



DEFUND THE POLICE? ABOLISH PRISONS?

THE CASE FOR CAREFUL BUT BIG CHANGE

Marquette Law School speakers shed light on what revamping the justice system, from the streets to the courts to the prisons, could bring.

By Alan J. Borsuk

Defund the police. Abolish prisons. Hot-button phrases for a time of heated advocacy.

But if you take a deeper look—perhaps after first taking a deep breath, given the scope of the societal challenge—you might find that the thinking of some who use such phrases can lead to provocative and constructive consideration of how, from the streets to the prisons, changes in systems might bring better, fairer outcomes overall.

That is a good way to describe a set of lectures at Marquette Law School over the last several years, programs predating the death of George Floyd in Minneapolis in May 2020, which catalyzed protests and fresh promises of change across the United States.

Consider the annual Boden Lecture delivered in September 2019, by Paul Butler, the Albert Brick Professor in Law at Georgetown University. A former federal prosecutor and a guest commentator on MSNBC, Butler chose a provocative title for his lecture: “Prison Abolition: The Ultimate Reform?”

But in a recent interview, Butler acknowledged that this was, in large part, a way to get people’s attention. He is deeply serious about the need for sweeping change in the criminal justice system, as anyone who reads *Chokehold: Policing Black Men*, his 2017 book on the subject, can attest. But throwing open the prison doors? No.

Talking about the lecture and the aftermath of Floyd’s death, Butler said, “My focus at Marquette was on abolishing prison. And the idea that has captivated the nation’s attention in the last months has been defunding the police.

“Prison abolition doesn’t mean that everybody who is locked up gets released tomorrow. Prison abolition is a process of gradual decarceration.

“The way I understand the ‘defund the police’ idea is that the cops don’t come off the street tomorrow. Rather, we recognize that people with guns and batons aren’t always the most effective first responders. So when we think about why people dial 911, it’s usually because of an issue with a relationship, a beef between neighbors, a mental health crisis, or a problem arising from addiction or homelessness. We don’t need guns to address those issues. We need social workers and health care providers, counselors. Those professionally trained first responders would make us safer.



“The way I understand the ‘defund the police’ idea is that the cops don’t come off the street tomorrow. Rather, we recognize that people with guns and batons aren’t always the most effective first responders.”

Paul Butler

“So I think what defunding the police and prison abolition have in common is, first, a more practical and solution-focused imagining of public safety and, second, provocative titles for the ideas that get people talking. Upon first hearing, ‘prison abolition’ and ‘defund the police’ sound crazy. But when you understand these are ideas that have been around for a long time, and when you break them down as policies, you find a lot of agreement among Americans that we can do better.”

In addition to Butler, the list of those who have spoken at the Law School in recent years includes some of the most prominent voices in the nation for change in how to approach safety and violence reduction. They include these national academics:

- **Patrick Sharkey**, a Princeton University professor who is an expert in the impact of violence on communities and in strategies that can reduce violence
- **Robert J. Sampson**, Henry Ford II Professor of the Social Sciences at Harvard University, who delivered the Boden Lecture in 2015 and is an expert on how to improve the social fabric of neighborhoods
- **Rachel E. Barkow**, vice dean and Segal Family Professor of Regulatory Law and Policy at New York University Law School, who delivered the Barrock Lecture on Criminal Law in 2016
- **Bruce Western**, Bryce Professor of Sociology and Social Justice at Columbia University, who keynoted a conference at Eckstein Hall in

2018 titled “Racial Inequality, Poverty, and the Criminal Justice System”

- **Gabriel (Jack) Chin**, Edward L. Barrett Chair of Law and Martin Luther King Jr. Professor of Law at the University of California, Davis, who delivered the Barrock Lecture in 2017
- **Raj Chetty**, William A. Ackman Professor of Public Economics at Harvard, a renowned expert on use of massive amounts of data to analyze economic opportunity in the United States, who spoke at Marquette University in 2013.

In addition, the work of Marquette Law School itself has focused often on examining the way the criminal justice system works and how it could be improved. That includes research and scholarship by Professor Michael O’Hear on violent crime and recidivism (featured elsewhere in this issue of the magazine). It also encompasses the Marquette Law School Poll, which several times in recent years has found support among Wisconsin voters for giving prison inmates chances to rehabilitate themselves.

Politics and Public Opinion: Some Support and Much Opposition

During an “On the Issues with Mike Gousha” program at Eckstein Hall, in advance of his Boden Lecture, Butler said that advocates of “progressive” change in criminal prosecution practices across the United States have met several times in recent years to talk about building the movement. But, as he put it, the meetings are held in small rooms. Ideas such

SAFETY AND VIOLENCE REDUCTION — Recent national voices for change at the Law School



Robert J. Sampson



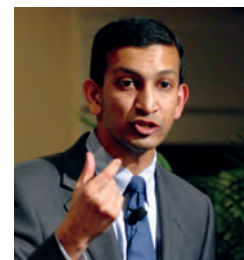
Rachel E. Barkow



Bruce Western



Gabriel (Jack) Chin



Raj Chetty

as the ones he advocates are going against the grain of American politics and long-established policy. And the more sweeping the change, the stronger the resistance. As a matter of electoral politics, “tough on crime” stands have been successful strategies for candidates across the country, going back at least half a century.

More specifically: Many states in recent decades have increased prison sentences for some offenses, set firm schedules of minimum sentences for many crimes, passed “truth in sentencing” laws restricting or barring parole availability for those who have not served their full sentences, or established “three strikes” policies that require long sentences for repeat offenders. Each of these had widespread support at the time of passage.

Even as there has been some easing of steps such as three-strikes policies that have not brought the intended results or have proved to be more unworkable than expected, and even as the federal government and many states have acted to reduce the number of people incarcerated, in large part because of the hefty costs, throughout all this, politics overall has remained anchored around the status quo.

In the aftermath of George Floyd’s death at the hands of a police officer in Minneapolis in May and again after the shooting of Jacob Blake by a police officer in Kenosha, Wisconsin, in late August, “law and order” and taking adamant stands against street protests and disturbances became major themes of this year’s elections, particularly at the presidential level. President Donald Trump made that a cornerstone of his campaign. And his opponent, former Vice-President Joe Biden, appeared to be put on the defensive, to some degree, in saying that he opposed violence and the results of some demonstrations, while still calling for changes, some of them in the vein Paul Butler and others advocate.

Is there openness in the general public to change in the criminal justice system? Marquette Law School Poll results point to a possible answer of “Yes”—depending on what is intended and how the issue is framed. In June 2020, voters in Wisconsin strongly opposed “calls to defund the police,” with 23 percent in favor and 70 percent against. At the same time, when asked for opinions on “calls to restructure the role of the police and require greater accountability for police misconduct,” 81 percent were in favor, with only 16 percent opposed.

There were strong divisions by race on “defunding the police,” with 45 percent of Black

Calls to defund the police*

IN FAVOR
23%

AGAINST
70%

IN FAVOR BY RACE

WHITE
20%

BLACK
45%

HISPANIC
57%

Calls to restructure the role of the police and require greater accountability for police misconduct*

IN FAVOR
81%

OPPOSED
16%

* Marquette Law School Poll, June 2020 (Wisconsin registered voters)

voters supporting the idea, compared to 20 percent of white voters and 57 percent of Hispanic voters. But divisions were much smaller when the question asked about “restructuring” the role of police. In that case, there were positive views among 83 percent of Black respondents, 80 percent of white respondents, and 97 percent of Hispanic respondents.

In following weeks during the summer, overall opinion shifted away from support of the protests that followed George Floyd’s death, suggesting declining support for reforms. That was particularly notable among whites.

For example, in June, 61 percent of Wisconsin voters generally approved of the Floyd protests overall, while 36 percent disapproved. In the next Marquette Law School Poll, in early August, the figures were 48 percent approval and 48 percent disapproval. While opinion was largely unchanged among Black and Hispanic people polled, approval of the protests among white respondents went from 59 percent in June to 45 percent in August. And approval declined in all of the media markets in Wisconsin except for the city of Milwaukee.

In the June poll, 59 percent of Wisconsin voters overall had a favorable opinion of the Black Lives Matter movement, while 27 percent had unfavorable views. In August, that shifted to 49 percent favorable and 37 percent unfavorable. Again, the decline in support was almost all among white voters. The Marquette Law School Poll in September saw the same numbers on this matter as in August.

An example of the real politics of change—and resistance to change—can be found in the handling of proposals for police reform within Wisconsin’s state Capitol. Democratic Governor Tony Evers called for the state legislature to approve bills involving police accountability and related issues. Republicans, who control both houses of the legislature, showed no willingness to do this, saying they wanted to consider ideas of their own later. The result was a special session of the legislature, on August 31, that was recessed after less than 30 seconds.

But advocacy for change remained strong—witness the decision by the Milwaukee Bucks basketball team to refuse to play a playoff game August 26, which triggered a wave of similar action by teams in multiple sports.

Interest in criminal justice issues is unlikely to subside, and proposals for change merit consideration. Beyond slogans and chants lie serious issues.

“We’ve relied on the police to be the primary institution responsible for not just public safety but for really all of the problems, all of the challenges that come up”

Patrick Sharkey

On the Streets: Calling for Fewer Warriors and More Guardians

Both Butler and Sharkey, in recent interviews, used the term *guardians* when talking about what communities need in addition to (or some would say in place of) conventional police officers, especially urban communities. Guardians, they say, would help people and communities avoid problems, or solve them when they arise. The need for conventional police work, including dealing with violent crime, would continue, but many matters that preoccupy officers now could be transitioned to the guardians.

While he was Milwaukee police chief, from 2008 to 2018, Edward Flynn spoke several times at Marquette Law School and said police were being asked to do too much. Someone is having a mental health problem? Call the police. Addiction to alcohol or drugs? Call the police. A domestic problem or neighbor dispute? Call the police. Flynn said many of these calls would be better handled by people trained to handle such situations and not by officers. Many experts on policing agree, although views diverge widely on how to do that.

To Sharkey, the big picture calls for strengthening community services for people by building up options such as youth centers, mental health clinics, and social service centers. Such efforts, when given appropriate resources and staffed by professionals, have documented records of helping reduce violence in communities, he said.

“We’ve relied on the police to be the primary institution responsible for not just public safety but for really all of the problems, all of the challenges that come up, where you have such unequal cities,” Sharkey said. City leaders for decades have had a choice, as he describes it: “You can invest in the institutions that can respond to all the challenges or you can invest in the police.” They have generally gone with the police. The politics of being “tough on crime” is one reason, he said.

“When there are more police on the street, there’s less violence, and we have very good evidence on that,” Sharkey noted. But high levels of police presence have also brought aggressive and violent policing, more incarceration, and communities, especially poor Black communities, where policing is a source of tension, anger, or worse.

“We need a different model,” Sharkey said. In an opinion piece in the *Washington Post* in June, Sharkey called for “a bold mayor and a bold philanthropist” to step up to support the kind

of model he envisions, through organizations given resources comparable to those of police departments. If such efforts are given sufficient time, they will show that this strategy “is going to be at least as effective as the police on controlling violence,” he said.

Police would still need to be first responders to major incidents of violence, he stated, especially involving weapons. Furthermore, he said, “Police have to be seen as a legitimate force in their community in order to be effective.”

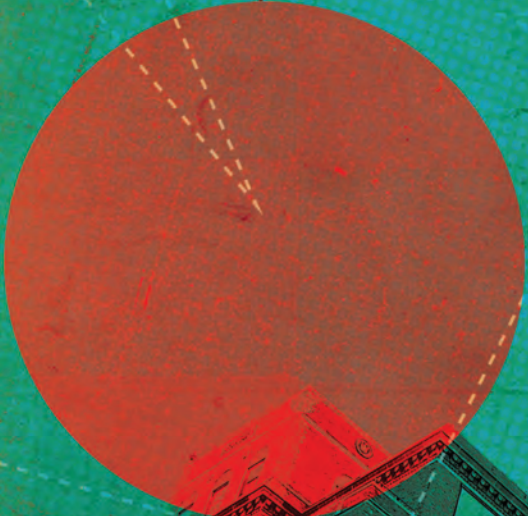
But to respond most effectively to the needs of urban communities, “we need to start investing in a different set of actors, a different set of institutions, and give them a chance with the same resources to create safe communities.”

Butler said that large numbers of police officers currently have a “warrior” approach to their jobs, not the “guardian” approach. Their work is intended, by design, to show that they dominate the people and the neighborhoods they patrol.

“If you think about it,” Butler said, “the person who applies for a job to be a warrior is going to have a different résumé and skill set from the person who applies for a job as a guardian. So if we get more of those who want to be guardians to become police officers, that could transform policing. And the corollary is, unless you get that shift in police culture from warriors to guardians, none of the reforms will work.”

Butler said that laws and policies, and not just the actions of law enforcement officers, drive police work in ways that have large and racist impacts, creating what he calls a chokehold on Black people. He wrote in his book, “The chokehold means that what happens in places like Ferguson, Missouri, or Baltimore, Maryland—where the police routinely harass and discriminate against African Americans—is not a flaw in the criminal justice system. Ferguson and Baltimore are examples of how the system is *supposed* to work. The problem is not bad apple cops. The problem is police work itself. American cops are the enforcers of a criminal justice regime that targets Black men and sets them up to fail.”

The results of a recent question to Wisconsin voters as part of the Marquette Law School Poll were described to Butler. People were asked to describe their experiences with police. Overall, 86 percent said the police make them feel mostly safe, while 11 percent said police make them feel mostly anxious. Among Black respondents,



however, while 43 percent felt mostly safe, 44 percent felt mostly anxious about the police. White respondents felt little anxiety, with 90 percent feeling mostly safe and 8 percent feeling mostly anxious. Among Hispanic respondents, 72 percent felt mostly safe, and 28 percent felt mostly anxious.

Butler said, “What you said that shocked me and made me sad is that the poll revealed that when white people see the police, they feel safe. I’ve been doing this work for 25 years, and I shouldn’t be shocked by anything, but I’m shocked because it is so different from my experience as an African American. . . . Even now, as a Black man in my 50s, with a good job and a nice car, when I see a police officer behind me, my heart starts beating more quickly. I get nervous. I think, ‘Should I pull over—or will that make the officer suspicious? Should I just keep driving?’ . . . The idea that when some people see the police it makes them feel safe, it is so different. It would be comical if it weren’t tragic.”

The Power of Prosecutors

In popular conception, perhaps, a judge is the individual with the most power in the criminal justice process. That’s not the reality, Butler said. On the day he gave Marquette Law School’s Boden Lecture, Butler also took part in an “On the Issues with Mike Gousha” program in Eckstein Hall’s Lubar Center. The focus of the program was prosecutorial discretion.

Butler said, “Prosecutors are the most unregulated actors in our legal system. They have more power than the judge to determine what happens to someone who is accused of a crime.” The discretion prosecutors have over whom to charge and what to charge them with is wide, Butler noted. Furthermore, “there is no one who can review that decision.”

The reality of the criminal justice process is that very few cases go to trial. Butler called criminal trials nearly a myth. Plea bargains bring a guilty finding in a very large majority of cases. Butler said prosecutors wield great power in driving deals in ways that leave poor and, in a large number of cases, Black defendants unable to get genuine justice. This includes their being forced to plead guilty to things they didn’t do because prosecutors tell them that going to trial will only bring worse outcomes, Butler said. He called for transformation in the way prosecutors work, similar to what he advocates for police, so that the emphasis is on

Police make them feel mostly safe*

BY RACE



* Marquette Law School Poll, June 2020 (Wisconsin registered voters)

solving problems and helping people get on track for stable lives, rather than incarcerating them in such huge numbers.

Sitting next to Butler as he spoke in the Lubar Center was Milwaukee County’s district attorney. John Chisholm was largely in agreement with Butler’s description of the realities of prosecutors’ work nationwide. He said that Butler “describes the system in unsparing terms.” But, he said, “People like Paul have helped me understand it.”

“We’ve oversold our ability to solve problems,” Chisholm said. The system, including the work of prosecutors, “has had a very, very horrible and detrimental effect on individuals who come into it, but particularly people who have historically been discriminated against, and particularly in the African American community.”

Chisholm said that the approach in the Milwaukee district attorney’s office during the crack drug epidemic in the early 1990s was to prosecute as much as possible. “No one was talking in terms of how [you] stop the market from expanding,” Chisholm said, or how you “address the real issue of why people were using.” Milwaukee became the place with the highest incarceration rate in the country for Black men.

Chisholm, who became Milwaukee County’s district attorney in 2006 after more than a decade as a prosecutor in the office, said that he began focusing on the disparities in outcomes by race after he heard from people how much negative impact this was having. “I took that seriously,” he said. Beginning in 2005, while he was a team captain in the office, he turned to the Vera Institute for Justice, a Brooklyn-based nonprofit that promotes “progressive” reforms to justice systems. Vera analyzed Milwaukee’s incarceration data.

That put Chisholm and the district attorney’s office on a path that he said they are still traveling. He said incarceration rates by race are now more equitable, and the commitment to finding alternatives to incarceration that aim to solve problems is having an effect.

Mike Gousha, the Law School’s distinguished fellow in law and public policy, asked Chisholm whether fewer people are being sent to prison. “Yes, and we have a long way to go,” Chisholm responded.

In Marquette Law School’s 2016 Barrock Lecture, New York University’s Rachel Barkow also called in strong terms for revamping the role of prosecutors, who she said had become too powerful in an era

dominated by plea bargaining. Many prosecutors use their power too readily in pushing for incarceration and forcing defendants to plead guilty. She said prosecutors should be held accountable “for how their decisions affect recidivism and reentry” from prison. “We should force them to think about more than short-term elections and instead look to longer-term facts such as crime rates and recidivism,” Barkow said.

Butler said that the long history in the United States of limiting opportunities for Black people cannot be overlooked as a factor in the total picture. “It’s certainly true that Blacks are disproportionately shut out of the American dream, and some of that can be explained by discrimination against poor people. But not all of it can be explained that way, especially in criminal justice. If you are a young man who doesn’t want to have any interaction with the cops and who doesn’t want to get locked up, you’re better off as a low-income white person than as a middle-income Black person. Low-income white folks have better outcomes in the criminal legal process than low-income or middle-income Black people do.”

From Incarceration to Mass Incarceration: Will the Trend Be Reversed?

In his Boden Lecture, Butler said that prisons, as they are known now, are a relatively recent creation, dating to the 1800s in Philadelphia. They were intended to be more humane than prior systems of punishment, which often involved torturing or killing criminals. But they have failed on every

score, he said. “Prisons are sites of cruelty, dehumanization, and violence, as well as subordination by race, class, and gender,” Butler said. “Prisons traumatize virtually all who come into contact with them.”

Starting around 1990, the United States began rapidly to increase the number of people who were incarcerated, going from about 400,000 then to 1.6 million by 2012. The country became the world leader, by far, in imprisoning people.

In his Marquette lecture, Butler said that there were people who needed to be incarcerated. But, he said, they were a much smaller number than are currently in prison and that large numbers of people in the system could be out in the general population without risk to public safety overall, if problems they had, such as mental health and addiction issues, had been treated ahead of their getting into trouble with the law or if they were given help in dealing with such issues instead of being incarcerated.

To be truly transformative, Butler said, “abolition” of prisons “has to be about more than tearing down the prison walls. We have to build something up, too.”

One of the ideas that would be on the list of what would help reduce recidivism among those who have been discharged from prison is the provision of more assistance in helping people successfully re-establish themselves in the community. This also has been the subject of programs at Marquette Law School.

On October 4, 2018, Bruce Western, a Columbia University professor and author of *Homeward: Life in the Year After Prison*, just then

“Prosecutors are the most unregulated actors in our legal system.”

Paul Butler



published, described his study of 122 people in the Boston area after their release. He said that almost all of them faced three urgent problems: reliable sources of income, ways to get health care, and stable housing. For those who could deal with those three, the chances of making it as productive members of communities were good, Western said.

Gabriel (Jack) Chin, Edward L. Barrett Chair of Law and Martin Luther King Jr. Professor of Law at the University of California, Davis, delivered the Barrock Lecture on Criminal Law in November 2017, focusing on the collateral consequences that often come with a criminal conviction, such as losing job opportunities and the possibility of renting public housing. He said unnecessary collateral consequences make it harder for those who have served their punishment to establish stable lives.

Butler pointed to a rare piece of bipartisan federal legislation, passed in 2018 and signed by President Donald Trump. Known as the First Step Act, it was aimed at reducing the number of people held in federal prisons and offering more help in reintegration into communities. It was supported by some conservative and libertarian groups, as well as by liberal groups.

Butler called it a “baby step, but it pointed in a good direction.” And there are encouraging signs of support for such plans around the country, he said.

Segregation and Barriers: The Unhappy Picture in Wisconsin

Several of the professors who spoke at Marquette asked the same question: What is it about Wisconsin that the incarceration rates of African American men are so much higher than the national averages?

“You lead the nation in locking up African American men,” Butler said, addressing the audience in Eckstein Hall’s Lubar Center during the “On the Issues” program. “So why would 6 percent be locked up in D.C. and New York and Los Angeles and 12 percent in Wisconsin? I haven’t been here [on my visit] a real long time, but the brothers here don’t seem that much worse than the brothers in L.A. or New York. So what’s going on?”

His answer: “That’s a result of policy decisions, that’s a result of law, that’s a result of law enforcement priorities.”

If Wisconsin could reduce its incarceration rate of Black men to the national average, “it would alleviate a whole lot of human suffering,” Butler said. Referring to criminal justice reform efforts, Butler added, “Something is happening around most

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Patrick Sharkey

of the country that is not happening in Wisconsin.”

In 2013, Raj Chetty, a prominent Harvard economist, gave the Marquette University College of Business Administration’s Marburg Lecture and took part in an “On the Issues with Mike Gousha” program. Chetty (a high school graduate of the University School of Milwaukee) has used massive amounts of data covering many years to analyze what success people in cities across the nation have had in moving up from childhoods in low-income households to adulthoods in higher-income households.

The answers vary by location, but the Milwaukee area was one of the places with low levels of opportunity for moving upward. Why? Chetty said that, nationwide, low opportunity matched generally with high levels of segregation by race and by income, high disparities in education success, wide variation in the quality of schools between low-income communities and high-income communities, and large differences in “social capital” factors in different communities within a metropolitan area. That was a pretty accurate description of the Milwaukee area.

Sharkey, the Princeton sociologist, picked up on the same factors in his 2020 “On the Issues” program and in an interview for this story. Sharkey said, “There are structural challenges that we have built over time. . . . We have built urban areas in ways that create divisions between central cities and suburbs. We have built that through zoning, we have built that through our housing policies, we have built that through transportation policies. Highways played a huge role in creating these divisions.

“So we built a structure of urban inequality at a local level through school districts, through highways, through zoning laws, through affordable housing programs. And that pits communities against each other. I do think that the more local set of structural barriers is really something that has not been discussed, but it does create ingrained opposition between communities that’s kind of hard to overcome.”



Patrick Sharkey



Those barriers are enormous in the Milwaukee area, he said. “It’s just stunning how segregated Milwaukee is,” he told Gousha. “It’s truly shocking . . . You’re at the epicenter of racial and ethnic segregation here.” He said, “The most pressing problem right now in a place like Milwaukee is how to develop the core institutions that are the guardians, that take ownership and responsibility over every community across Milwaukee.”

In the subsequent interview, Sharkey also said this about Milwaukee: “When I have gone there, it’s inspiring what has been going on.” He spoke highly of community efforts he saw during a visit in 2016, when he toured parts of Milwaukee, including areas where the Zilber Family Foundation was financially supporting efforts to build businesses and services.

The Zilber effort has been part of a larger effort to build “collective efficacy,” a concept that was described by Harvard Professor Robert J. Sampson in his books and also in his Boden Lecture at Eckstein Hall in 2015. In short, Sampson said research he has led has shown that communities with a strong social fabric and where people at the neighborhood level work on maintaining the quality of life and helping neighbors have better safety than other neighborhoods, even those with comparable income and demographic statistics.

Sharkey praised a plan called the Milwaukee Blueprint for Peace, produced by the city’s Office of Violence Prevention. The blueprint calls for increasing equity opportunities for residents and strengthening neighborhoods as ways to reduce violence. Sharkey said, “I thought everything in there was right. It was what I would write.”

But, he added, “it’s very difficult for that kind of blueprint to be carried out successfully because of the larger structural challenges that are in play in a place like Milwaukee. So what often happens is that a blueprint like the one developed, that kind of plan is undermined by a lack of sufficient funding and just stability, sustainability.”

When you add in more factors such as inequitable resources in different sections of the metro area and a lack of collaboration among political leaders, “then you’re swimming against a very strong tide,” Sharkey said. All these boundaries make it hard for people to work together to solve problems. “You end up with people having strong incentives to avoid the challenges Milwaukee is facing,” he said.

The theme of Sharkey’s 2018 book, *Uneasy Peace: The Great Crime Decline, the Renewal of*

“The most pressing problem right now in a place like Milwaukee is how to develop the core institutions that are the guardians, that take ownership and responsibility over every community across Milwaukee.”

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City Life, and the Next War on Violence, is that there was a major decline in crime in many large cities from the extremes in the early 1990s to historic low levels in the mid-2010s. Even with rebounds in crime in some places, crime overall remains far below the level of the early 1990s, he said. “Communities transform when violence declines,” Sharkey said. Milwaukee showed an example of that, as of several years ago, but crime data since then, such as a spike in the number of murders in 2020, are not reassuring.

Is Change Coming?

Is this a time that will bring real change? In an interview, Butler replied, “I’ll answer that with three words that you don’t usually hear from scholars or activists: I don’t know.” He said, “I’m encouraged by activists and elders and scholars who are allowing themselves to be hopeful. At the same time, based on my experiences as a scholar and activist and Black man, I’m skeptical. We have seen other moments of national reckoning on race come and go. There was a moment after the massacre at the church in Charleston, South Carolina, where some Confederate icons came tumbling down. And we’ve learned recently that they all didn’t come tumbling down because now some more are being taken back by the people. . . . That last moment wasn’t all that we needed it to be. So I don’t know.”

Butler said, “The Marquette Law School sent out a survey asking Americans what do they think of defunding the police—basically, ‘Do you think it is a good idea?’ The fact that the question is even being asked would have been unfathomable months ago because it would have been seen as such an extreme radical idea that it wouldn’t have been worth engaging random citizens on it. If all of the major newspapers and TV stations and cable networks are actively discussing whether the police should be defunded, it is a testament to the success of the movement for Black lives.”

When asked if he is skeptical or optimistic about real change in the light of the events of 2020, Sharkey allowed, “It’s a good question.” He said, “It feels different” this time, compared to the aftermath of other times when events triggered large waves of protests and demands for change. Sharkey pointed to changes in public opinion overall, including higher levels of support for movements such as Black Lives Matter. “It was remarkable to see support growing in the early days of the protests.”



NYU Professor Rachel Barkow said at Marquette Law School in 2016 that policies involving criminal law should be made the way policies are made in other areas of law. Elsewhere, she said in her Barrock Lecture, “we carefully study things to see whether on balance they will do more good than harm. . . . We look at risks presented by something and ask whether it’s worth doing because the good outweighs the bad.” She listed “environmental policy, occupational health and safety, consumer products, [and] pharmaceuticals.”

Policy related to criminal cases is less rational, Barkow said. She cited as an example decisions on whether to release people from prison or to use options other than incarceration. Actual results, even when they show strongly positive outcomes, are sometimes ignored because of political considerations or because of fears of a case where a convicted criminal will commit a crime that attracts public outrage.

“Criminal law, where the state power is at its most intrusive, should be as rational in its approach as these other regulatory areas. But it is not,” Barkow said. “And part of the reason is that it’s just not seen as a regulatory area where expertise is needed.”

Barkow said, “I don’t think we will be headed in the right direction until we recognize that the problems are far deeper than just changing laws through the existing political institutions. We need

significant institutional changes, and only then can we expect to change our current system.”

As polls, including the Marquette Law School Poll, have often shown, estimations and attitudes rise and fall as issues get hot and then cool. The things at the top of the political or community agenda change. The energy people are willing to put into pursuing ideas ebbs and flows. In the broad picture, by the end of summer 2020, that appeared to be happening to support for some of the things espoused in the aftermath of the death of George Floyd in May.

But the calls for change remain adamant. Many institutions, both public and private, in every part of the country have launched or ramped up programs, of one sort or another, and pledged to increase responsiveness to problems in workplaces, in schools, or in public settings. People of all races and stations in life have said, in effect, this time for sure, this time there will be change. But that will take more than confrontation, marches, and impassioned speeches.

The speakers at Marquette in recent years have envisioned changing—even transforming—the criminal justice system, with the goal of creating fairer, more equitable processes and outcomes and healthier communities. They have promoted bold, far-reaching ideas. But they also have advocated for careful and well-chosen paths for moving forward.

They each would agree that real change is needed. And real change comes real hard. ■

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Rachel E. Barkow