

Joshua B. Hoe

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Hello and welcome to Episode 86 of the Decarceration Nation Podcast podcasts are radically re-imagining America's criminal justice system. I'm Josh Hoe, among other things, I'm formerly incarcerated freelance writer, criminal justice reform advocate and author of the book *Writing Your Own Best Story: Addiction and Living Hope*. We'll get to my interview with Tracey Meares and Arthur Rizer in just a moment. But first the news.

Last week, a bipartisan group of lawmakers announced the beginning of the push to enact the recommendations of the Joint Task Force on jail and pretrial incarceration. This could be a game-changer in terms of pre-trial incarceration in Michigan are one of the top five causes of incarceration is driver's license suspensions, unrelated to public safety. In other words, a lot of people in Michigan get arrested because their driver's licenses got suspended because of an accumulation of fines and fees. And since they still had to go to work, and because there's very little reward Public transportation in many areas of the state, they drove to work, God stopped and got arrested. We can only hope that the recommendations the task force will quickly make their way through our legislature and become law.

Safe and just Michigan my place of employment is hosting another webinar, the business case for criminal justice reform on the 29th at noon. This should be a good one as we have some impacted business people and some national experts on the economy to talk about the importance of including formerly incarcerated people to economic success. I will include the links in the show notes, but I hope you will join us.

Finally, Kate Summers, who has long been doing our Instagram and Facebook is about to embark on a new journey in her life will be sad to lose her but she's been an incredible contributor to the promotion of the podcast over the last year. We'll miss her a great deal and I hope everyone will take a second to send her a thank you message and wish her well. We're planning to do a few more interviews on Patreon before she goes, but thanks for everything, Kate.

Okay, let's get to my interview with Tracey Meares and Arthur Rizer.

Tracey Meares is the Walden Hale Hamilton professor of law and founding director of the Justice Collaboratory at Yale Law School. She is a nationally recognized expert on policing in urban communities who has worked extensively with the federal government, including being a member of President Barack Obama's Task Force on 21st Century Policing in 2019 years was elected a member of the American Academy of Arts and Sciences. Before joining the faculty at Yale Law School, she was a professor at the University of Chicago Law School.

Arthur Rizer is the director of criminal justice and civil liberties and a resident senior fellow at the R Street Institute. He heads the institute's programs dealing with a variety of issues related to crime, placing intelligence and privacy is also a former police officer prosecutor and somehow also spent 21 years to The military during his military career, he was awarded the Bronze Star purpleheart meritorious service and Iraq campaign medals.

Welcome to the decarceration nation podcast Tracy and Arthur.

Tracey: Thanks for having me.

Arthur: Thank you appreciate every day you get to do a podcast with one of your intellectual idols. I'm pretty excited.

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Joshua B. Hoe

3:19

Oh, man, I assume you're talking about the other person I'm interviewing

Arthur Rizer:

Tracy knows I'm a big fanboy of her work. So no surprise to her. So we're really thrilled to be here.

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Joshua B. Hoe

3:34

Yeah. So we're here today to talk about your square one project paper called the radical notion of the presumption of innocence. But I always ask the same first question. How did you both get from where you started doing work, to where you're working on criminal justice issues now?31

Tracey Meares: Arthur, do want to go first?

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Arthur Rizer

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Sure. So I you know, I always wanted to work in the criminal justice field. Really, since I kind of gave up the idea that I was going to be an airline pilot when I got sick flying when I was a little kid, I that had bananas changed dramatically. Obviously, throughout my career I, the reason that I served time as a police officer, is because I thought it would give me a better perspective. When I ultimately became a prosecutor, which is what I always really wanted to do. I wanted to, you know, protect and serve. And I wanted to do that in a courtroom and ensure that we had a more justice system. But that, you know, fundamentally changed the longer that I worked in the criminal justice field, I'm obviously proud of my service. I'm, I think I did a good job. But you start to it starts to weigh on you when you are putting individuals in prison, sometimes for life, sentences, depending on on the crime. And so when I started to actually do research and writes on these topics as a professor and then at a think tank. And then you know, I'm also working on my PhD. at Oxford. I'm doing field research, I learned that if you want to change the world, you

want to make the world a more just place. Sure, you can do it with a badge. I'm sure you can do it with a with a law degree as a defense attorney or a prosecutor. But ultimately, I wanted to change policy. And I wanted to actually create a more, you know, fair place for my kids to grow up.

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Tracey Meares

5:29

I would say that my path is a little bit more circuitous than Arthur's. I was an engineer, undergrad structural design engineering. I went to law school, a bit of a bit of a lark, because I didn't want to take a biology class my senior year in college, which was required in order to go to medical school. My view was as an engineering major I'd already had five semesters of calculus and physics and chemistry. I didn't feel like I needed to do any more. So I went to law school. And I really thought I was going to be an intellectual property lawyer. I really had no serious interest in the criminal legal system. But one of my professors when I was in law school asked me if I had ever seriously thought about being an academic, and the answer to that question was no. And then, as I started to think about the kinds of questions I was interested in, I kept coming back to the community surrounding the University of Chicago, the Southside of Chicago, was very poor. And under invested in my mentor at the time, William Julius Wilson, had written a book called The truly disadvantaged and crime rates and violence rates were super high. At the time, this was in the mid 90s. Until I just started to think about what would it mean to be a little academic who integrated questions and theories of sociology and psychology into the process of thinking about community revitalization. And that he to thinking about drug law enforcement, prosecution, how policing worked, how people come to conclusions about the fairness of legal authority. So I kind of came into these questions from a fundamentally academic perspective, but definitely influenced by the life I was living at the time in Chicago, but also, you know, the history of my own family's involvement and deep care for the communities in which they live.

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Joshua B. Hoe

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You know, both of you are experts in policing and while we're going to be talking a lot about pretrial incarceration, I think it would be crazy at the current moment not to ask you both kind of what your feelings have been over, you know, the little over a little over more than a month since George Floyd's killing, you all have kind of general thoughts or specific thoughts about what's been going on in the movement to both address these problems and policing?

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Tracey Meares

8:24

Well, it's pretty personal for me. And as you noted, at the outset, I had the honor of serving on President Obama's Task Force on 21st Century Policing in 2015, which he convened after the killings of Michael Brown in Ferguson, Missouri and Eric Garner in New York City. You know, that taskforce of 11 people put together 59 recommendations, many of which at the time, were considered to be somewhat leading edge and now, five years later, you know, Some of those recommendations are criticized as being quote unquote reformers reforms and not going far

enough, weren't haven't really been pushed by the current minister administration. There hasn't been serious investment. And a lot of those recommendations. And I will say because of that a few years ago, in 2017, I wrote a piece in the Boston review, in which I argued that policing as we know, it must be abolished before it can be transformed. And what I meant was that we just needed to fundamentally rethink the project of public safety and how the state delivers it. That means changing the shape of policing, which is what I think you're hearing right now, from calls in the street, but also, you know, the ways in which the state support supports the its most vulnerable communities. You know, many of the people that we call us Until workers are living in neighborhoods that are the hardest hit by this pandemic. And it is in part because we do not approach public safety and the way that we should. So those are some of the things I've been thinking about lately.

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Joshua B. Hoe

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And just to follow up real quickly, before, just just when you say we don't approach public safety the way that we should, could you can you be a little bit more specifically about what you meant?

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Tracey Meares

10:27

I can. So I think it is important to think about public safety as a set of public goods to which everyone is entitled and the way that you would provide people with those public goods can't just be the face of the state that is an armed first responder, right. So in that world of decent housing and good education and public health, and clean water are all parts of public safety because people when they think about being safe obviously want to be saved from one another, you know, you think about interpersonal violence, but they also want to be secure from government overreach. And I think one of the major problems we see today is that for so many of these communities, their needs are met by the arm of the state that is, that is forceful, right? Without thinking about all of these other important public goods that I think are critical to public safety. You know, like, there's a document on the Justice Collaboratory website that talks about this reimagining public safety, you need to think about preventing harm, and all of its manifestations, and you also have to lead with the truth. That's the other reason why people are in the streets right now. These state agencies need to acknowledge the role they played historically, and today, and discrimination and Rod Doing it starts there with acknowledgement of harm.

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Arthur Rizer

12:04

Yes. So I very sadly, kind of my first reaction was almost I told you so I've been writing for a long time about the dangerous culture within policing. And you know, I do believe that the vast majority of cops are good people try and do good work. But, you know, an example that I use a lot is, you know, if we were trying to describe the model soldier, nobody would refer to the 1960s and 1970s. Vietnam soldier, not because they weren't any less brave, or serve their country, but

because there was a cultural problem in the military that everybody recognized. And we fundamentally changed the way that a military operates from the ground up the way that the military is looks in the 60s to way that it looks. Now it's fundamentally different, but for some reason, we're so unwilling to do that when it comes to police works. So I think that, you know, people are very often say, Well, yeah, but it's only a few bad apples and my responses. Yeah, but finish the adage, a few bad apples ruins the barrel. And if you are putting in good cops who witness cops being evil and bad, and abusing their power, guess what, you just corrupted those cops and the entire system is almost established to perpetuate that environment. And, you know, all the solutions that we've that we've come up with to try to change police culture. We know from other models don't really work. You're not going to police cheap your way out of this mess. You're not going to, you know, hire a bunch of cops with bachelor's degrees and expect poof, we now have a better culture. We have to fundamentally change the core of policing in this country from someone who you know, goes out there and is an enforcer and and moving into a world where we look for cops that are helpers. And, you know, when people talk about defunding the police, you know, I sometimes get frustrated because I'm like, Okay, well, then what? What do you want to do, but there are models that work, he can focus more on exactly what what Tracy was talking about of putting tools into people's hands that are equipped to do that type of work, social work, individuals that are specialized in how to handle juveniles, because cops truly have one ultimate tool and that tool is a hammer. And that is okay in some circumstances, but it should be a very limited circumstance. And we have kind of developed this world and to seem okay with it and listen, I'm on the right, okay, I'm a sinner writer, I'm a proud libertarian, and it drives me absolutely bananas that the bedrock of my ideology is supposed to be a limited government, but for some reason We just forget all of that when it comes to the one place that is the most intrusive environment, which is handcuffs. And for some reason, we just forget about how that looks. And I'm also a father of two brown boys, my kids are multi cultured. And the fact that they see the world so fundamentally different than I do scares me, and it makes me sad. And I see this thing happening with George Floyd and I'm chinese for eight minutes and 46 seconds, and the only thing I think about is, that could be my kid. And why the Sorry, I was gonna say the F word. Why, why? Why? Why would my interaction be so different? I know for a fact, I'm not I'm not here trying to legalize, you know, counterfeiting. But Why would my interactions so look look so differently as a white guy? Because I know it would. I know that it'd be presumed that it was an accident for me, and why do we have to resort to them? Violent arrest. And by the way, which leads beautifully into the topic that we're talking about it. Why? Why are people so crazy about not going to jail? Because jail is hell. And once we recognize that you are fundamentally destroying someone's life with those handcuffs, then everything becomes clear on what comes next.

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Joshua B. Hoe

16:25

That's a great answer and it could lead in. Just as a side note, you wouldn't be the first person to curse on the podcast. The first person was actually Rachel Rowan's Believe it or not, Vinnie. No, no, he actually went through fine. So Arthur, I also know that you recently wrote a piece

about conservatives and race. Can you talk about that for a few seconds before we jump right into the paper?

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Arthur Rizer

16:51

Yeah, I'm just tired of conservatives. Acting like is not our issue. We should be leading the way on this issue. We should be We're we're supposed to be the ones for procedural due process. Why did we lose it over this? And why are we so what happened to the conservative movement where we just pretend that science and it doesn't matter anymore? I mean, my God when I was a kid conservatives with a grown ups in the room, and now we just if we don't like something, we just pretend that it doesn't exist, Oh, we don't like global warming, because it affects certain business models, oh, there's no such thing. And we just move that, that that same theory on to other issues that we don't like, if it makes us uncomfortable, we just deny its existence. So I believe that on the right, you know, that we should be actively thinking about how we can, you know, do something about the racial inequalities in this country? I do not think there are, you know, dark rooms, with people twiddling their fingers together, saying hell, how can we keep the black man down? I mean, I'm sure it probably does happen, but it doesn't mean that it's any less of an issue. Packed on these communities. And you know, going back to the topic of policing for God's sakes, the last thing that the African American community wants is more interactions with police. So stop offering that as your solution, because it's not a solution. We have seen that just make things worse. exasperate every problem we have in the criminal justice system.

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Joshua B. Hoe

18:21

And so both of you somehow got involved with the square one project and decided to talk about pretrial incarceration. How did you all come to the square one project?

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Tracey Meares

18:30

I got an email from Bruce Western and we talked about this idea of reimagining justice from square one and the people who would be around the table and it sounded pretty interesting. So I signed up,

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Arthur Rizer

18:46

saying I Bruce, Bruce contacted me and I knew him and I was, it was like a movie star calling me is I absolutely. I read I devour everything he writes and that I saw Travis was on, you know, the guy that, you know, basically invented the idea of reentry from a government government's perspective. And then, you know, I just I could not, I was so honored to be part of it. So I was invited and I jumped to the opportunity.

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Joshua B. Hoe

19:16

So the paper starts with a disturbing quote about the Cook County Jail in Illinois, which is, strangely enough, become one of the epicenters of the COVID crisis. And the first paragraph of your paper suggests that any discussion of pretrial detention must acknowledge that we subject citizens presumed innocent of the crimes with which they are charged, so thought to something that resembles death. Could you all talk about starting and why you chose to start in such a, you know, almost apocalyptic place?

Arthur Rizer:

Well, it's Tracy's idea. So I'll let her answer.

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Tracey Meares

19:49

Well, I think that goes back to what Arthur was saying about the relationship between the ways in which many people enter the criminal legal system, you know, the forcible arrest point. There's a sense in which people downplay the fact that of forcible arrest. And it's temporary. It's not that intrusive. Even the supreme court can Terry versus Ohio seem to suggest that the stop and frisk was not particularly intrusive, it didn't last very long. You know, it's just a touching of persons out of body through their outer clothing and the like. But we know that those kinds of interactions that disproportionately black and brown people have with police actually are devastating and lead to trauma, and those are compared to being in jail, relatively minor intrusion. So we wanted to make sure that we set the stage for argument for people to understand that jail in its context is punishment and it's unavoidable to that that reality is unavoidable. And that juxtaposition of that reality, to the fact that so many people are there without ever having had their offense adjudicated is the starting point for us.

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Joshua B. Hoe

21:21

We all grew up being taught that people were innocent until proven guilty, but I think anyone who's been through the system and I certainly have will tell you a very different story. How did we get from where innocence was kind of a bedrock principle, as you all call it to where there is a presumption of detention as you suggest on the paper through there are there

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Arthur Rizer

21:44

Yeah, through fear mongering and through a very silent slow creep. I mean, it's mission creep at its finest. And, you know, if you go back to our fundamentals are back to our founding. You know, is in vogue right now to poopoo. Anything from the founding fathers, I don't fall into that camp, you know, we quote atoms in our paper. And I think it's really relevant. So I'm going to do it here, if you don't mind. And you know, people almost always quote atoms in a way where they say, it is important, it is more important for the innocent to be protected, and then guilt to be punished. And that's where they stop. And that's the famous line that goes back to, you know, to England and such, but Adams goes on. And he says, For guilt and crimes are so frequent in this

world, that it cannot be punished. But if innocence itself is brought to borrow and condemned, perhaps to die, then the citizen will say whether I do good or whether I do evil, it is immaterial, for innocence itself has no protection. And if such an idea, as were to take hold in the mind of the citizen, that would be the end of security whatsoever. And what Adams is saying is, if you not protect innocence, at its utmost, at the very essence of what the In essence means, then you actually start to crumble your own society, the ground starts to shake and the ground starts to break. And that is where we are at now. But I want to go back, you ask me where this came from. That is where that's the starting point. It's really important. We understand the starting point. And we're very slowly through fear. And by the way, I am a big believer that every terrible policy idea in this country comes from fear. Um, if you look at, you know, how we got there, it was slowly, but it was also you know, not hidden. I mean, American child learns about the presumption of innocence as a as a bedrock principle, but we also learn about lynching and how you just, you know, absolutely freaking forgot, and for years didn't even try to punish people who stripped innocence away from individuals. We you know, we enslaved people up to the Civil War and then did it through, you know, other legal means after the Civil War. We did it during the Japanese internment. So this is not something that happened in in closets. And what Tracy was saying I think is it's spot on is that, you know, the Supreme Court has acted like this wasn't a big deal. You know why? Because they didn't go through it. And when you are the ones that get handcuffs put on you, then you have a fundamentally different idea. When you see handcuffs or get on you, I just did a sit down with an individual who helped create the Crips, you know, the game that used to basically run LA and one of the things that they asked him was, what is your first interaction that you remember with the police, and he said, is when they were kidnapping, my uncle, and I have no idea what his uncle did. I have no idea if it was a good arrest, bad arrest, but from a 10 year olds perspective, that is what he witnessed and that is what he felt. And that is how we got to where we are

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Tracey Meares

24:59

now just out of court. Couple of things, which is to say, how would you say how did we get here? As if no, we used to be fully committed to this principle? We're not. We if when you're listening to what Arthur is saying, I hope the listeners are paying attention to the fact that for broad swathes of people who have never really committed to this principle, ever, so there's that problem. And then there's also there is also the reality that over time, the country has become kind of obsessed with the idea of crime prevention, in a way that was not always true. And so we didn't have, you know, during, you know, the period of time when black people were lynched and certain immigrant populations were detained without any Kind of due process. I didn't have a kind of theory of the of the system that allowed explicitly, legally allowed the system to detain people considered dangerous and in which the system gave its imprimatur to do that. And and, you know, we have a particular argument against that phenomenon. Those two things go together, right? It what there's the large groups of people, we were never committed to this principle. But now, we have a system that actually legitimizes the possibility of holding people prior to trial, who have not been adjudicated on some very Flim Flam, finding that they might be dangerous. We are arguing a bit against both of those things. And in our piece,

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Joshua B. Hoe

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yeah, I think that was a really good point. When I said we all grew up that obviously I should have been thinking about who the we were. That is very true. It's not necessary. Nearly all the way true all the way through history, obviously not. Your paper suggests that we should presume everyone has a right to liberty. I was listening to Ken Burns the other day in an old clip talk interviewing James Baldwin. And since it's relevant to your paper, I'm going to ask the same question he asked James Baldwin, what does Liberty mean to each of you?

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Arthur Rizer

27:24

Mm hmm. That's a great question. I yeah, I would start by saying that, you know, to me, Liberty is, you know, the right to opportunity to the American dream. I mean, I'm sorry, I'm cheesy. I still believe in the American dream. I still think that, you know, this is a tree that stands for something we are, in many ways, still the city on the top of the hill. And I think that we should reflect that in everything that we do, especially to our own citizens, you know, and what Gandhi said is that a civilization will be judged by B treats its weakest, least fortunate citizen. And to me, Liberty is ensuring that everyone has its fair shake as possible. I just find it incredible that we've just inherited a generation of Americans, mostly black and brown from the American dream, and then act surprised they don't want to participate. So liberty to me is, is a place where is is obviously freedom from the state you know, free to do as you will and I can start talking about my libertarian stuff credentials at this point. But in reality, it's the the opportunity to to, you know, to live your best life and raise your children and ensure that they had a better cut than you did or at least have the opportunities for one.

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Tracey Meares

28:51

I don't have a lot to add except to say, at its base. For me liberty is freedom from fear and fear. for too many people, especially right now I'm going back to the beginning of our conversation. Any people of color are afraid of all kinds of things that they ought not be afraid of, yet not be afraid. An officer or an agent of the state who is sworn to protect and serve them, but hurt them up, be afraid, that have no sitting in front of a neighbor's house for a few minutes because they're getting their things together or waiting for a child to come outside and not be afraid that other person will see them and call the police and not be afraid that if they take their child to school that the teacher will treat their child poorly because of the color of their skin and not be afraid of the possibility of having to work ice is hard to get half as much, as my grandmother said. So, you know, I think Arthur put it very well when he was talking about opportunity. And I guess, reason why I'm not a libertarian, as I understand it is, I believe that the state has an obligation to create the conditions or that opportunity, especially in a context in a world in the history that we've just talked about. Right. I just read an article today in the New York Times Magazine, in which Nicole Hannah Jones reminded us that the only people who got financial remuneration from the federal government after the Civil War, or former slave holders in

Washington, DC, to compensate them from lost property, or million slaves, people did not get like, what are we talking about here? So what does it mean to talk about opportunity, when we had a government sponsored approbation of entire communities for generations. Liberty to me means repairing that.

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Arthur Rizer

31:08

Yeah. Can I add one little thing to that? Absolutely. It's also helpful sometimes when we're defining things by what it's not. And what it's not, is the fact that there are 5000 just federal All right. 5000 criminal laws. These are opportunities for the government to put you in jail. And then when you look at regulations that can be criminally enforced. Here's the number is so outrageous that I hope your listeners hear this and google it because it's true. That number of regulations that can put you in jail ranges from 10,000 to 300,000. Because there's so many that we actually can't count them. That is outrageous. We are just we just invent ways to mess with people in this country. And you know, who gets the brunt of it. Poor people can use the color and you know, it's not something of the past. I get I get really frustrated when people talk about all of this stuff in criminal justice. I get something in history. No, it's not. Just a few months ago, Congress, the House passed a bill to ban flavors from cigarettes. It was I think smoking scrolls. I think that it's very harmful. I understand it from a health perspective. But menthol cigarettes in particular is what they're trying to get rid of, you know, who smokes that 80% of all black smoke menthols. And so what's going to happen when that is enforced at a local level? What do you think cops are going to do with that information? They're going to use it to get into your pockets because that's what they've always done and if people don't believe me, I'll prove it to Eric Gardner was selling Luci cigarettes when that loose e cigarette law first passed in New York. It was designed solely as a health protective measure. And then cops took it and used it as a way to get in your pockets when cops came to see Eric Garner and excuse me when cops showed up on scene, they were there because there was some fight breaking out. Eric Garner was the best witness But those police officers could have talked to, but instead, they wanted to get in his pockets. And that is what happened. And that's what happened in Ferguson. And it's going to happen to keep happening unless we stand up and say, we are done with this app messing with us.

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Joshua B. Hoe

33:14

In the first section of the paper, you suggest that the only justifications for pretrial detention are a risk of flight or a failure of a risk of failing to appear. I think most people would be surprised to hear that you didn't include public safety, although we've talked about some of the reasons above given the furor that emerged, for instance, after bail reform in New York City, and in New York State, it seems radical for you to say that was that intentional?

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Tracey Meares

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Oh, we put radical and scare quotes. Our position is only logical, right? The idea is that going to jail is punishment. It's the worst but worse punishment is akin to death. And our system of laws prescribes that can only be punished if a have had if they've been charged with an offense, and that offense is duplicated, and they've been found guilty, only then can they be subject to punishment. We don't have anything to say in the paper about the amount of punishment or whether jail would be appropriate punishment. You know, Arthur has written very compellingly about the ways in which our, our institutions of incarceration are abominations in the light. You know, we're not getting into that, but it's very simple. You can only be punished until your offense has been adjudicated. And therefore, it's very critical that we place a premium on the system's ability to ensure that a defendant a charge defendant is actually adjudicated, has the offense adjudicated. We believe as we say later on in the paper, that there are all sorts of ways to ensure that A person shows up for their trial or their adjudicative process. Right? And we but we did imagine that there could be very rare circumstances in which there was a serious risk that the person would flee a jurisdiction and not show up, or importantly, present a serious risk of harm to someone important to the adjudicative process, such as a witness, or adjure, or the judge and the like. And in that context, we imagined the possibility that that person would be held and confined before, uh, before adjudication. Right. But that would be very rare, and that the prosecutor would have to make very specific findings or present very specific evidence to a judge who would make very specific findings about that, but in no way did we think it was appropriate, it is appropriate for prior to admit Education for someone to be held merely on, you know, a claim that they may present a danger to the public. Lots of people present dangers to the public. I'm going to say something pretty outrageous, maybe for the for you to hear we know that with as much information as many prosecutors have that boys between the ages of 16 and 18, you know, present a certain risk of danger to the public and we don't just automatically go and put boys between the ages of 16 and 18 in jail.

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Arthur Rizer

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Yeah. I would also add that our argument is constitutional. We flat out believe that narrows. Salerno is wrong. We do not. We do not think that if you look at the the body of the constitution that people should be held without being convicted. I just don't think it's legal of how we do it and except for the very limited circumstance that Tracy just laid out. And I also think that it makes us less safe. Every single bail reform that we've seen up until recently, actually, has always been premised on the idea that it's more humane. It's better. I mean, look at the federal bail act it, it was designed to actually try to get more people out of jail, but it also allowed prosecutors to hold people personally when I was a prosecutor, I was a federal prosecutor. All I had to say was, he's dangerous period. And I got an automatic five days no questions asked, no questions asked, just to say Finally, he's dangerous. And then I could get him presumed to trainable through a myriad of different avenues, which was, I mean, if your sentence can be 10 years or more, then you're presumed to be attainable. You know how easy it is to get 10 years in the federal side. It's pretty damn easy. And, you know, just I don't want to, you know, presumably Your questions but you know, I listen, I'm on the center, right? My job is to influence the center, right? And you can imagine the way that this paper hit with some of my friends and

people who read my stuff. It, you know, cause kind of a splash and the thing that I kept hearing is, what about Ted Bundy? What about Jeffrey Dahmer? Are you saying that they shouldn't be detained? And I absolutely think that is such an intellectually dishonest question. Of course Ted Bundy would have would have been detained, but not because we're cutting into our principles is because Ted Bundy was a flight risk.

Tracey Meares:

It was absolutely proven he was a flight risk, that guy kept escaping from jail.

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Joshua B. Hoe

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Yeah, we often we often refer to that as the Hannibal Lecter problem and in criminal justice reform, we're to this this notion that you should always judge reform by the the most extreme possible example is, I think pretty pretty problematic to say

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Tracey Meares

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Rather than pointing to Ted Bundy who even under RV under what we wrote, in the four corners of what we wrote he would have been held no problem. We prefer to point to the people in Brooklyn who spent, you know, two years in jail without ever having their services adjudicated and being subject to solitary confinement and all other sorts of horrors. Those are the people that we should be thinking about, because that's what happens that the fear of letting Ted Bundy out is leading hundreds of thousands of folks being incarcerated before their trial.

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Joshua B. Hoe

39:48

Well, I tell the story all the time of when I was first incarcerated being I answered one of the questions wrong and got moved to mental health. Basically, I said I was depressed because I'd been arrested, which I was Next thing I knew I was in the mental health wing and I was next to a guy who'd been in the mental health wing for over a year and had serious mental health problems. And you know, he's Trump was waiting for his trial and basically been in solitary for over a year. And that's it. I agree with you. That's who I think of, I think a pre trial detention I don't think of, you know, myself who bailed out or many of the other folks

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Arthur Rizer

40:26

Again, it doesn't make a safe, it doesn't make a safer, we actually have really deep data that shows that holding some trial creates a wave, it creates a lane for them to jump into where more crime is likely. Because why because they lose their job they they lose their family, yada yada. Why are we surprised that it it creates an environment where more crime as possible, it doesn't make us any safer and that is something that people like to gloss over when they talk about this, this topic.

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Joshua B. Hoe

41:00

Yeah, you know, I mean, in that case, I mean, it certainly does. I asked his therapist at the time, you know, how does this make someone with mental health problems any better?

So one of the points that you make in the paper is that the presumption of innocence prevents a mob rule, and I was wondering if you could explain that a little bit more.

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Arthur Rizer

41:24

Um, oh, yeah. So I, I think you know, what I'm talking about when I when I say that is specifically that, you know, our justice system, I just said it, you know, prosecutors need to work for their paycheck, prosecutors need if they truly believe that someone is a flight risk. Well, let's be pragmatic, right, let's jump out of our paper for a second and have a pragmatic argument about the realities of today's justice system, where, you know, it's gonna be very hard to pass legislation to create the world that we've created on paper, even in that case. It is we should be ensuring that prosecutors through articulable facts are a true fact finding, determine whether someone's going to be held in pretrial detention. And what has happened is that the mob, the people are again terrified of, you know, the the, the career super predator that we created these rules that basically just the presumption is you're probably dangerous. And we know that people are picked. I mean, listen, probable cause is the standard for arresting someone. Probable cause is not supposed to be the standard of prison. And just because you call jail, not prison doesn't mean it isn't prison. People who have been most people that have been to both will tell you that jail is a lot worse

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Joshua B. Hoe

42:56

Oh, that's definitely true. Jail was definitely worse. I agree with that. So you know, hey, I often like to ask about, or talk about, you know, the notion that the we hear all these people on talking heads all the time talking about the whole idea of the rule of law. And to me, I always looked at the rule of law, or what made our system unique was that it didn't just limit the powers of the the power of the people or put laws regulating what people could do it also put regulations on the state. And you talked about the disparity in power between the people the state, that's the area, I think, way too often, the talking heads, just assume the rule of law means don't break the law. And so I was wondering if you since y'all talk about kind of the disparity between the power in power between people in the state that this was somewhere that I thought maybe we could flesh out a little bit more,

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Tracey Meares

43:55

I'll go first and I know that Arthur has some very specific thoughts about That too because, you know, I think that plays to on his libertarian strings.

Joshua B. Hoe

But I'm a civil libertarian. So we related but

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Tracey Meares

44:15

Back to what I was saying before about, you know, logic as the rules like people shouldn't be punished until there is a process through which we the people have participated and we make a decision through a process designed by law, that someone has broken a rule and therefore should be punished and those processes are not just about ensuring that citizens as you mentioned, obey those rules, but it also ensures that the government doesn't overreach in making decisions or imposing consequences on people that they have to follow processes. And when a prosecutor can go before a judge as Arthur just said, Say something like he's dangerous, and then someone is suddenly punished by being detained and thrown into jail. That's not consistent with the rule of law. That's not requiring that prosecutor to actually present evidence and it's not requiring the judge to actually deliberate and it's not consistent with all parties. Suppose it commitment to processes that ensure that a person is deemed innocent until proven guilty. So an another part of the paper, you know, where we're talking about this, you know, this, that that that process presumes that the the person who's charged has a lawyer or a special friend to help them navigate through this process in a way that's fair, but of course, if that person is detained prior to trial, they have less opportunity to confer with their lawyer that gives the government more of an advantage and it means that the person is less likely to be able to put on a good case and will spend even more time at trial. And, you know, we also make it an argument about the fact that if if people take up our idea that prosecutors, but in particular, judges are gonna have to work harder, you know, that they need to take seriously that that they are depriving a citizen of his or her Liberty, and that's on them. And they have to a serious obligation to take that deprivation to heart before imposing

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Arthur Rizer

46:41

Yeah, I would just add that individuals that argue that the rule of law means strict observance to law and order are wrong, and they're wrong historically, and they're wrong through the way that it's supposed to be applied in American jurisprudence, the term you know, it is it's a Greek idea, and it comes from the concept of the government is subordinate to the law. And really, the ends of the system should serve upholding the larger goals of human and civil rights. And so when you use the term rule law to talk about law and order, you are incorrect, and you should do some reading in Roman and Greek history because that is not what it was supposed to be.

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Joshua B. Hoe

47:32

So as I mentioned earlier, we kind of went through probably right about the time I saw Arthur at sea pack this year, a huge debate over pretrial detention in the state of New York first and implementing reforms that precluded dangerousness and then rolling back some of those reforms in In your opinion, what to do York if anything, get right and what did they get wrong?

Arthur Rizer:

Tracy do want to start

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Tracey Meares

48:00

You know, if you know more of the specifics, my understanding of what New York did, right was to make the kind of argument that we were making, which is there's a presumption against tension or for dangerousness, that was my understanding. So you might have more details about what happened later than I do.

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Arthur Rizer

48:17

Or the only problem. The only problem that I have with what happened in New York is it had nothing to do with the actual policy, per se, or the law is the way that the law was enacted on a political may just quite frankly, made my job a lot harder because I would go to different states, and because it was kind of rammed through and people on the right did not feel like they had any type of voice. And quite frankly, maybe they shouldn't have had a voice. But it made other jurisdictions that I was working in harder to work in. And that is truly the only real issue that I have with it. And my big issue that I have with any of these types of conversations is the solutions that people come up with are just kind of ridiculous if the work is not working exactly the way that people hoped it would then tweak it. Okay. You don't need to tear down. First of all, the people who have been screaming that, you know, we're letting murderers on the streets, started screaming that before the law was even implemented, so calm down your Cheerios, and let's let's wait a second, even after the fact that you don't like the results and tweak the results. I get impatient with people who who talk about something not working before anybody knows if it's working. I mean, come on.

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Tracey Meares

49:55

Yeah, that was a huge problem. And then there's always that that comparison of you know, compared to what I do, You know, as academics, when we think about errors, people tend to focus on the one kind of error that they see. Right, which is the person, you know, who maybe got out and did something, whatever it is. But without thinking about the 10s of hundreds, thousands of people who were also mistakes, those are mistakes, right? Because those people too, would have been held at trial. And we know that those people didn't do anything. So Since when is it that we're going to focus on I have a hard time understanding how people value liberty, honestly, if they're willing to sacrifice so many lives, many lives for the you know, one or two people to which people pointed, but I could also point to people, how do I think about that problem? You know, people are going to come in fences around the world. Yes, we know that true. Yeah.

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Joshua B. Hoe

51:04

It seemed like during the debate, there was a lot of collusion. And we talked a little bit about fear earlier between the press and law enforcement. And I assume Arthur knows a bit about this. In the current environment, what are your thoughts about kind of the relationship between the press and the police as it relates to pretrial incarceration and the presumption of liberty?

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Arthur Rizer

51:27

Well, I do know that, you know, that they kind of feed each other. They need each other in many ways. So we saw this explosion in law enforcement through, you know, the Clinton years and in even before that, and much of what fed that was kind of fear mongering did crime go up in the United States? It did. But when we actually when the dust settled, we saw what was the drivers of crime. It wasn't Exactly what we thought it was. There was a lot It was a lot more nuanced, but the problem is and then in the media, nobody, nobody wants to do new nuance even pardon me, your podcast is an hour plus long. Most people aren't. You don't want to do 10 second clips. tell you one thing, every single time that I know something personally, that will be reported in the news. It's always wrong by a little bit, sometimes a lot, sometimes just a little bit, but it's always off. And that gives me great pause. Did you have anything to add? Tracy?

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Tracey Meares

52:40

I don't actually um, you know, I find it be perplexing. Well, this will probably get into an another conversation but know the ways in which expansion of the system. Those who work in the system are advocating for. I find that interesting. Because on the one hand, it makes logical sense, okay? You just want your, you know, your your squad your team to be as big as possible. But on the other hand there all sorts of ways in which it doesn't make sense, given the ways in which people often complain about the kind of job that they're doing. And so you would think that as they make those kinds of arguments and sort of reflect on it, those issues about just the kind of job that they're doing that that might actually align them a bit better with some of those on the quote unquote, reform side, but you don't see it as much as often as you know, you might expect as a logical matter.

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Joshua B. Hoe

53:43

So I guess we get to the crux of the matter if we were to start so as they say, from square one, how would we redesign our pretrial system? Wow. Go ahead.

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Tracey Meares

54:04

No, no, no. You're gonna say, well, there's square one. And there's now Right. I mean, it. You know, this is one of one of the reasons why I really enjoyed writing this piece with Arthur, was that unlike some of the things that we sit around our square one table talking about that are really difficult and require reimagining I personally, I'm not sure what Arthur thinks, because

we've never talked about this aspect of what I'm going to say. But I don't really think that what we proposed is that hard to do. I mean, it might be politically hard, but all of the apparatus for doing it is actually there. And in fact, you know, COVID gave us an opportunity to demonstrate all the ways in which we can do it now and are doing it now. So, you know, r square one in this case is very clear. You know, there's a presumption of innocence that we're going to protect with a presumption of liberty, and we're going to ask all of the institutional players To adapt what they do right now, and just take it seriously. I mean, it doesn't. I maybe I know I'm making it seem a little bit easier than it is. But in a lot of ways, it's really not that hard.

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Arthur Rizer

55:15

Yeah. And I think yeah, I think when you when you boil down, you know what we're actually saying. And I think that unless we were purpose, you know, we pick the title on purpose. But when you actually boil down what we're doing, we're not trying to burn anything to the ground. What we're trying to say is, we need to go back to what these words actually mean. And what these words mean, is, as an American citizen, or excuse me, as someone just in this country, scratch that, as someone who was in this country, there are certain things that we have declared our God given rights, and one of those is the presumption of innocence. So if we could just Take that literally and go from there, then I will all squabble with you over the finer details, but we have to agree first and foremost that that means pain. And unfortunately, it doesn't. So I have two answers as well, you know, I have that answer. And I think pragmatically the data actually tells us that we're right there. We're not creating a more safe environment. And so I asked, you know, you know, whenever I start talking about these these issues, I asked, Does it promote human dignity? Nope. Does it make us more safe? Nope. Does it? You know, are we being good stewards with our tax dollars? No. And ultimately, I always say like, Are we a great nation? I think we are playing one thing for sure we're not exemplifying that through the way we we handle pre trial in this country. In fact, quite the opposite.

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Tracey Meares

56:58

I would add just one more, which is Not one of Arthur's principles, but it's important to this conversation. Do we know how to do this? Yep. Yeah, we do. I mean, it's not in contrast to some of our conversations at the outset about, you know, the reimagining policing, where we understand and know how to do certain parts of it. But, you know, certain parts of it will be totally brand new, because we haven't ever really had a commitment here. We know how to do this. We know how to have a hearing.

2

Arthur Rizer

57:32

Prosecutors present evidence of extreme flight risk and so on. We know how to do that. It's not that hard. And we're so intellectually dishonest about some of the stuff like when Tracy and I were presenting this paper to some of our peers, something you know, one of the suggestions we make is you know, if, if mental health is a huge driver of individuals that that may or may not

be need to be contained in the sun. Then maybe we should, you know, start having a more robust conversation about that. And the response instead of being like, yeah, let's let's have a more response conversation. The response is, well, that's just too hard. We can't have more mental health. And I was like, why not? If you want to have a conversation about defunding the police, that's the conversation you should have is in mental health is this enormous driver to violent interactions with police, and let's take some of that money and put it towards mental health services. But, you know, the fact that that is like, people act like a, you know, we're asking them to build the pyramids in six minutes. I mean, no, that's just like, good policy.

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Tracey Meares

58:42

And then one more thing I know, we're piling on, on Joshua. But no, let's go back to the principle that we're talking about, you know, you really want to say to somebody who has been charged with a crime, you know, that we're going to allow Judge to make a decision to incarcerate you merely because prosecutor says Well, there's probable cause to believe that this person broke into that person's house. So they're dangerous so that we have enough evidence to deprive them of their liberty. Know, rather than making a real showing, do we honestly want to say to that person, it's just too hard for us to have a serious commitment? the presumption of liberty, right to the presumption of innocence. Really? That's too hard. Yeah. Okay.

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Joshua B. Hoe

59:33

Well, unfortunately, I think a lot of times, yes.

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Tracey Meares

59:40

I disagree. I mean, I agree with you. Right. But then they have to be able to say that right not to say it to Arthur and me behind closed doors, you know, then say to the person, I know we said that. There's a presumption of innocence, but really, it's just too hard for us to really mean it. So okay,

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Joshua B. Hoe

59:56

So this is the decarceration nation podcast. This year, I've been asking my guests for any ideas they have outside of what we were talking about on how we could best decarceration America. Do you all have any other ideas aside from stop, you know, detaining a bunch of people on dangerous? Not that that's a bad one? That's a good one.

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Tracey Meares

1:00:17

Oh, we have all kinds of ideas. Right. I mean, you know, I think Arthur's already mentioned a couple of them, which I think are important, which is, you know, people can't be incarcerated, unless there is legal authorization for them to be in the system in the first place. So, you know,

I've actually been talking a lot about this in terms of the the policing issue, but the legislature's can play a much more robust role in either not enacting these ordinances or laws in the first place, but can actually specify either AR offenses for which of a person is found They are subject to any kind of incarceration or forcible arrest and the like, you know, like nobody goes to jail for parking tickets. Most of these things be like parking tickets. Why are people involved in this system? In our paper, we talk about the huge number of people who are detained prior to adjudication who have fitted misdemeanors, right. Why are those people part of this, that part of this doesn't make sense. And that's a rule that legislature can play. So that's one idea,

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Arthur Rizer

1:01:36

I'm gonna use a word professionalism. We need a new breed of professional cops and professional prosecutors in this country. And what I mean by that is, and I know people are gonna listen to this and be like, Oh my god, you don't think cops and prosecutors are professional? And actually know, if you look at what the word professional means? Not really. They're more Like, you know, plumbers, they have skills and they apply those skills in a very set way. And that is not what we need an equal justice system. You know, the way that we measure success in policing, even though most of the quota systems have been officially brought down, it's still the cops that are promoted the cops for the most arrest. When I was a prosecutor, we counted how many trials we had. That was like the badge of honor. Even though we know that how many trials you do, it has nothing to do with how good of a prosecutor you are. In fact, that might be a sign of, of being a bad prosecutor. So we need a different breed. I never one time in my entire time as a police officer, ever thought about the ramifications past the moment that individual was booked ever. I never thought about what that person had going on at home. I there was a crime. I could prove it through probable cause. And I locked them up and I put them away. I never thought about it. I never thought of myself as being a professional. When I was a prosecutor, I never went to a prison one time ever, and I'm working at DOJ for nine years. And I think that, you know, treating these, these jobs, and ensuring that we have professional development is something that would go a long way. And we call things professional development that aren't I mean, please, the vast majority of police training is on ensuring your shot group is tight, not on actual developing the profession of policing. When it comes to prosecutors. You know, when I was I was a federal prosecutor, we would go to South Carolina a couple times a year we would take classes, but it was always skills very, very seldomly. Do we see classes on how to be a better prosecutor, how to actually, you know, pursue justice in a real and meaningful way. That is what I think we need in this country. And I actually think that we could do it because we have actually done it in other institutions. We can do it in this one.

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Joshua B. Hoe

1:03:58

I always Ask the same last question. I'm a little I have a little trepidation this time because I just on my own list, there were 40 questions that I didn't ask. But what did I mess up? What questions should I have asked but did not

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Tracey Meares

1:04:18

I didn't, I didn't. I mean, I was trying to think of one way of maybe bringing in, you know, the concern about dangerousness. But honestly, I think we really, I think we really hit that you asked questions that allowed us to get it that in different direction. So I feel good about it

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Joshua B. Hoe

1:04:44

Wow I'm always thrilled to hear that. Like I said, I had a bunch of questions that I didn't get to. So I just want to thank you both so much for such an interesting discussion and for being my guests on the podcast today.

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Tracey Meares

1:04:54

Thank you for having us. I really enjoyed talking to both of you about this.

Arthur Rizer

It's such an honor I'm so tickled pink. It's great.

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Joshua B. Hoe

1:05:04

Well, thanks again and I hope to talk to both you again sometime soon.

And now my take a little over one year ago, the Department of Justice Civil Rights Division have the following to say about Alabama's Department of Corrections. There is reasonable cause to believe that the Alabama Department of Corrections has violated USC and is continuing to violate the Eighth Amendment rights of prisoners housed in men's prisons by failing to protect them from prisoner on prisoner violence, prisoner on prisoner sexual abuse and by failing to provide safe conditions. The violations are severe systemic and exacerbated by serious deficiencies in staffing and supervision. overcrowding, ineffective housing and classification protocols in attic In incident reporting inability to control the flow of contraband into and within the prisons, including illegal drugs and weapons, ineffective prison management and training in Division, maintenance and cleaning of facilities, the use of segregation and solitary confinement to both punish and protect victims of violence and or sexual abuse and a high level of violence that is too common, cruel and unusual nature and pervasive. Our investigation revealed that an excessive amount of violence, sexual abuse, and prisoner deaths occur within Alabama's prisons on a regular basis. Two days ago, the Department of Justice Civil Rights Division put out a second report, which concluded a few things first, almost none of the problems in the first report have been addressed by Alabama or by its governor Kay Ivey. From the report. The severe levels of overcrowding and understaffing contribute to the systemic use of excessive force since we issued on April 20. 19 notice letter, the overcrowding with Alabama prisons has actually increased. In addition, and as we noted in our April 2019 notice letter ATOC is critically understaffed and even now adnoc remains critically understaffed. Many of Alabama's prisons

have a staffing rate below 50%. And several facilities staffing levels are well below that number at OC still needs to hire approximately 2000 correctional officers to adequately staff its men's prisons. Ad OC is aware of the severe staffing deficiency yet has not taken meaningful steps or other emergency measures to address the under staffing. Second, that correctional officers in the Alabama Department of Corrections routinely use excessive force against people incarcerated in their prisons again from the report. Uses of excessive force in Alabama prisons are common All too often correctional officers use force in the absence of physical threat. While making no effort to de escalate tense situations, such uses of force heightened tensions and already violent and overcrowded prisons. Failing to de escalate these situations properly endangers the safety of prisoners and staff. correctional officers also use for force as a form of retribution. And for the sole purpose of inflicting pain. Such uses of force violate the Eighth Amendment. This is not okay. It is not okay that k IV in the Alabama legislators done nothing to fix these deep and systemic problems. so obvious that even bill bars Department of Justice has called them out. It is not okay that officers routinely use excessive force and chemical agents against our brothers and sisters in prison. And it is not okay that this is not a bigger story. All of us need to speak out and bring attention to the plight of our brothers and sisters in Alabama. Human beings should be treated with dignity. They should be afforded their basic human and constitutional rights and they should not be constantly subject to cruel and unusual punishment.

They should not be constantly subject to cruel and unusual punishment.

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