

**Professor Mark Osler
University of St. Thomas (MN)
1000 LaSalle Ave., MSL 400, Minneapolis MN 55403
(254) 717-7032**

Professional Experience

Professor of Law, University of St. Thomas (August 2010-present). Professor of Law, Baylor University School of Law (2000 – August 2010, tenured 2006). Awarded the Robert and Marian Short Distinguished Chair in Law (2015). First holder of the Ruthie Mattox Preaching Chair, First Covenant Church- Minneapolis (2018). Solo author of CONTEMPORARY CRIMINAL LAW (2018, West). Published op-eds in the New York Times (2014 and 2016) and Washington Post (2014, 2018, 2019), and articles with law reviews at Harvard, Stanford, the University of Chicago, Northwestern, Georgetown, UVA, William and Mary, and Rutgers. Won *Spears v. United States* in U.S. Supreme Court as lead counsel (2009), allowing judges to "categorically reject" 100-1 guideline ratio between crack and powder cocaine, and was quoted by Justice Stevens' dissent in *United States v. Booker* (2005). Portrayed as "Prof. Joe Fisher" in Samuel Goldwyn film "American Violet." Received "Professor of the Year" in 2016 and 2019, Dean's Award for Outstanding Scholarship (2015), Dean's Award for Outstanding Teaching (2013), and Award for Fulfillment of Mission (2011). Started nation's first federal commutations clinic. 2009 "Wacoan of the Year."

Assistant United States Attorney, United States Department of Justice, Detroit, Michigan (1995-2000).

Associate, Dykema Gossett, Detroit, Michigan (1991-1995). Clerk, U.S. District Court Judge Jan E. DuBois, E.D. Pa. (1990-1991).

Education

J.D. Yale Law School 1990

B.A. William and Mary 1985

Publications

Books

Contemporary Criminal Law (West Academic, 2018). This all-new casebook presents a clean new approach to teaching criminal law to first year students. A consistent emphasis on the elements of crime centers the book on what matters most, and compelling exercises are rooted in the discretion of prosecutors and judges. Using only opinions from federal courts in the modern era, the book presents a coherence that is missing from texts rooted in a hodge-podge of time frames and jurisdictions. Narcotics, firearm crimes, and immigration all are addressed in complete chapters, reflecting the real-life world of criminal law as it now exists.

Prosecuting Jesus (Westminster/John Knox, 2016). This book recounts the experience of presenting the trial of Jesus as a challenge to Christian support for the death penalty, a project that spanned eleven states and a broad range of faith traditions.

Jesus On Death Row: The Trial of Jesus and American Capital Punishment

(Abingdon Press, February, 2009). *Jesus on Death Row* describes the experience of Christ as a criminal defendant, from investigation to execution, with analogies to the modern criminal justice system and a critique of the death penalty.

Articles, Essays and Book Chapters

The First Step Act and the Brutal Timidity of Criminal Law Reform, ___ *New England Law Review* ___ (Forthcoming, 2020). This piece, which will be published with several responses, describes the aching slowness of reform and examines the causes before setting out discrete steps to accelerate the process.

Memo to the President: Two Steps to Fix the Clemency Crisis, ___ *St. Thomas Law Journal* ___ (Forthcoming, 2020). Written as a memo to a new president, this article sets out the problems with the federal system and two key steps towards reform.

Negotiation Lessons from a Former Wiseguy, Michael Franzese (with Blaine McCormick and Christopher Meyer) *Journal of Management Inquiry* (forthcoming). Two negotiation experts and a criminal lawyer analyze an extended interview with a negotiator for the mafia.

Clemency and the Soul of the Constitution, 34 *Journal of Law & Politics* 1 31 (2019). This piece examines the historical record and argues that the pardon power is an essential part of the constitutional mandate that must be preserved through systemic reform.

Short of the Mountaintop: Race Neutrality, Criminal Law, and the Jericho Road Ahead, 49 *University of Memphis Law Review* 77 (2019). Part of the MLK50 project, this piece addresses the failures of race neutrality in criminal law, and offers two concrete short-term projects to address racial inequities.

Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform (with Rachel Barkow). 59 *William & Mary Law Review* 387 (2017). The institutional role of the Department of Justice as a filter to the Executive in considering criminal justice reform serves as a brake on the process, even in a progressive administration. Here, Prof. Barkow and I establish the way that the DOJ engages with attempts at reform.

Clemency (Book Chapter) in *REFORMING CRIMINAL JUSTICE , VOLUME 1: CRIMINALIZATION AND PAN -SYSTEMIC ISSUES* (2017). This chapter described the challenges to contemporary clemency, and was written for the first effort by the Academy for Justice group.

Fewer Hands, More Mercy: A Plea for a Better Clemency System, 41 *Vermont Law Review* 1 (2017). The overly complex process for considering federal clemency produces inefficiency and unfairness. This article sets out a better model.

Clementia, Obama, and Deborah Leff, 28 *Federal Sentencing Reporter* 309 (2016). This piece sets out the bureaucratic tangle strangling clemency, and suggests a fix.

Prosecutors and Victims: Why Wrongful Convictions Matter (with Jeanne Bishop), 105 *Journal of Criminal Law and Criminology* 101 (2016). We know that wrongful convictions matter to the wrongfully convicted. More complex is the relationship between victims and prosecutors to

wrongful convictions.

Treating Drug Crimes as White-Collar Crimes (with Thea Johnson), 61 Wayne State Law Review 1 (2016). For most of the nation's history, narcotics were treated as commercial products, not a super-category of crime. This piece argues that narcotics trafficking should be treated like other kinds of commerce-based crime.

Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal (with Rachel Barkow), 82 University of Chicago Law Review 1 (2015). This argument for a radical change to the federal clemency process addresses the critical under-use of an important presidential power.

Forfeitures in a New Market-Reality Narcotics Policy, 52 Harvard Journal on Legislation 221 (2015). Criminal forfeitures have traditionally focused on the profits of narcotics trafficking. This article argues that it would be more productive to forfeit the cash flow within drug trafficking networks.

1986: AIDS, Crack, and C. Everett Koop, 66 Rutgers Law Review 851 (2014). Two health crises, both associated with oppressed groups, threatened the United States in 1986. The different approaches taken to AIDS and crack offer important lessons for the future.

Narcotics Prosecutors as Problem Solvers, 1 Stanford Journal of Criminal Law and Policy 1 (2014). With the shift of discretion from judges to prosecutors has come a correlating responsibility to solve problems. This article describes the ways in which narcotics prosecutors can embrace this role.

A Holocaust in Slow Motion: America's Mass Incarceration and the Role of Discretion (With Judge Mark W. Bennett), 7 DePaul Journal for Social Justice 117 (2014). Written with a sitting federal judge, this article looks to the role of discretion both in creating and solving the problem of mass incarceration.

Victims: Transforming the Death Penalty Debate and Talking to Each Other in the Dark: The American Abolition Movement and The Christian Opportunity (with Jeanne Bishop). These two book chapters appear in Ashgate Press's New Voices about Capital Punishment, edited by Peter Hodgkinson (2014).

Drugs, Bombs, and the Erosion of Rights, 11 Ohio State Journal of Criminal Law 249 (2013) A review of David K. Shipler's book, *The Rights of the People: How Our Search For Safety Invades Our Liberties*.

Roe's Ragged Remnant, 24 Stanford Law and Policy Review 215 (2013). One of *Roe v. Wade*'s troubling legacies is two distinct time thresholds—viability and birth—for the attachment of rights. This odd choice has allowed legal abortion of viable infants.

Learning From Crack, 10 Ohio State Journal of Criminal Law 671 (2013). By seeing the crack “epidemic” as a product of economic forces, *Learning From Crack* offers a new perspective that also serves as a critique of our societal response to this problem.

Amoral Numbers and Narcotics Sentencing, 47 Valpariaso Law Review 755 (2013). Written for a symposium on narcotics sentencing, this article argues that several mistaken assumptions regarding narcotics are written into penal codes, setting false priorities and mandating failure.

A Biblical Value in the Constitution: Mercy, Clemency, Faith, and History 9 St. Thomas Law Journal 769 (2012). While some try hard to see biblical values in the Constitution, they often fail to identify what may be the most obvious: The value of mercy written into the pardon power.

The Promise of Trailing Edge Guidelines to Resolve the Conflict Between Uniformity and Judicial Discretion, 14 University of North Carolina Journal of Law and Technology 203 (2012). The federal sentencing guidelines present a host of chronic problems, and many of them can be addressed through the use of a modern Sentencing Information System. This article explains how.

What Would It Look Like If We Cared About Narcotics Trafficking? An Argument to Attack Narcotics Capital Rather Than Labor 15 UDC Law Review 113 (2011). This symposium article argues that the goals of narcotics interdiction would be better served by intercepting money flowing to source countries rather than drugs flowing from them.

Joseph Allegretti, The Lawyer's Calling: Christian Faith and Legal Practice, 1 Journal of Christian Legal Thought 25 (2011) (book review).

The Ford Approach and Real Fairness for Crack Convicts, 23 Federal Sentencing Reporter 228 (2011) (with Matthew Fass). This piece promotes

the use of a systemic commutation process for crack defendants not subject to retroactivity under the Fair Sentencing Act, using as a guide President Ford's approach to draft evaders.

After the Implosion: Guidelines for a New Era 7 *Ohio State Journal of Criminal Law* 795 (2010). Arguing that the sentencing guidelines are fundamentally flawed, this piece describes a better "trailing-edge" system that would be based primarily on the sentences that judges actually impose.

Seeking Justice Below the Guidelines: Sentencing as an Expression of Natural Law, 8 *Georgetown Journal of Law and Public Policy* 167 (2010). This article critiques the federal sentencing guidelines as subject to constant subversion by judges as a natural law impulse towards mercy.

Buyer's Remorse: Texas Juries, Buyer's Remorse, and Booker's Fatal Flaw, 22 *Federal Sentencing Reporter* 100 (December 2009). This essay surveys the disappointment of all constituencies with the 5-year results of the Supreme Court's seminal decision in *Booker*.

Banishment and Intensive Parenting as Sentencing: Alternatives for Defendant Parents, 22 *Federal Sentencing Reporter* 44 (2009). Describing two possible alternatives to incarceration, this article argues for a stronger focus on the role of parenting in sentencing.

Policy, Uniformity, Discretion, and Congress's Sentencing Acid Trip, 2009 *BYU Law Review* 293 (2009). A thorough critique of the policy basis for the Federal Sentencing Guidelines, followed by suggestions for reform.

Death to These Guidelines, and a Clean Sheet of Paper, 21 *Federal Sentencing Reporter* 7 (2008). Urging a re-writing of the sentencing guidelines, this article attacks the pointlessness of the statutory goals of the present system.

Susan Glaspell Goes To Law School, 4 *Texas Theater Journal* #1, 43 (2008) (with Dr. DeAnna Toten Beard). This article describes a collaborative teaching technique using drama in teaching law.

Aseret Had'varim in Tension: The Ten Commandments and the Bill of Rights, 49 *Journal of Church and State* 683 (2007). By closely analyzing the interaction between the Ten Commandments and the Bill of Rights, this article questions the supposition that the Ten Commandments are a basis of American law.

More Than Numbers: A Proposal For Rational Drug Sentences, 19 Federal Sentencing Reporter 326 (2007). With specific suggestions for the revision of the narcotics statutes and sentencing guidelines, this article describes a solution to the problems created by over-reliance on the weight of narcotics as a proxy for culpability of the defendant possessing those narcotics.

Crazy Eyes: The Discernment of Competence by a Federal Magistrate Judge, 67 Louisiana Law Review 751 (2007) (With Hon. Jeffrey Manske). This article examines the gut-instinct decisions magistrate judges make when considering referral of a defendant for a custodial competency evaluation, and suggests systemic training to guide this process.

Christ, Christians, and Capital Punishment, 59 Baylor Law Rev. 1 (2007). Here, the trial of Christ is analyzed as a death penalty process raising many of the same problems faced under American law. A version of this article was included in **Morality, Justice, and the Law: The Continuing Debate** (Prometheus Press, M. Katherine B. Darmer & Robert M. Baird, eds, 2007), which also included articles by Ronald Dworkin, Oliver Wendell Holmes, and Cass Sunstein.

Ball in a Cup: The Case for Stability and Patience, 18 Federal Sentencing Reporter 164 (2006). This essay analyzes and critiques the process of establishing federal sentencing policy and evaluates alternatives to that process.

This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Discretion of Federal Prosecutors, 39 Valparaiso Law Review 625 (2005). This article suggests that the Attorney General announce a unifying principle to guide the exercise of prosecutorial discretion.

The Lawyer's Humble Walk, 32 Pepperdine Law Review 483 (2005). This article reflects on a panel discussion which I moderated at Pepperdine's inaugural conference for its institute of Law, Religion and Ethics. The panel was composed of three prominent attorneys, including Kenneth Starr.

Indirect Harms and Proportionality: The Upside-Down World of Federal Sentencing, 74 Univ. of Mississippi Law Journal 1, (2005). Starting with a comparison of the relative values assigned certain crimes under the Federal Sentencing Guidelines (such as possession of crack being

punished more harshly than the theft of \$6,000,000), this article substantiates the thesis that the Sentencing Guidelines reflect a focus on the indirect effects of crime rather than the underlying offenses themselves.

The *Blakely* Problem and the 3x Solution, 16 Federal Sentencing Reporter 344 (June 2004). This detailed description of a legislative response to an important Supreme Court decision was solicited to be published in a special issue devoted to the most urgent issue in criminal law. It was cited in the State of Washington's brief seeking rehearing from the U. S. Supreme Court in *Blakely v. Washington*.

Uniformity and the Death of Traditional Sentencing Goals in the Age of Feeney, 16:4 Federal Sentencing Reporter 253 (2004). A detailed proposal for reinvigorating the federal Sentencing Guidelines in the wake of the Feeney Amendment. This article was quoted by Justice Stevens in the landmark sentencing case of *United States v. Booker*.

Unashamed and Unafraid, in **The Baptist and Christian Character of Baylor** (2003). This book chapter presents a way of preserving both intellectual vigor and a Christian identity for Baylor by focusing on hiring some outstanding Christian scholars while remaining open to the hiring of those of other faiths and traditions.

Must Have Got Lost: Traditional Sentencing Goals, The False Trail of Uniformity of Process, and the Way Back Home, 54 South Carolina Law Review 649 (2003). Examines the structural flaws of the federal sentencing guidelines, and suggests broad reforms focused on the re-introduction of traditional sentencing goals into the federal sentencing scheme.

Capone and bin Laden: The Failure of Government At the Cusp of War and Crime, 55 Baylor L. Rev. 603 (2003). Argues that United States law and government create a gap between those agencies fighting wars and those fighting crime, and that entry into this gap poses particular dangers to rights.

Criminal Procedure, 34 Texas Tech Law Review 649 (2003) (with Brian Serr). A survey of case opinions issued by the federal Fifth Circuit Court of Appeals.

Two Preachers, A Trial Lawyer and Aristotle, 29 (Number 2) Religion and Education 78 (2002). A reflective analysis of an Oral Advocacy course taught at Baylor Law School.

Criminal Procedure, 33 Texas Tech Law Review 811(2002) (with Brian Serr). A survey of case opinions issued by the federal Fifth Circuit Court of Appeals.

The Calculation of Criminal History by AUSAs and Defendants: A Study of Inefficiency in the Eastern District of Michigan, 13:6 Federal Sentencing Reporter (2001) (with Hon. Avern Cohn). An insider analysis of practical problems plaguing criminal history calculation.

Editor's Observations, Volume 13:6, Federal Sentencing Reporter (2001) (with Douglas Berman). A scholarly overview of criminal history issues addressed in publication for which the author served as Guest Editor.

Shock Incarceration: Hard Realities and Real Possibilities, Volume LV, Federal Probation (1991). Critiques the expectations for boot camp prisons, and suggests more realistic expectations for these facilities.