

DN84 Brett Tolman

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Joshua B. Hoe

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Hello and welcome to Episode 84 of the Decarceration Nation Podcast podcast about radically reimagining America's criminal justice system. I'm Joshua Hoe, among other things, I'm formerly incarcerated freelance writer, criminal justice reform advocate and the author of the book writing their own best story, addiction and living hope. We'll get to my interview with Brett toman in just a minute, but first the news.

I want to take a second to thank former w NBA star Maya Moore for using her platform and even sacrificing her own game. To help her in the freedom of Jonathan irons. I also want to send a hearty welcome home to Mr. irons.

We are still seeing COVID infections and death pile up all across the country in prisons jails. As predicted, this is becoming jails are becoming and prisons are becoming one of the major vectors through which COVID is transmitted back into our communities. We are lucky that things have cooled Bought a great deal in my State of Michigan. But not that I would love to be a prisoner stuck in the system right now in any state, but particularly during the summer without fans and with reduced privileges. Across the nation, we're still seeing disastrous effects from this virus. And from the official response more from the lack of response to that threat. I hope we do better soon. I hope the governor start getting involved and start doing something to commute people, particularly people who are aged and infirm, and at risk of death from COVID.

I also want to mention to my friends at NNJ. You might remember I did a couple of episodes from an annual conference that was here in Michigan this year. They're having a webinar on operation relentless pursuit. On Thursday, July 9 at 1pm Eastern Standard Time, the speakers will be Hammad Khan and Alex Vitale. whoever won probably knows from the book, the end of policing, Alex will also be showing up on this podcast very soon. I will include the fire up flyer in the show notes on the website, and hopefully ever all of you can turn tune in to that webinar.

As for me, I took a vacation this week for the first time in a very long time. It was great. But I do realize how many people have been forced into unwanted an unpaid vacation by this virus. I'm grateful for the time I just got to take. But I really am hoping that this thing will turn around very soon for everyone else.

Okay. Several months ago, I was invited as a guest to C pack which is the largest gathering of conservatives in the United States, as you might remember c pack cap and right at the start of the COVID outbreak. As all of you know I very much believe that criminal justice reform is a bipartisan concern. And I was very flattered to be one of the few progressives invited to the conference. Anyway, let's get to my interview with former federal former federal prosecuting

attorney A former defense attorney frequent Fox News commentator and founder of the toman group, Brett tallman, who despite our many political disagreements is actually a good friend of mine. Brett toman was the United States Attorney for the district of Utah from July 2006 to December 2009, before becoming a US Attorney Tolan worked as counsel in the Senate Judiciary Committee for committee chairs, orrin hatch and arlen specter. Mr. toman, now runs his own firm called the tollman group, and was a chief counsel for the Judiciary Committee. Hello, Brett. And welcome to the decarceration nation podcast.

Bret Tolman

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Hey, Josh, thanks for having me

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Joshua B. Hoe

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A real pleasure, this is one of those rare opportunities where I'm actually talking to someone who I know and like, a lot and we had the privilege of working together a little bit on the first step back and really glad you're here. I always ask the same first question. How did you get from where you started in life to where you are now and I know that's a crazy common question, but I like to hear that People's journeys.

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Brett Tolman

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No. And it's been a crazy journey for me. I, you know, I first thought about the criminal justice system when I was about 12 years old, and I my sister was kidnapped and raped, she was in college. And I I can still vividly, you know, recall, my father and I are going up and driving around and trying to find the the individuals who committed the crime. And, you know, it took my sister away from us basically for about 15 years as she tried to deal with the emotional pain and difficulty and they were never brought to justice. And that I think that really impacted me and my father, I was the oldest son and he was a former, you know, peace officer from LA. And I think that pushed me the direction that I would eventually go, which was to become a prosecutor and think that that was going to be my career my whole life. I thought I would just, you know, put Bad guys. Oh, and then I got into it. And I, you know, I did a did a lot of good work that I'm proud of. But I also started to see that the criminal justice system had some really broken aspects to it. And I was really, it was tough to be part of that and know that there was a broken system in place. And so that's why I started the tone group. That's why I have been focusing on policy and advocacy for the last 10 years or so.

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Joshua B. Hoe

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And so, you know, you say that you saw some me, it's gonna be tough to make that leap from where you're using a lot of the tools of being a prosecutor, to starting to see some of the problems with the whole process. Can you talk about some of the times like you were, I've

heard you talk eloquently about some of the examples of things you saw in the past that that started to have an impact on you. Yeah, I've changed your feelings.

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Brett Tolman

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Yeah. I had a I had a case where I was prosecuting and the young man was about 23 years old and I'll never forget this case, Marco Antonio Rebus, and he's still in prison right now. And he literally had a really bad weekend. No one was injured. No, nobody killed. No, nobody suffered. He had very little criminal history. But he he had carjacked. He had committed a carjacking as he was kind of fleeing from being pulled over made some really bad decisions as young 20 year olds could do. It got worse and he jumped from one car to another car and he he had a gun with him and it's a violent crime under most statutes, so some punishment was appropriate. he pled guilty. But the guideline range the sentence he was going to serve was going to be, I think I think we had calculated almost 70 years in federal prison. He's 23 years old, and there's no parole. And so I thought that just that sentence was just so out of line with what this individual had done. And was there a way for me to affect that. And I had to get special permission had to go all the way to Washington, DC to try to get permission to offer him 35 years, and he got 35 years in federal prison in serving it now. So that was the first case that I started to think very, you know, long and hard about as a prosecutor that you know, we we may need to sit back and adjust some of these we may need to revisit these little did I know, what had gone in to creating the system that we have and some of the work that needs to be done.

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Joshua B. Hoe

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And there are you know, I think if we were just at a panel, we're at sea pack right now, and we're just listening to a panel you were on. And I think at one point when the panelists mentioned that, you know, there's just this incredible power that prosecutors have, and I've seen in articles that you've written before, talking about how, you know, before you kind of started to change, you know, you would use those powers. Absolutely it can you talk some of the power of the prosecutor,

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Brett Tolman

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Yeah, people have really no perspective of how powerful a prosecutor is. It's the one position that you're authorized to take away someone's constitutional rights their their liberty and and in what is the heart of what this country is supposedly, you know, all about. So that is an enormous amount of power. And, and yet, I haven't had more power than that I could. I could dictate what charges were brought, I could dictate what sentence was given. I could even punish them harder if they decided to go to trial. Or if they wanted to testify on their own behalf. And so when people talk about the power of the prosecutor right now, that pendulum has swung so far towards the prosecutor, that we really don't have a system where someone is presumed innocent. We don't have a system where you you. People always talk and in law school, Josh, people would talk about this, that, you know, we have a system where we'd rather 10 guilty guys

go free than one innocent one be locked up. That is not the system we have. Definitely not you walk into the courtroom. And most juries in this country have a 90 plus percent conviction rate. So you're not you're not a presumed innocent and you're not viewed as someone I mean, once the state says we charge this defendant With this crime, it's it. You're a criminal until you can prove that you're not.

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Joshua B. Hoe

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And I think one of the things that's interesting to me over the last several years is that there are certain things that really do in this area, unique to any other area seem to bring a lot of us together. And I think some of it is what you're talking about there is this notion of liberty, and the how important that is to just the kind of the basis of our system of government. And I wonder, you know, what, you know, me being, you know, kind of on the other side of the fence politically, you don't talk to me about kind of how conservatives look at criminal justice reform since we're here. I'm here investigating Kind of,

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Brett Tolman

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yeah, I mean, let's face it. conservatives and republicans, basically handed this issue over to the democrats and let them sort of control it for decades. And the only time that a Republican or a conservative way In was to make the punishment more severe or to increase the number of crimes. And that's changing. Now you look at my friend, Senator Mike Lee, and he tells people all the time that he's engaged in criminal justice reform and reforming government. Because he's a conservative, not in spite of it. And I think what he means is, it's about time for conservatives to step in and say we want also a system that works. We're the highest incarcerating nation in the country. Right now. There isn't a family in this country that isn't touched in some manner by the criminal justice system. It's just that pervasive now. So because of that, I think both sides have stepped up and are starting to address it, which is good, but you know, I, I've been saying for the last couple of years, nobody is addressing it as passionately as Trump and this White House and this administration. The question is Why Why would he be doing this? I think it's because he's not born out of the same political history that everybody is so accustomed to in DC. So he's free to make a decision based on what he thinks is right. And at least that's, that's been my perspective on it.

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Joshua B. Hoe

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So a lot of times when we start having these discussions, it sounds a little bit like, you know, the point is to bash prosecutors. And at one thing, I've always had this theory that prosecutors only see the worst in people, they see only terrible crime or not only trouble, but they see a lot of terrible crimes. And when someone comes back, they're not seeing someone who succeeded. They're seeing someone who's failed.

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Joshua B. Hoe

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And I wonder how we can start to have discussions with prosecutors. So that you know, we can start making change without you know, I mean, it sounds to me there's a group think because of the way that happened. Prosecutors offices

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Brett Tolman

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Yeah, as a brand new prosecutor wide eyed not long out of law school, and we were in a meeting and one of the other prosecutors asked the question of the you know, of the boss, hey, are we do we get involved in rehabilitation and helping to make sure some of these guys don't reoffend or you know, we're not prosecuting the same people. And you, you would have thought that he just slapped his mom. Because this, my boss said to him, and I'll never forget it. We are not social workers. We don't care about them after we put them in jail. I mean, that's literally what he said. And that was the mentality of the office I was in and the office I think of a lot of offices. I given that 95% or so come back. Oh, yeah. That's right. So we were short sighted, fairly short sighted. Not only that, but there's there's a there's a in the Department of Justice in Washington, DC. There's a plaque that says The threefold mission of a prosecutor is to punish, you know, those that commit crimes to deter others from committing crime and to rehabilitate the criminal. But they just sort of lopped off that last one. And they only focused on what to do that's popular, right? That's very popular. We created this culture, where it's it's not, it wasn't okay. But when we did that, we also sacrificed a lot of our humanity, we stopped seeing, like you said, we stop see the side that the rest of the world is seeing when they have their son or their, you know, their brother, their father or mother being prosecuted and going to jail. And they, this is not to suggest that we should punish people when they commit a crime, especially when you're a victim in that crime. But the difference I see Josh is that, for the first time I have seen, my eyes have sort of been opened up. And I've seen and I'd like to get prosecutors to do that. So if I had a perfect if I had a magic wand, I would not allow anybody to be a prosecutor until they've been a defense attorney already. I wouldn't allow anyone to become a prosecutor without having at least experience the other side of it. And I would not put someone who has just been a prosecutor on the bench. Because if you do that, you have now created a prosecutor who's the judge and with the prosecutors mentality, and a prosecutor who controls what happens in the courtroom. And that is not what this system was designed to be.

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Joshua B. Hoe

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I think we see another example of that and something else you've been working on, which is kind of commutations and clemency Yeah, in that, you know, one of the real problems with what's happened over the last you know, as long as there's presidents and governors is that usually whatever the Department of Justice or the state organs have that entirely control the process. And there, there's a huge conflict of interest there. And I think one of the things you've been involved in recently is kind of trying to come up with a different idea of that

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Brett Tolman

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video. I have long held and I know there are great advocates out there like Rachel Barco and Mark Khosla and others who have been advocating longer than I have on this, but I will tell you, I'm trying to lend my voice to the fact that we have a system right now where clemency so pardons and commutations of sentences are being decided by the prosecutors. I mean, that's, that's the, you know, the the fox in the henhouse analogy if I've ever seen one, and it's frustrating, but it's even more than that, because what it's doing is it is It's created a system in the prosecutor's office where there's almost a default rejection of a petition for clemency. And that is an important part of a governor or a president's power that is really been abandoned. So this, this is a refreshing approach that this White House is taking, the President asked that a few people be assembled. So you have Jared Kushner leading that and you have Matt Whittaker, former US attorney and friend of mine, myself, Alice Johnson, you know, others who have been incarcerated. So it's a it's a really thoughtful team that is trying to advise on candidates and trying to increase the likelihood that the President of the United States uses that power. Keep in mind, most presidents do it but they do it when they're about to leave office because they don't want to be caught off guard by having pardoned someone that they didn't want. And that just to me, is always set so odd that they would on their way out. They would push a bunch of people. But politically, they didn't want to do it before we can come up with a better system.

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Joshua B. Hoe

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Yeah. And having a little bit of independence probably helps with them. Yes. But yeah. We also worked together on the first step act. I guess what's your take on where implementation is right now? I know, for the most part, a lot of it's been implemented. We've got some parts that are still a little bumpy.

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Brett Tolman

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Yeah. I, I think I'll tell you candidly, I still think there are people in DOJ fighting against having to implement I think it's a massive bureaucracy, where the mentality has been only punished only deterrence. Right? And that this bill, changed that narrative and change that mentality or attempt is attempting to change that mentality. So I think they are resisting implementation in some areas. I think what they're doing on the crack powder cocaine, for example, This is one where retroactively, people were being sentenced, you know, disparately if they had crack cocaine, cocaine rather than powder cocaine. And so this was a very bipartisan effort to try to fix that disparity. But we're now seeing that DOJ is trying to undermine that by how they're attacking those that might qualify for a debt reduction incentive.

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Brett Tolman

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Yeah, they're going back and finding, not the amount that was charged. But the amount that correct erotically, is that the theoretical amount, it's, that to me, is more indicative of a

department that hasn't fully embraced what the President is trying to do in first step. And there are other areas not not as not as significant or as large, but I think there needs to be very, you know, intense oversight hearings of DOJ on first step specifically, I hope, Chairman Graham and I know that the house will Do it, but I hope that the Senate will as well.

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Joshua B.Hoe

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Yeah. And in the polling were in earlier, you know, I mean, I remember reading an article A while ago that you were in, I think the quote was, that used to give this speech, when you were still a prosecutor about give me an executive of any company, and I could prosecute you for a crime. And, and at the time, you were trying to help them like be more compliant. But over time, at least the article suggested that. Right. And now, you were talking about earlier today about all the 4000 crimes at the federal level, right. And we talked about the book crime a day and

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Brett Tolman

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yeah, you know, there are 350 plus thousand regulations with criminal penalties. So those are basically criminal statutes as well. And then you have 4000 you know, criminal statutes in the federal system and I still stand by this and I'm it's a little disheartening that we haven't made any progress because I've been giving that speech for many, many years. But there are so many crimes right now. This isn't a subject That you don't have executives of companies that commit crime they do. But I, I can tell you that as a prosecutor, I had so much ability to fashion a an indictment around gray area. And they may not even know that some of their conduct is criminal. And that's that's really the tragedy because criminal law is supposed to be aimed only at those who intend to commit a crime. But we've gotten away from that. And now there's many statutes on the books doesn't matter whether you intended to or not.

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Joshua B. Hoe

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So is there any other anything else you're really working on right now or that you've got going on?

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Brett Tolman

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Yeah, I think. So. expungement is really important. It gives people an opportunity to get out of the cycle, the recidivism cycle, and there's not at the federal system. So there's a bill right now, though, that I think is very important. It's the clean slate bill. And there's a couple of states, Ohio and Utah, who have passed sorry, Pennsylvania and Utah, have passed, clean relays were working on this. And I owe that campaign. It's really important because, you know, we keep finding ourselves. I know. Exactly. That bill, to me is very important, because it'll be the first first attempt in the federal system. And all it will do is seal some of the records on low level drug offenses. And, and it gives people an opportunity when they get out to get a job or to feel more confident to increase their salaries, to be contributing. And when they do that, you get rid of the

cycle of recidivism. And one of the really great things is you know, I mean, I sometimes call it economic stability for that reason you were just talking about some people, you know, yeah, once you get someone a good job and you get them, right, there's a lot less chance they're gonna have a they actually, you know,

Joshua B. Hoe

But, you know, I think that it's really important to remember that if someone is spent, you know, the research is pretty overwhelmingly shows that if someone spends a certain amount of time depending on the category of crime crime free, that they're actually less of a risk to ever recidivate than people who have never committed that's right for. And so if you can get people economic security after they've served their time, and after they've paid their debt, you know, there's a real benefit to that, you know, it's not just to them, but to their families. You know,

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Brett Tolman

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just think about how poorly we do this right now. We, we have in some areas 6070 even higher percent recidivism. By anybody's measure, that is failure, we are failing, and and yet nobody seems to be alarmed that we're doubling down, we're failing and we're doing the same thing. So we just keep doing the same thing and they're cutting these cycles and yet, you're right. 95% of all individuals that are incarcerated are getting Get out and they're getting out. So what are they? What shape are they getting out in? We can do a better job I remember and judge this is brought back this memory. I love that. This conversation has helped me remember this, but there was a judge in the District Court in Utah that had a photographic memory. He used to tell me you know, if he saw me, he would he would tell me, have you read all the supreme court? You know, reports, have you read the federal report or the F SAP and all that? And he was he wasn't joking, because he read them that was like his entertainment. But there were times where my judge I was clicking for would say, hey, run and talk to judge voice and ask him where this is in this decision. And he by memory would give me the page number of the of the words that were used by the Supreme Court justice or whatever, and he would quote it is rarely wrong. He might be a page or two off sometimes or that. But he came in one day and he said, Hey, You're going to be a federal prosecutor because I was going to go over and be a federal prosecutor and he said, If I were you, I would start reading the Icelandic penal code and the Norwegian penal code. And he had seven different countries. He wanted me to start to read, because he says, they are doing things better than we're doing them. I used to think this guy was the hottest guy, right? Well, now I look at this, and I think he was right. He was well educated. He was also not political. He just cared about what was a better system, and he thought I might be able to make a difference. I wish he was alive today, because I would love to be able to show them that I've read some of those and I'm trying to help.

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Joshua B. Hoe

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That's a great story. So I this is the decarceration nation podcast. So I like to always ask people, you know, what is something you think we could do that we haven't done yet? That would have a really positive and beneficial effect and decarceration?

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Brett Tolman

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Well, I do think that on the federal level and on the state Levels I would really like to see the the knee jerk reaction to create more crimes to solve every problem. I'd like us to stop doing that. I'd like to see decriminalization of in the federal system at a minimum. I know there are senators that have worried over the years about passing every year more and more crimes. I would also like to clarify that our criminal system still requires criminal intent.

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Joshua B. Hoe

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I'm definitely with you on that we make a strict liability it

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Brett Tolman

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to and I there's too many of them. So let's let's let's get to criminal tab because those and then I would like to see, I would like to see a shift to our prison systems being reserved for the violent predators for those that harm victims versus the ones that are acting out because they have you No, they have an addiction. There's a different way to approach those. There's a different way that we as a system, and it can still all be the criminal justice system. But right now, we're just warehousing people, and it's creating more criminals when they come out. And so it's always

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Joshua B. Hoe

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right. Sadly for several years of my life in 160 person pole barn I understand warehousing. Wow. Yeah. So I was asked the same last question, what is something I should have asked but didn't What did I mess up?

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Speaker 2

27:41

You know, one of the questions I get a lot is, you know, is there a way to get to prosecutors to actually, you know, think a little more about what they're doing and care a little more. They too often are like, surgeons when they get called in to operate but they know nothing about really the patient at all. That if we could change that, and I also want to see more accountability. I think absolute immunity has gone too far. And I think that qualified immunity. And what I mean by that is prosecutors and investigators can do unethical and even criminal things right now, and not suffer any consequences until we start to see that change. What incentive? Do they have to maybe be a little more thoughtful or to analyze the law a little better, or the facts a little better and to make a better decision? To me? Yeah, I was invincible.

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Joshua B. Hoe

28:36

Makes a lot of sense. And I can't tell you how much of a pleasure it is to talk to you.

Brett Tolman

Yeah, really good to be able to sit down and talk and thanks so much for doing Thank you. It's been an honor.

Joshua B. Hoe

Yep. Thank you.

And now my take. We get caught up in the difference between reform and transformation way too often. Doesn't matter if you pass a reform or a fundamental transformation of our criminal justice system. As long as we're in a democracy with legislative bodies at the local, state and national levels, it only takes one really bad event one brutal act of recidivist crime, one sensationalist crime, one week of bad press coverage, to send legislators into a mad dash to go right back to tough on crime solutions, new jails or prisons and the punishment mindset. If you shut down a jail, they can always build another one. If you get rid of a private prison, we've we've seen how quickly that can be reversed. When militarized tent cities went up the minute we had an administration committed to brutalizing immigrant communities. They get more liberal on parole and probation. One bad incident and all the changes can quickly go the way of the dodo. What we are really fighting here is a battle for hearts and minds. We have to get people All across the political spectrum to understand that crime cannot be evaluated in a vacuum, and that we have to look to optimize overall outcomes, not just continue to double down on failed solutions to new problems, because those solutions are all we know. We need to be helping people understand why the punishment system and incapacitation do not solve recidivism, do not solve crime, and often make things worse for everybody. We have to convince them that they need new solutions to old problems. What will make change durable, is if enough people grow beyond looking at every criminal justice problem as a call for more punishment, incapacitation and discrimination. Well, we'll make change durable is politicians feeling like they will not lose their jobs. If they respond to a crisis, using a different toolkit. We have to educate and transform enough People, so they will stand up for elected officials who have the courage to respond to crises in new ways, otherwise it will not make any difference, no difference at all if we get transformative change or reforms. Either way, they will all be rolled back in one bad media cycle. Education and changing hearts and minds is the only thing that will make change durable education and changing hearts and minds is the only thing that will lead to a radical transformation our criminal justice system. As always, you can find the show notes or leave us a comment at [decarceration Nation calm](https://decarcerationnation.com). If you want to support the podcast directly you can do so from [patreon.com slash decarceration Nation](https://patreon.com/decarcerationNation) all proceeds go to supporting our volunteers. For those of you who prefer a one time donation you can now go to our website and give a one time donation. All the money we raised From this, as I mentioned before goes to our volunteers. You can also support us by leaving a five star review for iTunes or like us on Stitcher or Spotify. Special thanks to Andrew Stein who does the editing and post production for me and to Kate

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