

2020

## Legal Responses To Violent Crime: Does Research Support Alternatives To Long-Term Incarceration?

Michael O'Hear

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>

---

### Repository Citation

Michael O'Hear, *Legal Responses To Violent Crime: Does Research Support Alternatives To Long-Term Incarceration?*, 103 Marq. L. Rev. 735 (2020).

Available at: <https://scholarship.law.marquette.edu/mulr/vol103/iss3/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

# MARQUETTE LAW REVIEW

---

Volume 103

Spring 2020

Number 3

---

## SYMPOSIUM INTRODUCTION

### LEGAL RESPONSES TO VIOLENT CRIME: DOES RESEARCH SUPPORT ALTERNATIVES TO LONG-TERM INCARCERATION?

MICHAEL O'HEAR\*

America's historically high incarceration rate has drawn sustained criticism from across the political spectrum.<sup>1</sup> Whether motivated primarily by considerations of cost-effectiveness or of social justice,<sup>2</sup> dozens of states have in recent years adopted a multitude of reforms intended to reduce excessive incarceration.<sup>3</sup> Yet, the national imprisonment rate remains more than four times higher than historic norms.<sup>4</sup>

Reforms to date have been hampered by their tendency to focus on reducing the incarceration of "nonviolent" offenders.<sup>5</sup> Such a strategy offers little hope of returning the United States to the levels of imprisonment that prevailed a

---

\* Professor, Marquette University Law School. B.A., J.D. Yale University. I am grateful to all of the many people who contributed to the success of the conference on which this symposium is based, as well as to the editors of the *Marquette Law Review* for their efforts in bringing the conference papers into their present form. Space precludes a comprehensive listing of all who should be thanked, but I would particularly note my appreciation of Marquette Law School Dean Joseph Kearney; Rita Aleman, program manager of Marquette Law School's Lubar Center for Public Policy Research and Civic Education; and Symposium Editor Allison Mignon.

1. See MICHAEL O'HEAR, PRISONS AND PUNISHMENT IN AMERICA: EXAMINING THE FACTS 212 (2018) (describing support of prominent political conservatives for incarceration-reducing reforms).

2. See Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1584-86 (2019) (summarizing main criticisms of mass incarceration).

3. MICHAEL O'HEAR, THE FAILED PROMISE OF SENTENCING REFORM, at xiv-xv (2017).

4. O'HEAR, PRISONS AND PUNISHMENT, *supra* note 1, at 166-67.

5. *Id.* at 198.

generation ago, for most state prisoners have been convicted of violent offenses.<sup>6</sup> 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 such 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.<sup>7</sup> 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.<sup>8</sup>

EBDM thus emphasizes the use of systematic research on what works, with a particular eye to reducing *both* costs to taxpayers—read, utilization of

---

6. *Id.*

7. Based on the classification system used by the U.S. Bureau of Justice Statistics, 55.2% of state prisoners at year end 2016 were serving time for violent offenses. JENNIFER BRONSON, & E. ANN CARSON, U.S. DEPT. OF JUSTICE, PRISONERS IN 2017, at 21 tbl.12 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/CEQ8-A6F4>]. Of this group, nearly half—27% of all state prisoners—were serving time for murder or rape/sexual assault. *Id.*

8. *Evidence-Based Decision Making in State and Local Criminal Justice Systems*, NAT'L INST. CORR. (2020), <https://info.nicic.gov/ebdm/> [<https://perma.cc/R634-LP94>].

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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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. As conference organizer, I was delighted that so many leading researchers on violent crime, risk assessment and reduction, and corrections administration agreed to participate in the program. The papers presented at the conference are collected in this symposium issue of the *Marquette Law Review*. The remainder of this brief introductory essay will provide an overview of the papers.

---

9. See, e.g., NAT'L INST. OF CORR., EBDM CASE STUDIES: HIGHLIGHTS FROM THE ORIGINAL SEVEN PILOT SITES (2017), <https://info.nicic.gov/ebdm/sites/info.nicic.gov/ebdm/files/ebdm-casestudies-highlights.pdf> [<https://perma.cc/8WCH-VKLJ>] (describing EBDM reforms adopted in seven jurisdictions).

10. See O'HEAR, PRISONS AND PUNISHMENT, *supra* note 1, at 3 (describing three-strikes laws).

11. Recidivism data reveal little evidence of specialization in crime types. For instance, in one important study of prisoners released in thirty states in 2005, among those who had been convicted of violent crimes and who then recidivated after release, public order offenses were far more common than fresh violent offenses. MATTHEW R. DUROSE, ALEXIA D. COOPER, & HOWARD N. SNYDER, U.S. DEPT. OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010—SUPPLEMENTAL TABLES: MOST SERIOUS COMMITMENT OFFENSE AND TYPES OF POST-RELEASE ARREST CHARGES OF PRISONERS RELEASED IN 30 STATES IN 2005, tbl.2 (2016), [https://www.bjs.gov/content/pub/pdf/rprts05p0510\\_st.pdf](https://www.bjs.gov/content/pub/pdf/rprts05p0510_st.pdf) [<https://perma.cc/JPP5-DGXD>]. Indeed, violent recidivism was almost as common among the prisoners convicted of property and public order offenses as it was among those initially convicted of violence. See *id.* (indicating that 33.1% of those who had served time for a violent offense were rearrested for a new violent offense, as compared to 29.2% of those who served time for a public order offense and 28.5% of those who served time for a property offense).

In her paper, Pamela Oliver provides a detailed analysis of U.S. prisoner data from the National Corrections Reporting Program.<sup>12</sup> Her work highlights the overall prevalence of violent-crime convictions among state prisoners, but also notes an extraordinary level of state-to-state variation in the composition of prison populations. She thus helpfully observes that “different policies are needed to reduce incarceration in different places.”<sup>13</sup> Her analysis also identifies key drivers of returns to prison. Importantly for present purposes, her work indicates that relatively few—ten percent or less—of violent offenders are returned to prison for a new violent offense within ten years of release.<sup>14</sup>

Ideally, judges and corrections officials would know in advance who those ten percent were going to be, so that sentencing, release, and supervision decisions could be adjusted accordingly. Of course, given the dynamic and elusive nature of human character, it does not seem possible that we will ever know with absolute certainty who the repeat violent offenders will be. Yet, research is providing an increasingly sophisticated understanding of recidivism, and of the flipside phenomenon of desistance from crime.

In their paper, Daniel O’Connell, Christy Visser, and Lin Liu synthesize key studies in the growing literature on “crime trajectories.”<sup>15</sup> The research highlights an important relationship between age and crime, with crime-committing tendencies typically reaching their peak during the teen years and normally falling thereafter.<sup>16</sup> While not all offenders follow this pattern, O’Connell and his coauthors note that “beyond the mid to late forties, the likelihood of violent offending is particularly low.”<sup>17</sup>

Research on such general patterns in violent offending raises the hope that individualized violence risk-assessment (VRA) tools may be developed that can helpfully guide the decisionmaking of judges, corrections officials, and other criminal-justice actors. In their contribution, Sarah L. Desmarais and Samantha A. Zottola discuss the current state of the art in VRA.<sup>18</sup> They find much support for the notion that an empirically based, appropriately deployed VRA tool can enable more accurate judgments about dangerousness in

---

12. Pamela Oliver, *What the Numbers Say About How to Reduce Imprisonment: Offenses, Returns, and Turnover*, 103 MARQ. L. REV. 1073 (2020).

13. *Id.* at 1079.

14. *Id.* at 1114–16.

15. Daniel O’Connell, Christy Visser, & Lin Liu, *Violent Offending, Desistance, and Recidivism*, 103 MARQ. L. REV. 983 (2020).

16. *Id.* at 987.

17. *Id.* at 1003.

18. Sarah L. Desmarais & Samantha A. Zottola, *Violence Risk Assessment: Current Status and Contemporary Issues*, 103 MARQ. L. REV. 793 (2020).

comparison with unstructured or intuitive decisionmaking.<sup>19</sup> They also note a variety of potential pitfalls in the use of such tools. Still, there seems ample basis for continued research and experimentation on the use of VRA tools as a way to distinguish among those convicted of violent crimes for such purposes as diversion from prison, supervision and treatment in the community, and suitability for release from incarceration.

Four of the conference papers address different strategies for responding to the threat of violent recidivism. Of course, a predominant strategy in recent years has been incarceration. In her contribution, Jennifer E. Copp considers whether incarceration has greater risk-*increasing* or -*decreasing* effects on inmates.<sup>20</sup> To date, the studies on recidivism in general have yielded mixed results, but seem to indicate that prison either has no overall effect on the likelihood of reoffending, or perhaps even a slightly criminogenic (that is, recidivism-increasing) impact.<sup>21</sup> Unfortunately, very little research has been done that focuses on the impact of incarceration on *violent* recidivism in particular, although at least one violence-focused study reached conclusions that were consistent with the research on recidivism more generally.<sup>22</sup>

In their paper, Edward J. Latessa and Myrinda Schweitzer consider the prospects for success with alternatives to incarceration.<sup>23</sup> Again, there is less research focusing on violent recidivism specifically than on recidivism in general, but the available studies suggest that neither traditional probation and parole nor intermediate sanctions like electronic monitoring have much effect on reoffending unless combined with treatment and services.<sup>24</sup> On the other hand, there are reasons to be hopeful about community-based alternatives that deliver programming consistent with the risk-need-responsivity (RNR) model.<sup>25</sup> As typically conceptualized, this model involves the systematic, individualized assessment of offenders with respect to risk, criminogenic needs, and responsivity to different forms of treatment.

---

19. *Id.* at 816–17.

20. Jennifer E. Copp, *The Impact of Incarceration on the Risk of Violent Recidivism*, 103 MARQ. L. REV. 775 (2020).

21. *Id.* at 781–84.

22. *Id.* at 786–87 (discussing David J. Harding, Jeffery D. Morenoff, Anh P. Nguyen, Shawn D. Bushway, & Ingrid A. Binswanger, *A Natural Experiment Study of the Effects of Imprisonment on Violence in the Community*, 3 NATURE HUM. BEHAV. 671 (2019)).

23. Edward J. Latessa & Myrinda Schweitzer, *Community Supervision and Violent Offenders: What the Research Tells Us and How to Improve Outcomes*, 103 MARQ. L. REV. 911 (2020).

24. *Id.* at 916–22.

25. *Id.* at 930–32.

In her paper, Faye Taxman explores a rather different way of thinking about the RNR model, that is, as applied to whole communities and their capacity to address problems of criminal violence effectively.<sup>26</sup> Based on a detailed case study of St. Louis, she suggests that many communities may confront a “crisis in programming,” including uneven quality and insufficient capacity to meet demand.<sup>27</sup> Her work points to a subtle tension that may arise in the implementation of EBDM reforms. While such reforms are often sold to policymakers as cost-savers, evidence-based treatment programs are unlikely to have much impact if they are implemented on the cheap.

Although EBDM is often contrasted with the deterrence- and incapacitation-based strategies of the late twentieth century, these approaches may to some extent come together in the “focused deterrence” model that Edmund F. McGarrell describes in his paper.<sup>28</sup> First developed in order to address urban gun violence, the model requires the identification of those individuals in a community who are believed to be at highest risk for involvement in the targeted forms of violence. Those individuals then receive a personal message from law-enforcement officials that they are known to law enforcement and that their future criminal activity will be met with stern responses, including the use of any available legal mechanisms that will serve to maximize punishment. The tough deterrent threats may be combined with testimony from community members who have been harmed by gun violence and with promises of social support, such as assistance with job placement, for those who wish to give up the criminal lifestyle. As McGarrell reports, a substantial body of evidence now supports the effectiveness of this focused deterrence approach in reducing a community’s rate of gun violence, although it is somewhat less clear that this results from reduced rates of violent recidivism *per se*.<sup>29</sup>

Five of the symposium papers consider risk and desistance as to specific categories of violent offenses or offenders. Jennifer L. Skeem and Devon L. L. Polaschek focus on high-risk offenders.<sup>30</sup> They note an important paradox: while reform efforts in recent years have tended to prioritize relatively low risk offenders for treatment-based alternatives to incarceration, the research

---

26. Faye Taxman, *Violence Reduction Using the Principles of Risk-Need-Responsivity*, 103 MARQ. L. REV. 1149 (2020).

27. *Id.* at 1174.

28. Edmund F. McGarrell, *Focused Deterrence Violence Prevention at Community and Individual Levels*, 103 MARQ. L. REV. 963 (2020).

29. *Id.* at 976–81.

30. Jennifer L. Skeem & Devon L. L. Polaschek, *High Risk, Not Hopeless: Correctional Intervention for People at Risk for Violence*, 103 MARQ. L. REV. 1129 (2020).

indicates that it is actually the high-risk offenders who are apt to exhibit the greatest reduction in recidivism rates following treatment. Skeem and Polaschek also discuss the research on treatment of individuals with psychopathic tendencies—an offender group that overlaps substantially with the high-risk population. While few post-treatment recidivism studies focus specifically on this group, the extant research does suggest that individuals who score high on psychopathy may be no less responsive to treatment than are other high-risk offenders.<sup>31</sup>

In their paper, Megan Kurlychek and Alysha Gagnon discuss the research on juvenile offenders who commit violent crime.<sup>32</sup> They identify several programs that have demonstrated success in reducing juvenile reoffending,<sup>33</sup> but also echo Taxman’s point about the importance of adequate funding for programs and fidelity to the chosen treatment model.<sup>34</sup>

Laura S. Abrams, Kaylyn Canlione, and D. Michael Applegarth also consider juvenile offenders in their contribution, but they focus even more narrowly on a small subset who have committed some of the most serious violent offenses.<sup>35</sup> More specifically, their qualitative study is based on in-depth interviews with individuals who were sentenced to life in prison for homicide offenses committed at age twenty or earlier. They find that even these individuals, despite facing unique barriers to rehabilitation, are able to find pathways to meaningful desistance.

Along with murder, rape seems to provoke the greatest horror among the core violent offenses. Although those who are convicted of sexual violence are apt to be regarded as especially depraved and irredeemable, Eric S. Janus argues in his paper that policymakers have given too much attention to preventing *recidivistic* sexual violence in comparison to other forms of sexual violence.<sup>36</sup> He points out that rates of sexual recidivism are much lower than often supposed, and that sex offenders differ greatly from one another in their risk levels.<sup>37</sup> Moreover, a large proportion of sex offenses are committed by first-

---

31. *Id.* at 1148.

32. Megan Kurlychek & Alysha Gagnon, *Reducing Recidivism in Serious and Violent Youthful Offenders: Fact, Fiction, and a Path Forward*, 103 MARQ. L. REV. 877 (2020).

33. *Id.* at 905–06.

34. *Id.* at 909.

35. Laura S. Abrams, Kaylyn Canlione, & D. Michael Applegarth, *Growing Up Behind Bars: Pathways to Desistance for Juvenile Lifers*, 103 MARQ. L. REV. 745 (2020).

36. Eric S. Janus, *Preventing Sexual Violence: Alternatives to Worrying About Recidivism*, 103 MARQ. L. REV. 819 (2020).

37. *Id.* at 832–36.



timers.<sup>38</sup> As a result, policies that indiscriminately target convicted sex offenders for harsher punishment and closer supervision are apt to be ineffective—and perhaps even counterproductive—in reducing rates of sexual violence.

Richard Wright, William J. Sabol, and Thaddeus L. Johnson focus on a different violent offense, robbery.<sup>39</sup> Their study, drawing on interviews with dozens of individuals who have been convicted of the crime, provides a somewhat less hopeful view than some of the other symposium papers. Emphasizing the “pervasive social exclusion” that marks the lives of their subjects,<sup>40</sup> Wright and his coauthors ask, “How do you reintegrate those who were not—and never have been—integrated to begin with?”<sup>41</sup>

Notwithstanding the particular challenges posed by these individuals, the overall sense that emerges from the papers in this collection is one of cautious optimism—optimism, that is, regarding the potential of EBDM-style reforms to achieve better outcomes in many cases of violent crime. But what about the politics? Is there any real hope that major new policies regarding violent crime will ever be adopted by officials who must attend to public opinion? A final set of four papers relates to this critical question.

My coauthored contribution with Darren Wheelock considers the phenomenon of public punitiveness toward violent crime, making use of an original public opinion survey.<sup>42</sup> We find that punitiveness toward violent offenders is connected to broader ideas about social organization, individual responsibility, and perceived group differences, rather than being rooted in prior experiences of victimization, fear of crime, or recent crime trends.<sup>43</sup> This may help to explain why violent-crime policies have remained so tough even though actual rates of violent crime have fallen dramatically over the past three decades.<sup>44</sup> The actual physical threat posed by criminal violence may be relatively low for most Americans today, but that does not necessarily mean that more lenient policies will find public support if current policies are valued primarily for their symbolic character.

---

38. *Id.* at 835–36.

39. Richard Wright, William J. Sabol, & Thaddeus L. Johnson, *Robbery, Recidivism, and the Limits of the Criminal Justice System*, 103 MARQ. L. REV. 1179 (2020).

40. *Id.* at 1183.

41. *Id.* at 1192.

42. Michael O’Hear & Darren Wheelock, *Violent Crime and Punitiveness: An Empirical Study of Public Opinion*, 103 MARQ. L. REV. 1035 (2020).

43. *Id.* at 1070–71.

44. See O’HEAR, PRISONS AND PUNISHMENT, *supra* note 1, at 168.

Public attitudes may be shaped in part by media coverage of violent crime. My solo contribution to the symposium offers a snapshot of crime coverage in two local news outlets.<sup>45</sup> I find that these outlets cover violent crime, and especially the most severe forms of violent crime, far more frequently than other types of crime that are in reality much more common.<sup>46</sup> Additionally, I find little information in the media coverage that either contextualizes the offenses or humanizes the offenders.<sup>47</sup> As a result, readers may come to perceive violent crime as most often being perpetrated by depraved, predatory strangers.

In recent years, public discourse regarding violent crime has been colored by anti-immigrant sentiment. But what exactly is the relationship between immigration and criminal violence? Michael T. Light and Isabel Anadon synthesize the relevant research in their paper.<sup>48</sup> They find little evidence that immigration increases violent crime, and conclude that “for policymakers serious about reducing the burden of violent crime in the United States, greater immigration enforcement is unlikely to achieve this end.”<sup>49</sup>

Finally, in her contribution, Cecelia Klingele challenges the assumption—which surely underlies much of the punitiveness toward those convicted of violent crimes—that violent acts are the province of a relatively small number of prolific perpetrators who are fundamentally “other.”<sup>50</sup> Klingele argues that “aggression and violence are pervasive human experiences,” not “rare acts limited to a deviant few.”<sup>51</sup> Harmful though it may be, little of the aggression that she discusses ends up formally labeled as “violent crime” by the legal system. If we better appreciated the true prevalence of violence, including the aggressions in which we ourselves are complicit, then we would perhaps be less likely to “overpunish and overstigmatize” the relative few who bear the formal mark of criminal.<sup>52</sup>

\* \* \*

Each paper in this symposium takes up a discrete piece of a broader problem of profound complexity and importance—can our criminal-justice policies

---

45. Michael O’Hear, *Violent Crime and Media Coverage in One City: A Statistical Snapshot*, 103 MARQ. L. REV. 1007 (2020).

46. *Id.* at 1030–31.

47. *Id.* at 1030.

48. Michael T. Light & Isabel Anadon, *Immigration and Violent Crime: Triangulating Findings Across Diverse Studies*, 103 MARQ. L. REV. 939 (2020).

49. *Id.* at 961.

50. Cecelia Klingele, *Labeling Violence*, 103 MARQ. L. REV. 847 (2020).

51. *Id.* at 850.

52. *Id.* at 868.

foster more humane and cost-effective legal responses to criminal violence? To be sure, there are any number of other pieces to this problem that might have been explored. This symposium will not be the final word on violent recidivism and its control. But I hope that the symposium will serve as a helpful point of entry for policymakers and criminal-justice practitioners into the growing body of social science research in this area, and as an inspiration for additional research. I am grateful to all of the distinguished contributors to this symposium, and I look forward to the next round of vital insights that their research will produce.