

Intro:

Mr. Chief Justice, may it please the court, it's an old joke that, when a man argues against two beautiful ladies like this, they're going to have the last word.

Intro:

She spoke not elegantly, but with unmistakable clarity, she said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."

Melissa Murray:

Welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. I'm Melissa Murray.

Leah Litman:

I'm Leah Litman.

Kate Shaw:

And I'm Kate Shaw.

Melissa Murray:

And as we mentioned in our term recap, this podcast, in addition to being so fierce, it's fatal in fact, is now a project of The Appeal, an organization that produces original journalism and commentary and covers how politics, policy, and the legal system affect vulnerable communities in this country. And actually, that's why we're so fierce and fatal in fact, because we are now a part of The Appeal. So we are really excited about our new partnership.

Kate Shaw:

And while we are still in the summer schedule, we wanted to stop to introduce our listeners to The Appeal, to the extent that our listeners who might not already know about it, or be super familiar with the work that it does. As we mentioned, one of the reasons we were so excited about this partnership is that, it will allow us to deepen our coverage of the criminal justice system and criminal cases on the Court's docket in particular.

Leah Litman:

To help tell us more about the Appeal and highlight some of the big criminal justice cases from the docket last term, and some upcoming ones to watch this term. We're delighted to have with us Josie Duffy Rice, the president of the Appeal and the host of the acclaimed Justice in America podcast. Josie graduated from Harvard Law School and worked as an attorney at the Center for Popular Democracy. She has also written about criminal justice, prosecutorial accountability, race, gender, culture, and politics for the New York Times, Slate, Gawker, Ebony, and a host of other outlets. So welcome to Strict Scrutiny, Josie.

Josie Duffy Rice:

Thank you so much for having me you guys. I'm really excited.

Leah Litman:

To get us started, we'd like to tell our listeners a little bit more about The Appeal, the awesome organization that we're now partnering with. So Josie, could you just tell our listeners a little bit about what The Appeal is, how it got started and what kind of work you do?

Josie Duffy Rice:

Sure. So, The Appeal like you all mentioned before, is a website that produces original journalism on how policy, politics, and the legal system impact America's most vulnerable people. And up until about a few months ago, we mostly covered the criminal justice system. So we were mostly looking at local criminal justice, right: prosecutors, police, and how local systems impact people's lives more generally. In the age of COVID, we've kind of realized that we would need to expand that, that we couldn't really just cover the criminal justice system when it's intersecting with healthcare, housing, labor, so intimately.

Josie Duffy Rice:

So, we've expanded a lot in the past few months. But traditionally, our coverage and our focus has been the criminal justice system. And we're trying to kind of... I think we're trying to do a couple of things. One is that, we're really trying to shine a light on local stories for a national audience. When I started covering criminal justice a few years ago, there wasn't anybody just covering prosecutors, right. There wasn't really a lot of focus on the local systems. And when there is a focus on the local systems, usually it stays local. But we were trying to highlight how intricately woven so many of these positions are with not just in a city, but how many patterns you see across different jurisdictions when you're paying attention to kind of, the national picture.

Josie Duffy Rice:

The other thing we really wanted to do was, we wanted to make sure that we were identifying who was causing mass incarceration and how. There was a lot of talk about mass incarceration, but this is an extremely opaque system, as you all know. And often when you talk to people, they say, "Okay, I really care about mass incarceration. I really don't like police brutality." But in terms of how we get from A to Z, there's not always a lot of knowledge of who's doing the things that are leading to the end game. And when you see coverage of this stuff in the media often, it's...there's no direct object. There's no person who's actually caused the harm, right. The harm has just been caused.

Josie Duffy Rice:

And so, we started The Appeal a few years ago to try to cover those things. And we've grown and we are so excited to have Strict Scrutiny as part of our team now, it was like...it made everybody's year when we announced this news, you guys made us seem very cool. So thank you.

Leah Litman:

You guys made us seem really cool. I liked how you just really put it like the harm is caused without anyone causing the harm it's like mass incarceration without, you know, people pushing carceral politics.

Josie Duffy Rice:

Right, someone was wrongfully convicted, shot, someone was wrongfully convicted, something bad happened. Yeah, mistakes were made and it's like, well can we get a name or if not a name, at least an

office? And yeah, so, we're not terribly popular with most prosecutors in the country, but I think it's a small price to pay for hopefully.

Leah Litman:

But hopefully soon with a wave of progressive prosecutors.

Josie Duffy Rice:

Yes, hopefully we're going to be their favorite news outlet when we solve mass incarceration, we're going to be very popular, which I think should be by December or something?

Melissa Murray:

First the pandemic then that.

Josie Duffy Rice:

Right.

Kate Shaw:

I found that explanation, Josie, of what The Appeal does so clarifying and it really is unique in a couple of ways. And I think one is that it does really have this kind of local focus, but because it is a national platform and you have this kind of deep bench of expertise there's this ability to both really focus, especially in a moment in which local journalism has been so decimated on local stories that might not otherwise get the attention that they deserve, but to connect them to other similar phenomena elsewhere and other dynamics, including structural ones that unify right or create through lines between these disparate events.

Kate Shaw:

And so, and there's not really anything else like it, that is hyper-local in focus, but also is able to zoom out and tell bigger national stories. And so, I think that's why one of the reasons, at least I, and I think we are such big fans of The Appeal, part of what I think we are we're trying to do is, it's almost something we're not doing journalism at all in the way that you guys are, but so commenting on what the Supreme Court does, which does seem kind of abstract, but to try to through the other end of the telescope or something, understand or try to break down and explain the kind of local on the ground effects of some of these decisions handed down from on high.

Kate Shaw:

And so I think that there is something unifying, very different kinds of projects that we're doing, but that's something that I think that that makes the partnership sort of make a lot of sense. So we are really excited about it.

Josie Duffy Rice:

Democratizing this information, making it accessible to people is a major way to open the door to have accountability in the system. And I find that people find it very intimidating to think through the implications of some of this, because they feel like they don't have the education or they didn't pay the \$300,000. They're not in the amount of debt that the rest of us are in. So they think that they haven't really earned the right to analyze and contextualize and criticize these systems. And what I think The

Appeal is trying to say is that, these people work for you functionally in a lot of ways, I mean, it's different obviously with the Supreme Court, but when we're talking about DAs and sheriffs and local elected officials, these people represent you, they work for you and they owe you an explanation for the decisions that they make.

Josie Duffy Rice:

And so, we're trying to always reiterate the importance of accountability. And again, like you said, Kate, I think in an age where local journalism is just being destroyed, it makes the future of accountability look even scarier. And so, our very small team is trying to shore up all the criminal justice coverage that we possibly can in the country. And we're going to keep trying to do that as long as we can.

Melissa Murray:

That makes me feel like we are newly reenergized, we're more than just a bunch of ladies on a podcast. So we're actually doing something meaningful. So thank you for that.

Josie Duffy Rice:

You are. I'm not kidding guys, it really is. It's so important. I even see in my family and my friends who don't have law degrees, it really makes a big difference when they can have access to context and analysis. And they are all learning slowly that lawyers aren't actually that smart, which is the only downside of this.

Leah Litman:

That's our goal. And honestly even within the legal profession, you talked about wanting to democratize information to reach a more general audience. There's even a weird hierarchy within the legal profession where somehow you have a greater claim to talk about the Supreme Court and project knowledge about the Supreme Court and importantly, to criticize the Supreme Court only if you speak about it in a certain way or have certain professional backgrounds and we think that's wrong too. And so again, part of the goal of the podcast is democratize it for the legal profession as well as, you know, an audience larger than that.

Josie Duffy Rice:

Yes, absolutely.

Melissa Murray:

So this is all to say, we are just so happy and excited to be part of an organization that's just burning it all down because we were doing it on a small scale and we're really excited to join your consecration.

Josie Duffy Rice:

I want to just take that clip and just play it anytime anybody comes to theappeal.org because I really find that, that's the best summary of what we're trying to do, but I'm so, so glad you guys are part of the team and you've the other podcast now, we have two, it's so exciting. It's huge for us. So thank you so much.

Kate Shaw:

Before we turn squarely to the Court and to the docket, I want to stay on The Appeal and on you Josie for just another minute, which is that I kind of wanted to ask you how you moved from practicing law full-time into kind of legal journalism and journalism more broadly sort of how you would describe what you do right now, with respect to the worlds of law in journalism and how you got to where you are right now.

Josie Duffy Rice:

Sure. So I think the short answer is that, I wasn't a very good lawyer and I say this all the time and people always say like, "No, there's no way that's true." And I'm like, "No guys, I promise you." I wasn't the worst lawyer in the world I hope, I mean but I was certainly-

Leah Litman:

Given the things we've been talking that have been happening at the Supreme Court and the Solicitor General's office over the last year. I can promise you Josie, you were to not the worst lawyer.

Josie Duffy Rice:

I at least had a little bit more humility than some of these other lawyers. My judgment was a little better. When I left law school, I went into a policy job and I really liked the work I was doing. It was local policy and it really was the thing that sort of, that and working at the public defender's office before I started law school really underscored for me the importance of local politics and this ability for local systems to get away with anything. And so, I was working for an organization that does and did progressive and local policy. And I enjoyed the people and I enjoyed the goals, but it never really felt like the best way that my brain worked to make change. And I had wanted to actually be a journalist. And then I was like, "Well, do journalism really do anything?" This is 15 years ago or whatever, when I was in college.

Josie Duffy Rice:

Probably the best way for me to make an impact is to go to law school, and I remember sitting in Civ Pro, this must've been day five, and I was like, "This was not a good idea for me." I was like, "It's too late. I'm here. I took out the loan, it's learning a lot, but this is just not the best way for me to change things." So I got really lucky when I left that policy job from not knowing what was going to happen, what I wanted to do next. But knowing that, that wasn't the work for me. There was an advertisement on Twitter of all places of course, the one good thing, the one piece of joy, Twitter sparked in my life was that, there was a job listing to cover prosecutors at Daily Kos, which I didn't know much about at the time, but it was a great place for me to start. There was a lot of freedom and there was nobody else covering prosecutors at the time. This was 2015, the term progressive prosecutor was not a thing.

Josie Duffy Rice:

Kim Fox was thinking about running. We were just learning about Laquan McDonald and Shreveport the first progressive prosecutor who now I think we would actually consider to be the opposite of that just because the needle has moved so much was on the verge of being elected. And it was just such a great time to start this job. And it's been, I can't believe it's been five years now, but I've just seen this field change drastically. And I think it goes back to an earlier point that you guys were making, that even a little bit of accountability. I always talk about the ROI on this work, because you can cover Trump and you're probably not going to make a dent in a lot of what he does. It's just very hard to get one article or one thing to shift his perspective on stuff.

Josie Duffy Rice:

We were talking about elected officials who had never been criticized, who had been doing whatever they wanted for so long and people didn't even know their names. And so-

Leah Litman:

Part of the advantage there might be they're capable of reading.

Josie Duffy Rice:

Right, exactly.

Melissa Murray:

I actually thought about saying it and I did not.

Leah Litman:

Melissa and I have seriously been operating on a parallel mind-meld for weeks now.

Josie Duffy Rice:

It's silly to imply that the only thing holding Trump back is the amount of coverage of him, but just... We have a lot to work through. In general, I just found that you could say like, "Hey, what's up with what's going on in this place?" And it would change. It was crazy. And it's still, I think we've the more focus there is, the more entrenched some of the behavior becomes. But on the other hand, like really you can make a lot of change this way. And my legal background has helped me sometimes, even though I don't know if the debt outweighs the help, but one day I will hopefully pay it off and feel differently.

Melissa Murray:

Well with that introduction, thank you. And it's great to have more context about The Appeal and your role in it. This is the part of the podcast though, where we induct you into the ranks of the Strict Scrutiny Cassandra. So Josie, this is the part where we do our Cassandra watch. And I should note, I received an email from a listener that TLDR, the email was who the F is Cassandra? So I realized that we had not properly explained the provenance of our term, Cassandra. For those who don't know, Cassandra is a Trojan princess from the Iliad by Homer and she's the sister of Hector and Priam, and she predicts the Trojan war. And in fact, she actually warns Troy that the horse, the gift from the Greeks, is actually a trick and they should not be deceived and no one believes her.

Melissa Murray:

And we are always channeling Cassandra here on Strict Scrutiny. We always see where things are headed and no one believes us. But we say it anyway. So we have some SCOTUS news to cover, and it's basically shaping up to be the kind of news cycle where, we are over and over and over again, confirmed as the legal communities, greatest and most overlooked Cassandra. So Josie, we hope you're ready to be indoctrinated into our little band of merry prognosticators. So Kate, why don't you get us started with the first episode where we, again, predicted the truth and were dismissed summarily.

Kate Shaw:

This one I think people might have had a suspicion that we were right about. So there was a lot of question about when the court granted cert in the latest challenge or sort of full frontal challenge to the Affordable Care Act. There was a question about whether the Court would schedule the argument for prior to, or after the November election and lo and behold, it has been scheduled for the last day of the sitting November 10th, which as people probably realize is a week after the November election. And this is a little dodgy because it looks like the Court may have deliberately put off the argument in the ACA case until after the election.

Kate Shaw:

One potential piece of supporting evidence is that, the Jones case was granted after the ACA challenge scheduled for argument before the ACA case. We don't know exactly why the Justices make the scheduling decisions they make. This is one of the many things that they're not at all transparent about. But it seems convenient at least for the president, who I'm sure wants attention deflected from his administration's full frontal attack on the constitutionality of the Affordable Care Act in the midst still of this raging pandemic. It is also the case that *Fulton v. City of Philadelphia*, which is another important case about religious exemptions from generally applicable civil rights laws is governed for the day after the election.

Kate Shaw:

That one, I am not sure was necessarily deliberately put off until after the election, although potentially it was. But for folks who were wondering whether the public would be focused on these important questions and importantly, the Trump administration's positions on these important questions, in the really significant days and hours before an election. No, it turns out the Supreme Court's scheduling has really advantaged the Trump administration with respect to both of those cases.

Leah Litman:

Yeah. Because imagine if the morning of the election, every headline and every major newspaper read, today the Supreme Court hears the Trump Administration's argument to demolish the Affordable Care Act, including the protections for people with preexisting conditions, which at this point would include people who have acquired the coronavirus.

Kate Shaw:

Yeah. And it is the case, as we've pointed out before, briefs gets filed and briefs get attention. And so, we will certainly be talking about the substance of the arguments that the Trump Administration is making in this case. But the public attention just isn't focused on the Court's work until oral arguments. And it turns out that is not going to be until a week after the election.

Leah Litman:

We have a development in one of the cases that was decided at the end of the Court's last term, *Trump v. Vance*. So the District Court rejected the new challenges to the New York District Attorney's subpoena. Judge Marrero rejected the President's claim that he should not be subject to a grand jury subpoena because the subpoena was impermissibly broad. He said that the President's objections didn't mean that judicial process was suddenly transformed into an incidence of incapacitating harassment. Notwithstanding this rather quick ruling, which was unsurprising given the weakness of the President's challenges to the subpoena, the claim still has to work its way up to the Court of Appeals, and after that, the Supreme Court, before the subpoena is likely enforced.

Leah Litman:

And even then, the grand jury's confidentiality rules mean we're not going to really see anything that is acquired as a result of this subpoena, at least initially.

Kate Shaw:

And Trump said quickly that he's taking the case all the way back up. So this is something that's going to take some time to play out.

Melissa Murray:

Shocking. In other shocking news, an Eighth Circuit decision, Hopkins v. Jegley, the Eighth Circuit adopted John Robert's reasoning from June Medical Services. And if you'll recall in our discussion of June Medical Services, this was the episode entitled Save Your Yarn, we surmised that the Chief Justice's concurrence, sole concurrence, in that case would be controlling. And the Eighth Circuit apparently agreed, adopting its reasoning and basically jettisoning the reasoning of Whole Women's Health v. Hellerstedt, which is what the plurality in June Medical Services had used for its analysis of the case. So again, very interesting development and for all of the people on team uterus, we told you so, okay.

Melissa Murray:

Other news, Thursday morning, I woke up here on the west coast to the news that not only was Steve Bannon on a boat, he was getting arrested by postal service inspectors while on a boat. So, that is varying the lead a little bit. So early Thursday morning, federal law enforcement officers boarded a \$35 million yacht anchored in Westbrook, Connecticut to arrest Steve Bannon, who at the time was reading and drinking a cup of coffee. Bannon-

Leah Litman:

This is like the opening scene of Arrested Development where Lucille and Buster see these law enforcement officers descending on their boat and they're like, "Is that the SEC? Did they have boats?" Well, who's Gob in this in this whole thing?

Josie Duffy Rice:

It feels like Steve Bannon's all the characters. He has a little bit of everybody.

Melissa Murray:

Except Lucille is the one I think who has the most sense in all of those and just going to see everything happening. In any event, Bannon along with three, others was charged with conspiring to cheat hundreds of thousands of donors of a GoFundMe campaign to privately finance the construction of a section of the border wall. So, there were the conspiracy charges and then the substantive charges for wire fraud and money laundering as well. Bannon went in and pleaded not guilty and then came out to the waiting press corp and said that this entire fiasco was basically because people did not want them to build the wall.

Melissa Murray:

And the question was the wall ever built? Nobody knows according to the indictment, Bannon and company allegedly siphoned money from the project and paid themselves using nearly \$1 million, in

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Bannon's case, to pay off personal expenses and to pay one of the other alleged co-conspirators a salary. But not to pay for the \$35 million yacht, which was apparently on loan from a Chinese billionaire.

Leah Litman:

So we can't call this a case of boater fraud since it wasn't used for the boat, okay. Too bad.

Melissa Murray:

So Leah and I both noted on Twitter that the timing of these indictments is really interesting because just a month ago, if you'll recall, life comes at you fast, you probably had forgotten, but Attorney General Barr had been trying to strong arm Jeffrey Berman, the US attorney for the Southern District of New York into resigning, so that he could be replaced with a handpicked Trump successor who knew very little about criminal prosecutions. So weird, so, so weird.

Kate Shaw:

And Geoffrey Berman's successful resistance of that effort to make him go quietly, may well be responsible for the installation of his very respected number two as the now number one in the office, the office that is now responsible for these indictments. So, so I think that Berman actually probably gets a lot of credit in what played out with Bannon this week.

Josie Duffy Rice:

It was a very poor strategic decision on the attorney general's part to get this guy to go quietly. And now the implication obviously is that this is why we could have told him.

Kate Shaw:

And don't you kind of wonder too like, is this it? It was one of those rare New York Times push notifications that genuinely made my jaw drop off. It was, "Steven was what, where? Oh my God." So it does feel to me as though there could be another shoe or two to drop from that federal district before the year 2020 is out.

Josie Duffy Rice:

Absolutely.

Leah Litman:

I can imagine a second stage to this where the General Counsel of the Fund the Wall GOFundMe-

Melissa Murray:

Who would that be Leah?

Leah Litman:

That would be Kris Kobach. Kris Kobach is of course the person who was ordered to complete court-ordered CLEs given his deceptive conduct in litigation and attempting to defend a citizenship requirement before voting. But that's just one of my personal interests.

Josie Duffy Rice:

Boater fraud, voter fraud, it's all running together.

Kate Shaw:

Exactly. That's all the very immediate breaking news for now, who knows where we'll be a week from now. But so let's go on to the heart of the episode, which is as we have been saying, one of the reasons we're really excited about our partnership with The Appeal is because it's going to allow us to deepen our discussions of criminal justice issues, in addition to issues affecting political equality, political power, those things are very much connected to criminal justice issues. We've done already a few episodes that are retrospectives on the past term, but we haven't totally exhausted the topic because this term was incredibly significant.

Kate Shaw:

And we actually haven't had a chance to go deep, at least as deep as we have wanted to on some of the criminal justice issues that the court decided just this past term. So, we're going to just take a little bit of time to go a bit deeper on some of the cases that we may have mentioned in passing, but haven't been able to devote the time that we would like to on this episode. So Leah, do you want to start us off?

Leah Litman:

Sure. I'm going to do two because it's Shark Week motherfuckers. So, one-

Kate Shaw:

Is it actually still Shark Week, wasn't that last week? How long is Shark Week?

Josie Duffy Rice:

Don't you feel every week is Shark Week? I feel like Shark Week happens multiple times a year.

Leah Litman:

It's like Infrastructure Week, it just keeps happening.

Josie Duffy Rice:

And I just don't know how much about sharks there could be, how many weeks can sharks fill up?

Leah Litman:

I don't know but when my governor was recorded on a hot mic saying, it's Shark Week motherfuckers, it's Shark Week.

Melissa Murray:

Big Gretch. Big Gretch.

Leah Litman:

Exactly. So one of the criminal justice cases that I wanted to highlight was Hernandez v. Mesa, just because it is a criminal justice case that didn't really present as a criminal justice case, given the particular facts and posture. This is of course the case involving a shooting of a 15 year old Mexican national by a border patrol agent. And the question in the case was whether the family had what's called

a cause of action. Essentially, an authorization to sue the federal officer who shot and killed their son. The Court ultimately said they do not. And part of why this case is so significant, is that it has unclear and uncertain ramifications for what is happening in the racial justice protests around the country and in particular in Washington and Oregon, because in those places and potentially others, the President and Attorney General have deployed federal officers nominally to protect federal property, but also to engage in more general policing and suppression of the protests.

Leah Litman:

And as a result, there have been allegations that these officers are engaged in excessive force and other constitutional violations. But then the question is, what can you do about it? And the question in Hernandez is when, if ever, you can sue federal officers who were engaged in constitutional violations for damages. And what Hernandez suggested is, those circumstances are increasingly rare if they present a new context or if they're extraordinary circumstances, counseling hesitation in allowing a cause of action, that those would be reasons not to allow it.

Leah Litman:

And so, we see some of the lawsuits challenging these federal officers deployment happening in the lower courts already. But Hernandez could potentially be significant for those cases that are seeking monetary relief.

Melissa Murray:

Great. I want to highlight a case that we talked-

Leah Litman:

Wait, no, I have a second.

Melissa Murray:

No. I'm sorry, I'm sorry.

Kate Shaw:

It's Shark Week Melissa.

Leah Litman:

It's Shark Week.

Melissa Murray:

That's like an RBG stall where someone starts talking.

Leah Litman:

I just did the RBG stall.

Kate Shaw:

Well, it's such a power move too. So, RBG for people who don't know, pauses for an interminably long time, mid thought sometimes and it's natural to begin speaking five or six or seven or ten seconds into a

pause, and yet she's often not finished. And if you do make the mistake of stepping into a sentence or a thought that RBG has not yet completed, the daggers she will shoot you, are really something to be avoided. So I do not think Leah just deployed those daggers on Melissa but I will note that was an RBG power pause.

Melissa Murray:

I got a very big settle down bitch vibe.

Leah Litman:

Okay. So then quickly. The other set of cases I would just highlight are of course, the COVID related voting cases. I know we talk about them a lot, but it's because they're important. And because of the deep connections between criminal justice and democracy. So for example, the voting rights cases coming out of Wisconsin, I think of as criminal justice issues because in the Wisconsin election, that the court forced voters to go out in person in the midst of the pandemic, there were a bunch of state judges on the ballot and those state judges will be very significant to criminal justice issues.

Leah Litman:

And so, you can only implement criminal justice reform at state and local level if those state and local elections are representative to democratic politics. And then the second case is more directly highlighting the relationship between voting rights in criminal justice and that's *Raysor v. DeSantis*. That is the case where Florida enacted by initiative, a measure that granted the franchise to persons who were previously incarcerated, but then the state legislature and state courts took that away for persons who had not yet paid all of their fines and fees.

Leah Litman:

A district court held that was unconstitutional. The Court of Appeals initially affirmed that ruling, but then the full Eleventh Circuit put it on pause and the Supreme Court did not disturb the Eleventh Circuit's decision to put on pause the injunction. So again, this underscores the deep connections between political rights and criminal justice, because even when you accomplish these super significant criminal justice reforms, there are a bunch of institutions like the courts that can blunt their effectiveness. Now I am done.

Melissa Murray:

It's almost like there's an op-ed about that, about your political agenda and the Court's thwarting of it. Anyway, you can take that out Melody.

Kate Shaw:

No, Melissa. No, don't take that out Melody. Melissa wrote a kickass op-ed about the importance of courts as entities that either can facilitate or can thwart the implementation of a policy agenda. So when the Democrats over the course of four nights at the DNC almost uniformly failed to focus on the Supreme Court and the courts in general, Melissa calls them out for doing that. So check out her op-ed in the Washington Post. Melody, don't cut that.

Melissa Murray:

What are courts anyway? Okay. So it's not Shark Week anymore. I want to highlight just one case, Ramos v. Louisiana, which I found endlessly fascinating this term. So in Ramos, which we've talked about before, the Court declared Louisiana's rule, which allowed for non-unanimous jury convictions...they held that it violated the Sixth Amendment right to a jury trial. And in doing so the Court overruled two precedents from 1972: Apodaca v. Oregon and Johnson v. Louisiana. As the Court explained, these earlier decisions were out of step with the Sixth Amendment and the longstanding assumption that jury convictions must be unanimous at least at the federal level. And the Court interestingly also noted that not only was Apodaca and Johnson a set of outliers constitutionally, but the roots of the Louisiana rule and the Oregon rule, Oregon had once had the same non-unanimous jury rule could actually be traced back to racism.

Melissa Murray:

In Louisiana's case, it was traced back to reconstruction and the 1898 state constitutional convention, which explicitly sought to enshrine white supremacy by limiting the power of blacks on juries. And in Oregon's case, it was traced to the 1930s where the KU Klux Klan came out in favor of the non-unanimous jury rule that was then adopted. And so, although the rule had subsequently been reaffirmed in the 1970s and Louisiana, the court nonetheless looked to its racist origins as further evidence of why it should be overruled or invalidated and the cases upholding it overruled.

Melissa Murray:

I thought this was really interesting for lots of reasons. So one, obviously, we can all get on board with the outcome here, which is to say that you can no longer have non-unanimous jury convictions going forward. But I thought that the dissents here were really interesting. Certainly the lineup was interesting. It was Justices Alito and Kagan along with Chief Justice Roberts dissenting, and Justice Alito went on a huge thing about the incivility of talking about race, which I did not find as interesting. But I thought it was interesting that Justice Kagan joined this. And I speculated as to why it might be. Like maybe she was just sort of accruing capital for later for other cases where other precedents hung in the balance. Like for example, Bakke v. Regents of the University of California, which is also a 1970s case with a very fractured set of opinions in which Lewis Powell writes for himself and apparently dictates some of the future of this doctrine.

Melissa Murray:

I think that was one of the things that she was thinking about, but on greater reflection, I'm convinced that in Ramos are the seeds of, I think, a campaign to maybe use race more extensively to overrule contested precedents, including precedents like Roe v. Wade. So hold on for a minute, what does Roe v. Wade a case about abortion, how does it have anything to do with Ramos, a case about jury trials? If we go back to 2019 with Justice Thomas's concurrence in Box v. Planned Parenthood of Indiana and Kentucky, where he wrote this really interesting opinion, linking abortion with the history of the birth control movement and Margaret Sanger and eugenics, and basically argued that abortion could be a tool of deracination and suggested inaccurately and misleadingly that abortion was laced with this racist taint and origin story.

Melissa Murray:

I think if you take that seriously, you could go forward and use Ramos and this whole idea of race being a predicate for reconsidering, a past decision to overlook lots of decisions, including Roe v. Wade. So

Ramos is one of these decisions where I think the outcome is really progressive, but not surprisingly embedded in it might be the seeds of something that others would find I think, less progressive.

Leah Litman:

This sounds like a fascinating topic for a law review article Melissa.

Melissa Murray:

Someone should write that.

Kate Shaw:

Melissa has, it's brilliant.

Melissa Murray:

Josie? Am I off the mark here?

Josie Duffy Rice:

No. I'm now really thinking about that. I think that's really interesting. The Ramos case to me, watching the past few years, the issue of non-unanimous juries first in Florida, then in Louisiana, then in Oregon has been interesting politically in a different way, which has been the response from the local criminal justice infrastructure. There was a quote from John DeRosier, the DA in Calcasieu Parish in Louisiana, where he testified in front of the legislature and said, "Look, we know this comes from racist roots, but it is what it is." And that quote followed him around. It made it to billboards in his town. It really like... I mean he still got reelected. He's fine. But it caused a lot of pushback from Black state legislators and in Louisiana.

Josie Duffy Rice:

And it reflects really just what seen in terms of local criminal justice, starting in Florida a few years ago before Hurst and then moving to Louisiana and Oregon, I can't tell you how much pushback there has been from local DA's on this non-unanimous jury issue in particular. And so much of it is just that this makes our job harder. And there's a lot of procedural pushbacks, we don't actually have the resources to convict people if we have to get everybody to agree.

Melissa Murray:

To be clear, I truly hope I'm wrong and that this is not going to be an instrumental and opportunistic use of race to reopen settled precedence going forward. Again, the Trojan horse, embedded in this gift could be sort of the undoing of something else.

Kate Shaw:

I hope you're not Cassandra on this one, Melissa?

Josie Duffy Rice:

I have a feeling you are. I really hope you're not and I have a feeling you are.

Melissa Murray:

My track record is good.

Kate Shaw:

Okay, so, let's switch gears. Actually, I want to highlight a case that we talked about a decent amount in the run up to the argument, but not much in the wake of it. And that is the Bridgegate case, Kelly v. United States. It was decided in early May, and so it had sort of faded by the time a lot of these end of term wrap-ups were getting written. But I do think it's an important case and it's worth pausing over for a moment. So this was the case just to remind people involving convictions arising out of the so called Bridgegate scandal. So this is when officials at the port authority and in then New Jersey Governor, Chris Christie's office hatched a plan to reroute traffic on the GW bridge in order to punish the mayor of the town of Fort Lee for not supporting Christie's reelection bid.

Josie Duffy Rice:

Normal, healthy behavior. Yeah.

Kate Shaw:

It's so egregious and the court does this thing that it sometimes does, which is to say, "Sure, this is unseemly, this is tawdry. But it's not a violation of federal criminal laws." And so a question I actually do want to unpack is this, just how to feel or think about it? So we have these two officials they're convicted of violating a couple of federal statutes, basically prohibiting wire fraud and fraud on federally funded programs. And Justice Elena Kagan writes the opinion here, unanimously reversing those convictions and finding that yeah, so far there was an abuse of power. This was all improper. But that doesn't necessarily amount to a violation of the federal criminal law.

Kate Shaw:

And for this technical reason, which is that the scheme here did not aim to obtain property or money. And that must be the object of the scheme in order to violate the relevant federal statute. And here the scheme was like about some political payback or something, which is different from a purpose to obtain property or money. I think that this case does sit in align with the McDonnell case out of Virginia, also involving unbelievably corrupt conduct by a sitting official state official as well. And also involves a unanimous reversal of that conviction. Not wanting to Chief Justice Roberts opinion. I think it's actually really interesting that the Kelly opinion doesn't cite McDonnell.

Kate Shaw:

I think it's kind of deliberate, they're different statutes, so in theory, I suppose you don't have to talk about, McDonnell. But the general principle here, which is these general vaguely worded federal criminal statutes, confer too much power on federal prosecutors. And that we don't necessarily want this much discretion to reside in the hands of federal prosecutors when we're talking about this complicated tangle of motivations that political actors are driven by. And so, to cavalierly allow the criminalization of conduct that we just find unseemly or improper or politically motivated would be dangerous. And on the one hand, I think that for progressive, there is of course, something really attractive and the reasoning that we want courts to closely scrutinize the amount of discretion that these broadly worded statutes place in the hands of prosecutors and that's of course, in particular in the federal system where the sentences can be so savage right in their length.

Kate Shaw:

And yet, it is hard to mistake the asymmetry of concern that the justices seem to harbor about the defendants in cases like these who are, sitting politicians, white politicians, politicians who might look like the kinds of people that the justice has come into contact with in social circles, might have actually come into contact with in fact, probably do. And I sort of stopped to think about it or have and the kind of mind run of criminal defendants, whose cases the justices are typically hearing right year in and year out. And so I guess I'd be curious just in general terms how to think about a case like this Josie. I mean there's in some ways I think like sophisticated criminal justice reform folks, like you, there's sort of leveling up versus leveling down like that, the instinct is to say, this is outrageous, the conduct was terrible. They should have the book thrown at them and like they should go to prison like everybody else.

Kate Shaw:

But they're also I think, is like sort of a leveling up response, which is that yeah, this kind of substantive justice, maybe it was appropriate in a case like this, and we should want more and not less of it. And so I guess how do you navigate being pulled between those two reactions to a case like this, where the conduct is horrible, but the sentences are so harsh and the statutes are broad and maybe too much discretion as confirmed by them.

Josie Duffy Rice:

Right. I think my instinct and it's taken me a long time to get here, but my instinct is always that we should be decriminalizing and construing criminal law narrowly. That we should not... if what the law says is that it has to be for money or property, it should have to be for money or property. I always struggle with this, and I struggle with this and every kind of way I struggled with it when we talk about arresting police, I struggle with it when we talk about anytime that we talk about the disparity between what happens to less fortunate defendants, what happens to the white collar defendants. My instinct is like, you guys should have to pay the same price everybody else does.

Josie Duffy Rice:

The reality is that making them... criminalizing people more, does not actually equal the playing field just because of the sheer disparity and who even gets indicted, whose behavior is even investigated, who even is arrested. And so, I don't think it's actually effective, but mostly I think that probably this is a good result, that if they want this to be illegal, that should be illegal in statute, but it shouldn't be construed to be broader than it is, that we should be narrowing criminal law, not expanding it, even though that was the most petty, worst... Bridgegate was just the worst example of American politics that I can even think of. It wasn't extreme-

Melissa Murray:

Wait, wait.

Kate Shaw:

At the time it was, it's been overtaken obviously.

Josie Duffy Rice:

It has been overtaken, but it still is in such an interesting way and that is just pettiness for the sake of being petty. It just was like, you guys are bored, you need a hobby. If you're doing this in middle of the day, it's just so ridiculous. Social consequences, this is a time for social consequences maybe not prison.

Kate Shaw:

Yeah. I think that's a really nice way to think about it. I was really troubled by the result, but I think it's maybe the right way to kind of reconcile these competing reactions is, yeah, probably on the statutes that were charged here. This was the right result. What I get concerned about in a case like this and McDonnell, and you see elements of it or strains of it in Citizens United and Rucho, the partisan gerrymandering cases. The Court is going to come to a place where there's a constitutional protection or privilege for any conduct, if it simply can be explained with reference to political motivations such that, that's not the basis of the Court's holding here or McDonnell, but it sort of feels like it's in the ether.

Kate Shaw:

And if it is the case that some, I don't know where probably First Amendment grounded right to do politics, would supersede any criminal statute that might otherwise criminalize particular modes of conduct if they're political and motivation, that's where I start to get really nervous. And I worry the Court is sort of laying the foundations for something like that sort of rule. But as a general matter of statutory interpretation, maybe this is the right result in this case. So I think you may have convinced me Josie.

Josie Duffy Rice:

You can see how this would just go so far that they should obviously be held responsible criminally for that, but I'm not sure that I'm convinced in this case that this is where to draw the line.

Leah Litman:

Those were the criminal justice issues on the Court's docket for last term. We also have some criminal justice cases we're already watching for this upcoming term that we thought we would just briefly preview. Since we're usually running short of time on our actual preview episodes and didn't want these cases to get lost. So I'll just rattle off some super quickly and just say the issues that they present. There's an Armed Career Criminal Act case, Borden v. the United States. I am obsessed with ACCA and this case is no exception. Just because it could greatly expand the reach of this federal criminal law, very draconian penalties for kind of piddly state offenses, like bumping up against someone in the course of shoplifting and accidentally twisting their finger in the course of trying get their ring. And all of a sudden that subjects you to a 15 year federal mandatory minimum.

Leah Litman:

The other set of cases that I'm really interested in involve remedies, possible remedies for police misconduct. So Edwards v. Vannoy is the follow on case to Ramos v. Louisiana. And it's whether people who were convicted by non-unanimous juries under the unconstitutional Louisiana or Oregon statutes can have their convictions vacated. There's a general doctrine of non-retroactivity that says new rules of criminal procedure don't apply to cases that have become final. That is, if you've already exhausted your appeals all the way up to the US Supreme Court. But if the new rule is either substantive or a new watershed rule of criminal procedure, then it does apply to your case. And so the question in this case is, is this a new rule? Or if it is, is it substantive or a watershed rule of criminal procedure?

Melissa Murray:

I think this one will be really important Leah, you raised it when we talked about Ramos the last time, there are so many other convictions that happened under this non-unanimous jury rule. So I think this is I think a broader question about whether the floodgates will be opened to all of these. And I just wanted to highlight on the briefs in this case the petitioner is being represented by Andre Belanger, who is I think the attorney of record from Baton Rouge, that's been on this case for the long haul, but joining now the Supreme Court level, is the Northwestern University Supreme Court practicum. And I'm saying this because one of our favorite Cassandras is an alumna of Northwestern.

Melissa Murray:

So Kate, your people are in here and they're also joined by Chicago institution, Sidley Austin, who has a number of lawyers on the brief as well. So, it's a full pronged effort here, and lots of amicus briefs already filed, including a set of briefs from my colleagues at the Center for Race and Inequality at NYU, Vincent Southerland and Deborah Archer who joined with some other race centers at different law schools to take up the case for the petitioner here.

Kate Shaw:

Quite a team. Wow. So I want to highlight a case that also has a really good litigation team on this one from Orrick. So this is a Fourth Amendment case, Torres v. Madrid. It involves a woman who was shot at 13 times, hit twice while she was fleeing from a group of police officers, but whom she claims and at this posture, like those claims are to be taken as true, she thought were just carjacking her because they were not in uniform, they were in plain clothes. So she drove her car away from them and they opened fire into her car. Again, 13 times hit her twice. She was able to keep driving. So she drove herself to the hospital. The argument that the officers have made and that the lower court accepted was, that there was no seizure for purposes of the Fourth Amendment.

Kate Shaw:

She wasn't seized, the Fourth Amendment prohibits unreasonable searches and seizures. So this wasn't a constitutional seizure because she wasn't stopped because she was able to keep driving to get herself to the hospital. Just to describe, it feels like this is a facially ridiculous finding below particularly with this very good litigation team is sure to reverse, but nothing's ever that simple in the Supreme Court, but the facts here are pretty shocking. And then one other case that seems worth flagging. So this is a case that has been described as replacing a case that was supposed to be heard last term, the Malvo case involving Lee Malvo, who is the juvenile, who was part of the so called D.C. sniper team. At issue in the case is Miller, in which the court held that mandatory life without the possibility of parole for juveniles violated the Eighth Amendment.

Kate Shaw:

And then in a follow on case, Montgomery, held that Miller applied retroactively, so Malvo ended up getting mooted. And so this case was granted in its place, although I'm sure, I don't know if either of you have been following the case closely. I don't know that it's identical here. The petition asks whether the Eighth Amendment restricts life without parole to permanently incorrigibles. So it requires a finding that somebody who is a juvenile when they commit their offense is permanently incorrigible. Malvo had this question about what exactly the rule of Miller that was found retroactive in Montgomery requires or holds. I mean, I think that is basically the question here, although it's framed somewhat differently, but

for folks who work on juvenile justice issues, this is just the latest in this extremely important line of cases beginning with Miller.

Leah Litman:

Yeah. It's super important. And we mentioned the number of people who were convicted by non-unanimous juries in Louisiana or Oregon. There were a huge number of juveniles who were sentenced to life without parole and states have taken different approaches to remedying these Miller violations. Some states have passed legislation making all of them eligible for parole. Other states have chosen to conduct individualized resentencings and this is a case that will decide whether those individual re-sentencing, some of them complied with Miller Montgomery, as well as what sentencing practices are constitutional going forward.

Leah Litman:

I think in addition to the question presented being framed slightly differently than Malvo, like the structure of the underlying state laws is a little bit different. If you remember from Malvo, the lawyer arguing the case, Danielle Spinelli said, "Look at the time this person was sentenced, Roper hadn't yet been decided. So the death penalty was still on the table. And so what the judge and jury were thinking about, is whether to sentence him to the death penalty or life without parole. And there was no statute requiring consideration of his youth. And so I think that those background features of the law were informing the court's consideration. And at the oral argument in that case, Justice Kagan was asking questions like, "Well, if state law either permitted or required a judge to take into account youth, would that basically be sufficient? And here are the structure of state laws, a little bit different." Jones is very well represented by our friends at the MacArthur Justice Center who we spoke to last week, but I am a little bit nervous about this case.

Josie Duffy Rice:

I know I'm a broken record, but this has been another interesting one to watch how it plays out locally. We've seen in places like Pennsylvania, where I think there were 2,000 juveniles who had been sentenced to mandatory life without parole. There has been some effort, some real moves towards recent announcing a fair amount of them. I would argue not enough. We have seen people and we interviewed one of them on our podcast, actually Abdul Latif who have been recent to have gotten a second chance and who have been found not to be irreparably corrupt. That's the language that Kennedy used in Montgomery. But then you go to places like Detroit and Michigan, especially where a lot of DA's have asked to resentence every juvenile that they've ever sentenced to life without parole.

Josie Duffy Rice:

And so, it's just been really interesting to watch how Montgomery has played out, not just state to state jurisdiction, to jurisdiction, what DAs are choosing to do with huge populations of kids or people who were kids when they committed their offense and are facing the rest of their life in prison.

Leah Litman:

This is actually an issue in our local prosecutor election, Washtenaw County. We're in the democratic primary, one candidate, Eli Savit who ended up securing the nomination promised never to seek life without parole for any juvenile. And so, depending on what the Court does that might make these local prosecutor decisions and reasons all the more significant.

Josie Duffy Rice:

Totally. I mean, Larry Krasner in Philadelphia, that was a big failure of his predecessor and a big part of his platform. So it's been interesting to watch it play out the duality of it playing out in both kind of places, both the Supreme Court and locally.

Josie Duffy Rice:

It just does seem like we're having this conversation on ridiculous terms about the irreparable corruption of a child. That's not a thing. The idea that we're even pretending that there are some predictive element that we can read into what's going to happen to a child's future just feels ridiculous on its face. So it's good to see them continue to hopefully continue to narrow this and yet it's such a fiction.

Melissa Murray:

I think you're pulling punches a little bit, Josie. I mean, part of it is like when you think of the population of youth who were thinking of it, it's mostly black and brown kids, there's lots of statistical evidence, empirical evidence that suggests that most people when viewing children of color, don't view them as children, think that they're older. And so again, a lot of this, I mean, if take that as sort of a background assumption that there is this assumption going on that these are not children, but it's sort of tiny adults. Then this is I think more obviously legible and how it functions is more obviously legible.

Josie Duffy Rice:

It is the race element and this culture of poverty thing, and you see that in a lot of the reasoning, we saw that in a lot of what happened out of Detroit, that the DA was saying, "Well, these kids never got a chance and they had such horrible childhoods and they were so screwed up that now we can't let them out of prison because they were irreparably screwed." It's like, okay, where to start on this logic. And in so many ways, it feels like the logic here is giving DA's the opportunity to do what they want to do anyway in some of these places, which is make the point that people can't change, even when there's absolutely no kind of evidentiary substance there.

Melissa Murray:

All right. So having teed up some of the criminal justice issues that are on deck for the court in October term, 2020, it's now time to get to the lighter stuff, some Court culture, and this Court culture segment could very well be titled why are men, Question mark?

Josie Duffy Rice:

You guys brought me out on the perfect day.

Kate Shaw:

First installment in our Why Are Men series. So the Supreme Court issued an invitation to argue a last week in a case called Collins v. Mnuchin, which is about the constitutionality of the structure of the FHFA. This is a post-Seila loss. Remember the Court invalidated the constitutionality of the single-director structure of the Consumer Financial Protection Bureau, although left the agency intact. So this is a follow on case about another very similarly structured agency. So because the federal government has taken the position that these agencies are unconstitutional in their single-director structure Court had to, as it didn't say the law, find an advocate to take the position that this structure is constitutional.

Kate Shaw:

So it issued an invitation, something the court does all the time. And it issued an invitation to Aaron Nielsen who is a law professor at BYU and yet another Kirkland attorney, I think this is the third straight white guy from Kirkland that the Supreme Court is invited to argue an unrepresented position before the Court within the last year. And Aaron is a very good administrative law scholar. And I am sure will do a very good job at this argument. But it is deeply disheartening, that at the close of a term, in which 12% of arguments were by women, 1 by a woman of color and the Court has this opportunity to do something to somewhat rectify these numbers.

Kate Shaw:

So, when we're talking about a denominator of like 50 or 60 cases, if the Court is going to hand out one or two or three invitations a term, if it just tried a little bit to diversify the ranks of its invitees, it can actually really move the needle on the numbers. And it seems almost deliberately unwilling to do that. So I actually wrote a law review article about this weird practice of the Supreme Court, inviting someone to argue on unrepresented position. A few years ago, when I wrote about it in 2016, 6 of the 59 invitees ever were women only one Maureen Mahoney had been invited before 2009. So literally before 2009, there had only ever been one, a woman invited to argue a case. Three where people of color, all men. And it looked for a minute post 2016, like the Court was doing a little bit better.

Kate Shaw:

It invited Deepak Gupta to argue a case. It invited a woman in Amy Weil to argue a case, but they seem to have now reverted to their prior practice. And they have a type when it comes to these invitations and it is, white guys who have clerked for one of the justices and often haven't argued before. Now, Paul Clement deviated from that model obviously he's argued a million times before the Court, but typically this is their type. And it's like, especially in the heels of a term or two terms in which you had these first timers who are not white guys like, Julie Rikelman like, Dale Ho argue the hell out of their cases. Like when these huge, important cases, there are other lawyers they could reach out to, and they just seem not to want to do that. And so I guess I will close by saying do better.

Melissa Murray:

You noted that Aaron Nielsen is a really great administrative law scholar from BYU and a former Kirkland attorney who did not say, although you alluded to it, that he is also a former clerk of Justice Alito. And so this is an opportunity for me to get back on my soap box about how clerkships are network forming opportunities. And this was one where Justice Alito came to know Aaron Nielsen, and again, felt very comfortable recommending him. Imagine what it would look like if we were able to diversify the ranks of the clerks at the Supreme Court at the lower federal courts, so that these networks were more integrated. And other lawyers who are now not familiar to judges or justices would become familiar to them in particular ways. And so, again, I'm thinking back to the terrific episode that you did Leah with Debbie and Amir and Tiffany Wright, who highlighted all of these issues as well. So another opportunity to think about the diversity of clerkship.

Kate Shaw:

And that is really, honestly, that was a fantastic episode and people who listen to it, if they haven't... what I just find so frustrating about the Court's failures here is that, a lot of the structural changes that need to be made in order to diversify the ranks of appellate lawyers and get more people into clerkships. Those are hugely important, and some of them will take a little time like the court could

tomorrow be a little bit mindful of the invitations that it is issuing. It's not even though the numbers are way too low, there are qualified women and people of color who are appellate attorneys who could easily discharge the duties.

Melissa Murray:

Not only that, if you wanted a law professor, there's Anne Joseph O'Connell at Stanford or Gillian Metzger at Columbia. I mean, there are really fantastic women doing administrative law work.

Kate Shaw:

Anne or Gillian would be a fantastic, and I have no idea if either of them would even want to do one of these arguments, but they could do a fantastic job. And like, it is just conspicuous that the Court seems to have no interest in reaching out and tapping people like them.

Leah Litman:

So, second incidence of Why Are Men is some changes in the personnel, in the Solicitor General's office. So, the SG's office has added another career deputy position. And in that position is another white man rounding out the office to have five deputies, four career deputies, all white men. And the newest addition is Curtis Gannon, who was formerly at the SG's office and is coming from the Office of Legal Counsel. Marshall Coyle reported that the increase in the number of deputies might actually be because of the increasing number of emergency applications that the federal government has been making to the Supreme Court. So asking them to grant stays of injunctions against the Trump Administration's policies, some other great things that DOJ has been doing that they might need the added resources for were one asking the Supreme Court to allow the President to block people on Twitter.

Leah Litman:

So, the Department of Justice filed a cert petition in the Court of Appeals case that had said the President can't block people on Twitter. And even though the issue is entirely splitless and definitely beneath the dignity of the Court, the DOJ decided to marshal its resources and time to ask the Court to hear it. And the DOJ also just filed a cert petition in the Boston Marathon bombing case. In that case, the Court of Appeals had vacated the death sentence of the defendant on the ground that the prosecutors had manipulated jury selection in order to wrongfully exclude people from the jury pool and DOJ filed a cert petition in that case as well.

Melissa Murray:

Nothing to see here.

Leah Litman:

So that's probably all we have time for. Thank you so much, Josie. We hope you will come on again soon and help us cover this upcoming term and terms thereafter. Thank you to Melody Rowell, our producer. Thank you to Eddie Cooper, who makes our music, and you can support the show at glow.fm/strictscrutiny.