

Deadly And Dangerous Prison Conditions | John Pfaff (Ep. 6)

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Welcome to Conversations with Coleman. My guest today is John Pfaff. John Pfaff is a professor of law at Fordham Law School. His work has been covered in *The Economist*, *The New Yorker*, *The New York Times*, *Washington Post*, *National Review*, *Slate* and *Vox* among others. And he has a JD and a PhD in economics from the University of Chicago.

CH: John. Thanks for coming on my podcast.

JP: Thanks so much.

CH: Before we get into your book, which is excellent and it's called *Locked In, subtitled: The True Causes of Mass Incarceration and How to Achieve Real Reform*. Is that right?

JP: It is. I can never keep "true" and "real" straight, but I think I think that's right.

CH: Yes. Just give us a little bit of your background. How did you get into studying criminal justice?

JP: Yeah. I don't have a great like origin story of how I ended up here. I was always sort of, I think it's sort of that, I've always sort of fascinated by criminal justice, just in general for reasons that are, there's no clear reason. It's like I know. I grew up as a, you know, in a middle-class home sort of the kind of place that's completely removed from any real criminal justice context. I don't have any *personal* experience with it. Ah, I just always find it sort of interesting and I remember in grad school at what drew me into prisons at least was when I was in grad school sort of trying to figure out what I wanted to write about and you, something about Colonel Justice, didn't know what. I was reading Chicago Tribune one day. It was like some like no two paragraph article in page B 74 was just after the.com bubble head popped and said how the governor was going to close all these state prisons, but it wasn't going to fire any prison guards. And that just sort of struck me as there was just something, there's something interesting about that. But sort of just from a...like, what exactly is the policy there? And so I started digging into it and once you start and realize there's a really fascinating sort of empirical question there sort of. How did prisons grow? Why do they grow? Like the research wasn't very good. And then once you start, this initially just sort of more of a statistical interest in the question. And then as I spent more time on it, you start getting pulled into sort of the more human side of the story as well and I've sort of been there ever since.

CH: Yeah. Well what I love about you, is that it, you know... Unfortunately the issue of criminal justice is politicized and you can predict based on someone's politics what their views on the causes of mass incarceration are going to be, which is on its face is suspicious because it should really be empirical. And what I love about you is you seem to have a strong bias towards the empirical rather than towards *either* political side, which is so rare and so refreshing.

JP: Ahh. Well, thank you.

CH: Yeah, so big picture question. Why do we put people in prison...in the United States? And is the moral logic of incarceration here different than in other countries?

JP: It's it's a tricky question to answer. I mean even just taking the the the second part, second question first, I guess--is the moral logic *different*? I mean at some level, yes, right? You don't, you know, you don't get to where we are compared to where Western Europe is at without a different set of attitudes. It's just I think it's more a question of where exactly those attitudes come from, right? So no, *one* distinction I think that separates Europe from the U.S. historically, although that's shifting now, has been it's just our racial diversity. Right? And so, you know, there's a there's a strong sense that one of the things that fuels mass incarceration is a is a willingness to to treat people of color, especially black people differently and less well, and so we're willing to default to just locking people up rather than addressing underlying causes. Europe

doesn't have that problem as much because they're much more homogeneous. And there's some, it's not strong, but there's evidence suggests it as as Europe's immigration population has grown, their **3:55 opinion** of this has grown as well.

CH: Mm.

JP: Right? So is it a different attitude? *Sort of*. right, but it's partly fueled by different facts on the ground and depressingly, it seems that as Europe starts looking more like us, they seem to start acting a bit more like us, less so, but but more, right? And so even that even that initial question--"Is it a different attitude?" It's hard to separate out sort of underlying ideology from sort of how that attitude interacts with sort of demographic realities on the ground.

CH: And where do you stand on the traditional moral rationales for incarceration, which is to say deterrence versus retribution versus just sort of keeping a person from committing crimes while they're in prison? Like at a basic level, why do we put a person in jail?

JP: Right. So...

CH: Or in prison.

JP: I generally don't talk about retribution because either you sort of believe that or you don't.

CH: Mhm.

JP: If you believe that doing crime means you *must* be locked up in these conditions we lock people up in, then there's really, you believe that and that's what you believe and I can't push that. So I tend to focus more on sort of the the public safety side. I would say for the retribution side, I think it's important to understand like exactly that people understand *where* we are sending our people *to*. Right? That there is is the conditions in which we can find people, is that really what all these offenses *deserve*? Like I think people don't fully understand what our prisons are like and how *awful* they really are. But putting that aside, you know, my focus is much more on the on the public safety perspective, and my general take there is that whatever amount of deterrence and incapacitation and rehabilitation prisons provide, there are *far* more efficient and *far* less costly ways to achieve all three of those in almost every instance than than prison.

CH: Yeah and a ah speaking to conditions, just in the past few months I think, the justice department threatened to bring a lawsuit against the state of Alabama because the conditions in terms of frequency of violence, frequency of sexual assault and the virtual impossibility of of preventing those scourges, the justice department charged it with violating the Eighth Amendment, which bans cruel and unusual punishment.

JP: Right. I mean there's there are some photographs smuggled out of one of the Alabama prisons and no one picture. It's horrific to see what an inmate had actually, the person detained in the prison actually cut into himself, to scroll in blood on his wall like, "I'm depressed. Need medical help. Being ignored." Right? Because he had no pains to communicate that so he wrote it on his cell wall in blood.

CH: Mhm.

JP: Um. Or more sort of systemic, you know you have the Alabama lawsuit. Also you have California, which was one of the few states is that sort of finds itself in recent years under federal judicial oversight for it's horrible conditions. And California basically admitted *in court* that their system was so over constrained and their medical services were so inadequate that they had about one preventable death every six days. That translates to about 60 preventable deaths a year at at a time when in our execution system executes about 30 people nationwide, right? So so California's conditions were killing more than twice the number people as sort of the entire nation's death row combined. It's ah really horrific.

CH: And the fact that you know, it differs state-by-state is a *big* theme of your book. Talk a little bit about how our misperception of *the* i.e. singular criminal justice system shapes how we think about it.

JP: Yeah, and I think that's a great point. I think I just realized that there's about four or five different overlapping systems. We have somewhere, we don't even know the exact number, somewhere between sixteen to nineteen thousand separate police departments, right? And most, in most places the police department reports to the police chief, who's appointed by a mayor, who's elected by the city, right? Or a sheriff who's elected by the county. Then you have a prosecutor, and they're generally elected by the county. And then, which is a weird geographic border for them to represent. And then you have laws that are passed by legislators who are I mean, they're *kind of* state officials, but maybe they represent like 17 towns upstate or like 17 square blocks in Brooklyn, like they're kind of not quite state officials. And then you have a parole board that's appointed by the governor selected by the state. And so it's a very fractured kind of system, and the feds sit on top of that, but they can't do much. They can give some money. Although the impact of that money is understated. They generally can't enforce very much. They can only enforce federal crimes and those are very narrowly defined. Um you know, one of the more depressing things about *Serial*, right I think it was the podcast *Serial* was it created all this demand for a pardon. Everyone kept petitioning Obama to pardon this person. He but he had to post something on his, on the White House website saying like, "I can't. Like only the governor of Wisconsin can issue a pardon for Wisconsin offenses. It's just not what I can do." All right, and none of these bureaucracies overlap with each other in a convenient kind of way or work together all that well. There's actually um a, years ago the D.A. for the, for New Orleans was Harry Connick Sr. (senior), Junior's dad. Um, and he decided he was going to abolish plea-bargaining. He said, or he's gonna abolish plea-bargaining to get around shoddy police work. So he's like, you know, it used to be the police would bring you a bad case, you know, this could be aggravated assault, but the police work is terrible, so they'd offer a deal, like if you plead guilty to this low-level misdemeanor, we can sort of all put aside and not deal with the police misconduct. Um. And Connick said, "I'm not going to do that. If it's bad police work, I'm just going to drop the case altogether. So police, you have to do a good job." And when the first got reported, was discussed or this is a great effort to serve, undo bad plea-bargaining to to create more police accountability, and after Connick stepped down they did sort of an audit of his office and they found he had done, *nothing*, right? That the New Orleans police department didn't care, right? They were responding to the mayor. And Connick Sr. responded to the county. Those are different jurisdictions and the NOPD basically said, "We're still going to bring terrible cases. Do what you want."

CH: Mm.

JP: And so this idea that this is a coherent system where you can sort of move things around between various levels is *pretty wrong*. And they, each level can do it's own thing for it's own reason. Um, I think another striking example that has a lot bearing today is when New York state in 1972-74 passed the harshest drug laws in the country, the Rockefeller Drug Laws. They were *brutal*. And what's remarkable is that between '74, and '84, when the New York enacted the harshest drug laws in the country, the number of people in New York state prison for drugs went up by about a hundred total. Right? So for the first decade, we basically *completely* ignored the Rockefeller Drug Laws. Albany had passed these rules and you know Nelson Rockefeller had campaigned on them, in effort to like distinguish himself from Goldwater and the new and the New York Police Department and the New York City Manhattan **10:10 Dieteman**, New York's D.A., we saw her drive criminal justice in the state. They didn't care. Either '84 to '94 or '95, the number in prison for drugs goes up dramatically. Right. So suddenly in New York state, in particular New York City started caring about the Rockefeller Drug Laws, but that's because they actually cared about crack-related violence.

CH: Mm.

JP: And then as soon as the violence starts just dropped, the number people in prison for drug starts to drop without any reform being passed at all. Right? So you know, you see these big legislative changes coming out of Albany. The, we past the Rockefeller Laws. We reformed them. We basically abolished them. And the

actual number of people in prison for drugs is moving, prisons are completely tied to New York City's internal politics. It has almost *nothing* to do with what's happening in Albany. It's a very fractured system.

CH: Yeah. So we'll get to how prosecutors are really the key link in the chain that no one is talking about. But just just for listeners, some basic context, the vast majority of incarcerated people in the United States are in state prisons, *not* federal prisons.

JP: Right. So we have about 1.5 million people in prison on any given day. And about 88 percent of them are in the states, about 12 percent are in the feds. If you go down to the jail population, um, we have about 750,000 people in jail on any given day, but about 10 million people who cycle through jails every year, of which probably about 5 million are unique individuals, about five unique, 5 million unique people cycle through our jails. Well over 90 percent of those are at the state, city, and county level. And for arrests, we make about 10 to 12 million arrests every year. And about 98 percent of those are by local or county or state police, but not by the by the feds.

CH: So you're, the the the sub-heading of your book is *The True Causes of (in) Mass Incarceration*. So let's just define mass incarceration for people. Give a basic timeline. When did it begin and when did our prisons begin ballooning? When did they peak? What's the story been in the past few years?

JP: Yeah. So mass incarceration is one of these frustrating terms that I don't know when you go from *low* to *middle* to *high* to *mass*, right? It's because it's kind of used to mean there's too many people in prison, which is true. And we should have *fewer* people in prison, which is true. But what *fewer* means is unclear, right? And for me, I think that where particularly matters is that the state systems again, which hold most of the people, over *half* of all people in prison are there for crimes of violence. Right? So when you talk about reducing mass incarceration, do you really mean *dramatically* reducing it, which means talking about homicide and rape as crimes you need to cut back on? Or do you mean just cutting back on the drug and property offenses, which do something but would still leave us with the world's largest prison population. Like it's it's it's a it's a nebulous term that I think people really do use in fundamentally different kinds of ways. And that can be kind of misleading. In terms of the history of where we are, from the 1920s when the data starts through the 1970s, our incarceration rate is higher than Europe's, but not by much, around a hundred, about hundred thousand. It stays fairly stable. There're some bounces here in there, but it's it's roughly about a hundred thousand. Europe and Canada around 70 or 80, like we're higher but not much higher. Um, so so so in 1960s, we see crime start to go up and interesting prisons actually start to go down as crime goes up in the 60s. And then this round in the mid-seventies, prison starts going up with the crime rate. We talk about sort of this explosion in prison populations, and that's not really true. It's actually sort of just this slow, steady, relentless rise from about '74 until it *peaks* in in 2010. Um...Although, it sort of, it sort of rises steadily until 2000...

CH: Mm.

JP: ...and uh kind of flattens out over the 2000s and starts dropping in 2010. One important thing to realize about that is that between '72 and 2010, every, all 50 states grew.

CH: Mm.

JP: From 2010 onward, only about half the states have declined. And about half of that decline has *just* been State of California. Right? So the increase was this dramatic nationwide increase. And there's some variation across states, right, but the entire country grew. This decline's been very much concentrated in California and then roughly across a bunch of other states, but about half the states are still growing.

CH: Yeah.

JP: Um, so not nearly the same kind of systemic nationwide trend for the decline as we saw for the the increase.

CH: I wanna flag one thing there. Isn't it true, I've looked at Bureau of Justice statistics, that if you look by race, the *black* prison population specifically peaked way back in 2001 and has been declining since then, whereas the *white* rate kept on increasing throughout the Bush years and only started decreasing in 2010. Is that true? And if so, do you do you have a sense of why that is?

JP: Yeah, so that is true. I mean, it's important to put it in in context, right? The the black male rate goes from around 2000, I think it's around 2 thousand, 8 hundred thousand to around two thousand four hundred thousand, which is still a rate of of of, a *staggering* high rate. I mean two percent of all black men are in prison on any given day. And the *white* male rate goes from like 300 and something to 300 and something. Right? So the gap is still gap has shrunk, but it's still staggeringly large. Um. We don't really understand what caused that decline to start earlier. I've started checking out a few things. I don't have anything concrete yet. It does look like, you know in general, the decline that we've seen even since 2010 in general has been much, it's not really it's states, outside of California, which has this unique weird history to it, we're not really seeing *state* declines. We're seeing *county* declines. Urban counties are sending *fewer* people to prison, rural counties are sending *more* people to prison. And in some states, the urban decline outstrips the rural increase. In other states, it doesn't. And and and so the urban county started declining sooner. And as a general matter in many states, urban counties tend to have be more racially diverse. And so it seems like a sort of tie to that general trend. But, it's ex- and it seems like you know, the the more, the larger the minority population in the city, the larger its decline in incarceration for for minority populations. And so exactly what's going on there, isn't entirely clear. But it definitely seems to be a story of sort of more, much more local politics.

CH: What's the status of the hypothesis that the "war on drugs" is the main, or a main driver of mass incarceration? And this this hypothesis is, was most importantly popularized by Michelle Alexander's book *The New Jim Crow*. So what's the status of her thesis?

JP: Right. So, in terms of simple numbers, the percent of people in US prisons for drugs was around five percent or five or six percent in 1980. It peaks at around 20 percent in 1990. And then, since then has declined to around 15 percent today in the state systems. And so it was never the the dominant driver. Um, and it it's even more complicated than that for two reasons. One is that it's important to understand what we mean when we call someone as being prison for drugs. What that means is that is the most serious offense for which they were *convicted*. It doesn't tell us anything about what they're arrested *for* or why they went to prison in the first place. Right? So you can imagine there, we know there's some number of cases--we don't know how many--right? If someone who's say gets arrested for domestic abuse, he has heroin on him at the time of the arrest. His partner won't testify against him. And so the DAs decide that rather than try to force through a difficult aggravated assault charge with an uncooperative victim, "We'll just charge, if you just plead guilty to the heroin, we won't charge you for the aggravated assault, but we're still going to demand prison time for the heroin *because* of the assault." And so you show up in prison as a low-level nonviolent drug offender, but you're there because of that, either that contemporaneous violence or prior violence on your record that that we can't see. Um, nd so some fraction of that 15% percent aren't really there for drugs. We just don't know what that is.

CH: Do you have any sense of where it might be?

JP: None.

CH: None.

JP: Whatsoever. The other, the other thing to realize also is that often times, it seems (indistinguishable word or two) some very pretextual about the use of drug cases. So if you look at that that that trend in in drugs, you know that spike in New York state, talking about '84 to '94 and then it starts to decline, that spike in drug cases correlates almost perfectly with the spike in violence that that came in the wake of crack markets. And its decline comes basically at the time that violence started to decline, which suggests at some

level we were using these drug cases as a way to get at violence. And you might object to to doing that, right? Either charge the person with homicide or not. Don't use the crack possession to get the person you might vaguely suspect is guilty of something more serious, but it's just that the the the story is still more intimately tied to violence. What's particularly fascinating is over the 1990s and 2000s as violent crime has gone down as serious violence has gone down sharply, you'd think that that would be the time that we would focus even more on drugs, right? Because there's less violence, there's le-, we have more police, less violence, there's more resources to dedicate to these more discretionary offenses. What we see actually is, at least when it comes to prison populations, the number of people admitted for drugs actually falls, the share of admissions goes down for drugs, and it goes up for violence. Violence's share of prison populations grows both in admissions and in total population. We actually concentrate much even more on violence as violence is going down than we do on drugs, which again points to something more pretextual about about drugs.

CH: Mhm.

JP: And so it's not irrelevant, right? There there two hundred and fifty thousand people in prison on drug charges. Many of them probably *just* for the drugs, not for this unwritten, I'm sorry, underlying violence. You know, there are even more who have drug addiction problems that we don't treat because we take a punitive attitude to drugs rather than a medical attitude, right? If anything, where it matters is not the drug incarcerations, it matters in that there's lots of other non-drug crimes, which have drug abuse at their heart, and we remain very firmly committed to not treating that as a public health problem.

CH: Mm.

JP: If the "war on drugs" matters, it's much more in that attitude, than the actual like arrest and incarceration of people for drug crimes.

CH: Do you have a strong position on whether we should decriminalize or legalize or neither?

JP: So certainly for marijuana, I think we should legalize. I I defer to the experts in the field that legalization doesn't mean some sort of full, libertarian *nothing*, no non-regulatory approach, right? Like there's a lot to be said for regulating, you know, we regulate the use of alcohol. I think we probably, if anything, I think most public health people think we under-regulate drinking, right? So the same argument could be made for marijuana. I also know that the the people who study this much more closely than I do from a very specific legalization perspective, *do* note, I think correctly, that most of our research on marijuana's impact is based on research from the '70s and '80s when marijuana was much less potent than today, right? And so that's not arguing for criminalization, but it does mean that, you know, we don't fully understand that the physical health size of it. And any any sort of narcotic substance has some potential for risk, but I think using criminal justice to regulate it is *not* the right approach. Do we apply that to meth, LSD, crack, heroin, cocaine? I mean there's an argument that we could treat them in a much less punitive approach. Um, I think that's a much harder political step to make. But I th-, and I think the public health implications are less clear, but I think it's certainly, I would certainly be in favor of seeing, you know, where the research points on sort of non-criminal approaches for even the harder stuff.

CH: So the true causes of mass incarceration...One of the false causes in your view is the "war on drugs," although there *is* much to change change about the "war on drugs."

JP. Yeah, I wouldn't, I wouldn't say false. I think I think the way I try frame what I'm saying is that the things I'm criticizing they all *matter*, right? There is a "war on drugs." We take a punitive of attitude towards drugs instead of a public health approach and that has real cost to it. It's and it's not and it's not just that, there's something else that matters more is that by focusing on drugs, we *actually actively undermine...*

CH: Mm.

JP: ...focusing on the other thing, right?

JP: And so is that there that, you know, *each* of things I criticize, I criticize, you know, the "war on drugs." I criticize our look on public prisons. I criticize...violence, drugs, our focusing on sentencing rather prosecutors,...

CH: Yes.

JP: ...right? In *all* cases--drugs, private prisons, sentencing--they're all bad. Right there're all things we could do better. But by focusing on them, we ignore something. So the violence for for drugs, for example, my real criticism with drugs is that there's actually a survey that Fox did, came out, it came out just when my book was like about to go to print, right? The editors wouldn't allow me to destroy the page count to put it in.

CH: Mhm.

JP: They did this big national wide survey and sort of what do you think about criminal justice? They broke it up by liberal, moderate, and conservative. So one question was: "Do you think a majority of people are in prison for drugs?" And about 65 percent of all people said "yes." Majority of all three groups said "yes. About half are in prison for drugs." When it's really 15 percent, not 50 percent. *That's* a problem, but you can address that. Then the question that I think is connected that, that's so problematic was one of the next questions was: "For someone who's been convicted of violence, but poses little to no risk of reoffending, should we punish *those* people less?" And about 60 percent of conservatives, liberals, about 70 percent of conservatives said "no,"...

CH: Mm.

JP: Right? And what I think has happened is that we've convinced ourselves that we can decarcerate by *just* focusing on drug and property cases. And so, we don't have to talk about the difficult violence cases. We don't have to talk about how do you handle murder and rape and aggravated assault and armed robbery. And and so it's not and so it's not that we you know, we talk about drugs and don't talk about violence. We talk about drugs *in a way that makes it hard* to talk about violence, right?

CH: Mm.

JP: We often draw this distinction nonviolent versus violent, even though people cross those lines all the time. We frame it as like no nonviolent people deserve some sort of relief. Violent people don't, which is... There's a whole host of problems with even framing it that way. And so my my concern is that yes, the "war on drugs" is bad. And it's had bad implications and there are too many people in prison for drugs. We have to talk about that in a way that doesn't throw the violent crime issue under the bus.

CH: Yeah. I like the way you bite the bullet on this issue because I think *most* people agree, definitely on the left and increasingly on the right, that we have too many people in prison. And actually changing that requires taking a different attitude towards even the worst offenders. Perhaps not the worst of the worst, but people who have assaulted people. You know, it's possible that we're actually being too punitive with those people and that's the hard conversation. The easy conversation is to say, "Let people out of prison who, you know got caught with a little bit of weed on them." Right? That's easy and true.

JP: Right.

CH: But but there's this harder conversation that that it's distracting from.

JP: Yeah. And in fact, I would say for weed about *one* percent of the prison population is in for weed. Right? No one's in prison for weed. *Jail* might be slightly different,...

CH: Right.

JP: ...pre-trial detention misdemeanors. But felony prison sentences, *no one* is in for weed.

CH: Right.

JP: And you know, and you know, we have to talk about the worst of the worst. Twenty-five percent of our entire prison population is just murder, manslaughter, and sexual assault, right? That 25 percent alone gives us an incarceration rate that's higher than most European rates for *all* offenses.

CH: Mm.

JP: And so if we *really* want to like cut 50, cut 60, cut 70 percent which is, you know, what we we aspire to, sort of get back to where we were in the 70s, like we have to let people out for for murder and for rape and for armed robbery like for *real* crimes. And if you look at the the people serving the 10 percent longest sentences, 98, 95, 98 percent of them had been convicted of a serious violent crime. And the more and more, the longer longer prison, it gets closer more than half of them are in just for homicide. Like we have even, and and I appreciate that the person today sitting down, you know the legislator in Texas or Kansas can't pass like the, push like the "Let Murderers out Early" bill,...

CH: Mmhm.

JP: ...but I view *my job* as sort of the one and other like sort of people who aren't lobbying day-to-day to try to push that like move that over to the window a little bit so we can actually really start actually talking about violence.

CH: Yeah. Do we incarcerate people for too long in the United States?

JP: From a public safety point of view, absolutely. In fact one thing I push back against is the use of this term "*violent offender*." It's a really dangerous term and and very hard to kick. In fact in my book I say, "*Don't use this term.*" And every time I do a round of edits, I find that I'd snuck it in somewhere...

CH: Mmhm.

JP: ...without even thinking. And the reason why I don't like that word is it suggests that violence is a *state*.

CH: Mmm.

JP: *This* person is violent. That person is not violent. And that's just wrong, right? We know the fact that people tend to age into violence, but also age out of violence, right? That someone in their 40s is less violent than someone in their 20s. Their, you know, their hormone levels have changed. They're, they're wiser. They're calmer. They're older and slower. If I was just as violent now as I was in my 20s, like everything aches and hurts now?...

CH: (chuckling)

JP: ...I'm 44. I move slowly. Like it's just, life is painful now. I don't want to get in a fight and I'm tired. I just want to go home and take a nap.

CH: (chuckling)

JP: Um... And and and so we ended, I mean just the stack of research on this is just miles high that people age in and age out. And we *tend* not to acknowledge that. Right? In fact, you know, someone once told me that in Pennsylvania, the *median* age at which we *imposed* the third strike for that life without parole, not that

those serving that we actually now the judge says, "Now you're going to go to life," is 40, right? Which is right when you're no longer that person that you were before. And at an earlier age conversely, we have a really, we're really bad at predicting who at 18 is going to offend until they're 40. All right, and so we up front, we don't know who's gonna offend for a long period of time, who's gonna offend for a short period of time. And once they get older and finally have all that data on prior records, that's just about the time they're going to stop being that person...

CH: Right.

JP: ...and start aging out.

CH: Right.

JP: So yeah from a public safety point of view, these long sentence provide no real benefit. You know, (chuckling) it's worth pointing out--just just the attitudinal difference we have in other countries. D.C. right now is debating how to dress this this resentencing law they have. And and law on the books right now says that if you're convicted of a serious crime when you're 18 or younger and you've served at least 20 years of your sentence, you can petition to be resentenced, which might give you a better shot at parole. The reform law they're trying to pass is shift the cutoff from 18 to 24 and change the amount of time spent in prison from 20 years to 15. That's it. Even *The Washington Post* editorial board came out against this saying, you know, "People have *only* served 15 years, right? This is problematic." And so I looked it up and in 2012 in Germany, which is last year I saw data for, there're exactly 96 people in the entire country who have been sentenced to more than 15 years in prison.

CH: Wow.

JP: I could write each of their names on a single piece of paper. Or in the Netherlands, like 98 percent of all people who go to prison are out within four years at tops. Most are out within six months, right? And so this idea that: "Well, if we don't lock you up for over 30 years, like that's not gonna work." Like that just, it's a very *American* thing, you know? Um, you know, in another example is in Finland Finland or Norway, you know I can never keep them straight, there's Anders Breivik, right, one of the worst mass murders in world history, you know, he murdered like 75 people, including 60 kids at a political camp on an island. He got the *maximum* he could get, which was 20 years with parole eligibility in 10, right? And he faces like sort of lifetime confinement on a protective basis, but that's served annual review, but his criminal sentence was *maximum* of 20, parole in 10, and most of the victims' family said they were okay with that, right?

CH: Mhm.

JP: They didn't need his life just completely locked up forever. Like they didn't you know, they were just used to these lower sentences and that was viewed as as okay. We are just, our our sense of what is required is *profoundly* more punitive than any sort of data suggests and than any other, most other countries in the world even *think* is necessary.

CH: What's your view of private prisons and the so-called prison industrial complex?

JP: Right. So, I think first when we talk about privatization, we want to separate out two pieces, right? There's the actual like Core Civic Geo Group, right who actually run the facilities right, actually open prisons, run prisons, manage prisons. And to put *them* in perspective, they hold about 8 percent of all prisoners are held in these private facilities. Um, about half of those are, about half of all private prisoners are held in just five jurisdictions, and there's no evidence that those jurisdictions saw any different outcomes than ones without private prisons. Um. We spend about three billion dollars a year in, sort of the revenue they take in, it's about we spend giving them it's about three billion dollars a year in comparison of the 50 billion that we spend on correction, state level corrections every year. About two-thirds of that, about 30 to 35 billion of that, is wages that go to public sector employees. I said private prisons make about 300, 3 billion in revenue and about 300

million in profit. And the private, the *public* sector is making 35 billion dollars *just in wages*. Right? And so the *political demands* are going to be much stronger coming from the public sector than from the private sector. I know New York state, for example, New York state is actually an interesting case because we actually have sort of the longest sustained decarceration in the United States. New York, New Jersey both started shrinking in 1999, a solid decade before the rest of the country. New Jersey has the largest percent decline during that time. New York state has the largest *total* decline. We've shuttled about 25 thousand prisoners since that time. Yet during that same period with *no* private prisons in the state *at all* at the adult level, our prison budget rose by almost a billion dollars. And we couldn't close a single prison because because the guards leap- lobbied really hard to keep these *public* prisons open, right? They have a very vested interest, often times being a prison guard is actually a *horrible* job. Now the levels of like suicidal ideation amongst prison guards that it rivals that of of combat veterans who have seen active combat. Right? It's it's a *terrible* job, but oftentimes, it's the only job in that in that community. And they're going to fight really hard to keep the one, like decent middle-class job there, right, as well as the legislators who have these these prisons. Um, and so the private sector there doesn't do much. I think it's also worth noting that you *can't get into* the private prison until you've gone through the entire public system.

CH: Mm.

JP: Right? You need *public* police officers to arrest you, you know a *public* prosecutor to charge you, you need a *public* judge to sentence you. You need to get, your charge gets sent to a publicly run D.O.- Department of Corrections. And then they decide at the last step to send you either to a publicly run or privately run facility, where the private contract is being signed by public officials, right? So it's not like we sort of privatized corrections. Alright? It, it's that we sort of *paid* that last step differently. The other piece we talk *less* about, more so now but less so, is not the people running the prisons, but the private contractors inside the prison, people who run the phone system, the people who run the commissary, right? And there're, maybe there's a bit more to be concerned with right. They they've charged incredibly exorbitant prices for like deodorant or phone calls or. They're trying to make a profit off that in ways that perhaps impact the prisoners' lives in a much more immediate kind of way. Um, still they're a relatively small player, like we talk a lot about you know, the state of the private health care systems that do a terrible job in in in prisons. And they *do*, but still a majority of all prison health care is provided by the public sector. And plenty of those public sector healthcare systems are also terrible, right? The California system that was killing six people everyday, *entirely* publicly run, right? And so again, there's there's, and there's no *real* evidence that the privates and the publics, one's any better or worse than the other, right? There's some studies point one way. Some studies point the other way. On average the sense is that, there're really good public facilities and *horrific* public facilities. There're nightmarish privates and actually some people say the best prisons they've ever seen have been privates. You know in Florida for example, *for years*, they've changed their website now, but for years the State Department Correction had a, had like a FAQ page, like 10 facts and myths about Florida's Department of Corrections. And myth number one, the very top thing you think they want to make sure you definitely saw was: "Don't worry. Our prisons don't have air conditioning. Here's a limited number of places we have air conditioning. Don't worry. We're not spending money to keep Floridian prisoners air-conditioned." And then in *really* small print at the bottom they say, "...*except* all of our private prisons are fully air-conditioned." Right? So apparently in Florida inmates actually would, people being sent to prison would *fight* to be sent to private prisons because they actually would get air-conditioning. And you know, in places like Texas and Florida, people die every year from heat exposure.

CH: Mmhm.

JP: Right? And so this idea that there's these horrible privates here and these much better publics there... The publics are terrible too. And it's it's kind of a a a distraction.

CH: Yeah. So the thing that's not a distraction, that we should be focusing on much more according to you is *prosecutorial discretion*. What does that mean? And why does it matter? And how do we know that it's the main driver of mass incarceration?

JP: Yeah. So what I discovered, and this is one of these times I was surprised by my own results is as sort of looking at you know, most studies to try to understand prison growth look at sort of trends in *crime*, trends in arrests per *crime*, and then they look at trends in prison admissions per arrest. And that always seemed to be really important. But prison admission per arrest is really strange because to get to prison admission, if, the odds, you have to be arrested, you have to be charged, and then you have to be convicted, then be sentenced, then be admitted. And they skipped over, they lighted all those steps together. And they did that because we don't really have *data* on prosecutors at all. So you, they couldn't really see it, so they sort of jumped over it. And so I came across this data set that looked at actually felony cases filed in court. That's something prosecutors completely control and around like '94 to when I, when I looked at it in 2007 2008, so this really fasting period of time where *crime* was going steadily down, *arrests* were going steadily down, and prison population's were going steadily up, and what I found is that crime that goes down, arrests serious arrests go down, felony cases go *way up*. And then the admissions kind of stay in lockstep with felony cases, right? So the chance that you go to prison once they file a felony charge against you doesn't change, but the chance that your arrest turns into a felony charge practically doubles.

CH: Mm.

JP: And so that suggests something, *something* that the prosecutors are doing. They were, they had this shrinking pool of arrests and they were sending an ever-larger numbers of them into felony court.

CH: Mm.

JP: And we don't and and and that explains a *huge* chunk of the prison rise over the 1990s and 2000s. The amount of time spent in prison, at least outside of homicide doesn't rise that much, but this admissions part rises. And it rises because of the D.A. We don't *really fully know why yet*. Um, in some ways I think the the most interesting explanations are probably the most boring. That's a common theme to my work--that the boring stuff matters the most. I think it matters the most because because it's boring, it's a lot to persist.

CH: Yeah. I mean I think there's also like like the story about so like you're describing these like kind of four links in the chain deciding *whether* someone goes to prison and for how long. One is the police arresting you.

JP: Right. And that goes down. Well first you need crime, the crime to happen.

CH: You need the crime to happen.

JP: And that goes down over the '90s and 2000s.

CH: And then there's whether or not the cops are arresting most crimes.

JP Right. And the chance of being...

CH: ...which goes down.

JP: ...arrested stays the same, so that the, roughly the same, so the number of arrests goes down. So...

CH: So we know that *that* link in the chain is not causing mass incarceration.

JP: Right.

CH: Then there's this second link, which no one even thinks about. Well first there's a third and fourth link, which is whether you get *convicted* of a crime...

JP: Right.

CH: ...and for how long.

JP: Right.

CH: Both of which people think about, but there's this sort of invisible second link, which is you probably a public prosecutor deciding whether he's even going, he or she is even going to press charges.

JP: Right.

CH: And *that's* the thing that has changed most in the past 30 odd years.

JP: Right. Or at least, I can see it changing from the '90s to the 2000s.

CH: Right.

JP: I don't know what's going on in the '80s. I just don't have data going back that far.

CH: The, I think the problem, one of the reasons that that has no traction is *that* doesn't have a clear political um implication for either side. So people just ignore it because you know, there's, it's not a *fun* thing to talk about. It's sort of *wonky*...

JP: Right.

CH: ...and, but but it's a *huge* issue.

JP: Right. I think it's lots of things. I think it's that. I think it's--we just don't gather data while our prosecutors do, so the numbers just aren't there. And so we tend to overlook the things we don't *count*. Um, you know, someone else's got, David Sklansky at Stanford's argued: "I think there's a lot to this that what pro-, what we ask prosecutors to do is very complicated." Right? Police have a very simple job. And after conviction, judges have a very simple job. Our prosecutors like, we ask them to do *a lot*. Like they're they're both, I mean unique amongst lawyers in the United States, prosecutors take a completely different oath, *ethical* obligation. Right? For every other lawyer in the country, your ethical obligation is to represent your client as aggressively and forcefully as you can. Prosecutors, public prosecutors take an *oath* to do justice, right? Since their their goal is not to just match, their ethical obligation, regardless of what their political, of what their employment goals are, but their *ethical* obligation is not to get a conviction, or is sort of *do justice*, which is this much more amorphous, harder to pin down kind of thing. Um... And so yeah, so we've overlooked them. And part, but I think we also overlook them just because we didn't have data on them. So it's hard to see what they were doing. And so now that we see it, you know, I think we've seen this this greater attention now being paid to prosecutors. And and like to be clear, like people well before my work understood prosecutors were hugely important. I think it was just, we didn't quite see *how starkly* important they were, and where where in particular, their decision was driving it. It *wasn't* that they were choosing to impose longer sentences. They were *choosing* to push more arrests into the felony system altogether. I think that was the part that was somewhat surprising to see. Um, you know, as as to *what* has changed--the best thing I've been, sort of, the most, there's a lot. But this or that the pieces that are perhaps being the biggest is this kind of weird result I've seen is that between 1970 and 1990, as as crime went *way up* and as arrests went up and the system started doing more, we didn't really *hire* that many more like line assistant DAs. It goes from like 17,000 to 20,000 nationwide. From 1990 to 2007 as crime goes down and arrests go down, we go from 20,000 assistants to 30,000 nationwide. So we hired three times as many as crime was going down and while we don't have any good metric of of D.A. productivity, every sort of proxy I can use, sort of tells the same story, which is that the average A.D.A. that is sitting at her desk today is no harsher than that same A.D.A. in 1990. We just have 10,000 more of them.

CH: Mmhm.

JP: Right now, if we make 12 million arrests and admit 600,000 people to prison, like you can *always* find a case to charge to keep your numbers up...

CH: Mmm.

JP: ...so you justify your position, right? And so it's this sort of this bureaucratic story, which in many ways I think to try something I think what's anyways I think what's an under-appreciated point is that you can and I do talk a lot about all these *policy* failures, like these *structural breakdowns* that drive it, but in many ways, it's a, it's a it's an ideology, right? We chose to pump money into prosecutor offices to let them hire more assistants, you know, as crime went down *rather* than putting that money somewhere else. And so as much as that's a policy failure in this sort of this, short in sort of this narrow approach, it's actually I think, a more, broader indicator of a broader sort of political or moral decision that drives the process.

CH: So in a very interesting part of your book was the comparison of how much we invest in *public prosecutors* compared to how man-, how how much we invest in *public defenders*. And part of the story is not just that we hired *way more* prosecutors at, even as crime was plummeting, but that their relative advantage compared to public defenders is pretty immense. Talk about that a little bit.

JP: Yeah, yeah. And so I would say I have no idea if that relative advantage has grown or shrunk.

CH: Mmhm.

JP: Our data on this is so thin I just know that as as around the late 2000s, in which the last time we have good data, it was big. Um, and so at the simple numbers we spend, at that in around 2007, 2008, we were spending around six, six or so billion dollars a year on prosecutors and we were spending about 4.5 billion dollars on all forms of indigent defense, so a public defender office, so states, there's a huge variation in how states and counties do it. Some states have like formal public defender offices. Other places, the courts will just appoint lawyers and pay them to take on cases. In a place like New York City where we have public defender offices, but they're actually private groups contracted with the city, so you know, Brooklyn Defender Services--it's not actually a government agency. It just has a government contract, but are basically like public defenders. Um... And so and and these key, these public, these indigent defense lawyers, whether the public defenders or appointed counsel, they represent about 80 percent of the people who are facing prison time or serious jail time. Right? So, so they take on almost all the cases that qualify as indigent. And so you start off initially with this budget gap, about 4.5 billion on one side for the defenders, about 6 billion for the prosecutors. But the real gap is actually far bigger than that. There's actually um, a report a study I see, I saw that looked at *just* North Carolina because the North Carolina Office of Indigent Defense did the study because in North Carolina, the D.A. budget and the public defender budget were the same. And the public defender, the the D.A.s actually said they were objected to that because because *they* have to handle a hundred percent of all criminal cases. And North Carolina works out that the public defenders handle about 50 or 60 percent and so in some ways they thought that budget parity was unfair to the *prosecutor*, not to the public defender. And what the Office of Indigent Counsel found was that: "Wow, wait, hold on a second." They said: "You know, when you, the D.A. wants to do an investigation, you called the police and the sheriff and they do it for you for free. When the public defender wants to do an investigation, they have to *hire* an investigator to do it. When you want a, a sample DNA sample tested, you send it to the state lab that does it for free. The public defender has to send it somewhere and *pay* to get the test, the sample tested." If you add in all the free services the public, the prosecutors get that the public defenders don't, it goes from being parity to to the prosecutors having a budget *triple* that the public defenders.

CH: Yeah.

JP: Right. And so in many ways the numeric gap doesn't begin to tell the story of the of the actual like reality gap between resources they have.

CH: And you tell one among many heart-wrenching stories. I think it was South Dakota, but there perhaps a few states like this where if not most where, if you're poor and you're accused, arrested for a crime and you didn't even commit the crime, or you have a good public defender who gets you off, *you have to pay* for the public defender's time. And if you *can't* pay it, *that's a crime*.

JP: Right.

CH: That I mean, that sounds like it's a paradox.

JP: Yeah, so you have to pay, there's some sort of fee associated with public defense in 40 some states. In some cases, it could be like you have to pay a fee to apply to be considered indigent and some...

CH: And by the way, you have a *constitutional right* to a public defender.

JP: Right.

CH: So then you are sometimes forced to pay for that constitutional right.

JP: Exactly or to pay to see if you qualify to have the state fulfill it for you or not or pay for it once it's provided because the the the Supreme Court opinion Gideon basically says you have this right, but doesn't lay out exactly what that means. Right? These are tell the states, "you have to provide it," but provide no other details about how to provide it. Um, and they've never really been willing to address that issue substantively ever since. There there have been Supreme Court cases *about* the quality of indigent defense, but they always focus on sort of this--it's called the Strickland standard. It's about like is the rep-, is the representation in this case sufficient or not? They never address these broader structural issues like how should states fund it. So in 47 states you have to pay maybe settle a filing fee. Maybe it's like South Dakota where you have to pay by the hour. Some states you can wave it. Some states they can't. And then in South Dakota, there's a particularly egregious case where they then make, you have to, I think it's like 80 bucks an hour for your public defender. And then you have to pay even if you're acquitted. And failure to pay itself as a crime. Not every state is *that* bad. Um, no. But but yes, I know we we make it very very hard to to (chuckles or coughs) actually exercise this right. And we tend to systemically underfund the offices. So they tend to be kind of overwhelmed, kind of all the time with with just you know, ridiculous caseloads. It's a very, you know, it's not a right we've consistently taken seriously at all.

CH: What's your opinion of cash bail? There's a big push to get rid of it in many places. What's your take?

JP: Yeah. I mean, as a general matter, you know, I think cash bail often ends, is used in particularly abusive kinds of ways. Now when you impose a \$10 cash bail on someone, you're basically trying to lock them up for being poor. Right? That that's the only reason a \$10 bail can possibly mean.

CH: Mm.

JP: And so I think a move away, and and sometimes you'll be, like places say that we're the only country that has cash bail--us and the Philippines. That that's not true. The U.S. and the Philippines is the only country that have the private sector involved in cash bail. Um. Other countries have it, but it's entirely run by the judiciary system, not by not by private and pri-, private actors have no no say in it. I mean, I think moving away from cash bail is important. I think it's also important to think about what we replace it *with*. Right? And so that's been a big controversy in California that just passed this big bill, law reform. They've abolished cash bail but in the process, they've also expanded the ability of judges to detain people pre-trial with *no* chance of getting out whatsoever. Right?

CH: Mm.

JP: So it's possible that in abolishing cash bail, they're actually going to increase the size of the the jail population. Right? And I think it's important to remember when we *impose bail*, right, these this is something we're putting on people who are presumed to be innocent. Right? And even three or four days in jail, you lose your job. You can be, you know, income hits start appearing. You can be physically or sexually assaulted. Alright. There's a lot of costs that that come from this on people who are *legally* supposed to be innocent.

CH: Mm.

JP: And I and I think you know, we tend to over-rely extensively on on on jails as a, as a way of educating people. And we assume that: "Well, if we don't lock them up, they won't show up at trial." But the evidence suggests that's just just not true. In fact someone (chuckles), I haven't seen the underlying report, but someone claimed that there's a study in New York showing that people *not* detained showed up in court *more* regularly than those on Rikers. Since Rikers is so incompetent and actually couldn't get people to their court dates.

CH: (chuckles)

JP: So you're actually you're actually more likely to show up at your trial if you're not detained than if you are. In New York City apparently.

CH: I mean that that suggests that we should just get rid of it. Get rid of pretrial detention wholesale.

JP: I think there's a lot to be said for that. That you know, and I mean especially in a place like New York State. States vary, but New York state legally speaking, you *cannot* be detained pretrial based on riskiness. It's only about likelihood of appearance I and and so, maybe there's some extreme egregious cases, like maybe you think there's no way you can keep a Manafort or someone like that locked down if you don't.

CH: Well, right. Right.

JP: But you know, nine out of ten of the cases, they're *not* gonna go anywhere. Right?

CH: Mm.

JP: Like they had, most people don't have a lot of places to go. They're not going to be able to run. And there's plenty of other intermediate steps one can try to to to use that are probably far more efficient and far less (indistinguishable two or three words)...

CH: It almost seems like the the logic is backwards. Like with poor defendants, you *shouldn't* keep them, you know, in jail pretrial. But with very *wealthy* defendants that are going to flee to Mexico or somewhere that doesn't extradite, *that's* exactly the case where you want to.

JP: Right. Yeah. That that's probably true. And I think you can see how that plays out I think, in the way we covered um, this effort to bail people out from Rikers last year. So last year around October, November, the RFK Human Rights Fund said it was going to bail out every woman and person under, child under 18 from at that point Rikers of the the 18-year-olds there got moved to another facility. And when they announced this, you know, a *huge* protest erupted from the from the law enforcement side of *The New York Times*. *The New York Times* like had an article. It's like 18 paragraphs long--so it's not like a little squib thing--talking to police officer, no, police chiefs and talking to all the all five prosecutors in New York City. There was talking to public defenders. And what was remarkable about this debate, is the police, the D.A.s and the public defenders, their *entire* debate was about sort of like safety issues. Right? "This is gonna make things more violent." "This is not gonna make things more violent." "People pose a risk." "They don't pose a risk." Two things that never came up in the entire article--no one pointed out that that *even* the public defenders didn't point out that that discussion was inherently illegal. Right? That dangerousness is not something you're

allowed to consider in New York state. And so the very fact that the D.A.'s were saying, "dangerous people will be released," meant that the D.A.s were all publicly admitting that they take dangerousness into account when they're not allowed to do that. No one commented on that. But more importantly is that the debate was entirely about what did this bailout mean to *me*? And *us*? Right? The people outside the system. *No one, not a single person*, even the public defenders, at least they weren't quoted if they said this, but they were, it didn't make the article, how what would it mean to this mother to be home with her kids for a month? What would it mean for this 18-year-old to be able to go high school for the next couple weeks, to be home with his family over like Thanksgiving or Christmas. Like *their* lives didn't matter. Right? And then you get to the end of this bailout and they said they were gonna bail out 800 people. They only bailed out like 200. No one quite knows what happened. And yeah, there's another like 18-paragraph article about the bailout. And the *entire* theme of this article was: "Look. Like nothing went wrong. We bailed out 200 people and there was like one misdemeanor re-arrest and everyone else is fine. So I guess we're all okay." And again, no one said like, "What did it mean *to these people* to be home and off Rikers for like a month or two months or to be home just in general." Like like they *just didn't exist*. And and to me it was *really* striking. Like we're, we had this whole discussion about the bailout and no one talks about what the bailout means *to the people bailed out*.

CH: Mm.

JP: And I think I said that's how microcosms or how we think about like the people in the system. They're, *they're* not there. They don't really exist it. And and it allows us to do I think really horrible things as as a result.

CH: So one of the most interesting points in the book was about this sort of seemingly, again wonky issue, about the *census*, and how it interacts with Republicans and Democrats. So, how are prisoners counted in the census? And you know, how is that used by Republicans and Democrats?

JP: Right. So, it's an interesting question to ask. You know if someone's in a prison, where do they live? They live in the prison or they live in their last known address. And it *matters* when it comes to how we draw our legislative districts. Um, and so in in four, in two states, people in prison can vote, Maine and Vermont. In the remaining 48, they cannot. And in 43 of those 48 states, uh they count as living *in the prison*, not as living where they came from. In the other five states--it's five now, there'll be six soon--they count as living at their last known address before being incarcerated. That matters because across the country, our prisons *tend* to be located in more rural areas. So they tend to be located in whiter, more conservative, more rural parts of the country, but they tend to be, they tend to hold disproportionately black and brown people, who tend to lean Democratic and who tend to come from more democratic urban areas. *But they can't vote*. Right? So it is and you know, I use this term intentionally, it's like a five fifths compromise, right? They count as five fifths of a person with zero fifths of a vote. Um.. And if we've effectively transferred about 1.5 million people from more Democratic areas to more Republican areas where they count *for* representation, but have *no say* in what happens there. And there are studies, you know, that it's clear that all across the country they're state legislators, Republican state legislators who are holding on to power *entirely* because of the prison in their district. Right. There's actually a fascinating map. Someone did the census where they did this racial map of the census where each dot represents a person, and they color coded white, black, Asian, and Latino or other. And you can literally see, basically see prisons from space.

CH: Mmhm.

JP: Right? You know blue dots are white, black, green dots are black, and so you see all over the country, there's these there's these areas are these sparse array of blue dots and then there's this *bright* green box in the middle of it. Right? And that's the prison. And so, you know, one study from Pennsylvania, for example found that if you were to count people as living at their last known address, not in the prison, at least five legislative seats would shift from rural Pennsylvania back to Pittsburgh and Philadelphia. And those five seats would almost certainly swing from Republican to Democrat. Right? And so it's not surprising that five states have gotten rid of what, this is called the *prison gerrymandering*. And the five states that repealed it are California, New York, Maryland, Delaware and now Washington state with New Jersey coming along

probably next. *All* five of them did it when the Democrats controlled the Senate, the House and the governor's mansion. It's the only way it can happen because otherwise it's Republicans voluntarily undermining their electoral chances. And that's that, of course, they're not going to do that.

CH: Yeah, when I read this, I actually also thought of the slavery analogy and you know, I think I have credit at this point as someone who wouldn't reach for a slavery analogy willy-nilly having testified against reparations for slavery in Congress. But it really is analogous, not in the sense that prisons are the same as slavery, but in the sense that you know, like these people *can't* vote, but are *being used* in place, and for for by politicians whom they overwhelmingly *would not* vote for, if they could vote.

JP: Right.

CH: Which is really bizarre and not often talked about in the conversation about gerry - gerrymandering in general.

JP: No, no it's not. And you know, it's starting to get some attention now. In fact it, both New Jersey Washington just this past year, and New Jersey I think coming up, like there is some attention but it it does take this democratic trifecta to fix it. And those are definitely not common in the country these days.

CH: Yeah, so that that kind of leads into the question: Are you aware of the documentary *The 13th*...

JP: I am.

CH: ...by Ava DuVernay, and and I guess the larger narrative that you know, the criminal justice system is, you know, racially biased. There are versions of this. There're like the strongest possible claim is that you know, the you know, it's almost conspiratorial. And then on the other side there, you know, some people believe there's no racial bias problem whatsoever. Where do you stand on that spectrum?

JP: Yeah, so I would say...I kind of, so there's a there's a there's a book by this guy Michael Tonry. The title I think is really powerful, which is called *Malign Neglect*. And he sort of has this opening premise is that often times our laws might not be passed with specific desire to bring about racial harm, but that once we realized that's what they're doing, we don't care about it. All right, and I think there's a lot to be said for that, right? That that the system--sort of city police, county D.A.s, state state parole, pro- state parole bars, like there's no one actually running this and there's no one in charge. And so people say: "The system does what it's designed to do." My response is: "It wasn't really designed as a whole to do anything. It's a patchwork of sort of poorly designed things that have changed over time for various idiosyncratic reasons." But I think to catch up, once we see the very specific racial harm they're doing, we could fix it and we don't. And we don't because we're kind of fine with that. Right? And so it's less like a top-down--"we designed it to be malicious," and more of a bottom-up--"we see the malice and we're fine with it." And so we let it persist and we actually might appreciate it once we see it, but it's not in the say intentionally top-down design for that. Um... So, so I mean that's sort of where I come are that the territorial part. I know, I think race plays a huge role. I think I think the best part of *The 13th*, the second half of *The 13th* I struggle with because it basically blames private prisons, the federal system and the "war on drugs," which are the three things as I see don't matter.

CH: (chuckles)

JP: But the first half of *The 13th* I think is hugely important because that's where she actually brings in this idea of a sort of this there's this professor at Harvard, Khalil Muhammad who has a book called *The Condemnation of Blackness*. And his theory and I think it's right, is that we tend to view failures in the black community, you sort of when a black person is going wrong with you can see this with Islam as well, right? That's a *community failure*, right? There's something that that person's crime reflects a broader systemic social failure of the group he comes from, which we don't do to white people, right? White mass murderers are lone wolves, right? Islamic, someone who's Muslim and a mass murderer is clearly a terrorist, right? And when when a black person commits a crime, it's a sign of our black communal failure. When a white person

commits a crime, it's like individual pathology. I think to me the most striking, revel- (chuckles) example of this was when Dylan Roof committed mass murder, right, clearly racially driven hatred in South Carolina, um some either like *Newsweek* or *Time* or something that said like no somehow he was self-radicalized, right? It wasn't there some sort of broader environment that would cause a white person to to instill these incredibly vile racist attitudes. It just sort of *happened to him somehow*. Right? Which was, if someone if someone if instead of being Dylan Roof, it had been had done had been a Muslim shooter like all we'd talk about are the communitarian implications for how we ended up like this. Right? And that does play a role, right, that we tend to react in a much more heavy-handed way towards towards those *social pathology* amongst minorities because we tend to view as a systemic collective failure in a way we don't impose it on on white people. That said, if we were to view white men as their own country, their incarceration rate would still be higher than most European countries' incarceration rates, right? We are we are incredibly brutal to everybody, right, but you know, it was 300 per hundred thousand for white men. It's 2,000 per hundred thousand for black men, right? It's still, orders of magnitude practically different. And so it matters. I think it's just important to to to think of exactly how it matters. I think know when you sort of see, I think the power of *The Condemnation of Blackness* hypothesis is it helps us understand exactly sort of some of the less conscious ways in which race is playing a really powerful role.

CH: I think I would agree with his diagnosis that we're more likely to view a crime by a black person as a general problem with the black community. And I'm certainly open to that racism is part of that reason, but isn't it also, I mean when you're talking about the differences in crime rates between white communities and black communities, then there's a there's a level of crime at which it becomes cogent to talk about it as a *community-level* problem. And there have been times, I mean certainly perhaps not as recently, but still perhaps in some places in in St. Louis and South Side Chicago where it actually makes sense to talk about it as a community phenomenon more so just because we're talking about an order of magnitude, more homicides than in white communities, right?

JP: Sure. It's a question more of...trying, once we see that, what lessons do we take away from that? Right? You can view it as sort of *cultural* failure, right? Or you could view it as they're other broader outside reasons that caused the social pressures that exist inside those communities right? And so, you know, we tend to use, you know, Chicago as this reference term or a general sort of black community cultural failure, not like let's try to understand why it's happening. Right? And so yes. Crime is certainly, crime is certainly concentrated in racially problematic ways. Although it's also, if you look at the National Victimization Survey, alright, the the actual gap in terms of violent victimization rates between whites and blacks is actually not all that much different statistically speaking. Right? So the homicide rate is hugely different. The actual like underlying non-homicide violence rate in the survey at least is is actually much closer than that narrative suggests. But the question I think becomes like what what do you do with that fact, right? I think too often the sort of, you know, the the Jim Forman you know *Locking Up Our Own* theory right is that you know, we can view it as from a broader social pathology of that is unique to black communities right or understand that those communities have been systemically under-served for so long, right, that that that a white community with those kind of pressures act in the exact same kind of way. Right? I think often we don't make that connection.

CH: Yeah.

JP: We view that that, you know, that East New York needs policing because there's something wrong there. Park Slope doesn't cuz there's something right there. We don't understand well that's cuz Park Slope has all sorts of resources that East New York does not have. And in that, you know if you someone from Park Slope and dropped them to spend their whole lives in East New York and flipped it, their lives would go in radically different directions.

CH: Yeah. A few rapid-fire questions. What do you think of the Ban the Box initiative?

JP: So it's not a topic I've studied closely which is...

CH: Maybe just describe it.

JP: Yeah. So the Ban the Box is this idea. You know lots of place require you to check a box. Like have you ever been convicted of...? It varies. Have you ever been convicted of a felony? Or even been arrested for anything other than a parking, no moving violation? And some sort of print indication of your felony record. And so there's this push to say, "Okay, let's *ban* the box so that, you know on the upfront application, you don't have to put that down." Um... And then at least get your foot in the door and you can try to make the case for yourself, rather than having it be an exclusionary rule from the jump. And the reason why I stress I don't study it closely is, results here actually kind of complicate it. And there's a tremendous amount of debate right now amongst criminologists and economists about what happens. But there've been some studies suggesting actually that banning the box has made things worse for black male applicants, um, because before, without the box, employers go back to using race as a proxy for criminality...

CH: Mm.

JP: And so in fact black employment drops, black applications actually drop because: "Well, I don't know who's the criminal, who has a record, who doesn't so I'm just gonna assume all black men do so I'm not going to hire any black men."

CH: Or all black men from a certain neighborhood,...

JP: Right.

CH: ...who talk a certain way...

JP: Right.

CH: Because that I mean, like even in the highest crime neighborhoods, *most* black men are not committing crimes.

JP: Right.

CH: But they they might talk similarly, dress similarly to black men who do.

JP: Right.

CH: So if you ban the box, it could it could turn out to be the case that the employer really *wants* that information to hire someone who might fit the profile of of of a black male criminal, but has no record.

JP: Right. And so they just...

CH: So they *assume* all, that anyone who looks that way who...

JP: Right.

CH: ...you know is. Okay. Okay.

JP: And I would I would I would also just add that, even if we forget the ban the box, there are these fascinating studies for example that have shown that actually, you know, that criminal records have very asymmetric impacts. These are, these sort of these audit studies they'll send out resumes to people with with either very black-sounding names or very white-sounding names and what they find is the fact that a white-sounding name that admits in its cover letter that *has* a criminal record is more likely to a get a call back, then the resume of of the black-sounding name that doesn't have a prior record.

CH: Mm.

JP: And so the the the implications of this are are, again there's a strong racial issue here. But the actual data is is, right now it's a big issue of debate is it making things better or worse? And it's not clear yet.

CH: How do you view the 1990, '94 crime bill? Um, you know, what would a...

JP: Yeah.

CH: ...25 years after?

JP: So we love to blame the '94 crime bill for sort of either causing or accelerating or playing a big role in driving mass incarceration. *It didn't*. Um, and and so when we talk about it driving mass incarceration, what we're talking about is this one--the '94 bill is this massive sprawling thing--it did all sorts of stuff. You know, it it had the Assault Weapon Ban, the Violence Against Women Act. They created 60 new federal death penalty cases. It um, it even changed the amount of data that the DMV could release for driver's licenses involving like abortion protests. It was a *huge* expansive bill. But one part of it, this thing called the the Violent Offender Incarceration Truth in Sentencing Grant Void Test offered states ten billion dollars, up to 10 billion dollars total over six years if they passed these really tough sentencing laws. That money could be used to build out prison capacity, to hold people longer for violent offenses. And that's the part where people say: "This caused mass incarceration." The feds gave the states ten billion dollars and then prisons got bigger and worse and everything. *Not true*. To start, they actually, the feds came back after the program was done and asked the states that took the money like, "How much did this money actually matter to you?" And all but four, most, the majority of states took no money. Of those that took the money, all but four said, "It didn't really matter all that much." And only four states said that money actually made a big difference. They offered *ten* billion. The states only claimed *three* billion. They actually left seven *billion* dollars in free money sitting on the table, right? It *just* didn't matter. And here's where, here to me is the really fascinating part about why this '94 bill story gets *everything* wrong and really distracts us. If you look at the annual change in prison populations over the 1990s, it *slows* the entire time. Every year, more and more people go to prison every year in the 90s, but every year fewer and fewer people are going to prison. And in fact in 2001--no one really notices this--the number of people in state prison actually fell. Feds went up, but the states fell by a very patriotic 1,776 people between 2000, 2001...

CH: (chuckles)

JP: And to me this actually gets at how much mass incarceration is really a story of politics, not policy. So over the '90s crime is going down and that over the '90s, another thing we observe is that Gallup keeps asking this question--actually, let me let me dial back. So so the important thing just the '94 bill, it it just didn't have a big impact right? The states kind of ignored it and prison growth actually slowed over its entire history. Right? And so it's actual impact was much less. If we care about 1990s era crime crime bills, what we should *really* be talking about is the Anti-terrorism and Effective Death Penalty Act (AEDPA) and the Prison Litigation Reform Act (PLRA). Both of which were passed within about a year of the '94 crime bill. Both of which make it really hard to complain about things in federal court. And that's really where the feds matter, right? So it's it's a big distraction. But that that decline over the '90s actually tells a much more fascinating story. And to see--I want to jump ahead to the 2000s to start. There's this very *common* claim people make which is true, which is that: "Over the 2000s, crime has kept going down." But a majority of Americans, somewhere between 65 to 75 75 percent of Americans say that crime is going up every year. And so the theory they say is look there's this general disconnect between time on the ground and what people think, right? And that's why crime policy is so bad. Everyone thinks crime is going up. Crime is really going down. This is terrible. And that's true. Now swing back to when that Gallup poll starts, which is 1993. In 1992-93, about 85 percent of Americans say, "crime is going up." That's right. Like crime was peaking in '91, '92. Everyone thought crime was peaking. And then over the course of the 90s, crime serious crime goes down. The percent of Americans who say crime is going up that goes down too, 85, 80, 75, 70, 65, 60.

CH: Mm.

JP: In 2000, 48 percent of Americans say, "crime is going up." We've learned, right? As crime went down, we as a country *learned*. In 2001, it drops to 40 percent of Americans say, "crime is going up" and the state prison populations go down, right? We actually--and of course over a decade--had kind of brought this *giant* lumbering system to a halt. Alright? We'd actually learned that crime was going down and even despite the '94 crime bill, prison growth had slowed. And finally in 2001 not only is a solid majority of Americans aware that crime is down, but prison state prisons actually shrink...And then in 2002, the percent of Americans who say "crime is going up" jumps like 70 percent. And the prison, state prison populations shoot way back up again. It's 9/11. Right?

CH: Mmhm.

JP: That responds to like: "Is crime going up?" It's *not actually* about crime. It's about sort of the *politics* of fear that came in the wake of 9/11. And people were just afraid of life in general. What's fascinating is that Gallup has another parallel poll they asked, which is: "Is there any area a mile from your house that you're afraid of walking in at night?" because the way of getting at--not "is crime going up"--like "Is crime in your neighborhood going up?"

CH: Mmhm.

JP: And what was interesting in 2001 is you *don't really* see a big jump in that, right? We understood even in 2001, 2002 that *our* neighborhoods were safe, right? And that doesn't change after 9/11. So "I still had that same commute. I still know what's safe or not. But the *country* is sounding terrifying to me. And because the country's terrifying to me, all of a sudden, I want I just I just want to crack down on things and be harsher." And it's not until after the 2008 financial crisis that we see another drop, right? Something sort of knocked us out of that like--fear. Right? What's real and what's yeah, again what's really striking with the 2008 crisis is that the whole way that we sort of brought the Republicans on board that they joined this reform coalition was like "we need to save money," right? "We're spending too much. Budgets are shot. Let's cut prison spending because prison's expensive." We spend more on prisons now than 2008. We didn't cut anything. We don't have to cut anything. Prisons are not *that* big a share of state budgets, right? It was all about changing the political conversation about punishment. Right? And and so I think that we focus on the '94 crime bill and in many ways that that *fundamentally* misses what happens, right? There was a political shift and it's 9/11 that really derailed us from from heading in a positive direction.

CH: What a--final question here--what are the most important reforms we can make that people aren't talking about?

JP: I mean, I guess from a purely policy point of view. I would say it's reigning in this, what we call, what can be called sort of the "prosecutorial free lunch." It's again, it's this idea that the system wasn't designed in any coherent way. So here's, the thing about prosecutors is that they're county officials and they're paid for out of the county budget. *Jails*, where we hold people convicted of misdemeanors, *they're* paid for out of the county budget. And *probation* or sort of misdemeanors that don't go to prison, *they're* paid for out of the county budget. But prison, where we send people who commit a felony, that's paid for out of the *state* budget. And so if you're a prosecutor and you can choose misdemeanor or felony, it's actually cheaper for *you* to charge them with a felony cause that takes them off your financial books and puts them on the state's financial books. And it *seems* really technical and you know, inter-governmental budgetary transfers are not a really fascinating topic to talk about. But you know, like I said earlier, California has driven the 2010 decline from 2010 to 2014 or '15, fully half of the nation's decline was *just* the state of California. And California did a lot in 2008, 2009 in response to some some litigation. But one of the things they did was they told the counties for this broad category of offenses, "you can still convict them of a felony, but you have to *house* them in county jail. *You* have to pay for them." And *all of a sudden*, they stopped putting them in jail, right? Because when they had to pay for it, they they didn't want to pay for it. And other proposals elsewhere in time--what they've done with the juvenile system, you've seen the same thing. If you make counties pay for

punishment, they stop punishing, right? And so I think for like a simple policy fix, like other than sort of the underlying ideological issues, like just reigning in that like "free lunch" for for punishing people um would be a big one. And it strikes me as one that should be sort of bipartisan-popular, right? For the Dem-, for for more liberals, it reigns in harshness. And for conservatives like: "Shouldn't you be concerned about like a government actor who has free access to a giant government budget?" Like that seems like sort of the classic like Republican nightmare, right? Like a powerful punitive government official, who has no resource restraints to do anything he wants. Like that that *should* get both sides I would think on board.

CH: Yeah. Well John Pfaff, it's been great.

JP: Thank you so much.