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From Sounds Bites to Sound Policy: Reclaiming the High Ground in Criminal Justice Policy- Making

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From Sounds Bites to Sound Policy: Reclaiming the High Ground in Criminal Justice Policy-Making

Cover Page Footnote

* Professor of Clinical Law, New York University. J.D. 1985 Harvard University; B.A. 1982 Northwestern University. I am grateful to Professor Randy Hertz for his comments on earlier drafts. I am also indebted to Whitney Cork and Philip Pilmar for their excellent research assistance. I especially wish to thank Professor Kim Taylor-Thompson for her love and support. This article is dedicated to Dr. Billy Taylor (1921-2010). I gratefully acknowledge financial support from the Filomen D'Agostino and Max Greenberg Research Fund at the New York University School of Law.

FROM SOUND BITES TO SOUND POLICY: RECLAIMING THE HIGH GROUND IN CRIMINAL JUSTICE POLICY-MAKING

*Anthony C. Thompson**

Introduction	776
I. Media Informs and Distorts Public Perceptions of Crime.....	779
A. Distorting Effect of Extensive Media Coverage of Crime	780
1. Public Policy as an Expression of Powerlessness and Outrage	784
2. Media’s Influence on the Perceptions of Leniency.....	786
B. Understanding the Theories Underlying Media Influence	788
1. Cultivation Theory.....	789
2. Social Network Theory.....	791
II. Media Informs Public Perceptions of Race.....	792
A. Media Influences Public Perception of Who Commits Crimes.....	794
1. Over-Reporting Crime Frequency in Eras of Declining Crime	796
2. Public Perception of Race Exacerbates Crime Issue	797
B. Politicians Capitalize on Timing and Media Focus.....	799
1. A Closer Look at Legislation.....	800
2. “Tough on Crime” Political Stance is Fueled by Media and Fear	806
III. Why Does This Happen?.....	812
A. State of the News Media Field	812
1. Crime is Easy and Cheap to Cover	813
a. Financial Pressures, Marketing, and Televised News.....	813

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b. Financial Pressures, Marketing, and Newspapers	815
2. Journalists, Like the Public, Embrace and Perpetuate Stereotypes and Misperceptions	815
3. Bias May Flow From Where the News Media Get Their Information.....	816
B. A Need for Oversight	817
Conclusion	820

INTRODUCTION

It is now axiomatic that the media informs and shapes the public's opinion about crime and criminal justice. The catch phrase "if it bleeds, it leads" continues to embody and animate the sentiment that guides much of the editorial judgment about the stories that newspapers should report on their front pages or that local and national television news should feature. Indeed, the media's fascination—and even obsession—with crime has garnered considerable scholarly attention and commentary.¹ Studies have demonstrated the strong correlation between the amount of media coverage on a particular topic with public knowledge and interest on that topic. When it comes to crime coverage, television programming not only tends to suggest that crime happens at greater frequency than it does, but it also exaggerates the amount of violent crime in the world relative to property crime.² The exaggeration effect of this coverage is that the public perceives the world as a much more violent and personally dangerous place than actual crime statistics would support.

So-called "reality shows" only add to the perception of ever-present danger. These shows often tantalize viewers with actual footage of police crime investigations or dramatic reenactments of the real-life experiences of police officers, suspects, and EMT workers. Even crime dramas that do not purport to be reality shows adhere to the proven marketing gimmick that they are only slightly fictionalized versions of what actually happens on our streets. As in any dramatic presentation, the overriding goal of these

1. See MICHAEL HOUGH & JULIAN V. ROBERTS, HOME OFFICE RESEARCH CENTER 9 (1998); Alexis Miller et al., *College Students' Perceptions of Crime, Prison and Prisoners*, 17 CRIM. J. STUDIES 311, 313-14 (2004) (citing GEORGE GERBNER, *THE KILLING SCREENS: MEDIA AND THE CULTURE OF VIOLENCE* (1994)); see also, e.g., MICHAEL HOUGH & JULIAN V. ROBERTS, HOME OFFICE RESEARCH, DEVELOPMENT AND STATISTICS DIRECTORATE, FINDINGS—CONFIDENCE IN JUSTICE: AN INTERNATIONAL REVIEW IN FINDINGS (2004), available at <http://rds.homeoffice.gov.uk/rds/pdfs04/r243.pdf>.

2. See STEVEN M. CHERMAK, *VICTIMS IN THE NEWS: CRIME AND THE AMERICAN NEWS MEDIA* 4 (1995); George Gerbner & Larry Gross, *Living With Television: The Violence Profile*, 26 J. COMM. 172, 177-81 (1976); W. James Potter & W. Ware, *An Analysis of the Contexts of Antisocial Acts on Prime-Time Television*, 14 COMM. RES. 664 (1987).

shows is to create a dramatic effect rather than an accurate portrayal. But by offering the viewing public an “insider’s” look at the gritty reality of law enforcement, the public understandably believes it is glimpsing a reality over which they have little control and much to fear. More often than not, these narratives adopt the perspective of law enforcement³ and depict crime as both random and the result of individual pathology rather than larger social ills such as poverty, racism, and unemployment.⁴ The goal of both reality and real-life crime dramas is to create a visceral impact on the public, but the unintended effect is that these dramatic renderings at once affect and shape public perceptions of actual crime and fuel the public’s belief that tough legislative responses offer the public its only opportunity to gain control over an environment in which crime runs rampant.⁵ Thus, unless the general public has access to strong countervailing sources of information on crime, their perceptions will be influenced perhaps subconsciously by these skewed inputs.

Not only traditional media informs the public’s views. Studies have documented that more than two hundred million people in the United States consider themselves regular users of the Internet.⁶ As the public gravitates away from traditional media toward newer media⁷—websites, blogs, YouTube—we see that these outlets continue to reflect a public fascination with crime. The problem is that whether one focuses on traditional or newer media, the public tends toward news media that confirms rather than challenges their views.⁸

3. See Sarah Eschholz et al., *Race and Attitudes Toward the Police: Assessing the Effects of Watching “Reality” Police Programs*, 30 J. CRIM. JUSTICE 327, 331 (2002).

4. See Gray Cavender & Lisa Bond-Maupin, *Fear and Loathing on Reality Television: An Analysis of “America’s Most Wanted” and “Unsolved Mysteries,”* 63 SOCIOLOGICAL INQUIRY 305, 305-17 (1993); see also Gray Cavender & Mark Fishman, *Television Reality Crime Programs: Context and History*, in ENTERTAINING CRIME 1-18 (M. Fishman & G. Cavender eds., 1998); Aaron Doyle, *‘Cops’: Television Policing and Policing Reality*, in ENTERTAINING CRIME 96-116 (M. Fishman & G. Cavender eds., 1998).

5. See Eschholz, *supra* note 3.

6. See Carl Bialik, *Numbers Show China Beats U.S. in Net Use, but Which Numbers?*, WALL ST. J., Mar. 28, 2008, at B1 (specifying that in 2007 the United States had over two hundred million users of the Internet and “71% of heads of households use[d] the Internet”).

7. See Zogby Poll: *67% View Traditional Journalism as “Out of Touch,”* ZOGBY INT’L (Feb. 27, 2008), www.zogby.com/news/readnews.cfm?ID=1454 (citing study conducted by We Media/Zogby Interactive in which nearly half of respondents indicated that the Internet is their primary source of news).

8. See Debra Burns Melican et al., *News on the Net: Internet News Credibility and its Role in Promoting Racial Stereotypes* (June 16, 2006) (unpublished manuscript), available at http://www.allacademic.com/one/www/research/index.php?click_key=1&PHPSESSID=5694e699d482f0d013f2a4fe259f7d41 (follow “PDF” hyperlink) (documenting selective ex-

Why should we care? Apart from a general concern about the quality of information on which the public relies, the more specific concern is that media affects not only public opinion but public policy. As the public's principal exposure to—and information about—crime either comes from media sound bites or downloads from selected Internet sources that mirror and amplify existing views,⁹ the difficulty of separating fact from hype becomes all the more challenging and all the more acute. Informed public policy demands at a minimum rigorous debate and ideas driven by evidence rather than heat. Criminal justice policy without a grounded evidentiary basis holds serious implications for both the public perception of effective public policy, and the administration of criminal justice policy. Comments by the Attorney General of the United States, Eric Holder, indicating that we “need to get smart on crime”¹⁰ suggest that we need to move from “criminal justice policy”¹¹ focused on sound-bites to a greater focus on evidence-based practices that have statistically proven track records.

This Article responds to that call for action. Part I demonstrates the ways the media drives and shapes legislation and exposes some of the implications of sound bite public policy-making in criminal justice. Part II takes an in-depth look at the process of shaping public perceptions of crime. This Part will explore the ways that conceptions of crime are formed and influenced. It will then examine ways that the media influences legislation. Part III discusses the need for oversight of the media and legislature in addressing the concerns of excessive media influence in policy-making. Ultimately, the introduction of social media and its impact may provide some of the answers.

posure to media stories and outlets that support the user's own beliefs and values with a tendency to view those sources as more credible).

9. *See id.*

10. Eric Holder, U.S. Att'y Gen., Remarks at the ABA Convention (Aug. 3, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html>. In his speech, Attorney General Holder further clarified his comments by suggesting that:

Getting smart on crime requires talking openly about which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime. Getting smart on crime means moving beyond useless labels and catch-phrases, and instead relying on science and data to shape policy. And getting smart on crime means thinking about crime in context—not just reacting to the criminal act, but developing the government's ability to enhance public safety before the crime is committed and after the former offender is returned to society.

Id.

11. *See id.*

I. MEDIA INFORMS AND DISTORTS PUBLIC PERCEPTIONS OF CRIME

The news media remains one of the most important and influential secondhand sources of public information. At the same time, it serves as a major contributor to public misperception and anxiety about crime. In one national survey, eighty-one percent of respondents reported that their perception of crime as a social problem derived from what they had seen in the news.¹² And as the media draws the public's attention to crime, it also fuels the public's fear of crime. Studies demonstrate that media coverage can lead the public into a "moral panic"—an episode of "sharply increased public anxiety about the threat some group or condition poses to society's values and well being."¹³ Unjustified panic should be a sufficient cause for alarm. But when that increased fear of crime makes citizens more willing to accept and insist on extremely harsh criminal justice policies to satisfy their desire to strike out against the problem over which they believe they have too little control, the media's subtle yet pervasive influence becomes more troubling.

Spikes and variations in public perception of crime over time can also be traced to the media.¹⁴ In the 1990s, for example, Gallup poll results indicated a sharp increase in the salience of crime in the public discourse.¹⁵ From March 1992 to August 1994, the number of respondents who named crime as the most important national problem increased from a mere five percent to more than fifty percent, with numbers remaining high for the remainder of the decade.¹⁶ On the basis of FBI crime statistics and analyses of television news variables (including the length of crime stories, mean story rank, and the number of stories), researchers calculated that the latter data "accounted for almost four times more variance in public perceptions of crime as the MIP [most important problem] than did actual crime rates."¹⁷ While the magnitude of the results may not be generalizable (the researchers acknowledge a potentially distortive "O.J. effect"¹⁸ in the wake of comprehensive coverage of one of the most well-publicized criminal trials in recent memory), the underlying premise is sound. The amount of

12. See Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 441 (2006).

13. See *id.* at 456.

14. See Dennis T. Lowry et al., *Setting the Public Fear Agenda: A Longitudinal Analysis of Network TV Crime Reporting, Public Perceptions of Crime, and FBI Statistics*, 53 J. COMM. 61 (2003).

15. See generally G.H. GALLUP, THE GALLUP POLL MONTHLY REPORT (REPORT NO. 285) (1994).

16. See Lowry et al., *supra* note 14, at 61.

17. *Id.*

18. *Id.* at 71.

screen time devoted to crime, rather than length of individual stories or their order of presentation, appears to be of primary importance.¹⁹

While there is considerable academic disagreement on the primary mechanism of crime perception formation, the “agenda-setting” influence of media exposure—i.e., its ability to “tell people what to think about”²⁰—is well documented. Local television is still the primary source of news for most Americans.²¹ It is a medium subject to frequent research, usually through self-reporting or experimental manipulations. A few recent analyses are illustrative. A national survey conducted in 1997 found that local news broadcasts “raise[] the perceived risk of crime above other risks also covered in the media.”²² Similarly, a localized survey of Philadelphia residents the next year found that the more respondents watched television news, the more likely they were to report crime as a problem in their city.²³ Taken in tandem, these results suggest that local news viewing correlates with increased concern about crime, regardless of local crime rates and with many personal characteristics held constant.²⁴ This last finding is important, as certain demographics are more likely to express concern about crime, notwithstanding external factors.²⁵

A. Distorting Effect of Extensive Media Coverage of Crime

Where actual crimes occur, we see the media’s coverage and corresponding influence in sharp relief. Media will choose which crimes to cover, and, thereby, determine which incidents to highlight and expose to the public and policy makers. The choice to cover a crime at all suggests significance: of all the crimes that occur in a major metropolitan area, for example, the one featured in the media somehow seemed noteworthy. Then the degree of coverage suggests a level of importance and shapes the perception that such incidents have significance. Equally as important: the degree

19. *See id.* at 72.

20. Kimberly Gross & Sean Aday, *The Scary World in Your Living Room and Neighborhood: Using Local Broadcast News, Neighborhood Crime Rates, and Personal Experience to Test Agenda Setting and Cultivation*, 53 J. COMM. 411, 412 (2003).

21. *See* Daniel Romer et al., *Television News and the Cultivation of Fear of Crime*, 53 J. COMM. 88, 93 (2003).

22. *Id.* at 94.

23. *See id.* at 98.

24. *See id.* at 88. Similar results can be found with slight variations throughout social science literature. *See, e.g.*, Gross & Aday, *supra* note 20, at 423 (concluding that people who report watching “a lot of broadcast news” are most likely to report crime as the *most important* problem facing their neighborhood).

25. In one telephone survey, women, African-Americans, younger respondents, and less educated respondents were more likely to name crime as an important problem. *See id.* at 418.

of coverage determines public perception of the frequency of crime.²⁶ Repeated media coverage of certain types of offenses can lead the public to believe they are witnessing disturbing patterns or trends about which the general public and political leaders ought to be concerned.²⁷

Of course, media coverage remains a critical component in keeping the public informed about its surroundings. Quite obviously, no single individual can possibly know all the information necessary to make policy decisions or rely solely on evidence distilled from personal experience.²⁸ Our nation is simply too large, our capabilities too small, and our experiences too confined to relatively narrow bands. Therefore, we depend on secondhand sources of information to enable us to see and make sense of events that occur outside of our day to day experience. This is true not only in remote locations, but in central cities and densely populated areas. We look to the media to provide information and fill in context that we might otherwise lack. But tendencies to exaggerate violent crime²⁹ and devote disproportionate coverage to particular dangers³⁰ belie actual crime statistics and unjustifiably increase general fears. Research suggests these effects are exacerbated by sensationalist, episodic reporting and increased exposure to media sources.³¹

A few examples help to illustrate the effect and the concern. The “unrelenting” coverage of child abduction cases and school violence, for example, increases the public sense that such incidents are common and prone to happen anywhere,³² though in fact stranger abduction is rare,³³ and kids are statistically safer in school than elsewhere.³⁴ The emphasis on “stranger danger” diverts attention away from more significant risks, like abuse by a

26. See Beale, *supra* note 12, at 457.

27. See *id.* at 443.

28. See, e.g., Stuart Macaulay, *Popular Legal Culture: An Introduction*, 98 YALE L.J. 1545, 1551-52 (1989).

29. Franklin D. Gilliam, Jr. et al., *Crime in Black and White: The Violent, Scary World of Local News*, 1 HARV. INT'L J. PRESS/POL. 6, 8 (1996).

30. Child abductions are one prominent example. See, e.g., Tonya L. Brito, *Paranoid Parents, Phantom Menaces, and the Culture of Fear*, 2000 WIS. L. REV. 519.

31. See Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. FLA. J.L. & PUB. POL'Y 37, 50 (1997) (“[F]or newspaper consumption the character of the message is important: local, random, and sensational stories evoke the most fear, whereas, distant, specific, and less sensational stories may have a calming effect on individuals. For television, the quantity of television viewed in general, violent programming in particular, and certain audience characteristics are generally associated with higher levels of fear.”).

32. Brito, *supra* note 30, at 523.

33. See *id.* at 524.

34. See *id.* at 525.

child's own family and friends.³⁵ The media has also focused considerable attention on juvenile crime. Through an intense and persistent focus on sensational incidences of juvenile violence, the media has fostered and fed the belief that children today are more aggressive and dangerous than at any other point in our history.³⁶ This perception has gained traction notwithstanding the fact that the juvenile crime rate has remained stable or decreased in the last decade.³⁷

Such misconceptions can have serious consequences for particular groups of offenders. A recent Internet survey conducted in multiple states indicated gross misconceptions about sex offenders.³⁸ Respondents typically believe that: (1) most sex offenders reoffend; (2) treatment is ineffective; and (3) juvenile sex offenders are themselves victims of sexual abuse as children.³⁹ Moreover, a "substantial minority" believes offenders prey on kids in schoolyards and playgrounds.⁴⁰ These stereotypes are at odds with data provided by the authors: the Bureau of Justice statistics indicate relatively low recidivism rates and suggest most children are victimized by people known to them, only about thirty percent of adult offenders have been victimized, and the majority of sexually abused children do not themselves become offenders.⁴¹ As many of the respondents indicated that most

35. *See id.*

36. *See, e.g.,* Lori Dorfman & Vincent Schiraldi, BUILDING BLOCKS FOR YOUTH, *Off Balance: Youth, Race & Crime in the News* (2001), available at http://www.hawaii.edu/hivandaids/Off_Balance_Youth_Race_and_Crime_in_the_News.pdf.

37. FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 5 (1998). Professor Zimring has utilized an analysis that attempts to explain the public's overestimate of juvenile crime. "In 1996, the total rate of juvenile arrests for Index crimes of violence other than aggravated assault was lower than in 1980." *Id.* at 47; *see also* HUGH D. BARLOW & THEODORE N. FERDINAND, UNDERSTANDING DELINQUENCY 9 figs.1.1 & 1.2 (1992); JAMES T. CAREY & PATRICK D. MCANANY, INTRODUCTION TO JUVENILE DELINQUENCY: YOUTH AND THE LAW 17 (1984); Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Justice: Should Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders?*, 68 TEMP. L. REV. 1897 (1995).

38. *See* Stacey Katz-Schiavone et al., *Myths and Facts About Sexual Violence: Public Perceptions and Implications for Prevention*, 15 J. CRIM. JUSTICE & POPULAR CULTURE 291 (2008).

39. *See id.* at 305.

40. *Id.* (citing BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS (No. NCJ 182990) (2000)).

41. *Id.* (citing BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (No. NCJ 198281) (2003); R.K. Hanson & S. Slater, *Sexual Victimization in the History of Child Sexual Abusers: A Review*, 1 ANNALS OF SEX RES. 485-99 (1988); Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Dangerous?*, 3 CRIMINOLOGY PUB. POL'Y 59-82 (2003); Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL'Y REV. 83-102 (2006); CTR. FOR SEX OFFENDER MGMT., WHAT COMMUNITY MEMBERS NEED TO

of their perceptions of sex offenders come from the media,⁴² the authors speculate that the media “sustain[] myths by portraying sexual offenders as a homogenous group of criminals who are incurable and highly predatory.”⁴³ While the authors view such misrepresentations as a barrier to effective prevention,⁴⁴ they also call into question the legitimacy of the criminal justice responses they have spawned, such as blanket sex offender registration laws.⁴⁵

Researchers have documented the media’s concentrated focus on violence against the person as causing additional distortions.⁴⁶ One survey of Los Angeles television news found that crime coverage focused on violent crime rather than property or white-collar crime in circumstances where the majority of the time, the alleged assailant was a non-white male.⁴⁷ A Chicago study of local news concluded that Chicago-area television news focused overwhelmingly on incidents of violence where the alleged offenders were people of color.⁴⁸ Conceptions of crime formed in one’s own community are similarly susceptible to inaccuracies and exaggerations, but of a distinct character. In neighborhoods where gang activity is prevalent, for

KNOW ABOUT SEXUAL ASSAULT AND SEX OFFENDERS (2000), available at http://www.csom.org/train/educating/one/files/1content_teaching.pdf.

42. *Id.* at 304 (citing CTR. FOR SEX OFFENDER MGMT., *Facts About Sex Offending Behavior: True or False Quiz* (2000), available at http://www.csom.org/train/educating/one/files/true_false_quiz.pdf).

43. *Id.* at 306.

44. *Id.* at 305 (“This popular notion can potentially interfere with parents’ ability to protect their children by reinforcing fear of strangers and inhibiting awareness of common ways that sex offenders gain access to child victims through familiarity and dependence on caretakers.”).

45. *Id.*

46. See RICHARD V. ERICSON ET AL., REPRESENTING ORDER: CRIME, LAW, AND JUSTICE IN THE NEWS MEDIA 244-47 (1991) (discussing a study that shows stories about violence against the person constitute at least one-third of popular newspaper, television, and radio stories); PHILIP SCHLESINGER & HOWARD TUMBER, REPORTING CRIME: THE MEDIA POLITICS OF CRIMINAL JUSTICE 140 (1994) (“Of the totality of crime covered by the press and television in Britain, violent crime against the person is given disproportionate attention by all news outlets.”). This is especially true in cases involving serial killers. See, e.g., PHILIP JENKINS, USING MURDER: THE SOCIAL CONSTRUCTION OF SERIAL HOMICIDE 220-23 (1994) (explaining that serial murder stories are especially attractive to media because they create an emotional response, communicate a threat, and have shock value).

47. See Franklin Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560 (2000).

48. See Robert M. Entman, *Blacks in the News: Television, Modern Racism and Cultural Change*, 69 JOURNALISM Q. 341 (1992). One analysis of photographic images from the national and sports news sections of three California newspapers revealed that “[f]emale, Latino, and Asian individuals were disproportionately underrepresented, while black individuals were over-represented,” but most often in sports or criminal roles. Tara-Nicole Beasley DeLouth et al., *Gender and Ethnic Role Portrayals: Photographic Images in Three California Newspapers*, 76 PSYCHOL. REP 493 (1995).

example, non-members may imitate behaviors of members to appear less vulnerable, creating the impression of more widespread gang membership.⁴⁹ This, in turn, can increase the pressure on adolescents to join gangs and engage in associated criminality.⁵⁰ Indeed, perceptions of widespread criminal activity in one's social group can influence the decision to commit crime.⁵¹

1. *Public Policy as an Expression of Powerlessness and Outrage*

As the public's fear of crime mounts, it often looks for ways to express its moral outrage against crime and to gain some command over actions that seem too often beyond its control. Thus, with media coverage of particularly violent crimes, the public understandably feels the need to lash out and punish.⁵² When the media covers the actions of law enforcement officials or political officials who seem to be willing to embrace punitive policies, the public will often gravitate toward those officials.⁵³ Media coverage of sensational crimes over the past decade has often contributed to a political agenda that looks to emphasize retributive responses to crime and to insist on longer penalties to incapacitate offenders all in the service of reducing the supposed frequency of such crimes.⁵⁴ As we see extensive media coverage of the tragic mass killings and critical injury to Representative Gabrielle Giffords in Tucson, Arizona, we once again see renewed calls for punitive responses as though such violent episodes were not unique but were instead emblematic of the types of crime that occur on a daily basis in our grocery stores and neighborhoods.⁵⁵

Sensationalist reporting not only draws attention to particular crimes, it also too frequently skews public policy. Megan's Law,⁵⁶ a sex offender registration measure, offers an example. In response to lobbying by the ti-

49. See Amanda S. Riley, *Beep! You're Guilty! The Constitutionality of Pager Ban Provisions in Gang Injunctions*, 31 W. ST. U. L. REV. 79, 92 (2003).

50. See Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 820 (1998).

51. *Id.* at 814-15.

52. See, e.g., Beale, *supra* note 12, at 442.

53. See, e.g., Douglas N. Husak, *The Problem of Criminalization*, 205 N.J. LAWYER 18, 20 (2000) ("Our policies and practices are based less on their merits than on what will gain approval for politicians. Few public officials have lost votes by being tough on crime, or by being perceived as being tough on crime.").

54. See Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 427.

55. See, e.g., Associated Press, *Giffords Intern Supports Gun Control in NYC Visit*, WALL ST. J., Jan. 25, 2011, <http://online.wsj.com/article/AP2f7c2e16d30f4b4eb88966db575517e8.html>.

56. N.J. STAT. ANN. § 2C:7-1 (West 1994).

tular victim's family, New Jersey passed the legislation quickly and with little deliberation.⁵⁷ Similar bills in other states followed, further increasing public awareness of the targeted danger.⁵⁸ Whether one considers Megan's Law, Jenna's Law, or other legislation named for its victims, a familiar pattern emerges. No one stops to question whether the law, as enacted, effectively meets the objectives set out in the legislation. Nor do we see any meaningful debate about practices with a proven track record of success. Instead, the media wants blood.

When the public feels less in control of the situation, it becomes more open to draconian approaches to crime control.⁵⁹ As Professor David Garland notes:

[T]he new political imperative is that victims must be protected; their voices must be heard, their memory honoured, their anger expressed, their

57. Robert E. Freeman-Longo, *Revisiting Megan's Law and Sex Offender Registration: Prevention or Problem*, in *SEXUAL VIOLENCE: POLICIES, PRACTICES, AND CHALLENGES IN THE UNITED STATES AND CANADA* 223, 224 (James F. Hodgson & Debra S. Kelley eds. 2004).

58. *See, e.g.*, Sean's Law, 2002 N.Y. Laws ch. 571 (ensuring the prompt suspension of a junior driver's license or permit when a junior driver is charged with alcohol-related traffic offenses); Stephanie's Law, 2003 N.Y. Laws ch. 69 (prohibiting surreptitious surveillance without consent and disseminating and unlawful recording thereof and amends the Correction Law in relation to the Sex Offender Registration Act); Bill Leaf-Brandi Woods Law, 2006 N.Y. Laws ch. 245 (increasing the penalties for Vehicular Assault and Vehicular Manslaughter when committed by persons who have previously been convicted of an alcohol or drug-related driving while intoxicated or impaired charge within the previous ten years); Increased Penalties for Shaken Baby Crimes: Cynthia's Law, 2006 N.Y. Laws ch. 110 (adding a new crime of Reckless Assault of a Child, a class D violent felony—a person who is eighteen years of age or more commits this new crime if he or she recklessly causes serious physical injury to the brain of a child less than five years old by shaking the child, or by slamming or throwing the child so as to impact the child's head on a hard surface or object); Craig J. Todeschini Unlawful Fleeing a Police Officer, 2006 N.Y. Laws ch. 738 (amending the penal law to criminalize the action of refusing to obey directions to stop by police and recklessly fleeing in a motor vehicle where such action results in injury or death to another, by creating three new crimes—Unlawful Fleeing a Police Officer in a Motor Vehicle in the first, second, and third degrees, as D felony, E felony, and A misdemeanor crimes, respectively). Craig Todeschini, age twenty-five, died April 23, 2006 when he crashed into a tree while chasing a motorcyclist going more than one hundred miles an hour through Pompey, fifteen miles south of Syracuse. The Amber Alert Plan is named in honor of nine-year old Amber Hagerman who was abducted and brutally murdered in 1996. Spurred by community outcry over Amber's tragic death, the Amber Alert Plan was created to serve as a quick and ready response to any child abduction. Since its creation, law enforcement officials have successfully utilized the plan to achieve the safe return of lost and abducted children.

59. *See, e.g.*, Megan's Law Strengthened: 2006 N.Y. Laws ch. 1. This law requires level one sex offenders to register for twenty years and level two sex offenders, in addition to level three sex offenders and sex offenders with a designation, to register for life; authorizes certain level two sex offenders to petition for relief from registering after they have been registered for thirty years; and eliminates the petition for relief for certain level three sex offenders.

fears addressed. The naming of criminal laws and penal measures for crime victims (Megan's law, Jenna's law, Stephanie's law, and most recently the British press campaign for "Sarah's law") purports to honour them in this way, though there is undoubtedly an element of exploitation here too, as the individual's name is used to fend off objections to measures that are often nothing more than retaliatory legislation passed for public display and political advantage.⁶⁰

The consequence of the sort of intense media coverage of crime and the public reaction to that crime has been a shift in the public debate "away from the instrumental reasoning of crime control analysis towards the visceral emotions of identification and righteous indignation. Once this shift has been effected, the terms of the debate are transformed and 'facts' become 'less persuasive than the moral authority of grief.'"⁶¹

2. *Media's Influence on the Perceptions of Leniency*

More direct evidence of media's substantive effects on the public's criminal justice perceptions may be found in empirical analysis of sentencing views. In one study, respondents' perception of the appropriateness of a particular criminal sentence was shaped by which version of a news media account they read (one of three).⁶² While most respondents believed that the sentence imposed by the judge was too lenient, those exposed to the tabloid newspaper report expressed the greatest dissatisfaction.⁶³ Moreover, exposure to a single sentencing story affected respondents' view of overall sentencing practices—evidence of media's "generalizing effect."⁶⁴ A related study found that respondents who learned about sentencing by reading a summary of court documents prepared by researchers were much less likely to hold negative views of both the offender and the sentence imposed than respondents who read a media account of the same hearing—by

60. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 143 (2001).

61. *Id.* at 144.

62. See Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 *LAW & HUM. BEHAV.* 451, 459 (1990). Respondents were assigned one of three actual Toronto newspaper articles covering the sentencing phase of a manslaughter trial. They were asked whether the sentencing judge appropriately considered all relevant factors and to rate the relevant importance of several sentencing aims.

63. See *id.* (noting that those reading the tabloid were more likely to state that the judge had not given weight to all relevant factors). Unlike agenda-setting effects, which appear to be based primarily on sheer quantity of exposure, see Lowry et al., *supra* note 14, at 71, more specific perceptions of crime may be shaped by the content or presentation of media.

64. See Roberts & Doob, *supra* note 62, at 460.

a wide margin.⁶⁵ The researchers concluded that most dissatisfaction with sentencing in the sample population⁶⁶ was the product of misinformation by the news media.⁶⁷

Perceptions of recidivism rates also seem to be influenced by the media. While there does not appear to be any empirical research on the frequency with which a suspect's parole status is reported in news accounts of crime, anecdotal evidence suggests that detailed information about the suspect's record is often provided. Breaches of parole are themselves deemed newsworthy. Consider a 2008 article in the *Toronto Star*, a Toronto-based newspaper, about the sentencing of a defendant for aggravated assault and weapons offenses arising out of a stabbing at a crack house.⁶⁸ The article not only mentions that the defendant was on parole for a life sentence of murder at the time of the stabbing offense, but also notes that "[m]onths before, despite three breaches of parole, he was paroled again when an expert deemed him manageable in the community."⁶⁹ The sentence immediately following renders the expert assessment absurd: "[The defendant] admitted that had his own finger not been in the way of the knife as he cut [his victim's] throat, he could have killed the man."⁷⁰ The provision of lurid details like this one is a powerful, though implicit, criticism of the parole system in a supposedly objective news piece.

The parole status of the prime suspect in the murders of former American Idol contestant Jennifer Hudson's mother, brother, and nephew received similar scrutiny.⁷¹ In that case, the suspect was not only on parole, but had already breached the terms of his probation by being found in pos-

65. *Id.* at 462. While sixty-three percent in the newspaper article sample believed the twenty-one month sentence imposed was too lenient, only nineteen percent of the court documents sample felt similarly. *Id.* In fact, the actual sentence of twenty-one months was relatively severe for the commissioned offense: assault causing bodily harm. *Id.* at 461. Moreover, seventy-six percent of the newspaper sample and thirty-six percent of the court documents sample believed the offender was "worse than average" in respect to the crime committed. *Id.* at 462.

66. In Canada at the time of the study, about eighty percent of the public (and seventy-nine percent of survey respondents) believed sentencing was too lenient. *Id.*

67. *Id.* at 466.

68. Peter Small, *On Parole at Time of Stabbing, Man Jailed 8 Years*, THESTAR.COM (Jan. 22, 2008), <http://www.thestar.com/GTA/Crime/article/296319>.

69. *Id.*

70. *Id.*

71. Because of Hudson's fame, the article was widely reported by entertainment media outlets as well as traditional news sources. See, e.g., Kate Stroup, *Hudson Suspect was Out on Parole—Despite Drug Bust*, PEOPLE, Oct. 29, 2008, <http://www.people.com/people/article/0,,20236443,00.html>.

session of crack.⁷² One article noted he could have returned to jail on the basis of this earlier transgression.⁷³

The political ramifications of this kind of reporting are currently visible in Illinois, where changes to parole laws can be traced to news reports of a single incident. In 2008, when Glenford Martinez killed his girlfriend and himself while paroled for murder, much was made of the fact that his parole had not been revoked despite his arrest for battery of the same victim some months earlier. A *Chicago Tribune* article used the incident to focus attention on the extent of discretion provided parole officers and the often “tenuous communication system between prosecutors and parole officers.”⁷⁴ It also credited its own reporting to the announcement by the state’s Attorney General office that it would be seeking legislation to increase the number of offenses that mandate automatic revocation of probation.⁷⁵ The former law only addressed felonies committed with a firearm or knife and failure to comply with the state’s Sex Offender Registration Act.⁷⁶ The law, as amended in 2010, mandates automatic arrest for parolees charged with domestic violence.⁷⁷ The specificity of the change is a powerful testament to the effects of media attention.

B. Understanding the Theories Underlying Media Influence

There has been a fair amount of research devoted to social psychology and empirical analyses of the media’s influence on public perceptions of crime.⁷⁸ These studies often suggest that exposure to media reports of

72. *See id.*

73. *See id.*

74. Angela Rozas & Mary Owen, *Murder Exposes Flaws in Parole System: Months After Arrest for Battery, Parolee Kills Ex-Girlfriend, Self*, CHI. TRIB., Apr. 11, 2008, <http://www.chicagotribune.com/news/local/chi-domestic-violence-080411,0,3118283.story>.

75. *See id.* (“[F]ollowing a story by the *Tribune* about the case, the Illinois attorney general’s office said it would push for a new law to make an arrest for domestic battery, as well as five other new offenses, a cause to revoke parole automatically.”).

76. *See* 720 ILL. COMP. STAT. ANN. 5/3-14-2 (section 3-14-2 of the Unified Code of Corrections).

77. *See* Ill. Pub. Act 096-0282 (effective Jan. 1, 2010), available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=096-0282>.

78. *See generally* STUART HALL, REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES (1997); HOWARD KURTZ, MEDIA CIRCUS (1993); Peter Dahlgren, *What’s the Meaning of This?: Viewers’ Plural Sense-Making of TV News*, 10 MEDIA, CULTURE & SOC’Y 285 (1988); Anthony N. Doob & Glenn E. McDonald, *Television Viewing and Fear of Victimization: Is the Relationship Causal?*, 37 J. PERSONALITY & SOC. PSYCHOL. 170 (1979); Eschholz, *supra* note 31; Gilliam, Jr. et al., *supra* note 29; Robert P. Hawkins & Suzanne Pingree, *Using Television to Construct Social Reality*, 25 J. BROADCASTING 347 (1981); Robert P. Hawkins & Suzanne Pingree, *Uniform Messages and Habitual Viewing: Unnecessary Assumptions in Social Reality Effects*, 7 HUM. COMM. RES. 291

crime increases the salience of the crime problem, focusing either on its importance to the public and/or public fear of crime victimization.⁷⁹ No consensus exists among researchers regarding the precise mechanism (or mechanisms) that leads to these effects. One commentator suggests that “no single aspect of the media shapes public opinion and, conversely, the media do not simply reflect prevailing trends.”⁸⁰ The relationship seems to be both shared and interactive.

There are a variety of factors that determine and shape public opinion of crime.⁸¹ However, social psychologists do not agree on the extent to which media exposure is relevant. There are a number of theories which include: (1) cultivation theory, which posits that large amounts of media exposure can distort perceptions of reality,⁸² causing the public to overestimate and fear crime;⁸³ (2) social network theory, which instead emphasizes the influence of personal experiences or the experiences of those in one’s social network;⁸⁴ and (3) the social comparison hypothesis, which argues individuals make judgments about the crime problem by comparing their own neighborhoods to others’.⁸⁵

1. Cultivation Theory

Cultivation theory, an influential approach to media and communication research, predicts that “[w]atching a great deal of television will be associated with a tendency to hold specific and distinct conceptions of reality, conceptions that are congruent with the most consistent and pervasive images and values of the medium.”⁸⁶ In the view of George Gerbner, who

(1981); Mary Beth Oliver, *Influences of Authoritarianism and Portrayals of Race on Caucasian Viewers’ Responses to Reality-Based Crime Dramas*, 9 COMM. REPS. 141 (1996); Mary Beth Oliver, *Portrayals of Crime, Race, and Aggression in ‘Reality-Based’ Police Shows: A Content Analysis*, 38 J. BROADCASTING & ELECTRONIC MEDIA 179 (1994); W. James Potter & Ik Chin Chang, *Television Exposure Measures and the Cultivation Hypothesis*, 34 J. BROADCASTING & ELECTRONIC MEDIA 313 (1990); Joseph F. Sheley & Cindy D. Ashkins, *Crime, Crime News and Crime Views*, 45 PUB. OPINION Q. 492 (1981); Dan Slater & William R. Elliot, *Television’s Influence on Social Reality*, 68 Q. J. SPEECH 69 (1982).

79. See Linda Heath & John Petraitis, *Television Viewing and Fear of Crime: Where is the Mean World?*, 8 BASIC & APPLIED SOC. PSYCHOL. 97, 97 (1987).

80. Sharon Casey & Philip Mohr, *Law-and-Order Politics, Public-Opinion Polls and the Media*, 12 PSYCHIATRY, PSYCHOL. & LAW 141, 147 (2005).

81. See *id.*

82. See Kimberlianne Podlas, *“The CSI Effect”: Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 447-48 (2006).

83. See Gross & Aday, *supra* note 20.

84. See Romer et al., *supra* note 21, at 89-91 (discussing competing theories).

85. *Id.*

86. JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS: CULTIVATION THEORY AND RESEARCH 3 (1999).

developed the theory in the 1970s in connection with his research on violent programming,⁸⁷ television viewership serves a social unification function not unlike that of religion in earlier periods.⁸⁸ Its “mainstreaming” effects help to minimize differences in reception associated with regional, political, socioeconomic, or cultural variance.⁸⁹ In its purest form, the theory does not attempt to answer specific questions, but to examine the medium more generally to assess “the implications of stable, repetitive, pervasive, and virtually inescapable patterns of images and ideologies that television (especially dramatic, fictional entertainment) provides.”⁹⁰

Because cultivation theory is concerned chiefly with the effect of recurrent images and metaphors,⁹¹ the *amount* of television viewing among respondents is paramount.⁹² Its methods traditionally require both a “message system analysis” to determine the content of television programming⁹³ and a survey of subjects with varied viewing habits regarding some aspect of social reality; those with the highest levels of exposure are predicted to provide a “television answer.”⁹⁴ Popular subjects for research include the influence of violent programming and perceptions of crime rates and crime victimization.⁹⁵

Numerous studies have found that heavy television viewers both overestimate crime rates and demonstrate “mean world syndrome”—i.e., a negative, distrustful view of social reality.⁹⁶ In general terms, these phenomena can be characterized as first-order effects and second-order effects, respectively.⁹⁷ The former refers to estimates of the frequency or probability of events, while the latter concerns “value judgments or general attitudes about the state of the world at large.”⁹⁸ Although there is more empirical support for television’s first-order effects,⁹⁹ interest in second-order effects

87. *Id.*

88. See George Gerbner et al., *Growing up with Television: Cultivation Processes, in MEDIA EFFECTS, ADVANCES IN THEORY AND RESEARCH*, 43, 44 (Jennings Bryant & Dolf Zillman eds., 2002).

89. See *id.* at 51; see also Robin L. Nabi & John L. Sullivan, *Does Television Viewing Relate to Engagement in Protective Action Against Crime? A Cultivation Analysis From a Theory of Reasoned Action Perspective*, 28 COMM. RES. 802, 804 (2001).

90. SHANAHAN & MORGAN, *supra* note 86, at 5.

91. See *id.* at 12.

92. See *id.* at 4.

93. Gerbner et al., *supra* note 88, at 49.

94. See *id.* at 46. That is, they provide results most aligned with the content analysis.

95. See Nabi & Sullivan, *supra* note 89.

96. *Id.*

97. *Id.* at 803.

98. *Id.*

99. *Id.* at 804.

remains high. One study found that television viewing has a direct effect on perceptions of crime and intentions to take self-protective action, “intervening variables,” which in turn affects perceptions of the world as a mean place and engagement in protective action.¹⁰⁰

Cultivation theory’s emphasis on net effects of media exposure recalls “agenda setting,” the term used to describe the media’s power in determining matters of public import.¹⁰¹ Other iterations of the theory incorporate individual characteristics. The concept of resonance, for example, posits that media-created “mean world syndrome” is “amplified” by personal experience.¹⁰² Other theories, which fall under the general heading of “reception models,” question the primacy of the quantity of media exposure altogether by privileging factors like selective viewing, individual program selections, and the means by which viewers construct meaning.¹⁰³

2. Social Network Theory

Public perception of crime is also a common subject of study for social network theorists, who instead emphasize the effect of interpersonal and community relations. Fear of crime, for example, has been analyzed in a variety of contexts, including: physical and social vulnerability associated with age, gender, socioeconomic status, or past experiences (“victimization”); neighborhood drug use and crime (“social disorder”); and proximity to groups with different cultural practices (“subcultural diversity”).¹⁰⁴ There is evidence that crime perception formation has both spatial and social elements. Two interesting illustrations: “whites’ physical proximity to

100. *Id.* at 814.

101. See SHANAHAN & MORGAN, *supra* note 86, at 14. The authors characterize agenda setting as “the specific, day-to-day agenda of public issue salience which culture (and cultural media) sets” and cultivation theory as concerned with the “more hidden and pervasive boundary conditions for social discourse, wherein the cultural ground rules for what exists, what is important, what is right and so on, are repeated (and ritualistically consumed) so often that they become invisible.” *Id.* Their point seems to be that cultivation theory is more stable, entrenched, and long-term. *See id.*

102. Nabi & Sullivan, *supra* note 89.

103. See Gerbner et al., *supra* note 88, at 48.

104. See generally Richard R. Bennett & Jeanne M. Flavin, *Determinants of Fear: The Effect of Cultural Setting*, 11 JUST. Q. 357 (1994).

[b]lacks influences their perceptions of crime rates”;¹⁰⁵ and larger, lower-density urban ghettos are associated with increased perception of crime.¹⁰⁶

Social network theory neither displaces nor ignores media research in this area. In one researcher’s view, “the effects of media exposure on fear of crime are less significant than any naive hypothesis would suggest,” because: (1) viewers’ interactions with its messages are shaped by predispositions, personal experiences, and perceptions of credibility; and (2) interpersonal news sources may be more powerful.¹⁰⁷ But while viewers “put what is learned from the media in the context of what they learn from other sources” and are aware of the media’s sensationalism,¹⁰⁸ media may still affect the larger public discourse, creating “consensus.”¹⁰⁹ The content of media images, for example, can obscure root social causes of criminality by overemphasizing “traditional law-and-order responses.”¹¹⁰

II. MEDIA INFORMS PUBLIC PERCEPTIONS OF RACE

In view of the rejection of the concept of “biological race” by the scientific community,¹¹¹ the social construction of race has become a critical focusing question for analysts and scholars. Michael Omi and Howard Winant, early proponents of this view, explored “the process by which social, economic and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings.”¹¹² Some believe that the social origins of race distinctions mean that

105. Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 179 (2006) (citing DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 241 (1993)).

106. See Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477, 496 (2009) (citing WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 14-15 (1996)).

107. Vincent F. Sacco, *Media Constructions of Crime*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 151-52 (1995). This may be because many media accounts are depersonalized. See *id.*

108. *Id.* at 153.

109. *Id.* at 154.

110. *Id.* at 153.

111. See Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 12 (1994) (noting genetic variation is primarily a matter of geography and differences within races can exceed differences between races).

112. Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299, 1310 n.36 (2008) (quoting MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S*, at 61 (1986)).

race is merely an illusion.¹¹³ But to deny the existence of race is to obviate a search for a solution to racial inequality and ignore a very real component of personal and community identity.¹¹⁴ Social construction theory instead recognizes that race is: (1) a product of human construction; (2) closely tied to gender and class distinctions; (3) subject to rapid changes in meaning; and (4) always relational (i.e., each race is defined by and against others).¹¹⁵

The historical development of race as it currently exists in the United States lends support to these observations. Since the 1800s, “Mexican” has been transformed from a nationality to a race,¹¹⁶ and “white” from a description of Anglo-Saxons to a more inclusive definition of Europeans and Middle Easterners.¹¹⁷ Generally, races have been defined by reference to the majority culture, arguably as a means of exclusion from that majority. Indeed, “whiteness” has been defined as the absence of a racial identity.¹¹⁸ “That is why, in the United States, there are scholars and *black* scholars, women and *black* women.”¹¹⁹ Nor is race merely an historical vestige; it is continually reinforced and redefined by contemporary social life¹²⁰ and ongoing political struggle.¹²¹

Social constructions of race—how we define race—contribute to the formation of racial stereotypes. Just as a biological basis for race is losing steam in the academic community, “old fashioned racism”—the belief in the genetic or cultural inferiority of particular races—is in decline. In its stead is the so-called “new racism,” marked by subtlety and the denial of continuing institutional discrimination.¹²² These attitudes and racial misunderstandings, more generally, likely flow from the fact that races tend to

113. See, e.g., Lewis M. Killian, *Black Power and White Reactions: the Revitalization of Race Thinking in the United States*, 454 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 43 (1981) (deeming race a “pseudoscientific yet politically potent fallacy”).

114. See Lopez, *supra* note 111, at 19-20.

115. See *id.* at 28.

116. *Id.* at 30.

117. *Id.* at 34.

118. See *id.* at 10 n.36.

119. Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 98 (1990).

120. *Id.* at 118 (“If race lives on today, it can do so only because we continue to create and re-create it in our social life, continue to verify it, and thus continue to need a social vocabulary that will allow us to make sense, not of what our ancestors did then, but of what we ourselves choose to do now.”).

121. John O. Calmore, *Critical Race Theory, Archie Shepp and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992).

122. See Gilliam, Jr. & Iyengar, *supra* note 47, at 566. Additional features include beliefs that blacks do not work hard, make illegitimate demands, and receive undeserved government handouts.

occupy separate societies often with only limited interracial interaction.¹²³ Perhaps as a consequence of this separation, negative stereotypes persist in abstract form even in the face of contradictory (i.e., positive) personal experiences.¹²⁴ While express racist attitudes have become socially stigmatized, studies of “implicit attitudes” reveal that negative associations with blackness are the norm.¹²⁵ These stereotypes are also self-reinforcing, as “people tend to remember stereotype-consistent information, remember the negative information in an even stronger form, and then emphasize its importance.”¹²⁶ As such, individual conceptions of race are strongly mediated by prevailing, socially mediated definitions and inferences.

A. Media Influences Public Perception of Who Commits Crimes

Not only is the television news coverage of crime increasingly filtered through a “racialized” lens, it also has had a pronounced impact on how America views people of color—particularly African-Americans when it comes to crime. In a *Washington Post* article, one author noted that even when the racial identity of a suspect is not pictured on television or noted, two-thirds of those who falsely believed the suspect was shown, believed that he was black.¹²⁷ It is important to note that even when crime is reported involving African-Americans, it is most often reported as a crime of violence and not a property crime. This can lead the average American to conclude that most black offenders are violent.¹²⁸ This can, in turn, lead to the stereotyping of African-Americans as criminal and/or violent.¹²⁹

123. See Calmore, *supra* note 121, at 2144 (noting the two groups “so often see quite different realities at both the perceptual and experiential levels”).

124. See *id.* at 2415 & n.53 (citing Arthur J. Kropp, *Colleges Must Find Ways to Eradicate Racial Division*, CHRON. HIGHER EDUC., Apr. 22, 1992, at B3) (discussing a study in which white youths described blacks in general as welfare-dependent but their own black friends as hardworking).

125. See generally Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178 (2007). One test that measured how long it takes an individual to pair black and good, and white and bad (and vice versa) demonstrated that eighty percent of white Americans of all educational levels show moderate or strong association of black with bad, regardless of their express beliefs. *Id.* at 191-92.

126. *Id.* at 198.

127. See Howard Kurtz, *A Guilty Verdict on Crime, Race Bias; TV Viewers Often Assume Suspects are Black*, WASH. POST, Apr. 28, 1997, at C1 (defining the assumption whereby whites “automatically associate a crime story with a nonwhite guy” as an “overlearned phenomenon”).

128. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE AND UNEQUAL* 181 (1992). For an in-depth discussion on the impact of race in crime, see *id.* at 179-98.

129. See Martin Gilens, *Race and Poverty in America: Public Misperceptions and the American News Media*, 60 PUB. OPINION Q. 515, 516, 531 (1996) (discussing stereotyping in

Further, the media depicts a large proportion of offenders as racial and ethnic minorities, even though a much smaller percentage of minorities are actually involved in the criminal justice system.¹³⁰ A large proportion of victims are also white.¹³¹ Suspects who are members of racial minority groups are also less likely to be treated sympathetically in the news. For example, black suspects are less likely to be identified by name and more likely to be shown physically restrained.¹³² Moreover, black people are underrepresented as victims in the news, even as they are overrepresented as perpetrators. According to Gilliam and Iyengar, more than sixty percent of the subjects who watched a broadcast that included no perpetrator falsely recalled having seen one and seventy percent of those who remembered seeing one identified the perpetrator as black.¹³³ In this way, the media appears to “influence public attitudes about criminal justice policies by instilling and reinforcing racial stereotypes and linking race to crime.”¹³⁴

Crime coverage is one of the major influences on criminal justice policy agenda-setting. In addition to frequency and scope of coverage, the media also serves other more subtle roles in its influence over the public’s perceptions about crime. One way it does so is through “priming” popular perceptions by the weight of coverage attached to an issue.¹³⁵ Another way in which the media contributes to confusion about frequency of crime is over-reporting violent crime and overemphasizing the role of minority perpetrators in the commission of violent crime.¹³⁶

context of perceptions of poverty); *see also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1081 (1991) (noting that when whites come in contact with a black person who defies their stereotypes, they pay her a compliment by stating that the person is not viewed any longer as black); Marlene Cimon, *Myths Color Views on Who Receives Aid*, CHI. SUN-TIMES, Jan. 29, 1995, at 24 (opining that most Americans believe that the average Aid to Families with Dependent Children (AFDC) recipient is a black female when in reality it is a rural white person).

130. *See, e.g.*, Beale, *supra* note 12, at 459.

131. *See id.*

132. *Id.* at 459-60.

133. Gilliam, Jr. & Iyengar, *supra* note 47, at 564.

134. Beale, *supra* note 12, at 402.

135. The “priming” effect of this “standard crime script” is so powerful that in video experiments which made no reference to a perpetrator, sixty percent of respondents erroneously recalled seeing a perpetrator and in seventy percent of those cases, they identified the perpetrator as black. *See* Gilliam, Jr. & Iyengar, *supra* note 47, at 564.

136. Gilliam, Jr. et al., *supra* note 29, at 8; *see also* Dorfman & Schiraldi, *supra* note 36.

1. *Over-Reporting Crime Frequency in Eras of Declining Crime*

The exaggerating effects of the media's coverage of the crime problem are often addressed by media law commentators.¹³⁷ The paradox of the

137. See e.g., Lopez, *supra* note 111, at 6-7, 11-17. Lopez begins by discrediting historical and contemporary theories of race: the biological perspective has been disproved by evidence that shared morphological characteristics, such as skin color and hair texture, belie significant genetic variation. *Id.* at 12. Ethnicity theory erroneously composites a heterogeneous group of people, while ignoring larger social and political institutions that reinforce racism. *Id.* at 17. And nationalist and colonialist theories oversimplify racial phenomena and ignore differences in social attainment within races. *Id.* at 26-27. Lopez's alternative, a "racial fabrication theory," argues that races are "historically contingent, socially mediated systems of meaning that attach to elements of an individual's morphology and ancestry." *Id.* at 38-39. On an individual level, race is a product of chance (ancestry and morphology), context (historical and social), and choice (conscious and/or coerced). See *id.* at 62.

See e.g., Meares & Kahan, *supra* note 50. The authors argue that three forms of "social norms of disorder" contribute to high crime rates in inner cities: (1) a lack of positive "social organization" (e.g., supervision of children, participation in community groups, and strong neighborhood ties); (2) the perception of disorder produced by past crime rates and crime fads ("social influence"); and (3) the "social meaning" attached to a decision to obey—or break—the law. See *id.* at 806, 811, 814-15, 821. By addressing these perceptions of the commonality of crime, law enforcement policies like curfews and loitering ordinances can reduce crime more effectively than harsh, deterrent approaches. See *id.* at 821.

See e.g., Lawrence M. Friedman & Issachar Rosen-Zvi, *Illegal Fictions: Mystery Novels and the Popular Image of Crime*, 48 U.C.L.A. L. REV. 1411 (2001). The authors trace the relationship between detective stories, public opinion, and the law. *Id.* at 1430. Recent incarnations of the genre depict crime as random and sociopathic rather than rational and deliberate. *Id.* at 1427. As such, contemporary detective fiction, along with rising crime rates, news media, and television dramas, contribute to a "culture of fear" that increases support for punitive criminal justice policies. *Id.* at 1428.

See e.g., Dorothy E. Roberts, *Foreword: Race, Vagueness, and The Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999). Roberts examines constitutionally vague loitering statutes to critique order maintenance policing backed by social norm theory. The idea that a breakdown of order contributes to crime rates relies on questionable empirical support and the flawed premise that police can distinguish between law abiders and law breakers in the absence of an underlying crime. See *id.* at 799, 803. Moreover, these law enforcement strategies receive mixed support in black communities and increase presumptions of black criminality. See *id.* at 806, 808.

See, e.g., Gilliam, Jr. et al., *supra* note 29. Statistical analysis of local news reporting revealed that both violent crime (particularly murder) and nonwhite crime are overrepresented. Moreover, racial cues in crime stories contribute to fear of crime by activating racial stereotypes. See *id.* at 8.

See e.g., Gilliam, Jr. & Iyengar, *supra* note 47. Familiar scenarios in local news stories "generate[] strong expectations about crime, allowing viewers to fill in gaps in the script." *Id.* at 564. These narrative "scripts" suggest that crime is violent and nonwhite. Racialized reporting in particular is associated with increased support for punitive policies (e.g., the death penalty and mandatory sentences) and, among white viewers, negative stereotypes about blacks. See *id.* at 560-61.

See e.g., Brito, *supra* note 30. The author examines how media scrutiny of crimes perpetrated against children intensifies and distorts parents' fears. Daycare sexual abuse scandals of the 1980s, pedophilia and child abduction cases of the 1990s, and more recent

decade of the 1990s—an increase in public concern about crime in an era of falling crime rates—is frequently cited as evidence of the distortive power of television news coverage.¹³⁸ A recent case study of three American cities by the National Council on Crime and Delinquency provides specific support for this and similar assumptions of exaggeration by the news media.¹³⁹ The study compared two decades worth of local news reports to actual crime trends in Washington, D.C., Dallas, Texas, and San Mateo, California to examine the media's portrayal of juvenile justice issues.¹⁴⁰ It found little correlation between trends in news media reporting and actual crime rates.

Consider two illustrations: Reports of a “juvenile crime wave” in Washington, D.C. in 2002 persisted though the increase in proportion of total juvenile arrests was less than one percent and overall crime rates had decreased by half within the previous decade;¹⁴¹ Dallas newspapers emphasized a rise in specific crimes and criticized the city police for a failure to meet crime reduction goals, despite a thirty percent decrease in violent crime reports between 1995 and 2007.¹⁴² These examples suggest two mechanisms by which news media may fabricate perceptions of a “crime problem”: extrapolating larger crime trends from isolated incidents, and selectively reporting rises in particular crimes. These forms of editorializing can be reduced to the same error that many of their consumers—legislators and constituents alike—fall prey to: overgeneralization.¹⁴³

2. Public Perception of Race Exacerbates Crime Issue

Social conceptions of race intersect public perceptions of crime through the operation of stereotypes about people of color. General presumptions about black criminality, reinforced by law enforcement strategies¹⁴⁴ and

mass murders at public schools are examples of “phantom menaces,” dangers grossly exaggerated by persistent news coverage. *Id.* at 520.

138. See, e.g., Lowry et al., *supra* note 14, at 62 (notwithstanding increased salience of crime, the national crime rate index in the 1990s increased at a slower rate than the population).

139. See *Youth Violence Myths and Realities: A Tale of Three Cities: Hearing on Youth Violence: Trends, Myths, and Solutions Before the H. Subcomm. On Crime, Terrorism & Homeland Security*, 111th Cong. (2009) (testimony of Dr. Barry Krisberg, Pres., Nat'l Council Crime & Delinquency), available at <http://judiciary.house.gov/hearings/pdf/Krisberg090211.pdf>.

140. *Id.* at 2.

141. *Id.* at 7.

142. *Id.* at 8.

143. JULIAN V. ROBERTS & MIKE HOUGH, UNDERSTANDING PUBLIC ATTITUDES TO CRIMINAL JUSTICE 11 (2005).

144. See Roberts, *supra* note 137, at 808.

disproportionate African-American populations within prisons,¹⁴⁵ racialize the public's perception of crime. Empirical studies have confirmed that racial cues are exceptionally powerful: public fears about crime are triggered more by minority offenders in particular than by violent crimes generally in local news coverage.¹⁴⁶ Similarly, "the news tends to exaggerate existing racial differences in actual crime rates by disproportionately depicting blacks in the role of violent perpetrators and whites as nonviolent perpetrators In effect, the news depicts crime in 'black and white.'"¹⁴⁷ Preexisting racial stereotypes, "primed" by the media,¹⁴⁸ are continually confirmed and applied in new contexts.¹⁴⁹

Perceptions of black criminality have some basis in crime and incarceration rates. However, the interaction between socially mediated constructions of race, negative racial associations, and mechanisms for the formation of public conceptions of crime does not merely mirror the underlying problem—it distorts and perpetuates it. Arguably, the war on drugs is largely responsible for the high incarceration rates of minorities, at least one study illustrates that those rates are not due to increased criminality. Taking the war on drugs in New York for example, during the period beginning in 1980 and ending in 1997, there was a 93% increase in drug offenses for whites, and 1615% and 1311% increases for Latinos and African-Americans respectively.¹⁵⁰ In addition, although blacks constitute approximately 13% of the U.S. population and 13% of its drug users; African-Americans constitute 35% of drug arrests, 55% of drug convictions, and 74% of drug imprisonments.¹⁵¹ This speaks to the effects of discretion in the criminal justice system and how that discretion impacts people of color generally and African-Americans in particular.

These mechanisms have important policy implications. Racialized news reporting has been associated with increased support for harsh punishments

145. See Meares & Kahan, *supra* note 50, at 818 ("Like segregated ghettos, prisons in which half of the inmates are African Americans help to forge an African American identity that 'color codes' to crime and that is separated from the 'mainstream' American identity.").

146. See Gilliam, Jr. et al., *supra* note 29.

147. *Id.* at 15.

148. *Id.* at 8.

149. Consider Gilliam and Iyengar's discussion of the employment of narrative scripts as gap-fillers. See generally Gilliam, Jr. & Iyengar, *supra* note 47.

150. ROBERT GANGI ET AL., JUST. POL'Y INST., NEW YORK STATE OF MIND?: HIGHER EDUCATION VS. PRISON FUNDING IN THE EMPIRE STATE, 1988-1998, at 4 (1998), available at <http://www.prisonpolicy.org/scans/jpi/nysom.pdf>.

151. Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 719 (2000) (citing U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 14 (1999)).

like the death penalty and mandatory sentencing.¹⁵² Commentators have noted that these tough-on-crime initiatives further disrupt already susceptible inner-city communities, reinforcing social norms of disorder and lawlessness.¹⁵³ It is also important to note that the law enforcement officials charged with maintaining order are not immune from the effects of racial stereotyping. Indeed, the evidence suggests blacks are subject to disproportionate arrest, often related to traffic stops and drug offenses.¹⁵⁴

Researchers have shown that the growth in disproportionate incarceration rates for people of color in the last two decades are not easily explained by higher rates of crime commission.¹⁵⁵ Noted criminologist Bruce Western for example, explains the growth in imprisonment as related to significant increases (for African-American men) in the use of imprisonment for those convicted of crime, increases in the length of sentences, and increases in the prosecution and incarceration of drug offenders.¹⁵⁶ Western concludes that “[p]oor and minority men were much less involved in crime in 2000 than twenty years earlier, matching declines in crime in the population as a whole.”¹⁵⁷ “Although disadvantaged men became much more law-abiding, their chances of going to prison rose to historically high levels.”¹⁵⁸

B. Politicians Capitalize on Timing and Media Focus

Major events generate “policy windows” that enable advocates to advance their agendas or to focus public attention on particular issues or trends that advocates consider special problems.¹⁵⁹ Some politicians opportunistically latch onto particular issues or events to which they can attach their legislative agendas. Others simply wait for the inevitable moment when their pet problem will manifest so that they might knowingly emerge ready and willing to use the media to instigate public debate or more often launch a personal diatribe.¹⁶⁰ Media coverage of those events

152. Gilliam, Jr. & Iyengar, *supra* note 47, at 561.

153. See Meares & Kahan, *supra* note 50, at 813.

154. See Roberts, *supra* note 137, at 808.

155. See BRUCE WESTERN, PUNISHMENT AND INEQUALITY 50 (2006) (documenting incarceration percentages in 2000 for men aged twenty to forty).

156. *Id.*

157. *Id.*

158. *Id.*

159. See Steven Chermak & Alexander Weiss, *The Effects of the Media on Federal Criminal Justice Policy*, 8 CRIM. J. POL'Y REV. 323, 324-25 (1997) (citing JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 1997)).

160. *Id.*

facilitates the advocates' use of the event and ultimately shapes how the constituencies to which they respond conceptualize these events.

I. A Closer Look at Legislation

Megan's Law is a prime example. In 1994, seven-year-old Megan Kanka was abducted, raped, and killed by Jesse Timmendequas.¹⁶¹ Timmendequas lived in a home across the street from Megan and one morning Megan reportedly knocked on Timmendequas' front door and asked to see the puppy he had just acquired. He invited her in and she never walked out. Timmendequas had been convicted twice before for sex offenses, and he lived in a house with two other convicted sex offenders. The Kanka family asserted that they had been unaware of Timmendequas' criminal history although the majority of their neighbors were at least aware of the criminal history of one of Timmendequas' roommates. The public revelation of Timmendequas' history of sex offenses provoked heated reactions from residents of the quiet suburban township in which the offense occurred.¹⁶² More than one thousand people turned out for a vigil in a local park.

The fury spread nationally. Megan's parents became actively involved in taking steps to ensure that justice would be done in Megan's case and that the tragedy they had endured would not be repeated.¹⁶³ Their efforts had tremendous public appeal because they were able to tap into fears about the safety of children particularly given the perceived threat that former sex offenders could be "hiding" in our midst.¹⁶⁴ The Kanka family launched the Megan Nicole Kanka Foundation, founded on the belief that "every parent should have the right to know if a dangerous sexual predator moves into their neighborhood."¹⁶⁵ They circulated a petition to enact legislation that would ensure notification that sex offenders were residing in the area and obtained hundreds of thousands of signatures in support.¹⁶⁶ The New Jersey state legislature responded to public pressure by enacting a hastily prepared package of nine sex offender statutes that have come to be known collectively as "Megan's Law." The legislature passed Megan's

161. See, e.g., Robert Hanley, *Man Convicted of Killing Megan Kanka Asks for New Trial*, N.Y. TIMES, Dec. 2, 1998, <http://www.nytimes.com/1998/12/02/nyregion/man-convicted-of-killing-megan-kanka-asks-for-a-new-trial.html?ref=megankanka>.

162. See LARRY J. SIEGEL, *INTRODUCTION TO CRIMINAL JUSTICE* 157 (12th ed. 2010).

163. See, e.g., MEGAN KANKA FOUNDATION, <http://www.megannicolekankafoundation.org/mission.htm> (organization founded by the Kanka family "to ensure that every possible step is taken to help prevent the future victimization of children").

164. See, e.g., SIEGEL, *supra* note 162.

165. See JOEL B. RUDIN, *MEGAN'S LAW*, ABA CRIMINAL JUSTICE § 4 (1996).

166. *America's Unjust Sex Laws*, ECONOMIST, Aug. 6, 2009, <http://www.economist.com/node/14165460>.

Law in less than ninety days. Forty-one states followed New Jersey's lead and passed their own versions of "Megan's Law."

Any such occurrence is tragic and worthy of attention and response. But in this instance, these laws were enacted without the kind of substantive hearings that one would ordinarily expect to test and question the efficacy of the proposal. Instead, given the emotionally-charged nature of this case, the legislation was passed with great haste and little debate.¹⁶⁷ As we consider the events with the benefit of hindsight, we can see with clarity that the media coverage led to understandable public outcry. But what followed was a desire to strike back, rather than the kind of thorough analysis that would examine and uncover the frequency of the occurrence of such offenses, and explore the kinds of practices that policymakers might put in place that had been effective in the past. Both the public and politicians simply looked for the newest, most draconian response to prove our ability to be tough on crime.

Three years later, we saw a repetition of this pattern. In November 1997, Jenna Grieshaber lost her life violently. She was a twenty-two-year-old nursing student, who was six weeks away from graduation when she was murdered in her Albany, New York apartment by Nicholas Pryor, who had recently been paroled.¹⁶⁸ The murder received considerable local attention, but when Jenna's murder spurred her parents to take action, the media coverage intensified.¹⁶⁹ The Grieshabers began a public and political crusade in New York State to end parole for anyone convicted of a violent felony.¹⁷⁰

Then New York Governor George Pataki took on the Grieshabers' cause as part of what would become his legacy. He made "Jenna's Law" the focus of his 1998 State of the State Address.¹⁷¹ The proposed law quickly gained momentum, although separate versions passed in the Assembly and the Senate. The Democratic controlled Assembly included provisions for education programs in prisons and allowed drug treatment as an alternative

167. See, e.g., Megan's Law, 1995 N.Y. Laws ch. 192, amended by 1999 N.Y. Laws ch. 453, and 2002 N.Y. Laws ch. 11 (creating the New York State Sex Offender Registration Act, which requires individuals convicted of certain offenses to register with the New York State Division of Criminal Justice Services and provide address information).

168. Evelyn Nieves, *Our Towns: Lost Crusader Inspires "Jenna's Law,"* N.Y. TIMES, May 3, 1998, <http://www.nytimes.com/1998/05/03/nyregion/our-towns-lost-crusader-inspires-jenna-s-law.html>.

169. See, e.g., Abby Goodnough, *Debate Grows Over Efforts to End Parole,* N.Y. TIMES, May 30, 1998, <http://www.nytimes.com/1998/05/30/nyregion/debate-grows-over-efforts-to-end-parole.html?src=pm>.

170. See *id.*

171. ROBERT B. WARD, NEW YORK STATE GOVERNMENT 449 (2006).

to prison for nonviolent drug offenders.¹⁷² The Republican controlled Senate rejected these amendments, and the regular session ended on June 19 without passage of Jenna's Law.¹⁷³ Against quite vocal public outrage about the state legislature's unwillingness to protect citizens against violent crime, the Speaker of the Assembly called a rare, one-day Special Session for the express purpose of passing the bill that had become known as "Jenna's Law." The Assembly passed the bill on July 29 by a 128 to 20 majority.

The media's role in shaping prevailing perceptions of crime has policy implications for legislators and judges responsive to shifts in public opinion.¹⁷⁴ In a handful of cases, heavy media coverage can be linked directly to the introduction of legislation reacting to "public outcry for retribution of criminal conduct."¹⁷⁵ As stated above, Megan's Law, which conditions states' receipt of federal criminal justice funding on the establishment of a sex offender registry, is one such example. The legislation was named for a seven-year-old New Jersey resident murdered by her neighbor, a convicted sex offender. The murder attracted extensive media attention nationwide and increased support for greater monitoring of these sexual predators.¹⁷⁶ While express reference to specific news reports is absent from the legislative history, the media's influence in disseminating stories like Megan's can be gleaned from language in the House Report identifying the need for the legislation:

Perhaps no type of crime has received more attention in recent years than crimes against children involving sexual acts and violence. Several recent tragic cases have focused public attention on this type of crime and resulted in public demand that government take stronger action against those who commit these crimes.¹⁷⁷

One example of treating a criminal justice policy based on media and politics rather than using evidence to formulate effective policy is that of the juvenile registration component of the Adam Walsh Child Protection

172. See Thomas F. Liotti, *1997-98 Survey: Penal Law*, 49 SYRACUSE L. REV. 665, 667 (1999).

173. See *id.*

174. See Roberts & Doob, *supra* note 62, at 454.

175. Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 743-44 (2007) (citing Megan's Law, the Sarbanes-Oxley Act, and the Patriot Act as examples).

176. See Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 INDIANA L.J. 315, 315 n.3 (2001). The author conducted a search of the LexisNexis news database, revealing sixty-four articles in twenty-one newspapers within nine days of the arrest of Megan's murderer. *Id.* He predicted this figure was grossly underestimated. *Id.*

177. H.R. REP. NO. 104-555, at 2 (1996).

and Safety Act (AWA) and its requirement that some juvenile adjudications be treated as “convictions” requiring registration.¹⁷⁸ Unlike many federal community notification laws that focus only on adult offenders, the Sex Offender Registration and Notification Act (SORNA) expressly applies to both juvenile and adult offenders.¹⁷⁹ The application of community notification to juvenile offenders appears to run counter to evidence that suggests the rehabilitative goals of the juvenile justice system.¹⁸⁰ Moreover, the registration requirement of juvenile sex offenders may have a negative impact on the normal development of adolescents and children, and is contrary to *parens patriae* juvenile justice.¹⁸¹

Unilaterally including all offenders fourteen years of age or older at the time of the offense, in essence, makes no distinction in the type of offense.¹⁸² Some experts have noted that charges included in some states’ sex offense statutes provide wide discretion. From acts including public urination and non-forcible conduct to violent sexual assault.¹⁸³ Some cases involve serious treatable conduct while others simply involve any person who has not yet reached the age of majority while being adjudicated delinquent from committing a sexual act.¹⁸⁴ The juvenile sex offender popula-

178. Sex Offender Registration and Notification Act, 42 U.S.C. § 16911(8) (2006) (“The term ‘convicted’ or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . . or was an attempt or conspiracy to commit such an offense.”).

179. Compare *id.*, with Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 14071(a)(3)(A) (2006) (“[C]onduct which is criminal only because of the age of the victim shall not be considered a criminal offense if the perpetrator is 18 years of age or younger.”).

180. Timothy E. Wind, *The Quandary of Megan’s Law: When the Child Sex Offender is a Child*, 37 J. MARSHALL L. REV. 73, 116 (2003) (“Applying the requirements of Megan’s Laws to adolescent sex offenders may have a negative impact on the normal development of the youthful offender. This is contrary to the fundamental underpinnings of the juvenile justice system . . .”).

181. Freeman-Longo, *supra* note 57, at 231. “Public notification may be considered a form of punishment,” and is therefore contrary to rehabilitative juvenile justice. *Id.* at 227.

182. See FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING (2004) (describing New Jersey case where a ten-year-old boy was adjudicated delinquent of second degree sexual assault against his eight-year-old cousin, classified as a moderate-risk sex offender, and required to provide formal notification to all schools within a two-mile radius).

183. SARAH TOFTE, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 5-9 (Jaime Fellner ed., 2007), available at <http://www.hrw.org/reports/2007/us0907/us0907web.pdf>.

184. See Ayn Embar-Seddon, *Assessing, Managing, and Treating Juvenile Sexual Offenders*, 2004 J. INST. JUST. INT’L STUD. 112, 113.

tion is diverse in both age and type of offense.¹⁸⁵ Studies suggest that juvenile sex offenders are overwhelmingly male.¹⁸⁶

Both the media and policy-makers supporting juvenile registration often suggest that juvenile sex offenders are likely to re-offend in the same manner and frequency as adult offenders,¹⁸⁷ while the preliminary evidence supports the opposite conclusion.¹⁸⁸ In addition to being less likely to re-offend, juvenile sex offenders are less likely to engage in the most serious of sex offenses and rarely fit the criteria of the legal definition of pedophile.¹⁸⁹ Finally, unlike their adult counterparts, juveniles adjudicated as sex offenders are much more responsive to treatment.¹⁹⁰

Despite the sparse quantity of data on juvenile sex offender treatment, experts have suggested rationales for juveniles being especially responsive to treatment. One explanation is that juvenile conduct is often a result of normal juvenile experimentation¹⁹¹ as opposed to deeply engrained adult pathology.¹⁹²

The rationale behind sex offender registration and community notification is based largely on the notion that individuals convicted of sex offenses engage in behavior that is not responsive to treatment and therefore need to be publicly identified.¹⁹³ This justification is less applicable to juveniles given their less predatory behavior and susceptibility to effective treatment.¹⁹⁴ Since juvenile sex offenders are less likely to recidivate and are more susceptible to treatment, the conventional rationales for registra-

185. NCSBY: NAT'L CTR. ON SEXUAL BEHAVIOR OF YOUTH, <http://www.ncsby.org/> (last visited Mar. 10, 2011) (information gathered and assessed by the University of Oklahoma Health Sciences Center).

186. Victor I. Vieth, *When the Child Abuser Is a Child: Investigating, Prosecuting and Treating Juvenile Sex Offenders in the New Millennium*, 25 *HAMLIN L. REV.* 47, 50 (2001).

187. See generally Alexis O. Miranda & Colette L. Corcoran, *Comparison of Perpetration Characteristics Between Male Juvenile and Adult Sexual Offenders: Preliminary Results*, 12 *SEXUAL ABUSE: J. RES. & TREATMENT* 179 (2000).

188. Margaret A. Alexander, *Sexual Offender Treatment Efficacy Revisited*, 11 *SEXUAL ABUSE: J. RES. & TREATMENT* 2 (1999), available at <http://www.helping-people.info/articles/alexander.htm>.

189. See NCSBY, *supra* note 185. A pedophile is an individual who fantasizes about, is sexually aroused by, or experiences sexual urges toward prepubescents for a period of at least six months. See AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR* (4th ed. 2000).

190. See NCSBY, *supra* note 185; see also Lisa C. Trivits & N. Dickon Reppucci, *Application of Megan's Laws to Juveniles*, 57 *AM. PSYCHOLOGIST* 690, 697-98 (2002).

191. Trivits & Reppucci, *supra* note 190, at 696.

192. See Embar-Seddon, *supra* note 184, at 114.

193. See ERIC S. JANUS, *AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTATIVE STATE* 54-58 (2006).

194. See Robert E. Shepherd, *Advocating for the Juvenile Sex Offender, Part 1*, 21 *CRIM. JUST.* 53, 54 (2006).

tion and community notification do not seem applicable. Moreover, Elliott Currie, in his seminal work *Crime and Punishment in America*, suggests that registration schemes may actually hinder and not help the rehabilitation of juvenile offenders.¹⁹⁵

The name of the act itself, the Adam Walsh Child Protection and Safety Act (AWA), suggests that the intent of the authors of the legislation was to play to the public's fear for the safety of children (in naming the act for an abducted child).¹⁹⁶ The process of naming legislation after victimized children creates a political dichotomy that would position opponents as appearing to be less than vigilant in the protection of children.¹⁹⁷ Notwithstanding the lack of evidentiary support for registration and notification at the time of the passage of AWA, and the fact that there were no published studies concluding that "publicly accessible sex offender registers will have any beneficial effect on reducing sex crimes,"¹⁹⁸ those provisions remained in the final draft of the legislation. The twin combination of registration and public disclosure of those juveniles adjudicated as sex offenders contradicts both the protections of minors in juvenile courts as well as the primary aim of rehabilitation of juvenile offenders.¹⁹⁹

The media's role in the shaping of legislation includes the focus of stories as well as the absence of information substantiating the frequency with which the incidents occur. Although the bulk of offenses against children are committed by someone the child knows, the media's spotlight focuses primarily on accounts of stranger rapes and murders.

One of the results of ignoring the data and following the political and media rhetoric is legislation like the juvenile registration and community notification provisions of AWA. The rationale of giving sex offender registration information to the public is to better protect the public from dangerous sex offenders.²⁰⁰ Arguably, to protect the public, notification is necessary for juvenile offenders when there is some evidence such as threats

195. See generally ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* (1998).

196. See, e.g., 152 CONG. REC. H5725 (daily ed. July 25, 2006) (statement of Rep. Foley); 152 CONG. REC. H5726 (daily ed. July 25, 2006) (statement of Rep. Cramer).

197. See Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community Notification Laws to Juveniles*, 91 CALIF. L. REV. 163, 174 (2003).

198. 152 CONG. REC. H5724 (daily ed. July 25, 2006) (statement of Rep. Scott).

199. See, e.g., Lisa A. Stanger, Note, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 FORDHAM L. REV. 1123, 1127 (1996).

200. See CTR. FOR SEX OFFENDER MGMT., *SEX OFFENDER REGISTRATION: POLICY OVERVIEW AND COMPREHENSIVE PRACTICES 1-2* (1999), available at <http://www.csom.org/pubs/sexreg.pdf>; see also Sex Offender Registration and Notification Act, 42 U.S.C. § 16901 (2006).

of force or violence with the victims, high-risk assessment, or lack of responsiveness to treatment.²⁰¹ However, in other instances, registration and community notification may result in emotional responses that impede treatment.²⁰²

Because it is unclear that community notification is appropriate in all situations in which juveniles are adjudicated delinquent of sexual offenses,²⁰³ and for juveniles who, for example, engage in consensual sexual acts with perceived peers who are under the age of twelve as a result of newly-found sexual impulses, community notification would likely not be the appropriate course of action.²⁰⁴ Juveniles engaged in the previously described behavior need treatment and support—it is not necessarily the case that mandatory community notification will benefit the public and the juvenile offender.²⁰⁵

2. “Tough on Crime” Political Stance is Fueled by Media and Fear

National and political divisions about race enabled conservative Republican politicians to advocate particular crime and welfare policies for electoral advantage. During this period, news media coverage put a black face on crime, and political campaigns to get “tough on crime” and on youth violence turned juveniles into symbols of race and crime.²⁰⁶

Politicians use gory and sensationalist stories to avoid real debate, and to attract attention. One commentator has argued that the repeated use of these well-publicized stories by legislator-debaters is an important rhetorical device.²⁰⁷ For federal legislators debating Megan’s Law and New York

201. Robert E. Longo & Martin C. Calder, *The Use of Sex Offender Registration With Young People Who Sexually Abuse, in CHILDREN AND YOUNG PEOPLE WHO SEXUALLY ABUSE* 334, 350-51 (Martin C. Calder ed., 2005).

202. See Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 541 (2004) (“Adolescents not only respond well to the positive influences of rehabilitation, but they also respond poorly to the negative influences of mistreatment and perceived injustice.”).

203. Longo & Calder, *supra* note 201, at 343.

204. See Suzanne Meiners-Levy, *Challenging the Prosecution of Young “Sex Offenders”*: *How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 506 (2006).

205. See Longo & Calder, *supra* note 201, at 349; Garfinkle, *supra* note 197, at 198 (“[C]ommunity-notification requirements for children’s and adolescents’ sex crimes can significantly hinder these young people’s potential to grow up and out of their criminal behavior.”).

206. See KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY* 144 (1992); TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 135-65 (2001).

207. Filler, *supra* note 176, at 330.

representatives debating related legislation,²⁰⁸ “the citation and description of individual cases of child abduction, sexual abuse, and murder” that had received national media coverage dominated normative discussion of the justification for the registry.²⁰⁹ Reliance on these stories “proved that legislators watched the same gory news coverage as everyone else.”²¹⁰ Thus, the legislators helped to further engrain media-intensive stories onto the public consciousness.²¹¹ Like media accounts themselves, proponents of criminal statutes are prone to exaggerations and omissions. Throughout the discussion of Megan’s Law, the glut of anecdotal evidence of the threat posed by sex offenders obscured some potential objections to the legislation, including its harmful effects on less culpable offenders²¹² and its failure to address sexual abuse within the home.

New policies, programs, and tactics respond to issues that are “hot” in the media at that moment. While direct evidence of a legislative response to news reports is hard to come by, the media also shapes public policy indirectly, further expanding its influence. For example, studies show that news coverage of gangs in the 1990s led to the creation of a special task force that in turn increased prosecution.²¹³ When a shift in news trend diverted attention to other matters, the program was abandoned. When gang activity inevitably increased, the media once again began covering the problem and the programs were reinstated.²¹⁴ Presumably, this kind of responsiveness by policymakers to areas emphasized by the news is rooted in a belief that perceptions propagated by the media are proxies for popular sentiments. However, it may be too old of an extrapolation to assume that recognition of the salience of crime problem translates into support for specific policies.²¹⁵

208. Sex Offender Registry Act, N.Y. CORRECT. LAW § 168 (McKinney 1996).

209. Filler, *supra* note 176, at 330.

210. *Id.* at 352-53.

211. *Id.* at 349 (“When legislators recount gruesome crime narratives, they assist the media in reactivating old, popular crime stories.”).

212. For example, possessors of child pornography or offenders who had engaged in consensual sex with a minor.

213. See JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE 18-19 (Albert Roberts ed., 2004); BARRY KRISBERG, JUVENILE JUSTICE: REDEEMING OUR CHILDREN 3 (2005).

214. KRISBERG, *supra* note 213.

215. In a recent survey of public perceptions of white-collar crime, a majority of respondents believed violent crime merits more severe punishment than white-collar crime. See Kristy Holtfreter et al., *Public Perceptions of White Collar Crime and Punishment*, 36 J. CRIM. JUST. 50, 57 (2008). However, about two-thirds also supported providing equal or more resources to the government for the purposes of white-collar crime control. See *id.* These results demonstrate that public perception of the importance of a risk may not align directly with policy preferences.

“Soft on Crime” rhetoric—and the attendant fear of being labeled as such—leads to a lack of support for constitutionally protective criminal laws and policies, and instead drives support for harsh laws and punishment. The charge of being “soft on crime” is a frequent refrain during election campaigns²¹⁶ and a common source of partisan bickering. For today’s political figures, the suggestion that one is too friendly to criminals may be as damaging as allegations of Communist sympathies were during the Cold War.²¹⁷ Since at least the 1960s, judges have been accused of being “soft on crime,”²¹⁸ which in part explains the diminishing role of judicial discretion in many federal and state sentencing schemes.²¹⁹ Opinion surveys from the 1970s to the 1990s indicate that this charge is believed by the public, though in practice parole boards and prosecutors ultimately have the greatest influence on the length of sentences.²²⁰ The criticism is also levied against legislators and other elected officials, with tangible effects on criminal legislation.

Often legislators’ criminal justice views are morphed by the political demands of an elected seat. An empirical analysis of House of Representatives roll call votes from 1988 to 2004 lends quantitative support to the assumption that votes for punitive policies cull public favor.²²¹ Particularly, “Democrats who voted tough on crime . . . when crime was a highly salient issue” received more support come reelection, while those who did not had fewer votes.”²²² Fear of losing one’s seat to charges of “softness” on crime is manifested as two forms of pressure: to oppose bills intended to protect offenders’ constitutional rights and to support nearly any bill that increases the scope or severity of offenses.²²³ Kentucky’s groundbreaking Racial

216. See, e.g., Heidi Przybyla, *Obama May Be Targeted By Republican Charges He’s Soft On Crime*, BLOOMBERG, May 15, 2008, <http://www.bloomberg.com/apps/news?sid=aciAh7jvN8Is&pid=20601070> (discussing charges of then presidential candidate Obama’s “soft on crime” record in the Illinois Senate). Michael Dukakis’s loss in the 1988 presidential campaign is attributed to ads making similar claims.

217. See Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 533 (2009) (noting the shift began in the 1960s).

218. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 113-14 (2007).

219. See *id.* at 128.

220. *Id.* at 113.

221. See Jessica Bonney et al., Issue Accountability and the Mass Public: The Electoral Consequences of Legislative Voting on Crime Policy 8 (July 31, 2007) (unpublished manuscript), available at <http://www.princeton.edu/~bcwrone/crimeaccountability.pdf>.

222. *Id.* at 27.

223. President Obama’s vote against a bill creating a death penalty for gang members as an Illinois state senator was cited in an ad campaign questioning his crime politics, though the bill was ultimately vetoed by a Republican governor and, in Obama’s view, was unne-

Justice Act, intended to reduce biased imposition of the death penalty, is an example of the former; the bill was passed in the face of opposition by the usual “soft on crime” detractors.²²⁴ As for the latter, increasingly bloated state criminal codes can be traced to legislators’ “common reluctance to appear ‘soft on crime.’”²²⁵ According to one view, state legislatures have become “‘offense factories,’ churning out more and more narrow, unnecessary and often counterproductive new offenses.”²²⁶ The problem of duplicative and/or contradictory offenses makes the law less accessible to lay people,²²⁷ compromises the “rule of law” by introducing too much police and prosecutorial discretion,²²⁸ complicates judicial interpretation of statutes,²²⁹ destroys the consistency of terms that was one of the more appealing features of the Model Penal Code reforms,²³⁰ and results in inconsistent punishment schemes.²³¹ While legislators themselves may recognize these drawbacks, their participation in the creation of new offenses is a matter of political expediency resistant to change:

When a new and unnecessary specific offense, such as “library theft,” is proposed, the issue becomes a referendum on whether legislators care about public libraries, not on whether the proposed legislation will actually do anything to combat the problem of theft or will instead have pernicious ramifications for the application of the criminal code’s general theft provision. As a result, the rational legislator is likely to vote in favor of the library theft bill because there is a clear constituency—library users, and taxpayers generally—that will benefit from its enactment, and no constituency to complain about the new provision’s more subtle and diffuse drawbacks.²³²

cessary due to “sufficient laws on the books.” See Heidi Przybyla, *supra* note 216. The attention is an illustration of the public assumption that any crime law should be endorsed.

224. See Justin R. Arnold, Note, *Race and the Death Penalty After McCleskey: A Case Study of Kentucky’s Racial Justice Act*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 93, 102-03 (2005). The bill’s sponsor famously characterized the provision as not soft on crime, but strong on justice. *Id.*

225. Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 644 (2005). Dawn Clark Netsch, a former Illinois state senator, characterized the political climate as an “enormous, almost hydraulic pressure to pass any criminal law bill that is offered, unless you don’t care about [keeping] the job.” *Id.* at 634.

226. *Id.* at 634.

227. *Id.* at 638.

228. *Id.* at 639.

229. *Id.*

230. *Id.* at 640.

231. *Id.* at 641.

232. *Id.* at 644-45.

Political pressure to pass a bill may result in hasty and poorly planned legislation. The dramatic change in the treatment of juvenile offenders in New York in the late 1970s can be traced to a particular high-profile crime and political climate. When Willie Bosket shot and killed two subway passengers in the course of a robbery, the juvenile court with sole jurisdiction over the fifteen-year-old provided for his release at age twenty-one.²³³ The crime and sentencing occurred in the midst of a reelection campaign of Governor Hugh Carey, who had been labeled “soft on crime” by his detractors.²³⁴ Two weeks later, he called the legislature into a special session to modify the law to permit transfers of juveniles to criminal court when charged with particular offenses.²³⁵ President Clinton’s reelection campaign, coupled with fears aroused by the Oklahoma City bombing, are similarly credited with the passage of the Antiterrorism and Effective Death Penalty Act of 1996, which limited habeas corpus relief and reduced federal review of death penalty sentences.²³⁶ While legislators and executives are more likely to cast criminal reform in moral terms, their ulterior—or complementary—political motives cannot be ignored. “The news media are not mirrors, simply reflecting events in society. Rather, media content is shaped by economic and marketing considerations that frequently override traditional journalistic criteria for newsworthiness.”²³⁷

Media also influences political acquiescence in or support for particularly harsh policies on crime and offenders. For example, if we broaden the scope of public policy beyond legislative evidence, we see other examples of ways the media’s intense coverage of an issue can influence public opinion and, thereby, affect policymaking. Joseph Arpaio, the sheriff of Maricopa County, Arizona, offers an example. He proclaims himself “America’s Toughest Sheriff” and has earned that distinction by adopting harsh, unorthodox practices in his jail that draw media attention locally,²³⁸ nation-

233. See Beale, *supra* note 217, at 534.

234. *Id.*

235. The result was the Juvenile Offender Act of 1978, 1978 N.Y. Laws ch. 478.

236. See Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What’s Wrong With It and How to Fix It*, 33 CONN. L. REV. 919, 923 (2001) (explaining that Clinton wanted to “avoid charges that he was ‘soft’ on crime”). Clinton’s signing of a bill the same year rejecting a Sentencing Commission’s recommendation to reduce the disparity in punishments for crack and cocaine possession was also seen as a way of combating Republican criticism in an election year. See William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1282 n.301 (1996) (citing *Crack-Based Racial Bias*, SACRAMENTO BEE, Oct. 28 1995, at B6).

237. Beale, *supra* note 12, at 397-98.

238. See generally, e.g., Daniel Gonzalez, *Advocate Strikes Back on Arpaio Crime Sweeps*, ARIZ. REPUBLIC (Jan. 3, 2010), <http://www.azcentral.com/news/articles/2010/>

ally,²³⁹ and even internationally.²⁴⁰ The more outrageous the approach, the more likely the sheriff will garner attention and the more likely that he will continue to shape and benefit from appearing to be someone who is willing to take a hard stance against offenders. His reelection by Maricopa County voters by double-digit margins in 1996, 2000, 2004, and 2008 only served as positive reinforcement for a man who appears to crave notoriety. Indeed, Arpaio's support and the public's acceptance of his outrageous policies hinge on public fear, outrage, and distaste for offenders.

Arpaio made his first appearance on the national stage in 1995 when he reinstated chain gangs. There was certainly no evidence that chain gangs served any purpose of punishment other than embarrassing the inmates and gaining notoriety for the sheriff. But given the massive amount of attention he received, Arpaio began expanding this practice to women offenders in 1996 and then to juvenile offenders. Arpaio's next controversial move was to set up a "tent city" as a way to address jail overcrowding without building a new jail. Given the extreme temperatures in Phoenix—with daytime temperatures inside the tents reportedly reaching highs of 150 degrees in the top bunks²⁴¹—the tent city drew the attention of civil liberties organizations and the media and reinforced Arpaio's efforts to take increasingly controversial steps. Perhaps his most famous action remains his choice to require that inmates wear underwear.²⁴² In 2005, he marched nearly seven hundred maximum-security prisoners four blocks from Towers Jail to the newly opened Lower Buckeye jail wearing only pink underwear and flip-flops.²⁴³ The sheriff claimed that the minimal clothing was intended to prevent the concealment of keys.²⁴⁴ The policies that Arpaio institutes certainly enable him to make a name for himself. Indeed, the press coverage that he received due to the pink underwear enabled him to extend the use of

01/03/20100103immig-raid0103.html; *Sheriff Joe: An In-Depth Look at 'America's Toughest Sheriff'*, ARIZ. REPUBLIC, <http://www.azcentral.com/news/arpaio/arpaio-jailer.html>.

239. See generally, e.g., Martin Bashir & Max Culhane, 'America's Toughest Sheriff' Unapologetic About Tactics, *Inmate Treatment*, ABC NEWS/NIGHTLINE (Dec. 14, 2009), <http://abcnews.go.com/Nightline/sheriff-joe-arpaio-unapologetic-tactics-illegal-immigrant-crackdowns/story?id=9219341>; Jacques Billeaud & Amanda Lee Myers, *Arizona's Sheriff Joe Arpaio Not Relenting on Immigration Enforcement*, CNSNEWS.COM (July 30, 2010), <http://www.cnsnews.com/news/article/70260>; *The Board: America's Worst Sheriff (Joe Arpaio)*, N.Y. TIMES (Dec. 31, 2008, 17:13 EST), <http://theboard.blogs.nytimes.com/2008/12/31/americas-worst-sheriff-joe-arpaio/>.

240. See, e.g., Charley James, *Inside Joe Arpaio: Arizona Deputy Calls Him A "Disgrace To The Department"*, UK PROGRESSIVE (May 4, 2009), <http://www.ukprogressive.co.uk/inside-joe-arpaio-az-deputy-calls-him-a-disgrace-to-the-department/article4402.html>.

241. See *id.*

242. See *id.*

243. See *id.*

244. See *id.*

the color to handcuffs, which he used to promote a book that he had written about himself. But the policies have yet to establish that they do anything more than violate inmates' human and civil rights.²⁴⁵ Yet, his policies continue.

III. WHY DOES THIS HAPPEN?

Market salience is the relevant predictor of the content of the news. The way that the news is produced and the priorities of and pressures facing news organizations as businesses determine the content of the news. This is especially true when it comes to news coverage of crime. This Article lays out a preliminary discussion of market salience and news media crime coverage in the context of newspaper and television news. A discussion of Internet news sources and "new media" is beyond the scope of this Article.

A. State of the News Media Field

The preponderance of crime reporting in mainstream news media, as well as the selection of crimes to report and the way they are reported are in many ways determined by realities and pressures of journalism, as practiced in newsrooms by individual reporters. Reporters are under considerable pressure to produce enough quality, sufficiently "newsworthy" content to fill each edition of a newspaper.²⁴⁶ Depending on the paper, there is a lot of space to fill. This is especially true in this day of twenty-four hour news coverage when many newspapers maintain websites, which need to be updated with content in real time. In the context of newspaper reporting, the pressure is even greater on the individual reporter because significant staff cuts in the wake of economic downturn and steadily declining circulations have increased the difficulty of producing news content.²⁴⁷

Coverage of crime is attractive because crime news is plentiful and very easy to produce. Despite falling crime rates, crime occurs reliably. Further, there are information dissemination procedures and practices in place that make crime information easy for reporters to obtain. Reporters use press releases issued by district attorneys' offices, and briefings from police department public information officers to write crime stories. Moreover, if an editor or producer has additional space that he or she needs to fill and

245. See, e.g., *Graves v. Arpaio*, 633 F. Supp. 2d 834 (D. Ariz. 2009), *aff'd*, 623 F.3d 1043 (9th Cir. 2010).

246. See Beale, *supra* note 12, at 421-22.

247. See RONALD K.L. COLLINS, *DICTATING CONTENT: HOW ADVERTISING PRESSURE CAN CORRUPT A FREE PRESS* 32-49 (1992).

there has not been enough crime locally, he or she can obtain crime stories from the Associated Press.

1. Crime is Easy and Cheap to Cover

News media outlets are under pressure to produce news coverage that will attract an audience. This has a significant effect on what it is that is deemed “newsworthy.” Further, especially in the case of televised or internet-based news coverage, there are usually several different outlets competing for the same audience in the same market. Thus, each news media organization must strive to make its programming more appealing than that of its competitors, attracting the most viewers or readers—which in turn attracts advertisers and revenue. To do so, it must show its audience what they want to see: news that is engaging, interesting to watch, and relevant to their concerns.²⁴⁸ One may also infer that news audiences are most receptive to news presentations that reflect their own values, or at least do not challenge important values explicitly. This is a sea change from traditional journalistic notions of “newsworthiness,” focused on informing the public about important issues—“what they need” to know, rather than what they might want to read.²⁴⁹

a. Financial Pressures, Marketing, and Televised News

Beginning in the 1990s, the profitability of network televised news began to erode due to increased competition (cable news, the Internet), decreased audience for network news, and lifestyle changes that undermined the ability of potential viewers to watch televised news during traditional airing times such as the dinner hour. At this time, many networks were also purchased by large corporations that demanded more efficiency and a greater profit margin.²⁵⁰ As a result of these pressures, television network

248. See PROJECT FOR EXCELLENCE IN JOURNALISM, *Network TV: Summary Essay*, THE STATE OF THE NEWS MEDIA 2010: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2010), <http://stateofthemediamedia.org/2010/network-tv-summary-essay/> (“The economics of network news are challenging but the problems may be more tied to the structure of the financial model than to ratings. Broadcast network revenues come almost entirely from advertising, while cable channels get half their revenue from subscription fees from cable operators. By our reckoning, two of the three news divisions could claim a profit for 2009, ABC and NBC, though all three network news divisions instituted cutbacks in costs and personnel, and ABC’s cuts are becoming increasingly steep.”).

249. See PROJECT FOR EXCELLENCE IN JOURNALISM, *Network TV: Audience*, THE STATE OF THE NEWS MEDIA 2004: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2004).

250. *Id.*

news companies have striven to make its product more entertaining, create more content, and reduce the cost of creating it.²⁵¹

The amount of news time devoted to crime stories and the way those stories are presented are affected by perceived viewer demand. In other words, in order to attract more viewers and thus more revenue, television stations and newspapers will make their content more attractive to those viewers by giving them what the news organization believes they want and like to see.²⁵² This meant an increase in crime stories²⁵³ and an emphasis on other types of “soft news” and entertainment-like content, and the elimination of foreign news bureaus and other “hard news” producing mechanisms that are more expensive to maintain. Sensational coverage of crime was perfect for this purpose.²⁵⁴ Further, the fact that television is a visual medium akin to film means that television emphasizes stories that are “discrete, dramatic, visual incidents between individuals,” rather than more abstract stories about public policy or the political system.²⁵⁵

Also taken into account are advertising strategies privileging the attraction of viewers in more desirable, higher-spending demographics. These demographics may in turn have a perceived taste for more graphic, violent, and shocking content.²⁵⁶ Thus, the level of violent crime portrayed in the news is calibrated according to the target audiences they seek to attract and the products to be advertised to them. Violence is manipulated to “establish specific brand identities, increase viewership during periods when local

251. *Id.*; see also STATE OF THE NEWS MEDIA 2004: AN ANNUAL REPORT ON AMERICAN JOURNALISM, JOURNALISM.ORG (2004), <http://stateofthemedias.org/2004/>.

252. See, e.g., Danielle Soulliere, *Prime-Time Crime: Presentations of Crime and Its Participants on Popular Television Justice Programs*, 26 J. CRIME & JUST. 47 (2003); see also Kenneth Dowler, *Comparing American and Canadian Local Television Crime Stories: A Content Analysis*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 573, 587 (2004). Dowler found that, although there were very few significant differences in the types of crimes covered in local newscasts in American versus Canadian media, the American broadcast coverage tended to be more “sensationalistic” in nature. Dowler suggested that this likely stemmed from the greater range of crime news from which American news producers could pick that, in turn, allowed them to select the more sensationally slanted stories, and also from the tendency of the American media to “adopt . . . strategies that encourage sensationalistic coverage of relatively routine stories” in an apparent “attempt to attract viewers.” *Id.*

253. See *supra* Part I.

254. See generally CONVERGING MEDIA, DIVERGING POLITICS: A POLITICAL ECONOMY OF NEWS MEDIA IN THE UNITED STATES AND CANADA (David Skinner, James R. Compton & Michael Gasher eds., 2005).

255. Beale, *supra* note 12, at 429 (citing Susan Brandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 586, 588 (2004)).

256. *Id.* at 430-32 (citing JAMES T. HAMILTON, CHANNELING VIOLENCE: THE ECONOMIC MARKET FOR VIOLENCE TELEVISION PROGRAMMING 239, 242, 245-46, 249, 251-52, 264, 266, 271 tbl.2.14, 276 (1998)).

advertising rates are set, and counter especially popular programming on competitors' channels."²⁵⁷

b. Financial Pressures, Marketing, and Newspapers

Newspapers, just as television news, are also driven and constrained by market considerations. Typically, newspapers are publically owned and thus under pressure to develop value for their shareholders. Like televised news, newspapers face this pressure to generate high profits while at the same time confronting declining readership and increasing competition. As a result, newspapers and the content they generate are increasingly influenced by marketing considerations. Moreover, in giving consideration to marketing, they must keep in mind not only their own brand, but the marketing goals of their advertisers.²⁵⁸

2. Journalists, Like the Public, Embrace and Perpetuate Stereotypes and Misperceptions

“Journalists, unconsciously or consciously, ‘cast modern experience in terms of myth.’” For this reason, stories about crimes involving race, ethnicity, gender, class, or religion may be reported as, or constructed to fit “stereotypical, mythological formula of . . . stor[ies] long loved by the public.”²⁵⁹ In other words, crime stories that reinforce the socially beloved narratives that inform a certain worldview are likely to be reported prominently. The narratives that are chosen are presumably informed by the meta-values of the media as a social institution. That is to say, the role of the media is to inform and shape public opinion, and because the media is controlled by social elites, it is employed to reaffirm existing systems of power. This is the drive behind the uneven presentation of race in the media, particularly in crime stories.²⁶⁰ According to Entman and Gross, almost all research “reveals a consistent bias against” black people, particularly black defendants in the media.²⁶¹ At the same time, almost everything presented in news reinforces white privilege and the idea of a racial hierarchy with white people at the top.²⁶²

257. *Id.* at 421.

258. *Id.* at 421-22.

259. LOREN GHIGLIONE, *THE AMERICAN JOURNALIST: PARADOX OF THE PRESS* (1990).

260. Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 *LAW & CONTEMP. PROBS.* 93, 97-103 (2008).

261. *Id.* at 97 (citing ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* (2000)).

262. *Id.*

Conversely, newsmakers are drawn to stories that will shock and sensationalize. Thus, they may also be drawn to stories that defy existing expectations. However, Entman and Gross claim that these stories, of which the Duke Lacrosse story is one example, are the exceptions that prove the rule.²⁶³ One reason why it received such a great deal of media coverage is because it defied expectations, which were themselves created by other media trends.²⁶⁴

According to Pollak, “events that appear to disrupt expectations . . . are the stuff of news.”²⁶⁵ Further, a “law of opposites” is at work in news reporting in that the most common crimes (according to official crime statistics) are the least represented in the news, and the most sensational, least common crimes get the most coverage. This is because these crimes are often the most violent, sensational crimes and thus the most titillating for the audience of the news organization.²⁶⁶ As a result of this reporting trend, the public is more likely to perceive the least common crimes as far more common than they are in reality.²⁶⁷ According to Jewkes, crime stories become more newsworthy based on the following factors, or news values: how common the crime is; the risk that news consumers might be victimized; whether the crime has a sexual aspect to it; whether the crime involves a celebrity or high status individual; whether the crime occurred locally; the level of violence; the presence of graphic imagery; and whether youth are involved.²⁶⁸

Further, biases of the individual reporters as well as the rational, marketing focused priorities of the organization not only determine which stories are published or aired and how, but also how the people and events that form the bases of the stories are characterized and discussed.

3. *Bias May Flow From Where the News Media Get Their Information*

An important question raised by the practice of obtaining crime information from police stations and district attorneys is the question of bias. Given that both of these sources are in the business of apprehending and trying to punish criminals, or alleged criminals, it is possible that relying on them

263. *Id.* at 108-09.

264. See Jessica M. Pollak & Charles E. Kubrin, *Crime in the News: How Crimes, Offenders and Victims Are Portrayed in the Media*, 14 J. CRIM. JUST. & POPULAR CULTURE 59, 59 (2007).

265. *Id.* (quoting Reiner et al., *From Law and Order to Lynch Mobs: Crime News Since the Second World War*, in CRIMINAL VISIONS: MEDIA REPRESENTATIONS OF CRIME AND JUSTICE 13-32 (Paul Mason ed., 2003)).

266. See *id.* at 61.

267. See *id.*

268. See *id.* (citing YVONNE JEWKES, *MEDIA AND CRIME* 40 (2004)).

as sources of news may have the effect of creating news that is biased against alleged criminals and in favor of prosecutors. The Duke Lacrosse rape scandal and the way it played out in the media is a good illustration of both this phenomenon (relying on police and DA sources for crime information) and its effects.²⁶⁹ In that situation, many members of the media took information directly from the District Attorney, failed to examine the other side of the story, and called for a quick conviction without critically examining documents or assessing the credibility of sources. In this situation, as in many others, the presumption of innocence is largely treated as a formality.²⁷⁰ According to one study of Los Angeles television news that reports that twenty-seven percent of criminal suspects are described using prejudicial information, most of it cited to law enforcement or official sources used because they are easy to access and presumably credible.²⁷¹

B. A Need for Oversight

Reclaiming the high ground in criminal justice policy-making requires monitoring and oversight to track the degree of distortion that occurs. And, equally important, there is a genuine need for a watchdog role to track and expose the misinformation to the general public. Currently, such oversight is sorely lacking. Scholars have certainly raised awareness of the problem of media distortion and exaggeration in reporting, as well as exposing the political opportunism that inevitably flows from such distortion and infects public policy. But too often that important debate is confined to academic circles or arenas that the public does not typically access. Similarly, criminal justice actors and politicians may be aware of the effects of sound-bite policy, but they lack the stage, staying power, or incentives to raise the issues in a broader public setting. So, sound-bite based criminal justice policy-making continues to flourish almost without challenge.

But what might occur if one were to look for ways to challenge this phenomenon? One option might be to exhort the media to police itself. As with other professions, such as medicine, law, and business, the media could rely on its own professional ethics to raise question about—and compel examination of—its choices and their impact on policy-making. While one might question whether professional ethics are up to the task, ethics in

269. See Entman & Gross, *supra* note 260, at 96; see also Michael Welch et al., *Primary Definitions of Crime and Moral Panic: A Content Analysis of Experts' Quotes in Feature Newspaper Articles on Crime*, 34 J. RES. CRIME & DELINQ. 474, 474, 488 (1997) (demonstrating a general tendency in newspaper crime coverage to rely on law-enforcement officials and to under-represent the perspectives of defense lawyers).

270. See Entman & Gross, *supra* note 260, at 95.

271. *Id.* at 96.

journalism might offer more hope than in many other professions. Media professionals not only acknowledge the significance of their role in a free society, but are often quite cognizant of the power they wield. It is the ideals of the profession—to tell the truth to power even in the midst of countervailing forces that seek to distort or suppress it—that draws many into the profession. And it is that dogged determination to get the story right that could offer some measure of hope that the media might monitor itself. Granted, not all individual reporters are motivated by such ideals. Still, reporters generally at least acknowledge and embrace the need for accuracy and truth in reporting. But it is at the editorial or management levels where the concern about self-monitoring surfaces and raises question. There, we see the direct impact of market forces to attract a maximum audience and advertisers.²⁷² We see coverage choices governed more by viewership and profitability²⁷³ than truth and accuracy. So, it is not surprising that, thus far, self-policing mechanisms seem to have failed to provide adequate protection.

Reclaiming the high ground in policy-making also demands closer examination and oversight of political leaders and their legislative agendas. Legislators are driven by a different form of “market force”: the desire for election. Too often, that drive encourages the politician to seek media attention through hype and hyperbole and to adopt legislative stances that seem to respond to and exploit issues raised by and in the media. While scholars and criminal justice actors urge the adoption of evidence-based policy-making in their own circles, policymakers have not typically felt compelled to create environments where evidence-based and evidence-inspired²⁷⁴ policies can be debated, evaluated, and implemented.

At various points in our history—and largely due to political or financial forces—legislators have looked to examine and be guided by the impact of their legislation. Environmentalists in the 1970s managed to use their political clout at a time when there was greater national receptivity to the idea of environmental protection to demand that environmental impact state-

272. See CHRISTOPHER GASSON, *MEDIA EQUITIES: EVALUATION AND TRADING* 148-49 (1995) (describing a strong correlation between audience share of the three major U.S. networks and advertising revenue).

273. See *id.* at 147.

274. Evidence-based policies are those policies that are created after the development of evidence to support claims of projected success. There are a number of examples of policies which sound appealing in print, but ultimately have a negative impact. One of the problems with using only evidence-based practices is that they do not account for innovation. In conversations with former Urban Institute researcher and current U.S. Department of Justice advisor Amy Solomon and Criminal Justice Institute Executive Director Elyse Clawson, the term “Evidence-Inspired” evolved as a mantra to base innovative criminal justice policies on some form of evidentiary framework.

ments accompany any legislation that might adversely affect the environment.²⁷⁵ Taking a page from that playbook, if legislators are going to provide their own oversight, one might suggest in any criminal justice legislation the inclusion of “Correctional Impact Statements.” These statements would require a vigorous review of the financial and correctional impact of any new legislative initiatives. Like an environment impact study, this would at least raise awareness of the cost of legislation and might encourage greater scrutiny of its effectiveness in light of that cost. The goal of this new correctional assessment would be to move legislatures toward evidence-based policy-making.

Of course, even without correctional impact statements, we might in this time in our history begin to see greater attention on costs of legislation given the pervasive impact of and concern about the global economic crisis. The media and the public have heightened their concern about the fiscal choices that elected officials make in light of the lingering effects of the financial crisis on the local and national economy. The fact that citizens are losing their jobs and facing an uncertain financial future has shifted individual and public priorities toward fiscal conservatism and forced greater scrutiny of politicians’ choices to engage government and taxpayer resources. Thus, the political and financial environment could begin to move politicians toward greater focus on evidence-based policy-making.

But political and financial environments shift. And the existence and proliferation of political oversight groups suggests a pervasive distrust that politicians will be sufficiently motivated or capable of policing themselves. So, we might look for a political group or think tank to shine a light on the relationship between media distortion and criminal justice policy making. Of course, no such committee or group has emerged with any degree of effectiveness. Moreover, oversight committees and even “think tank” evaluations of public policy have often become mired in party politics such that they lose their effectiveness.

Given these challenges, genuine oversight of both the media and legislators may need to come from a source that technically lies outside the media profession and the political domain, but still has the potential to reach the public directly: social media. The impact of social media is just beginning to be examined. But we already see signs of its impact. Bloggers and individuals who use Twitter already provide real-time in-depth exposure to and analysis of events. They offer their followers more information than conventional media, taking the time to fill in details and commentary that con-

275. See R. Shep Melnick, *Strange Bedfellows Make Normal Politics: An Essay*, 9 DUKE ENVTL. L. & POL’Y F. 75, 76-78 (1998).

ventional media either lacks or simply limits. Indeed, blogs have created such a demand for more in depth coverage of stories that newspapers such as the *New York Times* now offer additional information on their website about stories printed in the paper. This additional information coupled with readers' ability to respond and ask questions of the reporters and columnists is far more comprehensive than traditional "letters to the editor."

Arguably, this involvement of the social media into the world of conventional journalism has begun to affect the substance and type of reporting. If criminal justice actors or academics who understand the distorting effect of reporting were to use social media more comprehensively than they currently do, a more nuanced debate could potentially take place. No longer confined to academic circles, a debate about accuracy and impact could occur on social networking sites, such as Facebook, and in blogs that would engage greater numbers of the public in critical discussions of the accuracy of what the media provides.

CONCLUSION

The impact of media on the development and implementation of public policy initiatives concerning crime are sure to continue. However, when it comes to crime coverage, programming suggests greater frequency and more violence than actually occurs. Politicians, wanting to appear responsive to this faux-increase in crime, often devise legislative "solutions" that have no basis in fact. These legislative efforts often make the problem worse. The question then becomes: Who is best positioned to provide oversight for both the media and legislatures that respond to this exaggerated coverage?

Market forces militate against self-policing by the media. In the same vein, elected officials often wary of being labeled "soft on crime" do not have the support to lead with evidence. Ironically, new social media may provide some level of review in both places. Ultimately, it is the public that will need to demand more from both elected officials and the "Fourth Estate."