

88 Jessica S. Henry

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Joshua B. Hoe

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Hello and welcome to Episode 88 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 interview with Jessica S. Henry, author of the new book smoke but no fire convicting the innocent of crimes that never happened in just a second. But first, the news"

This week, my friend Eli Savit, won his primary to become the next prosecuting attorney in my county have washed not Michigan, given our county is overwhelmingly a democratic county and since today, there is no Republican opponent, he is highly likely to become the next prosecuting attorney here. Eli is a former guest on this podcast he ran it's a progressive, promising and cash bail. And then juvenile life without parole sentences and much more. I wish him a lot of work, but we'll endeavor to hold him accountable if he strays from those promises. I will include a link to our interview in the show notes.

There was a really interesting article in 538.com, about psychology and crime. I bet if I suggested to many of you that crime was increasing across the United States, you would agree, but the truth is that crime is actually decreasing. There are a few areas of increase. homicides and domestic violence. But since the onset of COVID, crime is down substantially, in some areas as much as 30%. And we are in a historical low in terms of crime since about 1967. And just to be clear, even though it's areas where crime is increasing, which are certainly troubling, these are a year over year increases, not historical versus statistically significant increases. Of course, we should go to the bottom of what is happening and try to fix whatever we can and protect people as best we can. But that takes time. And there's a psychology and immediate culture. Which seems to make crime always like it is right at our door and makes it seem like our personal safety is always at risk. I hope you'll give the article a read or obviously included in the show notes and really start to think about how we think about crime and safety when we think about criminal justice issues as well.

Okay, let's get to my interview with Jessica S. Henry. Jessica Henry was a public defender for nearly 10 years in New York City before joining the Department of Justice Studies at Montclair State University where she is an associate professor and frequent national commentator. She is also the author of the new book smoke but no fire, convicting the innocent of crimes that never happened. Welcome to the decarceration nation podcast. Jessica Henry,

Jessica S. Henry:

thank you so much for having me.

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Joshua B. Hoe

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I always ask the same first question. How did you get from wherever you started in life, this kind of like an origin story question to where you were writing books. About people incarcerated or prosecuted for crimes that they actually never committed.

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Jessica S. Henry

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You know, I stumbled on criminal justice as a concept in college. During my freshman year of college. Actually, I accidentally took an upper-level class. And I thought it was so fascinating that I kind of committed myself pretty early on to serving as opposed to Fender when I graduated from college, I went to law school with that intention. And I was a public defender in New York for about 10 years, I did trial work and appellate work. And then when I switched into academia, it gave me such an amazing opportunity to think more about from a macro level and a theoretical level, about the things that I had seen firsthand. And so it's been this wonderful journey for me that started really when I was 18. And this continued on through the present day.

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Joshua B. Hoe

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So when you were 18, what was it about it that stood out to you?

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Jessica S. Henry

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I think even then, I was, I was taken with the idea that The government had so much power over the stakes of individuals and just how unfair the system seemed to be how stacked it was against the poor and against people of color. Whether it was the most minimal laws like vagrancy laws or the way that drug laws were being enforced. It always seemed to me that there was this class or this group of people that were constantly the underdogs and that we really needed to step up and be witnesses to what was happening and to do whatever we could to mitigate against some of the harms that I saw as being caused by the state.

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Joshua B. Hoe

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Yeah, no, as generally, as a general rule, I've kind of shied away I think sometimes people get frustrated with me from innocence because I've kind of chosen to try to be a voice for people who were guilty or at least guilty of something. But your book was pretty shocking to me. Can you introduce the kind of the basic premise of the book to the audience?

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Jessica S. Henry

4:59

Sure. So my book focuses on wrongful convictions, but on a subset, if you will, within the world of wrongful convictions, and that's innocent people who are convicted of crimes that actually

never happened in the first place. And when I started looking at the existing data which tends to measure exoneration, so people who have been wrongly convicted and were actually cleared of any wrongdoing, ie number of no crime wrongful conviction convictions, it's about one-third of all of the people in the database. And the more I dug in, the more I realized that that one-third number is actually a gross underrepresentation of just how many people appear to be wrongly convicted of crimes that have never happened.

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Joshua B. Hoe

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And can you speak to that a little bit like how many people are we talking about in the kind of as much as we can tell if we can tell it all? As a general rule Are you talking about

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Jessica S. Henry

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is a little tricky, it's a little tricky to know because the data that exists is only from 1989 and it only consists of cases that are reported and known to the National Registry of exonerations, which is, I think, the best source of data at the moment about wrongful convictions. But when we really take a step back, and we think about all the people who are currently in the system, right, ranging, and I consider both felonies and misdemeanors, I think the numbers of people are shocking. estimates for the number of wrongly convicted generally are about 4%. And so if you think about that, and then take a third of that we're talking about thousands and thousands of people who have been convicted of crimes that never happened.

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Joshua B. Hoe

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It is reasonably there's a lot of people that might not be covered in those numbers.

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Jessica S. Henry

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Yes, absolutely. So for two basic reasons, and I don't want to get too wonky here. But

Joshua B. Hoe

well, this podcast is kind of wonky, so...

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Jessica S. Henry

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let's do it. One of the things that the National Registry of exonerations At the time that I was looking at their data is they excluded what they called group exonerations. So in instances for where there was, let's say, gross police misconduct and the prosecutor kind of threw their hands up and said, we've got to get rid of this thousands of cases, because we just don't know what happened here. within that group, some of the people are clearly convicted of crimes that were manufactured by the police. But they're not included in the registry, because it's so hard to parse out which of the people whose cases were dismissed or innocent and which of the people

whose cases were dismissed were factually guilty but had something wrong. So that's one whole category of people who are not included in the database. The other category is misdemeanors. And, you know, we don't have really good information about misdemeanors in general. And we have really bad information about the number of people who are wrongly convicted of misdemeanors, but that's really not represented in the database. particularly well. And yet, as I talked about in my book, there are many instances probably far more than anyone ever could imagine, of people being wrongly convicted of misdemeanor offenses that simply didn't happen.

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Joshua B. Hoe

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And you give hundreds of stories in the book, but could you give us a couple of examples that have no crime wrongful convictions that really stand out to you?

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Jessica S. Henry

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Well, there are a couple. Um, you know, there was one case and his name, he at the time he lived by Charles Robbins, but then he later changed his name to Oh, gosh, hang on one second. I'm sorry. I say it correctly. Oh, dear. This is the last thing you want is dead air on your show. I'm sorry. I apologize. We'll call him Charles Robbins for now. here how you Mateen Sharif. So, um, Mr. Robbins at the time, was charged with and found guilty of murdering his child who had been found dead with some bruises. is on her body. And he was on Nevada's death row for decades until it was ultimately discovered by a set of new attorneys who had been appointed to his case who kind of started from the ground up, that the child had actually had Barlow's disease, which is a form of scurvy, and had his defense lawyer hired an expert just to do a minimal examination of the child, it would have been revealed, and this whole hardship that he endured would never have occurred. And what bothers me so much about his case is, so they come up with this diagnosis. Finally, I think it's like 28 years after he had been incarcerated. And even the prosecutors expert says, Yeah, this child died of scurvy, infantile, scurvy, not have any kind of abuse. The prosecutor still was determined to take him to trial. And so rather than risk staying even another minute in prison for a crime that never happened, and that he clearly didn't commit MIT, he pled guilty to a lesser offense and was released immediately. And so there's so much about that story, if you want to unpack it, that is offensive, he was poor. And he didn't have quality representation. And there were allegations in the case that the prosecutor had threatened people to say that if you don't accuse him of having actually abused his daughter, we're going to come after you. And the lack of an expert and the fact that you know, the judge allowed all of this to happen. And then ultimately, that the prosecutor insisted on getting a plea instead of releasing this man who had suffered so much. It's just a tragedy from the start to the finish.

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Joshua B. Hoe

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So the majority of the book kind of breaks into what I would think of really kind of as a typology of horrors. So I just want to go through some of those. The first is forensic error is what should we be aware of here?

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Jessica S. Henry

10:57

Yeah, so many people brought into the justice system because a forensic expert at the outset determines that a crime was committed. So for instance, at the scene of a fire for a fire specialist may come in and determine that the cause of the fire was intentional, not accidental. And when they get that wrong, and they label an accidental fire as an arson, then the whole system kind of kicks in. If it's arson, someone must have set the fire, and then the police have to find the perpetrator of this intentional fire. And the next thing you know, you've got somebody who's being tried and convicted based on bad fire science and perhaps famously or most infamously, we have Cameron Todd Willingham down in Texas who was actually executed for the arson murder of his three children based on fire science that modern scientists today say was wrong.

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Joshua B. Hoe

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Well, actually, in that case, I was living in Texas at the time, weren't they fire experts generally saying that was True even before he was executed, if I remember correctly, I've seen her before he

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Jessica S. Henry

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was executed, but after he was convicted, so he was convicted based on bad science. And then there was sort of this groundswell of outcry saying, hey, this science is just not right. But for a variety of reasons, that argument wasn't accepted and he was executed. He's not the only person while he's the only person that I'm aware of who was executed for the arson, for arson murder, that was not probably arson or murder. There are numerous cases in the book that I talked about other people who were also convicted of arson, where later science sort of in retrospectively was able to say, wait for a second, that wasn't an intentional fire. That was an accidental fire, and yet people were held criminally responsible and incarcerated for decades.

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Joshua B. Hoe

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And you think about you know, and a lot of those cases, like where someone's kids have been hurt or something like that. They're dealing with the trauma of that. Death of their child, at the same time they being arrested, prosecuted, ultimately incarcerated for something that they never did. Which is pretty, pretty, pretty amazingly, it's really horrifying. Are there other examples of types of forensic errors that people should be aware of?

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Jessica S. Henry

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Oh, sure. I mean, you know, you've got folks who are charged with murdering, just to stick within that realm for a minute of charged with, you know, murdering their children based on the Shaken Baby Syndrome theory. It's another theory that today has been highly questioned and, you know, arguably has been debunked by scientists, but it used to be believed that if a child exhibited certain, certain symptoms, then whoever and then died, whoever had was last in the care of the child must have been the person who harmed the child because the systems would repeat the symptoms would appear immediately. And so you have I've known numerous cases in the book of people who were charged and convicted of murder, again, based on science that We now know today is faulty or inaccurate.

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Joshua B. Hoe

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Kind of the next section is on false accusations. What should people know about this?

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Jessica S. Henry

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A couple of things. First of all, I do want to be clear that, you know, one of the issues, when we talk about cases like sexual assault, is that oftentimes people are not believed right, they come forward with a true story that they have been the victim of a rape or sexual assault, and they are disbelieved by the police and by the prosecutor. And that's a real issue. Conversely, we know of stories where people have abused the system and created false allegations of harm caused to them in order to serve whatever their goals are. So whether it's revenge for ending a relationship or child custody dispute where they need extra Arsenal, or even for monetary purposes, people have been known to falsely accuse others of crimes and in the book, I specifically hone in on two Two types, because they sort of occurred the most prevalently in that database that I was talking about. And that's sexual assaults and child sex abuse allegations. And in both of those instances, I've had been utterly decimated by cities that were believed to be true.

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Joshua B. Hoe

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We have certainly seen, I think, mostly, what generally seems to happen is there's a particularly heinous crime or appearance of a crime that occurs or an accusation and then there's kind of a moment of moral panic. And then you have kind of an almost incredible in a lot of cases. What turns out to be an overreaction. I think there were some examples of that in kind of the early days of some of this child abduction and abuse kind of claims. Is that not accurate?

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Jessica S. Henry

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Yeah. So there was a whole period of moral panic. People were being accused of in these sorry, but something in my throat, where people were accused Of these child daycare center, sexual assaults and the stories that were told by children were so fantastical and often were prompted by perhaps well-intentioned but very misguided psychologists and therapists and

social workers who were working with these children. And people were sent to prison for years and years and years. I tell the story in the book about the Keller family. They had run a daycare center, and they were accused of the craziest of things like taking children across their daycare center was also in Texas. Sorry. Texas just keeps coming on up. Their daycare center was in Texas and they were accused of flying children over the border to Mexico to cause harm even though of course there was no evidence at all that helicopters had ever been seen. They were accused of murdering a gorilla at the zoo when there was no gorilla. They were accused of killing babies when no babies were ever reported to be missing, and all kinds of other things about drinking blood and what have you and they were convicted, they served. I forget how long but many, many, many, many, many years. You know, based on these crazy stories that couldn't have been true.

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Joshua B. Hoe

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So obviously, in the current environment, the next part will have a lot of resonance to folks, what should people know about police and no crime wrongful convictions?

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Jessica S. Henry

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You know, so one thing I think is so important, just to sort of saying from the outset, is that policing is a really important part of the conversation today, and with a very good reason it's a really important subject. But when we talk about the contributions of the police to wrongful convictions, generally in no crime, Roth evictions, I do want to say that they're just one part of an entirely dysfunctional system. But specifically, the police contribute. I kind of break it up in two different ways or I think about it in two different ways. One of his actual misconduct where they are planting evidence on suspects, encouraging witnesses to lie in order to get favors done for their own cases. You know, times police go so over the edge that they become the folks who are committing a crime. So they would rob people of their drugs and money and they would do whatever it was and then plant drugs on innocent people. There was a shakedown scheme in Chicago in the housing projects where if you didn't pay officers, hush money bribes, essentially, they would manufacture serious drug crimes against you. And when it came time to bring those cases in court, police officers were invariably believed over the voices of innocent people who were poor and often people of color. And so that's one kind of way in which the police create no crime wrongful convictions, which is the actually create crimes that never happened. But the other way is also pernicious, just a little bit different. You know, a lot of times cities will set an agenda of broken windows policing. And they'll go after the order the police to go after low-level offenders under the guise that are under the thinking that, you know, if you go after these low-level offenders, we're going to improve society and stop higher level more serious crimes. But what we have seen is that police would routinely stop people who were doing nothing wrong, and often arrest them for bogus things like trespass, and I talked about this in the book when I was a public defender in the Bronx. In the 90s. There were this operation clean halls that were going on and the police had the right they were given permission to enter buildings and they would routinely arrest anyone who was in the lobby of a building who didn't have

identification, showing that they were allowed to be there. And that included people who had gone downstairs to the lobby to get their own mail but didn't have ID on them. It would include people who were there visiting their aunts or their grandmother, which of course is not trespassing. And people would be brought into the police station, they would be processed, they would have to wait in a holding cell for arraignment sometimes overnight. They would often plead guilty there on the spot at arraignment to a misdemeanor trespass, rather than having to come back to court to fight it. So that's an example of the police creating crimes that don't exist in response to sort of larger policy objectives. That surrounded Crime Control, and sometimes they did it because they could write so down in again, Texas sorry. In Harris County, the police were routinely stopping people in doing field tests on the spot of substances that the police believed were drugs and if the field test came back positive that would give the police the probable cause to arrest them. Well, it turns out as we know, field tests are notoriously unreliable and People again would be presented with plea offers, take it or leave it kind of right on the spot. And they would often plead guilty based on the positive field tests. And the only way we know that that's a problem now in Harris County did something very unusual. They sent out those field tests to be tested anyway, even after people had entered plea convictions, and the lab tests were coming back negative. So we know there were hundreds of people who pled guilty to drug crimes that were based on bad tests for drugs that they didn't possess.

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Joshua B. Hoe

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Yes, that's very depressing. Of particular interest. I mean, we've talked about many times on this podcast is the problem of or what I call the problem of prosecutors. We've talked about Brady violations. We've talked about lots of different elements of the problems created by prosecutors' offices. In terms of no crime situations, what else should people know?

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Jessica S. Henry

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Well, Brady violations are a huge issue and that extreme And, of course into wrongful convictions generally and no crime convictions specifically. But, you know, a couple of things to think about. So when the police make an arrest, one of the things that are supposed to happen is the prosecutor supposed to take a look at the basis of that arrest and decide whether there's enough to go forward with the case to proceed with the case. And oftentimes, that check on the police arrest doesn't happen the way it's supposed to. And instead, they rubber-stamp the arrest charges. And so that creates a problem because we then pull people into the system. And once they have been officially charged with a crime, prosecutors get very caught up in that machine of gaining convictions, even though prosecutors are supposed to be representing all of us, right? They represent this if you ever watch law and order, right. So the people of the state of New York versus John Smith, and the people include all of us, including the defendant and the defendant's families, but they lose sight of that right in an effort to gain convictions. And that's it huge problem. And so whether it is Brady violations where they fail to turn over evidence that they are required to do so under the Constitution, or whether it is simply playing fast and loose with the evidence or putting on forensic evidence that they should know is shady or putting on

witnesses that they should know or not trustworthy. Prosecutors kind of buy into the whole idea of getting convictions more than anything else. And the other piece that's kind of a problem is that prosecutors have gained as I'm sure you've discussed at length in other, you know, conversations, prosecutors really are the most powerful players in the courtroom today, because they're the ones that bring those initial charges and they often overcharge people to induce them to plead guilty. And there's this winds up being this informational balance where only the prosecutor really knows whether or not they're able to prove their case and how strong their case is, and so they dangle plea offers to people who have the choice to either take the plea or risk at all and sometimes face incredibly long prison terms if they are found guilty.

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Joshua B. Hoe

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It's interesting that you brought up on order, which is a show I routinely criticize it because it seems in a lot of ways you can almost see all of these things in the book and out of the book happen on a regular basis, but they portray it in most cases as heroic. So do you think that there are a role and kind of the larger narrative of what you're talking about that can be attributed to the media and to television depictions

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Jessica S. Henry

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we've been sold, and I say, we like the collective we all of us, we have been sold on this idea of crime and crime-fighting and using the criminal justice system as the only mechanism to respond to quote-unquote, criminal behavior, and so on. Prosecutors have been heralded as sort of these champions of justice. But justice is really defined as convictions. And there's never a lot of questioning about the foundation for the charges in the first place. You know, one of the things about our system of justice is that the burden of proof that the prosecutor has to meet is beyond a reasonable doubt. But as I say, in the book, beyond a reasonable doubt is not beyond all doubt. It's not 100% certainty. We have built into our criminal justice system, the possibility of error, and we make it incredibly difficult to prove that error occurred. And prosecutors know that and they can take advantage of that.

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Joshua B. Hoe

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Did you have any thoughts about kind of the way the media plays into this?

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Jessica S. Henry

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Just send I mean, oftentimes the media will sensationalized crime and the way that we need to respond to it and Herald prosecutors who gain convictions as heroes, as opposed to sort of taking a step back and asked And what's actually going on in the day to day operations, you're going back to those trespass cases, prosecutors didn't have to bring charges, they could have said to the police, this doesn't look right. This is the 10th case of trespass, brought from that building in the last hour, something is wrong here, but they didn't. And so I don't know if I'm

answering you specifically in the media. But I, I just think in general, there's an ethos about our criminal justice system that heralds or celebrates justice or conflates justice with convictions. And I think it's time we examine that that premise.

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Joshua B. Hoe

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Yeah. And I think it's interesting cuz I think one of the larger I guess what I might be trying to get at is it seems to me that there's some part of this whole story. That's just, there's something either in our nature or in the way we look at crime in general, that seems to mean that no matter what happens if there's a tragedy, we want to assign blame and we want someone to be responsible or something Like that because it does seem like your report on an extremely large number of cases that were sentenced and prosecuted as crimes but never really work crimes.

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Jessica S. Henry

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Exactly. I mean, and that's sort of when whatever the trigger is, whether it's a false accusation, the police planting evidence, somebody just misses labeling an event as a crime that kicks us into this criminal justice gear. And everybody does what they think they're supposed to do, instead of challenging or examining carefully and thoughtfully. a basis for this crime designation. They go full steam ahead to find the person who committed the crime, even when really had they just taken a step back, they might have realized there was no crime at all. And that's a problem. It's a huge problem because we do not as a society have any interest whatsoever in prosecuting innocent people for crimes that never happened. You would

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Joshua B. Hoe

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think not and yet, your book seems to demonstrate that we do it quite a bit of the time, I was a little surprised to see that there was a section about defense attorneys. Is it only because of constrained resources and kind of the large caseloads? Are there other issues here too?

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Jessica S. Henry

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Large caseloads, and underfunding are huge issues that plague public defenders. I'm a former public defender. I love public defenders. I think the work that they do in general is fantastic. But I also do think that in some jurisdictions, even public defenders are constrained by some real institutional pressures. So if you're assigned in some jurisdictions, you're assigned to a judge in a courtroom, and you're before that same judge each and every day. If you fight really hard for one case, it could be down to the detriment of another client and you learn that sometimes you've got to go along to get along, which of course, does not provide adequate and zealous representation to the individual defendant you're supposed to serve. And of course, it's not just That defense attorneys are constrained by the evidence given to them. So if the prosecutor is engaging in Brady violations and not turning over evidence they're supposed to or if the police are flat out lying, it's really hard for the defense attorney to adequately defend their clients when

they're working in such an unbalanced system. And then finally, of course, there are some lawyers who are appointed to represent all defense, all defendants who may not have experience or expertise or interest who are just doing it to make a quick buck. You know, I talked about lawyers who showed up to court who were intoxicated, who showed up to capital cases where they didn't even realize it was a capital case. He's really tragic, scary things that go on. And when you think about what the role of the defense lawyer is, you are literally as a defense lawyer, the only person standing between the entire weight of the state and your individual client that's a huge responsibility. And when it's not done properly, whether it's because of resource constraints, time constraints, or a lack of enthusiasm, it's hugely problematic.

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Joshua B. Hoe

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He also we've talked about a little bit already, but is there anything else we should know about judges point part in this kind of drama?

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Jessica S. Henry

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So glad you asked me about that because I feel like judges get a pass. And I don't understand why we don't talk more about judges. So in jurisdictions where judges are elected, they are subjected to the same kinds of political pressures that prosecutors are, and in many jurisdictions, to be a good judge, you've got to be a tough on crime judge. And that can mean that you do things that are not fair or just and in the book, I kind of talk about both some of the institutional problems that we have seen from judges who are sitting on the bench including racism, overt and implicit, and we also but I also talked about how they just sometimes don't do their jobs. So, in the case, for instance of a prosecutor trying to use evidence that is unreliable, judges actually have the authority to vet that evidence before it's ever introduced in court. And if it is not accurate or based on proper science, they can exclude it, but they don't. They usually allow it to be presented to the jury as if it were true. And that's a huge problem. I just also participate in a sort of excessive sentencing after trial, It's called the trial penalty. So defendants kind of know that if they don't take a plea, and if they go to trial, they actually exercise their constitutional rights, they could face a significantly enhanced sentence just for going to trial. Judges don't have to impose those kinds of sentences, but they do. And so they wind up being part of a system that insulates checks and balances that should exist whenever a defendant is charged with a crime. We

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Joshua B. Hoe

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talked about a little bit before too, but do you want to talk anything else about misdemeanors and how they play into the system problems?

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Jessica S. Henry

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So it's really easy for people to dismiss the idea of a misdemeanor as being you know, it's a minor offense, it's a petty offense. And what I would like to say is matters, misdemeanors matter. It creates a criminal justice fingerprint for people who have misdemeanor convictions, it can be an impediment to gaining employment, it can be an impediment to certain educational opportunities, depending on the nature of the offense. And so it would be easy to sort of say, oh, who cares? The system worked, it's fine. They got home right away. They just took a plea to a misdemeanor, or they only served, you know, a couple of days in jail. It's no big deal. But it is a big deal. And sometimes, though, people will take pleas to misdemeanors because they can't afford to pay even modest amounts of bail that might be set in their case. And so we have the system that has somehow routinized or come to accept the idea that It's okay for innocent defendants to plead guilty to misdemeanors, because there's really no harm. But there is a harm and it's not okay. And that's not what our criminal justice system was ever meant to do. We are not there to punish the innocent or to hold some people accountable for things that never occurred.

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Joshua B. Hoe

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So now we kind of get to the meat of things. So what exactly do you think we should do about this problem with no crime, wrongful convictions as a society and as legislators and whoever?

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Jessica S. Henry

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I mean, a lot of my recommendations would improve not just the criminal justice numbers, right. A lot of my recommendations would not be not simply limited to no crime wrongful convictions, they would actually improve the criminal justice system as a whole. But there are specific things that would reduce the number of no crime wrongful convictions specifically. And so we started out talking about forensic error. And I think, you know, we have to do a better job at vetting what kinds of evidence we allow into court judges need to do a much more rigorous job of reviewing what kinds of forensic proof prosecutors want to introduce. Judges need to allow defense lawyers to get their own experts so that they can challenge prosecutors evidentiary claims. And judges themselves may want to consider getting experts to help them understand whether the science that's being proffered to them is reliable. And, you know, I also talk a lot in the book about cognitive biases. And I still believe there is a place for cognitive bias training. Now I know that in the conversation today, that's happening around policing, for instance, the four officers who had been involved in the George Floyd shooting, they had received cognitive bias training. And it seems like there's some decent amount of evidence that suggests that the bias training up least people receive now isn't necessarily super effective. Right? And yet, you know, I talked about in the book there, there was a study done with a bunch of judges and when they were sort of primed properly and given they took the implicit bias test that your listeners can take over at Harvard's website. You know, it made a difference in the way that they judged and the outcomes that they gave. So I think there is a place for bias training. I don't think it's the answer to all things. But I do think it is something that we can consider. I also think holding prosecutors and police responsible right now prosecutors have absolute immunity for their actions that they

take in their role as prosecutors. that's hugely problematic because it means if they do something intentional and deliberate, they can still be protected. They still won't be held responsible. And even if we reduced it to qualified immunity, which is what police officers Have we also know that's an incredibly difficult standard for people to prove? Um, and so I do think we need to start thinking carefully about how we hold office, police officers and prosecutors responsible for their actions or ways that we can start to hold them responsible for their actions because that might reduce the misconduct that occurs

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Joshua B. Hoe

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during thought TV thoughts about how we can move the political needle on these things. Because I think, you know, obviously, right now, there's no shortage of people calling for reform, to radical reform of an even elimination and in certain cases of the police. And you certainly have had several years of backlash against prosecutors, we've had the progressive prosecutor, the so-called progressive prosecutor movement kind of grow out of a lot of these concerns. But it seems like when the rubber hits the road, there doesn't necessarily seem to be a lot of political will to make substantial changes. Have any kind of thoughts about that?

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Jessica S. Henry

37:02

I think, you know, when it comes down to dollars and cents, there's a very persuasive argument about why it doesn't make sense to be arresting, prosecuting and incarcerating people at the rates that we do. And I do think also, there is an opportunity now for a discussion about these quality of life crimes at the lower level that brings so many people into our justice system, and who are churned through each and every day. If we were to change the way that we thought about low-level offenses, that would really clear a lot of the overflow in our court system, and especially now with the Coronavirus having shut courts, the backlog is tremendous. And we need to start thinking differently about what we define as crimes and how we, how we engage with citizens to keep them out of the criminal justice system in the first place. Those are policy directives that are worthy of a conversation on whether it's reducing, whether it's legalizing marijuana, as many states have done already. or not, I shouldn't say many, but as some states have done already, or reconsidering this low-level quality of life crimes, that would be a really great place to start.

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Joshua B. Hoe

38:19

Do you in your own life? You know, first you kind of live this as a prosecutor, I mean, as a defense lawyer, big difference there. And then and then you kind of went into teaching how it's doing all the research for this book changed kind of the way you're going about what you do, if at all.

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Jessica S. Henry

38:41

I think it's just highlighted and solidified for me that my own anecdotal experience is continuing to happen out in the court system in every state in this country today, and that was one of the things that were not surprising. To me, but that, you know, sort of reinforced what I had always suspected. It's it there, these tragedies are unfolding not just in major urban areas, although of course, they are occurring in major urban areas. But they're occurring anywhere that there are poor people, or people of color. And we need to change the way we go about doing criminal justice, because we've lost the notion of justice, it's just not there anymore, and we can do better. And so I think being able to write this book, and really look at all of the different cases that I saw, and the different contributing factors help solidify for me that but I've known all along, which is that this is a system that is really stacked against the most vulnerable and most marginalized people in our society. And we have an obligation to step up and try to reduce that weight of the state against the people.

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Joshua B. Hoe

39:55

It is that something that you know, I mean, if you were gonna say everyone reading this book, I hope Here's something practical you all can take from this and kind of move into your everyday lives. Would that be it? Or is it something or do you have something like that?

2

Jessica S. Henry

40:08

Well, I think I think one of the things I would love for people to consider carefully was twofold. Really. One is I always tell my students, if you ever get called for jury duty, I hope you go. And I say that, because so many people that I know are always looking for a way out. And the reason it's so important to go is you get to see our criminal legal system at its know, its operation. And it's shocking when you see what goes on. And I hope that people learn to take criminal accusations with a degree of skepticism because we need to understand that there are all of these other things that happen when criminal charges are first brought. And so people are willing to participate as they should, in terms of serving on juries and if they are willing to sort of bring a degree of skepticism and knowledge about what goes on. I think that would be an important step. I also think people should be supporting root cause for reform. We need a smaller criminal legal system, we need to stop bringing so many people into the system, we need to stop punishing people as severely as we do. And I think we need to be aware that innocent people are wrongly convicted of crimes that never happened.

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Joshua B. Hoe

41:26

You know, interesting, you bring up calls for form. This is the decarceration nation podcast. And this year, I've been asking my guests, if they have any other particularly any innovative or non-innovative ideas, aside from just letting them run out for accomplishing decarceration. Do you have any thoughts here?

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Jessica S. Henry

41:44

I mean, I think I don't have anything that is particularly unique, but I do support reexamining at minimum re-examining folks who are doing very severe time for drug offenses. I mean, I think we've just seen that there's no reason for that. But, you know, one of the things I, I also study life without parole and death and the death penalty. And I've often wondered why we can't imagine criminal justice system of punishment like that which exists in Europe where Why are we? Why are so many people serving whole life sentences where there's absolutely no possibility of release ever? Could we ever imagine a system where after X number of years after 20 years after 25 years that even people who were convicted of the most heinous of crimes, at least would have the opportunity to demonstrate they have reformed that they have been? You know, that they have changed, that they are no longer a threat to society that they are truly remorseful? What would that look like? What would that be? Because our prisons as you know, have become in many places geriatric holding cells for people who are in their age. knees and are no harm to anyone. So I just wonder, wonder about that. And I wonder whether we could ever imagine a justice system that doesn't have those permanent removal of people for forever without providing the possibility of release at some point.

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Joshua B. Hoe

43:21

As someone who personally knows several people who got relief from the supreme court as juvenile lifers, and are now doing incredible things in their community, I really couldn't agree with you more on that. I always ask the same last question. What did I mess up? What questions should I have asked but did not?

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Jessica S. Henry

43:43

I think you did a great job. I mean, I think we covered a lot of ground here. You know, one of the things that I wanted to just circle back to you said at the very beginning that you don't usually take on the innocent because, you know, there's so many things that are important to talk about folks who actually are factually guilty. And one of the reasons I think, talking about the wrongly convicted, particularly the wrongly convicted who are convicted under the circumstances that my book talks about, but even in general, is I do think it shines a light on how just dysfunctional the entirety of our system is. And that can only benefit everyone who's pulled into the system. And so while I understand where you're coming from, I will say I do think this provides a really important opportunity to engage people and say, because we all can agree that an innocent person should never be convicted of a crime they didn't do. Oh, absolutely. And so I think that that creates an opportunity for a real conversation about all the different things that contribute to wrongful convictions, which frankly, contribute to a system that's broken for everyone.

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Joshua B. Hoe

44:54

Yeah, and I absolutely The reason I don't talk about innocence a lot isn't because I think innocent people should be in Prison obviously I don't. It's, it's because I mean, to be honest, it's

because there's a lot of people who talk about innocence and not many people talk about the system being unjust for the guilty.

You know, I tried to fill that gap.

Jessica S. Henry

And it's a really important one. It's a really important one.

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Joshua B. Hoe

45:21

At the same time it was very shocking, you know, I'm not sure I thought there were as many different instances of innocence problems within a sentence as the book identifies. So, once again, just tell everyone what the name of the book is and how they can find it.

2

Jessica S. Henry

45:38

Sure. So it is smoke but no fire convicting the innocent of crimes that never happened. It's published by University of California Press, and you can buy it anywhere you purchase books. So whether that's Amazon or your local independent bookstore, it is available for order online and I'll

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Joshua B. Hoe

45:55

include links to the book in the show notes. So thanks so much for doing this. It was a real pleasure to have you on the podcast.

Jessica S. Henry

It's really a pleasure to be here. Thank you.

Joshua B. Hoe

Thanks.

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Joshua B. Hoe

46:10

And now my take.

Last week, Michigan Attorney General, Dana Nestle wrote a letter supporting the commutation of Michael Thompson, who has been in prison for over 20 years, I think close to 30 years. And you're really for just selling a couple pounds of pot in a sense, and I'll tell explain more about that in a second. I agree that Michael Thompson should have his sentence commuted

immediately. And I really hope that the governor is listening. But I think that there are some important things for people to understand about the plight of Michael Thompson, since his case is in the news a lot lately, and also because it has larger implications for how we work on these issues. First, Michael Thompson is not in prison on for marijuana. He's in prison on a habitual sentence. The prosecutor combined the sale of a few pounds pot with a previous felony and later since the police searched his home after the crime and found a few antique guns and ammo. He also added charges of felon and I use that word in quotes in possession of a handgun and felon again in quotes in possession of ammo, and made this made Mr. Thompson eligible for a habitual sentence. habitual sentences are sentencing enhancements that allow judges to give life in prison sentences for crimes that would normally not be eligible for life. And Mr. Thompson's case, the firearm and ammo charges would have only been a few years in prison, and the pot sale would have been 12 or 13 years max, he's already served over 20 years. Last week, the Supreme Court in Louisiana upheld the legality of another such absurd habitual sentence when they maintain that the habitual life sentence for fair Wayne Bryant, who stole a pair of hedge clippers, and how has life a life sentence was born. legal and just my point. If we want to help the thousands of people across this country like Michael Thompson, and like fairway and Bryant, we have to address habitual sentencing. We can't just talk about things like pot or whatever the headline clipping that makes the story start go we have to address habitual sentencing. The beating heart of mass incarceration is long and indeterminate sentences. We put people in prison for life at a cost of once you include medical, usually of over a million dollars per person, plus everything that could have been different in their lives, but for being in prison, and we're doing it for things like hedge clippers, and antique guns, and all because we constantly fall for tough on crime security theater, in the 80s in the 90s. Everyone was terrified that there would be drug prosecution, I mean, that there would be drug crime in their area. And so they think flipped out and passed laws in a moment of moral panic that allowed things like 60 years or life in prison for hedge clippers. I do hope that everyone is pushing for Michigan's governor Whitmer to commute the sentences the sentence of Michael Thompson. But here's another little chestnut that they never included the news coverage on this story. In Michigan, we've done everything you can possibly do to make it almost impossible to create an early release. A commutation only means that someone becomes parole eligible in Michigan, there would be a public hearing and the board could still choose to deny Mr. Thompson parole, even despite a commutation from the governor. Even if the parole board were to grant Michael Thompson's parole, it is still an eight to nine-month process. And as even more current news stories have shown he has now come down with COVID there are no easy ways to end mass incarceration. There are no easy waste and mass incarceration there are no easy ways to end mass incarceration, we have to do the hard work, we have to change these terrible laws.

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