Supreme Injustice: How the Court Has Enabled Mass Incarceration

Rachel E. Barkow is the vice dean and Charles Seligson Professor of Law as well as the faculty director for the Center on the Administration of Criminal Law at New York University School of Law. She previously clerked for Justice Antonin Scalia and was appointed by President Obama to the U.S. Sentencing Commission. In September, she delivered the Annual B. Kenneth Simon Lecture at the Cato Institute's 20th Annual Constitution Day Symposium, where she addressed how the Supreme Court has enabled mass incarceration and has effectively gutted the carefully crafted protections the Framers wrote into the Constitution to limit the government's power to impose criminal punishments.

I'm especially happy to spend Constitution Day here at Cato because of the great work Cato does generally defending constitutional rights, and specifically because of Cato's excellent work on criminal justice. Cato is one of the leaders in defending the rights I'm here to talk about, and its work has been outstanding.

Unfortunately, that outstanding defense of the Constitution contrasts pretty starkly with what we see from the Supreme Court. The court has engaged in an almost complete abdication to the government in criminal proceedings, in spite of clear constitutional language and history. That's the topic of my lecture today.

There is plenty of blame to go around for America's rise in mass incarceration. But I'm going to focus on understanding the Supreme Court's role in that because it really is one of the architects of mass incarceration. They might not have intended it, but they have made sure that the foundation of mass incarceration has stayed firmly in place.

America used to look much like the rest of the world when it came to incarceration and the use of criminal enforcement. Until the 1970s, we had stable incarceration rates that looked like other parts of the world, or at least other Western democracies.

Then our use of incarceration started to explode. We now lead the world both in the total number of people who are incarcerated, which is right around 2.2 million people, and in the rate of incarceration per capita. We currently have an incarceration rate of 830 for every 100,000 people. That's more than five times what it was in 1972 when we started this record climb upward. And it's 5 to 10 times higher than other industrialized countries. We have less than 5 percent of the world's population but almost a quarter of the world's prisoners.

Those numbers are shocking, but they're just the tip of the iceberg. One out of every 38 people in the United States is under some form of criminal justice supervision. They're either incarcerated, on probation, or on parole. And in some states and communities, those rates are even higher. For example, in Georgia, 1 out of every 18 people is under some form of state control.

We now live in a country where one out of every three adults has a criminal record. For every 17 people born in 2001, 1 of them will go to prison or jail. It's almost unfathomable, the sheer scale of it, and it's not falling proportionately across the population. Black people bear a disproportionate share of it. African Americans make up a third of the people incarcerated, even though they're only 13.4 percent of the U.S. population. One-third of Black men have a felony conviction, and Black adults are six times more likely to be incarcerated than white adults.

And here too, those national numbers, as shocking as they are, can obscure even more alarming statistics if you look in particular communities. Here in the District of Columbia, more than 75 percent of Black men can be expected to be incarcerated at some point in their lifetime. At our current pace, one out of every three Black men in the country can expect to be incarcerated during their lifetime.

Hopefully, these numbers paint a picture for you that shows you exactly how broad the sweep of criminal punishment is in America, just how many people it's reaching. And I could talk to you about the thousands upon thousands of collateral consequences that are imposed upon people who have convictions, the inhumane conditions that exist in prisons and jails around the country, the lifelong negative consequences.

But instead of giving you the sweep of all this in all its tragic glory, I want to turn to that question: What does the Supreme Court have to do with any of this? What is its role? And before I get to that, I think I need to start with the Constitution. It's Constitution Day, after all. And anyway, that's how I start pretty much every question.

You may be thinking that the problem is just that the Framers did not anticipate the government would abuse these coercive powers and so the Constitution just doesn't speak to this. And if that were the case, it

certainly wouldn't be the Supreme Court's fault that this all happened under its watch. But the Constitution is not silent on governmental overreach in criminal cases. The Framers didn't let state power in criminal cases slip through the constitutional cracks. It's exactly the opposite.

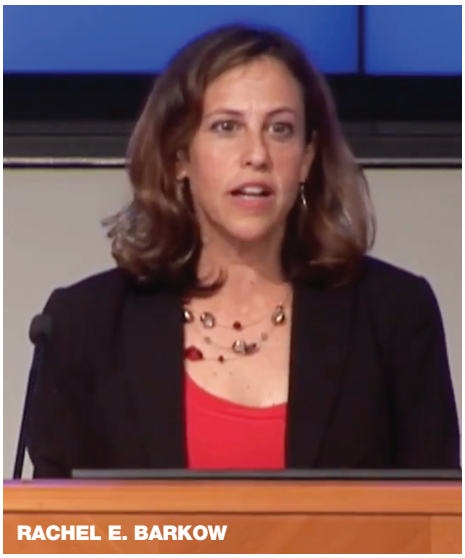
The Framers of our Constitution were well aware of how a state could try to abuse its coercive criminal powers. They knew about the excesses of the "Bloody Code" in England. They feared that majorities would seek to oppress their opponents through the use of criminal law and punishments. They worried obsessively about how a police state could deprive people of their liberty.

Far from being silent on checking the government's power in criminal matters, the Constitution, I would say, is obsessed with it. In fact, one of the animating features is its preoccupation with regulating the government when it comes to criminal powers. Even before the Bill of Rights, the Constitution provided protection for people who had been accused of crimes in the very structural provisions that the document sets out.

The Framers worried about what would happen if you had a Congress that tried to single out their political enemies and disfavored individuals through criminal laws that would target particular people. Alexander Hamilton observed that the creation of crimes after the commission of the fact and the practice of arbitrary imprisonments, "have been, in all ages, the favorite and most formidable instruments of tyranny." They were worried about it. Article I prohibits bills of attainder that target particular people and ex post facto laws that attempt to make things criminal after the fact.

Article II vests the president with the ability to give pardons for all federal offenses except in cases of impeachment. And the Supreme Court has told us this power exists to afford relief from undue harshness or evident mistakes in the operation or enforcement of the criminal law. In other words, the Framers were aware they needed to give the president a way to check government overreach when there was excess punishment and punitiveness.

But what would happen if the legislature and the executive branch were to work together to single out particular groups for prosecution or engage in overreach? The



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Constitution recognizes this danger, too, and it relies on the judiciary to be a key check on the political branches. Before people can be convicted of a crime, they're entitled to judicial process. We also have federal judges with life tenure and salary protections. In theory, that should give them some independence from the legislature and the executive to ensure that they make fair and impartial decisions.

But the Framers didn't stop there, and this part is critical. They did not trust judges alone. Although Article III judges are relatively more independent than Congress or the executive branch, they are still part of the government. They get government salaries and government pensions. They are part of the government and they're appointed through a process that favors governmental connections. They are going to be naturally sympathetic to parties in power because they're drawn from that same pool.

The Constitution recognizes that. It worries about that. The Framers didn't think judges would be sufficient protection against the possibility of state abuse in criminal cases. And so, the Constitution provides in Article III that the trial of all crimes must be by jury.

To our modern sensibilities, with so few jury trials held today, this may seem antiquated, but it was no afterthought. The Framers did not want anyone to be subject to governmental punishment without agreement from ordinary people. And under the Constitution's structure, the jury would have a bold power to protect people because of the prohibition on double jeopardy. If jurors acquit, that person is free, period. The intention was this would act as a check on all three branches of government.

In addition to all of that, in the Bill of Rights, the Framers once again focused like a laser on criminal excess. Four of the first 10 amendments deal explicitly with the criminal process. The Fourth Amendment regulates the state's policing and investigative powers. The Fifth Amendment acts as a check on the state's executive powers by providing for grand juries and prohibiting the state from prosecuting people twice for the same offense. Its Due Process Clause requires the government to follow proper process before depriving somebody of life, liberty, or property.

The Sixth Amendment, once again, brings up the jury, making clear that they'll be drawn from the community where a

crime occurs. In addition, the Sixth Amendment has a bunch of other rights: speedy and public trial, notice of criminal charges, the right to confront the witnesses against you, the right to the assistance of counsel. And then the Eighth Amendment regulates legislative judgments on punishment by prohibiting cruel and unusual ones and excessive fines.

It's hard to imagine a Constitution that could possibly be more concerned with state overreach in criminal matters. We see constitutional regulation of all aspects of the government's criminal power from investigation to prosecution, from adjudication to the legislation defining punishment.

It's not the case that the Constitution is failing to protect against the government's excess in criminal matters. It's a failure of its guardian, the Supreme Court. The court has failed to protect against government excess through a host of decisions that, in my view, don't bear scrutiny if you care about the Constitution's text, its original meaning, or just plain good government. These decisions only really make sense if your animating principle is an almost pathological deference to the government.

How did we end up with so many people incarcerated? It's an equation with two main factors. We're admitting more people into prisons and jails and/or they're staying longer. It's those two things working together. So, obviously for admissions, the more people that you're charging with crimes and convicting, the more admissions you will see. And then the longer sentences are, the longer they stay. So that means that on any given day, more people will be incarcerated because they're there for longer periods of time. The Supreme Court has been a critical player both in opening floodgates for admissions and in permitting lengthy sentences.

I'm going to start with the court's role in the admissions boom, the meteoric rise in incarceration that began in the early 1970s. It coincides with the Supreme Court giving its official imprimatur to coercive bargaining tactics by prosecutors. These tactics allow prosecutors to threaten people with punishments orders of magnitude greater if those people have the audacity to invoke their right to trial by jury.

Now, colloquially, this is known as plea bargaining, but that is a grotesque misnomer. It's really anything but a bargain for the defendants. It's an absolutely critical condition for mass incarceration because

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you cannot have mass incarceration unless you have mass case processing. And the only way that you can process the number of criminal cases we do in America is if you do away with jury trials.

Why would defendants give up the benefit of a trial by a jury of their peers, their right to make sure that the government can prove its case? Why give up the gold standard that the Constitution and the Framers took such great pains to include? The answer is that defendants aren't giving this up willingly. They're coerced. Prosecutors are threatening them with longer punishments if they go to trial. And as more and more laws have created mandatory minimums, prosecutors have basically full control over exactly what that risk of exposure is. If a defendant is convicted, that minimum is going to kick in no matter what the judge thinks. And as maximums get higher, the prosecutor's charging decisions also dictate somebody's maximum exposure.

In 1971, the Supreme Court not only gave official recognition to the rise in this plea negotiation bargaining in *Santobello v. New York*, the justices actually praised it. They viewed it as a necessity. They observed that if every criminal charge were subjected to a full-scale trial, the states and the federal government would need to multiply by many times the number of judges and court facilities. I'll give them some points for candor there. They basically admit we have to keep things going as they are because of how difficult life would be for judges if we had to have all these trials. That would make things really, really hard for them. What an inconvenience the jury would become!

That's how the court plays a role in having more and more people admitted to our prisons, but it also has played a role in that second factor, which is the length of sentence. And here the court has just completely failed to police sentence length, again in derogation of its duty under the Constitution, which has an amendment dedicated to this.

A majority of the justices agree that the Eighth Amendment does prohibit excessively long sentences. Somewhat frighteningly and in contradiction of language and history, we've had at least three justices—Scalia, Thomas, and Alito—who've thought no sentence of incarceration can be disproportionate, but thankfully a majority has not bought into that. A majority of the court has said yes, you can have excessively long sentences that violate the Constitution.

But the test the court uses to determine whether a sentence is excessively long is effectively impossible to satisfy. In fact, no sentence has ever been struck down on this test, even in a country where you can get a life sentence for writing a forged check for $88.30. The court uses a test from a concurring opinion of Justice Kennedy in a case called *Harmelin v. Michigan*. Under that test, if you want to challenge your sentence under the Eighth Amendment, you have to show

the sentence is grossly disproportionate. What's "grossly disproportionate?" In the court's view that means you have to show that the state has no reasonable basis for believing it will serve a penological goal.

But penological goals can include deterrence, rehabilitation, retribution. And then this one's the kicker of why you can really never win: incapacitation. If the state says we need to sentence you to a really long time to incapacitate you for a really long time, then the state has a reasonable basis. That's how you get a Supreme Court and lower court decisions that say, for example, it's okay to give someone a 25-years-to-life sentence for stealing a slice of pizza, because that's how you incapacitate them from stealing more pizza.

Here are some real Eighth Amendment cases that the Supreme Court has decided: It's okay to have a mandatory life sentence for someone who has committed three low-level theft offenses that cumulatively total less than $230. It's okay to have a mandatory life sentence without parole for a defendant who had no prior record, when it was his first offense and he possessed 672 grams of cocaine. It's okay to have a 25-years-to-life sentence for someone under California's three strikes law who stole three golf clubs because the defendant had a prior record that included other burglaries and a robbery.

The Supreme Court has effectively taken the judiciary out of the business of checking the state when it comes to long punishments. The court knows how to give greater scrutiny for proportionality because it's done so in other contexts, including its death penalty cases. Its failure to do it in a noncapital context, even though the Constitution is no less relevant in such cases, is really one of the worst examples of a judiciary not enforcing an explicit, constitutional guarantee.

How did we get here? One part of the problem is that there is always a majority on the court that, no matter what their ideological background or their theory of jurisprudence, have a background of representing the government. It is a bench that is drawn overwhelmingly from the pool of government lawyers. These are people who have spent their careers defending and representing the government as prosecutors, or in the Solicitor General's office, or in other positions in the Department of Justice.

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We have rarely seen justices who have represented regular people, who've seen their stories up close, who've witnessed the toll of governmental abuse and misconduct. Rarer still would be justices who have defended people who are accused of crimes. So, we get a skewed perspective, I think, from justices more inclined to see themselves in the government lawyers who are arguing these cases.

Now, I don't think there are any easy answers to this, but I do want to emphasize in closing one thing that I think is a place to start: diversifying the professional background of the people who serve as judges. Because currently we have a bench that is dominated, just absolutely dominated, by former prosecutors and lawyers who've represented the government. No one has done better research on this than Cato. There is an excellent report by Clark Neily, who looked at the background of federal judges and found that 44 percent were former government advocates compared to just over 6 percent who were advocates for individuals against the government. That's a seven-to-one imbalance. And if we look at those with criminal law experience, how many prosecutors versus defense lawyers, it's a ratio of four to one.

People who care about criminal law need to be vigilant here. Judges really matter, these appointments really matter, and it matters what perspective people are bringing to the bench. ■