

Common Law S4 Ep 12: John Monahan Transcript

[THEME MUSIC IN, THEN UNDER]

Risa Goluboff: Today on Common Law, predicting violence with UVA Law professors John Monahan and Greg Mitchell.

Greg Mitchell: Often somebody will be locked up or hospitalized and there's never any chance to really test those predictions anyway.

John Monahan: But there's one prediction that you CAN test. You predict a person to be safe, and then they go out and murder five people. Then you got it wrong, big, big time.

[THEME MUSIC UP, THEN OUT]

Risa Goluboff: Welcome back to Common Law, a podcast of the University of Virginia School of Law. I'm Risa Goluboff, the dean. For this episode, Professor Greg Mitchell, an expert in law and psychology as well as evidence and civil procedure is co-hosting with me again. Greg, welcome back.

Greg Mitchell: Thank you. I'm delighted to be back.

Risa Goluboff: It's been just so much fun, Greg and I have so enjoyed getting to know people who've been both influential in your field and influential to you personally. So tell us about who will be joining us today.

Greg Mitchell: Today we'll be interviewing UVA Law's own John Monahan, who was only the second psychologist to join a law faculty without a law degree. John has the distinction of writing two books that really are foundational works for scholars and lawyers who deal with law and psychology issues. In 1985, John and our colleague Larry Walker published the first edition of their book called "Social Science in Law" ...

Risa Goluboff: Right.

Greg Mitchell: ... an incredible influence on how social science research is used as evidence in litigation.

Greg Mitchell: And in 2001, John was a lead author of a book titled "Rethinking Risk Assessment." This book was the product of a massive project funded by the John D. and Catherine T. MacArthur Foundation that led to the development of a structured risk assessment method that is much more accurate at predicting future acts of violence than when psychological experts just use their unaided clinical judgment to make those predictions.

Risa Goluboff: Well Greg, this sounds amazing. We'll be right back with UVA Law professor John Monahan.

[THEME MUSIC IN, THEN UP, THEN OUT]

Greg Mitchell: John, thank you so much for joining us today to talk about your work.

John Monahan: Thank you very much. Glad to be here.

Risa Goluboff: It's so great to have you here, John. I thought I would start a little bit with your background. So you received your Ph.D. in clinical psychology. How did you become involved in working at the intersection of law and psychology?

John Monahan: Well, I did a clinical internship as part of my Ph.D. in psychology and my internship turned out to be in jail. My father was a cop, so I suppose that's another source of my interest in the field.

Risa Goluboff: What was that internship? What kind of work did you do for it?

John Monahan: Mainly evaluate people for dependence or competence to stand trial or for an insanity defense.

Risa Goluboff: And were there standard ways of doing that at the time?

John Monahan: Uh, there really weren't, uh, which made it very interesting, but I kept thinking about that — there should be standard ways of doing it, and particularly there should be standard ways of assessing whether a person is likely to commit another crime or another violent act in the future.

Greg Mitchell: Why did you choose not to stay as a practicing clinician? Why did you go into academia?

John Monahan: I really didn't like the clinical work. I found it very, very draining. I felt while I wasn't terrible, it was not my major strength, to put it mildly.

Greg Mitchell: Would you say the practice though influenced your academic research?

John Monahan: Very much so. 1972 was the year that I did my clinical internship. And California became the first state to change the legal standard for involuntary hospitalization for people with mental illness. The change was from a very amorphous need for treatment to a much more concrete, "dangerous to self or others."

Greg Mitchell: Right.

John Monahan: And 1972 was also the year that I began my first and only other job at this interdisciplinary program at the University of California, Irvine. I was interested in doing research in criminology, because my father was a New York city cop and I had always grown up thinking of that as part of my life. And when I got to the University of California at Irvine, the issue was was I going to teach? And I decided that what I would teach were the things that I experienced on my internship, namely competence to stand trial and the insanity defense.

Greg Mitchell: So you're saying basically you've been interested in crime and insanity your whole life.

John Monahan: I have, actually...

Risa Goluboff: Do you come to it naturally, John? I hope not.

[LAUGHING]

John Monahan: No, I have to struggle to get there.

Risa Goluboff: And so your first academic paper was actually on mental illness and dangerousness, right? Can you talk a little bit about that one?

John Monahan: Sure. It was a book chapter called "The Prediction of Violence." Based on the very few studies that existed at the time, I argued that psychologists and psychiatrists could predict violence at better than chance levels. Although for sure it wasn't much better than chance.

Risa Goluboff: You mentioned 1972 and how important 1972 was. And you mentioned, you know, this California case and it sounds like it was a real watershed, right? You're entering the field at a moment when there's a lot going on and there's a lot changing. Can you just say more? Why were those things so important as you were kind of coming up in your field?

John Monahan: Right. A few months after I wrote that chapter, the first thing I had published, the California Supreme Court decided the landmark case of Tarasoff vs. the University. Tarasoff was a female student at the University of California. At a Christmas party, another student, a foreign student named Poddar, walked under the mistletoe and Tarasoff kissed him. He took the kiss to mean that Tarasoff wanted a physical relationship with him and when it became clear that she did NOT want a physical relationship, he killed her.

Risa Goluboff: Ugh.

John Monahan: Poddar had been in therapy at the Berkeley student counseling center and he told his therapist in advance that he felt jilted by Tarasoff, and next time he saw her, he was going to kill her. No action was taken by the counseling center to warn Tarasoff of the threat because the counseling center believed that there were no circumstances in which confidentiality in therapy could be breached. The California Supreme Court, however, believed otherwise. It held that psychologists and psychiatrists could be found liable if they negligently failed to predict a patient's violence to others and to take action. As the Tarasoff court said, quote, "the protective privilege ends where the public peril begins." And in a footnote, the court cited my recently published chapter in support of its conclusion that violence at least sometimes could be predicted.

Greg Mitchell: That's really interesting. So your, your chapter basically says clinicians are slightly better than chance at predicting future violence, which I think to you and I, as psychologists, is not a ringing endorsement of clinical judgment. Right?

John Monahan: To be sure.

Greg Mitchell: But the California Supreme Court took that to mean, oh, well, they can do better than chance, so they have at least have some idea when somebody is going to actually go out and harm somebody else. And so they have a duty if that's a credible threat to notify that other person. I mean, it's interesting. It's a little bit backwards than what you might've argued at the time. Isn't it?

John Monahan: Yes, it very much is. But Poddar told his therapist, I am going to kill her. And as it happened in the California Supreme Court said, look, you're not going to get this right all the time, you don't want to make too many predictions, but here we have a case where there was a direct threat everybody knew about, that he boasted about, and it happened and we just can't see that happening.

Risa Goluboff: So John, did you think at the time, or do you think now that was a case of bad case making bad law or do you think the court got it right?

John Monahan: I think the court got it right. And in fact, uh, virtually every other state rapidly shifted in the direction of Tarasoff. I don't know of any states that have said, no, there is no Tarasoff.

Greg Mitchell: Which at the time was roundly opposed by the American Psychological Association and the American Psychiatric Association, I assume as well.

John Monahan: It was.

Greg Mitchell: Right.

John Monahan: It was. And they tried to have it overturned by legislation, but the legislature wasn't about to overturn it. So then they just tried to limit it as much as possible. And the way it is now is if you have a direct threat to a specific person at a specific time — if you have that, then you have to warn the victim and you have to tell the police.

Greg Mitchell: Ah.

John Monahan: But if you warn the victim and you tell the police, then you, the therapist, is off the hook.

Risa Goluboff: So how did that footnote change things for you, John?

[LAUGHING]

John Monahan: The footnote in Tarasoff case, uh, certainly changed my life. After Tarasoff was decided, my phone just simply did not stop ringing off the hook. A few months later, I was asked to testify before the U.S. Senate Judiciary Committee on the role of quote "dangerousness in civil commitment." At the hearing, I was questioned at length by the newly elected senator from Delaware, Joseph Biden. So I was also asked to be a witness in scores of Tarasoff cases. Then, partially, I have no doubt that my being recruited here had something to do with the fact that's the research I was doing.

Greg Mitchell: I think a lot of people think there's more sophistication to some of these clinical assessments of risk of recidivism and risk of future danger than there often is.

John Monahan: Right.

Greg Mitchell: Can you just kind of explain how were psychological experts going about making predictions of violence, let's say for civil commitment back in the 1980s, compared to how it's being done now.

John Monahan: Oh, it'd be very, very different. Then it was very much clinical intuition. The therapist would ask whatever questions the therapist thought were relevant and then would interpret the information however he or she thought it needed to be interpreted. And there was really no standard way of doing it. And one of the main problems is, is if you predict the person's going to be violent and they're mentally ill and you put them in a hospital where they're medicated and they have therapy, then you can just assume that they would have been violent. There's no way to ever know whether you were right or not. The way things have changed is risk assessment is now much, much more systematic now than it was then. For example, the most frequently used risk assessment, HCR 20 standing for Historical Clinical Risk assessment. There's 20 items. Does the person have a job? Substance abuse? Major mental illness? Do they have insight? Do they think a lot about being violent? You rate each of these 20 things as either, no, they don't exist, maybe they possibly exist, I'm not sure, but yes, whether they do exist. And then people are ranked as low, moderate, high in

terms of risk of violence. So that's the kind of standard way that things are done now.

Greg Mitchell: And so that's really what we would call a structured risk assessment using validated items.

John Monahan: Right.

Risa Goluboff: So earlier Greg mentioned that massive MacArthur Foundation project that you participated in that led to your structured risk assessment. Can you tell us more about that?

John Monahan: In the research that I did for the MacArthur Foundation, we identified over a hundred potential risk factors for violence in the clinical literature, conducted a study of over a thousand men and women in short-term psychiatric facilities hospitalized for about a week or so and followed them in the community after they were discharged. It was really an enormous undertaking. At its height, the study, which we called MacRisk, had 20 full-time interviewers. I mean, it was, it was something that I will never in my life ever do again, alright?

[LAUGHING]

John Monahan: And ultimately the MacArthur Risk produced a software program we called the Classification of Violence Risk. It could identify one group of people who had a 1% chance of being violent in the future. And another group of people that had a 70% chance of being violent.

Greg Mitchell: What I think people fail to understand is intuitive clinical judgment is hardly ever validated. Right? Predictions are never compared with outcomes. And as you said, often somebody will be locked up or hospitalized and there's never any chance to really test those predictions anyway.

John Monahan: Right. but there's one prediction that you CAN test easily. You predict a person to be safe, and then they go out and murder five people. Then you got it wrong big, big time. And I think that clinicians are petrified that their professional lives are going to be over if they say no, this person is going to be safe, and then a horrible thing happens.

Risa Goluboff: It's very asymmetric in the consequences.

John Monahan: Absolutely. You'll never know when, if you send the person to a hospital, whether you're right or not; you will always know if you are wrong or not.

Greg Mitchell: So do you see a bias in, if it's a clinical judgment, do you see more predictions that this person WILL be violent or WILL recidivate under clinical judgment because of their worries about making the wrong error than you see under risk assessment tools?

John Monahan: You definitely do. In fact, if you look at the research that's been done on clinical judgment, I mean, it tends to be better than pure chance, but it – people drastically overestimate the likelihood of violence. And I don't doubt that they sincerely think the person's going to be violent, but it's hard not to take into account the fact that if they ARE violent, kiss your career goodbye.

Risa Goluboff: What's happened to validated risk assessments. I mean, how many now exist?

John Monahan: There are a whole lot in different circumstances, some that just focus on people in the family, some that just focus on personal relationships as well as strangers. So I think there are probably scores of violence risk assessment instruments, but I think it is true that the vast majority of time, it is just still intuitive clinical prediction. What has changed now is that oftentimes, patients would be told in the beginning of therapy, “Everything that you say here is going to be confidential with one exception: if I think that you're going to be violent to yourself or other people, I'm going to have to take some action and you should know that.” And the fear, of course, is then the people are just going to keep their mouth shut.

Risa Goluboff: Right.

John Monahan: They won't tell anybody, but the thought is that people just have to be told that. And it is kind of remarkable after being told that how straightforward people can be.

Risa Goluboff: What they still tell the - right, right.

John Monahan: They still tell you. And you want to say stop, stop.

Greg Mitchell: Right, but that speaks often to their disordered state of mind, right?

John Monahan: Absolutely.

Risa Goluboff: Well, I'm curious, you know, even the best tools aren't perfect, and I know you have had mixed feelings ...

John Monahan: Right.

Risa Goluboff: ... whether risk assessment should be used, how it should be used, and whether it's effective. And you said at one point when you were working on the clinical prediction of violent behavior that you had, uh, different working subtitles, right? And the first one was Why You Can't Do It. And then about halfway through, it was How to Do It and Why You Shouldn't. And then by the time you were done, it was How to Do It and When to Do It. Um, and then you also described it as moving from an empirical distaste for the prediction of violence, to an ethical aversion to engaging in it, to a concession that there may be circumstances in which prediction is both empirically possible and morally appropriate. And I just wonder if you could say a little more about that journey, and then you know where you are today, cause I thought that was a really – it was a really moving way to think about your kind of intellectual attitude toward this enterprise.

John Monahan: Yeah, well, thank you, but that does, I think, accurately describe my kind of journey when – I think prediction has gotten better now than it was when I first started in the field. Before the 1970s, the length of time spent in mental hospitals was measured in the decades, and the modal method of discharge was in a box. All of a sudden, it's way less than a week in Virginia, that you're going to be hospitalized if you're going to be hospitalized at all. So given that you're only hospitalizing somebody for a relatively brief period, and given how the accuracy has improved, I think that it would be irresponsible not to engage in prediction now, but it's taken me a long time.

Greg Mitchell: Your work and others working on structured risk assessment really has led to the avoidance of so many costly errors. I mean, there are people who are not languishing in mental hospitals now, because we can actually do a more valid risk assessment. And we understand that maybe they can be released back into the community, maybe under certain terms that ensure they're following their treatment

and such, but I, it must be incredibly rewarding to be in this field and see all of the positive gains that have been made.

John Monahan: It is, it is. And there are many more ways now than there were in the past to take this into account. So now in many states, you're going to have to see your therapist, you're going to have to take your medication, and if you don't, then we're going to put you in the hospital. But the default option is get the treatment that you need in the community, and that's all you need, so there's much more of that than there was in the past and I think that that is a very good thing.

Risa Goluboff: So, what do you see as key questions in the field right now? Where do you see violence risk assessment headed in the future?

John Monahan: There haven't really been many new psychotherapies and new medications in a long time. I think that as therapy has gotten better, they could use this more. And I think that's where a major change has to occur.

Greg Mitchell: If we could stay just for a moment on mental health issues, Risa and John, if it's okay with you, I would love to tell the listeners just a little bit about John's work on the mental health of lawyers, actually, which is a very pressing issue for us and the people we're teaching, obviously. And I know John, you've done some longitudinal work looking at lawyer career satisfaction and happiness. Could you just say a word about what you found there?

John Monahan: Sure. Uh, when I first came to the law school, I taught one class that was mostly first-year students and one class that was mostly third-year students. And I thought, wow, what a difference! The first-years were all raising their hands, "Call on me! Call on me!" Many, though certainly not all of the third years, were turning around staring at the clock. So I took every single law student who came here in 1987 and asked them all kinds of structured questions and, published an article at that time. And then 20 years later, when I was going to teach on that topic again, I wondered where is all that data? And I found it in a file cabinet in the basement. So I said, I could do a 20-year followup, which I did. And then 10 years went by and I figured, hey, 30 years is better than 20 years, and did a 30-year follow up.

Risa Goluboff: Now at that point, you still had 81% of the class participating, which is incredible. What did you learn?

John Monahan: Over nine in 10 respondents scored as being satisfied with their lives. And over seven in 10 were highly satisfied or very highly satisfied. So I was actually quite pleased to see how well people did 30 years after law school. The thought has crossed my mind to do a 40-year followup but that – I think that's not in the cards.

[LAUGHING]

Risa Goluboff: Oh, I would like to see that.

[LAUGHING]

John Monahan: Right, right.

Risa Goluboff: But John, one, one of the things, I think – my understanding is one of the things that's so striking about this data, I mean, first you got really high response rates because of the UVA Law attachment. But, you know, the literature on lawyers is that they're NOT very happy, right, so this is really in contrast to a lot of what the literature would say or predict.

John Monahan: Oh, yeah, definitely it was not what the literature would predict because most of the literature is just anecdotes and the people who aren't unhappy are the ones who talk a lot. And the people who are happy — they're too busy to complain. So yeah, I think people are actually much, much happier.

Greg Mitchell: Well, and I would just say, you never told us what you learned about why the law students between first year and third year seemed so different.

John Monahan: Yeah.

Greg Mitchell: I've never seen that kind of behavior you saw, John, where people were looking at the clock.

[LAUGHING]

John Monahan: Yeah. Well, maybe that was just me. Maybe that was just in my classes.

Greg Mitchell: One topic I hope we have some time left to cover, is this more general topic of the role of social science evidence in litigation and in legislation lawmaking. You and our colleague Larry Walker wrote a series of articles, I think starting in the 1980s, probably while you were also doing the MacArthur study.

John Monahan: Yes.

Greg Mitchell: So you were very busy.

John Monahan: I was.

Greg Mitchell: And you guys argued that there are three basic ways that social science research can be helpful to the law. And then you eventually brought all of those ideas together in your book, "Social Science and the Law," which I think is about to come out in its 10th edition. Isn't it?

John Monahan: It is.

Risa Goluboff: Congratulations!

John Monahan: Why, thank you.

Greg Mitchell: Could you explain for listeners the three different ways you see social science as a legitimate input into the law?

John Monahan: Sure. Uh, the first one that Larry Walker and I came up with was: use social science to determine facts. So trademarks, people register a trademark and other people can't use it.

Greg Mitchell: Right.

John Monahan: The most simple fact to be determined is whether consumers are confused between two products and the only way to find that out is to do research and ask them.

Greg Mitchell: And I think it's the standard now that if you don't produce that kind of evidence in a trademark infringement case, it can be very difficult to get the case to trial.

John Monahan: Absolutely. And especially since the surveys are so easy to do, many courts will just say, well, the only reason you didn't do this may have been because you DID do it and it didn't turn out the way that you'd like it to turn out.

Risa Goluboff: So that's your first category using social science to determine facts. Your second category is the use of social science in actually making legal determinations and finding legislative facts, right?

John Monahan: Absolutely. Clear example of this is Brown versus Board of Education.

Greg Mitchell: And this is really where, as I understand it, courts often through briefs submitted by the parties, but sometimes on their own initiative, will research social science and use that to inform how they make a decision in a case, including the Supreme Court or legislatures may rely heavily on social science evidence as they're formulating an act. I mean, is that correct?

John Monahan: That's correct. I think that's wonderful. That's exactly the way that it should be.

Greg Mitchell: Do you have any concerns when it's the courts themselves doing this on their own? I know Judge Posner got in trouble a few years ago when he had his clerks put on equipment in a donning and doffing case where the plaintiffs are claiming they should be paid for the time it takes to put on equipment as part of their hourly wage. And he had his clerks do this and used estimates from how long it took them to inform whether this was de minimis or not. Do you have any concerns when the courts do their own research?

John Monahan: Yeah. I think having the courts do the actual research themselves is probably not a good idea, but there have been other cases since then on the exact same issue of the donning and doffing stuff when they got an outside expert to do the studies. And I mean, the courts have, have loved that. And in fact, it took a fair amount of time to get this stuff on and off. And the motion was people should get paid So the court says why wouldn't we use – possibly use – this research?

Risa Goluboff: So I think back to the Brown versus Board of Education research, the Clark studies and footnote 11, where the court really relied on the doll studies. And my sense was that that was, uh, a kind of dark

moment for social science and the law. The general way Brown is taught includes, you know, that there were thought to be real problems with those doll studies, in the methodology of the studies themselves, and then beyond the problems methodologically was a concern that if you base constitutional law on a social scientific fact like that, then what do you do if social scientific facts change.

John Monahan: Right.

Risa Goluboff: If it's no longer the case that separating kids of different races leads to lower self-esteem as shown by these doll studies in the first place, then does that mean segregation is now constitutional? I'm curious, is that a ghost for social science and the law, or is that not how it's really thought of in the field?

John Monahan: I think in the field, it's thought of as it's about time that people looked at research rather than just kind of pick things out of thin air. Earl Warren, exactly, as you say, Risa, was criticized a lot for that footnote and in a subsequent interview, what he said was "it was only a footnote after all."

[LAUGHING]

Greg Mitchell: Going to Risa's point about the law changing with the facts changing, the research on juvenile decision-making and competence to make certain decisions is often quite debated amongst developmental researchers. Now, certainly there are some broad agreements about greater impulsiveness and the developmental arc and it lasting a lot longer than some people think. But *Roper v. Simmons*, I see it almost entirely turning on these facts about how juveniles develop over time and their competence, their, their ability to control their environment and their decision-making. So what if that research changes? I guess one response to Risa would be, well, maybe the law should change to track that. I don't know. What do you think?

John Monahan: Yeah. The one thing you don't want is every time a new issue of some psychology journal comes out, we're going to change what the law is. But over time, well the law certainly has changed in terms of many issues of child development, and I think that the research has pushed the law in certain directions. And I think that's a good thing.

Greg Mitchell: But the area that's probably been the most controversial -- I think you and I agree -- is this third category that you and Larry referred to as social framework evidence.

Risa Goluboff: Social context, right? What you call the social context.

John Monahan: Provides the context. That's right. So you have the context for making a decision about the future, taking group data, for example, into account, the general conclusions of social science research, to help determine factual issues in a given case, like for example, uh, sentencing, especially in Virginia for low-level crimes is based heavily on a prediction. The notion is you get the sentence to go to prison, but if you are very low-risk, and the crime is not murder or something, then you can be instead treated in the community and not have to go to jail.

Greg Mitchell: I think the best example of this is the research on the reliability of eyewitness identifications that in just 15 years or so, the federal courts have kind of moved from regularly not allowing that evidence to now quite commonly allowing an expert in an eyewitness identification case to testify about the research showing the circumstances under which eyewitness identifications tend to be more and less reliable.

John Monahan: Right, because many people believe wrong. They believe that, for example, if you think your life is at stake, if someone has a gun pointed at your head, that I'll never forget that face. But that's just not true. You're staring at the gun, not at the face. So you can recognize the gun pretty well, but you have no idea who was sticking it in your face. I think what is really problematic, which doesn't happen often, but it DOES happen, is that a psychologist will not just present the background research, but then apply it to the case. One of the recent cases person says, well, given that the lighting wasn't very good et cetera, et cetera, I think the accuracy rate is no higher than 30%. Well, I don't know where that number came from.

Greg Mitchell: Right. And to kind of bring it full circle from where you started in the early '70s to now, I mean, effectively what you've got when a psychologist or other social scientist does that is unaided clinical judgment or clinical intuitions, right?

John Monahan: Right!

Greg Mitchell: They'll read the case file and they'll make a prediction about -- really a POST-diction ...

John Monahan: Right.

Greg Mitchell: ... about what happened in the case, using nothing more than their quote-unquote expertise.

John Monahan: Right. Well, post-diction is always easier than prediction.

Greg Mitchell: Right.

Risa Goluboff: This framework of these three different ways in which courts and legislators use social science has been incredibly influential. And I'm curious what you think – what's your assessment of how well courts actually deal with social science today compared, say, with the 1980s, when you started writing about this topic?

John Monahan: I feel good about it. I think courts are doing a much better job now, partially because the lawyers are doing a much better job. The briefs are much better. I mean, really remarkably good. They consult with all kinds of social scientists. You do infrequently now, encounter cases where the judge obviously has no idea what he or she is doing, and you just kind of look at it and just kind of cringe, but the 10th edition of the casebook has no cringe-worthy interpretations of research. So I think that things are much, much better now than they have been in the past. The field has moved a tremendous amount in a relatively short period of time and I just hope that movement continues.

Risa Goluboff: Where do you think the room is for continued improvement? Where are the places where courts can still do better?

John Monahan: Better judicial training in terms of social science research will indeed pay off, and has paid off, and I think that it's probably through involvement of behavioral science experts in briefs that the actual education is going to take place.

[THEME MUSIC COMES IN]

Risa Goluboff: Well, John, this was truly fascinating and I learned a lot and it was such a pleasure to have you. Thank you for taking the time.

Greg Mitchell: Thanks, John. I really appreciate you doing it.

John Monahan: Well, thank you for asking me. I've learned a lot as well.

[THEME MUSIC UP, THEN UNDER AND OUT]

Risa Goluboff: It strikes me in talking to John, Greg, that the stakes of this research -- of the dangerousness research -- are so high. I mean, when someone is predicted NOT to be dangerous, and then they do something dangerous and, you know, I don't think you can ever have a hundred percent accuracy, right. But those stakes are unbelievably high and very visible. And then you contrast that with what I think has been a much less visible, kind of more chronic than acute, the stakes of putting people away who are not dangerous, and them languishing for years and years and years in institutions that they didn't need to be in. Right?

Greg Mitchell: You're absolutely correct. We didn't talk about how I had a six-year gap between grad school and law school and coming back to the academy. And in that six years, I was working for a firm in Nashville and one of our clients was one of the hospitals that had a ward for mental health treatment. And I handled a number of civil commitment proceedings. And I'm here to tell you everybody involved in that, except for the attorney appointed for the person who somebody who was trying to have committed, was erring on the side of a false positive, right -- on the side of let's go ahead and at least have a temporary commitment because everybody in that room — and it would be a lawyer for the hospital, a lawyer for the person who is possibly going to be committed, and there's a judge and these are usually state court judges, right, elected state court judges. Nobody wants that person to be let go, and including the person representing the person to be committed, wants them to be, let go, and then they go commit suicide or harm somebody. By the way, in these cases, it's often a parent. They can seek to have adult children committed in many states, and everybody has the best interest, we THINK, of that person in our hearts. But the few times the judge did NOT do the commitment, we were so nervous about what was going to happen. And it was on the head of the judge. I mean, one of the biggest problems John sees in his research is a willingness by elected judges to actually follow the recommendations from the risk assessment tools. Because they often say this person isn't as risky as the pre-sentencing report suggests. And those judges don't want to have that coming back at them if they let somebody go who hurts somebody. So you're absolutely right. That's why it's so good that we have some

instrument we can point to and say, look, we can't just use our judgments because they're often going to be biased in favor of committing somebody or keeping somebody locked up. And that often does a lot of harm. I'm curious whether you see this in history because as you know, of course, historical research can play a huge role in a lot of cases, particularly big cases that make it up to the Supreme Court. What's the view of historians about how history gets used amongst the courts?

Risa Goluboff: That's a big question. I think historians are often quite critical of the way that courts use history. There's a category of history that is derogatorily described as "law office history," right -- the history that gets produced in law offices. And I would say that the main gap really is the desire for determinative answers, right. This IS what the history says. You want it to be clear and definitive and history is rarely clear. And there was a case years and years ago where I was asked to write an affidavit as an expert historian about the origins of a particular law, and I went back and forth with the lawyers for a long time. And eventually we decided they weren't going to file that affidavit because what I felt I could say as a historian was not nearly as definitive enough for them to want to use it as lawyers.

Greg Mitchell: Right, right.

Risa Goluboff: One thing I really want to talk about before we go, Greg, is the longitudinal survey that John did with the law graduates from the class of 1990, which I think there's just so much in that we didn't get to talk about with John.

Greg Mitchell: I was a little surprised. I thought he soft pedaled some of his findings, and maybe he was not wanting to sound like too much of a cheerleader for UVA.

Risa Goluboff: A big braggy, as my kids would say?

Greg Mitchell: Yeah. Right. but the results were really striking I thought.

Risa Goluboff: I thought too. And, my husband, Rich Schragger, also our colleague, and I, we teach a class on work-life balance. Every year we read the Monahan studies and first of all, the 81% response rate is just, you know, almost unheard of, so that's amazing. And then what they found: 91% of respondents said they felt satisfied with their lives

and that ranged from average satisfaction to very highly satisfied. And that has actually increased from the 20 year to the 30 year, from 86% to 91%. And, you know, they feel like law school prepared them for their careers. They feel really satisfied with their careers and their lives. I think it's, it's really, heartening. I mean, here we are, we're in the business of educating lawyers and you're kind of bombarded all the time with, you know, anecdotal "anecdotal" as people like to say that suggests that lawyers are unhappy. And I think the data that John has found really cuts against that in a huge way.

Greg Mitchell: Yes, some of them work very long hours, but they get paid very well for it. It was the people at the big, big law firms working incredibly long hours -- those tend to be the least happy, but that's not representative of all, all lawyers and not even in those firms is that true for everybody. So I do think that generally the legal profession is, you know, of course this is self-serving, but I think it's a wonderful profession.

Risa Goluboff: I agree. Uh, self-serving again, but, you know, it'd be interesting. I mean, John said he's not going to do a 40 year, though I would love to see it.

Greg Mitchell: Well, as you know, John's an Energizer bunny, so I will make it my task here to convince him to do that follow-up study.

Risa Goluboff: I'll back you up.

Greg Mitchell: Alright, good. Thanks for having me again, Risa. I enjoyed it.

Risa Goluboff: Thank you, Greg. This was great.

[THEME MUSIC IN, THEN UP, THEN UNDER]

Greg Mitchell: That does it for this episode of Common Law. If you'd like more information on John Monahan's work on predicting violence, visit our website, commonlawpodcast.com. There you'll find links to all of our past episodes, our Twitter feed and more.

Risa Goluboff: I'm Risa Goluboff.

Greg Mitchell: And I'm Greg Mitchell. Thanks for listening.

[THEME MUSIC UP, THEN UNDER]

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[THEME MUSIC UP, THEN OUT]