

# MARQUETTE LAWYER

FALL 2020

## THE CRIME AND SOCIETY ISSUE

Can Academics Such as Paul Butler and Patrick Sharkey Point Us to Better Communities?

Michael O'Hear's Symposium on Violent Crime and Recidivism

Bringing Baseless Charges—Darryl Brown's Counterintuitive Proposal for Progress

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David Papke on Law and Literature

A Blog Recipe

Remembering Professor Kossow



Princeton's Professor  
Patrick Sharkey



Georgetown's Professor  
Paul Butler

## Bringing the National Academy to Milwaukee—and Sending It Back Out

On occasion, we have characterized the work of Marquette University Law School as bringing the world to Milwaukee. We have not meant this as an altogether unique claim. For more than a century, local newspapers have brought the *daily* world here, as have, for decades, broadcast services and, most recently, the internet. And many Milwaukee-based businesses, nonprofits, and organizations are world-class and world-engaged.

Yet Marquette Law School does some things in this regard especially well. For example, in 2019 (pre-COVID being the point), about half of our first-year students had been permanent residents of other states before coming to Milwaukee for law school. Some number of them will stay and practice in Wisconsin. This is an important contribution of great universities: expanding the human capital of a region by those whom it attracts.

Another way Marquette Law School brings the world to Milwaukee is our annual series of distinguished lectures and, in more recent years, public conversations with other



visitors to our Lubar Center. This issue of the magazine draws on a number of them, with a particular focus on crime and society. These include discussion of last year's Boden Lecture by Georgetown's Professor Paul Butler, in the cover story (pp. 6–17); excerpts from an in-person symposium on violent crime and recidivism, organized by my colleague, Professor Michael O'Hear (pp. 18–31); and an

essay version of the 2019 Barrock Lecture on Criminal Law by Professor Darryl Brown of the University of Virginia (pp. 32–37).

Nor did COVID-19 shut down our exploration of these important issues. For example, you will also find Princeton University's Professor Patrick Sharkey and his take on Milwaukee presented in the cover story. This comes from a discussion, "On the Issues with Mike Gousha," that the Law School held in July 2020 and made available online. Professor Sharkey had been to Milwaukee and Eckstein Hall twice previously, in 2016 and 2018. Thus, we especially welcomed his observations during the perilous time after the killing of George Floyd in Minneapolis, even before the police shooting of Jacob Blake in Kenosha.

Renowned experts such as Professors Butler and Sharkey and the others whom we bring "here" do not claim to have charted an altogether-clear (let alone easy) path to a better future for our communities, but we believe that their ideas and suggestions can advance the discussion in Milwaukee and elsewhere about finding that better future.

So we continue to work at bringing the world here, even as we pursue other missions. To reverse the phrasing and thereby to state another truth, we bring Wisconsin to the world in issues of this magazine and elsewhere, not least in the persons of those Marquette lawyers who practice throughout the United States and in many nations of the world. And we help the nation understand itself, as this year once again our Marquette Law School Poll surveys public understanding and opinions of the Supreme Court of the United States (a national poll already released and to be featured in the next issue). That particular poll not only received a substantial amount of national attention the morning after the death of Justice Ruth Bader Ginsburg, but also established baseline information about public opinion on a potential effort to expand the size of the Court beyond nine justices for the first time in more than a century and a half.

In that regard, I myself am reminded of past *Marquette Lawyer* magazines. These include both the summer 2020 issue, which discussed the inaugural national Marquette Law School Poll on public opinion of the Supreme Court, from the previous fall, and the cover story in summer 2017: The latter featured the Hallows Lecture by Judge Albert Diaz of the U.S. Court of Appeals for the Fourth Circuit, which advocated eighteen-year terms for members of the Court.

No doubt I mark the calendar or think of public policy issues by reference to the *Marquette Lawyer* rather more than do most people. Yet there can be no question that this issue reflects, once again, our bringing the world to Milwaukee and, in a sense, our sending it back out. There is some consistency in that. We invite you to read the issue and thereby to spend some time here, in Milwaukee and in Eckstein Hall, with us.

Joseph D. Kearney  
*Dean and Professor of Law*

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# Law School Programs Receive Coast-to-Coast Attention

Timely efforts focus on the U.S. Supreme Court and on Milwaukee history

## Poll provides insight after Justice Ginsburg's death

Obviously, it was one of those things that just happen. On September 15, the Marquette Law School Poll completed a week of surveying people nationwide on opinions related to the U.S. Supreme Court. Three days later, Justice Ruth Bader Ginsburg died, immediately moving Supreme Court issues to the top of the national agenda.

After deliberation, the next day, the Law School released the findings on Ginsburg's standing as the best-known justice and on opinion about naming a successor during 2020. The *New York Times*, *Washington Post*, and CNN were among those reporting on the poll.

Full results of the Law School's second annual Supreme Court poll were released in subsequent days, as scheduled, and ahead of President Donald Trump's nomination of now-Justice Amy Coney Barrett to succeed Ginsburg.

It was another example of the value of the Marquette Law School Poll. Since 2012, the poll has become widely recognized, across the country, as a reliable source of information on public opinion on political issues in Wisconsin, a state with an unusually high

political profile. But the poll also provides insight on many other matters, including the economy, social policy, criminal justice, and education.

One important focus in 2020 was on opinion related to COVID-19. Almost monthly, the poll showed trends in how people were responding and how they rated government responses. One example: In late March, 70 percent of Wisconsin voters said they were very worried or somewhat worried about being affected by the coronavirus. The total ranged variously between 55 percent and 65 percent in five subsequent polls from May through the end of October. The poll also showed strong support overall for requiring people to wear facemasks in public places (in early October, 72 percent were in favor of such a requirement, with 26 percent opposed). In late October, 64 percent of respondents said that they themselves wore facemasks all the time in going out to public places, while 20 percent said that they did so most of the time; 12 percent reported doing so "only now and then" and 3 percent said "never."

The poll was the only source of such information in Wisconsin. This was true as well with respect to evolving public views on racial justice and the Black Lives Matter movement (see the cover story of this issue for some aspects of this polling).

Full results of the poll may be found at [law.marquette.edu/poll](http://law.marquette.edu/poll). ■

## Spotlighting a piece of Milwaukee's history

How about making a documentary on Milwaukee's socialist history? At the start, the idea was connected with the expectation that Milwaukee would be in the national spotlight in 2020 because of the Democratic National Convention. Plus, the word *socialism* has been used a lot in politics recently, and Milwaukee has the most interesting socialist history in the nation.

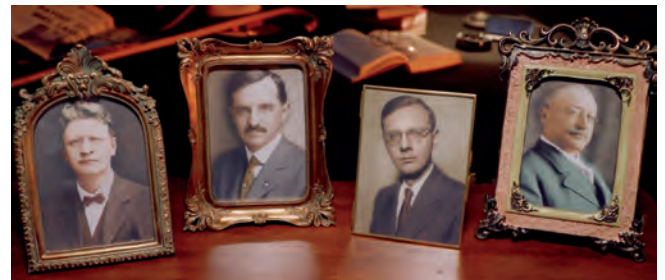
So Mike Gousha, the Law School's distinguished fellow in law and public policy; his wife, Lynn Sprangers, also a journalist; and two filmmakers, Steve Boettcher and Mike Trinklein, undertook the extensive effort of making a one-hour documentary.

The political convention fizzled, thanks to the COVID-19 pandemic, but the history remains relevant.

The film, *America's Socialist Experiment*, premiered in June on PBS stations in Wisconsin and was then shown on PBS affiliates across the country, from New York to Los Angeles, Chicago to San Francisco, Alabama to Idaho. It is now available on Amazon Prime.

For all but a few years between 1910 and 1960, Milwaukee had socialist mayors. But, as the documentary details, they were frugal pragmatists, not big-spending ideologues. They focused on improving public services and daily life-quality issues while providing clean government. They became known as "sewer socialists." It was initially a term of derision, hurled by East Coast socialists who thought the Milwaukeeans weren't sufficiently revolutionary.

Gousha, who narrated the program, concluded, "No one really thinks much about sewers, toilets, and clean water until they're not available. But Milwaukee's socialists did." The socialist era came to an end in 1960. ■



A screenshot from *America's Socialist Experiment*: an image created using photos of Mayors Emil Seidel (in office, 1910–1912), Daniel W. Hoan (1916–1940), and Frank P. Zeidler (1948–1960), and Congressman Victor L. Berger (1911–1913, 1923–1929). Photos courtesy of Library of Congress (Seidel and Berger), Milwaukee County Historical Society (Hoan), and Zeidler family collection.



# Mitten Urges U.S. Senate to Act on Publicity Rights for College Athletes

Whether or how to keep playing at all has been the hottest issue in college sports in recent months, thanks to the coronavirus pandemic. At the same time, a most important long-term debate appears to be moving toward major action. The question has been whether college athletes, especially the most prominent ones, should be allowed to make money based on their celebrity while still in school.



Matthew J. Mitten

Playing a role in that national debate is Matthew J. Mitten, a Marquette Law School professor and executive director of the school's National Sports Law Institute. Mitten testified remotely in July before the U.S. Senate Judiciary Committee that federal legislation is necessary to establish the parameters of college athletes' licensing of their name, image, and likeness (NIL) rights; this would be a significant reform, permitting athletes to receive

related income. He subsequently submitted proposed legislation, drafted with Professors Stephen Ross and Doug Allen of the Pennsylvania State University and Professor Barbara Osborne of the University of North Carolina.

In his Senate testimony, Mitten said it is important for Congress to protect the fundamental amateur nature of college sports by ensuring that athletes' receipt of NIL income does not constitute "pay for play." Only relatively few of the approximately 460,000 National Collegiate Athletic Association (NCAA) athletes—primarily big-name athletes playing football and men's basketball—would be in a position to earn substantial income from NIL licensing deals. So it is equally important to avoid unintended adverse consequences, such as less money being available to fund participation opportunities and scholarships in

nonrevenue sports and to achieve Title IX gender equity in college sports.

Mitten told senators that congressional legislation was a much better route for dealing with the issues than either action by individual states or changes imposed by courts applying antitrust law. Only Congress is in a position to deal with the full picture of what is needed, he said, while avoiding the problems of different states having different rules.

"[A] nationally uniform law regulating intercollegiate student-athletes' licensing of their NIL rights," Mitten said in his testimony, "is required to provide consistency; to prevent the development of conflicting state laws; and to avoid the dangers of professionalizing college sports and creating competitive balance inequities if different states enact different NIL laws for their respective colleges and universities."

In a subsequent interview, Mitten said that colleges and universities should not be able to pay athletes directly. "I'm staunchly opposed to that idea," he said. "We don't want college sports to be minor league professional sports." But athletes who are sought out for such things as appearances at events or commercial endorsements should generally be permitted to benefit. In the current situation, athletes are limited to receiving scholarships and other benefits equal to the cost of college, and licensing their NIL rights would permit them to receive a share of the revenues generated by the multibillion dollar college sports industry.

One important matter, Mitten told senators, is to give the NCAA and colleges and universities a limited antitrust exemption so they can't be sued for enforcing NIL rules.

Several states have passed NIL laws, with a Florida law scheduled to be the first to become effective, in mid-2021. "National NIL legislation needs to be enacted by Congress before this Florida law goes into effect," Mitten said. "We're not quite at that point where the clock is going to strike midnight, but it's definitely ticking." ■



# 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

**“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.”**

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.”**

Patrick Sharkey

*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. ■

**“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.”**

Rachel E. Barkow



# DEALING WITH VIOLENT CRIME AND RECIDIVISM

Unless society finds alternatives for long prison terms for many who commit violent crimes, incarceration rates will remain high.

Calling for reductions in prison populations by greater use of alternative sentences for people convicted of “nonviolent” crimes is an idea that draws wide support. But the fact is that, even if implemented, such steps would reduce the number of incarcerated individuals only by a relatively modest amount. To cut what some call “mass incarceration” more substantially, new approaches would need to be taken for dealing with “violent” criminals. Marquette Law Professor Michael O’Hear convened a symposium on violent crime and recidivism last year, bringing researchers from around the country to Eckstein Hall. The papers presented were published in the spring 2020 issue of the *Marquette Law Review* and are excerpted here.

## LEGAL RESPONSES TO VIOLENT CRIME:

### Does Research Support Alternatives to Long-Term Incarceration?

By *Michael O’Hear*, professor, Marquette University Law School.

America’s historically high incarceration rate has drawn sustained criticism from across the political spectrum. Whether motivated primarily by considerations of cost-effectiveness or of social justice, dozens of states have in recent years adopted a multitude of reforms intended to reduce excessive incarceration. Yet the national imprisonment rate remains more than four times higher than historic norms. Reforms to date have been hampered by their tendency to focus on reducing the incarceration of “nonviolent” offenders. Such a strategy offers little hope of returning the United States to the levels of imprisonment that prevailed a generation ago, for most state prisoners have been convicted of violent offenses. In truth, a

genuine reversal of mass incarceration cannot occur without changes in the way that the criminal justice system responds to violence.

But are reforms even feasible? The system’s current severity as to criminal violence doubtlessly owes much to a fear of recidivism. Intuitively, a person once convicted of a violent offense seems to present a troubling risk of committing more violence in the future—and the stakes are undeniably high. A large proportion of those prisoners classified as violent have committed murders and rapes. A repetition of such crimes would be a terrible price to pay for reforms that proved overly lenient. Moreover, even those who are serving time for less-serious violent crimes often have records that suggest a trajectory toward ever-greater mayhem if they are allowed to return to free society. The specter of Willie Horton inevitably looms large over any consideration of more-lenient responses to violent crime—and not entirely without justification.



Yet, even acknowledging that a particular caution must attend reforms in this area, there may still be some ability to extend the new approaches that have been transforming legal responses to drug and other nonviolent crimes in recent years. These new approaches sometimes go under the label “evidence-based decision-making,” or EBDM. The National Institute of Corrections describes EBDM as

“a strategic and deliberate method of applying empirical knowledge and research-supported principles to justice system decisions made at the case, agency, and system level. . . . [T]he EBDM framework . . . posits that public safety outcomes will be improved when justice system stakeholders engage in truly collaborative partnerships, use research to guide their work, and work together to achieve safer communities, more efficient use of tax dollars, and fewer victims.”

EBDM thus emphasizes the use of systematic research on what works, with a particular eye to reducing both costs to taxpayers—read, utilization of expensive jail and prison cells—and rates of criminal victimization. Typically, this entails the deployment of research-based, individualized risk-assessment techniques and therapeutic interventions designed to address individually determined risk factors. Rejected are the blunderbuss, one-size-fits-all penal strategies of the late twentieth century, emphasizing stern deterrent messages and the long-term incapacitation of repeat offenders—best exemplified by the harsh three-strikes-and-you-are-out laws that were broadly adopted in the 1990s. Although violent crimes may inspire a particular horror, there are otherwise no stark, categorical differences between the human beings

who have been convicted of violent crimes and the human beings who have been convicted of other sorts of offenses. If individually focused, research-based approaches can lead to reduced incarceration and reduced victimization as to the nonviolent offenses, why not also as to the violent?

It was this question that motivated “Responding to the Threat of Violent Recidivism: Alternatives to Long-Term Confinement,” a two-day conference hosted by Marquette Law School in June 2019 and generously supported by the Charles Koch Foundation.

#### GROWING UP BEHIND BARS:

### Pathways to Desistance for Juvenile Lifers

By *Laura S. Abrams*, professor and chair of social welfare at the UCLA Luskin School of Public Affairs; *Kaylyn Canlione*, a master’s student at the Luskin School; and *D. Michael Applegarth*, a Ph.D. student at the Luskin School.

*The authors provided detailed profiles of 10 men in California who were sentenced to life in prison or comparable terms for murders they committed while they were juveniles, but who made major changes and were eventually released.*

The second major finding is that all participants converged in regard to the major themes of moral reckoning, making meaning, finding hope, and proving worth. Getting to the point of reckoning with the crime appeared to entail a blend of maturation as well as major internal contemplation, all while having scant hope for release and experiences of parole denials and other setbacks. These findings lend support to the notion that desistance, at least for those in harsh conditions, is in many ways more of an internal process than an external

one. In other words, desistance did occur with maturation (albeit sometimes well into the thirties), yet without the presence of many opportunities to fulfill adult roles and responsibilities or with external hooks for change. Without abundant external reinforcements, narratives were consistent that the internal process of taking responsibility for the pain they caused others and reckoning with the past, including personal traumas, was a critical part of self-transformation. Moreover, the spiritual and moral transformation that many described emerged without the assistance of structured programs, and instead through a connection they forged with prison peers, focused self-contemplation, and a will to make a better life. These themes are similar to other research on life imprisonment that finds faith and moral development to be a consistent growth experience.

It is also important to note that all of these men had to first earn their standing in the prison over the course of many years in order to enroll in rehabilitation programs. Education, religion, and victim impact programs all had a potent effect on facilitating long-lasting desistance but were withheld for major periods of time on account of their sentence, prison yard interactions, and often, behavior. It is conceivable that many could have reached the second part of the journey (hope, meaning, and moral reckoning) even earlier with the help of those supports that they were systematically denied. Thus, one practical implication of this study is that in order to prepare youth convicted of violent felonies for parole and/or release, these programs ought to be accessible far earlier in the imprisonment process.

## The Impact of Incarceration on the Risk of Violent Recidivism

By *Jennifer E. Copp*, associate professor, College of Criminology and Criminal Justice, Florida State University.

With respect to the question of incarceration and violent recidivism, that there is no difference in the risk of violent recidivism between those sentenced to incarceration and those sentenced to probation suggests that incarceration is not an effective method of reducing violent recidivism. Further, that there was no difference across these two alternatives for those convicted of violent and nonviolent offenses suggests that there is no need to treat violent offenders differently from a recidivism standpoint. Understandably, recidivism is not the only consideration, and other factors (e.g., retribution) figure into sentencing decisions and broader policies.

The above reinforces the need to depoliticize the word *violent*. With few exceptions, offenders often commit a mix of violent and nonviolent offenses . . . Thus, researchers should be careful not to reinforce the false dichotomy between violent and nonviolent offenders that has so permeated public discourse on policy reform. Indeed, there is considerable

evidence to suggest that the current wave of criminal justice reforms is not comprehensive, but rather focuses on a particular “class” of offender. The (un)intended consequence of this focus is that the policies and practices with respect to the sanctioning of individuals convicted of serious and violent offenses will not be downgraded and may actually be stepped up. Given the increasing support for “evidence-based” decision-making, criminologists can play a role in conversations with correctional policy makers. Accordingly, how we research specific topics, and how we interpret what the evidence says, can help guide these important discussions.

Finally, we have a tendency to view community supervision as a lesser alternative to prison, and one reserved for those convicted of less-serious offenses. There is quite a bit of research that demonstrates, however, that community supervision is not necessarily “getting off easy.” In fact, some of this work has documented offenders’ preference for custodial sentences in lieu of intensive supervision. And although we tend to focus on probation as an option for certain low-risk offenders, a potential counterargument is that it may actually be more beneficial to offer noncustodial, community-based alternatives to high-risk populations in order to “soak them in services” that may not otherwise be available in the prison setting. Recognizing the concerns associated with transferring our overreliance on incarceration to an overreliance on probation, there may nevertheless be circumstances in which probation presents a more efficient alternative for certain offenders who have been identified as too high-risk for less restrictive sanctions.

## VIOLENCE RISK ASSESSMENT: Current Status and Contemporary Issues

By *Sarah L. Desmarais*, professor of psychology and director of the Center for Family and Community Engagement at North Carolina State University, and *Samantha A. Zottola*, postdoctoral research scholar, Center for Family and Community Engagement, North Carolina State University.

Violence risk assessment instruments represent the current state-of-the-art approach to forecasting the likelihood of violent recidivism. Our review of the scientific evidence supports their continued use to inform criminal justice decision-making and failed to find substantial benefits associated with the application of new technologies, such as machine learning. Further, and in contrast with much of the current narrative surrounding risk assessment, we found relatively limited evidence of predictive bias and disparate impact, instead finding more evidence of predictive parity and, even, reductions in racial disparities in rates of restrictive placements. However, continued discussion and research are needed to clarify points of debate, including the definitions of fairness and proxies for race, and, ultimately, to establish whether the use of violence risk assessment

instruments reduces or exacerbates racial disparities in the criminal justice system. In the end, the implementation of a violence risk assessment instrument will not improve criminal justice outcomes in and of itself. Their results must be used in meaningful ways to inform criminal justice practices.

#### PREVENTING SEXUAL VIOLENCE:

### Alternatives to Worrying About Recidivism

By *Eric S. Janus*, professor of law, Mitchell Hamline School of Law, and director, Sex Offense Litigation and Policy Resource Center.

The foundational myth of modern regulatory prevention policy holds that almost all people convicted of a sex offense will, when allowed back in society, commit another sex offense. In reality, the opposite appears to be true: almost all people convicted of a sex offense refrain from reoffending sexually. In a recent Bureau of Justice Statistics (BJS) study of sex offenders released from prison, 92.3 percent of the individuals were not rearrested for a new sex offense in the nine-year follow-up period. Even that statistic is likely to overstate the re-arrest rate for the entire class of sex offenders. The BJS study was confined to individuals released from prison. Thus, it does not include individuals who were convicted of a sex offense but not sent to prison. This non-prison group would include people sent to a local jail or placed on probation and is almost certainly less risky than the group sent to prison. So, the recidivism rate for the entire group of sex offenders is likely less than the 7.7 percent detected in the BJS study.

Of course, the fact that recidivism rates are much lower than asserted in the “frightening and high” meme is not support for the assertion that sexual violence is not an important problem in the country. In fact, sexual victimization is relatively widespread. The rate of rape and sexual assault annually for persons over 12 for example, is 1.4/1000 people, and the lifetime prevalence of sexual victimization among women is 18.2 percent. But the focus on recidivism suggests that recidivistic offending is the core of the problem. In fact, as demonstrated below, it is not. . . .

The likely consequences of current policies have been thoroughly described in other sources. We can summarize as follows: civil commitment programs are exceedingly expensive and have no demonstrable effect on the incidence of sexual violence and a very small effect on recidivistic sexual violence. The latter effect arises from the brute fact of incapacitation; the former most likely because the effect on recidivism is very small, and recidivism itself is a small fraction of sexual offending. Largely unexplored are the resource-allocation consequences of civil commitment programs. Their cost nationwide is estimated to be in excess of half a billion dollars annually, exceeding the amount budgeted (or requested) for all programs under the Violence Against Women Act

nationally in fiscal year 2020. There is strong evidence that these programs do not achieve their articulated goal of confining only the “most dangerous.” They over-commit initially and extend confinements unnecessarily. These factors add to the likelihood that alternative uses for the billions spent over the years would have more effective prevention effects.

### Labeling Violence

By *Cecelia Klingele*, associate professor, University of Wisconsin Law School.

Labels matter: they affect self-identity and alter human behavior in ways consistent with the labels themselves. That is why it is important to consider who deserves to be called “violent,” and for how long that label and its attendant stigma should last. Lying is a ubiquitous vice, for example, but rarely does the telling of a falsehood result in the lifelong stigma of being labeled a liar, or even an “ex-liar.” While lying is a vice, it is not ordinarily considered identity-defining. By contrast, labels such as “felon,” “ex-felon,” and “offender” are usually inescapable once imposed, regardless how minor or idiosyncratic the underlying criminal behavior may have been.

Studies show that individuals charged with felony offenses who are placed in diversion programs that allow them to avoid felony conviction recidivate at rates far lower than those who proceed to formal conviction (and who consequently bear the label “felon”). Being labeled a felon causes two types of re-entry problems: first, the legal restrictions that flow from felony conviction have a lasting effect on economic opportunity. Second, people often internalize the label itself, making it a part of their self-identity and reinforcing a narrative of social failure that often drives behavior consistent with that narrative. By inference, the label “violent felon” may well do extra damage by signaling not only that a person has transgressed the law, but also that violence has somehow become a petrified component of his or her character, defining not only past conduct but also future behavior.

If, however, violence (along a continuum) is actually normative—and research suggests that it is—then periodic or isolated examples of violence—even those that lead to criminal conviction—are not necessarily indicators of persistent, escalating, or enduring danger that must be aggressively controlled in perpetuity. Instead, violent conduct—like any other deficit, such as poor interviewing skills or dishonesty or blaming others—should be met with opportunities to identify the driver of the conduct and build skills to improve the quality of future interactions, whether by reducing impulsivity, improving distress tolerance, increasing empathy, or altering home and work environments to improve safety.

Ample research included elsewhere in this symposium issue confirms that most people convicted of violent crime are no less responsive to intervention than nonviolent criminals, or

than people in the general population. Just as people outside the justice system benefit from dialectical-behavioral therapy groups, mindfulness classes, and planned respites from life stressors, so too would people with criminal convictions of all kinds, if they were given access to them. Instead of restricting the ability of people convicted of violent crime to access rehabilitative programs, community and institutional corrections officials should provide robust opportunities to build core stress and conflict management skills to all individuals who have shown deficits in these areas. They should do so not because these individuals are intrinsically dangerous or different, but because managing aggression is an important human competency that can be mastered with practice.

The more we are honest about aggression as a shared human trait, the more we will eschew unhelpful labels that literally and figuratively place those convicted of violent crime in a box they cannot escape. And if we are honest about the degree to which violent impulses are commonly experienced and imperfectly muted, we will be more inclined to devise and implement interventions and supports for convicted individuals similar to those we seek out for ourselves and our loved ones when anger management or impulse control becomes life impairing.

## REDUCING RECIDIVISM IN SERIOUS AND VIOLENT YOUTHFUL OFFENDERS:

### Fact, Fiction, and a Path Forward

By *Megan Kurlychek*, professor in the Department of Sociology and Criminology at the Pennsylvania State University, and *Alysha Gagnon*, a Ph.D. student at the School of Criminal Justice at the University of Albany, SUNY.

Perhaps most important for the current narrative is the fact that even when youth exhibit chronic, serious, and violent behavior, it is not time to give up on them. In fact, research shows that interventions can be highly effective with the juvenile population. . . .

The kid is a kid.

This simple but perhaps often overlooked fact is driven home in a recent review of the history of juvenile justice by noted legal scholar Barry Feld in his most recent book, *The Evolution of the Juvenile Court: Race, Politics, and the Criminalizing of Juvenile Justice*. The fact behind the “the kid is a kid” comment is that youth are indeed different from adults and thus remanding a youth to adult punishments is folly. This concept has been evidenced through history, from medical and psychological science, and most of us know this from common sense. However, this common sense and reliance on empirical evidence are often left behind when political rhetoric and media campaigns of fear create a moral panic. Somehow, in this panic, individuals forget the simple fact that kids are just kids, and assume that something must

be different about a kid who can commit such a violent act, resulting in adult punishments. In a way, something is different; this kid most likely exhibited early signs of trouble and has many risk factors and needs that have not been addressed. However, what isn’t wrong is that they are not somehow more mature and calculated than other youth and therefore should be subject to adult punishment. At best, evidence suggests such a course only leads to more recidivism and crime, with worse life outcomes for the youth.

## COMMUNITY SUPERVISION AND VIOLENT OFFENDERS:

### What the Research Tells Us and How to Improve Outcomes

By *Edward J. Latessa*, professor and director of the School of Criminal Justice at the University of Cincinnati, and *Myrinda Schweitzer*, a senior research associate and deputy director of the University of Cincinnati Corrections Institute.

Despite the research supporting the value of incorporating RNR (the risk-need-responsivity model) into community supervision, even for violent offenders, there are still advocates for more punitive policies such as increased use of incarceration or simply increasing control and monitoring if the offender is supervised in the community. Those advocating such strategies of crime control do so based on the often-interrelated goals of punishment: retribution, deterrence, and incapacitation. These advocates are challenged by others who argue that we must address the underlying causes of crime and criminal behavior and provide programs and services to address the needs of the offender, especially for those returning to the community. So, can we achieve the goal of public protection and meet the dual needs for punishment and rehabilitation? Punishment is an inherent part of the correctional system and is often justified simply because a person has broken the law. This is especially true for those who commit a violent offense.

Society demands that certain offenders be punished and expects our elected officials to see that offenders be held accountable. The problem is the belief that somehow punishment alone will deter offenders from continuing to break the law in the future. The underlying assumption of deterrence is that the offenders are aware of the sanction, they perceive it as unpleasant, they weigh the cost and benefits of their criminal conduct, and they assess the risk and, in turn, make a rational choice to break the law (or not). The problem is that most street-level criminals act impulsively; have a short-term perspective; are often disorganized and have failed in school, jobs, and relationships; have distorted thinking; hang around with others like themselves; use drugs and alcohol; and are not rational actors. In short, deterrence theory collapses. Incapacitation, which attempts to limit offenders’ ability to commit another crime (usually by locking them up), can have

some effect, but as many have found out, simply locking up offenders and “throwing away the key” has proven to be a very expensive approach to crime control. This strategy is also limited, since the vast majority of offenders return to society. Without treatment, many will return unchanged at best and, at worst, with many more problems and intensified needs for services. Even if one supports incapacitation, one must ask, “What should be done with offenders while incarcerated?” This leads us to rehabilitation. With this approach, the offender chooses to refrain from committing new crimes rather than being unable to do so. So, what works in changing offender behavior?

Most researchers who study correctional interventions have concluded that without some form of human intervention or services, there is unlikely to be much effect on recidivism from punishment alone. If you do not believe that, just look at the number of offenders who have been incarcerated in our jails repeatedly. While the origin of the quote is unknown, it is commonly said that “the sign of insanity is doing something over and over again and expecting a different outcome.” Unfortunately, not all correctional treatment programs are equally effective; however, considerable research has demonstrated that well-designed programs that meet certain conditions can appreciably reduce recidivism rates for offenders. Effective programs have many characteristics, and space does not allow elaboration; however, two are particularly noteworthy. First, it is important to target crime-producing needs that are highly correlated with criminal conduct. The most effective programs are centered on the present circumstances and risk factors that are contributing to the offender’s behavior. Antisocial attitudes, values, beliefs, and peer associations; lack of anger control; substance abuse; lack of problem-solving skills; and poor self-control are some of the more important targets for change for offenders. Second, effective programs are action oriented rather than talk oriented. In other words, offenders do something about their difficulties rather than just talk about them. These types of programs teach offenders new prosocial skills to replace the antisocial ones (e.g., use of violence). Interventions based on these approaches are very structured and emphasize the importance of modeling and behavioral rehearsal techniques that engender self-efficacy, challenge cognitive distortions, and assist offenders in developing new prosocial skills. So, should we hold offenders accountable for their behavior? Absolutely. Nevertheless, punishment and treatment need not be incompatible, and doing one without the other is not likely to achieve long-term public safety.

## IMMIGRATION AND VIOLENT CRIME:

### Triangulating Findings Across Diverse Studies

By *Michael T. Light*, associate professor of sociology and Chicano/Latino studies, University of Wisconsin-Madison, and *Isabel Anadon*, Ph.D. student in sociology, University of Wisconsin-Madison.

Our overarching goal in this article was to gather insight across multiple literatures that heretofore had been connected only indirectly. Taken together, we find very little evidence that immigration increases violent crime, and the fact that we see similar results using different routes to answer interrelated questions gives us confidence that this finding is robust. At the very least, the convergence on the lack of findings suggestive of a positive relationship between immigration (legal or otherwise) and violence seriously undermines arguments that immigration jeopardizes public safety. For this reason, our inquiry has important implications for crime policy moving forward.

Although violent crime has fallen sharply in the United States since the early 1990s, violence remains a serious problem for many American communities, especially lethal violence. Indeed, the U.S. homicide rate is seven times higher than other high-income countries. Our review suggests that for policy makers serious about reducing the burden of violent crime in the United States, greater immigration enforcement is unlikely to achieve this end.

### Focused Deterrence Violence Prevention at Community and Individual Levels

By *Edmund F. McGarrell*, professor, School of Criminal Justice, Michigan State University.

Study of the community-level impact of focused deterrence does not directly address the question of impact on individual-level violent recidivism. Having said this, it is worth noting that an overall impact on community levels of violence is likely to have an indirect effect on violent recidivism. At a basic level, each reduction in fatal and non-fatal shootings is likely to reduce the number of individuals incarcerated for serious gun violence. That reduces violent recidivism at a macro level. Beyond this effect, the claim of an indirect effect is based on several research-based characteristics of violent crime. First, much violent crime is episodic and related to lifestyles that put people in risky situations. Violence demonstrates patterns of contagion, and being involved in shooting networks greatly elevates the risk for all network members of being involved in future violence. If overall levels of violence in the community decline, it would seem to reduce the likelihood of violent recidivism through the reduction in risky contexts that can lead to violent incidents among high-risk individuals.

More directly, the limited findings of focused deterrence re-entry efforts at the individual level suggest promise for





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reducing violent recidivism. This is most apparent in Chicago's parolee forums that used the focused deterrence call-in strategy with high-risk parolees returning to the community. Although the research findings are limited, the positive results support continued experimentation and testing, particularly given the related research indicating violence reduction at the community level.

Finally, the evidence of the gang/group-focused deterrence strategy at the individual level is very mixed. Although there is no evidence of "backfire" effects, several studies have found no evidence of reduced re-offending at the individual level. On the other hand, several studies have found reduced levels of re-offending when the comparison group appears to be of equivalent risk. Given the consistent finding of impact at the community level, there appears to be reason to continue to study patterns of violent recidivism at the individual level. In pursuing this research, several questions arise. These include the consistency with best practices in corrections, better understanding of how these strategies are perceived by the individuals affected by the strategies, and whether short-term effects are sustained over time.

## Violent Offending, Desistance, and Recidivism

By **Daniel O'Connell**, senior scientist at the Center for Drug and Health Studies and assistant professor in the Department of Sociology and Criminal Justice at the University of Delaware; **Christy Visher**, professor of sociology and criminal justice and director of the Center for Drug and Health Studies, University of Delaware; and **Lin Liu**, assistant professor in the Department of Criminology and Criminal Justice, Florida International University.

The world is not a safe place. We tell our children this and hope they heed the lesson in order to survive when they walk out the door. People die and are maimed on our highways every day, and other harrowing accidents and tales of human misfortune fill our news programs every night. While we mourn, we accept these tragic circumstances as an unfortunate cost of living on the planet as we hope the next tragedy does not involve ourselves or our loved ones. But crime is different, and violent crime brings forth an emotional reaction that other tragic situations do not. This is largely due to the sense of injustice felt when a person is harmed at the hands of another. And unlike accidents, violent crimes leave us with a villain in the form of the person who caused the harm. Our literature and media engrain our consciousness with a determination to punish evil and praise good, and our legal system is designed to find fault, ascribe blame, and protect us from harm. All of this leads to a framework designed to punish wrongdoers, often to the fullest extent possible, and to attempt to avoid all harm by insulating ourselves from those who cause harm. Our overflowing prisons are the result of this approach as people languish for years repaying their debt, instilling in us a sense

that justice has been done and ensuring that those who are incarcerated cause us no more harm.

Our punitive approach may have worked or at least been acceptable when the scale of the problem was smaller and populations and crime rates did not require the construction of prison after prison to house those whom we have deemed unfit to live among us. We now live in an era associated with mass incarceration in which approximately two million people are residing behind bars on any given day. The price of this approach is growing, and policy makers are seeking ways to reduce prison populations without impacting public safety.

Knowing that people generally age out, or desist from offending as they age, and that the majority of violent offenders do not go on to commit violent crimes after release, it may be time to reconsider our approach toward imprisonment, recidivism, and what we are asking from our prison systems. While we call our prison agencies "departments of correction," expecting these agencies to correct what has led people to them is an undue expectation. By the time someone gets to prison, especially for a violent offense, virtually every other social system has failed, from our families, schools, and communities to our economic systems. Expecting our prisons to correct long-standing individual problems is unreasonable. Releasing enough individuals to have an impact on prison populations cannot be accomplished without accepting some amount of risk. Research suggests that releasing many of them can be accomplished by accepting a low to moderate amount of risk.

The tolerable level of risk is what needs to be reconsidered when addressing the possibility of violent recidivism. In the United States, we have essentially set the bar near zero, as evidenced by the Willie Horton incident in which a prisoner released on furlough who subsequently committed assault, rape, and robbery in another state was influential in affecting the presidential aspirations of Governor Michael Dukakis in 1988. These types of events have made both politicians and the prison system overly risk averse. But Horton was one of approximately 600,000 people released that year. If the reaction to a tragic car accident were akin to what happened after the Horton case spread through the media, the speed limit would be ten miles per hour, clearly not a speed that would allow society to function. What is needed is agreement on a reasonable and broadly accepted level of recidivism that does not try to prevent all harm by keeping tens of thousands of people incarcerated.

A lesson might be learned from traffic engineers who make recommendations for speed limits. The goal is not to prevent all accidents but to find the speed that keeps traffic flowing while creating the safest roads possible. In the United States, engineers follow the 85th percentile rule, which actuates to the speed at which 85 percent of drivers travel at or below the speed limit. They do not attempt to set the limit at a range

that creates the fewest accidents, recognizing that accidents are going to happen. A similar approach to developing an “acceptable” level of recidivism might involve setting a baseline rate. For example, in the federal recidivism study mentioned earlier, 24.5 percent of released violent offenders committed a violent offense within three years under current release strategies. Were states to make policy changes that shortened sentences, relaxed release conditions, created medical exceptions to sentences or other mechanisms, and the three-year rates remained within an acceptable margin relative to the 24.5 percent base rate, the changes might be considered successful. If recidivism rates were to increase by a margin of, say, 10 percent to 29 percent, the policy changes might need to be scaled back.

## **VIOLENT CRIME AND MEDIA COVERAGE IN ONE CITY: A Statistical Snapshot**

By *Michael O’Hear*, professor, Marquette University Law School. O’Hear analyzed a year of crime coverage in the Milwaukee Journal Sentinel and on the website of WTMJ-TV, two major news outlets in Milwaukee, Wisconsin.

Despite other differences between the *Journal Sentinel* and WTMJ.com, violent crime clearly predominated in the crime coverage of both outlets, far overshadowing property and other nonviolent crime. This reverses the actual prevalence patterns of violent and nonviolent crime as reflected in police data, and complements similar observations of crime coverage made by other scholars. To the extent that individuals make judgments about the relative importance of different crime threats on the basis of media coverage, there may be a tendency for people to overestimate the threat of violent crime, underestimate the threat of nonviolent crime, or both. Moreover, even within the category of violent crime, there was a sharp skewing toward homicide relative to lesser forms of violent crime, which also reverses the actual prevalence of these offense types and raises parallel concerns about potential misjudgments regarding crime risk.

... [A]lthough the newspaper more commonly provided contextualizing/humanizing information than the [television] website, such information was hardly included as a matter of course in the crime coverage of either outlet. To be sure, contextualizing/humanizing information is not apt to be available to reporters for the first story that initially reports the occurrence of a crime, and there is not apt to be any follow-up coverage if the perpetrator was not apprehended. Yet, even if understandable, a lack of contextualizing or humanizing information still seems an important aspect of crime coverage that may contribute to perceptions of crime as random and incomprehensible, and criminals as depraved monsters.

... [A] sizable share of the Milwaukee crime coverage focuses on cases with victims who are female or youthful.

... [A]s with other types of skewing in the crime coverage, disproportionate reporting of these crimes may lead to an overestimation of some risks or an underestimation of others. Moreover, when media coverage focuses particularly on crimes that provoke especially high levels of public outrage, it may be more difficult for policy makers to adopt crime policies that would be most effective in relation to more-common, less intensely disturbing types of victimization.

How concerned should we be about unrepresentative crime coverage? As noted earlier in this article, the research literature does not provide consistent support for the expectation that news consumption always tends to enhance fear and punitiveness. ...

Still, while not without its inconsistencies and limitations, the research literature does point to a likelihood of links between fear of crime, support for punitive criminal-justice policies, and consumption of at least one particular type of crime coverage—that which is provided on the local TV news. To the extent that local TV news actually drives fear and punitiveness, the dynamic may be related to the tendency of TV news to provide relatively superficial crime coverage with little contextualizing/humanizing information. Similar tendencies seem apparent with the news website coverage analyzed in this article.

If fear of crime and public punitiveness are thought to be excessive in the United States today, there are reasons to wish for deeper media coverage of crime that routinely seeks to reveal the context in which crimes occur and the background of the individuals who commit crimes.

## **VIOLENT CRIME AND PUNITIVENESS: An Empirical Study of Public Opinion**

By *Michael O’Hear*, professor, Marquette University Law School, and *Darren Wheelock*, associate professor, Marquette University Department of Social and Cultural Sciences.

Research increasingly makes clear that long prison sentences are not normally necessary from a public-safety perspective for individuals who have been convicted of violent crimes. Yet, such sentences remain common in practice. Given the dynamics of democratic accountability in the United States, we suspect that official V-punitiveness [a term the authors use for attitudes of punitiveness toward perpetrators of violence – ed.] may result in part from public V-punitiveness. Reformers who wish to moderate punishment for violent crime may thus need to take into account the existence, intensity, and sources of public V-punitiveness.

Our findings, based on surveys conducted through the Marquette Law School Poll, suggest several lessons for such reformers. First, our respondents did seem to recognize violent crime as a qualitatively distinct crime category, most starkly in relation to first-time offenses. Although members of the public may be willing to indulge property offenders with second



chances, public preferences seem to run in the opposite direction when it comes to those who have been convicted of violent offenses.

Second, although we suspect that V-punitiveness may result in part from a tendency to associate “violent crime” with some of its most outrageous forms, such as murder and predatory rape, we did not find any evidence that public preferences change when policy questions are explicitly framed by reference to less extreme forms of violence.

... [W]e found little reason to think that V-punitiveness may be moderated through public education about the actual risk levels of violent offenders and research on the most effective ways of reducing violent crime. Public education on such topics might be a promising reform strategy if V-punitiveness were fundamentally instrumental in character—that is, if people supported punitive policies out of a belief that such policies would alleviate their risk of violent victimization. To the extent that is a mistaken belief, correcting the belief would presumably change the connected policy preferences. However, we did not find an association between V-punitiveness and our primary measure of fear of violent victimization, that is, perceived safety when walking alone at night. Nor did we find an association between V-punitiveness and a respondent’s past personal experiences with victimization, which would presumably tend to increase the respondent’s fear of future victimization. Nor did we find an association between V-punitiveness and county-level crime rate or crime trends. Nor did we find support for the hypothesis that V-punitiveness is related to a desire for stronger formal social controls in order to compensate for weak collective efficacy.

Our only finding that suggests an instrumental basis for V-punitiveness was the relationship between these policy preferences and a respondent’s perception that violent crime was a “major problem” in his or her area of residence. However, the overall weight of the evidence indicates that V-punitiveness is grounded less in instrumental than in symbolic considerations, particularly insofar as support for these policies is seen as a way of expressing a broader set of beliefs about social organization, individual responsibility, and perceived group differences.

The latter observation points to a final lesson: in order to change the minds of people who are currently skeptical of reform, it may be necessary for reformers to ensure that alternatives to long prison terms are not seen as symbolically undercutting perceived traditional moral values like individual accountability for wrongdoing. This may be quite challenging at a time when life and near-life sentences have become such a normalized feature of our criminal-justice system—in this context, non-incarcerative sentences, and even some years-long prison terms, may seem merely a “slap on the wrist.”

## WHAT THE NUMBERS SAY ABOUT HOW TO REDUCE IMPRISONMENT: Offenses, Returns, and Turnover

By *Pamela Oliver*, professor of sociology at the University of Wisconsin-Madison.

The analysis of returns to prison for those released 2007–2016 showed that, in recent years, the majority of people released from prison the first time have not gone back, contrary to past research from the height of the drug war when people were cycling in and out of prison on short sentences. It has shown that those who do go back to prison mostly enter on technical violations, not new crimes, and that the new crimes are more often nonviolent than violent, even for people who were imprisoned for violent crimes.

The analysis of time in prison and expected time to release showed that nearly 60 percent of prisoners are projected to be released within five years, meaning significant prison downsizing is possible from reforms focused on sending many fewer people to prison so that those released from prison are not replaced.

The analysis also called attention to possibilities for reducing prison populations from reducing time served for those who are sent to prison, both by shortening sentences to those found in some states and by increasing the use of parole or other early-release mechanisms.

The overview also emphasized the huge variations between the U.S. states in their overall imprisonment rate, their recent history of increasing or decreasing incarceration rates, their mix of offenders, their sentence lengths by offense, and their patterns of return to prison after release. National summaries obscure these variations. This means that patterns that are true in one state may not be true in others, and reforms that create large reductions in incarceration in one state may have little impact in another. It also means that national-level summaries often obscure the details of what is happening in different places.

The rise of mass incarceration was a political process that began in the 1960s with a concern about controlling the Black urban poor and built on early twentieth-century discourses that portrayed Black people as inherently criminal. This impulse became intertwined with the high crime rates of the 1960s and 1970s, feminist-influence victim’s rights, and other movements that fed the punishment boom. A politically motivated and racially targeted “war” on crack cocaine in the Reagan–Bush years, initially centered in Black urban areas, drove up both total incarceration and the Black/white disparity in incarceration in the late 1980s and early 1990s. A politically motivated “war” on violent crime and “three strikes” laws in the Clinton years fueled further increases in overall incarceration from the mid-1990s to the mid-2000s and spread mass

incarceration into predominantly white rural areas and small cities, thus lowering the racial disparity in incarceration and changing the offense mix of prisoners. The manifest racial disparities in imprisonment became a major wedge for pushing back and challenging the injustice of the system. Black imprisonment rates began to fall in the late 2000s even as white rates continued to rise.

There are consequences of past policies that have contributed to current problems. The aforementioned extreme racial disparities in imprisonment sent a large fraction of a generation through prison and are still having indirect consequences in Black communities. There is evidence that a police focus on drug enforcement increased homicide and violent crime. The drug war incentivized police to focus on drug enforcement rather than other activities, through both federal funding initiatives and forfeiture laws, leading to gross injustices, including even in extreme cases to “plant” evidence and falsely accuse people of drug dealing; it also has led to a reliance on informants coerced by the threat of high penalties that has led to false accusations and a general erosion of the social fabric that would otherwise prevent crime. In addition, the decades of mass incarceration plus the decline in wages for jobs in the bottom half of the income distribution have had impacts on children and families that have increased economic instability and contributed to substance abuse and violence.

#### HIGH RISK, NOT HOPELESS:

### Correctional Intervention for People at High Risk for Violence

By **Jennifer L. Skeem**, professor of public policy and Mack Distinguished Professor of Social Welfare at the University of California, Berkeley, and **Devon L. L. Polaschek**, professor of psychology at the University of Waikato in New Zealand.

People at high risk for violence are relatively likely to be confined as part of their criminal sentences. Compared to community-based programs, services in institutions tend to be more oriented toward harsh punishment, which tends to have an adverse effect on recidivism. This need not be the case. First, CBT (cognitive behavioral therapy) programs that implement evidence-based principles can be—and sometimes are—offered in jails and prisons. This is particularly true in other countries. Second, RNR (risk-need-responsivity) programs and principles are applicable to high-risk people in custodial settings. Third, many of the promising programs reviewed earlier for people with psychopathic traits were provided in institutions. Finally, meta-analyses illustrate that effective principles of correctional intervention can be applied in custodial settings—even if they often are not. After controlling for participant and intervention characteristics, the supervision setting (institution vs. community) did not moderate the effect of CBT on recidivism. As Lipsey and his colleagues concluded, good programs “can be

effective within institutional environments where there is more potential for adverse effects.”

When high-risk people are serving long sentences, institutional settings arguably provide an opportunity to deliver intensive doses of good treatment, and ideally follow up this investment with careful release planning. As explained earlier, treatment dose matters—as the number of sessions completed increases, so does the effect of treatment on recidivism.

... [C]urrent justice reform efforts need to accommodate this perspective of high-risk people as one that can promote both client welfare and public safety. Dealing effectively with high-risk people is one of the most important goals of the justice system. These people represent more than a serious threat to the social order that must be contained—they also present important opportunities for correctional systems to maximize risk reduction by reallocating resources to evidence-informed programs tailored to address their wide-ranging needs. Limited perspectives on what community and institutional services can provide to these people have historically been barriers to this approach. But, as we suggested earlier, lawmakers have become more receptive to programs with crime-reduction potential. What is needed is recognition that this pragmatic approach is particularly effective with high-risk people.

### Violence Reduction Using the Principles of Risk-Need-Responsivity

By **Faye S. Taxman**, University Professor at George Mason University. She is a health service criminologist.

An emphasis on programming should also acknowledge some of the barriers that affect program participation, including the social determinants of health, socioeconomic status, and behavioral health factors. For the most part, programming does not recognize these issues, and even the curriculums tend to reflect a more Caucasian focus and do not recognize the communities or lives that the actual clients confront. This results in alienation from the program due to the presentation of the “ideal self” or “reformed citizen” as being from another racial or economic status. That is, given the over-representation of individuals of lower economic needs in the justice system, the social determinants of health have an impact on the behavior of individuals and communities. More emphasis needs to be placed on coping, survival, and stress management instead of the traditional RNR (risk-need-responsivity) framework’s emphasis on criminogenic needs or the drivers of human behavior. The issues that affect human frailty (i.e., food deprivation, housing instability, economic pressures, etc.) influence how culpable a person is in the decisions that are made, behaviors engaged in for survival purposes, or problems with participation in programming. Given the prevalence of the conditions of human frailty, these conditions are important to consider in determining which programs and services to

offer to different individuals based on their configuration of individual risks, needs, and stability (or instability) factors. This means that programming content needs to address the real work situations of individuals. . . .

Finally, a dearth of programming means that programs cannot be a protective factor in a community. Examining the number of programs and the capacity of the programming illustrates that if an individual has a need for a program, it is unlikely that the service will be available—and it is even more unlikely that an appropriate service will be available. Taxman, Pattavina, and Perdoni documented the gaps in service for substance abuse treatment and found that when services were available, they were typically of the lowest dosage and level of care. Few services exist that are intensive or of the high level of care. Moreover, the programs may not be in the communities that are accessible to individuals who need the programs. . . .

Essentially, the recommendations are to build a resilient service delivery system that can be useful to reduce the high rates of violence and to prevent crime. That is, to build a service delivery system that has a clear mission that includes addressing the social determinants that affect the health and well-being of citizens and improves the quality of life in higher-risk communities.

## Robbery, Recidivism, and the Limits of the Criminal Justice System

By **Richard Wright**, *Regents' Professor of Criminal Justice and Criminology in the Andrew Young School of Policy Studies at Georgia State University*; **William J. Sabol**, *Second Century Initiative Professor of Criminal Justice and Criminology in the Andrew Young School*; and **Thaddeus L. Johnson**, *a Ph.D. candidate in criminal justice and criminology in the Andrew Young School*.

The threat of legal sanctions rests on an assumption that would-be offenders perceive themselves as having freedom to choose whether or not to commit any given crime. This assumption flies in the face of what we know about the immediate context in which robbers “decide” to offend, with most of them believing that their desperate need for cash cannot be deferred or met through more conventional means. This is not to say that such offenders are unmindful of the risk of arrest and prosecution, but rather that the perceived urgency of their immediate situation serves to attenuate the link between law-breaking and potential sanctions. Convinced they have no realistic alternative to doing a robbery, offenders consciously employ various cognitive techniques to neutralize the power of threatened sanctions to deter the contemplated offense. Most commonly this involves simply refusing to dwell on the possibility of being caught, which obviously precludes the need to worry about the contingent risks of prosecution and punishment.

“[The risk of getting caught is] just a reality. I know it’s a possibility. But I try not to think about that because, if I dwell on it too much, I may talk myself or scare myself out of doing [the robbery].”

Whereas some offenders reportedly find it easy to avoid thinking about getting caught, others clearly have to work hard to keep such thoughts out of their minds.

“I try to keep [thoughts about getting caught] out of my mind. I look at it more on a positive side: getting away. A lot of times it enters my head about getting caught, but I try to kill that thought by saying I can do it; have confidence in pulling the job off.”

Some offenders go so far as to drink or use drugs before an offense in a deliberate attempt to dull the impact of threatened sanctions, thereby allowing them to proceed without worrying about the potential consequences.

. . . Although in the minority, some would-be robbers do think about the possibility of getting caught but proceed anyway. Why does an awareness of this risk fail to deter them from offending? Here again, a large part of the answer can be found in their financial desperation, which encourages them to discount danger and concentrate instead on the anticipated reward. An active armed robber interviewed by Wright and Decker explained his lengthy prison record this way: “[I always think about the possibility of apprehension, but] I guess the need is greater than the fear of getting caught.”

Even offenders who, during their crimes, are attuned to the possibility of arrest and prosecution tend to regard that risk as so small for any given offense that it easily can be discounted in the face of their pressing need for quick cash—a process made easier still by the fact that many of them have an overblown opinion of their skill at avoiding detection.

“Definitely! It depends. I don’t know. What I’m really trying to say [is that] if you good at what you doing, you don’t care too much cause you figure nine times out of ten you not gonna get caught.”

Whether one-in-ten odds of getting caught are good or bad is open to debate, but surely it depends in part on the perceived severity of the resultant sanction—a calculation shaped by the individual’s current circumstances and prospects. Most persistent robbers know full well that their law-breaking is going to land them in prison sooner or later. Yet they carry on despite the mounting risk of apprehension. Recall that most such offenders experience themselves as locked into a grim cycle of events that is leading them nowhere. Against that backdrop, the prospect of a stint in prison may come to be seen almost as a welcome break from the emotional turmoil and physical danger that are part and parcel of life on the street. ■



Can Prosecutors **Temper**  
**the Criminal Code** by  
Bringing **Factually Baseless**  
**Charges** and by **Charging**  
**Nonexistent Crimes?**

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Darryl K. Brown is the O. M. Vickers Professor and Barron F. Black Research Professor at the University of Virginia School of Law. This is an edited version of Marquette Law School's Barrock Lecture on Criminal Law, "The Dilemma of Discretion: Which Offenses Should Prosecutors Charge?" which Professor Brown delivered in Eckstein Hall's Lubar Center on November 4, 2019. A longer version appears in the *Marquette Law Review*.



## FOR REASONS THAT MERIT AS MANY AS TWO CHEERS BUT RAISE CONCERNS, PROSECUTORS, DEFENSE LAWYERS, AND JUDGES IN SOME STATES CIRCUMVENT CRIMINAL LAW IN THE NAME OF SEEKING FAIRER OUTCOMES.

BY DARRYL K. BROWN

In what ways, if any, can prosecutors legitimately use their charging power to resist or circumvent legislative policies that are codified in criminal statutes? One way they do so is relatively familiar and largely uncontroversial. It is not hard to find examples of prosecutors using their discretion to charge some offenses that apply to a defendant's conduct rather than others in order to avoid triggering either mandatory sentences or collateral consequences that are triggered by convictions for specific crimes.

My focus will be a second, very different kind of prosecution practice for circumventing the limits of state criminal laws, a tactic that is both more controversial and less familiar—somewhat surreptitious yet perhaps quite widespread. This practice, in fact, comes in two forms. One is charging factually baseless crimes—that is, filing criminal charges that prosecutors lack the evidence to prove because defendants did not, in fact, commit them. The other is charging “nonexistent” offenses—crimes that are not, in fact, legally valid or recognized offenses at all under state law. Both of these practices occur—sometimes quite openly—in several states.

Yet both pose a fundamental challenge to core rule-of-law components: that the legislative branch has the sole power to make the laws; that law restricts the scope of executive power because prosecutors can act only on the basis of duly enacted criminal laws; and that, even under available laws, criminal prosecutions commence only when officials have some evidence that a suspect has, in fact, violated a valid criminal offense.

Broadly speaking, two sources of law impose those limits: (1) constitutional separation of powers, pursuant to which the legislature has exclusive power to make law; and (2) the legality or *nulla poena sine lege* principle (no punishment without law), which constrains the state's power over individuals, especially through the prohibitions on *ex post facto* laws and laws that are too vague to provide adequate notice of their meaning.

In many states, however, these two black-letter boundaries on the government's power to prosecute and punish have exceptions. Prosecutors sometimes proceed against defendants for “baseless” offenses—crimes defined in the state code, but which they lack the evidence to prove. Moreover, trial courts convict and sentence in such cases despite the government's failure of proof. They do so usually with no subterfuge, as appellate courts affirm those convictions. Likewise, in some states, appellate courts have endorsed convictions for “nonexistent” offenses—“crimes” that are not in the state code and so not, as a matter of law, crimes at all.

When legal scholars have addressed factually baseless charges and nonexistent crimes, they uniformly condemn both practices. But in some jurisdictions, the criminal bar and bench openly defend one or both practices. Appellate courts in several states continue to approve of one or both. And, in Ohio, a recent proposal to amend the state criminal procedure rules explicitly to prohibit convictions without a factual basis was defeated after public objections from the state prosecutors' association and some state judges. Although I long ago moved from the practitioner to the scholarly side of the divide, I nonetheless here will join the lawyers and judges on this one, with qualifications, and argue in defense of factually baseless convictions in particular.

There are certainly grounds to worry about a practice that challenges core rule-of-law principles, but I will make the case that, for baseless convictions at least, the departure is less than it seems, and that this innovation can serve legitimate public purposes. Even though these tactics nominally expand prosecutorial power, they generally serve defendants' interests. Closely considered, factually baseless criminal convictions seem often to function as improvised responses to deficiencies in state criminal codes and sentencing laws, at least in the eyes of those who know the system best. They might even be interpreted as implicit protests by the criminal justice actors who know best how criminal law works in practice.

## State Law on Factually Baseless and Nonexistent Offenses

Judicial approval of criminal convictions without proof that a defendant violated a valid statutory offense are found in two distinct lines of cases: (1) those affirming convictions under a criminal statute for which prosecutors cannot prove a factual basis, and (2) those affirming convictions for “nonexistent” or “hypothetical” offenses that do not exist—i.e., are not valid crimes—in state law. Both variants are recognized in several states. Courts have expressly condoned factually baseless convictions in Delaware, Kansas, Maryland, Michigan, New Mexico, New York, Ohio, Washington, and Wisconsin. Appellate decisions explicitly affirm convictions for nonexistent, hypothetical, or invalid crimes in Delaware, Illinois, Kansas, New Hampshire, New York, and Ohio.

The catch is that courts sustain these sorts of convictions only when they result from guilty pleas, usually pursuant to a plea bargain. Even states doing so uniformly hold that convictions for the same nonexistent offenses are invalid when they result from jury verdicts. (Juries are occasionally led to convict for nonexistent crimes on the basis of erroneous instructions that misdescribe the law of codified offenses.) It is hard to imagine how the courts could proceed otherwise in this respect: To allow a jury or judge to convict a defendant at trial without finding a factual basis for guilt beyond a reasonable doubt would be unconstitutional. To be sure, confining this body of law to guilty-plea cases is a substantial *conceptual* limit on factually and legally baseless convictions, but it is not a significant *practical* one. In all U.S. jurisdictions, fewer than one in ten convictions are achieved through trial. Plea bargaining, as the Supreme Court has famously observed, “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”

To be clear, it seems that most U.S. jurisdictions do not endorse factually or statutorily baseless convictions. Both practices are barred in federal courts. Appellate courts in some states consistently reverse plea-based as well as trial-based convictions for nonexistent offenses. Let me summarize the situation by saying that enforcement of convictions for nonexistent crimes or without factual proof is widespread but not a practice to which most states adhere. That split among the states sharpens the question: given that most states seem to find no reason to tolerate factually or legally groundless convictions, why do so many continue to enforce and rationalize them?

## The Case for Factually Baseless Charges in Plea Bargains

Unlike convictions for nonexistent offenses, factually baseless charges, in this context, are usually crafted by the parties and accepted by trial courts intentionally rather than inadvertently. Justifications offered by courts and lawyers for this practice boil down to three arguments. One is a familiar argument of expediency: the criminal justice system needs to resolve most prosecutions by guilty pleas, and without the option to reach plea agreements on charges that do not match the defendant’s factual conduct and circumstances, fewer prosecutions would be resolved by guilty-plea agreements. The second is implicit in the first: sometimes a defendant *wants* the option to plead guilty to a factually baseless charge, because it provides an advantage over the alternatives. Third, the common law that states have devised for factually baseless pleas ensures (at least as much as the criteria for ordinary guilty pleas do) that defendants convicted in this manner are not innocent or unduly sanctioned, because courts must find a factual basis for greater, “related” charges—typically the originally filed charge.

The expediency rationale merits skepticism. Courts and prosecutors frequently worry that any regulation of plea bargaining will impede its efficiency and overburden criminal courts. But there is little beyond anecdotal evidence to support claims that baseless pleas contribute significantly to efficient case dispositions. Although there are too many variables for firm empirical conclusions, what data exist on states’ criminal case clearance rates, trial rates, and guilty-plea rates suggest there to be little difference between states that rely on factually baseless guilty pleas and those that do not.

The stronger arguments for baseless pleas are those grounded in the appropriateness—in the view of the parties and the court—of the conviction and sentence. A survey of baseless-conviction cases suggests that they often result in more favorable outcomes for defendants than any alternatives—dispositions of which prosecutors approve, since they engineered them by filing the factually baseless charge. The fact that these sorts of convictions are both deliberately crafted by parties and approved by trial courts points to underlying deficiencies in state criminal codes and sentencing laws. Baseless guilty pleas are an improvised means of working around those deficiencies and rendering more just criminal dispositions.

Some examples of factually baseless convictions clarify the point. Consider a Wisconsin case from the early 2010s, *State v. Jackson*. After the defendant was charged with battery and related offenses, his bail was set at \$2,500, with the condition that he have no contact with the state’s



primary witness. Unable to post \$2,500, Jackson was not released on bail. But he did make a threatening phone call to the state witness. For this he was charged with intimidating a witness and bail jumping. In exchange for Jackson's agreement to plead guilty to bail jumping (a class H felony), the prosecution dropped the more serious charge of witness intimidation (a class G felony). Jackson's phone call to the witness gave the prosecution a factual basis for witness intimidation, defined as attempting to "prevent or dissuade any witness from attending or giving testimony at any trial." But the state lacked evidence of bail jumping, which is defined as an intentional failure to comply with the terms of his or her bond by anyone "having been released from custody." Jackson was never released from custody. What, then, is the factual basis for his guilty plea to that charge?

The standard answer in jurisdictions that recognize baseless pleas is twofold. One is that the defendant consented to be convicted for the offense and gained something from it, such as a lesser sentence or dismissal of charges. The second is that the trial judge can accept such a guilty plea only if she finds a factual basis for the *different*, greater charge (here, witness intimidation) of which he was *not* convicted. An important point here is that the guilty-plea charge is not a lesser-included offense of the greater offense, which the court dismissed. A factual basis for the greater offense would necessarily provide a basis for the lesser-included offense. Instead, courts substitute an equitable assessment focused on whether the two offenses are sufficiently "related" that conviction on the baseless charge is deemed fair. Courts describe this standard more as *recognizing* than *authorizing* the practice of negotiating guilty pleas to offenses that defendants did not actually commit.

States that permit baseless convictions do so across the full range of crimes, from the most serious felonies to minor crimes. The defendant in another recent Wisconsin case, *State v. Morales* (Wis. App. 2017), was charged with first-degree attempted homicide for assaulting his victim by punching him and—holding a pencil in his fist—causing puncture wounds. Morales eventually pleaded no contest to aggravated battery, a lesser felony without a clear factual basis. Attempted homicide requires intent to kill but not injury to the victim; aggravated battery requires causing great bodily harm. But the court convicted Morales of the latter offense based on the state's evidence for the greater offense (Morales's intent to kill), leaving unanswered whether the victim suffered "great bodily injury." In *State v. Majors*, a 1980 case from the Washington Supreme Court, a defendant charged with first-degree murder pleaded guilty to second-degree murder—for which there was ample factual basis—and to being a habitual criminal, for which there was not. Habitual-criminal status (which increased Majors's sentence beyond second-degree murder) requires two prior convictions, for which the state apparently lacked proof. But the clear factual basis for the murder offense, and Majors's consent to the plea bargain, were sufficient.

A disproportionate number of reported baseless convictions involve sexual assault crimes. In a Maryland case, *State v. Rivera* (Md. App. 2009), the defendant was charged with five serious felony counts of child sexual abuse. To avoid evidentiary challenges at trial, forcing the victim to testify and triggering deportation proceedings for the defendant, the prosecution and defense reached an agreement that the felony charges would be dismissed after the defendant pleaded guilty to one newly filed misdemeanor for "contributing to

a condition rendering a child in need of assistance.” The Maryland court affirmed the conviction even though the state provided no basis for finding the misdemeanor’s elements that “court intervention [for the victim] is needed” and that “the child’s custodian is unwilling or unable to provide the proper care.”

On the one hand, the fairness to defendants in this practice is apparent. Even for factually baseless guilty pleas, courts still make a factual basis finding that the defendant committed *some* offense. Conviction on a factually baseless offense always rests on a finding about a greater offense. Courts still (as they must) confirm that guilty pleas are knowing and voluntary, and that defendants are aware of the plea bargain terms. The requirement that courts find a factual basis for guilty pleas before accepting them and convicting defendants may be too lax generally. But it is not *laxer* in baseless-plea cases; it is simply focused on a greater offense for which the defendant will not be convicted.

On the other hand, there remains something fundamentally disconcerting about convicting people of crimes that they did not commit, even if it is done in exchange for *not* convicting them of other crimes that they probably did commit. Most U.S. jurisdictions refrain from this practice. What is the appeal for those that do not? It cannot simply be that the state is convinced the defendant committed the greater crime but cannot prove it. If the state lacks sufficient proof, it doesn’t get to convict. And assuming that defendants can recognize the state’s weak case, they should be uninterested in pleading guilty to anything. Most if not all of these cases should be ones in which the state has a good chance of proving its case at trial but seeks a plea agreement for familiar reasons—a

certain conviction in much less time, for much less expense, and much less burden to victims and witnesses.

This point leads to the insight that baseless pleas are a signal that the state’s criminal code or sentencing laws are deficient in some respect—too rigid or insufficiently fine-grained in the distinctions they authorize among offense definitions and sentencing options. In effect, baseless pleas are a collective criticism of—or a protest to—state legislatures that is made in unison by judges, prosecutors, and defense attorneys. The professionals who know best how well the criminal code and sentencing laws operate—on the ground, in trial courts, when applied to actual defendants and criminal conduct—are declaring, through baseless guilty-plea agreements, that the punishments available in the code don’t always fit the crime.

Not all baseless pleas appear to be prompted by overly rigid criminal codes. In child abuse cases and sexual assault cases in particular, the greater motivation is likely the difficulty of proving well-grounded charges and the trauma that victims would face from testifying. But in many of the examples above, baseless charges appear to serve as a means to provide a somewhat lower sentencing range than is available under the original charge, and perhaps a charge a defendant finds somewhat more palatable. That seems to describe, for example, *Morales*, reducing attempted homicide to aggravated battery, and *Majors*, enhancing a second-degree murder sentence with a groundless habitual-criminal finding, instead of proceeding on first-degree murder charges. Whether the motivation for a different sentencing range is simply to induce a guilty plea, or whether it represents a disposition that prosecutors and judges genuinely view as more appropriate than the harsher outcome for



provable charges, the point is the same. Legislatures bear some of the blame for the fact that prosecutors and courts resort to this less-than-ideal practice.

## Convictions for Nonexistent Offenses

Prosecuting people for *nonexistent* offenses—crimes that do not exist in a jurisdiction’s laws—would seem more problematic. It is one thing to convict a person of an actual crime based on his guilty plea combined with a factual basis for a different actual crime that is related but more serious. It is another to convict a person of a “crime” that can be found in no statute or common law. What are elements of a hypothetical offense? What sentencing laws apply to it? *Factually* baseless convictions at least respect the legislature’s exclusive power to define crimes, even if they evade its constraints through an equitable doctrine that substitutes proof of one offense for another. Nonexistent offenses, by contrast, seem an act of collusion between courts and prosecutors to usurp the legislature’s lawmaking authority, which is roughly the conclusion of courts in states that reject nonexistent-crime convictions. Yet appellate courts in several states are surprisingly sanguine about convictions and sentences based on nonexistent crimes, even when they recognize that the offense contradicts legislative intent.

The conceptual affront to the rule of law posed by nonexistent crimes is somewhat greater than the practical one. There are no reported prosecutions for wholly imagined offenses along the lines of “wearing purple clothing on Sunday” or “showing support for the Georgia Bulldogs within the state of Tennessee.” All are somehow related to codified offenses. The majority of these cases seem to be misconceived inchoate versions of specific crimes, such as attempted felony murder or attempted reckless manslaughter. Others seem to be errors arising from somewhat complex statutes, such as “armed violence,” which require a certain kind of predicate offense but for which prosecutors charged an ineligible one. A final category involves convictions for statutory offenses that—unbeknownst to the parties and court at the time—were held to be unconstitutional or impliedly repealed. When nonexistent crimes arise in any of these ways, the elements of those offenses, and the applicable sentencing laws, are usually clear enough.

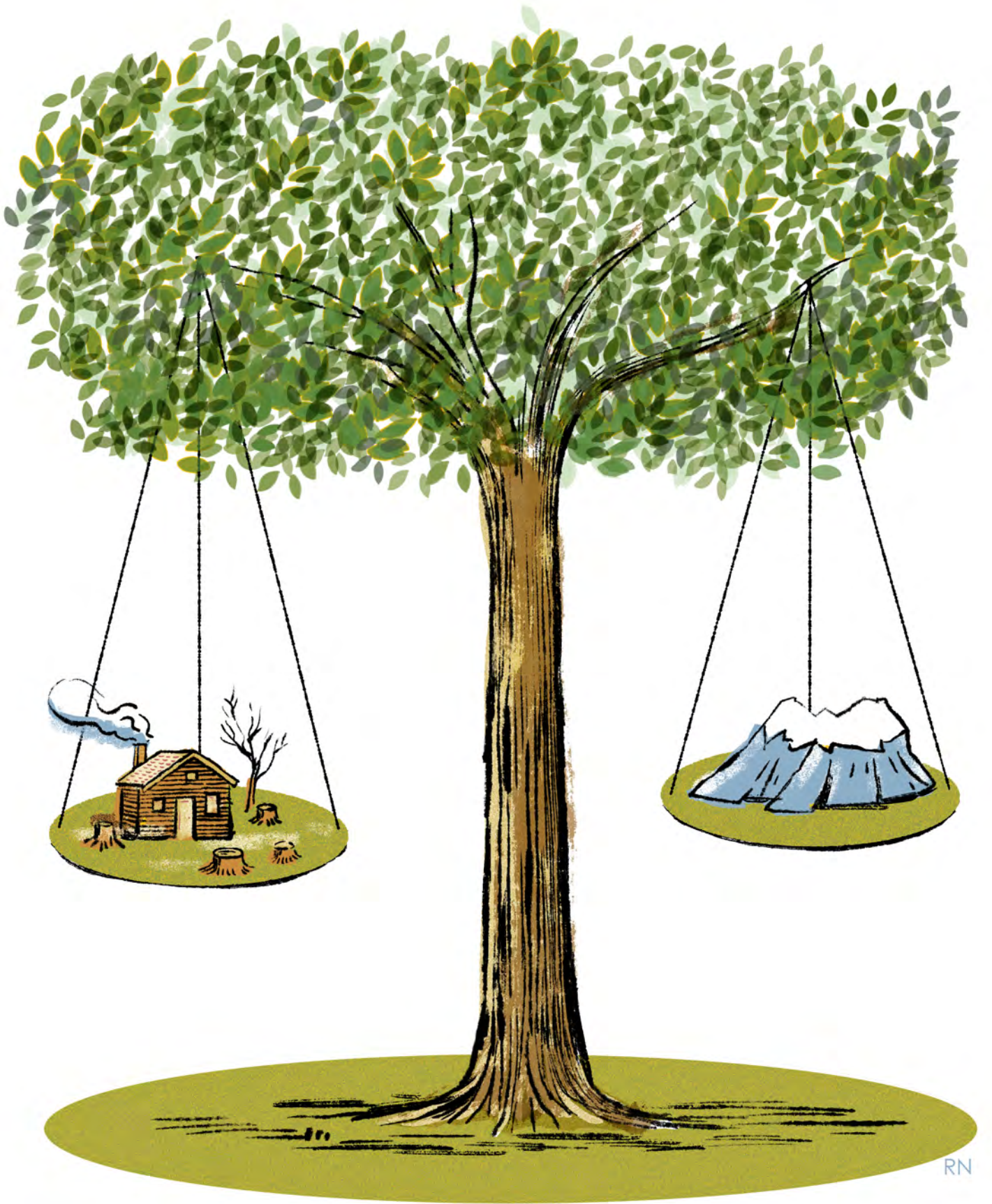
Some prosecutions for nonexistent crimes are clearly unintentional; none of the players recognized that the statute had been invalidated, or they misinterpreted its scope. Others may be intentional efforts to take advantage of the validity of nonexistent-crime convictions achieved through guilty pleas. Repeated cases, in the same jurisdiction, of plea bargains for nonexistent attempted-unintentional crimes suggest that lawyers may recognize that such charges can yield a disposition

and sentence all can live with. Courts seem inclined to affirm them for that reason, and in some cases because they are loath to allow a defendant to vacate a conviction from which he benefited when it could leave the state with slim prospects for successful re-prosecution due to the loss of evidence over time.

But the reasons for tolerating convictions for nonexistent offenses are weaker than for factually baseless ones. If many are unintentional errors by lawyers and judges—or, when an offense is held unconstitutional after a conviction on it, simply an effect of bad timing—then nonexistent crimes are not, for the most part, an implicit complaint from prosecutors and trial judges to legislators about the inadequacies of the criminal code. As for defendants unfairly gaining delay in vacating such guilty pleas that they were initially happy to reap benefits from, the response is twofold. One is the standard rule-of-law rationale: legislatures—not courts and prosecutors—can make law, and without a basis in valid law, courts have no authority, or jurisdiction, to impose criminal liability and punishment. The other is instrumental. Prosecutors and judges can avoid the problem in which defendants subsequently prompt courts to vacate the convictions for nonexistent offenses they agreed to by exercising greater care not to charge and convict suspects for nonexistent crimes in the first place.

It is true that the rule-of-law argument applies equally well, or nearly so, to factually baseless convictions. Distinguishing the latter by the fact that they stay within the legislature’s criminal code is a somewhat tenuous reed. The best argument, in my view, for giving two cheers for factually baseless guilty pleas and one faint cheer or less for nonexistent-crime convictions relies on the inference about the differences in their practical utility. In general, baseless pleas seem to be deliberate strategies for crafting more lenient outcomes for defendants than the criminal code provides, but outcomes that prosecutors and trial judges, for various reasons, prefer and endorse as well.

Seen in their most favorable light, baseless pleas are a public objection to deficient criminal codes that, implemented without such circumvention tactics, would impose unduly harsh sentences on defendants and unduly heavy burdens on prosecutors, courts, and some victims. Yet it is a rebellious strategy with built-in safeguards: to contravene legislative parameters requires a three-way agreement by prosecutors, judges, and defendants. The precariousness of this justifying story forecloses a full three-cheers endorsement. But the surprisingly resilient practice of factually baseless criminal convictions provides insights into the challenges of doing justice in real-world contexts and crafting criminal justice systems capable of accomplishing that. At a minimum, they merit more thoughtful attention. ■



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# SKEPTICISM BORDERING ON DISTRUST

## Portrayals of Law in American Literature

By David Ray Papke

**M**any works in the American literary canon include legal characters, settings, and themes. Lawyers with a taste for literature might delight in reading or rereading these works and perhaps even comparing the fictional portrayals of law, lawyers, and legal proceedings to what they encounter in the “real world.”

Yet literary legalists should beware that these canonical works do not necessarily champion law or express a belief in justice under law. The works’ skepticism—bordering on distrust—might give lawyers pause and lead them to dismiss this literature as inaccurate and biased. That would be unfortunate. The symbolic, usually narrational world of literature can help lawyers refine their critical consciousness regarding law.

My plan in this essay is to point out examples of American law-related essays, stories, and novels; to underscore a sizable handful of personal favorites; and to distill the criticisms these works offer of law, lawyers, and legal proceedings. The rudder for this ambitious voyage will be three grand modes of literary expression—romanticism, realism, and absurdism.

### An “American Renaissance” and the Law

The Republic’s earliest literati were not as accomplished in their essays, stories, and novels as were the fledgling statesmen with their declarations, constitutions, and amendments, but a genuinely noteworthy body of literary works did appear a half-century after the founding of the nation. The authors of these works could be classified as “romantics.” As with the transnational romanticism that surged during the late eighteenth and early nineteenth century, the American authors glorified nature and also valorized imagination and emotion rather than reason and structured argument. Their works often employed introspective narrative voices, told magical tales of bigger-than-life characters, and ended in an apprehensive mood. The legendary F. O. Matthiessen, one of the first literary critics to treat the American writers as a distinct group, was

so impressed by their work that he referred to it, if a bit pretentiously, as “the American Renaissance.”

The essays, stories, and novels from the American romantics did not necessarily focus on the law, but the works that did certainly merit attention. The essayist Ralph Waldo Emerson and his disciple Henry David Thoreau tossed out aphorisms as if they were bread crumbs for a flock of birds, but Emerson and Thoreau were especially pointed in warning of law’s shallowness and its tendency to enforce conformity. In Thoreau’s enduring “On the Duty of Civil Disobedience” (1849), he excoriates Daniel Webster, the era’s most famous lawyer, and says, “The lawyer’s truth is not Truth, but consistency, or a consistent expediency.” The law itself, Thoreau insists, “never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice.”

Nathaniel Hawthorne, who never fully welcomed Thoreau into his circle of writers and intellectuals and once suggested life among “the Indian tribes” would have suited Thoreau well, nevertheless shared some of Thoreau’s doubts about law. Hawthorne’s *The Scarlet Letter* (1850) begins with Hester Prynne pushing open a “heavily timbered” prison door and beginning a life of painful marginalization. Hawthorne condemns the “dismal severity of the Puritanic code of law” and warns against accepting retribution as a sound reason for punishment. And my goodness, I think Hawthorne’s *The House of the Seven Gables* (1851), published just a year later than *The Scarlet Letter*, is on one level about fraud and duplicity in real estate transfers and in trusts and estates. It concerns manipulating the law, albeit with serious consequences.

My personal favorite among the authors of the “American Renaissance” is undoubtedly Herman Melville. He is of course known for *Moby Dick* (1851) and a half dozen other superb novels. Less known is that he was married to the daughter of Lemuel Shaw, a prominent lawyer, jurist, and chief justice of the Massachusetts Supreme Judicial Court. Might Melville’s attitudes about lawyers and law have had something to do with his personal feelings about his father-in-law and the latter’s calling? Scholars have worn themselves out speculating if one or another of Melville’s lawyers or judges was inspired by Shaw.

I am particularly fond of two of Melville’s law-related tales. In “Bartleby, the Scrivener” (1853), the unnamed lawyer/narrator is a former Master in the Court of Chancery in New York City and, by all accounts, “an eminently safe man.” His attempts to make sense of the distant and uncooperative scrivener Bartleby, one of which includes laughable research in legal treatises, fail badly. Poor Bartleby in essence commits suicide and dies with his face up against the wall in the Tombs. Reflecting in a postscript on Bartleby’s earlier employment in the “lost letter” department of the Post Office, the lawyer/narrator sighs, “Ah Bartleby! Ah humanity!”

In *Billy Budd* (unpublished at the time of Melville’s death), the author imagines a fictional drumhead court hastily assembled to consider questionable charges of murder and mutiny against the unfortunate indentured seaman Billy Budd. Captain Vere, whose name must be ironic, controls the proceedings, reveals himself to be a rigid positivist, and virtually dictates Budd’s conviction. Nevertheless, as Budd stands on the yardarm about

**Thoreau, Hawthorne, Melville, and the other romantics have little confidence in law and legal institutions’ ability to sort out the contradictions in human nature and the complexities of social life, both of which the authors took to be bewildering and even terrifying.**

to be dropped into the sea, he calls out, “God bless Captain Vere,” a final victory perhaps of the poetic over the rational.

What is the core criticism that the American romantic writers offered regarding law and legal institutions? Thoreau, Hawthorne, Melville, and the other romantics have little confidence in law and legal institutions’ ability to sort out the contradictions in human nature and the complexities of social life, both of which the authors took to be bewildering and even terrifying. Lawyers and legal thinkers, the romantics thought, do not go deeply enough. They are insufficiently philosophical and therefore not profound. In part because of its pride in itself, legal thought struck the romantics as superficial and unable to get to the “truth” of things.

### Realism, Law, and Social Injustice

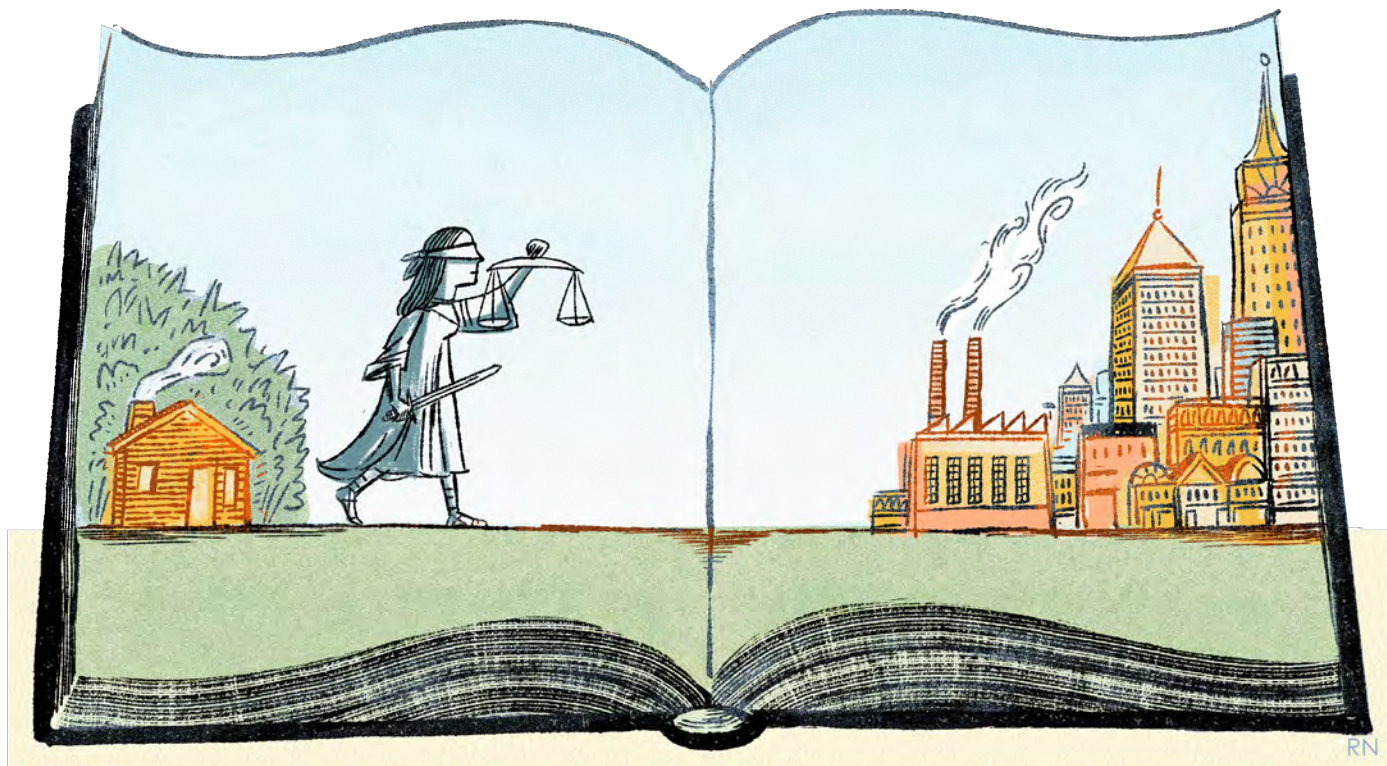
Romanticism has never completely disappeared from American life, but in the decades following the Civil War, literary realism supplemented romanticism as an important mode of literary expression. Neither romanticism nor realism is more “accurate” than the other, and surely neither is inherently better. Basically, different writers and readers prefer one or the other. Such preferences are usually unreflective.

That having been said, realist literature has distinctive features. Realist stories and novels tend to employ third-person narrators with pronounced observational skills, to feature everyday characters, and to chronicle fictional daily events in great detail. Literary naturalists, the close relatives of literary realists, add an additional twist: The fate of their protagonists is often predetermined and therefore outside their direct control.

The pantheon of literary realists is large and ramshackle, and the following authors are lined up in the temple alphabetically rather than by the quality of their works: Stephen Crane, Theodore Dreiser, William Dean Howells, Henry James, Jack London, Frank Norris, Katherine Anne Porter, Upton Sinclair, John Steinbeck, and Edith Wharton. Stories and novels by these authors do not necessarily take shaped and consistent political positions, but in general the authors are sensitive to socioeconomic class and inequality and to the ways law and legal institutions can be biased against immigrants, the working class, and societal outsiders.

An emotionally devastating but important example of this can be found in Upton Sinclair’s





*The Jungle* (1906). Set among the immigrants working in Chicago's turn-of-the-century meatpacking houses, the novel supposedly led Congress to enact the Meat Inspection Act and the Pure Food and Drug Act in hopes of eliminating the meatpacking industry's unhygienic practices and foul products. This tale of a literary work awakening the public's consciousness and then spurring government action notwithstanding, the author did not want bourgeois law reform. Sinclair cast criminal law, real estate law, and labor law as handmaidens of industrial capitalism and thought all of them should be turned on their heads on the way to socialism. In his own famous words, "I aimed for the public's heart, and by accident I hit it in the stomach."

A sterling realist novella with intriguing literary reflections on legal practice and the workings of the courts is Katherine Anne Porter's *Noon Wine* (1937). In the story, a Texas farmer named Royal Earle Thompson benefits greatly from the hard work of a Swedish farmhand named Olaf Helton. When a bounty hunter arrives looking for Helton, Thompson kills the bounty hunter with an axe. Thompson's lawyer assures him a jury will never convict, and at trial Thompson is in fact acquitted. However, the community knows Thompson is guilty as sin, and Thompson and his wife become outcasts. Confused and distraught, Thompson kills himself.

Equally sobering is Richard Wright's *Native Son* (1940). A tale of deprivation, oppression, and perhaps liberation, the novel revolves around Bigger Thomas, a twenty-year-old African American raised in Chicago's slums. He stumbles into one murder and then violently perpetrates another. At trial, he is sentenced to death, but the proceedings have an "artificiality" about them, as Thomas's Communist defense counsel and the hyper-patriotic district attorney try to place Thomas's crimes into pre-shaped political narratives. Examinations and cross-examinations are small annexes to the lawyers' larger soapboxes. Most troubling of all are the lessons Thomas learns. Having developed and grown in the midst of an odd "bildungsroman," he appears in the end to be saying, "I killed, therefore I am." If this makes the reader uncomfortable, Wright would take that as an accomplishment.

In general, the critique of law and legal institutions served up by the realist novels differs from that of romantic works. Realism portrays bias and manipulation rather than superficiality and overconfidence. Law and legal institutions—especially but not exclusively the courts—take advantage of immigrants, workers, poor people, and people of color. We had best watch carefully, the authors imply and sometimes say explicitly, lest we find ourselves swept up with powerless parts of the population. The legal system, alas, frequently contributes to social injustice.

**Sinclair cast criminal law, real estate law, and labor law as handmaidens of industrial capitalism and thought all of them should be turned on their heads on the way to socialism.**

“Law and legal thought are, for the absurdists, not so much superficial, as they were for the romantics, but rather nonsensical and contradicted.”

### Law, Like Everything Else, Is Absurd

Absurdism began rearing its sometimes goofy head in American literature following World War II, but that did not mean either realism or the even earlier romanticism disappeared. Harper Lee’s *To Kill a Mockingbird* (1960), for example, might be thought of as a law-related realist novel. It is also, by many accounts, the most popular American novel of the twentieth century. Valentine Davies’s *Miracle on 34th Street* (1947), meanwhile, is essentially a law-related romantic novella. It features lengthy courtroom proceedings regarding the mental health of a man named Kris Kringle and in the end confirms that he is none other than Santa Claus. The film version won the Academy Award for Best Story, a designation that in recent times has given way to more prosaic awards for screenwriting.

Absurdism was a multifaceted movement hardly limited to the United States or even to literature per se. Influenced by surrealist and Dadaist art and also by existentialist literature and philosophy, absurdist literary expression is often “metafictional”—that is, it pauses to reflect on itself. Given this tendency toward what some consider navel-gazing, absurdist authors have staked out less space in the literary canon than their romantic and realist compatriots, but the leading American figures include Donald Barthelme, Don DeLillo, Joseph Heller, Thomas Pynchon, Tom Robbins, Kurt Vonnegut, and David Foster Wallace.

Absurdist literary expression is not rigidly formulaic, but several features commonly appear. For starters, absurdist literature is usually comic and includes abundant black humor. If life makes no sense, why not laugh at it? The literature is also ironic and bursting with incongruity, and narrators are frequently sneaky tricksters who cannot be trusted. The endings of absurdist stories and novels rarely proffer enduring or inspiring messages but tend instead to be agnostic and even nihilistic. Democracy is a joke, and God is not only dead but also buried.

The two best-known works of American absurdist literature are probably Joseph Heller’s *Catch-22* (1961) and Kurt Vonnegut’s *Slaughterhouse-Five* (1969), and although neither features a lawyer character or legal proceeding, each takes sudden, snappy jabs at law. In *Catch-22*, bombardier John Yossarian has ample opportunity to reflect not only on absurdly contradictory situations but also on an actual military rule: If a soldier is crazy, he does not have to fly bombing missions, but if he asks to be excused from a mission, that shows he is not crazy and makes him ineligible to be excused. *Slaughterhouse-Five* revolves around optometrist, prisoner of war, and time-traveler Billy Pilgrim. He reflects from time to time on Edgar Derby, an American soldier who, in the midst of the horrid, deathly firebombing of Dresden in World II, is arrested for taking a teapot from the ruins, quickly found guilty at trial, and shot on the spot by a firing squad. “So it goes.”



If one is interested in an absurdist work of American literature in which the protagonist is a lawyer and legal proceedings abound, I recommend John Barth's exquisite *The Floating Opera* (first published in 1956 but substantially revised in 1967). The cynical narrator is 54-year-old Todd Andrews, who characterizes himself as the best lawyer on Maryland's Eastern Shore and recounts in detail the day he decided not to go through with his planned suicide. Andrews's cases are comical, with the most extended one involving ownership and responsibility for multiple pickle jars of excrement in a decedent's estate. For Andrews, the practice of law is merely a game that he enjoys playing. He is intrigued by the relationship of law to justice in the way one might be intrigued by a toy tractor attempting to climb over a book. "The law and I," Andrews says and Barth presumably agrees, "are uncommitted."

Overall, absurdist literature does not so much hone in on legal concerns, but it does provide a critique of law, legal thought, lawyers, and legal institutions. As already suggested, from an absurdist perspective all are as silly as the world around them. Law and legal thought are, for the absurdists, not so much superficial, as they were for the romantics, but rather nonsensical and contradicted. Lawyers and legal proceedings are not biased against the weak as they were for the realists but rather noncommittal and meaningless. Something such as "justice under law" cannot exist, given the irrational, vindictive, and vicious nature of humankind.

## What Might We Do with All This?

If so inclined, a legalist or most anyone else for that matter could reply to the romantic, realist, and absurdist literary critiques of the law. Take note, Emerson, Thoreau, Hawthorne, Melville, and other romantics, the legal discourse might lack philosophical depth, but it never sought that in the first place. We rely on law to manage social affairs rather than to seek enduring "truth." Attention, Messrs. Sinclair, Steinbeck, and Wright, and also all other realists, everyone realizes that assets and power can provide advantages in the courts and in other legal institutions. However, equality under the law remains a valuable aspirational wagon to which our society can hitch itself. And Heller, Vonnegut, Barth, and other absurdists, how do we move forward and what do we use as a guide if law is unavailable? Religion, nationalism, and militarism are not particularly appealing alternatives.

The assorted literati, I suspect, would want the last word on these issues, but even our literary greats do not get to speak from the grave. Perhaps it is best simply to say the portrayals of law, lawyers, and legal proceedings in canonical American essays, stories, and novels invite one to reflect on law. In my work as an academic, I have found critical engagement with the law to be the greatest intellectual treat. Literature has been an extraordinarily useful resource for me in the development of my critical legal consciousness. ■



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# Mix Cars, Drugs, Guns, and Add Water— A Recipe for Interesting Blog Reading

For more than a decade, the Marquette Law School Faculty Blog ([law.marquette.edu/facultyblog](http://law.marquette.edu/facultyblog)) has been a forum for a wide range of ideas involving the law, public policy, and events at Eckstein Hall, among many other things. In addition to faculty members, law school graduates and current students have contributed extensively to the blog. Here are four recent pieces, three by faculty members and one by a current student, that provide fresh perspectives on matters of current interest.

Alexander B. Lemann

## As we approach our autonomous future, will products liability law hold us back or shove us forward?

In recent years, highly autonomous vehicles (AVs) have acquired a reputation as a technology that is perpetually just a few years away. Meanwhile, their enormous promise continues to tantalize. AVs have the potential to transform American life in a variety of ways, reducing costs both large and small. From virtually eliminating the roughly 40,000 deaths and hundreds of thousands of injuries we suffer in car accidents every year to making it possible to commute to work while sleeping, AVs are seen as potentially revolutionary.

Against this backdrop, many torts scholars have expressed concern that imposing liability on AV manufacturers threatens to slow or even deter AV development. When AVs take the wheel, will the companies that make them also take on liability for whatever crashes

they can't avoid? AV development also raises the possibility—much less commonly noticed—of new liability for manufacturers of conventional vehicles. If AVs are significantly safer, will courts and juries come to see conventional vehicles as defective? According to a recent Arizona appellate court opinion, the answer is . . . maybe so.

In *Varela v. FCA US LLC*, the plaintiff, Melissa Varela, had slowed to a stop on the highway because of traffic in front of her when she was rear ended by a Jeep Grand Cherokee moving at over 60 miles per hour. Varela was injured, and her four-year-old daughter, riding in the backseat, was killed.

In filing suit, Varela argued that the Jeep was defectively designed in that it did not include an autonomous safety feature known as automatic emergency braking. Automatic emergency braking monitors the road in front of a car and can sense an impending collision. After



Alexander B. Lemann

providing a warning to the driver, the car can then stop on its own if the driver fails to act. Automatic emergency braking is gradually becoming a universal feature on new cars sold in the United States, and even in 2014, when the Jeep at issue in *Varela* was sold, it was standard on the two highest trim levels. Unfortunately for Varela, it was optional on the trim level of the car that hit her, and the driver had not elected to purchase it. The premise of her suit is that the Jeep would never have collided with her at all if it had been equipped with automatic emergency

braking, and that any Jeep sold without it is for that reason defective.

The superior court dismissed Varela's case on preemption grounds, holding that the 2017 decision by the National Highway Traffic Safety Administration (NHTSA) not to mandate the inclusion of automatic emergency braking foreclosed the possibility of state tort law doing so. Indeed, an Arizona appellate court reached the same conclusion on virtually identical facts just last year, in *Dashi v. Nissan North America, Inc.*, 445 P.3d 13 (Ariz. Ct. App. June 13, 2019).

But here the appellate court reversed, reasoning that the NHTSA's decision was based on its satisfaction that manufacturers were rapidly adopting automatic emergency braking anyway, and that an agency's decision not to mandate a national standard

"does not, without more, impliedly preempt a state common-law tort action." *Varela v. FCA US LLC*, 466 P.3d 866 (Ariz. Ct. App. May 5, 2020) (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002)). The court made almost no effort to distinguish *Dashi*.

With Varela's case reinstated, the question of defect looms. Varela's challenge is a fundamental one in the history of products liability law as applied to automobiles: Is a manufacturer required to equip all the cars it sells with the latest safety technology, as long as the technology meets some standard of cost-effectiveness or reasonableness? Put another way, is a car to be evaluated by comparison with the safest cars on the road, or with the typical car that has come before?

As *Varela* indicates, this question could take on a new urgency in the coming years. As manufacturers of highly autonomous vehicles like Waymo and Tesla struggle to produce cars that have no need of human drivers, most of the progress is these days being made in the form of incremental improvements to the autonomous features found on many cars already on the road. While scholars and commentators have fretted about the prospect of increased liability for manufacturers as they take responsibility for driving, it could be that manufacturers will find themselves facing new forms of liability even for the same old cars.

*Alexander B. Lemann is an assistant professor of law at Marquette University Law School.*

Judith G. McMullen

## Learning to be alert to addiction

When lawyers think about working with clients who have addictions, we often imagine clients who are young or middle-aged and facing legal consequences such as criminal charges for drug possession or for driving under the influence of alcohol or another drug. But not every person struggling with addictions is young, in trouble with law enforcement, or even using substances in a visible way that signals addiction to family members or professionals.

More than 2.5 million adults over age 55 struggle with addictions every year in the United States. As people

age, their bodies become more sensitive to medications and alcohol. According to data from the CDC, 85 percent of people over the age of 60 take prescription drugs. Older people often take multiple prescription medicines, and often these drugs interact with each other, or with alcohol. Ten percent of hospital admissions of older people are related to problems with drugs or alcohol. Many older people become addicted to opioids or anxiety medications that were prescribed by their own doctors to deal with pain or anxiety. Once they become



Judith G. McMullen

dependent on drugs, they may feel ashamed or hopeless. Family members may mistakenly attribute physical unsteadiness or mental confusion to normal aging or even dementia. Older people struggling with addictions often suffer alone and in silence. But it doesn't have to be that way. Professionals who work with them can help them recognize the need for help and empower them to get it.

Lawyers who work in estate planning or elder law are keenly aware of the need to continually assess the mental capacities of their clients. Discussions in law school courses or continuing

legal education programs often center on various kinds of dementia, how to recognize them, and how to work with clients who have periods of lucidity. As the above statistics point out, lawyers also need to recognize that confusion, speech difficulties, or memory problems could be related to drug dependence, drug interactions, or even drug doses that are too high for an elderly person's tolerance. We can recognize possible issues and refer our clients for medical or substance evaluations. Most importantly, we can normalize the experience of our clients, assure them that they need

not be ashamed, and show them that there is help and hope available.

A team composed of some of my colleagues from Marquette University's Clinical Mental Health Counseling program and me has produced a very brief public service video (<https://youtu.be/P4pE-vdOpRc>) that could be shown to clients or their family members who are facing difficulties with possible addictions. Please feel free to share it with anyone who would find it useful.

*Judith G. McMullen is a professor of law at Marquette University Law School.*

## Robert Maniak

# Rules of engagement, across the world

Afghanistan was hot. An almost indescribable amount of heat meant that you were constantly sweating as everything you wore became soaked, so that you were never truly dry. I was there in 2014 as part of what, we thought at the time, was the United States' withdrawal from the country. The unit I was a part of had the impossible task of maintaining the operation of Camp Bastion's flight line, providing all the logistics that kept the aircraft and crews happy, while also keeping them safe.

Contrary to public assumption, and most recruiting commercials, the U.S. Marine Corps isn't made of just infantry and aircraft units. There is a whole ecosystem of support jobs, which keep everything moving along. My job was one of the less glamorous, less flashy, less likely to be publicized ones. I maintained air conditioners and refrigerators. And the unit I was assigned to wasn't all that exciting either. We were a support squadron of the aircraft squadrons. We did not have any aircraft to maintain. Rather, we supplied all the less glamorous logistics for the units that did fly.

Part of that logistics support was security. After the disastrous 2012 attack that killed two Marines and destroyed millions of dollars of aircraft, the airfield, which was nested inside the larger base, was subject to increased security protocols, limiting access to only those who had business there. This meant that in addition to doing our daily jobs, like vehicle and heavy equipment maintenance, we would also be tasked to stand post at the entry points for the flight line or be on stand-by as a quick reaction force in the event that someone breached the base fence and made the one-kilometer trek to the flight line.

Occasionally, certain Marines were assigned to a longer-term security assignment. Being assigned to this meant you would not be doing your regular job at all. Rather, you would be assigned to stand a rotating medley of security posts for 12 hours a day. It was here that I found myself during that summer, stuck on the day shift in the sweltering sun.

As part of the pre-deployment training that our unit underwent,



Robert Maniak

we drilled, often and repeatedly, the procedures of what to do when at an entry point. Tell the person to stop, cognizant of the fact that they probably don't speak English, so hand signals and patience are a priority. Once they stop, pat them down and use a metal detector to ensure they don't have anything dangerous. Since our unit was going to be policing only internal checkpoints, we didn't need to worry about vehicle-borne explosives or harder-to-conceal rifles. We were worried about knives and handguns or other improvised weaponry.

Occasionally, base intelligence would get wind of something it didn't like and order the base to enter a heightened defensive posture. This happened once while I was assigned to the unforgivingly hot 12-hour post. It didn't happen during the day, of course; it happened in the middle of the night. Another Marine and I found ourselves hustled out of bed to don our gear and provide overwatch protection. We were about 50 yards from a hastily constructed entry control point that was stopping traffic on the road rather than at the normal entry point. We overlooked the road on a natural hill, so we ended up looking down onto the vehicles being stopped. We watched as truck after truck, backlit by the moon and unnatural floodlights, was stopped and searched.

The first few presented no issues. The drivers, though confused by the existence of the control point, cooperated without issue, happily turning over their identification and proper permits to the corporal in charge. But then an issue arose. One driver's paperwork wasn't in order. He was missing something, and suddenly everyone was on edge. As the corporal called in for a supervisor, the driver knew something was wrong. This stop was taking far longer than any other truck ahead of him. The Marines staring at him were tense. The driver,

a man from India, whose job was to do what Americans would not, namely clean port-a-johns, was drained of all color, looking whiter than the moon.

As luck would have it, the truck he was driving was older, rickety, and poorly maintained. He was asked to step out of the vehicle, and when he engaged the parking brake, the truck lurched forward. Suddenly, every Marine, myself included, drew our rifles up. The driver, now faced with a total of six different muzzles pointed at his chest, used whatever strength he had to raise his hands above his head. The tension lessened as we realized what had happened. The driver, who was shaken and no doubt scared for his life, fell out of the truck on to the ground. Our supervisors arrived and double-checked the paperwork. There wasn't an issue after all. The permit had been issued using the European dating system, day-month-year, rather than the American one, month-day-year.

Looking back to that incident six years later, I am reminded of why we didn't open fire that night. As part of pre-deployment training, we had to memorize the rules of engagement. Before firing our weapons, we had to have positive identification of our target and either that target needed to show a hostile intent, an example of

which would be leveling a weapon at someone, or the target needed to show a hostile action, such as firing a weapon at someone. That night, despite the fact that we were all on edge, despite being fatigued from spending all day in the hot sun, despite the fact that each Marine that night carried 180 rounds of ammunition and had training in how to shoot a hostile target, the six of us came to the same conclusion: The driver was scared and made a mistake. It wasn't hostile; it was human.

As yet another video emerges, as yet another community is in mourning, as yet another person was shot by police, I think of that night. The six Marines that night all decided that the driver of a large truck located in a war-torn country, where we would be woken up by rocket attacks and the sound of gunfire, was not a threat. And yet over the past few months America has been inundated with horrific events in which people are shot and, in some cases, killed by police officers. Some were sleeping in their beds; others begged for their mothers as they were choked to death; and others still were shot in the back. And that is a damn travesty.

*Robert Maniak is a third-year student at Marquette Law School. This post was written in the wake of the shooting of Jacob Blake by a police officer in Kenosha, Wis., on August 23, 2020.*

David A. Strifling

## Attorney General Kaul, Wisconsin DNR reverse slide of Wisconsin's public trust doctrine

An important shift in Wisconsin water policy has taken place, one that will likely have quantitative effects on Wisconsin water quality. It relates to the relative influence of the public trust doctrine in the state. On several occasions, I have written on this blog about the

doctrine's apparently declining influence in Wisconsin. The public trust doctrine is generally taken to mean that a state must act as "trustee" of certain natural resources, particularly the navigable waters of the state, and manage them for the trust beneficiaries—its people.



David A. Strifling

Operationalizing those general terms has been difficult and has proceeded in fits and starts. For present purposes, I will focus on the 2011 Wisconsin Supreme Court decision in *Lake Beulah Management District v. Wisconsin Department of Natural Resources*. The court concluded that the public trust doctrine gave the Wisconsin Department of Natural Resources (WDNR) “the authority and a general duty to consider whether a proposed high-capacity well may harm [other] waters of the state” via water level drawdown and other potential impacts. In Wisconsin, high-capacity wells (HCW) are statutorily defined as wells with the capacity to pump more than 100,000 gallons of water per day. The court further held that, when considering HCW applications, WDNR had the authority to “deny a permit application or include conditions in a well permit” to prevent the harm to other nearby waters.

Around the same time, a new statute arguably undercut that same authority. While the case was before the court, the legislature enacted 2011 Wisconsin Act 21, creating Wis. Stat. § 227.10(2m). The statute provides that “[n]o agency may implement or enforce any standard, requirement, or threshold, including a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule . . . .” For several years, uncertainty persisted over the tension between the Supreme Court opinion and the statute because the WDNR’s public trust authority is not “explicitly” stated in the statutes or in WDNR’s administrative rules.

On May 10, 2016, then-attorney general Brad Schimel issued an opinion giving priority to the statute over the *Lake Beulah* opinion. AG Schimel determined that DNR had no “explicit authority” to impose conditions on a high-capacity well permit, or to evaluate the drawdown and related impacts that those wells might cause on nearby waters of the state. For that reason, he

wrote, “much of the Court’s reasoning in *Lake Beulah*, including the breadth of DNR’s public trust authority discussed below, is no longer controlling.”

That was an important statement of policy. The Marquette Water Law and Policy Initiative performed a quantitative analysis to analyze its empirical effects. We used WDNR-published data from 2013 to 2018 to answer two questions: First, how many high-capacity well applications were filed? Second, how long did WDNR take to grant or deny the application? The preliminary data appear to show that more applications were filed, and that the time to grant or deny them decreased significantly. I presented those findings at an event in the Law School’s Lubar Center on March 4, 2020.

The chart below depicts the number of days the agency took to approve a high-capacity well application (plotted on the y-axis) against the date the application was filed (plotted on the x-axis). The average time for approval decreased from about 270 days in 2015 to about 63 days in 2017.

The tide turned shortly after the March 2020 event. In early May, the current attorney general, Josh Kaul, revoked former AG Schimel’s opinion, writing that “the crux of [the opinion] is incorrect” in light of *Lake Beulah*. Kaul cited a circuit court case following *Lake Beulah* instead

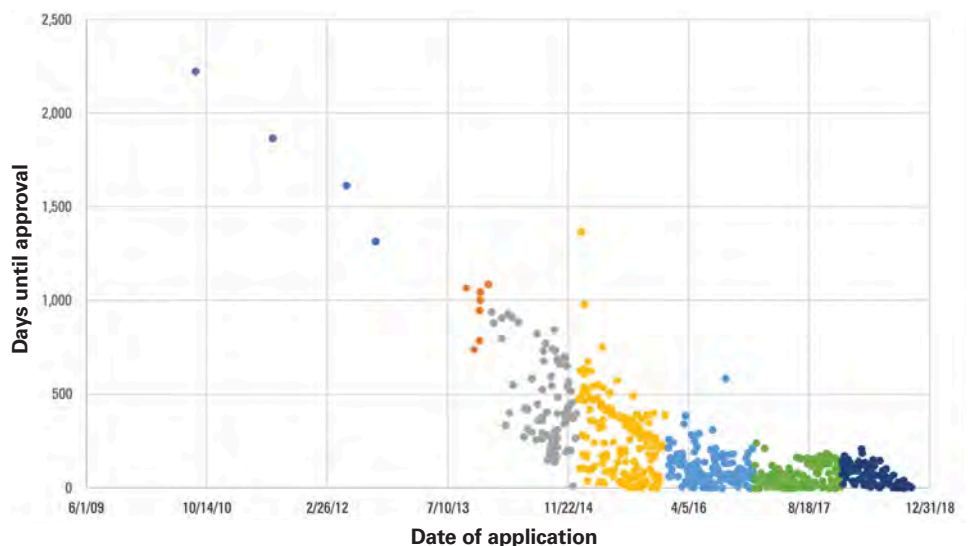
of former AG Schimel’s opinion, and noted that an appeal in the case has been certified to the Wisconsin Supreme Court. The court’s consideration of the case means that the policy shift announced by Kaul may be only temporary, pending a decision of the court.

Following Kaul’s action, the WDNR announced that it would revise its HCW review process in response to the changed policy. Repeatedly citing *Lake Beulah*, DNR said it will “make a fact-specific determination in each case and will consider environmental impacts when reviewing a proposed high-capacity well application if presented with sufficient concrete, scientific evidence of potential harm.”

Environmental law observers have often lamented the lack of empirical scholarship tracking how changes in law and policy quantitatively affect environmental metrics. The events detailed in this post provide a case study along those lines. We will continue to track the effects of this important shift in the law to determine whether it reverses the previously observed effects, and we plan to publish a paper reporting the results of our work to date.

*David A. Strifling is director of the Water Law and Policy Initiative and an adjunct professor of law at Marquette University Law School. ■*

**Time for Wisconsin DNR Approval of HCW Applications (in Days)**





# CLASS NOTES



Grant F. Langley



Paul T. Dacier



Maxine A. White



Reyna Morales



Jack A. Melvin



Geraldo F. Olivo, III

**70** Grant F. Langley received the 2020 Government Lawyers Division's Grant F. Langley Service Award from the State Bar of Wisconsin. The division has named its service award in honor of Langley, who served for more than 35 years as the Milwaukee city attorney.

Michael C. Elmer published the third edition of *Global Patent Litigation—How and Where to Win* (with Gregory Gramenopoulos), with the fourth edition forthcoming in late 2021.

**82** Michael S. Ariens was named the inaugural Aloysius A. Leopold Professor of Law at St. Mary's University of San Antonio. He teaches courses in American legal history, constitutional law, evidence, and professional responsibility.

**83** Paul T. Dacier was named chairman of the board at AerCap Holdings, N.V., in Dublin, Ireland. AerCap is the world's largest commercial aircraft leasing company.

**85** David C. Sarnacki has published *A Visual Refresher Course on Expert Testimony*, a book directed at young lawyers.

Maxine A. White was recognized by *The Milwaukee Times* as a Wisconsin Black woman who has helped shape women's rights. She is the first African American woman to serve on the Wisconsin Court of Appeals.

**97** Reyna Morales was appointed by Gov. Tony Evers as a judge of the Milwaukee County Circuit Court. She previously was a trial attorney with the Office of the State Public Defender in Milwaukee.

**98** Kimberly R. Walker was appointed special deputy city attorney for the City of Milwaukee.

**99** Jack A. Melvin was elected a judge of the Waukesha County Circuit Court. He was previously a staff attorney with the State of Wisconsin Labor and Employment Relations Commission.

**01** Shannon A. Lienza, a U.S. Navy Reserve judge advocate general commander from Duvall, Wash., was deployed to Camp Lemonnier in Djibouti on the Horn of Africa. Lienza, who is also an attorney at Microsoft Corp. in Redmond, Wash., serves as the legal advisor to the base commanding officer.

**02** Jeffrey B. Norman was promoted to assistant chief of the Milwaukee Police Department.

**03** Christopher J. Schreiber joined Michael Best & Friedrich as a partner in the litigation group. He specializes in commercial bankruptcy and creditors' rights.

Rebecca A. Kiefer was elected a judge of the Milwaukee County Circuit Court.

**04** John J. Schulze was named secretary of the board of directors for the Villa of Saint Francis, an assisted living facility in South Milwaukee, Wis.

Nicole N. Hanna was hired as recruitment officer for the Max Planck Institute for the Study of Crime, Security, and Law in Freiburg, Germany.

**08** Geraldo F. (Jerry) Olivo, III, joined the tort & insurance litigation department with Henderson, Franklin, Starnes & Holt, in Fort Myers, Florida.

**09** David D. Conway was appointed by Gov. Tony Evers as a judge of the Dane County Circuit Court. He was previously an assistant U.S. attorney for the Western District of Wisconsin.

Benjamin M. Crouse formed Chadwick & Crouse in Milwaukee. The firm focuses on family immigration, deportation defense, and humanitarian immigration cases.

**10** Jason K. Roberts was hired by Transaction Tax Resources (TTR) as vice president of global content. TTR provides transaction tax answers and tax rates to more than 10,000 companies.

Lindsey A. Larson was appointed an administrative law judge for the Wisconsin Department of Workforce Development.

Five Marquette lawyers were elected to serve two-year terms as district representatives on the State Bar of Wisconsin's Board of Governors:

Jesse B. Blocher, '06, of Habush Habush & Rottier, Waukesha

Sherry D. Coley, '03, of Davis | Kuelthau, Green Bay

Elizabeth K. Miles, '09, of Davis | Kuelthau, Milwaukee

Anna F. C. Muñoz, '05, of Brookdale Senior Living, Milwaukee

Nicholas C. Zales, '89, of Zales Law Office, Milwaukee

In its 35th Annual Black Excellence Awards, *The Milwaukee Times* recognized Brittany C. Grayson, '11, Kristen D. Hardy, '14, and Ashley A. Smith, '18, as Special Honorees in the Law.

# Remembering the Warmth and Commitment Julian Kossow Brought to Teaching Law

## **“I went to law school for all the wrong reasons,”**

Julian R. Kossow wrote in a piece for the Marquette Law School Faculty Blog in 2010. That, of course, is not a conclusion held by others, because Kossow went on to a distinguished career, including a decade as a visiting professor at Marquette Law School, where he was highly respected not only for his knowledge but for the care and warmth he showed to students. Kossow died August 2, 2020, at the age of 87.



Julian R. Kossow (1932–2020)

In that blog post, Kossow explained what he meant about enrolling in the part-time evening program at Georgetown Law in Washington, D.C., in the early 1960s. “I had been doing real estate development for four or five years,” he wrote. “I was a client before I was a law student. I became quite annoyed that my attorneys seemed to be patronizing me. They spoke a language that was foreign to me. I decided to go to law school to find out what the mystique was all about and, hopefully, to emerge as a better developer.”

In a second blog post, Kossow described a pivotal moment early in his time in law school. He wrote:

“The entire event took, at most, ten seconds, but in that incredibly brief time I learned that the study of law was the right thing for me. The time was mid-September 1963. The place was the old Georgetown University Law Center at 5th and E Streets, N.W. The room was shaped like a bowling alley. One hundred and twenty-five part-time evening students were shoehorned into that room. At precisely 5:45 p.m., Professor Thomas O’Toole entered the room from the back. It was the only way in and out of the room in which constitutional law was being taught. Professor O’Toole took one step, paused, and from the back of the room, spoke in a loud, clear voice, ‘Mr. Chase, why was the Court in *Euclid* concerned about the scope of the town’s zoning plan?’ Before Mr. Chase could answer, the professor took another step into the room, paused, and said, ‘Mr. Kossow, why did I ask that question?’

“A few seconds later, after I had choked on an answer that included the words ‘comprehensive plan,’

the professor walked to the front of the class and said, ‘Mr. Hubbard, do you agree with Mr. Kossow’s answer?’ . . . Professor O’Toole, in ten seconds, changed the direction of my life.”

Kossow said he found himself intellectually excited by his studies. It was an excitement he passed on to many students at several law schools where he taught, including his years at Marquette from 2004 to 2014.

Daniel Toomey, a Washington, D.C., lawyer who was a close friend, has recounted Kossow’s career: Successful involvement in real estate development both before and after becoming a lawyer. Involvement in land reform work in Ethiopia, working with Emperor Haile Selassie in the 1970s. Development of thousands of apartments for Russian immigrants to Israel.

“He was urbane, well-read, curious, and loved traveling with his wife, Janet,” Toomey wrote of Kossow. Marquette Law Professor Michael O’Hear wrote, “Julian had a warm smile, a hearty laugh, and a treasure trove of colorful anecdotes from his professional work and extensive international travel. Julian also impressed with his passionate commitment to teaching.”

Although he lived in Washington, D.C., Kossow commuted to Milwaukee for years to teach courses including property, real estate finance, real estate contracts and conveyances, and trusts and estates. In a comment on the Law School’s Faculty Blog, Jane Eddy Casper, a retired administrator, wrote, “He taught several courses in the evening throughout his MULS years, sharing his scholarship, insight, and gentlemanly ways with numerous part-time evening students. One of those students (graduated 2016) told me recently how much she enjoyed the dinners he arranged at local restaurants throughout the semester—small groups of first-year students who then got to know each other better and, of course, got to know their professor better as well.” In fact, Kossow continued that tradition even in retirement in Washington, D.C., gathering with Marquette lawyers—his former students—in the area. He had retired, but he was still teaching. ■



Joe T. Riehl



Mary L. Ferwerda



James M. Burrows



Jacob M. Bibis



Devin S. Hayes



Sara E. Flaherty

**11** **Joe T. Riehl** joined CollegeNET as associate vice president, corporate counsel. CollegeNET is a technology company in Portland, Ore., serving the needs of colleges and universities.

**Mary L. Ferwerda** received an Emerging Leaders Philanthropic Five (P5) Award from the United Way of Greater Milwaukee and Waukesha County. The P5 Award recognizes five community leaders in their 20s, 30s, and 40s who have made extraordinary commitments of leadership, volunteerism, mentoring, and philanthropy to the region's nonprofit community.

**Lucas J. Kaster** was appointed by the U.S. Commission on Civil Rights to its Minnesota Advisory Committee. He is an attorney at Nichols Kaster in Minneapolis.

**Laura A. Bautista** coauthored "Four Key Items to Ensure Success in Your In-House Role," published in *The Legal Intelligencer* – Law.com.

**James M. Burrows** joined Bosshard | Parke in La Crosse, Wis. He litigates commercial, employment, intellectual property, and other civil disputes.

**12** **Stephanie A. Martin** (Chavers) wrote an article, "Pay Equity & Race: A Discussion We're Not Having (Yet)," in *Rewarding Reads*. She is a compensation manager at BioTelemetry, in Pennsylvania.

**13** **Jacob M. Bibis** and **Devin S. Hayes** both have been made shareholders at von Briesen & Roper, in Milwaukee. Bibis is a member of the firm's litigation and risk management practice group. Hayes is a member of the firm's labor and employment law section.

**14** **Chris K. Flowers** was named in-house counsel at Camp Gladiator, Austin, Texas.

**Kristen D. Hardy** of Briggs & Stratton Corporation, Wauwatosa, Wis., was elected to a two-year term as secretary of the State Bar of Wisconsin.

**16** **Sean A. Bukowski** joined founding partner Ryan R. Graff, L'06, at the Mayer, Graff & Wallace firm, in Manitowoc, Wis., as an associate.

**18** **Jake M. Bogar** opened Bogar Law Offices in Germantown, Wis. His practice specializes in real estate transactions, corporate law, and estate planning.

**Kelsey R. S. Kerr** joined Alan C. Olson & Associates in New Berlin, Wis., as an associate.

**Joseph W. Bukowski** joined the wealth planning department at Michael Best & Friedrich in Milwaukee.

**Elisabeth W. Lambert** was named a recipient of a 2020 Equal Justice Works Fellowship. With the ACLU of Wisconsin as her host organization, she works with students to challenge discriminatory practices in Wisconsin public schools.

**19** **Sara E. Flaherty** was named legal director at Manitou Group in West Bend, Wis.

**Travis L. Yang** joined Ryan R. Graff, L'06, founding partner, at the Mayer, Graff & Wallace firm, in Manitowoc, Wis., as an associate.

**Matthew J. Borkovec** joined Remley & Sensenbrenner, in Neenah, Wis. His practice areas are estate planning, real estate, and business law.

**Employment data for recent classes are available at [law.marquette.edu/career-planning/welcome](http://law.marquette.edu/career-planning/welcome).**

The Association of Corporate Counsel–Wisconsin announced the election of new board members and executive officers for 2020–2021.

#### Executive Officers:

President: **Danielle White**, L'11, senior legal counsel, Rockwell Automation

Vice President: **Anne F. B. Dorn**, L'05, senior legal counsel, Direct Supply, Inc.

Secretary: **Michael A. Baird**, L'05, senior staff counsel – corporate legal, Fiserv, Inc.

Treasurer: **Pamela G. Stokke-Ceci**, L'13, assistant general counsel, Badger Meter, Inc.

Legal Operations Liaison and Immediate Past President: **Ryan C. Murphy**, L'04, general counsel and vice president, Edgerton Contractors, Inc.

#### Board Members:

**Isioma O. Nwabuzor**, L'15, vice president and associate general counsel for Robert W. Baird & Co.

**Jascha B. Walter**, L'99, regional general counsel, North America, for SoftwareONE, Inc.

#### SHARE SUGGESTIONS FOR CLASS NOTES WITH [CHRISTINE.WV@MARQUETTE.EDU](mailto:CHRISTINE.WV@MARQUETTE.EDU).

We are especially interested in accomplishments that do not recur annually. Personal matters such as weddings and birth or adoption announcements are welcome. We update postings of class notes weekly at [law.marquette.edu](http://law.marquette.edu).

## SOME THINGS HAVE CHANGED.



## OTHERS HAVE NOT.

We cover a rich set of subjects, using an extraordinary array of materials. Our standards remain high. We are guiding people even as they find their own paths in entering the law. **In short, everyone here is committed to Marquette Law School as a place advancing the university's mission of excellence, faith, leadership, and service.**

**OUR MASKS CANNOT HIDE OUR CHARACTER OR OUR SUCCESS.**