and updates will hopefully change that approach to victims. But it is very hard to turn around the culture of an institution.

A restorative-justice approach which admits and addresses the truth in charity offers a useful instrument to create a new culture, within the Catholic Church, which enables the truth to emerge not just in the adversarial culture which is common in our societies, but in an environment which focuses on healing. At our service of lament and repentance, I stressed that the scandal of the sexual abuse of children by clergy means that the Archdiocese of Dublin may never be the same again—or should never be the same again. But that is more easily said than achieved. After a period of crisis, there is the danger that complacency sets in and that the structures which we have established slip down quietly to a lower gear.

A Church which becomes a restorative community will be one where the care of each one of the most vulnerable and most wounded will truly become the dominant concern of the 99 others, who will learn even to abandon their own security and try to represent Jesus Christ, who seeks out the abandoned and heals the troubled.

I hope that these rather personalized reflections will be of some use to you today and in our renewal and in our commitment and will give us all new hope. ■

Barrock Lecture

How Should We Punish Murder?

On January 24, 2011, Jonathan Simon, the Adrian A. Kragen Professor at Boalt Hall, the University of California–Berkeley School of Law, delivered Marquette Law School's annual George and Margaret Barrock Lecture on Criminal Law. Simon's speech—"How Should We Punish Murder?"—appeared in expanded form in the summer issue of the *Marquette Law Review*. This is an excerpt from that article.

Jonathan Simon

The disproportionate role that murder plays in the media and popular culture reflects its role in ordering our broader conception of crime and its appropriate punishment. Because of its role at the penal summit of crime where life is most threatened, murder establishes the top of the penal scale. At the very least, a flat and severe sentence for murder has an inflationary effect on the whole structure of punishment through adjusting the scale of pricing of criminal penalties overall. Thus, the high price for murder, at the very least, makes it far easier to set high sentences for all manner of less serious offenses. If murderers serve 10 or 20 years, one is not likely to see repeat burglars or drug traffickers serving for decades. It follows that where murder punishments are extreme, there is the potential and perhaps an inexorable pull toward more severe punishments for all the lesser crimes; and where murder punishments are moderate, the overall array of punishments will be moderate.

In modern society, this price logic is accelerated by a criminological logic that extends the threat of murder into the larger structure of crimes. In the past, the law of crimes reflected a variety of social functions, including the protection of religious values (blasphemy was a capital crime), status hierarchies, and property. In modern society, however, the preservation of life has become the overwhelming value expressed through the criminal law. Herbert Wechsler and Jerome Michael in their seminal analysis of the law of murder, written at the end of America's first great wave of violence in the mid-1930s, captured this sense that all of criminal law, and not just the law of homicide, was concerned with preservation of human life. They wrote:

> It will be well, in closing this brief survey of the law of homicide, to recall that the rules defining criminal homicides are not the only rules of the criminal law which have for their end or among their ends the protection of life. Even though life is not destroyed, a multitude of acts entailing unjustifiable risk of death is made criminal by the law governing other common law offences, arson, burglary, robbery, assault, battery, mayhem and rape, as well as by the general law of attempts, solicitation, conspiracy, riot, disorderly conduct and the heterogeneous mass of lesser offences created because the behavior involved is deemed to be dangerous to life or limb. Indeed, most behavior which is inspired by an intention to kill, or is characterized by an unjustifiable risk of killing, conscious or inadvertent, falls, where death does not ensue, within some wider or narrower, more or less specific category of criminal behavior, calling for the treatment which may be as drastic as that for homicide or as gentle as a stereotyped fine. Moreover, any provision of the criminal law serves the end of protecting life in so far as it makes possible the incapacitative or reformative treatment of persons who, unless they were subjected to such treatment, would engage in behavior threatening life.

Instances of less serious crimes, such as vandalism, minor theft, or drug possession, can be viewed as legal violations calling for only modest punishment from either a retributive or a deterrence perspective. However, they can also be viewed as evidence of "criminality" for which the present modest offense may be part of a potentially escalating pattern of crime whose increase tends toward violence and murder. Thus, a flattening of the law of murder, especially at a severe level, will tend to create pressure to revalue all criminal punishments upward. . . . [T]he job of the law of homicide is to dissipate penal heat through the measured separation of terrible violence into morally meaningful substantive crimes, and to link these crimes through a ladder principle to the severity of punishment. When the law of homicide fails at that job, penal heat builds up as fear and outrage at the worst crimes infects the public response to all crime.

Mass incarceration might be thought of as the visible symptom of an underlying problem in our penal culture. Just as obesity can mean that a person has lost the ability to regulate their own appetite for food, mass incarceration is evidence that our collective appetite for punishment is out of whack. Earlier I suggested a thermal metaphor for this function, the law of murder as a kind of radiator. Here, I suggest a somewhat different consumption-based metaphor of appetite, where murder functions as a key anchor for changes in our overall appetite for punishment. The ability to set a proper scale of punishment when it comes to murder is crucial then to establishing an overall sense of proportionality for punishment.

I am not suggesting that the law of murder alone drives over punishment in contemporary society. We know from extensive scholarship by now that many features of contemporary U.S. society help to drive mass incarceration. One of the most important features includes the political structure of crime policy, which is extremely decentralized, and creates pathological incentives for both individual lawmakers and individual prosecutors. The U.S. and the UK have also experienced a significant increase in economic inequality over the past generation and growing insecurity of working and middle-class families, and both societies continue to struggle with an incomplete resolution of our history of organized racism. A long-term crisis of the conditions under which liberal governance is carried out has made government appear weaker and less legitimate. But while all these factors may contribute to the heating up of the crime policy field, the law of murder represents a unique mechanism within the substantive law of crimes that permits a kind of internal effort at homeostasis by dissipating and channeling penal heat. Perhaps only at the margins, a well delineated and differentiated law of murder permits a cooling process. This process occurs by describing morally meaningful and culturally resonant differences between events that, from the victim perspective, are identical, and by creating pathways of responsibility. These pathways channel popular outrage about the legal response to violent crime away from the centers of political power and toward judges, parole boards, and juries. Likewise, and perhaps at the margins, our garbled and incoherent law of murder contributes to this epic problem.

Could this be the right time to look for a major rethinking of the law of murder? The last great recasting of the law of homicide (and the criminal law more generally) began more than 80 years ago in the scholarship of figures like Rollin M. Perkins and Herbert Wechsler. Today we are once again in a time when criminal law

theorists are returning to fundamental questions about the law of murder. There are a number of reasons this is a promising moment for such a return.

First, the law of murder today comes into question in a time of "mass incarceration" in the United States, and arguably in England as well. Between the 1930s, when Wechsler began thinking about the rationale of the law of homicide, and the mid-1970s, when he produced his last revised edition of the Model Penal Code, the imprisonment rate for the United States had declined from around 118 prisoners per 100,000 free adults, to around 96. In 2009, the national imprisonment rate was leveling off for the first time in decades, at around 504 per 100,000 free adults. Broad agreement exists among criminologists that current levels of imprisonment are unneeded to control crime, which is at a level much reduced from the heights of the 1970s and 1980s, and that states cannot afford to maintain these high levels of imprisonment, especially as aging prisoners drive up healthcare costs. While homicides are down considerably, the life sentence for murder, and the very long prison sentences that it produces, are becoming a major part of that cost in at least some jurisdictions (California in particular).

Second, there has been a sea change in penal rationales. When most of the modern reforms of the law of murder were developed in the middle of the 20th century, the dominant penal rationale in both England and California was rehabilitation. By the 1980s, a comparatively extreme version of penal incapacitation had emerged as the dominant rationale for the law of homicide (and everything else) in California. England has also increasingly embraced incapacitation as the master rationale governing punishment (and especially the punishment of murder). From a penal-heat perspective, the dominance of incapacitation is critical because it has removed any potential for the correctional enterprise to contribute to a cooling of emotions generated by crime in society. Appeals to rehabilitation, or retribution understood as just deserts, point to factors that can encourage sympathy for the offender and acceptance of limits to punishment. Rehabilitation helps define the violence of the offender as, at least in part, due to factors beyond his or her control, and promises to utilize the punishment experience to address those factors and reform the likely future behavior of the offender. Just deserts presents the offender as an equal member of the community who must be called to account for his or her usurpation of the victim's rights, but who can "pay their debt" to society through the expiation of just punishment. In contrast, incapacitation calls attention only to the dangerousness of the offender and promises only to contain that threat, not redress it.

Third, the rise of human rights law internationally, and the growing significance of international human right treaties like the Universal Declaration of Human Rights and the Torture Convention, highlight dignity as a central positive value that must be protected by the law, including the law of murder. In England today, the law of murder is also determined in important respects by the European Convention of Human Rights and by the European Charter of Human Rights. As enforced by the European Court and Commission of Human Rights (respectively) and promoted by European Community administrative organs like the Committee for the Prevention of Torture and Degrading Punishment, the law sets limits on the severity of punishment and requires an institutional commitment to resocialization, individualization, progressivity, and potential for release. In the United States, the emergence of dignity as an influential substantive norm for the criminal law has only just begun and is likely to move more slowly, as it is limited to the interpretation of the "cruel and unusual" punishment ban under the Eighth Amendment and the meaning of "degrading and inhumane" punishments under the Torture Convention.

Fourth, there are signs that some process of revaluation of punishment and the law of murder is already beginning. England, which has experienced a less extreme but similar pattern of escalating punishment in recent decades, is, after a long period of increasing its penal severity and incapacitation orientation of its justice system, in a period of reconsidering its heavy reliance on imprisonment—the law of murder in particular has come under scrutiny. In 2005, the Law Commission, a chartered

expert body on law reform, published its consultation paper, *A New Homicide Act for England and Wales?* The consultation paper specifically cited the harsh minimums for life sentences established by the 2003 Criminal Justice Act as requiring an effort to reform and rationalize the law of murder. The Law Commission published its final report in 2006 recommending a three-tier structure to the law of murder. There is more than irony in the fact that England would consider adopting American-style degrees of murder after more than 200 years; additionally, there is an invitation to consider whether we have lost something in the emergence of a flat and high de facto single degree of murder in California.

In the remainder of this article I will describe in more detail the evolution of the law of murder in the England and the United States from the penal-heat perspective. Specifically, I will examine four change points: the emergence of the murder-manslaughter distinction in the 17th century; the emergence of degrees of murder at the end of the 19th century; the emergence of parole in the 20th century; and the abolition, or near abolition in the case of the U.S., of the death penalty in the last third of the 20th century. Next, I consider the present, when in both England and at least some jurisdictions in the United States there is a collapse of the law of murder toward a higher, flatter grading. In the final section, I will offer some tentative propositions toward reform on questions considered by the English Law Commission consultation paper: How many crimes of murder? And how should these crimes articulate into the structure of punishment? ■

Nies Lecture

Can the Patent Office Be Fixed?

Through its Helen Wilson Nies Lecture, the Law School annually hosts a distinguished scholar of intellectual property law. This past spring, the Nies Lecture was delivered by Mark A. Lemley, who is the William H. Neukom Professor at Stanford Law School and a partner in Durie Tangri LLP. The following is an excerpted version of the lecture as subsequently published in the *Marquette Intellectual Property Law Review*.

The excerpt picks up after Professor Lemley's exposition of "the problem of bad patents." In particular, the preceding section describes "the vise" in which the Patent and Trademark Office (PTO) is caught. On the one hand, it has been issuing a large number of dubious patents over the past 20 years, particularly in the software and electronic-commerce space. On the other hand, Lemley writes, it is not clear that we can or should weed out bad applications at the PTO. For the vast majority of patents are never litigated or licensed, so spending a lot of money to ensure their validity would be wasted. The preceding section also describes recent research and empirical studies that variously suggest that we need to pay attention not only to legal rules but also to examiner behavior and reward systems.

Mark A. Lemley

How, then, can we fix the PTO, allowing examiners to distinguish between patentable and unpatentable inventions effectively, without slowing the process to a crawl or wasting a bunch of money?

What Won't Work

First, some things that likely won't work.

1. Preventing fee diversion.

The PTO is funded through user fees imposed on applicants and owners of issued patents. For much of the last 20 years, some of that fee revenue (typically 10 to 20 percent of it) has been diverted by Congress to general federal revenue. It is a commonplace among patent lawyers that the way to solve the PTO's