

## 87 Somil Trivedi 2

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Joshua B. Hoe

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Hello and welcome to Episode 87 of the decarceration nation podcast, a podcast about radically reimagining America's criminal justice system. I'm Josh Hoe, among other things, I'm formerly incarcerated, a freelance writer, a criminal justice reform advocate and the author of the book *Writing Your Own Best Story: Addiction and Living Hope*. We'll get to my annual interview with Somil Trivedi of the ACLU about the recently concluded Supreme Court term in just a second. But first the news.

Last week, the Michigan Supreme Court held that the state of Michigan was not liable for holding someone for 17 months for failure to register when by law that person was not legally required to register. Our chief justice Bridget Mary McCormack had a blistering dissent in which she said:

"I would reverse the Court of Appeals judgment and reinstate the court of claims order denying the defendant's motion for summary disposition. The citizens of Michigan would be surprised indeed, to learn that Michigan law provides no recourse for blatantly lawless incarceration."

I find this case very disappointing. The state shouldn't be responsible for unlawfully incarcerating its residents. Otherwise, there is nothing aside from wishes and dreams, incentivizing a state to be careful about incarceration, which is the ultimate deprivation of liberty aside from death.

Safe & Just Michigan also held another webinar last week we talked about "The Business Case for Criminal Justice Reform with an all-star panel of economists and directly impacted experts. I will include a link to this webinar in the show notes.

Okay, let's get to my interview with Somil Trivedi. Somil Trivedi is a senior staff attorney in the criminal law reform project working closely with the ACLU's campaign for smart justice. He speaks and writes nationwide on criminal law and prosecutorial reform issues and has been published very widely in what is thankfully becoming an annual event, Somil is joining me to help summarize the recent Supreme Court term. Welcome back to the podcast Somil.

Somil Trivedi

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Thank you, Josh. It's great to be back.

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Joshua B. Hoe

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Usually, I start by asking for people's origin stories, but since you've already been on before, why don't you tell everyone something that they might not know about you? Or something fun that happened a year where people have not generally been having a lot of fun?

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Somil Trivedi

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Ah, that's a good one. Something fun that happened to me is that because we're all working remotely, I'm currently coming to you from a cabin in North Carolina, where I'm with my family and it has been a blissful reprieve from the chaos happening outside. And so I'm not looking forward to going back to real life in DC. It'll happen eventually. But for now, it's been pretty nice out here. Feel like I'm almost in Michigan.

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Joshua B. Hoe

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That's great to hear. I mean, the being outside and being away from DC part. So let's start with us a bunch of decisions that really weren't decisions. Let's start with *Raysor v. De Santos* in Florida. Just around a week ago, we found out that the court declined to intervene in this case and allow people who earned the right to vote through Amendment 4 to actually vote if they haven't paid the entirety of their criminal justice, fines, and fees. This goes back to the governor and the legislators kind of demand that a sentence is only fully served when fines and fees are paid, correct?

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Somil Trivedi

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Yeah, that's right. And obviously, the core of this case is about voting rights. And there are much smarter people than I who do this work, including at the ACLU. But underlying the case, obviously, is this insatiable need for Americans to punish one another. And that's what is at the heart of these voting rights cases that have to do with disenfranchisement. So I think you're hitting History of the case is exactly right, you know, or the voters overwhelmingly approved Amendment 4 giving formerly incarcerated people with felony convictions the right to vote back.

Republicans were mad about this and passed a law requiring them to pay certain fines, fees, and restitution. Even though the state of Florida has now admitted that it cannot figure out how much those amounts are for a lot of people, or even whether people have actually paid them off. And yet, for a sort of torturous ride up and down the district court in the 11th circuit in Florida. And despite both the district court and the 11th circuit at one point, proving the plaintiff's case and granting injunctive relief. For some reason, the most recent opinion out of the 11th circuit was to dissolve the district courts' stay thereby reinstating these requirements to pay the fees. Although it did so with no opinion whatsoever, and then the Supreme Court followed suit again giving no reasons whatsoever. So now, folks in Florida are really in this awful purgatory where their right to vote is unclear. Whether they have to pay is unclear, in fact, whether they will be prosecuted for attempting to vote having not paid is now unclear, pending at least a full appellate argument in mid-August. And so, you know, this is disappointing from the perspective

of the right to vote right and Sonia Sotomayor, his dissent rightfully focuses on the right to vote and the Supreme Court's increasingly antipathetic view to voting rights. But as I said at the top, this is about punishment for crime. So that's where, you know, I'm sure that's where you see it from as well.

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Joshua B. Hoe

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Yeah. And, you know, I mean, you raise an important point, which is that over the last several years, it seems like the court is pretty roundly decided against people trying to get the right to vote or to protect the right to vote. Do you have any kind of larger feelings about kind of that direction in the court's jurisprudence?

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Speaker 2

6:26

Yeah, if we're speaking more broadly, this term was yet another bad one for voting rights. You know, we had the really disappointing decision out of Wisconsin, where, despite forcing folks to put their lives on the line with COVID ramp and the Supreme Court upheld a change in dates for early voting, and, and you know, this follows in a series of cases over the last few terms and really going back to Shelby County in the early 2010s. And before that, was, you know, this, this Supreme Court has pretty much rejected every attempt to expand the vote and supported every attempt to shrink the vote. And what I find sort of fascinating and frustrating about that is that you know, especially this term, folks gave John Roberts a lot of credit for solidifying the institution of the Supreme Court and bringing it to a more centrist place. And that's partially true. There were some, you know, encouraging decisions on things like LGBT rights, and the Trump v. Vance decision on the President not being above the law, which I hope we'll talk about today. As much as John Roberts is interested in preserving the institution of the Supreme Court, he doesn't seem all that interested in preserving the democracy that underlies it. And I think that extends to the criminal justice realm where there have been a few justices who have consistently sort of supported the rights of criminal defendants, against challenges by states to restrict their rights. But John Roberts hasn't always been one of them. And so again, and this is sort of the, you know, the *Raysor v DeSantis* cases and sort of amalgamation of both where we see a court trying maybe to tack center and retain some credibility on individual issues. And yet when it comes to, you know, the most marginalized amongst us trying to vote or trying to reenter society After finally escaping mass incarceration, we don't see that same sort of, you know, support.

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Joshua B. Hoe

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You know, turning to some of the more criminal justice-related cases, one of the most important kinds of non-decisions come in this unique moment where whole communities are reconsidering their relationship to police and policing? Was this *Baxter versus Bracy* decision on qualified immunity. Would you like to talk about that for a second?

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Somil Trivedi

9:08

Yeah, and this one is supremely disappointing as you indicate, I think the background here is that we are obviously in a national reckoning about policing and police accountability. And, you know, they're sort of an old saw that says the Supreme Court, follow public opinion, right, rather than create it. And if you can just raise enough awareness about an issue and bring the country along with you, then the Supreme Court might actually change its ways and reverse itself on an important issue. You know, we always use gay marriage as a prototypical example. I thought we had done that here.

I don't think that many people knew what the hell qualified immunity was about six months ago. And through the concerted efforts of people like you and activists on the ground and lawyers bringing qualified immunity cases up and down the circuits. We had finally gotten the case to the Supreme Court that squarely asked the question. Is qualified immunity legal?

And so, obviously, I should take a step back for listeners who don't know, you know, qualified immunity is the judicially created doctrine, the Supreme Court created a doctrine that says police officers and other public officials, but in you know, in our day and age, I think police officers are front of mind. Police officers cannot be sued civilly, that is by the victims of any of their misconduct in civil court for money damages unless they violated a constitutional right. And the kicker is that that constitutional right had to be quote-unquote, clearly established in the circuit where the violation happened. And in effect, the clearly established prong of qualified immunity has meant that unless there was a case exactly like the one before the court, allegedly. As the theory goes, the police officer didn't have noticed that what they were doing is wrong. And therefore they can't be held civilly liable for it. So in the *Baxter v Bracy* case, our client, Mr. Baxter, had a dog sicked on him, even though he was prone and had his hands up and was clearly succumbing to the upcoming arrest, still, police officers sic the dog on him who bid him. And although there have been police dog bite cases in the past, Supreme Court decided to ultimately decline to review this case. And so despite being in a national moment about police accountability, the Supreme Court really dropped the ball by not taking this case up right now.

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Joshua B. Hoe

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And there's some you know, what we found, I think over the years is there are so few possibilities that are likely for people who have suffered from abuse by the police. To get any kind of tip for those whose problems to be addressed in quarter anywhere else. So I think this is an example of a doctrine that really in a lot of ways seals off the police from accountability. Would you say that's fair?

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Somil Trivedi

12:19

I agree with that. We have seen that prosecutors are typically very reluctant to charge officers with crimes, right? That's because they have this sort of inextricably intertwined and relationship

that is that creates this conflict of interest where prosecutors don't want to charge the folks that they work with. civilian oversight boards have typically been sort of toothless. It's, as we all know, now it's very difficult to fire police officers who commit misconduct and so suing them civilly is one of our as you say, one of our last bastions for Police accountability and qualified immunity is an extremely high hurdle whose viability is questioned? Let me just say, across the ideological spectrum, conservatives hate it because it finds no support in the text of Section 1983. The Civil Rights suit the civil rights statute, under which people Sue, it's wholly judicially created. progressives hate it because it bars racial accountability and and and recompense for victims of police brutality. It's extremely thin ice. Judges across the country recognize that scholars across the country recognize that and yet the court seems not ready to recognize that and until we have that, in many, many other reforms, including potentially divestment from police and obviously this all ties into the larger discussion that we're having as a nation. You know, qualified immunity won't solve all of our problems, but we will solve a lot of them.

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Joshua B. Hoe

14:04

It certainly makes it a possibility that someone could at least have a avenue for trying to get some accountability. Do you see any legal possibilities? You know, where are we in terms of kind of the legal end of the battle to try to hold officers accountable when they go over acceptable lines of behavior?

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Somil Trivedi

14:26

It's a good question. First of all, I don't think the battle to end qualified immunity is over. I think, certainly we will keep bringing cases up. And as the drumbeat grows louder and more and more people oppose qualified immunity. We'll have our shots at the Supreme Court. But you know, there are also legislative movement happening in order to say create a national use of force standard. That makes it much harder for police to justify use of force. You know that we had a win in California on that front aren't saying that police officers can't have just thought their actions were reasonable, but that their actions had to have been necessary. Right. I think that ought to be the national standard, and there's some momentum in that direction. And so, you know, a legislative push is important. I think the wave of quote-unquote, progressive prosecutors around the country, while not a panacea certainly is encouraging on that front, the more prosecutors we have, who are willing to, for example, stop calling officers with histories of misconduct or lying on the stand, can do what police departments themselves can't do effectively, right. Police Departments say they want to fire bad cops, but can't because of things like union contracts. Well, if prosecutors can stand up for what's right and stop calling them that will effectively render them, neutralize them and so there are certainly other options for police to come. ability. But this one is a big one. And I hope we will have a chance in a coming term to fix the problem.

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Joshua B. Hoe

16:09

So, you know, I mean, in my community, kind of the formerly incarcerated community, one of the biggest things that's happened last four or five months is the prevalence of COVID in prisons and jails. A second kind of non-decision decision was Williams versus Wilson, and involved COVID-19 in the Federal Bureau of Prisons, that particular the Elkton facility in Ohio. Many people might remember the video taken on a contraband phone of the person in prison, who was talking about people dying in his unit, that virus that that video went viral. So can you talk a little bit about this case, and why you think the court might have declined?

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Speaker 2

16:49

Yeah. And so this is COVID in many ways is the story of our time. And what is happening jails and prisons with respect to COVID is a humanitarian tragedy on a scale that I don't think people recognize. And that video from Elkton really crystallized it for a lot of people just how scared folks who are incarcerated right now must be and rightfully so. The rates of COVID contraction in jails and prisons are 500 times higher than even the very high and scary rate outside the death rate is 300 times higher. Right. Yet, because of our society's willingness to throw people away once they are incarcerated. We have done very little about it and the Supreme Court this term, though not, though their decision wasn't as consequential as some of the district court and circuit court opinions still showed a sort of unwillingness to engage with what is clearly an emergency. So just to Give the legal background. The ACLU and others have filed cases across the country seeking the immediate release of as many incarcerated people as possible from these facilities at least until we can figure out how to stem the tide. Because, as you know, the Eighth Amendment prohibits cruel and unusual punishment and the Supreme Court has been clear that when there is an A communicable disease inside prisons, and jailers have removed, folks ability to protect themselves from it, the jailers must protect them that is enshrined in the Eighth Amendment. And yet, court after court in this country has declined to grant that relief and get folks out of harm's way. And so in the Elkins case that was burning down from COVID just dozens and that was really bad. It was really really bad and then it got bad elsewhere as well. But Elton, we were able to secure a preliminary injunction, meaning the judge did order the rapid release of medically vulnerable people out from Elkton. When we secured that when obviously the government appealed to the Sixth Circuit, when the Sixth Circuit declined, at least initially to stay that decision, the Supreme Court stepped in and did at least for a short time, while the Sixth Circuit could, could render a final opinion. And then sadly, it did about a week later, and lifted the injunction, therefore keeping people trapped. And so I don't want to overstate the Supreme Court's role here. Justice Sotomayor granted a sort of administrative stay not really reaching the merits sort of allowing the Sixth Circuit to address the issues. That was disappointing in and of itself. I think it was very clear that the district court had done its work. Um, it was very clear that this was an emergency situation. And so for The Supreme Court to put its thumb on the scale of the government and keep these folks trapped even for a few days when we know how contagious COVID is, was really disappointing.

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Joshua B. Hoe

20:11

Seems like there's a long history on this Court of deciding against petitioners and for prisons on most issues, but particularly on issues of cruel and unusual punishment. Do you kind of want to talk about some of the larger context around that?

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Somil Trivedi

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Yeah, um, both the court for the federal judiciary and Congress could not be more aligned against the rights of prisoners. You know, one aspect of these cases, the Prison Litigation Reform Act, which I'm sure you know a lot about but basically creates all kinds of procedural hurdles before folks in prison can seek relief for what we know are the important conditions that they live under. And especially for something like COVID. That is that is a dire and fast-moving emergency. The procedural hurdles that the PLRA creates and that judges give deference to make it essentially impossible for an individual prisoner or in the case of the lawsuits that we were bringing, you know, a class of prisoners gets out in any time frame that would actually help them stay healthy. And so far, the series of COVID cases that we and others have filed have only judges have only reaffirmed their total unwillingness to see an emergency for an emergency and do what's necessary instead hiding behind the PLRA and other procedural hurdles. And so, you know, I'm, I'm genuinely scared for the state of the law on the Eighth Amendment, and I'm genuinely scared for the real human beings who are going to suffer because of it.

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Joshua B. Hoe

22:02

Yeah, it is quite upsetting. I mean, we've got, you know, in the middle of the summer in the middle of a pandemic, you know, a lot of places a lot of prisons without air conditioning, who've turned off their fans so that there isn't transmission across units. You know, it's a, it's a, you know, we have people who've died all over the country, just in Michigan, over 60 or 68 people have died. It's a terrible situation. Is there? You know, do you think that there's any chance in the world that there'll be some other way to start to get court serve these to get this court to start to think a little differently about this, or are we just going to have to come up with legislative solutions?

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Somil Trivedi

22:48

That's a good question. I think, you know, it is possible that the court will see another case. I know that one is coming up through the Ninth Circuit in one of our lawsuits as well. Think that This is an area where we can't rely on the courts to move quickly enough. And we need to convince legislators, governors, prosecutors, sheriffs, to do the right thing and drastically reduce intakes drastically increase releases. And that has happened in some places many of the largest jails in the country have after at least we have applied some pressure have reduced their numbers have tried to thin out the population such that social distancing is possible. So I think that kind of drumbeat is going to be what's effective here.

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Joshua B. Hoe

23:37

So last year, we ended in a pretty bleak place on kind of death penalty issues. So finally of the kind of non-decision decisions, should we talk a little bit about Barr versus Lee, what was that about?

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Speaker 2

23:51

Yeah, speaking of bleak, so, in late June, the Attorney General made an announcement that after a 17-year hiatus. And despite most of the country moving away from the death penalty, many state supreme courts are states abolishing the use of the death penalty. Out of the blue bill Barr says that the federal government is going to start executing people again. Look, let's just put cards on the table. This had nothing to do with a need to, to reinstate the death penalty or to you know, it didn't serve any real prosecutorial or penological purpose. It was because this government needed a distraction from the twin pandemics of COVID and police accountability that it didn't like in the headlines. So it plucked the death penalty out of hibernation. And that used for real human beings to do that. And so, so, execution dates were set extremely hasty execution dates. This month, we're set and The legal issue that ended up before the Supreme Court was that the federal government claimed that it now had, whereas it had not before, it now had a safe method of legal injection via a single-drug protocol called pentobarbital sodium. Whereas it used to do us a three-drug protocol. That was actually part of last term's harrowing decision in Bucklew. How the government claims it has a safer alternative, so, therefore, it can move forward. No problems. Um, of course, that's not the case. And the four men whose execution dates were set, filed a renewed Eighth Amendment petition in their district courts, arguing that there were real safety concerns with even this new drug specifically that it could cause a buildup of foam in there. Lungs that could simulate asphyxiation or grounding. So we're cruel and unusual punishment, or at least that's what they argued. I'm sufficient that the district court granted a preliminary injunction and put off, they're extremely hasty execution dates. The federal government, again, no reason whatsoever, because they hadn't executed anybody in 17 years. And these folks had been on death row for quite a while, have sent an emergency petition to the Supreme Court. And the Chief Justice after putting it to the entire court, Grant are lifted the injunction and allowed the executions to go forward.

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Joshua B. Hoe

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Yeah, I think they've unfortunately already executed to people since then, I believe. And, you know, I mean, I remember we talked about Bucklew, I think was Bucklew last year. I think that's the decision where the justices Kavanaugh and Gorsuch were joking back and forth. About the appropriateness of firing squads and hangings. Do you have any kind of feelings about, you know where we can be? Are we just is this just going to be? I mean, is this court just absent some tectonic shift in membership going to just be terrible on the death penalty is where we're at?

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Somil Trivedi

27:21

Yeah, I think that's where we're at. I think the well, you know, they have carefully crafted the law around Eighth Amendment challenges to be virtually impossible to clear because as you remember from *Bucklew*, they actually force the defendant themselves to pick their poison, right, they have to themselves identify a safer alternative. And if they can't, then then the government is allowed to move forward with the government's chosen cocktail, even if there is credible evidence that it would be cruel and unusual. And so they stack them. Deck against those on death row. And so no, I think yet again, this is an area where we need to work in the States. And I think, you know, we have been winning I don't want to make, there's lots of work to be done. And we should live in a country where nobody is put to death by their state. But executions have been declining across the country. We hadn't had a federal execution in 17 years. And I think the political context here is important and that if we can get a federal government who doesn't use the execution of human beings as a political stunt to distract from poll numbers, then we should continue that trend, but I don't think we should go to the Supreme Court to do it.

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Joshua B. Hoe

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One kind of interesting side note, or at least to me, what's really depressing but interesting is that one of the two gentlemen who has been executed since the family of the victims actually asked for them not to be executed. We have kind of situation a lot of times where prosecutors always say that there are four victims but there's all these times that come up where victims have very different desires than prosecutors and prosecutors always seem to be willing to do exactly what the victims or survivors of crime. I don't want them to do teary thoughts here.

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Somil Trivedi

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Yeah, I'm really glad you brought that up. I have this bolded and highlighted in my notes that you're absolutely right. In fact in bill bars, the initial announcement that he would resume federal executions he trotted out justice for victims as the reason why not only we had to execute these people but had to do it expeditiously. Right. And then lo and behold, the very next day, the victims come out and say that they don't want this. And you know, this is important for our national conversation about criminal justice reform, policing reform. Hear constantly from even practicing Computers who generally support some reform efforts or at least want to be seen as supporting some reform efforts, that, well, the side of divestment or the side of transforming our system doesn't adequately take victims into account and therefore they lack credibility, right? So victims get trotted out as this monolithic Prop, as you've indicated, and yet, if victims themselves don't fall in line with the, with the prevailing ethos of mass incarceration and mass punishment, then they're jettison right, then their opinions don't count. And so it's very much a one-way ratchet that I think law enforcement for too long has used as I said, as a prop. And so I think this is this case is very telling, and I hope that our movement continues to be the one who actually cares about them in that we actually listen To what they say. And in many cases that is not on the side of mass incarceration.

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Joshua B. Hoe

31:07

All right, let's move to some cases that actually had decisions. So the first one Ramos versus Louisiana was a case about unanimous juries. What was happening in Louisiana and Oregon prior to this decision, and what was this decision

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Somil Trivedi

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was happening prior to this decision in Oregon and Louisiana is that they allowed criminal juries to convict on less than unanimous votes, which is to say if you have a 12 person jury in 48 states and all the territories you can you have to get all 12 to vote for the conviction in Oregon and Louisiana, you could win by a 10 to two or an 11 to one. The reason this is important and I credit justice Gorsuch in the majority and justice Kavanaugh in the concurrence for pointing this out. This is available to racism and slavery. So the reason that certain states allowed non-unanimous juries is as part of a suite of Jim Crow legislation to dilute newly freed slaves, or former slaves power in all realms of society, including on jury. So if, if the white American society wanted to keep convicting black folks of crimes, now that they couldn't enslave them, they could neutralize any black votes on the jury by allowing their votes to be disregarded and this was very overtly part of the legislative history in both Louisiana and Oregon. And as I say to Gorsuch and Kavanaugh his credit, they recognize this history as relevant to the discussion. But ultimately, what was dispositive here? Is that the unanimous jury has a long and important history in the United States. And so justice Gorsuch as he is want to do, um, goes through the history of what it means to have a, quote, impartial jury within the confines of the Sixth Amendment decides that when we say an impartial jury, we have always meant an impartial, unanimous jury, and to him that that history seals the deal. So, you know, ultimately, this case delves into issues of Stare Decisis because there was a case out of Oregon called Apodaca, which seemed to uphold the validity of non-unanimous juries. But ultimately Gorsuch finds reasons influenced by informed by this racist history, but also specific to the right to a unanimous jury in American history. He finds those to be compelling reasons to overrule or ignore Apodaca.

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Joshua B. Hoe

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It's kind of weird. You know, I mean, we had a decision last year on juries from Kavanaugh that we talked about. And this year we have this one from Gorsuch joined by Kevin Ah, and they seem to be tuned into the race issue here. But on so many other issues, the death penalty, cruel and unusual punishment. elections, they seem to totally ignore, or at least be less concerned with the question of race. Do you have any kind of Have you been able to divine anything that kind of decides when they're going to be dude did to the kind of robbing you just think about how the death penalty simplified? It's pretty clearly racially disparate. So I just wonder if there's any way to if there's a divining rod or anything to figure out what these guys are going to figure out when race is relevant?

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Somil Trivedi

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Yeah, that's a really good insight. And I think race has to absolutely slap them in the face before they're gonna recognize it. Um, you know, in last year's decision to criticize flower's decision. I mean, there were four, there were seven total retrials, and four of them had to do with racial striking of juries by a very overtly racist, da right. And even then Cavanaugh, although again, to his credit, he recognized the racial elements of that case, in a very narrow ruling. And here again, there's a racist history, but the ruling is not ultimately on those grounds. And so I do not have a lot of hope for the Supreme Court recognizing how significantly race plays a role, particularly in our criminal justice system if they are going to uphold protections for criminal defendants. It is going to be almost certainly on the sort of originalist grounds that Gorsuch very much to his credit because he has been better on criminal justice than a lot of folks thought. And, you know, he ultimately wrote this opinion Giving Mr. Ramos a second chance, it's likely they're likely not going to be dispositive racial issues are likely not going to be dispositive, even though we know in real life, racial issues are often dispositive, real justice system. And by the way, I'll just point out that, Justice Alito in his dissent, which was unfortunately and disappointingly, joined by Justice Kagan, Justice Alito keeps the flame of racism and or at least white fragility alive. aching pains to point out that the majority opinion is just calling nice people racist, even though it didn't ultimately, rule on the race question and that sort of mean, right. And that's all that's all. That's all you know, really has to say about it. Even though the majority clearly found Race influenced these juries and has a place in the discussion.

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Joshua B. Hoe

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It's sort of an interesting decision. And then it's a solid majority. But there's a lot of judges concurring in part, some holding for different reasons, some dissenting, some dissenting in part. Is there any significance to that? Just?

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Somil Trivedi

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Well, probably not for our discussion. I mean, a lot of the concurring opinions have to do again with Stare Decisis more so than the unfair jury question. And I'm not saying that's not important. That's extremely important that the court clarify when it's going to stick with a decision and when it's not. I think Cavanaugh is making a particularly concerted effort at clarifying that law. I think we've seen over the last few terms that certainly Justice Thomas is on a crusade to essentially end Stare Decisis ethically in the not so bad attempt to end Roe v. Wade. So I think that's a lot of the reason for the various concurrences and dissents here. I think most people agree. I actually think that it was unanimous here, that the unanimous jury has that sort of protected place in American history and is part of the Sixth Amendment

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Joshua B. Hoe

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The next case is Kahler versus Kansas, which is about the insanity defense will actually about what constitutes a floor for an acceptable and say defense. In this case, the court held that the state need not find that someone could tell right from wrong to be, too. Is that a correct reading or am I close?

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Somil Trivedi

38:44

No, you're right on. So yeah, the question here and this is actually I'm glad you followed the last one with this one, because this is another question that sort of what norms are built into the criminal law and have been since the founding and before us. That that has become so fundamental as to sort of requiring them of states. And so in the prior case, when a state tried to take away the unanimous jury, Gorsuch stepped in and said, No, this is a historically important part of our jurisprudence in the Sixth Amendment says you can't do that. Here. We have the flip side, which is Kansas has an insanity statute that limits the insanity defense to use at sentencing, which is not really an issue here and isn't really a defense at all right? If you've already been convicted, and are simply trying to mitigate that sentence, that's not a defense. Or at the guilt phase, limits it to undercutting your mental state, your mens rea. And Justice Kagan delivered a six to three majority that said Yes, we agree the insanity defense is the sort of thing that is so rooted and the language from the leading case is so rooted in the traditions and conscience of our people as to be ranked as fundamental. She agrees with that. And nearly all states have some form of the insanity defense. So she agrees with that premise, and simply says that what Kansas has done limiting the insanity defense to sentencing and attacking mens rea, is not the abolition of the insanity defense, it's still there, and therefore you haven't violated this principle that you can't get rid of sort of fundamental criminal protections. That's wrong. On a technical level that the dissent points out and commentators have pointed out, as many of your listeners will likely know, the defendant can attack the government's failure to prove Mens Rea in a given case. That's not a defense. That's the prosecution. Having failed their case. Right. And so if you have effectively abolished the insanity defense if all you've done is allow evidence of mental defect via that avenue right and that that's Briar, that's the rest of briars descend and the basics of what has gone wrong here. Yeah, that that is the basic problem with Kahler.

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Joshua B. Hoe

41:31

Now, I can't say that I love this decision because you know, like they seem to say that medical science changes all the time and standards say all the time. So the requirement for what constitutes insanity should remain fluid. But wait, what the decision really reads to me like is a race to the bottom like where you says you just said that there's really no effect there. There could be a law that is in essence made it impossible to claim insanity. And that that seems problematic to me. Again, am I reading that right?

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Somil Trivedi

42:02

Oh, that's right. That's right. And there's sort of there's a fundamental contradiction here where Kagan wants to leave room now, there's a strategic question as to why she's siding with the conservatives on this one. Maybe it's horse-trading? I don't know. But in any case,

Joshua B. Hoe

And the previous case as well.

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Somil Trivedi

42:20

That's right. That's exactly right. Um, so, yeah, that she is saying she wants to leave room for states to experiment and to, you know, move along with the times. And yet she recognizes that there are certain principles that are so fundamental as to be not open to experimentation, right. And she just ends up on the wrong side of that line. Um, you know, what I think is interesting about this case, and the previous case also is that, although I couldn't agree more, that Justice Kagan got it wrong, and it's very important to preserve the insanity defense. Just as I think it's important to preserve the right to a jury trial. We have to read both of these in the context of what mass incarceration really looks like right now, in that there are no trials, right?

Joshua B. Hoe

We all know that's definitely true.

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Somil Trivedi

43:10

Yeah, right. And so, you know, I try to read all of these Supreme Court opinions, not for them in and of themselves, but how they'll actually implicate our movement and how we will be able to use them to move the movement forward. And therefore, you know, this entire term is a little bit small-bore in that way, in that we're still not attacking the fundamentals of the criminal punishment conveyor belt, right. We're not attacking the fact that prosecutors can use underhanded and coercive tactics to extract plea bargains in 97% of convictions. So while I'm disappointed with this case, and I'm happy about the prior case, I think neither are necessarily as impactful as we think in terms of sheer numbers or dismantling the system that we're talking about.

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Joshua B. Hoe

43:59

So, this next case *Andrus versus Texas* is one of those rare situations where the court finds that counsel was somewhat incompetent, which seems to point us toward *Strickland v. Washington*. Do you want to talk about *Strickland* first and then *Andrus* next?

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Somil Trivedi

44:13

So *Strickland v. Washington* is a surprisingly important case. In that it, it recognized that fundamental to a fair trial and fundamental to the right of counsel is that that counsel the

competent, right, and so Strickland created a test that said, if your counsel is so deficient, as to have undermined your defense, and that that undermine of your case and therefore you're going to get a new go at it. And you're right. These cases do not come up very often because the first prong of Strickland, whether there was deficiency is an extremely high bar to clear and so we're always happy To see the Supreme Court step in and recognize deficiency when it sees it. So, in this case, you know, the facts very quickly are really harrowing. Mr. Andrus was one of many children to a mother who was unfortunately addicted to drugs and absent for much of their much of his young life. He was forced to raise his younger siblings was at some point sent to juvenile detention for a very minor part in a crime were in. in detention, he was given all kinds of psychotropic drugs. He just had a very difficult life when he was then arrested and charged and convicted for murder. But however tragic the facts of his actual life were. His representation was possibly more tragic in that his lawyer did not get any of this stuff into the mitigation portion of his capital case. didn't meet with him for eight months. After the case started, met with him only a total of six times outside of court in the four-year pendency of the case, virtually no investigation whatsoever. The mother who had every incentive to sort of defending her own mothering lied on the stand, and despite lots of warnings that she would do that, you know, the lawyer made no, no attempt to blunt that testimony. So, so this was sort of a cut and dried example of Unfortunately, the kind of loitering that sadly, the most vulnerable can get from time to time. And so this was a This was curiously a per-curiam unsigned opinion with a three-person descend from again, Alito, who just spent his time tarring, Mr. Anderson's reputation and reliving all the crimes that he committed or the crime that he committed rather than engaging in conduct of the attorney. But, but so now this case has been kicked back to The Texas courts where they will decide indeed whether Mr. Landis was prejudiced by this performance. And while I sitting here have no doubt that it was, unfortunately, this isn't entirely a feel-good story, because the state court could still find that despite this, this deficient performance outcome would likely be the same.

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Joshua B. Hoe

47:23

Yeah, that doesn't sound as hopeful as I, as I thought when I originally read through it. I feel like we've just as you just described that the history is that it's not very easy to get counsel declared incompetent after the fact. Do you feel like this decision has made created any more of a viable pathway or career opened up any space for people to have a better challenge for incompetence?

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Somil Trivedi

47:51

So I'm not so sure I think this was pretty squarely within the confines of Strickland and the facts were so egregious that the court couldn't ignore it. I didn't see anything doctrinally in the opinion that expands on Stricklin. Really. Um, so No, unfortunately, you know, as I've said that this was a pretty small-bore term for the court on criminal justice, except for so some of the sort of non-opinion opinions that we talked about earlier, but on the actual opinion, again, this was a

win. I'm really happy about it. But it's not going to create a sea change in public defense or anything like that.

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Joshua B. Hoe

48:36

Probably the most, I think, surprising case to a lot of people in this term was the McGurk case in Oklahoma. I've seen a lot of people on the right outrage that Oklahoma kind of like Alito said, you were talking about that Oklahoma apparently didn't have jurisdiction to try a member of the Seminole nation charged for sex offenses. Do you want to talk about this case and what's kind of your basic take?

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Somil Trivedi

48:58

Yeah, so um, This like the voting case is a little bit less about criminal justice and more about the underlying issue which, which is that America has brutalized, mistreated and lied to the indigenous population for generations stemming from the Trail of Tears, right wherein we uprooted tribes from their native home in Georgia and other places, made them trek thousands of miles west, many of them killing thousands of them, and relocated into a land that wasn't theirs, but promised them that when they got there, the land would be there. And then over years and years and years, the federal government sort of emitted death by 1000 cuts to that promise, slowly set stripping them of jurisdiction over their own land, including in criminal prosecutions, right so even though the original treaty, us, you know, concretizing everything that I just said, said that, you know, this would be Indian country for purposes of the Major Crimes Act, or yours the state of Oklahoma had still just been prosecuting folks like the plaintiffs in this case, Mr. McGurk. And so justice Gorsuch, his opinion, lays out this very sad history and says, No, we have to abide by our treaty obligations. Our treaty obligations say this would be Indian Country and therefore, for purposes of the Major Crimes Act in Indian country, and therefore, the state of Oklahoma has no jurisdiction for purposes of certain prosecutions, only the tribe and concurrently the federal government has jurisdiction. So I think it is it is a major win for the recognition of indigenous people, right? Forget about the criminal justice context. It's a major way in that realm, but I have to say, not so sure how much of a wind it is, or criminal justice itself, because it doesn't fully relegate criminal prosecutions to the tribe, where you might imagine that they would have a better sort of tie to the community and be less likely to be to impose harsh penalties on a people that who we don't consider ours, as the state of Oklahoma might have been doing. Unfortunately, the federal government still has concurrent jurisdiction here and is likely to use it in at least some cases. And as we know, criminal penalties at the federal level are often much harsher, even harsher than very harsh state penalties. So I do worry very much about the next steps here. Being that the federal government, particularly under this administration, I just use this as an excuse to ramp up federal prosecutions of what used to be local crimes, if that makes sense.

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Joshua B. Hoe

52:06

And the other kind of pushback I got I saw a lot on this case was that this essentially got rid of Oklahoma's jurisdiction basically, that they legally would cease to exist as a state. I'm guessing we sort of answered this already, but I'm guessing there's not a lot of truth to that.

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Somil Trivedi

52:25

No, I mean, if Ted Cruz is tweeting about it, you know, it's wrong. Oklahoma continues to be a state to the city of Tulsa where I used to live continue.

Joshua B. Hoe

I did too.

Somil Trivedi

Oh, wow. That's great. Um, yeah. So So no, this was obviously limited to the Major Crimes Act, at least this decision was from what I can tell, and I don't purport to speak on behalf of tribes or tribal leaders, but I think they are interested in continuing to work hand in hand with the state of Oklahoma. As they always have done right. But this is an important recognition that this is, first and foremost their land, and therefore the treaty obligations that the country entered into have to be honored. I think that's all that this case needs.

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Joshua B. Hoe

53:15

So I think you wanted to talk a little bit about the Trump cases in terms of presidential immunity and prosecution and the ability of presidents to be subject to subpoenas. Do you want to talk about where what happened here? Yeah, so

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Somil Trivedi

53:28

I would think most of us would call this one of the blockbuster cases of the term and certainly with respect to criminal justice. And I bet I don't have to give much explanation. But the background is that the DA in Manhattan Cy Vance, had sent a subpoena to the President's accountants for the President's Personal papers, including his tax returns for the purpose of a criminal investigation into Trump's financial dealings. And of course, as we all know, The Trump administration has blocked an inquiry into anything Trump-related, whether it be official government, business or otherwise. And whether it be Mr. Vance or Mr. Muller or the Congress, they have taken the extreme position that presidents have absolute immunity from any kind of investigation whatsoever. And so this was a companion case with a congressional subpoena, also to the same organization, seeking much of the same information, though not the tax records. So I'll talk about the congressional piece in a minute, but I'm on the DA subpoena the criminal subpoena, the court ruled 72 and in in the most important respect, unanimously that the President does not enjoy absolute immunity from criminal process like this. This is obviously a resounding win for the rule of law right the principle that no man is above the law had to mean something. And President Trump put that to the test with this case the Supreme Court passed

that test continues to be the rule in America as we've all known since the founding, but from time to time needs reaffirmation, that no man is above the law and therefore, from and mais RS will be subject to this subpoena. Um, I think the other takeaway, however, that we continue when we say when we intone the term, no man is above the law. We continue to mean the criminal law, right? Because there's law supporting Congress's ability to get the President's papers and the decision in the congressional case was much more limited. And it is going to be much tougher for Congress to get these documents. In fact, after these opinions came down, the petitioners in both cases applied to the Supreme Court for sort of expedited entry of judgment. And the Supreme Court granted that in the criminal case and did not grant that in the congressional case. So and one other important note from the Roberts majority, is that you know, he notes the public interest in a fair and accurate judicial proceeding is at its height in the criminal setting, where our common commitment to justice demands that guilt shall not escape nor innocence suffer. So you actually hit it on the head a minute ago when you said, This court isn't actually all that interested in fairness, until a prosecutor needs something right, then all of a sudden, the interest in fairness is at its height. And so I find that a really disconcerting part of an otherwise very, very good opinion that, um, we continue to reaffirm the primacy of the criminal law and of prosecutors to enforce the criminal law when we talk about fairness, but what When it comes to things like the insanity defense this term, or any number of other criminal protections on the defense side, all of a sudden we're not so worried about these principles. And it also speaks to the fact that we are all or many of us our whole are crossing our fingers that the criminal law will somehow fix Trump or Trumpism. And I think that's a misguided approach, right? prosecuting President Trump, whether now or after he gets out of office. So whether via Robert Muller or OSI Vance, I'm not going to fix the underlying symptoms that got us Trumpism in the first place. So again, while I'm extremely happy about the baseline, the top line decision here, it's actually a reaffirmation of primacy of the criminal law in our society. And I actually worry a lot about that. You know,

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Joshua B. Hoe

57:54

Justice Roberts as been a lot of people have theorized that is kind of what I think Think, falsely is claimed his kind of newly found liberalism is a lot of times about court legitimacy. I think, obviously, people are quite worried about Justice Ginsburg right now, God forbid, what do you think would be the impact on Supreme Court credibility if Trump tried to appoint another justice, or the GOP allowed him to appoint a justice after the election, but before the transfer of power?

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Somil Trivedi

58:25

Oh, that is the nightmare scenario. Right. And so all of us send all your Jin Singh and other good wishes to Justice Ginsburg right now, who I believe has now recovered from this later latest infection. But um, yes, I think yes, to Justice Roberts credit and despite the things that I've said about him, being less than centrist or less than concerned about the legitimacy of our democracy in the criminal justice system, then people will give him credit for did bring the court back to some sense of decency and normal See this term? And so I'm glad about that. Um, I

think even I think he would be disappointed in the result that you just are the hypothetical that you just posed. And I think we would risk a real slide back to a court that is both is partisan and is viewed as partisan. And so I think this is a Fingers crossed situation.

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Joshua B. Hoe

59:27

So kind of in conclusion on the term, do you have any kind of overall takeaways from this term or thoughts that you have in general about what we should take away from this term?

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Somil Trivedi

59:38

Yeah, I think, um, as opposed to the last term, where we had a few criminal justice blockbusters, you know, the Curtis flowers case and others, plus a few that that sort of flew under the radar but really did impact or could impact of the mass incarceration complex, you know, Raymond and Davis cases that we pared back on the ability of the state to pressure folks into pleas and other disposition. This term, the court was less focused on those systemic issues. And where they had a chance to like with qualified immunity, they punted, right. So that is just an unfortunate fact about this term that we didn't make a lot of progress on criminal justice. And, and in fact, maybe backslid in a few areas, like, you know, like the, on the insanity defense case. I also think that you know, without stretching to find a thematic consistency here, I think, just like the chaos of the Trump administration defines pretty much everything we do, and we're now seeing that you know, manifest as a sort of dying star and his last couple months sending stormtroopers into various American cities and really testing the rule of law. I think this was a chaotic term at the court, right? I mean, we covered five cases that were sort of off-menu or off schedule, right. So sort of the Supreme Court term kind of mirrored the state of the country in that we're living from emergency to emergency. And the Supreme Court is being asked to step in, jumping from emergency to emergency. And that's not good for the law. And I don't think we got a lot of positive results from that. Right, whether it's the voting rights case, or the COVID case, or the qualified immunity decision that came in the midst of, of national protests, right. I don't think that's any way to run a ship. So I hope I think all of your listeners might agree that the next time we have this talk, we can return to some sense of order, and, and refocus on kinds of systemic injustices, particularly in the criminal justice realm that really needs fixing.

101:54

Joshua B. Hoe

Well, this is the decarceration nation podcast in this season. I've been asking guests if they have any unique ideas ways we could decarceration. But maybe in this case, it might be better to ask what you see on the horizon in terms of where we might be heading with the Supreme Court in the future.

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Somil Trivedi

1:02:10

Sure. So on specific cases, you know, the Ramos case about unanimous juries, left open, whether folks already convicted by non-unanimous juries can now reach back on collateral

review and challenge those convictions that cases, Edwards v van Noy, and that's already up on cert. The McGirt case the Oklahoma case could potentially apply to hundreds or thousands more indigenous people in Oklahoma and elsewhere. So that might make it all the way up. And, you know, we'll keep filing cases until the Supreme Court gets that one right to and, you know, of course, the Trump administration, I think is going to be darkest before the dawn. So there could be challenges to things like the legality of bars, stormtroopers in Portland and elsewhere. You No, now he wants to move the election. Who knows what. Right. But, you know, in general, taking a little broader view? Of course, I should, I should caveat that we should never rely on the Supreme Court for sweeping change in our area right in criminal justice reform. We need to be out in the streets fighting in court in legislators and statehouses, right doing the kind of work that you do. But, you know, given the trajectory of the last couple of years with the Curtis flowers case, the Haymond case, Ramos Vance, you know, I'm honestly still cautiously optimistic that we can bring smart and targeted cases that at least chip away at Mass Incarceration while we're doing the more revolutionary work, we just got to keep our eyes peeled for those cases. So that's where I think we're going.

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Joshua B. Hoe

1:03:48

As you know, I always ask the same last question, how did I mess up what questions should I have asked but did not.

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Somil Trivedi

1:03:54

I think you are very good at surveying the Supreme Court term in public out what was important, so I think, nailed it. And I look forward to doing this again next year.

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Joshua B. Hoe

1:04:07

Yeah, I can't wait this third year would be excellent. I really appreciate you taking the time. Thanks so much for doing this. It's great to talk with you again.

Somil Trivedi

Same with you, Josh. Looking forward to it.

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Joshua B. Hoe

1:04:22

Now, my take, we are still struggling to deal with the fact that prisons are one of the core vectors for COVID circulating throughout our communities. But we also should be ashamed of ourselves for allowing the COVID to kill so many in our prisons and jails when we could have shown compassion and let people out. According to the Marshall Project. 78,526 people have tested positive in our prisons, and at least 766 people have died. Almost all of the top hotspots in the United States right now for COVID our federal and state prisons. We need to remember are our

brothers and sisters in our prisons in jails. I don't care which branch of government intervenes, but we need Governor's to be more compassionate with releases and commutations and we need courts to stand up for their previous support for pandemic conditions justifying relief. It is not okay for this to continue and it's time for every legislator, Governor and judge to do everything they can to ensure releases for people who are most at risk from COVID in our prisons and jails.

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