Fox Rothschild Podcast

The Presumption of Innocence

Episode 64: Cages We Built: The Making of Mass Incarceration in America

Featuring Matt Adams of Fox Rothschild and Rachel Barkow

Matt: Hi everyone, and welcome back to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild. I'm your host Matt Adams, and today we're talking about America's mass incarceration problem with Professor Rachel Barkow.

She's the Charles Seligson Professor of Law and Faculty Director of the Zimroth Center on the Administration of Criminal Law at the NYU School of Law. She's a past member of the United States Sentencing Commission. She's the author of *Prisoners of Politics: Breaking the Cycle of Mass Incarceration,* and we're talking to her today about her second book, *Justice Abandoned: How the Supreme Court Ignored the Constitution and Enabled Mass Incarceration*.

And Professor Barkow is no stranger to this program. She was our guest on episode 55 of "The Presumption of Innocence," talking about the power of presidential pardons, some of the unique situations that have come about as the transition into America's 47th president.

But Professor Barkow, before we get started, welcome back to the program. Congratulations on the release of your second book. It is magnificent and I can't wait to dive into it.

Rachel: Thank you so much. It's great to be back.

Matt: So professor, let's set the stage for our audience. Mass incarceration really is this term that refers to the dramatic increase of prison and jail populations in the United States.

And it really-- particularly if you're statistically tracking that trajectory --really began in the late 60s, early 70s And it's this discussion, intellectually, of why America has a higher rate of incarceration than other countries. And if you look at just the very inside flap of Justice Abandoned you lead with something extremely powerful. You say, "With less than 5% of the world's population, and almost a quarter of its prisoners, America undisputedly has a mass incarceration problem." We're going to get to your theories on why, but talk to us about that mass incarceration problem. Set the stage for our audience about, from your perspective, what that means. As someone who sat on the Sentencing Commission, who designed-- or helped to design-- the sentencing structure in the United States, what does that mean for us as a country?

Rachel: Yeah, so you know, it wasn't really until the 1970s that the United States started distancing itself from other Western democracies in terms of how much it used criminal law and punishment.

Because up until that point, up until the 1970s, we had incarceration rates that looked like other places around the world. We were really no different than European countries. And in fact our rates had been pretty stable over time as well.

So something changes in the 1970s. And it's a big change. You know, that's when we start to see incarceration rates go up and up and up. basically, five decades of increasing incarceration rates. And we start to diverge from other Western democracies in the world. You know, our closest counterparts would be, you know, places like Russia that incarcerate a whole lot of people. So, you know, the question is, what happened that led us to depart from our own historical practice and from other places in the world that look most like us?

And, there's a couple things that happen. So, first and foremost is we do have an increase in crime in America at the end of the 1960s. Homicides are up, and that's a pretty reliable crime statistic to look at. It's very hard to fudge those statistics. So we know homicides are up and other crime indicators are too. Drug use is high. Lots of people in America look around and they think it looks kind of like chaos and disorder and violence. And it leads to a political push to do something about that, you know, because the sensibility is whatever we had been doing wasn't working very well or why was crime on the rise?

Matt: To be tough, on crime. To be to, to kind of stick it to --

Rachel: Yeah. So that kind of kicked off the idea that, you know, law and order that to do more to combat crime. And, you know, there were early stages of that, at least as a political strategy before then. You know, most people credit Barry Goldwater's presidential run as being the first one where he kind of starts talking about law and order, getting tough on crime and disorder. That sort of plants the seed to kind of use this. It's used in, in some midterm elections in the 60s. But, you know, the, the Nixon presidential campaign of 1968 really puts it front and center. And he wins on that campaign.

And there is this push to do something about crime and disorder in America. There's a variety of different things that are done and, you know, one of 'em is longer sentences for things. so, you know, that kind of kicks it off.

But we see it throughout the 1970s and the 1980s, more mandatory minimum sentences. You know, in the 1980s we get mandatory federal sentencing guidelines at the federal level. Which really mean that the federal prison population starts to skyrocket after that. You know, they're very long sentences. They're much longer than what judges had issued before. There's lots of congressional mandatory minimums.

And states around the country are doing the same thing. So it's not like it's just Congress, it's kind of everywhere. And it's, really a political push to get tough on what looks to be this problem. And there's not a lot of good political forces against any of this, right? It's kind of, everybody who has

political power has something to gain from this. Because prosecutors kind of like what they're seeing. We're hiring more prosecutors, we're expanding offices. They're getting tougher sentences to threaten people with when they bargain with them. So they're getting more pleased as a result. police like it because they think that if they go to arrest somebody, that person's going to be locked away for longer, you know. So there's like a professional satisfaction, they like what's happening. Victim's rights groups are really trying to get longer sentences. And that victim's rights movement is kind of taking off in the same time period. You get corrections officers are happy to see this 'cause it means more prisons are being built, more jobs. A lot of communities like having prisons being built in their communities 'cause they think it'll bring jobs to the area.

A lot of political forces like what they're seeing and they keep pushing for more. And there's very few political pressures on the other side . And so that's what kind of creates this snowball effect where you increase sentences initially 'cause crime is rising, but then it sort of takes on a force of its own.

And even as crime rates start to stabilize and fall, we keep incarcerating, we keep ratcheting up sentences, we keep going for more, long past the point that it looks like it's responding to actual crime increases. 'Cause crime starts going down, but we're still increasing our incarceration. So that's kind of the dynamic of the last 50 years I think it started from a place of legitimate concern with crime, but then there were political forces that once they were in there, they kind of take on a life of their own. And then they're not really responsive to crime anymore. They're more responsive to the professional interests of the people involved. People who think there's something to be gained by consistently going out there and asking for tougher sentencing. And that's been what the United States political landscape has looked like now for about 50 years, half a century.

Matt: So what are the costs to a society that has a mass incarceration problem? When I think about mass incarceration and calling it a problem, I think about racial disparities. I think about economic issues. I think about communities, entire communities that are wiped out and decimated for generations. Generational strife in certain of our inner cities.

Talk about the costs. The easy argument is the sort of, let's get behind being tougher on crime because that helps you win a political office. But what are the negative consequences to a society of laws, like ours, when we have an identified mass incarceration problem?

Rachel: Yeah, you did a really good job ticking off the list, so I'll just add one more and then maybe elaborate a little bit on your list. So, you know, I would say one of the costs that's the one that I think people pay the least amount attention to is that at a certain point, these policies backfire and they make us less safe. And so for me, that has always been the greatest cost of all.

Like at a certain point, when you keep increasing sentences and lock people up for longer lengths of time, and the people who are incarcerated come back out. And you want them to come back out and successfully reenter society and live law-abiding lives. But as you keep lengthening these sentences, you are making it harder and harder for people to do that.

And we know that because we have studies that show that, that at a certain point a sentence is, is doing more harm than good. You're making it so much harder for them to reenter. You're putting

them in prisons that have no programming, you know, where there's a lot of people with mental health needs that aren't being served. So they're very violent places where people learn really bad survival skills for when they're released. You know, it may work inside a facility where you need to be kind of quick to defend yourself, and, and make sure that people know that, you know, you kind of don't step aside when something bad happens. Those aren't great skills for when you're released.

And those kinds of negative consequences for when people come out of prison mean that they're more likely to commit crimes when they do. And so the cost of longer sentences, it's similar with something like pretrial detention. I, you know, I think a lot of people just assume, okay, you're arrested for a crime. We as a society will be safer if we lock everybody up who's arrested, you know, 'cause then they can't commit any crimes. And what I think people fail to think about is, think about what happens to somebody when they are detained, right? They are going to lose their job, right? Almost no one gets to keep a job when they, you ask your employer, hey, you know, I may need a little time off 'cause I, I gotta go serve some time in jail. You know, like, those employers aren't going to keep them. They lose their job. They often get evicted from their housing. They lose custody of their children. You know, these are people who are living pretty marginal economic lives as it is, most people who get entangled with criminal law. So when they get detained pretrial, that is just earth-shattering for their whole existence.

So even when they're only detained for a few days, when they come out, it is so much harder for them to land on their feet and lead a law-abiding life. Again, we're kind of setting people up to fail with these policies. And time and again, when you look at some of the things we've done and people have studied, okay, how are they doing for helping with crime? This is what we learned. We learned they're having the opposite effect. You know, same thing with collateral consequences of convictions. There was this push to say, okay, well you know, you commit a crime, then you know you should lose public housing. You should lose professional licensing ability. You should lose your ability to vote and all these other collateral consequences.

Well, it turns out, these collateral consequences, again, make it harder for people to lead law-abiding lives. They can't get the licensing that they need for certain jobs. They can't get housing that they need. It makes it harder for them to be employed. And so we're setting people up to fail with policies that are too harsh.

So that's, I guess the first one that I would add to your list that I think people don't realize. I, I get the instinct. I think we all have it. Like, it, it's sort of intuitive where you think, okay, well let's just lock away bad problems. And we don't sort of stop to think, well wait a second though, are we actually just making it worse? Think about in your own life, you know, I, I sometimes have a tendency to compartmentalize and, and avoid thinking about a problem. But sometimes when I do that, I make it worse. You know, I'm just pushing it off to another day. And by not dealing with it head on, I'm, I'm actually making it worse. That's a little bit like what we're doing when it comes to our criminal justice policy.

Matt: We've kicked the can. We've kicked a can down the road and now it's metastasized. And I think you used that, that word in the preface to your book. It's metastasized into this gigantic problem that is not capable of being dealt with. Because who wants to spend more money on prison

systems? Virtually nobody. There's no political will for that. We have veterans that come home and are starving, would we spend the money on them, or we spend the money on prisons? The political will just doesn't seem to be there.

Rachel: Right. And a lot of people, by the way, who find themselves entangled with the criminal justice system, we do have a lot of veterans, you know, who have a lot of issues with trauma and mental health concerns that don't get addressed. You know, so there's, there's a real interconnection between a lot of our societal issues, but the point is that by not kind of dealing with underlying problems and just kind of thinking, well, we'll just kind of use this get-tough posturing, you know, we've kicked the can down the road, but we've put the can now in the middle of like a six-lane highway.

Matt: Yeah.

Rachel: And retrieving the can now has become way more difficult than before. So, so I would say that's one huge cost. And then your list is really the right one. So it's disproportionately falling on particular groups, and then if you're going to be quick to arrest people for things that have these structural deprivations, you're adding to that cycle of difficulties for people in, in communities that have, you know, higher crime rates and those are, disproportionately, communities of color.

So we have all kinds of racial justice issues with it. And, for people who live in those communities, they really kind of lose their sense of it being a legitimate system. It just looks like this system's not doing a whole lot to protect them. It's not a great solution for actually dealing with underlying crime.

So you have people who are in high crime neighborhoods. And at the same time, they find themselves constantly stopped by the police, you know, constantly knowing people who are getting sentenced longer for things than looks like would be a proportionate sentence.

And they lose faith in the government and then they stop cooperating, right? They don't really want to interact with the police. And now it's even harder to solve some of those crimes, 'cause, you know, people aren't going to be cooperating with a system that they think is kind of rigged against them. So you have that issue.

You have the fiscal costs as you point out, which is, you know, it's particularly awful to spend so much money on something that's not effective. Like it's just, it's not an effective way of addressing crime. And it costs us so much money. You know, it's very expensive to operate prisons, and, and yet we do, because it's that short-term thinking of just like, well, that's how we're going to deal with this problem. When we really should be using those things less and investing in things that'll yield better long-term results.

And, and then as you said, there's just the kind of cost to communities. You can see around the country, just whole communities that find themselves with huge numbers of people in and out of the criminal justice system. And, you know, that just is devastating for community health.

So, so all of this are, just really huge costs. And you know, we're having all these high costs, but we're not getting a return on our investment, you know, we're just not getting the safety that you would hope we would get. And if we were going to pay that kind of high cost, maybe you say it's worth it if you feel like we're all safer as a result, but you know, we're not.

Matt: And I want to stick with this sociopolitical sort of question just for a moment, and then I want to dive into some of the, the way that you laid it all out in the book against the backdrop of some critical Supreme Court decisions over the trajectory of this same period in time, starting in the 1970s and bringing us into the early 90s.

But the question I have for you while we talk about this as a broader societal problem and sort of the sociopolitical dynamics that surround the mass incarceration issue is: From your perspective, are we back to that same place we were in the late 60s when you talked about this becoming talking points by then-presidential candidate Nixon? Are we back to when our political dynamic in this country is geared towards the very rhetoric, the very same rhetoric, that you highlight as having been sort of the start of this problem? Because I can give two prominent examples. I live in northern New Jersey. I follow politics in New York, and I follow politics in New Jersey. And in New York, the now-governor of New York, has just essentially held the state budget hostage on trying to undertake what she called reforms to the way that defendants receive discovery.

And it would effectively limit the types of discovery and the pace at which discovery is given in cases resulting in more coerced pleas. That's the bottom line of what that was going to do. And in New Jersey, we have a gubernatorial race, a crowded field right now. And one is literally running every 10 minutes an ad on TV about repealing New Jersey's bail reform that went into effect in 2017, which eliminated cash bail in the state and went to a federal model based upon the risk to the community and that particular individual defendant's risk of flight and imposed a presumption of noncustodial pretrial detention. And I don't even think that that particular candidate-- to say nothing of Gov. Hochul in New York --even understands what that bail reform statute did. It has just become a prophylactic talking point to attack the opposite political party-- and to say that somehow every time, unfortunately, somebody in our society is a repeat offender, commits a crime and then goes out and commits another crime, that somehow bail reform policies are to blame for it. Just like Gov. Hochul I don't think she fully understands the idea that providing earlier and more fulsome discovery to defendants allows us to have a more efficient judicial system, a more fair judicial system. Not where the power belongs to the state, they can just pound their chest and say, take the plea because I said I'm going to hurt you, and not have the proof to back it up.

Are we back to that same place? Because I'm seeing some very profound examples of it in my everyday life, and I'm a criminal defense lawyer. and I'm wondering how people without a legal background are consuming it, because I know it keeps me up at night.

Rachel: Yeah, I think I we're back, but I guess I might say we never left. Because I think it's been pretty consistent from the end of the 1960s to today that that has been a campaign tactic. It ebbs and flows a little bit, in some elections and some campaigns, how prominent of an issue it is. But, you know, for most of that time, in most races, for most things, you are better off as a candidate being tough --or being perceived as someone who's tough-- on criminal justice issues.

There are some exceptions there have been some prosecutors elected around the country in the last decade who have successfully run on smart on crime platforms. But for the most part, you are better off and it's easier to get voted in and maintain your position by having that tougher stance. So I think the Hochul example, the rollback bail reform in New Jersey examples, that I think you could just see things like that, all across the country,

Matt: Yeah.

Rachel: Because, you know, I think it's important to note that both parties have found it in their interest, to be tough on crime. And as I said, the only real exception to that is sometimes in local communities and local races, there might be a different dynamic. So you could have a local prosecutor-- where you talk about being smarter on crime precisely because of what we just talked about, which is these are communities that totally get this whole tough thing isn't working and they want a different approach.

They understand you need reform, and so they will vote for people who seem like they will stand and are going to be smart about the issue. As soon though, as you go to like a statewide election, you know, then it's very different because now you're talking about a lot of people who live in the suburbs or they live in rural areas, they don't have a lot of day-to-day exposure with any of these issues, and so they're kind of just thinking about it in a more intuitive sense, which is: Well, yeah, I want things to be tougher. You know, I watch the evening news and I, I see crime on there all the time. Because, you know, the media coverage of crime doesn't really fluctuate with crime rates.

And what are the best stories? The best stories are gory, gruesome crimes, right? People gravitate to hearing about things like that. And so that is always going to be a healthy chunk of any local newscast.

And social media has only made that stuff worse because again, you just kind of highlight the outlier cases, the worst ones, and people have a sensibility that crime is rising even when it's not.

And so, if you don't actually live in a neighborhood that is the one that is directly fixing it, you just kind of tend to think things are bad out there. Maybe not where you live, but you're watching news or you're in social media in a world that makes you think things are just really dangerous in other places, and therefore you're going to want to vote for these candidates who are saying they're going to be tough about it.

Matt: Well against that, then can we actually reverse the mass incarceration problem in the United States? Against the backdrop of examples of these talking points that gain populist traction, where people sitting in their safe little bubbles say, oh, it's bad out there, but don't really know what it's bad. And take on causes like repealing certain criminal justice reforms that they really don't understand how they mechanically work. Is it possible?

Rachel: Yeah, um--

Matt: Can, can we change the trajectory of mass incarceration in the United States?

Rachel: So we've just walked through my kind of professional journey of the last decade. 'Cause the, the first book I wrote was kind of about these dynamics, and, you know, and I kind of lay them all out in detail and I talk about how they're counterproductive and they're really bad.

And then I, I got to the end of that book and I thought, well, so what do, what can you do to break this cycle? And I thought about three possible things. So one was, you know, the idea there are localities where you could elect prosecutors who take a different approach. And the idea there might be over time, as you see that they do those things and they work, maybe that would build up more political momentum.

But as you point out with the New Jersey example, sometimes even that doesn't work because New Jersey's bail reform has been wildly successful--

Matt: Wildly successful.

Rachel: It has dramatically reduced the jail population with no increase in crime. Like it is a good government policy. I mean, it's really one that other states are looking to emulate. But you know, it's hard to get that out in a 30-second campaign ad. And so it's going to depend on whether or not kind of the truth of the policy prevails or is it just these scare tactics? But, by potentially putting in place prosecutors who can win these local elections, maybe you do get some reforms passed.

Then I had another chapter that talked about, well, the other thing you can kind of do is you kind of tinker with the structure of government because you could create maybe some agencies that look at costs and data and that can maybe push back a little bit.

And then I got to my final chapter, which is when I started talking about the courts. And I, I said, you know what, maybe if we just had different judges, we could get better enforcement of constitutional protections. And that chapter was the one that kind of just sat in my brain after I was done with the first book. I just kind of kept coming back to the idea of why isn't that working now? Like, you know, that it's not like the Constitution isn't there with these protections. Really why hasn't that done more? And that's what led me to want to write a book that really outlined for people that I think one possible solution to all of this is if we had a court that was actually willing to make sure that constitutional protections get enforced.

And so, you know, it might mean you need a different kind of justice. It might mean that you just make a different set of arguments to the current court that, you know, reminds them that some of these cases were wrongly decided and they're not consistent with original understandings of the Constitution and the framers. 'Cause a lot of the justices like those arguments and, and care about them. And so I thought it was helpful to just kind of go through some cases that had, they just come out differently-- and I argue in the book they should have, you know, they should have if you're a believer in textualism and originalism and precedent. You know, these were cases that at the time they were decided, were wrongly decided on those bases. Like the way that you could argue they were rightly decided would just be pure pragmatic arguments where basically the government was coming into the court saying, we need this tool. You know, we, we need to be able to do this thing. And it's important for public safety and it's important for efficiency, so let us do this thing. And you

know, basically those arguments won and the Supreme Court said to the government, you know, okay.

And in the process, I think we lost this really valuable check on the political dynamic. And I think if you had a court that pushed back and defended the Constitution, that could help put the brakes on some of this politics. And that I think is kind of the genius of what our framers did, is they knew that. Like, it's so interesting to me when you go back and you read a lot of the original framing materials is this dynamic of the public just being a little blood thirsty and a little prone to severity. Like, it's at least been part of the human condition for a couple centuries because they were well aware of it and they therefore put in place a variety of checks in our Constitution so that you wouldn't have the masses kind of go to town using criminal law and punishment and so that the government wouldn't use that power in an abusive way.

So when you look at our Constitution, if you just kind of read it from start to finish and you look at the Bill of Rights, it's kind of amazing how much of it is about criminal law, how much it is about the government using its power over crime. And that is because the framers really were worried that the government would do that too much. And the only way though-- the Constitution can't enforce itself-- so the only way that those provisions keep their teeth is if you have a court that is actually willing to say to the government, sorry, I get why you want to do this, and it would be more efficient, but you can't. And that is what the Constitution demands. I'd like to include the court in the mix because I do think it's a potentially good source for really positive change.

Matt: Well, *Justice Abandoned* is all about the court. And you really take up where the last book left off. It's a self-described autopsy of the Supreme Court's errors spanning the 60s through the early 90s. It's a magnificent read, and you've really broken it up into six prominent cases.

The first three of which you say are the game-changer cases. You write in the preface to your book, and I'll just quote it, "The first three cases alone could have changed the entire landscape of punishment in America had they come out differently." The next three you say, perhaps just added some fuel to the fire. They were indirect. You write, "The last three chapters analyze cases that have an indirect but still critical role in allowing mass incarceration to metastasize."

Why did you focus on the six cases that you did, the three that you say are the game changers and the three that you say had an indirect role but perhaps added the fuel to allow mass incarceration to be the significant problem that it is today.

Rachel: I didn't want it to be just like a book of the cases that I don't like. So my criteria for this: First of all, I wanted cases that I could show were improperly decided under all the major theories of constitutional interpretation, including originalism. And so that's a big cutoff right there. Because for me, given how so many people really value that as an interpretive methodology, I thought it was really important to talk about cases that are inconsistent with the framers' design. So these are--

Matt: And by the way, for our audience, if they haven't recalled from your first time on the program, you clerked for Scalia.

Rachel: Yes. Uh, so I'm very familiar with the originalist methodology. You know, I, I take it very seriously. And I take it very seriously in this book.

And so the first five cases, I think, are very clear about how they're inconsistent with the original meaning of the provisions. The last case is a case that involves the 14th Amendment. And there the history is a little less clear. I still think the case was wrongly decided. It's the *McCleskey* case involving the use of statistical proof of racial discrimination. I, I still think the better historical argument is that that proof is valid for showing discrimination, but it's not as clear cut as the other five. And I admit that in the book. But the first five are, you know, kinda some of these, they're, they're so clear on the original meaning that I genuinely wonder if they would've come out the same had this current court decided them.

So that's one criteria, you know, it had to be consistent with the text and the history, and also the longstanding precedent at the time that the court had decided the case, you know. That, so these were real departures from what had been thought before they had been decided. And so those are kind of your major methodological approaches: text history, adherence to precedent. And, and I wanted to show cases that, that didn't live up to any of those major approaches.

And then the other criteria for me was that I had to be able to make a claim that these cases were critical for mass incarceration. So they couldn't just be like, involving criminal law at all. It had to be that they were really important for mass incarceration. So, you know, the first chapter deals with pretrial detention, for example. In pretrial detention, for 200 years, our country held the view that you could not detain somebody pretrial just because you thought they were a danger. Instead, you know, bail and pretrial detention was just all about making sure the person appeared in court for their trial. So it was all about flight risk, witness intimidation, evidence tampering. Those are the reasons that you had to detain people, not because you thought, oh, it's scary, they may have done this thing, right? That's what their trial is for. Everybody agreed that was the law in America, because the presumption of innocence means something. And what it means is you're innocent until proven guilty, so we can't detain you because of this thing we're saying you did, right? Like, that's not okay.

And that was a conventional, well-understood view in America until the end of the 1960s, when there's an effort to change it. And so *Salerno*, for me is a good candidate-- the first chapter is about *Salerno v. United States*, which is the case where the Supreme Court allows preventive detention after arrest because of dangerousness.

And it's a good case for me because it's inconsistent with that original history and meaning and longstanding tradition. And because when you expand pretrial detention that way, that is a direct feeder of mass incarceration. Because a quarter of the people who are incarcerated in America 25% are there in jails. And almost everyone who's in a jail is there pretrial. So, you know, that is a huge chunk of people that we have incarcerated on any given day are there as pretrial detention. So allowing that population to expand ends up being a huge driver.

And then similarly, the next chapter deals with plea bargaining. That's another key ingredient, because you can't have this many people incarcerated unless you find a way to have mass case processing. And the only way you can have mass case processing is you get people to plead guilty.

And, you know, how do you get that many people to plead guilty? You start threatening them with way longer sentences if they exercise their trial rights. And that's the birth of plea bargaining and coercive plea bargaining. The Supreme Court's acceptance of that, again, at a critical ingredient for mass incarceration.

And then that third in that trilogy of the first three cases is sentence length. Because if you have no check on how long a sentence is, if you don't take the Eighth Amendment seriously in terms of how long a sentence can be, you are going to have people who are serving really long sentences that are disproportionate to what they did. Which means on any given day in America, you just have more people in prison because they're there serving those longer sentences.

So, you know, those three cases together really form a cornerstone of how you get explosive incarceration growth in America without a check. Because the court basically one by one takes away those checks. Like, you want to detain people pretrial? Okay. You know, you want to threaten them if they want to exercise their true trial, right, with really long sentences? Okay. You are going to give them really long sentences for really tiny things like a life sentence for forging an $88 check? Okay. You add it all together and you see, okay, well it looks like the Constitution then becomes kind of a dead letter in putting any kind of break on that political dynamic. So those three I view as kind of heartland key cases, all of which, by the way, when you look behind the history of the Eighth Amendment or the jury trial guarantee, you know, they're, again, they're inconsistent with that original meaning and what the framers of our Constitution thought those provisions would be doing.

And then the cases, the the last three are the ones, as you said, that, they have a, a less direct role, but I think still pretty critical. I'm happy to talk about that if you want to too, or we can talk more about the first three.

Matt: Yeah, before we go into the last three, I just was struck when I was reading the beginning chapters where you're talking about *Salerno*, where you're talking about *Bordenkircher v. Hayes*, where you're talking about *Harmelin v. Michigan*. You're talking about sentences, course of plea bargaining and lowering the bar for pretrial detention. My mind went immediately to a phenomenon that I've encountered, not in federal court but in state courts where I practice, which is an escalating plea policy. Whereby policy of a particular prosecutor's office, a particular prosecutorial agency, you get your best plea usually at the earliest phase of the case without the benefit of discovery. And by policy, that office will not deviate from that best policy, even if they don't have reciprocal discovery or all the *Brady* and *Jenks* material is properly compiled. It is so frequent at that earliest phase-- and I'm talking about like a preindictment disposition conference in state court. As a practitioner, we so frequently, so frequently know zero about the case, we haven't truly done our defense investigation in earnest yet. But nonetheless, we are presented with what we are being told is our best offer that we're going to get in the life of this case. And that is the most offensive, most constitutionally, unsound, an affront to everything that we stand for in this country that I can think of.

I want to get your thoughts on that. Because I was having dinner a couple nights ago with a eclectic group of people. Among them, among them, two federal District Court judges, a couple of prosecutors and a bunch of defense lawyers. And we were having a great time, don't get me wrong. But this came up and I lost it. And the federal practitioners really didn't understand it. The only

people who understood it were these defense lawyers who practiced in federal and state court. And they were like, it's unfathomable. And when I read those chapters of your book, my mind went immediately there because this set the stage for that type of practice, that type of prosecutorial nonsense.

Rachel: Yeah, no, I totally agree. And it just makes a mockery of the jury trial, right? Because you have a right under the Constitution, if you are facing punishment greater than six months, you have a right to a jury trial. And it is a constitutional right that is one the framers exalted. We had the jury trial in our original constitution even before the Bill of Rights was added.

I mean, the jury was a big deal because it was the idea that you were going to have ordinary people had to agree before the government could take away your liberty. And what ends up happening to that valuable right, we don't treat other constitutional rights this way. We don't kind of put a price on them in ways that burden them, where it looks like we're taking away your ability to. The idea is that we treat these rights as important enough that you can't condition them on things. And the jury trial rights should be treated in that same kind of framework, same kind of idea, that you can't condition what the jury trial is, it means by putting a price on it, by saying, look, you want to exercise your jury trial, right? Well, I'm sorry, but if you do that, just know you're going to get a higher punishment as a result, right? That framing just doesn't exist for other constitutional rights. The court has not allowed that to happen. It has looked to see if that's too coercive.

And so the thing that you're describing in New Jersey, you know, if you can exercise your jury trial right, you are going to get a way higher sentence no matter what, because it means you have to kind of give up on, you know, the best offer is going to come when you don't exercise it at all. You know, and it's going to come early before you even have any idea of what your trial's going to look like, is insane right? It, it, it really does devalue what the jury is supposed to be doing. And the court accepts this in *Bordenkircher* and just is comfortable with the idea that the government can do that because it just says, well, you know, it's the give and take of plea bargaining.

But there's really no give and take from the defendant side. It's all just the government. And I think the only way you get a result like that from the court is because they just get a sensibility that we have to have pleas for this system to function because otherwise there would be too much of a burden on the court system if everybody went to trial. Therefore, you have to have pleas and you have to give the government leverage to get those pleas, and so the court accepts it.

And so it's just this purely administrative efficiency, pragmatic argument where the court accepts that. But to me, it is offensive because if you allow that pragmatism to prevail, you are just demeaning what it means to have a jury trial. You're just saying then you just think jury trials are too costly, you know, jury trials are too much of a burden on the system. We have to avoid them. We have to let the government avoid them. So we have to have the government have these tools. And so it all comes down to, okay, can we actually say that about jury trials? Can we just decide we're going to effectively write them out of the Constitution because we think they're too expensive? And to me, that's what happens in *Bordenkircher* is the court just saying it's too much. Like, you know, we can't do it. It's too much, it's too ....and, you know, and the echoes today are arguments you're seeing about due process.

The issue is, these are cornerstones though of our constitutional republic. And they are the things that protect us from an overreaching government. And so to think of them as too much is to put so much trust in the government not abusing the power that it has. And it's to just put faith in the fact that you don't need a check on that. And, even if you're not an originalist, you have to ask yourself, are you really that comfortable giving the government that kind of power? Because it's effectively letting the government be your judge and your jury, because you're letting them look at all the evidence, decide, yeah, this is what you should get in this case, you know? And if you don't agree with me and you want to take your chances later on down the line with the jury, you're going to risk a punishment orders of magnitude higher.

And you know that's really tough risk for anyone to take, you know, even if you're innocent. Because you don't know how the jury's going to decide. And in the situation you're describing, it's even worse, 'cause you don't even know the evidence they have against you. Like you can't even make an assessment 'cause you don't even know what witnesses they're going to call. Like, it's a horrible situation that I don't think anyone would devise, if they wanted to make sure that you were going to get to the truth, right? You'd only design a setup like that if you had full faith in the government's perfect accuracy and fairness and ability to objectively kind of look at the situation. You can't expect that from a human being. And government lawyers are human beings.

That's why we have courts. That's why we have juries. We want to make sure someone else is taking a look. And I think it's really important that we have jurors do that. I think the jury trial really is important and it's hard to make some of the arguments I make in the book today because, you know, we've had some of these things for so long, for 50 years, that sometimes people look at me like I'm nuts. Like, of course you're going to have pretrial detention, of course you're going to have plea bargaining. Like, you know, you can't put that genie back in the bottle. And, and why would you? And I think, you know, it's just important to try to remember why those things were put in the Constitution in the first place. You know, what is the value that they serve? And it really does serve this value of protecting liberty and making sure that nobody loses it. Until we've had a process that's fair, that's objective and that we presume you're innocent until we can show otherwise. You know, you put the government to its paces. And it's not efficient, you know, it's not efficient and it's not cheap. But I don't want to live in a country that prioritizes efficiency and costs over liberty. And, and I don't think that's what our framers want.

But I think over time we got Justices who did, you know, who, who were sympathetic to that idea. They kind of trust that the system works well, you know, why do you need all these other checks? Whereas I think, you know, if you think back to the framing generation, you know, they had some pretty abusive kings that they were dealing with, and I think they had a better sense like, whoa, you can't just trust the government. Like, you need some checks in place. And, maybe we're at a time in our country's history where people get that again.

Matt: I, I, I hope we are. I genuinely hope.

Rachel: Sort of looking around saying, you know, actually you do want to check on certain things.

Matt: Those back in the 1700s, they were pretty smart. They could predict what was going to happen. And I, I'm known to pull the proverbial pin on the grenade in a cocktail hour discussion in mixed company on this very issue. Because the prosecutors in my circles would say, well, these people know what they did. Well, maybe they didn't do anything, and maybe they don't have the resources to fight at the same level that you do. And there's so many other variables that often could drag this conversation for a while.

I want to just give a quote. One of my favorite quotes in any cases that I've ever read comes from a, a New Jersey State Supreme Court case called *State v. Miller*. It's from 2013. This is then-Associate Justice Barry Albin writing for the court. And I'll just --in full disclosure-- Justice Albin is a tremendous thinker and was a tremendous Justice. When I was President of the New Jersey Association of Criminal Defense Lawyers, I gave him our highest award. I appeared before him and was subjected to his intellectual undressing on more than one occasion. But, this is a profound statement. It says-- this is Justice Albin lamenting the plight of what he called, "an impoverished defendant that was treated as just another fungible item to be shuffled along on a criminal justice conveyor belt." And he continued, "Miller is more than another dispositional entry on a docket sheet. More than another statistic in some inexorable impersonal process that knows no delays for justice." And I think it captures exactly what you just said so poignantly and, and much more eloquently than I could ever. So I, I just wanted to inject it into our discussion here.

I was actually responsible during the COVID pandemic for challenging a system of virtual grand juries that was established during the pandemic to accommodate what was the fear of spreading the virus. And I was trying to suggest that we can't lose sight of the fact that this is the seminal entryway into due process, and we can't take any shortcuts. Because grand jurors were laying in bed and, you know, walking down the street and doing all kinds of crazy things that just were going sideways. And thankfully we're out of that time. But I used that as the opening words to our brief. Justice Albin himself was on the court at that time and then proceeded to ask me three hours of questioning based on the fact that we pretty much took that segment of his prior decision. We got a good chuckle out of it when he left the court, but it was not, it was not a comfortable three hours, I will assure you.

In our waning moments together, professor, I want to go down those other three cases and preview for audience that indirect but still critical role in allowing mass incarceration to metastasize, specifically *Rhodes v. Chapman, Terry v. Ohio* and *McCleskey v. Kemp.* For our audience, I think getting those cases-- we learn 'em in law school, we learn 'em in criminal procedure, we use them in our daily practice-- but there have real life consequences. And I think just like the example of what these decisions allowed vis-a-vis an escalating plea policy, these decisions gave birth to other decisions which gave birth to other deprivations of constitutional rights. And I think in your final segment of the book, the last three cases, I think you really gave clear examples. I think there's probably hundreds of those examples. But why'd you choose the three you did? And then talk to me a little bit about each.

Rachel: Yeah, so, there's a chapter on *Rhodes v. Chapman*, which a lot of people don't know, sometimes prison conditions slip through the cracks of cases. But that's a case where the Supreme Court was deciding whether or not overcrowding was okay. It was, you know, double bunking in cells

that were built for one person. And there was all kinds of medical and psychological testimony that said the space is not big enough, it doesn't meet the standards of humane conditions. 'Cause the living space the person had in the case before the court was about the size of the average door in a house. That was your whole living space. And people were held in their cells for all but six to eight hours week. And so, they were spending almost every waking moment of their lives with space no bigger than a door for themselves.

I don't really think it takes a psychological expert to tell you what that would do, and the damage that would cause to somebody. But I think, why the court ultimately said that was okay, two thirds of the prisons in jails in America at that time had a similar space crunch. So had the court said, that's not big enough, that would've effectively meant you'd have two-thirds of all prisons and jails, would have to be under some kind of court order to release people. You know, some, something would have to be done if that wasn't big enough. And so again, it's that pragmatic concern that comes in, right?

Because when you read-- especially there's concurrences in that case by more liberal justices and you kind of think how come they're not dissenting? And you know, it's, they have this footnote where they talk about two-thirds, you know, like, so that, I think they don't want to kind of upend what prisons and jails look like in America. So they're agreeing that this is okay. But at the same time, they write these concurrences basically saying the lower courts, but we still want you to police conditions, you know, we still want you to take a look. But the problem is it doesn't work that way.

And, you know, that brings up the point that you ask the question about, which is, what ends up happening after *Rhodes v. Chapman* is, you know, prisons only get more crowded, not less. We go from two-thirds to even more than that, uh, with space crunches. And, and we start to get triple bunking, in addition to double bunking. And no heat, no air conditioning, and that is the product of courts just not willing to step up and say, look, I know it costs money. I know you've gone too far. But the Constitution has a floor. Like we just demand humane treatment when the state takes away your liberty. Like, it's just supposed to be liberty deprivation, it's not supposed to be this additional kind of form of torture. And I think *Rhodes* is important for that reason, for mass incarceration, because if you don't have to meet the constitutional minimum, you're basically getting a discount sale on incarceration. You're getting half off the constitutional requirement 'cause now you can just double bunk people in a space that was the minimum space for one.

And then the reason that I picked *Terry* is because it really is-- first of all, again, you know, with *Terry*, the original understanding of the Fourth Amendment, you know, you need probable cause for a search and a seizure. And, Terry somehow comes up with this idea that -- ,

Matt: The words "reasonable suspicion" found nowhere in the text of the Constitution.

Rachel: Right. What if we call it stop and frisk instead of search and seizure and we just say it's like reasonable suspicion? Reading the history of how that case was decided is like literally taking a tour of the sausage factory. But, 1968, when the case is decided, and I think the most interesting thing, just kind of getting a sense of what the world looked like while the case was pending. So Nixon's running this presidential campaign and he and George Wallace both are running campaigns that are

these law-and-order campaigns where they're talking about the Warren court, where they're saying, you know, the court is one of the reasons why the country is in the situation it's in.

They're blaming the Supreme Court for decisions like *Mapp v. Ohio*, which imposed an exclusionary rule on unconstitutional searches. And *Miranda*, which, you know, gives people warnings when they're in the police station. The politicians are characterizing *Mapp* and *Miranda* as kind of like the end of law and order, and it's the Supreme Court's fault. And people actually have, election signs on their lawn that say "Impeach Earl Warren."

So, you know, the environment in 1968 is the court is very much on the ballot and there's op-eds around the country talking about the court. And so when *Terry* is a case that is there in the election year, the justices know that they have been attacked for not being sensitive enough to the need for the police to be able to tackle crime. And I think it absolutely colors how they decide that case. And so they come up with this watered-down standard for the police to be able to search and seize things. And it paves the way for proactive policing around the country. Because, you know, now the police all of a sudden can be way more aggressive. And by the way, the court knew it was going to be awful for communities of color. There was briefing, you know, the LDF and others had told the court, one of the reasons people are, in fact, rioting around the country is because the police are treating them so poorly. And if you allow this, you know, it's only going to get worse.

But the court did it anyway. And what that means is that you get a lot of cities in America where the police take on really aggressive stop-and-frisk campaigns. So, you and I know because of being in proximity to Manhattan, stop and frisk here at its high point was like 700,000 plus stops a year in Manhattan. Just to put it in perspective for people listening. You know, now we're more like 10 to 12,000. They were doing 700,000 of these in a year, because they could. And when you do something like that, you, you get mass incarceration. 'Cause you know, if you're going to stop that many people, you're going to start finding some things on some of them, right?

But you're doing it in a way that is compliant with the Constitution, and you're just decimating community trust and community relations. So, we have reduced dramatically the stops in New York, with no hit to crime. It's been an improvement with community policing relations. So it's another one of those things that like the court allowed it to happen, but I don't think it was necessary for public safety.

And then the last chapter, is on *McCleskey*. It's actually a capital case where the challenge was that the Georgia death penalty was being disproportionately used in cases where the victim was white. But the really important part of that case for kind of criminal justice writ large is there was this statistical study that showed it, you know, they controlled for like every factor you could possibly think of. Could it be the defendant's criminal history? Could it be the type of crime? They, they controlled for all those things statistically and were left with this unexplained disparity.

And we have statistical evidence like that for a whole variety of things in the administration of criminal law where it's like, you try to think of anything you could think of that could explain the difference other than race. And even after you control for all that, it looks like what's left is race. And the Supreme Court in *McCleskey* said, no, not good enough. What you need to show us is that one

person who says the racist thing. Like we, we need individualized proof in your case, not just statistical evidence. You need to show us that, individual person in your case who says the discriminatory thing. And that hurdle for proving racial bias, you know, is just devastating. Because a lot of racial bias is implicit, so there is no statement anywhere, because people don't even realize they're doing it. And even when it's explicit, you know, most people kind of don't say it out loud. So it means that it's just very hard to successfully prove racial bias. And so I included that case because I think that is a real part of mass incarceration.

I just think in America, we wouldn't have it the way we do if it was falling equally on all people. I think it's because it's disproportionately on people of color that it goes unchallenged. I think if there was more of a check on the racial disparities, it would make it much harder for it to continue. And so, so I thought it was really important to include it, with the caveat that the 14th Amendment's history is, is less clear on what you need to show for purposeful discrimination.

Matt: Well, the book is, *Justice Abandoned: How the Supreme Court Ignored the Constitution and Enabled Mass Incarceration*. Its author is Professor Rachel Barkow. She's been with us for the better part of the last hour. Professor, I hope we have time for one more question because --

Rachel: Oh, yeah, sure.

Matt: I want to bring this full circle. What do you expect today's court ---as presently constituted the United States Supreme Court of today 2025 -- to do, if anything, to address the mass incarceration problem? Or is there at least some hope that they will perhaps put some checking force on this populist political idea that has led to the very conditions that we face, that you've outlined in the book and we, we've extensively talked about today with the mass incarceration problem, will they do anything?

Will it be a direct rebuff of an acknowledgement of the mass incarceration problem, or will it be something more subtle-- hopefully, at least-- that at least pushes back on the idea that we can cure all the ills of the world by taking away people's rights?

Rachel: Yeah, I mean, I'm not great at predicting what the court will do. In my cautiously optimistic moments, what I hope is that if enough people kind of read this and understand the background of these cases, that they'll start to get a taint on them that I think they deserve. They should be the kind of decisions that you think, oh gosh, wow, you know, this was really poorly argued, they didn't look at the original history, this was wrong when it was decided. And that if people start to get that sensibility and they start to challenge the decisions, you know, I think it could be that one, at least they don't get extended. So, you know, for something like pretrial detention and *Salerno*, maybe it means then people at least start to put limits for how long you can be detained pretrial, or maybe more needs to be demanded of the government before they can do it,

So there might be ways without fully overruling it that you at least use that original history to recognize how important the presumption of innocence is, and therefore you put some checks on, pretrial detention, you know? But in an ideal world, it would be, it just gets overruled. You know,

eventually someone just says, you know, this was wrong the day it was decided and it it should be overruled.

I think we have a long way to go to kind of set the stage for the court to do that. I do think there's some justices on the court who would be sympathetic to the arguments. I think we have enough committed originalist and they're certainly willing to overrule things these days.

Matt: We've, we've seen it. We've seen it in recent years.

Rachel: Yeah. That's what I'm hoping the book will prompt, is kind of thinking about, okay, let's assume that is our target goal is to get these cases overruled. What's the best way to do it? I think the way that they strategized about getting *Roe v. Wade* overturned, for example, is kind of the blueprint, right? Like you had people who thought it was wrongly decided when it was decided. They played a long game of chipping away at *Roe's* scope, you know, finding decisions where they were kind of constantly narrowing access to abortion. And then ultimately 50 years later overruling the case entirely.

And so, there is a model where you would say, if you think a case is wrongly decided from the outset, you find ways to chip away at it. You find ways to educate people that it was wrong. And then, you know, you have a moment where then maybe you have the death blow on the case. And I, I think that would be the goal here, is to start really thinking about how you could do that in all of these areas.

But the kind of second best thing would also just be to use some of the history in the book to educate judges around the country for whatever live issues they have today. Let's say, you were thinking about something like, discovery in plea negotiations. Some states have thought about open file discovery-- I think some of this background could be really helpful because it could show a court like we probably shouldn't have accepted coercive plea bargaining in the first place. You know, here's this whole history about why the jury trial is really important.

But even if you assume that's water under the bridge, at a minimum for someone to make an intelligent choice about whether to accept that plea, they need access to all the information that the government has, right? They need to be able to look at that to make an intelligent choice. Because if the court is going to say, this is all give and take, and it's all about making an informed decision, what information does somebody need in order to be able to do that? You know, maybe what they need is access to open files so they know.

So I think there's a way to use the material proactively, even without overruling things, that I hope could prove to be helpful. And, you know, then there's potentially the last way it could be used is, maybe you get legislative solutions to some of these things, 'cause you get enough people who, recognize the world didn't look like it does today 50 years ago. You know, this is, it's relatively new on the country's long time horizon. So it's also a way of just kind of breaking up what people think has always been. Because it hasn't always been, and it's actually relatively new in terms of our overall country history. And so maybe it gives people a little bit more comfort in undoing it if they know that we existed in a way that didn't look like this before.

Matt: Well, it's meticulous, it's evidence-based and I can't thank you enough for writing the book.

It's evidence-based, it's history based and it provides the originalist viewpoint to smack down the notion that we should dilute the constitutional principles that we hold dear. We should be reinforcing them at every opportunity. And the dilution of them is what's causing the problems in our society, not upholding them. And I think for anybody interested in learning the evidence-based realities behind some of these decisions, and it's just a very useful tool as a constitutional lawyer. It's a very useful tool as a concerned citizen, in a society that right now is, being directed by what sounds good and what plays well in the media and what makes for a good social media post. Professor Rachel Barkow thank you so much for joining us on this latest episode of "The Presumption of Innocence."

Until next time, take care.