumstances. And that's actually a huge problem these days, because of the Federal is of crime, right? federal criminal statutes have exploded since the war on drugs. There are more and more federal joint state federal task forces, right, we hear that term all the time, that's the state and the feds working together to prosecute the same crime. So even if way back when at the founding, you know, that there were there were states who were protecting their realm, their sphere of influence, and the federal government was trying to protect different spheres of influence. That's just not the case anymore. And so the the underlying assumption of the dual, the, the dual sovereignty exception just doesn't apply anymore. And it's more and more dangerous now, because of how much weight the feds can bring to a particular prosecution.

It also seems like and I might, I might, I'm not a lawyer, so I might be misunderstanding this. But in this case, it seems like there was one case that resolved. And then another case started, are we getting to the point where, in essence, instead of having to forum shop, prosecutors can just get them once and then get them again later?

That's exactly right. And that's that's precisely the point of the double jeopardy clause, because we don't want to put people under the fear of successive prosecution all the time, you get one bite at the apple, right? And if you look at it from the perspective of the person being charged, do you think they give a lick about whether it's the state or the federal government? Do you think they appreciate the different sovereign prerogatives are being pursued? No, to them, it's all the same. They're getting prosecuted twice. And then Gamble's case, he happened to be guilty, and it's bad enough for a state to put their case on find you guilty, you serve your time, you think your debt has been paid, and then you get prosecuted again, imagine if you were innocent. Imagine if the state of Alabama and found him innocent, and then the feds come in and try to extract a pound of flesh again, having seen the entire state case, go go forward, having seen all the strategic, you know, positions that both parties took, having basically seen the defense already, and then they get to build a new case where they where they plug all the holes, and get you again. And so that's really that's really perturbing. And I think, I think so, you know, that there's not much to talk about in the in the majority opinion itself, you know, Alito has his opinion, pretty much just walks through the history of the dual sovereignty exception. Same, saying that it has been an exception for a long time. And that's fair enough. It's kind of like, sort of watching paint dry, but like lead paint, because it's like, both boring and bad. So there's not much to talk about there. But I think it is interesting that Gorsuch and ginsburg sort of joined forces in in the descent to make sort of the obvious point that the ultimate purpose of the double

jeopardy clause is to protect liberty. And we're not protecting Liberty here. In fact, we're doubly infringing on.

Yeah, that seems relevant.

Yeah, that's exactly right.

Are there any I mean, I think we've already talked about me, it seems to me that there's a lot of dangers from this precedent. So I mean, aside from what we've already covered, are there any other larger implications?

Yeah. And so it's hard to there isn't really great data that I've seen on the number of the successive prosecutions that come about, but I think we need to talk about it in terms of state coercive power generally. Right. You know, you mentioned a minute ago that often in cases that could be duly charged, there is coordination, right? And what is that coordination ultimately, meant to do? It's meant to pressure folks to plead out. Right. And so this is, I think we should view this case, in terms of being yet another tool in the hands of the government, to pressure folks to abandon their their right to a trial. And, you know, as sort of a framing for this whole our whole conversation and for this term, you know, I'm less interested in, in what these cases say about the trajectory of the court or about any single justice or, you know, our Gorsuch and Kevin, all frenemies, you know, there's lots of folks who do that kind of that kind of palace intrigue, analysis of the Supreme Court, I'm interested, frankly, in how these cases are going to make a dent in mass incarceration, and reduce racial disparities in the system and really attack racism. And so that's the frame through which I want to see gamble. And many of these other cases that any case that reduces the ability of particularly prosecutors, but for the state, to impose coercive pressure in order to ban out a plea bargain, and send people to jail for as long as possible. That's how we need to be reading these cases. And that in that way, gamble is a disappointment.

Actually, you said something just a second ago, that's interesting to me that you suggest. So if I'm getting this right, that like right now, when we press for plea bargains, we can do what's called pressure people with what we call the the trial penalty, in a sense to allow them to pressure with the double trial penalty.

Exactly. Right. Exactly. Right. And it may not even be double it may be three x four x, right? Because we all know that federal crimes very much heavier sentences, right. So if you're a state level defendant, and you need the feds coming down the pike, you are going to feel immense, not just double but maybe more pressure to plead out and resolve everything. Because for the same exact conduct, you can be getting many, many more years from the fence picker just about cut you off from something you're about to save her. So if you want to finish up here now.

I apologize. I'm really bad at stopping talking. But um, no, I was I was gonna I was going to end on sort of a more optimistic note, which is that the ACLU actually filed an amicus brief in this case, sort of pointing out the things that I'm pointing out sort of the absurdity of assuming that to a criminal defendant in matters at all the two sovereigns are prosecuting him. But what's what's encouraging is that we joined forces with the constitutional accountability Center and the Cato Institute to file that brief. And as I mentioned at the top that sort of indicative of the the sort of cross partisan, cross ideological consensus that is coming, coming together on criminal justice cases, and, you know, we join with the Cato Institute and americans for prosperity and many other groups across the ideological spectrum on a variety of criminal justice issues, you know, qualified immunity here, the dual sovereignty exception, a jury trial rights more generally. And I think so to the extent that gamble was a disappointing decision. It also shows the power of the the coalition that's fighting these sort of opinions.

Yeah, I think it would be remiss to move on from the kind of the bad part of the term without at least mentioning the string of death penalty cases. Do you want to say anything about that?

Yeah, that's right. Um, you know, death penalty, the death penalty is sort of a beast unto itself. So I won't spend too much time on it. There are far more folks, for folks who are far more expert in it than I am. But I think it was, again, a disappointing term on the death penalty. Particularly there was a case called buck Lou about the method of lethal injection. And, you know, we've sort of had an uptick in those cases, over the past decade or so, where a man who compellingly presented with tumors all over his body that would be that would, that would result in excruciating pain and the potential for choking, if put to death, through the protocol of chemicals that Missouri wanted to put him to death with, although he be legitimately presented with those issues, that we create an extremely excruciating the Supreme Court's current lethal injection jurisprudence, it was on him to literally pick his alternative poison, right. And when he didn't name something that could guarantee that it would be less painful than this disgusting cocktail that, that he was, ultimately to be injected with, you know, when he didn't meet the burden of finding a better way to kill himself, it didn't seem to matter to the Supreme Court that the way that was going to happen was going to be extremely cruel, and unusual as applied to him. So I think that was a disappointing case. I think we continue to be disappointed on the death penalty by the Supreme Court. But again, to try to end on a positive note, folks have been taking the fight to states now. And so, you know, the the Supreme Court of Washington recently outlawed the death penalty in a case that my colleague, Jeff Robinson argued, partially argued at the Washington Supreme Court. And so to the extent that that we can glean anything is that, you know, between the Supreme Court case between between the string of penalty cases recently, and as we've seen bill bars, clearly political resuscitation of the death penalty at the federal level, I think going to the states is going to be a place we're going to we're going to have to go soon,

Probably should at least mention that that buck Luke Ace is also if I remember correctly, the one where I believe was Cavanaugh was waxing poetic about shooting firing squads, and and Gorsuch was waxing poetic about hangings. Going back to hanging somewhere?

Yeah, that's right. And, you know, you know, you're on shaky ground when you're when you're delivering pains to hangings, but, but I'm glad you raised the fact that, you know, Gorsuch wrote this opinion. And so to the extent that we're going to sing his praises later, I want everybody to keep in mind that that he was totally blind to the obvious suffering that was going to take place in this case.

Alright, let's move to some cases you thought were good news. The first one is McDonough vs. Smith. Now let me see if I get this right. McDonough was an election official. And Smith, who had been appointed to investigate voter fraud accused McDonough of improperly using fabricated evidence is that am I close?

That's right. Um, Madonna was an Election Commissioner in Troy, New York. And he was falsely accused, by all rights by a man named Trey Smith who had actually a grudge against his family against McDonald's family and faked a bunch of evidence, including a DNA test that supposedly tied McDonough to the ballot envelopes. It was all sort of ham fisted. And the court agreed. This was a this was a botched prosecution and Macondo was acquitted. So and so then McDonald's sued Smith, in federal court under Section 1983, civil rights suit, claiming malicious prosecution and fabrication of evidence. Right. And so the Supreme Court. Right, right. Seems like I would be an open and shut case. And it was on it is on the merits. And so the sort of there that the narrow question at the Second Circuit, and then at the Supreme Court was actually about when a cause of action accrues against a prosecutor for fabrication of evidence, and I don't want to get too into the legal jargon. But this is essentially about statute of limitation. Right. So McDonough actually waited until after he was acquitted to bring this suit. And the Second Circuit Court of Appeals in New York, the Federal Second Circuit said, No, you actually had to bring it at the time you knew of the fabrication, so basically midstream in your prosecution. And this is sort of wrong on doctrinal levels, for reasons we don't have to get into but this is another case where the ACLU joined with a bunch of other groups to file an amicus brief. And we made a very simple point that how are you going to make a criminal defendant who is currently being prosecuted, and therefore has his life in the state's hands then accused the state of wrongdoing, that creates all kinds of perverse incentives for the state, and really puts the defendant in a horrible position. And so luckily, the Supreme Court did, did side with Madonna and said, that kind of rule for a statute of limitations doesn't make sense. And they ought to be able to wait until after the proceeding has terminated in their favor, aka an acquittal, in this case, and then you can go ahead and bring your civil rights case against the prosecutor and Sotomayor did a great job, uh, pointing out all the reasons why that should be.

Was there anything significant that the dissent from Thomas not surprising that it was the dissent from Thomas?

Uh, yeah. You know, I think Thomas had a pretty gangbusters term. In general, I think a lot of his dissents had really nothing to do with with the law, or with the law in hand, but I don't think that there was anything particularly notable here, he simply would have kept the second circuits rule under sort of the the doctrinal issues that we're talking about. I think what's what's more

interesting here is that while this was encouraging, certainly encouraging for prosecutorial accountability, right, which is how this impacts the ground level work that we're doing. This allows this makes it easier, at least in the Second Circuit, to hold prosecutors accountable for blatantly fabricating evidence against defendants. And we know that based on the work of the Innocence Project, and the ACLU and so many others, that fudging with the evidence suppressing evidence, fabricating evidence, this is a real problem. And it's almost impossible to hold prosecutors accountable for it under a lot of different legal doctrines. But so the to the extent that we made it a little easier, I think that's really vital. That's it. I got another that said, I can't I can't, I can't have a whole case of just positive. So this story may not have a happy ending, right? So Mr. McDonald is going to go back to the Second Circuit. And he's going to be able to bring his case, technically, it won't be barred by the statute of limitations, but it might be barred by the doctrine of absolute immunity. And in a nutshell, that's the doctrine that says, even if a prosecutor violated the Constitution, even if he admits it, and even if he did it in bad faith, and even if it resulted in a faulty prosecution, and in many things, cases of faulty conviction, although Luckily, McDonough was not wrongly convicted, in this case, even if all of that is true, and everybody agrees that this was a violation of a person's rights. If it was within the realm of what a prosecutor generally does, right. And in this case, the question is going to be whether fabricating evidence is what a prosecutor generally does not. We're gonna we're gonna go with no, but there's a there's a strong possibility that either the Second Circuit or the district court in New York finds that it is. And so I think people need to keep that in mind when we would, when we talk about sort of criminal justice reform, generally, because there are still major, major hurdles to holding police, prosecutors jailers accountable under these doctrines. And as I mentioned a moment ago, there is a increasingly angry and committed cross ideological consensus that doctrines like this are tantamount to government violence, impunity, right that the government can do whatever it wants, shoot unarmed black men wrongfully convicted people and send them to death, and nothing will happen to them. Because of these legal doctrines that have no basis in history, no basis in text. It's just the Supreme Court has decided we need to protect these folks. And I think it's time to reevaluate that. And so to the extent that McDonough does a little bit for prosecutorial accountability, that's fantastic. The next step needs to be addressing doctrines like this, that still make it virtually impossible to get justice.

Alright, so now we move to a case I think you mentioned earlier Flowers versus Mississippi. This case is kind of nuts. So Mr. Flower was tried, Mr. Flowers was tried six times by the same prosecutor, and has had all six of those trials overturned or something like that. Am I right?

Yeah, that's right. I mean, you talk about giving it a rest. This this case, had a tortured history from the very beginning. So yes, six trials of this man for a murder in the early 90s. Five of four of them, overturned for prosecutorial misconduct, including two of them for inappropriately striking black jurors. And it's the striking of black jurors. that eventually made it up to the Supreme Court this term. And it's hard to overstate just the blatant racism involved in this case. So the prosecutors name is Doug Evans. He's the elected prosecutor in this county in Mississippi. He has tried Mr. Mr. flowers all six of these times. And let me just read to you and this is a cabinet opinion, as I mentioned at the top of the at the top of the Kavenaugh should be

commended for, for, for not burying his head in the sand taking this case and writing a strong opinion, uphold the right of both criminal defendants and jurors to be free of racial discrimination. And so there were I'll read from Kavenaughs opinion, there were there were four critical facts that required reversal in this case, and the facts are just going to blow your mind. So in the in the six trials combined, the state employed, it's a peremptory challenges. Those are the challenges that you get, and you don't have to name your cause. You just get to strike folks. And we can talk about the the sort of sorted racial history of peremptory challenges generally, but so in this case, over the course of six trials, Doug Evans used his peremptory challenges to strike 41 of the 42 progress perspective, black jurors that could have that could have sat on the on the jury. That's astounding, right? In the most recent trial, six of the jurors perspective, jurors were black, and he used peremptory strikes to strike five of them. Right. Third, in an effort to gin up pre textual reasons to strike all these black jurors right to come up with non racist reasons. The state engaged in what cabinet called dramatically disparate questioning of the black and white jurors. Right. And here's how dramatically disparate it was. They were in the fight in the final trial of the five black prospective jurors that were eventually struck, they were asked 145 questions, the 11, seated white jurors, were only asked 12 questions total, right. So this is this is an obvious attempt to come up with any reason to get rid of the black chairs, and then allow a whole bunch of white jurors on for the same reasons. And so the fourth, the fourth factor, that cabinet considered important was that the state struck at least one black prescriptive perspective, jerk, sorry, Carolyn, right. Who was similarly situated to white perspective, jurors who are now struck in that. And this basically came down to Evans trying to find conflicts of interest, like this office was prosecuted a cousin of yours, and therefore you're biased. And therefore, that's my non racist reason for striking you. And yet, several white jurors had similar conflicts of interest, and we're led onto the jury without any real serious question. And so I think this is this is it. I mean, it's a massively important case, for for re exposing the racism that you and I and many others know exists across the criminal justice system. But anytime we can get a reminder that it is front and center every day, and that is not a thing of the past. I think the Doug Evans and Curtis flowers case, is extremely symbolically important for that reason, and maybe not only symbolically because that we're seeing more and more cases across the country, including in North Carolina, there's going to be a case argued next week, where this sort of stuff still goes on. And maybe prosecutors are getting better at hiding their racist motivations. And they're asking better questions. But we know the motivations from so many folks. And so I think this is a really important, really important case. And here is one where, where Neil Gorsuch and Thomas, just sort of bury their heads in the sand and, and refuse to see the see this case for what it is, which was obvious racism,

And was there anything significant in that descent?

So, you know, they basically, they basically take the state's word for it, right, so so Thomas and Gorsuch walk through all of the supposedly race neutral reasons that the prosecutor gave for striking all of the black jurors and say, we're supposed to trust those that are constitutional system is not equipped to dive into the underlying motivations is race neutral pre tax are given. And again, to Kavanagh's credit. He says no, that's absolutely not what we're supposed to do.

What we're supposed to do is take the case as a whole, in this case, take all six cases as a whole as a whole. And if you see 41 or 42, black jurors being struck, and you see black jurors getting asked 145 questions to 12 for the white jurors. That is relevant evidence that you can bury your head in the sand.

It also seems like it begs the question of the fourth point, which is similar similarly situated people with, you know, I mean, it doesn't seem to their descent doesn't seem to get it that question unless I'm missing know

That's exactly right. That's exactly right. And that's why I think the factors, that cabinet lays out a holistic assessment of the entire process, and finding those sort of similarly situated competitors. That's sort of the final takeaway on top of the sort of more important racial justice takeaway.

And am I wrong or my crazy here? Or does this now mean, the same prosecutor could try for a seventh up that this thing are?

You're absolutely right. And the saddest thing is right now Curtis flowers is sitting in pre trial detention, waiting for his fate, even though it is beyond obvious that the state of Mississippi cannot prosecute him fairly. Is there there will be no justice served by continuing to pursue this case. And so, you know, one thing that one thing that's sort of a bigger picture takeaway from this is, you know, Doug Evans is running again for for da, down in Mississippi, and he's running unopposed. And the ag who took the case and argued in favor of Doug Evans is running for governor. And so if we don't think that politics plays a role in you know, we're sorely mistaken. And I think, you know, we talked about the progressive prosecutor movement earlier. And that's vital. And it's, it's come with some really important changes across the country, you gotta remember, there's over 2400 elected prosecutors in the country, and maybe 15, who are legitimately, you know, on this reform bandwagon, most places in the United States, if you are a black person facing the criminal justice system, you are likely to face these these types of problems, if not more. And so to the extent that we are, we need to, we need to push progressives and decarceration earners, down into the bowels of Mississippi and Alabama, and, and Arizona and everywhere else, to make sure that this movement really gets to the people who really need it, right. And if we can't do that, we have to remember that the courts are still a powerful weapon, because there are just places in the country despite the cross ideological consensus that I'm talking about, where they're not going to pass, you know, peremptory challenge legislation, they are not going to elect a progressive prosecutor. And we need to be in the courts fighting, waving the Curtis Lauer's case, to make sure that we're using all the tools in our tool belt to eliminate racism from the system.

And now we move to United States v. Davis. And this is both a void for vagueness decision and to some extent, and 924c stacking case, right?

That's right. That's right. So now, now we're moving to cases where so flowers and McDonough I would say are great for prosecutorial accountability. Right? You had individual instances of extreme prosecutorial misconduct that were remedied. And that's great. Right. And we need to see more of that. Now. With Davis and I hope we can talk about Haman in a second. We're talking about sort of structural statute based cases where I think there's a glimmer of hope for ending the sort of cold massive power of the government generally. Right. So so to go to Davis, you're exactly right, that it's both a void for vagueness case in a 924c case. So I'll talk about the facts real briefly. You know, here, Maurice Davis and Andre Glover, they robbed a series of banks in Texas, and they were charged with federal bank robbery and federal felon in possession, which would have given them over 70 years each, right. And you think that would have done the trick, but no amount of blood is enough down in Texas. So on top of these robbery and federal felony and possession charges, they also tacked on a counts under 924c. what you just mentioned. And those are enhancements for the carrying or brandishing of a weapon in the commission of certain other crimes, right. So it's not good enough that Federal Bank Robbery is a crime, and that being a felon in possession is a crime. Now we've got enhancements for the simple fact of carrying a gun, right. And those would have added 35 years on top of so consecutive to these folks. 70 years of possible charges at trial, and their mandatory, right. So we can talk about why prosecutors felt the need to do that. But I think I've hinted at the fact that every extra year you can tack on is more is more pressure to plead out and get a quick conviction. And so I have a feeling that that's what was going on here. And I know a lot of these cases. But to get to the constitutional part of it 924c contains what's called a residual clause that says, you get this, this gun enhancement if you committed a crime that carries, quote, the serious potential risk of physical injury. And that's whether or not you actually caused physical injury, right. So it's sort of sort of categorical approach, where if you committed a certain type of crime, even if that a serious physical injury never actually happened in the in your case, simply by being involved in a crime that has the potential risk of physical injury, you get these Additions on your sentence automatically. Right. And so Gorsuch says in his in his really important majority opinion, that this clause serious potential risk of physical injury is unconstitutionally vague. And what that means is that it doesn't provide a would be offender of notice of what behavior would get them charged, right? You don't know which you can't really know which crimes the judiciary has decided are ones that carry serious potential risk of physical injury, even if you didn't do it in your own case. So the word that wording itself is unconstitutionally vague and violates due process and Gorsuch goes a step further. And says, it also allows prosecutors and judges to interpret what that phrase means, instead of forcing Congress to be more clear about it. And he relies on on a pretty ironclad set of cases under the armed career criminals act and other acts that that have almost identical language to to this one to 924. See, where we've also found them unconstitutionally vague. So to me, it's a pretty uncontroversial position on the law. But I think for what it does to criminal justice, I think it can be really important.
So cast out there.

So Kavenaugh and Thomas, where the dissent was there. You know, you're saying it's fairly uncontroversial? Was there anything from the the scent that resonated?

Well, so I think what resonates most in Kavanagh's this end is that he devotes the first thousand or so words to just explaining the horrors of gun violence and, and making the holy unsubstantiated claim that its federal gun laws that have gotten our violent crime down since the since their peak in the in the 80s, and 90s. And anybody who's been working a day in criminal justice reform knows that that is just not true. And you know, we were talking about progressive prosecutors earlier. And we all know now and we're getting more data every day that long periods of incarceration do not correlate at all with lower crime. And there's better and better research every day that actually says that longer periods of incarceration can be criminal agenda, it can create crime, because of the awful conditions of prison and our inability to rehabilitate, and for all kinds of other reasons. So I think Kevin are really outside himself as just a law and order conservative who wants a particular policy outcome, in this case, longer sentences, instead of really engaging with the legal question here, which is whether the statute was too vague, or even engaging in the facts of his own of his own argument. And so that's really disappointing from cabinet. Like I said, we have to praise him for his for his flowers opinion. And we really have to, we really have to judge him for this one, because it's the kind of fear mongering that leads to the passage of of, you know, likely useless enhancement statutes like 924c?

Alright, so the next case is United States became and the case hold that a judge can't add an additional mandatory minimum after a probation violation. I think what we call a new crime, is that correct?

That's right. So this case is about supervised release, which, you know, just to set the table, as you well know. Yeah, we talked about the 2.3 million people in jails and prisons in the United States as an abomination. And it absolutely is. Let's think of the additional 4 million people are under downstate of control by the government, whether that supervised release under federal law or parole or probation. And I don't think that's even counting folks under really owners, diversion programs that can also really lead to remain to jail. And so I think that's the context in which we should talk about this case, how it really impacts the millions and millions of people, because I'm going to talk about the case in a second and what happened to Andre Heyman. But we know very well that the vast majority of supervision violations are tricky tax violations for things like failing a drug test, or even worse in ability to pay fines and fees, which are, which are burdensome, to say the least. And those lead to a totally unacceptable number of prison entries these days. And we really need to rethink the whole system. And that is what Gorsuch does, in this opinion. So to get to the facts, sorry for the long preamble. Andre Heyman was, was convicted of possessing child pornography, right? federal Federal offense under 18 USC 2252. And the judge sentenced him to 38 months in prison plus 10 years of supervised release, why 10 years was appropriate here, I have no idea. The situation so he gets out of jail out of prison, after 38 months, he's been under release. And unfortunately, on a sort of no knock raid, he gets found with some more child porn on his phone. But because he was under supervised release, this wasn't made a new criminal charge instead, at an administrative supervised release hearing a district judge. So not a jury, applying a preponderance of the evidence standard, so not

reasonable doubt, found that in fact, he had downloaded some of these images onto his phone, and then they move to sentencing. And at sentencing, we reduce the role of the jury even more, because if it were some other kind of supervision violation, like I was talking about a moment before a drug test or something like that, the judge had the discretion to give him zero to two years or additional present time for violating his super rise release. But under a George W. Bush era era, mandatory minimum amendment to the 84 sentencing reform act, child porn categorically requires the judge to give him five more years. Right. So so that's what he's remanded for. And the judge has no say in it. The 10th circuit, which is actually a Neil Gorsuch is old circuit, but he was gone by the time this case was was heard, the 10th circuit found that that this mandatory enhancement or a mandatory minimum of five years, done under the auspices of a judge and not a jury, operating under preponderance of the evidence, not reasonable doubt, violated the Fifth and Sixth Amendment rights to to a jury trial.
And I think that the opinion is super significant in many ways. And I think the most important way is that we have sort of a vanishing jury trial right in America,

Right on the 96% of cases are plea bargained...

That i think that's that's exactly what I'm getting at that, you know, the the majority opinion, lamented the fact that that Andre Heyman could be sent to jail on a supervision violation without a jury finding the facts here beyond a reasonable doubt. But as we know, 97 95 to 97% of all that end in a conviction, and without the jury having any say at all. Right. And, and so I think Gorsuch, his opinion, lays the framework and has a lot of important historical background on the importance of the jury, to the American not just criminal justice system, but society in general, to act as a check on what could be tyrannical government criminal power. And and that has come to pass right? The founders and john adams and others who, who inserted the word jury into the into the Bill of Rights more times than any other word, I think they realize that and their fears I've come to pass because our criminal justice system within a rounding error is pretty much done outside the purview of jurors. And so I think Gorsuch his opinion, it lays down an important marker there. And you know, it's interesting, Alito descent just goes on this issue. I said point, like, like,

It seems like in the dissent, that the main argument they're making isn't so much that he's wrong, it's that we don't want it we can't afford to have a system that isn't a plea bargain system. I'm a rocker.

That is exactly right. He actually points out in a way that he thinks is helpful to him. He says that there were something like 1800 federal criminal prosecutions in 2018 and 16,946. revocation proceedings. That's right. Let me say that again, 16,946 revocation proceeding. And his takeaway from this is not that we need to bring more fewer revocation proceedings. It's that the whole system would collapse. If we actually allowed a jury to weigh in on whether somebody should go to jail. He actually used the phrase, the whole system would come crashing down. And I think Gorsuch his response is probably a Yeah. And that would be the response of, of criminal justice reformers nationwide. I think this,

I think in the in the book, The New Jim Crow, they make the suggestion that everyone should just refuse plea bargains at the same time and collapse the system.

I think it's it's an option that we at the ACLU and others have talked about, ad nauseum, I think, I think it would put the fear of God in some prosecutors, and I think Neil Gorsuch might have put the fear of God and some prosecutors with this opinion. It, we need a recalibration. Right. plea bargaining isn't going anywhere, anytime soon. And while there are scholars around the country who truly believe that any amount of plea bargaining violates your right to a fair jury trial, and there are there are merits to that discussion. That's not happening anytime soon. But what could happen with a combination of cases like Davis, and like Hammond, and like Curtis, and like Madonna, to the extent that we are reducing the amount of leverage that that prosecutors have in a plea bargaining process, we can really make a dent in plea bargaining, and that's going to make a serious dent in mass incarceration and racism. And so that's why I say and I don't want to be Pollyanna about it, because prosecutors still retain a lot of power. And police still retain a lot of power. And the Supreme Court is never going to be our primary vehicle for fixing the justice system or fixing plea bargaining. But to the extent that we can take bites out of it, we've done so a little bit in this term. And I think that's, that's super encouraging.

A lot of these are five, four decisions and my understanding of the law that usually means not particularly strong either way. Do you have any feelings about the the way that these all seem to breaking down not always the same groupings of people, but that it's usually Five, four decisions?

Yeah, I think I think what that shows is that the Supreme Court is still making narrow decisions, right? You got to cobble together a five for coalition. And that means you're usually not making sweeping rules. And it's it's sweeping rules that we need to end mass incarceration, right. So again, I think the takeaway is, we can be encouraged by by by decisions like Haman and Davis and others. But we have to know that, that nine times out of 10, the ruling is going to apply to a particular set of facts. And it's going to be on the narrowest possible ground so that we can get an ideologically pretty diverse court and this point, at least on issues of criminal justice, I don't want to wait into other areas, but on the air on issues of criminal justice, we've seen that you can find strange bedfellows if you put together a sort of narrow well woven opinion that touches on everybody's flashpoints. And so I think that's, that's an opportunity, if we keep bringing good cases, and keep arguing them in the right way to capture those those narrow majorities. I think they're just more combinations and permutations than they were before.

All right. Do you have any larger overall takeaways from this term? That you haven't already mentioned?

No, I think I think, you know, I want to keep folks eye on the ball of mass incarceration and breaking down racism in the system. I think, you know, we often talk about the Supreme Court in sort of ivory tower terms. And then we go and talk about criminal justice reform, as is it as if it's some different thing. And so I'd love folks to start to start looking at these opinions, for the

ways that can you move on the ground or the ways that we can't, and so that we can we can build law into into our movement, and know where we have to fill in the gaps. So I'm not one who's written off the Supreme Court and tell me, but I'm realistic about how much it can do. And so I think it's important to view these opinions and opinions in the coming terms through that lens, how can we use it to really bolster this movement to ultimately make America more fair, just and safe place?

Right. So give me an example of how we might be able to take one of those decisions, it seems like some of them were fairly impactful, and maybe build it into the movement, so to speak.

Sure. So you know, Haman is a case about about the federal law. Right. But we know that that supervised release provisions are bound in the state system, right. So by using the same logic and going in and seeing if there are state systems, county based systems that are in fact sending folks back to jail without employing a jury. That can be a litigation strategy, right. That can be a legislative strategy, into the extent that Davis is about forcing the legislator, late legislature to write clear laws, instead of sweeping laws that that sweep in as many people as possible. That's a strategy that you can absolutely take to the States. And so I think, if litigators and advocates want to go poking around in the criminal law in their state and find examples of vaguely worded statutes, or systems where the jury trial right isn't being used, I think that's where we should go.

I Always ask the same last question. Is there a question you would have liked me to ask or something you'd like to talk about that I didn't get around to asking you about?

No you're a fantastic question askher. I am tapped dry.

I wish. That's really not the reason I asked that question. Sometimes they come across that way. But really, I'm just always hopeful. There's something that I messed up so that I get more, more to it. Well, thank you. Thanks so much for doing this. And I really appreciate you taking the time and helping us understand the last Supreme Court term.

Well, thank you, Josh, and thanks for your work all across this movement.

Thank you so much. And talk to you again soon, I hope.

Okay. All right.

Now, my take, I don't want to take up too much time here, since we covered an awful lot of ground in that discussion. But I do want to say a few things about the death penalty. This was a term where the Supreme Court did a lot of damage, and increase the justifications, the legal justifications for using the death penalty. At one point they even called for the idea that the firing squad and hanging might be acceptable, things to reach turn to just a very problematic part of this Supreme Court term. I've seen people who serve their sentence for murder, do things that

probably saved lives. We know for a fact that that innocent people have been and continue to be sentenced to death. We know for a fact that the death penalty is administered in a racially disparate manner. And we have a strong suspicion that an eye for an eye leaves everybody blind. the death penalty is not served anyone? Well, it's brutal. It's irreversible. Despite many chronicled issues, and lots of mistakes. You can't do anything to fix those mistakes. Unfortunately, our attorney general Mr. bar has decided to reinstate and implement the federal death penalty. And our president has decided that the key to deterring mass shootings is to have expedited executions, which oddly enough was something several members of the court were openly in favor of this term. It's a sad state of affairs to say the least, we're going the wrong direction. On the death penalty, we need to end the death penalty in the United States.

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