NELLCO
NELLCO Legal Scholarship Repository

Duke Law School Faculty Scholarship Series | Duke Law School

2-1-2007

The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness

Sara Sun Beale
Duke University Law School

Follow this and additional works at: http://lsr.nellco.org/duke_fs

Recommended Citation
Beale, Sara Sun, "The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness" (2007). *Duke Law School Faculty Scholarship Series.* Paper 85.
http://lsr.nellco.org/duke_fs/85

This Article is brought to you for free and open access by the Duke Law School at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in Duke Law School Faculty Scholarship Series by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

William and Mary
Law Review

VOLUME 48 NO. 2, 2006

THE NEWS MEDIA'S INFLUENCE ON CRIMINAL JUSTICE POLICY: HOW MARKET-DRIVEN NEWS PROMOTES PUNITIVENESS

SARA SUN BEALE*

ABSTRACT

This Article argues that commercial pressures are determining the news media's contemporary treatment of crime and violence, and that the resulting coverage has played a major role in reshaping public opinion, and ultimately, criminal justice policy. The news media are not mirrors, simply reflecting events in society. Rather,

* Charles L.B. Lowndes Professor of Law, Duke University School of Law, sun@law.duke.edu. I would like to acknowledge the Eugene T. Bost, Jr., Research Professorship of the Charles A. Cannon Trust No. 3, for its support of my work. I would like to thank my research assistants Randy Cook, Scott Edson, Juliet Karastelev, Kimberly McCaughey, Michael Meyer, Melanie Merry Roewe, and Johanna Stein. Their work was of the highest quality, and this Article would not have been possible without them. Thanks also to James Hamilton, Maxwell McCombs, Ted Chiricos, and Sarah Eschholz for generously sharing their research, and to Darryl Brown, Dan Filler, Tim Kuhner, Richard McAdams, Marc Miller, Robert Mosteller, Eric Muller, Sam Pillsbury, Andy Taslitz, Ronald Wright, and the participants in the faculty workshops at Boston College, the University of Illinois, Florida State University, and the University of Texas for their helpful comments on drafts of this manuscript. Earlier versions were also presented at the Hoffinger Colloquium, Center for Research in Crime and Justice of the New York University School of Law, and at the International Society for the Reform of Criminal Law's Conference on Politics, Crime and Criminal Justice in Canberra, Australia.

media content is shaped by economic and marketing considerations that frequently override traditional journalistic criteria for newsworthiness. This Article explores local and national television's treatment of crime, where the extent and style of news stories about crime are being adjusted to meet perceived viewer demand and advertising strategies, which frequently emphasize particular demographic groups with a taste for violence. Newspapers also reflect a market-driven reshaping of style and content, resulting in a continuing emphasis on crime stories as a cost-effective means to grab readers' attention. This has all occurred despite more than a decade of sharply falling crime rates.

The Article also explores the accumulating social science evidence that the market-driven treatment of crime in the news media has the potential to skew American public opinion, increasing the support for various punitive policies such as mandatory minimums, longer sentences, and treating juveniles as adults. Through agenda setting and priming, media emphasis increases public concern about crime and makes it a more important criteria in assessing political leaders. Then, once the issue has been highlighted, the media's emphasis increases support for punitive policies, though the mechanisms through which this occurs are less well understood. This Article explores the evidence for the mechanisms of framing, increasing fear of crime, and instilling and reinforcing racial stereotypes and linking race to crime.

Although other factors, including distinctive features of American culture and the American political system, also play a role, this Article argues that the news media are having a significant and little-understood role in increasing support for punitive criminal justice policies. Because the news media is not the only influence on public opinion, this Article also considers how the news media interacts with other factors that shape public opinion regarding the criminal justice system.

TABLE OF CONTENTS

INTRODUCTION 400
I. THE PUNITIVE POLICIES OF THE END OF THE TWENTIETH CENTURY 405
A. Sentences for Adult Criminals, Rates of Imprisonment 405
B. Conditions of Incarceration, Treatment of Offenders . . 406
C. Treatment of Juvenile Offenders 407
II. CRIME RATES 408
III. A COMPARATIVE PERSPECTIVE 410
A. Comparing Punitiveness 410
B. Comparing International Crime Rates 413
C. The Comparative Bottom Line 417
IV. PUBLIC OPINION, PUNITIVENESS, POLITICS, AND THE NEWS MEDIA 418
A. How the Media Portray Crime and the Criminal Justice System 421
1. Network News 422
2. Local News 430
3. Newspapers 432
4. New Media and Shifts in Media Choice 436
B. How the Media Treatment of Crime Affects Public Opinion and Criminal Justice Policy 441
1. Mechanisms that Increase Crime Salience 442
2. Mechanisms that Produce Increased Punitiveness . 446
a. Framing 447
b. Fear 453
c. Racial Typification 458
3. Different Groups, Different Media, and Different Settings 462
4. What the Research Doesn't Tell Us 465
C. It's Not All the Media 468
1. American Culture 469
2. American Politics 471
3. The News Media Interact with Culture and Politics 475
CONCLUSION 476

INTRODUCTION

At the end of the twentieth century the criminal justice system in the United States underwent a major change, a shift toward more punitive policies, that has had a profound impact. Every U.S. jurisdiction adopted and implemented a wide range of harsher policies. In the federal system and in every state, sentences for adult offenders were substantially increased and in many instances made mandatory. Policies were adopted to make the conditions of incarceration more onerous for adult offenders, and every state adopted provisions allowing more juvenile offenders to be prosecuted and punished as adults. The result is a system that is significantly more punitive than that of any other Western democracy, and an incarceration rate that is—by a large margin—the highest in the world. Throughout this period crime was a highly salient political issue, and the policies in question had widespread public support.

Not surprisingly, there is a good deal of scholarship seeking to explain this fundamental shift in American criminal justice policy.[1] There have almost certainly been multiple causes. In prior work I explored two factors: (1) the role played by partisan politics that developed when civil rights and the Vietnam war dominated the political landscape; and (2) the cognitive processes of risk perception.[2] This Article addresses two other issues. The first is a preliminary question: were the new American policies simply a

---

1. *See, e.g.*, DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (Univ. of Chi. Press 2001) (emphasizing the distinctive social organization of late modernity); BRIAN JARVIS, CRUEL AND UNUSUAL: PUNISHMENT AND US CULTURE (2004) (exploring the influence of literature, art, film, and television); MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE (2004) (exploring seven other explanations and proposing a complex interaction of policy cycles, sensibilities, and moral panics); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (emphasizing the role of historic differences between the United States and Europe regarding class distinctions, which lead Europeans to reject degradation of prisoners because of commitment to eliminating low status treatments).

2. Sara Sun Beale, *What's Law Got To Do with It? The Political, Social, Psychological and Other Non-legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 32-44, 51-64 (1997).

response to sharply rising crime rates—and were these harsh policies responsible for bringing crime rates down? If so, nothing is left to explain. The first portion of this Article describes the adoption of the punitive policies and concludes that they cannot be explained, *at least in full*, by anything distinctive about the rates or types of crimes that occur in the United States. The door is thus open for other explanations.

The second portion of the Article explores the news media's treatment of crime during the 1990s and into the new century, the reasons for that treatment, and the question whether the treatment of crime—in addition to or instead of the crime itself, or other factors such as partisan politics—may have had a significant role in reshaping public opinion, and ultimately criminal justice policy.[3] I begin with the question of how the news media treats crime, focusing on economic factors and changes in media coverage. The news media are not mirrors, simply reflecting events in society. Rather, media content is shaped by economic and marketing considerations that override traditional journalistic criteria for newsworthiness. This trend is apparent in local and national television's treatment of crime, in which the extent and style of news stories about crime are adjusted to meet perceived viewer demand and advertising strategies, which frequently emphasize particular demographic groups with a taste for violence. In the case of local television news, this trend results in virtually all channels devoting a disproportionate part of their broadcast to violent crimes, and to many channels adopting a fast-paced, high-crime strategy based on an entertainment model. In the case of network news, this strategy results in much greater coverage of crime, especially murder, with a heavy emphasis on long-running, tabloid-style treatment of selected cases in both the evening news and newsmagazines. Newspapers also reflect a market-driven reshaping of style and content, accompanied by massive staff cuts, resulting in a continued emphasis on crime stories as a cost-effective means to grab readers' attention. These economic and marketing considerations shape the public's exposure to crime in the news media.

---

3. I assume, and do not attempt here to prove, that changes in public opinion can bring about changes in public policy. For a seminal work addressing that issue, see James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543 (1995).

Turning next to the question of how the news media's market-driven treatment of crime may influence public opinion and bolster support for punitive penal policies, I survey research in the social sciences and media studies. Two key points emerge from this survey. First, through agenda setting and priming, the news media's relentless emphasis increases public concern about crime and makes it a more important criteria in assessing political leaders. Once the issue has been highlighted, the news media's emphasis appears to increase support for punitive policies, though the mechanisms through which this occurs are less understood. I explore the evidence for several of these mechanisms. One strand of research focuses on framing, which appears to increase support for punitive criminal justice policies by enhancing viewers' acceptance of the assumption that crime results from individual choices rather than societal causes. Other research explores the connection between news media portrayals of crime and increased fear, which in turn has links to punitive attitudes. Finally, media appears to influence public attitudes about criminal justice policies by instilling and reinforcing racial stereotypes and linking race to crime. This Article thus builds on the work of media scholars such as Joseph Cappella and Kathleen Hall Jamieson, who have argued that the news media, traditionally thought to be one of the major institutions supporting democracy, may actually be undermining or distorting it.[4]

My focus here is a narrow one, necessarily leaving out many related—and potentially very important—facets of the news media's impact on criminal justice policy. First, the news media's treatment of crime may have other, more salutary effects that are not addressed here. For example, the media has helped focus attention on the cases of innocent persons who were wrongly convicted,

---

4. JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD 30-37 (1997); *see also* JAMES FALLOWS, BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY 5-6, 9 (Pantheon Books 1996) (describing why journalists have changed, how they undermine the press's credibility, and what they are doing to reform the profession); *cf.* William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 170 (arguing that the Supreme Court's constitutional decisions encourage a nonanalytical and/or celebrity-oriented style of journalism, rather than a public-interest style of journalism involving serious investigation and reporting of issues of public import).

promoting public support for DNA testing and other mechanisms to avoid miscarriages of justice.[5] The news media has provided extensive coverage of incidents of police abuse,[6] and may have played a role in promoting legal reforms with respect to other subjects such as drunk driving and child abuse.[7] Second, other factors may have a greater impact than the news media. My claim here is not that the news media is the sole or even the most important cause of America's uniquely punitive criminal justice

---

5. The *Chicago Tribune* is perhaps the leading example. It won the 2003 Pulitzer Prize for its editorials on the death penalty, and its investigative reporting helped lead to the exoneration of many individuals on death row and to the governor's moratorium on executions. For a collection of the *Tribune*'s death penalty stories from 1999, see National Online Youth Summit, Spring 2001: Does Capital Punishment Have a Future?, http://www.abanet.org/publiced/noys/01/learning/innocence.html (last visited Oct. 3, 2006). For an archived collection of the *Tribune*'s death penalty editorials from 2002, see Chicago Tribune Death Penalty Editorial, http://www.chicagotribune.com/news/nationworld/chi-dpeditorials-special,1,4085577.special (last visited Oct. 3, 2006).

The Medill Innocence Project at Northwestern University was one of the pioneers in employing techniques of investigative journalism to develop evidence exonerating persons serving long criminal sentences for crimes they did not commit, resulting in the exoneration and release of ten persons, five of whom were on death row. "The project's work, which has been featured on '60 Minutes,' '48 Hours,' 'Dateline NBC,' and the front pages of the New York Times and the Washington Post, has been cited for stimulating a national debate on the death penalty." Medill Innocence Project, http://www.medill.northwestern.edu/medill/ugrad/areas_of_study/medill_innocence_project.html (last visited Oct. 3, 2006).

6. For example, the extensive press coverage of California Highway Patrolmen beating motorist Rodney King, and of the sexual assault on New York prisoner Abner Louima, has been credited with generating congressional hearings and causing local and federal officials to examine the New York Police Department's policies. *See* Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 1 & n.1, 2 nn.2-3 (2001) (beginning her analysis with the comment that "[t]he television images [of King and Louima] are seared in our minds"); Asit S. Panwala, *The Failure of Local and Federal Prosecutors To Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 659 (2003); *cf.* Frank Rudy Cooper, *Understanding "Depolicing": Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355, 361 & n.33 (2002) (noting shift in New York's media coverage from support for police department being tough on crime to criticism of department for racism and brutality in the wake of the Louima case).

7. *See, e.g.*, Carolina D. Watts, Note, *"Indifferent [Towards] Indifference:" Post-*DeShaney *Accountability for Social Services Agencies when a Child Is Injured or Killed Under Their Protective Watch*, 30 PEPP. L. REV. 125, 126-28 (2002) (describing press coverage of the death of five-year-old Terrell Peterson and the "increased public outcry over" cases in which child protective services fail to protect children under their care from abuse).

policies,[8] but rather that worrisome evidence suggests that it is playing a significant role in shaping—or distorting—public opinion.[9]

Parts I and II set the stage by describing the punitive policies of the last part of the twentieth century and the drop in crime rates. Part III puts the U.S. developments in a comparative perspective, concluding that the United States' uniquely punitive policies cannot be explained, at least in full, by anything distinctive about the rates or types of crime that occur in this country. Part IV explores the link between the news media's treatment of crime and public pressure for punitive crime policies. It discusses the survey research and experimental simulations providing evidence that news media may significantly increase support for punitive policies. I do not, however, argue that the news media was the sole, or even the most important factor in promoting punitiveness. The U.S. movement toward punitiveness was well underway by the 1990s, the period of many of the media developments I describe. Part IV notes other factors that shape public opinion and considers how the news media interacts with them.

This Article brings together research from a variety of fields–including media studies, political science, and criminol-

---

8. Some of the other factors are addressed by the articles in *supra* note 1. Other forms of media, particularly entertainment media, may also have a significant effect. Only a few studies addressing public opinion regarding criminal justice policies have considered both entertainment media and news media. For a review of some of the literature on both forms of media, see R. Lance Holbert et al., *Fear, Authority, and Justice: Crime-Related TV Viewing and Endorsements of Capital Punishment and Gun Ownership*, 81 JOURNALISM & MASS COMM. Q. 343, 344-48 (2004). The article's authors did a comparative evaluation of three forms of television viewing: news, crime drama, and police reality. They found that TV news and police reality programming were consistently and positively related to fear of crime; news viewing, however, had only half the predictive value of police reality viewing. *Id.* at 351. They also found that viewing crime drama and police reality shows had a significant direct relationship with positive attitudes toward capital punishment, whereas viewing news programs had a negative relationship in one year studied and no statistical relationship in the other year. *Id.* at 351-52.

9. By its nature, the notion of distortion seems to require a normative baseline against which present policies and rates of imprisonment can be judged. Although I do not provide a normative theory, I believe that three key points emerge from the information presented in this Article that—especially taken together—strongly suggest that we are far from the policies that would emerge from an undistorted process. First, we have a uniquely high rate of imprisonment—unique as judged both by comparisons to other nations today, and unique by historic standards. Moreover, the public support for these policies is based to a significant degree on a clear factual error. Finally, racial stereotyping and bias appear to have distorted and influenced both the media's coverage and its effect on public opinion.

ogy–that has received too little attention from lawyers and legal academics, in an attempt to shed light on important forces that are playing a role in shaping criminal justice policy. For readers from those other fields, the Article connects these bodies of research with a variety of important changes in the criminal justice system.

I. THE PUNITIVE POLICIES OF THE END OF THE TWENTIETH CENTURY

A. Sentences for Adult Criminals, Rates of Imprisonment

The trend toward restructuring the sentencing process and increasing sentence severity was well underway in the 1980s, and it continued throughout the 1990s as imprisonment rates swelled to unprecedented levels. Many U.S. jurisdictions adopted mandatory minimum sentencing provisions in the 1980s,[10] with a similar but more comprehensive trend at the federal level involving both mandatory minimum penalty statutes and more severe and rigid federal sentencing guidelines.[11] In the 1990s, as the new higher sentences took effect, several states supplemented them with highly punitive recidivist statutes, many based on California's "three-strikes" law.[12] Although these statutes vary from jurisdiction to jurisdiction, the new recidivist statutes provided that the sentence

---

10. By 1983, forty-nine of the fifty states had adopted one or more mandatory minimum sentence provisions. MICHAEL H. TONRY, U.S. DEP'T OF JUSTICE, SENTENCING REFORM IMPACTS 25 (1987).

11. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7-10 (1991) (describing legislation passed in 1984, and at two-year intervals thereafter).

12. California's "three-strikes" law became effective March 7, 1994, and was later ratified by voters in a referendum. *See* CAL. PENAL CODE §§ 667, 1170.12 (West 1994). The provisions are called "three-strikes" laws based on a baseball analogy: after three strikes you are "out"—that is, subject to enhanced penalty, which in California is a mandatory sentence of life without parole. After California and Washington State adopted their three-strikes laws in 1993 and 1994, twenty-two other states and the federal government adopted new laws enhancing punishments for repeat felony offenders. *See generally* JOHN CLARK ET AL., NAT'L INST. OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION (1997); Michael G. Turner et al., *"Three Strikes and You're Out" Legislation: A National Assessment*, 59 FED. PROBATION 16, 17 (1995).

for a third, or in some cases a second, qualifying offense would be doubled or increased to life without parole.[13]

By the end of the twentieth century the combined effects of the sentencing changes brought about significant changes in the periods of incarceration served by offenders and in the rates of imprisonment in the United States. In the federal courts the average sentence imposed in 1995 was nearly twice that imposed in 1980,[14] and federal offenders sentenced in 1998 will spend about twice as long in prison, on average, as offenders sentenced in 1984.[15] By 2004, the rate of imprisonment in the United States was estimated at 724 per 100,000 population, by far the highest in the world.[16] Part III puts the U.S. experience in a comparative perspective.

B. Conditions of Incarceration, Treatment of Offenders

Many jurisdictions have deliberately made the conditions of imprisonment more harsh. For example, one study in 1995 found that thirty states had abolished a variety of inmate privileges during the past year—such as weight lifting, family visits, and furloughs to attend family funerals—and most other states had drastically restricted privileges.[17] One notoriously tough-on-crime Arizona sheriff, who said that inmates "'should be made to suffer, in a humane sort of way,'" housed inmates in military-surplus tents set on gravel fields "where temperatures often reach 110 degrees and can drop below freezing during winter nights."[18]

---

13. *See* CLARK ET AL., *supra* note 12, at 2, 12-13; Turner et al., *supra* note 12, at 19.

14. Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 FED. SENT'G REP. 12, 17 (1999).

15. *Id*.

16. *See* THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: GROWTH IN POPULATION CONTINUES 4 (2006) [hereinafter NEW INCARCERATION FIGURES], *available at* http://www.sentencingproject.org/pdfs/1044.pdf. Russia, the former world leader, has reduced its rate to 564 per 100,000 population; this number is expected to continue to decrease due to a prisoner amnesty program implemented by Russia's Parliament in 2000. *Id.* at 1.

17. *See* Peter Morrison, *States Cut Back on Inmates' Privileges*, NAT'L L.J., Aug. 21, 1995, at A22.

18. Peter Morrison, *The New Chain Gang; States' New 'Get-Tough' Prison Policies Are Gaining Support from Politicians and the Courts*, NAT'L L.J., Aug. 21, 1995, at A1 (quoting Arizona's Maricopa County Sheriff Joe Arpaio). In 2006 Sheriff Arpaio, who continues these policies, toured Britain and recommended that British prisons adopt his practices. Emily Smith, *Your Jails Are Like a Holiday Camp*, SUN (London), July 24, 2006.

During this period, eight states reintroduced the chain gang—in which shackled inmates work outside the prisons—and chain gangs were considered in other states as well.[19] Historically, chain gangs were associated with harsh living conditions, brutality, and high rates of mortality; public exposés of these conditions led to the elimination of chain gangs in almost all states in the 1930s and 1940s.[20] Contemporary support for the reintroduction of chain gangs is explicitly punitive. One California legislator's bill to authorize chain gangs was intended, in his words, "to punish, not rehabilitate."[21]

C. Treatment of Juvenile Offenders

Beginning in the mid-1990s there was a fundamental shift in juvenile justice policy in the United States and a major change in the treatment of serious and violent juvenile offenders. Between 1992 and 1995, forty states adopted or modified laws making it easier to prosecute juveniles as adults in criminal court, and forty-seven states and the District of Columbia made changes in their laws targeting juveniles who commit serious or violent crimes.[22] In

---

19. As of 1997, chain gangs had been introduced in Alabama, Arizona, Florida, Iowa, Oklahoma, Nevada, Tennessee, and Wisconsin; legislation proposing chain gang requirements had been introduced in California, Indiana, Montana, and Tennessee; and proposals for chain gangs had surfaced in West Virginia, South Carolina, Washington, and Vermont. Wendy Imatani Peloso, Note, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459, 1459-60 (1997). In 2005 Butler County, Ohio, instituted chain gangs, but the county's implementation seemed less harsh than the programs initiated during the 1990s. *See* Janice Morse, *Even Chain-Gang Laborers Like the Idea*, CINCINNATI ENQUIRER, May 11, 2005, at 2C (noting that prisoners would get regular breaks and that some preferred being out of doors). "The term 'chain gang' was derived from the fact that prisoners had a heavy steel or iron shackle permanently riveted to each ankle, with a heavy chain permanently fixed to connect the shackles." Peloso, *supra* at 1465. Instead of heavy, permanent irons, contemporary prisoners on the chain gang wear removable chains made of lightweight steel and leather cuffs or metal shackles on each leg. *Id*. at 1468.

20. For a discussion of the hardships faced by inmates sentenced to chain gangs, see Peloso, *supra* note 19, at 1463-67. *See generally* Emily S. Sanford, Note and Comment, *The Propriety and Constitutionality of Chain Gangs*, 13 GA. ST. U. L. REV. 1155 (1997).

21. Daniel M. Weintraub, *No Chains, No Gain, Says Legislator Who Thinks Prisons Too Soft*, ORANGE COUNTY REG., Apr. 14, 1996, at A03 (quoting California State Assemblyman Brett Granlund).

22. PATRICIA TORBET ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3, 59

contrast to the traditional regime, which based dispositions on the juvenile's needs with the goal of rehabilitation, states have increasingly shifted to dispositions based on the offense with the goal of punishment.[23] As a result, more juveniles are being charged and tried in criminal court, detained longer, and incarcerated in adult correctional institutions than ever before.[24] These trends continued throughout the 1990s and into the new millennium,[25] though recent efforts to reverse the tide have emerged.[26]

II. CRIME RATES

How do crime rates fit into the picture? Like every other industrialized Western nation, the United States experienced an increase in crime following World War II.[27] But we are no longer in

---

(1996), *available at* http://www.ncjrs.gov/pdffiles/statresp.pdf.

23. *Id*. at xi.

24. *Id.* at 6.

25. *See, e.g.*, PATRICIA TORBET & LINDA SZYMANSKI, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996-97 UPDATE 2 (1998) (noting that twenty-five states made changes to their statutes permitting transfers of juveniles to adult court in 1996 and 1997).

26. Reformers are introducing research on cognitive development during adolescence to provide a basis for constitutional limitations through the Cruel and Unusual Punishment Clause, as well as a basis for reevaluating the competency of adolescents to participate in criminal proceedings. These efforts led to the Supreme Court's holding in *Roper v. Simmons*, 543 U.S. 551 (2005), that the Eighth Amendment prohibits the execution of a person who committed the relevant offense as a juvenile. For a critical discussion of the evidence upon which the Court relied, see Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 380 (2006); *see also* Symposium, *The Mind of a Child: The Relationship Between Brain Development, Cognitive Functioning, and Accountability Under the Law*, 3 OHIO ST. J. CRIM. L. 317 *passim* (2006).

The MacArthur Foundation has developed a research network to design and implement new research on adolescent development and juvenile justice, and to communicate the results of these activities to policymakers, practitioners, journalists, and other social scientists and legal scholars. The network's activities are described on its website. *See* Research Network on Adolescent Development and Juvenile Justice, Our Purpose, http://www.mac-adoldev-juvjustice.org/page2.html (last visited Oct. 4, 2006).

27. *See* GARLAND, *supra* note 1, at 90 (reporting "a rapid and sustained increase in recorded crime rates–not just in the USA and the UK, but in every Western industrialized nation," and concluding that "[t]he most likely explanation for a cross-national pattern of rapid and sustained increase is a social structural one that points to common patterns of social development"); LEON RADZINOWICZ & JOAN KING, THE GROWTH OF CRIME: THE INTERNATIONAL EXPERIENCE 3-9 (1977); TONRY, *supra* note 1, at 28-33 (comparing trends in U.S. crime rates with those from Finland and Germany).

a high-crime era. During the last fifteen years the United States has experienced not only an unprecedented increase in incarceration rates, but also a remarkable decrease in crime. The 1990s saw "the largest decline in violent crime rates in more than half a century."[28] By 2000, homicide and robbery rates were at their lowest levels in the United States in more than twenty-five years,[29] and serious violent crime continued to decline.[30] Both victimization surveys and reported crimes showed steep drops.[31] By 2004 the violent victimization rate reached its lowest level in the thirty-year history of the National Crime Victimization Survey, a rate less than half of that in 1993.[32] Similarly, property victimization—including larceny, burglary, and theft in general—declined through 2004, continuing a twenty-nine year trend.[33] Reported crimes showed similar trends.[34]

For many people these developments suggest a relatively simple story: our crime rates increased, harsher penalties were needed and imposed, and accordingly crime rates fell. Indeed, a widely shared belief is that our penal policies have been a necessary response to uniquely high American crime rates. Part III argues that this belief is simply not accurate. Although the experience of crime certainly

---

28. Gary LaFree, *Explaining the Crime Bust of the 1990s*, 91 J. CRIM. L. & CRIMINOLOGY 269, 269 (2000) (reviewing ALFRED BLUMSTEIN & JOEL WALLMAN, THE CRIME DROP IN AMERICA (2000)).

29. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES: LONG TERM TRENDS, *available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm (showing yearly homicide rates from 1950-2000); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME AND VICTIMIZATION SURVEY: VIOLENT CRIME TRENDS, 1973-2001, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/viortrdtab.htm (showing yearly robbery rates since 1973).

30. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SERIOUS VIOLENT CRIME LEVELS DECLINED SINCE 1993, *available at* http://www.ojp.usdoj.gov/bjs/glance/cv2.htm.

31. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME AND VICTIMS STATISTICS, *available at* http://www.ojp.usdoj.gov/bjs/cvict.htm.

32. SHANNAN M. CATALANO, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2004, at 1, 5 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv04.pdf (noting that from 1993 to 2004 the overall violent crime rate fell 57%, burglary fell 49%, and motor vehicle theft fell 54%).

33. *Id.*; *see also* Jan M. Chaiken, *Crunching Numbers: Crime and Incarceration at the End of the Millennium,* NAT'L INST. OF JUST. J., Jan. 2000, at 10-12 (discussing the decline in property crimes).

34. *See generally* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2004, at 72 tbl. 1-1a [hereinafter CRIME IN THE UNITED STATES], *available at* http://www.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section2.pdf.

played a role in the adoption, implementation, and retention of our increasingly punitive penal policies, Part III explains why crime rates cannot provide a sufficient explanation for the unique developments in the United States. The argument presented here has been explored in greater detail elsewhere.[35] It is presented here, however, in order to contradict what many regard as conventional wisdom, and thus clear the way for an analysis of the news media's impact.

III. A COMPARATIVE PERSPECTIVE

How do the developments described in Part I compare to those in other nations? The American experience is distinctive. Although other nations have seen increases in punitive policies, the scale of incarceration, as well as the continued use of capital punishment, have set the United States far apart from its overseas counterparts. An examination of international crime developments, furthermore, shows that crime rates cannot fully account for the differences in incarceration rates, indicating that other forces must be driving American punitiveness.

A. Comparing Punitiveness

Although other nations have seen a recent rise in punitive policies,[36] a significant disparity exists between the United States and other industrialized countries. The Unites States confines a larger proportion of its population than any other nation.[37] The

35. For a detailed analysis of the relationship between the long term crime trends in the United States and other nations, see TONRY, *supra* note 1, at 101-30.

36. *See, e.g.*, GARLAND, *supra* note 1, at 7-9; Roy Walmsley, *World Prison Population: Facts, Trends, and Solutions* (European Institute for Crime Prevention and Control, HEUNI Paper No. 15, 2001), *available at* http://www. heuni.fi/uploads/6mq2zlwaaw3ut.pdf (detailing a growth in the world prison population and discussing the social, economic, and political implications). Garland argues that over the past twenty years both the United States and the United Kingdom have seen a similar rise of a "just deserts" penological ideal that focuses on punishment and has led to harsher policies. GARLAND, *supra* note 1, at 9. However, Garland also acknowledges that, though the trends in the United States and the United Kingdom are similar, "salient" differences exist between the two nations, including a vast disparity in incarceration rates. *See id.* at 7, 212 n.5.

37. *See* NEW INCARCERATION FIGURES, *supra* note 16, at 1.

United States' incarceration rate, 724 per 100,000 population, is five times that of England and Wales,[38] Europe's leading jailor,[39] and more than twelve times the Japanese rate.[40]

One important factor that has contributed to this disparity is the United States' greater tendency to rely on incarceration in sentencing for nonviolent offenses. The Bureau of Justice Statistics's cross-national study found that the United States and Sweden were more likely than any other countries to incarcerate burglars, and that the average sentence for burglars was generally highest in the United States.[41] For example, in the mid-1990s, 59.5% of burglars convicted in the United States were incarcerated and served an average of eighteen months.[42] In England and Wales, however, a convicted burglar had a 38.2% chance of being incarcerated, and those incarcerated could expect to serve 6.5 months.[43] Similarly, someone convicted of drug possession in the mid-1990s was 8.75 times as likely to be sentenced to imprisonment in the United States than if convicted in Germany.[44] The same pattern applied to offenses involving the potential for violence. In general, the United States

---

38. *See id.* at 5 (listing the British incarceration rate as 145 per 100,000 population).

39. *See* Alan Travis, *UK Now Europe's Jail Capital*, GUARDIAN, Feb. 27, 2003, *available at* http://www.guardian.co.uk/prisons/story/0,7369,903763,00.html.

40. *See* NEW INCARCERATION FIGURES, *supra* note 16, at 5 (listing the Japanese incarceration rate as 60 per 100,000 population).

41. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CROSS-NATIONAL STUDIES IN CRIME AND JUSTICE, at viii-x (David P. Farrington et al. eds., 2004) [hereinafter CROSS-NATIONAL STUDIES]. Note, however, that beginning in 1994 the Australian penalties exceeded those in the United States. *Id.* at x.

42. PATRICK A. LANGAN & DAVID P. FARRINGTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME AND JUSTICE STATISTICS IN THE UNITED STATES AND IN ENGLAND AND WALES, 1981-96, 73 app. tbl. 7 (1998) (showing U.S. statistics for 1994 and United Kingdom statistics for 1995); *id.* at 77 app. tbl. 11. The study showed that for murder convictions, 95.8% in the United States and 94.3% in England and Wales were sentenced to incarceration. *Id.* at 73 app. tbl. 7.

43. *Id.* at 73 app. tbl. 7, 77 app. tbl. 11.

44. RICHARD S. FRASE, SENTENCING IN GERMANY AND THE UNITED STATES: COMPARING ÄPFEL WITH APPLES 18 tbl. 2 (2001) (revealing that 8% of offenders convicted for drug possession were incarcerated in Germany in 1997, compared to 70% in the United States in 1996). Frase concludes that, in the context of nonviolent offenses, "there is much for Americans to learn from the German experience with non-custodial sanctions," namely "how to deal humanely and efficiently with high-volume, low- and medium-severity crimes." *Id.* at 58.

had the highest probability of incarceration and longest average time served for robbery.[45]

The contrast between the United States and other Western nations in sentencing policy appears particularly sharp in relation to capital punishment.[46] Since *Gregg v. Georgia* in 1976,[47] the American death penalty has experienced a sort of renaissance,[48] and more than eight hundred people have been executed.[49] By contrast, the last state-sanctioned execution in western Europe occurred in 1977.[50] In the intervening years Europeans have developed a revulsion to the notion of government-sanctioned execution, seeing the practice as inconsistent with the idea of a civil society.[51] Until 2005, when the Supreme Court held that the practice violated the Eighth Amendment, twenty states permitted the execution of offenders who were juveniles when they committed their crimes.[52] The practice violated the United Nations Convention on the Rights of the Child, which had been ratified by every country in the world except the United States and Somalia.[53]

---

45. *See* CROSS-NATIONAL STUDIES, *supra* note 41, at xii (reporting that the probability of custody following a conviction for robbery was highest in the United States and Sweden, and average time served was highest in the United States and Australia).

46. *See generally* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 1 (2003) (describing the profound changes in policy that have created conflict between the United States and other developed countries).

47. 428 U.S. 153 (1976) (plurality opinion). *See generally* Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion).

48. *See* ZIMRING, *supra* note 46, at 50.

49. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NUMBER OF PERSONS EXECUTED IN THE UNITED STATES, 1930-2005, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm.

50. ZIMRING, *supra* note 46, at 16.

51. *See id.* at 40.

52. *See* Roper v. Simmons, 543 U.S. 551, app. A at 579-80 (2005) (listing the twenty states).

53. *See id.* at 576 (citing United Nations Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3); *see also* ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 1 & n.2 (3d ed. 2002) (citing Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, G.A. Res. 29/118, Annex, U.N. Doc. E/1984/50/Annex (May 25, 1984)).

B. Comparing International Crime Rates

Do crime rates explain or justify the difference in incarceration rates and overall punitiveness? More crime, or more violent crime, may account for a higher incarceration rate and justify the use of harsher penalties. Conversely, a rise in punitiveness may lead to a drop in crime rates and thus be desirable. Although absolute comparisons of transnational crime trends are difficult to make,[54] a review of international crime rates and developments suggests that American punitiveness cannot be fully explained or justified by differences in American crime patterns.

The U.S. crime rate is not particularly high compared with other industrialized nations that have far lower rates of incarceration.[55] As of 1999, England and Wales, Denmark, and Finland all reported more crime per capita than the United States, and the Netherlands, Canada, and Germany reported rates not significantly lower than the United States rate.[56] Yet the United States' incarceration rate is at least five times that of each of these nations.[57]

To be sure, the United States does have a significantly higher homicide rate than its counterparts abroad.[58] However, neither

---

54. Differences in recording practices and in crime definitions across national boundaries, as well as differences in enforcement policies and political pressures behind reported crime statistics, all contribute to this difficulty. PHILLIP L. REICHEL, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 38 (2d ed. 1999). These differences do not mean that nothing can be learned from a comparative crime analysis, but only that such an analysis must be understood in light of the inherent problems in making absolute comparisons.

55. This conclusion was also found by Leena Kurki when reviewing the International Crime and Victimization Survey in 1997. Leena Kurki, *International Crime Survey: American Rates About Average*, OVERCROWDED TIMES, Oct. 1997, at 1, 4.

56. OFFICE ON DRUGS AND CRIME, UNITED NATIONS, SEVENTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS, COVERING THE PERIOD 1998-2000, at 10-12 tbl.2.01 [hereinafter 1998-2000 CRIME TRENDS], *available at* http://www.unodc.org/pdf/crime/seventh_survey/7sv.pdf (listing rates of crimes recorded in police statistics per 100,000 inhabitants for the year 1999: United States, 8517.19; England and Wales, 10,061.11; Denmark, 9291.31; Finland, 9866.52; Netherlands, 8128.66; Canada, 8117.75; Germany, 7676.39).

57. *See* THE SENTENCING PROJECT, U.S. PRISON POPULATIONS—TRENDS AND IMPLICATIONS 5 (2004), *available at* http://sentencingproject.org/pdfs/1044.pdf.

58. 1998-2000 CRIME TRENDS, *supra* note 56, at 13-15 tbl.2.02 (listing 1999 rates of complete homicides, per 100,000 inhabitants: United States, 4.55; England and Wales, 1.45; Germany, 1.22; Denmark, 0.98; Finland, 2.77; Ireland, 1.01; Spain, 1.16; and the Netherlands, 1.42); *cf.* FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (1997) (arguing that the higher American homicide

homicide alone nor violent crime in general can fully account for the higher U.S. incarceration rate. According to the Bureau of Justice Statistics, in 2001 violent offenders accounted for 49% of state inmates[59] and about 11.3% of federal inmates.[60] If we make the generous assumption that half of all people incarcerated in the United States were violent offenders, the U.S. nonviolent incarceration rate would be at least 362 per 100,000 population,[61] as compared to the total British incarceration rate of 145 per 100,000 population.[62] Because the British have the highest rate of incarceration among industrialized nations other than the United States, we clearly incarcerate many more nonviolent offenders than other nations, and our incarceration rates are not simply the result of our having more crime, or more violent crime, than other nations.

What about the argument that our high rates of incarceration were the cause of the sharp declines in crime that the United States experienced during the 1990s? Most scholars agree that altering sentencing policy in the United States, and elsewhere, has a *relatively small* influence on criminal activity,[63] and that social

---

rate is the result of a significantly higher propensity for a very small portion of American crimes to result in death).

59. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2001, at 1 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf.

60. *See* PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2002, at 11 tbl.18 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf (showing that 16,117 out of 142,766 federal prisoners were violent offenders).

61. *See* NEW INCARCERATION FIGURES, *supra* note 16, at 5 (showing the United States incarceration rate as 724 per 100,000).

62. *See id.*

63. *See, e.g.*, HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 90 (2003) (noting researchers' general conclusion that "[c]rime rates can be brought down with the heavier use of prisons and jails, but the total amount of crime reduction tends to be disappointingly small, and most of the crimes that are avoided are property crimes as opposed to the serious violent offenses that everyone wants most to address"); *id.* at 98-105 (distinguishing the impact of increased incarceration on different offenses and concluding that it has been most successful in reducing property crime, least successful in reducing drug crime, and modestly successful in reducing serious violent offenses—where "a fair assessment might be a 'Gentlemen C'" grade); Michael Tonry & David P. Farrington, *Strategic Approaches to Crime Prevention*, *in* CRIME & JUSTICE: A REVIEW OF RESEARCH 6 (Michael Tonry ed., 1995) ("There is widespread agreement over time and space that alterations in sanctioning policies are unlikely substantially to influence crime rates."); Walmsley, *supra* note 36, at 18 ("[R]esearch has shown that to have a significant effect on crime levels you would have to lock up far more people and for longer periods—at greater

forces operating independently of punitive legislation account for most of the change in crime rates.[64] Comparative analysis "shows

public expense—than even the countries who are most enthusiastic about imprisonment have been willing to do."); *see also* THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 4-8 (2005), *available at* http://www.sentencingproject.org/pdfs/incarceration-crime.pdf (noting that economic growth, changes in drug markets, strategic policing, and community responses to crime all contributed to the decline in crime during the 1990s, and that other factors such as diminishing returns and the continued demand for drugs place significant limits on the degree to which incarceration can reduce crime rates); Ayse İmrohoroğlu et al., *What Accounts for the Decline in Crime?*, 45 INT'L ECON. REV. 707 (2004) (employing a dynamic economic model and finding the two most important determinants of crime from 1980 to 1996, in order of importance, were a higher probability of apprehension, stronger economy, and aging of the population; that the effect of unemployment was negligible; and that increased income inequality prevented a larger decline); Joachim J. Savelsberg, *Knowledge, Domination, and Criminal Punishment*, 99 AM. J. SOC. 911, 916-19 (1994) (analyzing crime rates and imprisonment rates in the United States and Germany, and concluding that "crime and criminal punishment seem to develop causally independently of each other in each country").

One recent study did find a substantial deterrent effect from three-strikes legislation. *See* Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002) (applying county-by-county data to an economic model finding a greater deterrent effect from California's three-strikes legislation). Shepherd claims that during the first two years, the legislation deterred "approximately eight murders, 3952 aggravated assaults, 10,672 robberies, and 384,488 burglaries." *Id.* at 159. Shepherd's study presents several potential problems. First, econometric models may be inadequate to approximate the behavior of real individuals. For instance, Shepherd's model posits that individuals make decisions to commit crimes on a utility-maximization basis. Even if this point is valid, it may not capture crimes committed in the "spur of the moment" or "crimes of passion" that work counter to an individual's good reason. Furthermore, Shepherd has no estimate for nonquantifiable factors—for example, those not related to income and loss—and the potential error is great. Second, the estimated deterrence in her model does not comport with reality. Her results showed a deterrence of 384,488 burglaries from 1994 to 1996. *Id.* However, a review of data from the Bureau of Justice Statistics shows that reported burglaries decreased from a level of 384,257 in 1994 to 312,212 in 1996. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORTED CRIME IN CALIFORNIA, *available at* http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/StatebyState.cfm (search "California" data in the "Number of property crimes" variable group) (last visited Oct. 4, 2006). One reason why Shepherd's model predicted such a high deterrence for robberies may have been the strong influence of income and monetary loss variables on her model.

64. *See, e.g.*, FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 100-27 (1995) (concluding that increases in incarceration in California during the 1980s may have resulted in some reduction in burglary and larceny, but finding no substantial incapacitation benefits for homicide, assault, and robbery); FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 85-105 (2001) (concluding that California's three-strikes law reduced crime in California by only 0.6%); William Spelman, *The Limited Importance of Prison Expansion*, *in* THE CRIME DROP IN AMERICA 97, 123-25 (Alfred Blumstein & Joel Wallman eds., rev. ed. 2006) (attributing approximately 27% of the drop in crime rates to

that gross crime trends are determined by fundamental social and structural forces that affect most Western countries, and that they follow much the same broad patterns irrespective of national differences in crime control policies and punishment practices."[65] For example, historic crime trends in England, Scandinavia, Germany, Switzerland, Holland, and Belgium have been broadly consistent despite differences in national policy.[66] Recent comparative data also support the view that imprisonment rates do not determine crime rates. For example, a 2002 report by the Research, Development, and Statistics Directorate of the United Kingdom

---

prison expansion and the remainder of the drop to other social factors). For a challenge to the analysis of Zimring and his colleagues and their response, compare Brian P. Janiskee & Edward J. Erler, *Crime, Punishment, and* Romero*: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. 43 (2000), with Franklin E. Zimring & Sam Kamin, *Facts, Fallacies, and California's Three Strikes*, 40 DUQ. L. REV. 605 (2002).

Other scholarship gives increased incarceration much greater weight. Steven Levitt characterizes prior studies as providing "very strong" evidence linking increased punishment to lower crime rates, with estimates of elasticities of crime with respect to expected punishment ranging from –.10 to –.40; using an estimate for elasticity, he concludes that the increase in incarceration during the 1990s can account for a reduction in crime of 12% for homicide and violent crime and 8% for property crime. Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 178-79 (2004). Levitt's article has several limitations that should be noted. Extrapolating from prior correlation studies, it posits an estimate for elasticity and argues on that basis that increased imprisonment is one of four factors that can provide a convincing explanation for the observed decrease in crime during the 1990s. *Id.* at 179 & n.7. He notes, however, that application of the same factors does not explain the rise in crime during the preceding period of 1973 to 1991. *Id.* at 185-86. Moreover, his analysis is not comparative; his only reference to comparative data—in a footnote—lumps together all European nations. *Id.* at 183 n.10. He also acknowledges that at the margin, increased spending for police would have a greater impact on crime reduction. *Id.* at 179.

The argument is over degree. Although Levitt argues that incarceration has a significant effect through incapacitation and deterrence, he recognizes that other factors can cancel out this effect. Moreover, he concedes that the massive increases in incarceration from 1973 to 1991 did not have the effect of decreasing crime that his model predicts. *Id.* at 184-86. Apparently other factors were more important during this period. Scholars such as Frank Zimring, whose work emphasizes the limited effect of increased incarceration, do agree that increased incarceration rates play *some* role in crime reduction. *See, e.g.*, ZIMRING ET AL., *supra*, at 85 (noting the level of reduction for felonies is between 0 and 2%). Indeed, it would be fatuous to suggest that incarceration could not affect crime rates: Incarcerating all males during the crime prone ages from fifteen to thirty-five would certainly reduce crime. But it would do so by a mechanism that would incarcerate many men who would never have committed an offense, and certainly would be an enormously costly policy in both social and economic terms.

65. TONRY, *supra* note 1, at 98.

66. *Id.* at 101-04.

Home Office compared crime experiences across Europe.[67] Among fifteen selected European Union nations, eight saw crime rates increase and seven saw rates decrease between 1996 and 2000, with changes in crime rates ranging from a 27% drop in Ireland to a 17% increase in Belgium.[68] These nations' relative incarceration rates, however, do not correlate with their respective changes in crime rate, suggesting that the two statistics may not be causally related.[69] Although a full analysis of the relationship between crime rates and incarceration is beyond the scope of this Article, this brief survey gives a sense of the data supporting the widely shared scholarly view "that crime rates alone cannot explain ... prison populations."[70]

C. The Comparative Bottom Line

Despite popular belief to the contrary, the United States did not have a uniquely bad crime problem that by itself could account for the adoption of our uniquely punitive penal policies. Moreover, we have maintained these policies despite the fact that we now have crime rates that are low by both historic and comparative standards. Assuming that crime rates played some role in bringing about harsher policies and then in reducing crime, the puzzle is the degree to which the United States diverged from its Western counterparts. What then accounts for America's uniquely punitive policies? The remainder of this Article examines the role played by the American news media in shaping public opinion and criminal justice policy.

---

67. GORDON BARCLAY & CYNTHIA TAVARES, INTERNATIONAL COMPARISONS OF CRIMINAL JUSTICE STATISTICS 2000, at 1 (2002), *available at* http://www.homeoffice.gov.uk/rds/pdfs2/hosb502.pdf.

68. The selected nations were Ireland, Italy, England and Wales, Scotland, Germany, Denmark, Spain, Finland, Sweden, Greece, France, the Netherlands, Portugal, Austria, and Belgium. *Id.*

69. *Compare id.* (showing changes in crime rates from 1996 to 2000: Sweden, +3%; France, +6%; Germany, -6%; the Netherlands, +9%; Italy, -9%; Spain, -1%; and England and Wales, -8%), *with* THE SENTENCING PROJECT, *supra* note 57, at 5 (showing 2003 incarceration rates per 100,000 population: Sweden, 73; France, 85; Germany, 91; Netherlands, 93; Italy, 100; Spain, 125; and England and Wales, 139).

70. Walmsley, *supra* note 36, at 16; *see* TONRY, *supra* note 1, at 27-34.

IV. PUBLIC OPINION, PUNITIVENESS, POLITICS, AND THE NEWS MEDIA

Surprisingly, the good news of falling crime rates seems to have had little effect on public opinion in the United States. Public opinion polls in the United States throughout the 1990s and into the current decade demonstrated high levels of anxiety about crime, a persistent unawareness of the drop in crime rates, and strong support for more punitive measures. National polls identified crime as the most important problem facing the nation each year from 1994 to 1998, and in 1999 and 2000 crime was selected as the second- or third-most important national problem.[71] In one 2000 survey, crime issues topped Americans' list of the worst problems facing their local communities.[72] Only the attacks of September 11, 2001, and related concerns about war, terrorism, and the economy, finally pushed crime out if its lead position in 2002.[73]

Moreover, national polling indicates that a majority of the public is not aware that crime has decreased dramatically. Although there was a slight dip in 2000 and 2001, the table below reveals the persistence of a widespread belief that crime in the United States has been rising rather than falling.

---

71. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 106 tbl.2.1 (2004) [hereinafter 2003 SOURCEBOOK], *available at* http://www.albany.edu/sourcebook/pdf/t21.pdf.

72. The Gallup Organization, *Crime Tops List of Americans' Local Concerns*, June 21, 2000, *available at* http://wwwgalluppoll.comcontent/?ci=2800&pg=1. But note that Gallup's definition of crime in this survey includes other issues like gun control. *Id.*

73. 2003 SOURCEBOOK, *supra* note 71, at 106 tbl.2.1 (indicating that fear of war/international tensions, terrorism, and the economy were the leading concerns from 2002 to 2004).

Table 2.33.2005[74]

Attitudes toward level of crime in the United States
United States, selected years 1989-2005

Question: "Is there more crime in the U.S. than there was a year ago, or less?"

	More Crime	Less Crime	Same Amount of Crime	Don't Know/ Refused
1989	84%	5%	5%	6%
1990	84	3	7	6
1992	89	3	4	4
1993	87	4	5	4
1996	71	15	8	6
1997	64	25	6	5
1998	52	35	8	5
2000	47	41	7	5
2001	41	43	10	6
2002	62	21	11	6
2003	60	25	11	4
2004	53	28	14	5
2005	67	21	9	3

Perhaps this result should not be surprising. Numerous studies have indicated that only a small fraction of the U.S. public is knowledgeable about public affairs, and this state of political

74. Sourcebook of Criminal Justice Statistics Online, *available at* http://www.albany.edu/sourcebook/pdf/t2332005.pdf (footnotes omitted) (last visited Oct. 4, 2006).

ignorance has changed little since social scientists began to measure it in the 1940s.[75]

Public opinion also provides strong support for more punitive policies. For twenty years a random nationwide public opinion poll has asked, "In general, do you think the courts in [your] area deal too harshly or not harshly enough with criminals?"[76] In every year from 1980 to 1998, more than 74% of those polled have responded "[n]ot harshly enough."[77] Although the percent of respondents who say sentences are not harsh enough fell to 67% in 2002,[78] that is still a very high level of agreement.

The general consensus that sentences are not harsh enough has persisted despite the major increases in both sentence length discussed above, as well as the record-high rates of incarceration. What explains the persistence of public anxiety and support for punitiveness in light of current conditions in the United States? Although public opinion likely will lag behind events, and thus concern about crime might persist for some time after crime rates have fallen,[79] other factors likely are enhancing public concern, and punitive attitudes, about crime. This Article seeks to explore the role played by the media in shaping public opinion about crime and criminal justice. In so doing, I do not mean to suggest that the news media are the only or even most important factor. The story of cause and effect is much more complex. Some of the changes in media noted below occurred after the punitiveness movement was well underway.

---

75. *See generally* Michael Schudson, *America's Ignorant Voters*, WILSON Q., Spring 2000, at 16 (discussing the "appalling political ignorance of the American electorate").

76. *See* 2003 SOURCEBOOK, *supra* note 71, at 140-41 tbl.2.47, *available at* http://www.albany.edu/sourcebook/pdf/t247.pdf (reporting for 1985 to 2002).

77. *See id.*; Hofer & Semisch, *supra* note 14, at 12 (reporting data from multiple sources dating back to 1980). From 1980 to 1995 the percentage responding "[n]ot harshly enough" remained between 80% and 86% every year but 1987, when it slipped to 79%. However, the rate responding "[n]ot harshly enough" fell to 78% in 1996, 74% in 1998, 68% in 2000, and 67% in 2002. 2003 SOURCEBOOK, *supra* note 71, at 140-41 tbl.2.47, *available at* http://www.albany.edu/sourcebook/pdf/t247.pdf.

78. 2003 SOURCEBOOK, *supra* note 71, at 141 tbl.2.47, *available at* http://www.albany.edu/sourcebook/pdf/t247.pdf.

79. Crime rates did rise in the early 1990s, and measures such as three-strikes legislation and chain gangs that were adopted in the early to mid 1990s may be seen as a response to increased crime rates or individual crimes that received extensive publicity, such as the murder and kidnapping of schoolgirl Polly Klaas. *See* Beale, *supra* note 2, at 57-59.

A. How the Media Portray Crime and the Criminal Justice System

Television networks and stations sell audiences to advertisers by offering programs to viewers. James Hamilton's groundbreaking study demonstrated that broadcasters adjust the level of violence in entertainment programming on television to the target audiences they seek to attract and the products to be advertised.[80] They manipulate violence in entertainment programming to establish specific brand identities,[81] increase viewership during periods when local advertising rates are set,[82] and counter especially popular programming on competitors' channels.[83] In the context of

---

80. JAMES T. HAMILTON, CHANNELING VIOLENCE: THE ECONOMIC MARKET FOR VIOLENT TELEVISION PROGRAMMING 157-58, 197-99 (1998). Hamilton demonstrated that the levels of violence in entertainment programming are determined by marketing factors such as the size and demographic composition of the potential viewing audience, the distribution of tastes for violent programming, and the priority advertisers place on different groups. *Id.* at 51-54. In particular, the age and gender of potential viewers are key determinants of the prevalence of violence. *Id.* at 52. Advertisers of many products place a high value on the younger viewers (age 18-34) who have the greatest taste for violence, because those younger viewers have not yet solidified their purchasing habits and are perceived as more easily influenced by advertising than older viewers. *Id.* at 53.

81. *See id.* at 134-38. Hamilton documented the networks' manipulation of violence in order to establish specific brand identities with certain demographic groups. For example, primetime movies shown on FOX have far greater use of sex and violence than the other major networks (ABC, NBC, CBS), which is consistent with FOX's reputation among critics, viewers, advertisers, and government officials for using higher levels of objectionable content. *Id.* at 134-35. Among cable channels, those that promote a family- or women-friendly image (for example, Disney, Lifetime, and AMC) steer clear of violence, whereas others like WGN, TBS, and SciFi show considerable levels of violence. *Id.* at 136. Premium cable channels, such as HBO and Showtime, show unedited theatrical films, which means that they can have higher levels of controversial content than broadcast television. *Id.* at 138. However, brand differentiation is still evident among premium channels. *Id.* Encore has a much lower rate of controversial content consistent with its attempt to develop a reputation for high-quality, low-violence programming. *Id.*

82. *See id.* at 142-43. Ratings during the so-called "sweeps" months of February, May, July, and November are the basis for setting local advertising rates. *Id.* In order to aid their local stations, the broadcast networks devote significant energy and resources to special programming to attract high ratings. *Id.* at 143. Hamilton studied programming during these periods and found that networks purposely decreased or increased violence and sexual content according to their strategy for attracting ratings among specific demographic groups. *Id.* at 143-49. For example, FOX deliberately increased its percentage of violent films in keeping with its target viewers, and CBS, with allegiance to older viewers, decreased its use of violent films. *Id.* at 144-45.

83. *Id.* at 148. For example, in order to compete and attract young males whom they

entertainment programming, use of violence is an economic strategy to develop specific types of audiences.

The same economic factors increasingly are determining the style and content of news programming on local and national television, as well as in the print media. As a result, the coverage of crime —particularly violent crime—has increased dramatically, and the nature of the coverage has shifted toward a tabloid style. Similar trends can be noted in network news, local television news, and newspapers.[84]

1. Network News

Despite the falling crime rates, the networks dramatically increased the coverage of crime in their dinner-hour newscasts in the 1990s. In 1990 and 1991, the three major networks aired an

---

hoped were not wedded to the popular comedy *Seinfeld*, HBO deliberately programmed "Testosterone Thursday" as a violent viewing alternative. *Id.* at 151 (internal quotation marks omitted). In response to *Monday Night Football*, some channels explicitly focused on nonviolent programs to attract women, whereas others turned up the volume on violence in order to attract those males for whom football aggression insufficiently met their taste for violence. *Id.* at 148-49.

84. Sensationalized journalism is not, of course, entirely new. *See, e.g.*, Jane W. Gibson-Carpenter & James E. Carpenter, *Race, Poverty, and Justice: Looking Where the Streetlight Shines*, 3 KAN. J.L. & PUB. POL'Y 99, 105-06 (1994) (describing early use of crime reporting by newspapers and television, and suggesting that news stories are "real-fictions," which incorporate "non-news entertainment elements including adventure, mystery, romance, pathos and nightmare"); Jessica E. Jackson, *Sensationalism in the Newsroom: Its Yellow Beginnings, the Nineteenth Century Legal Transformation, and the Current Seizure of the American Press*, 19 NOTRE DAME J.L. ETHICS & PUB. POL. 789, 790-92 (2005) (describing origins of sensationalist yellow journalism during a period of turmoil in the newspaper business when large corporations–particularly the rival Hearst and Pulitzer organizations–competed for readers by highly sensationalized coverage, including exaggerated headlines, fabricated stories, and coverage that propelled the United States into the Spanish-American War).

In his 1931 autobiography, Lincoln Steffens described typical "crime waves" that wash over cities and nearly drown the public and the authorities who feel they must explain and cure these extraordinary outbreaks of lawlessness with "more law, more arrests, swifter trials, and harsher penalties." THE AUTOBIOGRAPHY OF LINCOLN STEFFENS 285 (1931). What accounts for the periodic appearances? Steffens's account attributes them to the press and politicians, not to any change in criminal activity. He commented: "I enjoy crime waves. I made one once; Jacob Riis [a reporter for a rival paper] helped; many reporters joined in the uplift of the rising tide of crime ...." *Id. See generally id.* at 285-91 (describing news stories creating a perception that a wave of burglaries was occurring, though there was no increase in reported cases).

average of 557 crime stories per year in their evening newscasts. For the remainder of the decade, they aired an average of 1,613 stories per year.[85] In 1995, the peak year, the networks presented 2,574 crime stories in their dinner-hour broadcasts.[86] Indeed, crime was the leading topic the networks covered in their evening news shows in the 1990s.[87] Some of the increase was driven by the extraordinary coverage given to the O.J. Simpson story, but a much more general trend was at work. Excluding the Simpson case, the focus on murder increased steadily throughout the decade, even as the murder rate declined precipitously. In the first third of the decade (1990 to 1992), the networks' evening news averaged fewer than 100 murder stories each year. During the middle period (1993 to 1996), the networks broadcasted an average of 352 murder stories per year. In the last third of the decade (1997 to 1999) they broadcasted an average of 511 murder stories per year—five times as many as at the beginning of the decade, when the murder rate was highest.[88]

During the 1990s the three networks' coverage of criminal investigations and trials, such as those of O.J. Simpson, the Menendez brothers, and JonBenet Ramsey, frequently overshadowed hard news on meaningful political and social issues,[89] and this trend has continued. A snapshot analysis of the programming schedules of three nightly newscasts when a tabloid case was covered revealed that CBS spent 46% of its broadcast on the tabloid crime, and NBC and ABC spent 45% and 31%, respectively.[90] In a more extensive study of all the news segments on the three networks in 1997, tabloid crime stories received more attention than public policy topics. For example, there were eighty-six news segments on the JonBenet Ramsey murder investigation, compared

---

85. *See* Center for Media and Public Affairs, CMPA Factoids: Crime Coverage in TV News Data, http://web.archive.org/web/20010111075900/http://www.cmpa.com/factoid/crime.htm (last visited Oct. 4, 2006).

86. *See id.*

87. Paul Farhi, *Nightly News Blues*, AM. JOURNALISM REV., June 2001, at 32, 34-36, *available at* http://www.ajr.org/article.asp?id=41.

88. *Id.* For a graphic representation of the number of murder stories compared to the murder rate during the 1990s, see Center for Media and Public Affairs, *supra* note 85.

89. RICHARD L. FOX & ROBERT W. VAN SICKEL, TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY 73-76 (2001).

90. *Id*. at 74 tbl.2.7.

to nineteen segments on campaign finance reform and thirty-five segments on health care.[91] Medicare received the highest amount of coverage among public policy topics at fifty-eight segments, compared to ninety segments on the O.J. Simpson trial.[92] Not even the events of September 11, 2001 changed the crime-laden news landscape. Although crime coverage dropped from 11.7% of total stories in June 2001 to 3.5% in October 2001, it was back at its pre-September 11 level by 2002.[93] In fact, crime was the only "soft news" topic other than religion that regained the same level of prominence in network news that it had before the terrorist attacks.[94] Between 2000 and 2003, crime remained the second or third most frequent topic on the network news, with an average of 1,137 crime stories per year.[95] There was, however, a significant reduction in crime stories in 2004, when crime news fell to fifth place, trailing the war in Iraq, the presidential election, the economy, and terrorism.[96]

What explains the growth and prevalence of crime stories in the network news, particularly when crime rates were falling?[97] The answer is that the economic pressures facing the networks changed, and a drive for profits in this new environment pushed the networks away from hard news and toward a greater emphasis on tabloid-style crime stories. Twenty years ago, network news was not expected to make money; in 1986, NBC News was losing "as much as $100 million a year."[98] At that time, the big three networks

---

91. *Id*. at 76 tbl.2.8.

92. *Id*.

93. PROJECT FOR EXCELLENCE IN JOURNALISM, THE WAR ON TERRORISM: THE NOT-SO-NEW TELEVISION NEWS LANDSCAPE 2 (2002).

94. *See id*.

95. *See 2003 Year in Review*, 18 MEDIA MONITOR 1, 2 (2004), *available at* http://www.cmpa.com/mediaMonitor/documents/janfeb04.pdf (1002 crime stories); *2002 Year in Review*, 17 MEDIA MONITOR 1, 2 (2003), *available at* http://www.cmpa. com/mediaMonitor/documentsjanfeb03.pdf (1318 crime stories); *2001 Year in Review*, 16 MEDIA MONITOR 1, 2-3 (2002), *available at* http://www.cmpa.com/mediaMonitor/documents/ janfeb02.pdf (1244 crime stories); *2000 Year in Review*, 15 MEDIA MONITOR 1, 2 (2001), *available at* http://www.cmpa. com/mediaMonitor/documents/janfeb01.pdf (986 crime stories).

96. *See 2004 Year in Review*, 19 MEDIA MONITOR 1, 2 (2005), *available at* http://www. cmpa.com/mediaMonitor/documents/janfeb05.pdf (691 crime stories).

97. *See* Farhi, *supra* note 87, at 35.

98. Marc Gunther, *The Transformation of Network News: How Profitability Has Moved Networks Out of Hard News*, NIEMAN REPORTS, Summer 1999 Special Issue, at 21, *available*

earned enough money from entertainment programming to carry their news operations, and they provided hard news for their own prestige, their self-perceived journalistic responsibility to provide information that would promote an educated citizenry, and the Federal Communications Commission's (FCC) public service requirement.[99] The environment today is quite different. The FCC no longer polices the public service requirements,[100] and networks are now owned by corporate conglomerates less likely to tolerate losses or place a great deal of value on traditional journalistic criteria of newsworthiness. For example, ABC is now owned by Disney, and NBC by General Electric.[101] Equally important, the network nightly news programs lost up to one-half of their audience during the 1990s,[102] and the remaining viewers were generally older and hence less valued by many advertisers.[103] During this period

---

at http://www.nieman.harvard.edu/reports/99-SpNRspecial99/NRspecial99.pdf.

99. *Id.* at 20. For a discussion of the culture of the network news divisions during the 1960s and 1970s, and the changes that occurred because of deregulation, changes in ownership, and increased competition, see JAMES T. HAMILTON, ALL THE NEWS THAT'S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS 160-89 (2004).

100. For a discussion of the change in the FCC's role, see STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 139-55 (2001).

101. All three networks changed hands in the 1980s. General Electric bought NBC, Capital Cities Communications bought ABC, and Laurence Tisch, a hotel and theater magnate, took over CBS. Gunther, *supra* note 98, at 21. In 1996, Disney acquired ABC; in 2000 Viacom acquired CBS. HAMILTON, *supra* note 99, at 162. In 2006, however, investor Sumner Redstone responded to Viacom's falling stock price by engineering a division of Viacom and CBS into separate entities. *See Viacom Completes Split into 2 Companies*, N.Y. TIMES, Jan. 2, 2006, at C2 (stating that split brought about by Redstone had been completed); Geraldine Fabrikant, *Viacom Comes to the Great Divide, and Calls It a Path to Growth*, N.Y. TIMES, Dec. 26, 2005, at C1 (describing Redstone's role in bringing about the split and his emphasis on the stock's price). The separation into two corporate entities has not lessened the influential Redstone's emphasis on CBS's stock price and profitability, and the network's strategy has included a strong emphasis on increasing its ratings by moves such as the designation of Katie Couric as the anchor for the evening news. *See* Geraldine Fabrikant & Bill Carter, *A Tortoise Savors the Lead; But the Race Isn't Over at CBS*, N.Y. TIMES, Sept. 12, 2006, at C1 (noting that Redstone was pleased with performance of CBS's new chief executive, whose early moves increased the network's stock price and earnings, and unhappy with the performance of Viacom, whose CEO he had already fired).

102. The percent of people who said they regularly watched a nightly network news broadcast reportedly fell from 60% in 1994 to 30% in 2000. Farhi, *supra* note 87, at 34. However, Nielson found only a 10% drop (from 59% to 49%) in the percentage of households that reported viewing a network news broadcast on any given evening between 1990 and 1998. FOX & VAN SICKEL, *supra* note 89, at 61 tbl.2.1.

103. Whereas two-thirds of those over the age of fifty said they watched television news the previous day, only 44% of those under thirty did so. Farhi, *supra* note 87, at 34. For a

the networks had to compete with a multiplicity of new competitors, including all-news networks and the Internet, while also accommodating lifestyle changes that interfere with regular viewing habits at the dinner hour.[104]

As the networks' profit margins eroded, corporate owners pressured their news divisions to become more efficient. The networks have acknowledged "that competition from increasing media rivals—cable news, Fox, and now the Internet—are forcing them to find new formulas to attract and keep viewers."[105] A strategy emerged for making network news into a profitable business: (1) make the product more entertaining; (2) generate more news programming; and (3) cut the cost of hard news.[106] The networks cut back on gathering information on various forms of hard news—most notably eliminating their foreign news bureaus—while increasing their focus on what has been called "infotainment,"[107] "soft news,"[108] and "news lite."[109] The Project for Excellence in Journalism compared network news coverage in 1977, 1987, and 1997. It found a dramatic increase in scandal stories, from less than 0.05% in 1977 to 17.1% in 1987 and 15% in 1997.[110] Similarly, human-interest stories and quality-of-life stories (or "news-you-can-use") doubled from 8% in 1977 to 16% in 1997.[111] By contrast, straight news or in-depth analysis fell from seven in ten stories in 1977 to four in ten in 1997.[112]

Sensational crime stories also fit this strategy. Focusing on the investigation and trial of a single criminal case gives the networks

---

discussion of advertisers' preferences for younger viewers, see HAMILTON, *supra* note 80, at 52-53.

104. *See* Farhi, *supra* note 87, at 34 (noting that many younger viewers are still working or commuting when the networks broadcast their nightly news at 6:30 or 7:00 p.m.).

105. James McCartney, *News Lite*, AM. JOURNALISM REV., June 1997, at 20.

106. Gunther, *supra* note 98, at 21.

107. PROJECT FOR EXCELLENCE IN JOURNALISM, CHANGING DEFINITIONS OF NEWS 1 (1998), http://www.journalism.org/node/442.

108. HAMILTON, *supra* note 80, at 249 (internal quotation marks omitted).

109. McCartney, *supra* note 105, at 18 (internal quotation marks omitted).

110. PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 107, at 5-6. The authors note that the 17.1% in 1987 was due to a spike in scandal coverage during the Iran-Contra affair. *Id.*

111. *Id*. at 6. These stories were 6.6% of the total in 1987. *Id*.

112. *Id*. Coverage of straight news was 51.4%, 32.9%, and 34.3% in 1977, 1987, and 1997, respectively. *Id*.

the opportunity to provide prolonged, detailed, and relatively inexpensive coverage. As cases drag on for weeks, months, or even years, they become national melodramas, and the networks and other media try to develop suspense and interest in cases such as O.J. Simpson, the Menendez brothers, JonBenet Ramsey, and Louise Woodward (the British nanny tried for murder of the child for whom she cared). Some cases, such as O.J. Simpson and William Kennedy Smith, involve wealthy or famous defendants. Others, such as the Lorena Bobbitt mutilation case, involve sexual titillation. Although a few cases, such as those involving Timothy McVeigh and the officers who beat motorist Rodney King, seem to involve broader public policy issues, the majority of cases covered in great detail by the networks had little traditional news value, and they exemplify the shift in content away from hard news. In fact, the networks have come increasingly to cover human-interest trials that would formerly have been left to the tabloid press.[113]

Another key development altering network news programming has been the development of the television newsmagazines *Dateline NBC*, *20/20*, *48 Hours*, and *60 Minutes*, which have proliferated since 1993.[114] These shows, which air on the networks during primetime, present true crime stories as dramatic entertainment. The percent of broadcasts of these shows that included a crime story varied from roughly 20% on some shows to more than 40% for others.[115] The existence and prominence of these newsmagazines have played a significant role in moving network news away from hard news and toward a focus on news as entertainment. The twin forces of cost-cutting and news as entertainment are exemplified in the growth of the primetime newsmagazines. New corporate news executives decided to increase profits by generating additional programming from the nightly news operations' fixed costs. The staff used for the regular news can do double duty for the newsmagazines, and even some of the star anchors appear on both

113. *See* FOX & VAN SICKEL, *supra* note 89, at 67-76.

114. *Id.* at 77 & tbl.2.9 (calculating that the number of editions of these programs increased from four per week in 1993 to eleven per week in 1999).

115. *Id.* at 79 & tbl.2.10 (showing that more than 40% of *48 Hours* broadcasts included crime segments in 1997 and 1998, and that 29% to 45% of *Dateline* broadcasts between 1994 and 1998 included a crime segment).

network news and the newsmagazines.[116] News footage can be recycled between the two, and the network news can provide free advertising for a newsmagazine. Because newsmagazine producers choose the stories that they want to cover, rather than the stories driving the coverage, costs become easier to control. In 1999 production of an original hour of a newsmagazine cost between $500,000 and $700,000, compared to that of an hour of original entertainment program, which cost at least $1.2 million and as much as $13 million an hour for popular programs like *ER*.[117] With cost comparisons like these, the economics of primetime newsmagazines were very attractive in the 1990s. In the past few years, however, newsmagazines have suffered from "overexposure" and competition with even cheaper reality TV programming, leading to the elimination of some shows and the evolution of others to focus almost exclusively on murder and other "blood and guts" stories.[118]

Although the American public thinks of primetime television newsmagazines as news—81% say *60 Minutes* is news and 71% say *Dateline NBC* is news—the shows' producers see these programs as entertainment.[119] Entertainment increasingly means crime and justice. In the fall of 1997, *60 Minutes* covered no stories about government or foreign affairs, but allocated 27.8% of its show to segments on crime and law/justice.[120] Government issues hardly fared better on *Dateline NBC* with only 1.4% of the stories, and with no stories on foreign affairs and 26% dedicated to crime and law/justice.[121] A 1998 study examined the percent of news magazine broadcasts that contained a tabloid-style crime story and found it

116. *Id.* at 77 (explaining that former news anchor Dan Rather has hosted CBS's *48 Hours* and news anchor Tom Brokaw is a frequent contributor to NBC's *Dateline*).

117. Gunther, *supra* note 98, at 24-25.

118. Howard Kurtz, *At Newsmags, Aiming Straight for the Eyes*, WASH. POST, July 31, 2006, at C01 (describing "blood-and-guts" stories on *Dateline* and noting the producer of *48 Hours* says a Darwinian response led the show to cover murder "almost exclusively for the past two years"). One analyst noted that journalists are cheaper than actors, but real people are even cheaper than journalists. *Id.*

119. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, STRIKING THE BALANCE, AUDIENCE INTERESTS, BUSINESS PRESSURES AND JOURNALISTS' VALUES § V (1999), *available at* http://people-press.org/reports/print.php3?ReportID=67.

120. PROJECT FOR EXCELLENCE IN JOURNALISM, CHANGING DEFINITIONS OF NEWS (1997), http://www.journalism.org/resources/research/reports/definitions/primetime.asp (last visited Mar. 10, 2005).

121. *Id.*

ranged from a low of 19% of programs on *20/20* to 47% of the airings of *48 Hours*.[122]

The coverage of crime on television newsmagazines is the epitome of "commodification—'the packaging and marketing of crime information for popular consumption.'"[123] The show format presents crime as an unfolding mystery story, beginning with the main players' character profiles, then the crime itself (typically murder), the investigation, and finally the trial.[124] These true crime stories are presented as dramatic entertainment, and rarely is there in-depth analysis of the legal, criminal justice, or societal issues that are implicated.[125] The crime drama's unfolding nature is economically attractive to the shows' producers in two ways. First, it is relatively cheap to produce: a small crew can be dispatched to the crime scene for an extended period of time to cover the police bulletins, attorney press conferences, the courtroom activity, and interviews with friends, neighbors, and family of the victim and perpetrator. Second, the length of these proceedings allows for suspense to mount among the public, and for growing interest to translate into higher ratings as new developments emerge.[126]

The nature of television as a visual medium also plays a role in determining the amount and kind of crime coverage on national and local television. As Susan Bandes has noted, television emphasizes "filmic" stories—"discrete, dramatic, visual incidents between individuals."[127] Coverage of the investigation and trial of violent crime fits this profile because it is dramatic and lends itself to replays of the gory details of the crime itself, as the appellate process generally does not. In contrast, television is less well suited to covering procedural failures in individual cases or the system as a whole.[128]

---

122. FOX & VAN SICKEL, *supra* note 89, at 79 tbl.2.10 (showing that more than 40% of *48 Hours* broadcasts included crime segments in 1997 and 1998, and that 29% to 45% of *Dateline* broadcasts between 1994 and 1998 included a crime segment).

123. *Id.* at 78.

124. *See id.* at 77 (explaining that these shows often portray crimes as mysteries that are not solved until the program's end).

125. *Id.* at 78.

126. *See id.* at 62.

127. Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 586, 588 (2004).

128. *Id.* at 586-88; *see also* FOX & VAN SICKEL, *supra* note 89, at 98-99 (commenting that

2. Local News

Various studies in the 1990s found that crime is the number one topic on local television news.[129] One recent study also shows that the events of September 11 have not changed this trend; in fact, crime accounted for one-quarter of all stories on local television news both before and after the terrorist attacks.[130] Crime coverage dominates local news programming, and local stations manipulate crime and violence as a marketing strategy. Viewers with a taste for violent entertainment media also have a taste for local news with an emphasis on crime, and stations treat local news, like entertainment programming, as a commercial product that they adjust to meet their target audience's interests.[131] For that reason, the incidence of crime stories in the local news bears no relation to crime in that area. James Hamilton's study of 16,000 local news stories from fifty-seven stations in nineteen different markets found that the emphasis on crime in the local news depends not on actual crime in the area, but on viewer interest in violent programming.[132] Furthermore, a station's selection of news topics and style of presentation is critical for establishing a brand identity in the local television market, which in turn influences its value to various advertisers.[133]

---

showing people thinking on television is not very interesting).

129. *See, e.g.*, PAUL D. KLITE ET AL., ROCKY MOUNTAIN MEDIA WATCH, PAVLOV'S TV DOGS: A SNAPSHOT OF LOCAL TV NEWS IN AMERICA 3 tbl.2 (1995) (stating that crime accounted for 30.2% of the average news broadcast on 99 stations on a single day in 1995); Center for Media and Public Affairs, Assessing Local News Coverage of Health Issues, http://www.cmpa.com/studies/AssessingLocalNews.htm (last visited Oct 5, 2006) (reporting that crime accounted for 20% of the 17,000 local news broadcasts and was the most common topic); Press Release, Rocky Mountain Media Watch, Survey Examines Excesses and Improvements in Local TV Newscasts Across the U.S. (Aug. 4, 1998), *available at* http://www.bigmedia.org/texts5.html (stating that crime accounted for 26.9% of the average news broadcast on 102 stations in a single day in 1998).

130. Wally Dean & Lee Ann Brady, *After 9/11, Has Anything Changed?*, COLUM. JOURNALISM REV., Nov./Dec. 2002, at 94 ("[T]o make room for that coverage of defense and foreign affairs, local TV chipped away at the coverage of everything but crime and disaster.").

131. HAMILTON, *supra* note 80, at 242.

132. *Id.* at 239 (controlling for many demographic factors, and finding that viewers who report higher consumption of violent entertainment programs are more likely to watch local news with a crime emphasis, and more likely to follow national or international news that involves violence, such as military conflicts).

133. *Id.* at 249.

Hamilton found that a wide range of crime coverage existed, from 17% to 42% of the newscasts, and that among these stories 7% to 70% dealt with murder.[134] The "[h]igh-crime" stations shared many commonalities. They were more likely to present crime in a style that evoked entertainment: fast-paced, heavy use of dramatic video clips, fewer verbal explanations, and teasers throughout the broadcast for multiple stories on crime.[135] Crime coverage was negatively correlated with coverage of hard news on public affairs, and positively correlated with accidents, military stories, health stories, and "news you can use."[136] Given its feature focus, high-crime stations not surprisingly trained their stories more on the crime commission and the alleged perpetrator than the workings of the criminal justice system.[137]

High-crime coverage by a station did not reflect high crime in the local area. Hamilton showed that the number of crimes occurring in a given market did not have a significant statistical impact on the proportion of crime stories.[138] Instead, the characteristics of the viewing market determined whether a local news station would choose crime as a top story. For example, a one-point ratings increase in *Cops*, a quasi-reality crime show, was associated with a 5% increase in proportion of lead stories on crime.[139] By contrast, a one-point ratings increase for the network nightly news, thought to indicate a greater interest in hard news, correlated with a 1.5% drop in lead crime stories.[140] The larger the percentage of adult women in a viewing market, the lower the fraction of news devoted to crime.[141] Similarly, a one-point ratings increase in *Melrose Place*, an evening soap popular among women between the ages of 18 and 34, correlated with a 2% decrease in lead crime stories.[142] Hamilton observed a clear segmentation of stations in their approach to crime coverage in the local news. Stations were more likely to cover crime

134. *Id*. at 245-46.
135. *Id*. at 249.
136. *Id*. at 251-52 (internal quotation marks omitted).
137. *Id*. at 249.
138. *Id*. at 271 tbl.2.14.
139. *Id.*
140. *Id.*
141. *Id*. at 264.
142. *Id*. at 266.

stories or lead broadcasts with a focus on crime as the likely audience for crime coverage increased, measured by either the ratings for *Cops* or an increase in the number of younger viewers.[143]

3. Newspapers

Economic factors have also reshaped the newspaper industry and its crime reporting. In newspapers, as in television, we are in an era of market-driven journalism. In general, newspapers are publicly owned, and they face pressures to generate high profit margins for shareholders[144] at a time of declining readership and intense competition from other media sources. In response to these pressures, newspaper owners and top management have emphasized cost cutting and content designed to attract readers, and as a result the traditional wall between the editorial and marketing/advertising departments in newspapers has dissolved.[145] The most famous example is that of the *Los Angeles Times*, where CEO Mark Willes reorganized the newsroom "along the lines of a consumer products company, with brand managers and profit-and-loss statements for each section of the paper."[146] Newspaper editors are increasingly expected to consider marketing as well as traditional journalistic considerations.[147] Stories in newspapers are often determined not by what the press thinks the public *needs* to know, but on what the public *wants* to know, and by opportunities for marketing and the interests of corporate owners and sponsors.[148] This has shifted content from hard news about national and

143. *Id*. at 276.

144. Neil Hickey, *Money Lust: How Pressure for Profit Is Perverting Journalsim*, COLUM. JOURNALISM REV., July/Aug. 1998, at 28, 29-31 (stating that shareholders such as mutual funds, insurance companies, and pension funds care little about journalism and pressure publicly owned media companies to maintain or increase profits).

145. *Id.* at 35-36.

146. Marc Gunther, *Publish or Perish?*, FORTUNE, Jan. 10, 2000, at 148.

147. *See* DOUG UNDERWOOD, WHEN MBAS RULE THE NEWSROOM: HOW THE MARKETERS AND MANAGERS ARE RESHAPING TODAY'S MEDIA 15 (1993) (describing "a new kind of editor, a cross between an editor and a marketing official").

148. *See, e.g.*, Russ Baker, *Murdoch's Mean Machine*, 37 COLUM. JOURNALISM REV., May/June 1998, at 52 (describing how Murdoch papers promote other Murdoch ventures; for example, the Adelaide *Advertiser* promoted a Murdoch pay television channel in news articles, and the *Sun* in London reversed its opposition to the Millennium Dome after Murdoch's BSkyB satellite service became an investor in the project).

international affairs to soft features frequently linked to advertiser interests, such as mutual fund investing and vacation planning. Crime reporting continues to be a popular theme because of the low cost to produce the stories and the potential for particularly sensational crime stories to attract readers' attention. The cost-effectiveness of crime and its attractiveness to readers are critical in an industry that is increasingly focused on the bottom line.

Regular newspaper readership, which has been declining since the 1950s, began to drop steeply in the late 1970s, and this led to pressure to redesign newspapers in ways that would make them more attractive to contemporary readers.[149] Declining circulation and advertising revenue left newspapers with the choice of cutting costs or accepting lower profits in what has traditionally been a highly profitable industry. Inland Press Association, which has been analyzing financial data of newspapers for many years, found in its latest survey of 425 newspaper operations that cutting costs has been the preferred choice. Inland turned up six major trends: investments in news coverage, production expenses, and payroll were down, but investments in marketing, revenue, and profits increased.[150] The biggest change for journalism has been the increased involvement of advertising and marketing personnel in shaping news content. Focus groups, reader polls, and a consumer product sales orientation were completely foreign—and for some, abhorrent—to newsrooms traditionally led by values of independent news judgment, editorial detachment, and "give-them-what-they-need," not what-they-want reporting.[151] Some leading papers and chains, such as *USA Today* and the many papers owned by Rupert

149. *See* UNDERWOOD, *supra* note 147, at 1-11 (describing studies and programs of American Newspaper Publishers Association and American Society of Newspaper Editors in the 1970s and 1980s and the marketing spirit that ran through the industry); *see also* THOMAS E. PATTERSON, DOING WELL AND DOING GOOD: HOW SOFT NEWS AND CRITICAL JOURNALISM ARE SHRINKING THE NEWS AUDIENCE AND WEAKENING DEMOCRACY—AND WHAT NEWS OUTLETS CAN DO ABOUT IT 2 fig.1 (2000), http://www.ksg.harvard.edu/presspol/Research_Publications/Reports/softnews.pdf. Patterson's data show a decline of more than 10% in regular newspaper readership between 1993 and 2000, as well as a decline in reading newsmagazines and watching local and national television. *Id.*

150. Lou Ureneck, *Newspapers Arrive at Economic Crossroads*, NIEMAN REPORTS, Summer 1999 Special Issue, at 5, *available at* http://www.nieman.harvard.edu/reports/99-SpNRspecial99/NRspecial99.pdf.

151. *Id*. at 9.

Murdoch, blazed the way, and competitors felt intense pressure to keep up.[152]

In the 1990s, newspapers found that they needed to maintain a critical mass of readers in a specific demographic market in order to be perceived as desirable to potential advertisers.[153] In his study of newsroom change, Doug Underwood talked to reporters across the country who complained about things such as the "puffy special sections" designed for the *Dallas Morning News*'s affluent readers, or developing special stories that would appeal to Hispanics in the *Miami Herald*.[154] The magic formula appeared to be local community news, celebrity news, "useful news" such as buying a car or retirement planning, and coverage of hot topics like health.[155]

Not all newspapers have restructured their newsrooms on the basis of marketing data. This trend is more prevalent among the chain newspapers that are publicly owned. Publicly held newspaper companies have maintained pretax profits of 20% to 40%, a performance that Wall Street wants to maintain.[156] Market segmentation and customer-driven news was the publicly held papers' response to the attack on profits by intense competition for readers as media outlets expanded in quantity and immediacy. In contrast, family-owned newspapers, such as the *New York Times* and the *Washington Post*, have structured their newspapers' stock such that they maintain control. "These families have maintained an interest that goes beyond making money," notably the prestige of the paper in the world of journalism and politics.[157] Underwood's survey of

152. For a discussion of the influence of *USA Today*, see UNDERWOOD, *supra* note 147, at 95-103.

153. Ureneck, *supra* note 150, at 13.

154. UNDERWOOD, *supra* note 147, at 36.

155. Ureneck, *supra* note 150, at 14 (internal quotation marks omitted). The desirability of these topics was largely confirmed by a major recent study of newspaper readership led by the Media Management Center of Northwestern University. Surveying 37,000 readers of 100 newspapers across America, they found that the topics with the greatest potential to increase readership were (1) news about community and ordinary people; (2) health, home, food, fashion, and travel; (3) politics and government; (4) natural disasters and accidents; and (5) movies, television, and weather. READERSHIP INSTITUTE, MEDIA MGMT. CTR. AT NORTHWESTERN UNIV., THE POWER TO GROW READERSHIP: RESEARCH FROM THE IMPACT STUDY OF NEWSPAPER READERSHIP 8 (2001), http://www.readership.org/consumers/building/imperatives/data/Revised%20Report.pdf.

156. UNDERWOOD, *supra* note 147, at 20.

157. Ureneck, *supra* note 150, at 16.

429 staff members in twelve daily newspapers in California, Idaho, and Washington supports the conclusion that large-chain newspapers emphasize the reader as a customer, whereas the independently owned newspapers are noteworthy for traditional journalistic values in determining the news.[158]

How do the general trends toward news content that is determined by reader interest affect crime reporting? According to the Readership Institute, readers have less interest in crime than the editors realize, indicating that they prefer a more local focus to crime coverage, fewer national events, fewer photos, and fewer stories overall.[159] Nonetheless, crime reporting remains a staple for newspapers, and is increasingly presented in a more tabloid style.[160] Crime stories are attractive because newspaper editors can always rely on a police reporter to fill space in the newspaper ("newshole") reliably and cheaply. The reporter on the police beat goes to the station each day and collects the arrest reports, crime reports, and accident reports as potential stories.[161] Big city police departments assist by screening the crimes and presenting the media with detailed information on major cases, often written up in a press release for ease of use.[162] In most cases, the police reporter would also be expected to cover any celebrity arrests or sexy crimes, leaving little to no time for any attention to crime trends or the police department's performance.[163] Should there be insufficient local crime news, editors can always turn to the wire services (for example, the Associated Press) for crime stories from other parts of the country.[164] Unless a sensational crime has occurred precisely in the newspaper's market, like the *Los Angeles Times* reporting on the O.J. Simpson case, most news of such crimes will come across the wire services.[165]

---

158. UNDERWOOD, *supra* note 147, at 121.

159. READERSHIP INSTITUTE, *supra* note 155, at 9.

160. *See* FOX & VAN SICKEL, *supra* note 89, at 64-67; DAVID J. KRAJICEK, SCOOPED!: MEDIA MISS REAL STORY ON CRIME WHILE CHASING SEX, SLEAZE, AND CELEBRITIES 96 (1998).

161. KRAJICEK, *supra* note 160, at 96.

162. *Id.* at 104.

163. *Id.* at 13.

164. *Id.* at 98.

165. *Id.*

Front-page newspaper headlines about the leading crime stories have a tabloid style, implying reader familiarity with the case, either through continuous printing of the wire-service updates by their local paper, or through other media. Indeed, the increasing quantity of coverage in major newspapers of cases like the JonBenet Ramsey murder investigation or the William Kennedy Smith rape trial corresponds with a decline in sales of traditional tabloids such as the *National Enquirer* and the *Star*.[166] The expansion of tabloid content in their regular newspaper apparently has undermined the market for the tabloid rags.

4. New Media and Shifts in Media Choice

Increasing evidence suggests that many news consumers are turning away from traditional media outlets in favor of new media sources, such as the Internet, all-news cable stations, and political talk radio. These new media are still evolving, and relatively little is known about their coverage of crime, though it may parallel the treatment of crime in the established media.

The number of Americans who report that they read a newspaper or watch local or national news has dropped precipitously, and online and cable news outlets have gained a significant share of the market. Between 1993 and 2002, local television news consumption dropped from 77% to 57% of all Americans, nightly network news consumption dropped from 60% to 32%, and newspaper consumption dropped from 58% to 41%.[167] Meanwhile, online and cable news outlets gained large audiences rapidly. In 2002, 33% of Americans watched cable television news daily, and 25% checked news online at least three days per week.[168] Internet users also trust online news, with one survey finding higher ratings for the online sites of major national news organizations than for the news organizations themselves.[169] A 2002 survey also found that users rated cable

166. FOX & VAN SICKEL, *supra* note 89, at 65-67.

167. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PUBLIC'S HABITS LITTLE CHANGED BY SEPTEMBER 11 (2002), http://people-press.org/reports/display.php3?ReportID=156.

168. *Id.*

169. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, INTERNET SAPPING BROADCAST NEWS AUDIENCE (2000), *available at* http://people-press.org/reports/display.php3? ReportID =36.

television websites as the third-most credible news source out of sixteen choices, before both national network news and national radio broadcasts.[170]

Since its introduction in 1989, political talk radio has also changed the media landscape.[171] Talk radio is composed of "[c]all-in shows that emphasize discussion of politicians, elections, and public policy issues."[172] Both the audience and the format of talk radio differ from that of more traditional news media. Talk radio attracts news consumers who are interested in politics and distrustful of the mass media.[173] Talk radio listeners are also more conservative, more politically knowledgeable, and have less faith in the national government than the general public.[174] Talk radio eschews the objective format used by traditional sources.[175] Because talk radio differs so significantly from traditional news media, it is difficult to categorize. Like network television newsmagazines, talk radio tests the boundaries of what should be considered news media as opposed to entertainment programming.

The new media options are still evolving, and no consensus exists on whether they will prove to be fundamentally different than traditional news media. One influential commentator has suggested that the Internet may end up as nothing more than a clone of existing technologies, adding little that is really new or that enriches the information supply.[176] At the present time, most

---

170. ONLINE NEWS ASS'N, DIGITAL JOURNALISM CREDIBILITY STUDY 7-8 (2002), *available at* http://www.journalist.org/Programs/StudyText.htm (last visited Feb. 13, 2002) (stating that 47% of respondents also said "that 'online news is more up-to-date than other news sources'").

171. *See* SUSAN TOLCHIN, THE ANGRY AMERICAN: HOW VOTER RAGE IS CHANGING THE NATION 92 (1995); Stephen Earl Bennett, *Predicting Americans' Exposure to Political Talk Radio in 1996, 1998, and 2000*, 7 HARV. INT'L J. PRESS/POL. 9, 9 (2002) (measuring the size of the political talk radio audience in different years and identifying the factors that predict exposure).

172. Gangheong Lee & Joseph N. Cappella, *The Effects of Political Talk Radio on Political Attitude Formation: Exposure Versus Knowledge*, 18 POL. COMM. 369, 369 (2001) (internal quotation marks omitted). Other radio call-in shows emphasize topics such as sports and entertainment.

173. Bennett, *supra* note 171, at 18.

174. RICHARD DAVIS & DIANA OWEN, NEW MEDIA AND AMERICAN POLITICS 167-76 (1998).

175. Lee & Cappella, *supra* note 172, at 382.

176. Doris A. Graber, *The 'New' Media and Politics: What Does the Future Hold?*, PS: POL. SCI. & POL., Mar. 1996, at 33.

Internet news sites are not independently owned, but rather are counterparts of other media outlets, such as nytimes.com or television network websites.[177] There were popular Internet-only newsgathering sources in the 1990s, but many of these disappeared during the dot com bust.[178] As a result, Internet users have become more dependent on traditional news organizations' websites, which withstood the market collapse.[179] Media consolidation also limits the flow of information. A small number of media conglomerates control most of the mass media, with one company often owning a combination of networks, cable stations, newspapers, and other outlets.[180] Finally, new media sources may not be much less objective than traditional sources. On the whole, the new media focus more on broadening its audience than conveying any particular political message, and tends more toward entertainment than serious policy debate.[181] Consequently, new media sources may simply reiterate the same information as traditional sources. Moreover, the new media, like the traditional media, face strong economic pressures. CNN, the originator of cable news, has suffered declines in its ratings in the face of challengers, and has made efforts to revise its format and coverage to attract viewers, especially younger viewers.[182]

---

177. Project for Excellence in Journalism, The State of the News Media: An Annual Report on American Journalism, http://www.stateofthenewsmedia.org/2006/narrative_online_ownership.asp?cat=5&media=4 (last visited Oct 5, 2006) (identifying the top ten online news sites including Yahoo! News, AOL News, CNN, MSNBC, and other media-sponsored sites).

178. Larry Pryor, Executive Editor, Online Journalism Rev., The Third Wave of Online Journalism (Apr. 18, 2002), http://www.ojr.org/ojr/future/1019174689.php. Pryor explains the history of online journalism by dividing it into three waves. *Id.* The first wave, from 1982 to 1992, consisted mostly of proprietary online services that charged users. *Id.* The second wave, from 1993 to 2001, was the dot com boom in which most providers began offering content for free. *Id.* The third wave, which began in 2001, is defined by sophisticated business structures and content providers developing products for which consumers are willing to pay. *Id.*

179. *Id.*

180. Laurence Zuckerman, *Questions Abound as Media Influence Grows for a Handful*, *in* LIVING IN THE INFORMATION AGE 139 (Erik P. Bucy ed., 2002) (showing that, although fifty companies controlled most of the mass media in 1983, this number shrunk to a mere six by 2000).

181. DAVIS & OWEN, *supra* note 174, at 252.

182. *See, e.g.*, Steve Donohue, *Behind the Headlines at Revamped News*, MULTICHANNEL NEWS, Aug. 6, 2001, at 1, *available at* http://www.multichannel.com/article/CA150149.html (reporting that CNN was relaunching its Headline News with a new format, new look,

However, some distinctive aspects set new media apart from traditional media. The new media sources give consumers greater control over when and where they receive information, allowing individuals to self-select stories that interest them.[183] This is more a difference in degree than kind, because users of traditional news media can self-select stories simply by changing the channel during news broadcasts or skipping over articles in newspapers. Both the Internet and political talk radio have an interactive format that may have an impact on the stories consumers choose and how they interpret those stories.[184] By interacting instantly with news organizations and other consumers around the world through chat rooms and message boards, users can reach millions of different viewpoints. They can also express their own opinions through a less cumbersome process than old methods, such as writing a letter to the editor. The Internet also gives news consumers more options; rather than limiting users to one media format, websites offer audio and video clips as well as print articles. Similarly, the sheer volume of information on the Internet offers endless access to resources, including vast archive systems. Finally, the Internet's lack of regulation allows entrepreneurial news vendors to publish "blogs" to reach thousands of news consumers.[185]

No research quantifies crime coverage in the new media, though there are many indications that crime stories are as ubiquitous in the new media as in traditional news media. Crime stories appear to be a staple of cable television news, and critics have condemned

---

anchor team, and graphics package aimed at attracting adults aged twenty-five to fifty-four, and noting CNN's hiring of former *NYPD Blue* actress Andrea Thompson as an anchor following her brief reporting stint at an Albuquerque station); Tom Dorsey, *New Studio and Format*, COURIER-J. (Louisiville, Ky.), Aug. 6, 2001, at 2E (noting that CNN is "obviously trying to keep up with the breezy Fox format that emphasizes tabloid-type reporting with lots of attitude").

183. Graber, *supra* note 176, at 33 (arguing that the most important change induced by the proliferation of new media options is the empowerment of media users, but also admitting that Americans will not experience increased exposure to political information).

184. *Id.* at 34 (explaining that the interactive feature of new media gives consumers access to more political information).

185. Judith Shulevitz, *The Close Reader—At Large in the Blogosphere*, N.Y. TIMES, May 5, 2002, § 7, at 31 (reporting that some blogs, short for "weblogs," attract thousands of readers every month). *See generally* Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185 (2006) (discussing the legal and economic impacts of blogging).

the cable networks' drawn-out coverage of high-profile crime stories,[186] claiming that all-day reporting of one story creates "an unnecessarily painful national psychodrama."[187] For example, all cable networks devoted enormous coverage to the story of missing Washington, D.C. intern Chandra Levy, and they reportedly reaped a ratings bonanza.[188] Comparing ratings from 2001, when the Levy story was at its peak, to July 2000, MSNBC's average household audience increased 39%, and Fox News's increased 149%.[189] The cable channels' coverage of the case included Fox New's broadcast of psychics attempting to contact Levy.[190] The cable networks' focus on tabloid-style news programs is seen as a strategy to attract young viewers.[191] Crime has also been the focus of political talk radio, at least during some recent periods: a 1996 study found that radio hosts devoted more time to crime than any other subject, including foreign affairs, the federal budget, and the President.[192]

---

186. *See, e.g.*, Felicity Barringer & Jim Rutenberg, *Cable's Focus on Sniper Helped the Authorities, but Also Drew Harsh Critics*, N.Y. TIMES, Oct. 25, 2002, at A31 (criticizing cable news for airing hours of D.C. sniper coverage and showing that this coverage resulted in the cable stations' largest average daily audiences of the year); Daniel Henninger, *Wonder Land; The Sniper Story on Cable TV: Pure Melodrama*, WALL ST. J., Oct. 25, 2002, at A10 (criticizing news coverage of the Washington, D.C. sniper story on CNN, MSNBC, and Fox News for being speculative and melodramatic).

187. Barringer & Rutenberg, *supra* note 186.

188. Because Levy was a congressional intern who had been the lover of Congressman Gary Condit, the story of her disappearance had political elements, and was not purely a crime story. For an argument that the case presented important issues that warrant serious media coverage, see Matt Welch, Media Criticism Gone Horribly Wrong (Apr. 2, 2002), http://www.ojr.org/ojr/ethics/1017782279.php.

189. Alesia I. Redding, *Media Reap Outrageous Fortune for Scandals*, S. BEND TRIB., Aug. 12, 2001, at E1. All day household ratings also increased at both networks: a 20% increase for MSNBC, and an 82% increase for Fox News. *Id*. CNN had a 24% increase in household ratings and a 30% increase in household audience. *Id.* CNN's *Larry King Live* program experienced its highest ratings for the summer when it focused on the Levy story. Don Kaplan, *The Chandra Effect Boosts Cable News*, N.Y. POST, Aug. 2, 2001, at 73. Although the networks acknowledged that the increases were due at least in part to their coverage of the Levy story, they did suggest it was not the only factor. *See Cable-News Viewership Jumps Amid Levy Coverage*, ORLANDO SENTINEL, Aug. 7, 2001, at E8, *available at* 2001 WLNR 10872166.

190. Allison Romano, *Shocking Fox News Gains!; CNN Feels the Heat, USA Continues To Decline in July Cable Ratings*, BROADCASTING & CABLE, Aug. 6, 2001, at 14.

191. Howard Kurtz, *MSNBC Reaches for Viewers with Sex and Crime "News" Television*, L.A. TIMES, May 10, 2000, at 10 (explaining that, in order to reach the coveted 25- to 54-year old demographic, MSNBC introduced a "'celebrities and tabloid' approach" to programming).

192. JOSEPH N. CAPPELLA ET AL., ANNENBERG PUB. POLICY CTR. OF THE UNIV. OF PA.,

B. How the Media Treatment of Crime Affects Public Opinion and Criminal Justice Policy

Americans report that they get critical information about crime from the media. For example, in one national survey, 81% of respondents said that they based their view of how bad the crime problem is on what they have read or seen in the news, rather than on their personal experience.[193] In an American Bar Association poll asking respondents to identify "extremely or very important" sources of information on the criminal justice system, 41% of respondents identified television news, 37% identified primetime newsmagazines, and 36% identified local newspapers.[194] Most people also trust the accuracy and fairness of the information received from these sources.[195] But how does the information gleaned from the news media affect public opinion about criminal justice policies?

Scholarship on the media includes a wide range of theories. At one extreme, some scholars have argued that the news media is extremely powerful, and that it can inject particular points of view into its audience.[196] At the other extreme, scholars have contended that the media has minimal effects on individuals because of various mediating conditions, including their selective exposure to media they find congenial to their views, selective perception in accordance with preexisting beliefs, and selective retention of

---

CALL-IN POLITICAL TALK RADIO: BACKGROUND, CONTENT, AUDIENCES, PORTRAYAL IN MAINSTREAM MEDIA 17 tbl.3 (1996), http://www.annenbergpublicpolicycenter.org/03_political_comm unication/archive/1996_03_political-talk-radio_rpt.PDF (analyzing topics discussed on three days of political talk radio programming and finding that crime accounted for 17% of all topics, whereas foreign affairs accounted for 12.5%, the federal budget accounted for 11.8%, and the President accounted for 2%).

193. *See* Public Agenda, Crime: People's Chief Concerns, http://www.publicagenda.org/issues/pcc_detail.cfm?issue_type=crime&list=4 (last visited Oct. 5, 2006) (reporting results of an ABC News poll from June 2000).

194. AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 94-95 (1999), *available at* http://www.abanet.org/media/perception/perceptions.pdf.

195. The Gallup Organization, Gallup Brain, July 13-14, 1998 (reporting that 66% of individuals trust network news broadcasts and 73% trust the local television news). The questions used to compile this poll data are available at http://brain.gallup.com/documents/questionnaire.arpx?STUDY=CNN9807020.

196. DAVID L. PALETZ, THE MEDIA IN AMERICAN POLITICS: CONTENTS AND CONSEQUENCES 117-18 (2d ed. 2002).

material consistent with their own views and preferences.[197] At present, the data do not appear to support the strongest view of the media as being able to completely determine the attitudes and opinions of media consumers. However, strong evidence indicates that the media plays an important role in increasing the importance of crime to the public, and both experimental simulations and survey research support the view that the contemporary media coverage increases support for punitive policies.[198] Although the news media is certainly not the only influence on public opinion, the media interacts with and reinforces other key influences, such as American culture and politics, to increase punitiveness.

1. Mechanisms that Increase Crime Salience

Data collected from hundreds of experimental simulations and surveys have confirmed the media's "agenda-setting" and "priming" effects. Agenda setting refers to the media's ability to direct the public's attention to certain issues,[199] whereas priming describes the media's ability to affect the criteria by which viewers judge public policies, public officials, or candidates for office.[200] When combined, the two phenomena show that the media's emphasis on crime makes the issue more salient in the minds of viewers and readers, which causes the public to perceive crime as a more severe problem than real world figures indicate.

More than 350 empirical studies conducted worldwide support the media's power to set the public's agenda.[201] The effect was first discovered after scholars found an extremely high correlation (.975) between the rank order in salience of the issues reported in news coverage of the presidential campaign, and in the salience rank order of the issues that undecided voters said were the campaign's

197. *Id.* at 119.

198. *See infra* Parts IV.B.1 to C.3.

199. ELIZABETH M. PERSE, MEDIA EFFECTS AND SOCIETY 43 (2001).

200. PALETZ, *supra* note 196, at 158-59.

201. *See generally* Maxwell McCombs & Amy Reynolds, *News Influence on Our Pictures of the World*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH (Jennings Bryant & Dolf Zillman eds., 2d ed. 2002) (providing a general overview of several studies that support the media's agenda-setting effect).

key issues.[202] Many subsequent studies have replicated these findings, reporting a link between national surveys asking respondents about the country's most important problem, and news coverage of the same issues.[203] Survey data have also shown that the agenda-setting effect is particularly strong when networks place certain stories as the "lead stories" of broadcasts[204] and when individuals lack personal experience with an issue.[205]

The agenda-setting effect has also been demonstrated in experimental simulations. In one study, for example, individuals that initially had identical opinions about the priority of several national issues changed their priorities after viewing a newscast emphasizing an issue,[206] whereas a control group's priorities remained the same.[207] Perhaps more important, the emphasis of the manipulated footage had a persistent effect on viewers, which indicates that these effects may extend into the real world setting. For example, participants who had been exposed to a single story on unemployment continued, one week later, to nominate unemployment as one of the country's most important problems more frequently than did those who saw no stories about unemployment.[208]

After the news increases the salience of certain issues by agenda setting, the media then primes audiences to believe that those issues warrant more political attention. The concept of priming

---

202. Everett M. Rogers et al., *A Paradigmatic History of Agenda-Setting Research*, *in* DO THE MEDIA GOVERN?: POLITICIANS, VOTERS, AND REPORTERS IN AMERICA 229 (Shanto Iyengar & Richard Reeves eds., 1997).

203. SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION 30-33 (1987); *see also* PERSE, *supra* note 199, at 98-99 (finding that the public's ranking of the importance of issues such as urban unrest, the Vietnam War, and drug use corresponded more closely to media coverage of these issues than to real world indicators).

204. IYENGAR & KINDER, *supra* note 203, at 45 (finding that virtually all of the changes in the public's concern over energy, inflation, and unemployment could be traced to changes in placement of these issues as lead stories).

205. PERSE, *supra* note 199, at 100. The author found that television coverage had a substantial effect on public opinion regarding the importance of energy and inflation issues, but less effect on viewers' concern about unemployment, an issue with which viewers had more direct experience. *Id.*

206. *See* IYENGAR & KINDER, *supra* note 203, at 19 & tbl.3.1 (evaluating issues such as defense, inflation, pollution, arms control, civil rights, and unemployment).

207. *Id.* at 20. For example, pollution as the "most important" national problem moved from fifth to second place after participants saw a newscast about pollution. *Id.*

208. *Id.* at 25.

rests on cognitive accessibility theory, which states that when people make judgments they use subconscious shortcuts, such as relying on the most accessible information, particularly recently acquired information and commonly accepted stock stories.[209] Media scholars first discovered the priming effect by using survey results to examine how the public evaluated presidential performance. When television news repeatedly drew attention to certain issues, the importance of these problems as criteria upon which to base an overall assessment of the President more than doubled.[210] Further research has supported these findings and shown that information the news media makes readily available[211] becomes more important when the public assesses presidential performance.[212]

Experimental simulations have linked the priming effect to crime, showing that news stories about crime can prime the public's view of presidential candidates, and that this effect is linked to racial attitudes.[213] Researchers found that the insertion of crime

---

209. *Id.* at 64.

210. *Id.* at 68. This priming effect emerged in several independent tests on the issues of arms control, civil rights, defense, inflation, unemployment, and energy; it emerged from both positive and negative stories; and it affected the issues on which the public evaluated Democratic and Republican presidents. *Id.* at 115.

211. The priming phenomenon is similar to an error in cognition that scholars call "availability." Opinions are affected by the cognitive availability of various occurrences and examples. For example, the media's increased coverage of murders and other violent crimes leads to exaggerated public estimates of the frequency of such crimes. Similarly, heightened coverage of one particularly horrible event may shape public opinion about the whole criminal justice system. *See* Beale, *supra* note 2, at 58-59.

212. McCombs & Reynolds, *supra* note 201, at 14. For example, a post-1986 National Election Study revealed that the factors on which the public assessed Ronald Reagan's job performance changed after heavy news coverage of the Iran-Contra scandal. *Id.* Voters became much more concerned with the President's ability to deal with foreign affairs issues, especially those concerning Central America. *Id.* A subsequent study found a link between frequency of media use and overall support for Bill Clinton during the Monica Lewinsky sex scandal. Individuals who read newspapers and watched television were more likely to focus on this issue when evaluating Clinton's performance. *Id. But see* Joanne M. Miller & Jon A. Krosnick, *News Media Impact on the Ingredients of Presidential Evaluations: Politically Knowledgeable Citizens Are Guided by a Trusted Source*, 44 AM. J. POL. SCI. 301, 312 (2000) (concluding that priming occurs only in the minds of those who trust the news media most and who know the most about political issues, whereas "politically naive citizens" are less affected by media priming).

213. Nicholas A. Valentino, *Crime News and the Priming of Racial Attitudes During Evaluations of the President*, 63 PUB. OPINION Q. 293, 293-320 (1999). Valentino showed adult residents of Los Angeles a regular television newscast into which he had inserted local television news footage of a police operation to arrest suspected gang members. *Id.* at 301-02.

stories into a real local news broadcast primed participants to consider crime in evaluating their support for candidates Bill Clinton and Bob Dole.[214] Although Clinton had a large lead over Dole when participants viewed a newscast with no crime footage, his lead was cut by more than 25% when they saw a newscast with crime footage featuring no suspect or a white suspect.[215] Priming the audience with racial images had an even more dramatic effect; when minority suspects were featured in the simulation footage, Clinton's lead was cut in half.[216] Apparently the racial cues brought stereotypes about party race allegiances to the forefront of viewers' minds.[217]

Recent surveys verify the conclusions of the simulation studies, finding evidence that the media's agenda-setting and priming effects have directed public attention to the issue of crime. One study conducted during a period when local crime rates were falling found a .70 correlation between elevated public concern about crime and crime stories in the local newspapers, and an even higher correlation when the stories appeared on the front page.[218]

All references to race were removed from the narrative; the only racial cue was a five-second mug shot of two suspects of like race. *Id.* at 302. Through digital manipulation, different study groups viewed the suspects as white, black, Asian, and Hispanic males; a fifth group saw the crime footage with no mug shots; and the control group watched the newscast without the crime story at all. *Id.*

214. *Id.* at 304-12. Stereotypes about Republican and Democratic approaches to crime may have played a role. Valentino assumed that even though Clinton worked hard to distance himself from the traditional "'soft-on-crime' Democratic stereotype," the Republicans and their standard bearer, Bob Dole, still had greater credibility on the law-and-order issue. *Id.* at 298 & n.2. Accordingly, Valentino hypothesized that exposure to crime news, particularly when it featured minority suspects, would depress Clinton's overall support and boost Dole's. *Id.* at 298-99.

215. *Id.* at 305. The study used a 100-point "'feeling thermometer' scale" to measure participants' attitudes toward the candidates. *Id.* at 302 n.8.

216. *Id.* at 305.

217. Valentino relied upon the existence of common public perceptions that Republicans were the party that best represents whites, whereas Clinton was perceived as having especially good rapport with minority communities. *Id.* at 298. Valentino postulated that crime news should prime Clinton's performance on crime as a predictor of his overall support, and that this effect would be especially prominent among those exposed to minority suspects. *Id.* at 299.

218. Salma Ismail Ghanem, Media Coverage of Crime and Public Opinion: An Exploration of the Second Level of Agenda Setting (May 1996) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with author). Ghanem conducted statewide surveys in Texas to determine public opinion about crime. In 1992 only 2% of respondents to the poll

Additionally, the influence of media coverage of tabloid crime cases has been found to affect public confidence in the criminal justice system. Researchers found that respondents who had been primed with reminders of high-profile cases, such as the O.J. Simpson trial or the JonBenet Ramsey murder investigation,[219] expressed lower levels of confidence in the criminal justice system as a whole; and less confidence in individual actors within the system, such as the police, judges, juries, and prosecuting attorneys, than in those who had not.[220]

2. Mechanisms that Produce Increased Punitiveness

Although there is strong evidence of the news media's ability to increase the public's view of the importance of crime, the specific mechanisms increasing public support for harsher punishments are less well understood. Scholars from several disciplines—including media studies, political science, and criminology—have proposed different theories to explain the media-punitiveness relationship, but no consensus has emerged. Some have attributed heightened punitiveness to the media's framing effect, which is achieved through the episodic framing of stories and the use of stock scripts.[221] Other scholars have blamed the media for instilling fear in viewers, which provokes an affective response.[222] Still others posit that the media's presentation of crime in racial terms triggers

---

stated that crime was the most important problem facing the country; by the fall of 1993 the number had jumped to 15%. *Id.* at 49 tbl.1. In two polls in the first six months of 1994, the number reached more than 37%. *Id.* Ghanem found a correlation of .70 between the number of news stories about crime and the percentage of the public identifying crime as the most important problem facing the country (and a correlation of .73 after excluding stories about the atypical prosecution of O.J. Simpson and the killer of Tejano singer Selena). *Id.* at 65. There was a .86 correlation between the number of front page crime stories and the public's identification of crime as the top public concern. *Id.* at 68.

219. *See* FOX & VAN SICKEL, *supra* note 89, at 128-29. Researchers asked one group of respondents about their overall opinion of the criminal justice system, and then about individual sensational crimes, whereas the other was first primed by questions concerning the specific tabloid cases, and then asked about their confidence in criminal justice institutions. *Id.* at 131.

220. *Id.* at 132-33 & tbl.4.3.

221. *See infra* Part IV.B.2.a.

222. *See infra* Part IV.B.2.b.

racism and makes individuals more punitive.[223] Despite not agreeing on the exact mechanisms that produce the relationship between media and punitiveness, scholars across disciplines generally agree that a link does exist. They also agree that news reporting affects people's attitudes in different ways depending on several factors, including their existing views, their past experiences, and their demographic characteristics.[224]

a. Framing

Several media scholars have linked increased punitiveness to the internal structural emphasis of crime stories, which they refer to as "framing." The media frames stories when it "select[s] some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation."[225] Framing is significant because it activates some ideas, feelings, and values more than others, and thus encourages particular trains of thought and leads audiences to arrive at certain conclusions.[226] Scholarship correlating framing with increased punitiveness has focused on two main aspects: the episodic framing of stories and the use of stock scripts.

Television news coverage tends to be presented in either episodic or thematic frames, and the choice of frame may affect punitiveness.[227] Episodic frames are more common, as they focus on particular events or individuals—the bread and butter of daily

---

223. *See infra* Part IV.B.2.c.

224. *See infra* Part IV.B.3.

225. Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, J. COMM., Dec. 1993, at 52 (emphasis omitted).

226. PERSE, *supra* note 199, at 106. Framing can also impact audiences' ability to recall information. Patti M. Valkenburg et al., *The Effects of News Frames on Readers' Thoughts and Recall*, 26 COMM. RES. 550 (1999) (finding that framing newspaper articles in terms of human interest diminished respondents' ability to recall the core information about a crime story). News is often framed in terms of human interest to make stories more interesting and compelling, but the findings of Valkenburg and her coauthors suggest that the emotional human-interest frame may actually diminish recollection by distracting attention away from the facts, disrupting readers' information-processing capacities, or by inducing cynicism in readers.

227. PERSE, *supra* note 199, at 100.

news.[228] By contrast, news presented in a thematic frame would address a broader social, political, or economic issue, buttressed by relevant statistics, expert commentary, and analysis.[229] The choice of frame influences the audience's policy preferences. For example, a recent study analyzing *Newsweek* articles found that changes in the media's framing of the race issue brought about subtle shifts in racial policy preferences.[230] Episodic framing encourages viewers to blame problems on the individuals depicted, whereas thematic framing diverts blame to larger social and political institutions.[231] In the context of crime, episodic framing may lead to increased support for punitive policies because individuals who attribute crime to the personal characteristics of offenders have been found to support more punitive measures than those who attribute the problem to social factors.[232]

Evidence also indicates that the media's use of "stock stories" or "scripts" may influence punitive attitudes and invoke racial stereotypes. Cognitive psychologists define scripts as "coherent sequence[s] of events expected by the individual, involving him

---

228. *Id.*

229. Shanto Iyengar, *Framing Responsibility for Political Issues*, ANNALS, July 1996, at 62.

230. Paul M. Kellstedt, *Media Framing and the Dynamics of Racial Policy Preferences*, 44 AM. J. POL. SCI. 245, 254-57 (2000). Kellstedt divided media coverage on race into two categories—egalitarianism and individualism—and analyzed how shifts in coverage impacted racial policy preferences. *Id.* at 249. He hypothesized that when stories focused on "individualism," the idea that people should get ahead on their own without government assistance, people would be more inclined to favor conservative policies. *Id.* at 249-50. Conversely, when stories emphasized "egalitarianism," the idea that everyone deserves equal opportunities, people would support liberal policies. *Id.* at 250. Although the findings did support his hypothesis, Kellstedt noted that the shifts in policy preferences were very subtle. *Id.* at 257.

231. Iyengar, *supra* note 229, at 278. For example, news that dwelt on a particular poor person encouraged viewers to blame the victim for his predicament, whereas news on increases in the number of Americans at poverty level and national food emergencies elicited attribution of poverty to societal causes. *Id.*

232. *See* John K. Cochran et al., *Attribution Styles and Attitudes Toward Capital Punishment for Juveniles, the Mentally Incompetent, and the Mentally Retarded*, 20 JUST. Q. 65, 66-67 (2003). Controlling for demographic factors, the authors found that individuals who adhere to a "dispositional attribution style" and blame crime on internal characteristics of offenders are more supportive of capital punishment for juvenile, mentally incompetent, and mentally retarded offenders than those who adhere to a "situational attribution style" and blame crime on extrinsic factors. *Id.* at 83.

either as a participant or as an observer."[233] Scripts facilitate comprehension by distilling knowledge into an orderly and predictable set of scenarios and roles, enabling individuals easily to make inferences about events, issues, or behaviors.[234] When media coverage includes "salient cues," individuals develop expectations that lead them to select matching stories;[235] "[i]n many cases script-based expectations are so well developed that when people encounter incomplete versions of the script, they actually 'fill in' the missing information" based on the script.[236]

Experimental simulations have shown that the standard script for local news coverage of crime[237] affects public opinion. Researchers found that individuals who had viewed different versions of a newscast containing a typical crime segment[238] filled in gaps in the coverage using preexisting stereotypes.[239] For example, more than 60% of the subjects who watched a broadcast that included no perpetrator falsely recalled having seen one, and 70% of these subjects identified the unseen perpetrator as African American.[240] Participants who saw a black perpetrator were also more likely to recall the presence of a perpetrator; those who saw a white perpetrator were 50% less likely to recall any perpetrator.[241]

---

233. Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 561 (2000) (quoting Robert P. Abelson, *Script Processing in Attitude Formation and Decision Making*, *in* COGNITION & SOCIAL BEHAVIOR 33 (John S. Carroll & John W. Payne eds., 1976)).

234. *Id.*

235. CAPPELLA & JAMIESON, *supra* note 4, at 63.

236. Gilliam & Iyengar, *supra* note 233, at 561.

237. The standard script begins with the anchorperson announcing that a crime—usually a violent one—has occurred, then takes the viewer to the scene for a closeup of the incident and personal accounts by relatives of the victim and bystanders, and finally shifts to police activities and the suspect's identity, often limited to visual imagery that conveys his race or ethnicity. *Id.*

238. The authors manipulated the main elements of a crime script within a larger local news broadcast. *Id.* at 563. Some subjects watched a crime story in which the perpetrator was an African American male; others saw the same story with a white male suspect. *Id.* A third set of subjects watched a crime story that contained no information or graphic concerning the perpetrator's identity. *Id.* The control group viewed a newscast containing no crime story. *Id.*

239. *Id.* at 564 (finding that participants exposed to the manipulated footage were more attentive to information that validated their prior stored beliefs).

240. *Id.*

241. *Id.* Although skin color and socially constructed racial groups are not identical, this

The crime script's racial element appears to be a significant cue that triggers public opinion about crime and crime policy.[242] For example, exposure of white subjects to a black perpetrator or no perpetrator significantly raised support for the view that crime is caused by individual factors, rather than general social causes, and also had the greatest impact on punitiveness, increasing support for punitive policies by 6%.[243] The crime script's racial element may even influence opinions about seemingly unrelated issues, such as welfare,[244] through a process called "spreading activation," in which

---

Article uses the term "black" throughout because it is broader than the term "African American."

242. *Id.* at 567-68; *see also* FRANK D. GILLIAM, JR., NAT'L FUNDING COLLABORATIVE ON VIOLENCE PREVENTION, YOUTH CRIME AND THE SUPERPREDATOR NEWS FRAME: THE IMPACT OF TELEVISION ON ATTITUDES ABOUT CRIME AND RACE, http://www.peacebeyondviolence.org/res_mono_gil_youth.html (last visited Aug. 21, 2003) (reaching the same conclusion after conducting a similar study that used youth perpetrators instead of adult perpetrators).

243. Gilliam & Iyengar, *supra* note 233, at 567-68. In contrast, black participants' explanation for the cause of crime was unaffected by the manipulation. *Id.* Furthermore, for black viewers, exposure to any variation of the crime script reduced support for punitive crime policies. *Id.* For example, one experiment found that in ambiguous circumstances heavy television news viewers who had previously viewed a black perpetrator were more likely to rate a subsequent suspect whose race they did not know to be guilty. *See* Travis L. Dixon, *Schemas as Average Conceptions: Skin Tone, Television News Exposure, and Culpability Judgments*, 83 JOURNALISM & MASS COMM. Q. 131 (2006). In this two-part experiment, participants first watched a fictitious crime news story in which the race and skin tone of the perpetrator varied. Next, participants read two crime scenarios in which a race-unidentified suspect was either unambiguously guilty or ambiguously guilty. Participants were then asked to rate the culpability of the suspects in each story. When the guilt of the subsequent suspect was ambiguous, heavy television news viewers were more likely to rate the suspect as culpable if they had previously viewed light-, medium-, or dark-skinned black perpetrators than if exposed to white perpetrators. However, an interesting anomaly appeared in the test condition of subsequent exposure to a suspect whose guilt was unambiguous. In that situation, heavy television news viewers who had seen a medium-skinned black perpetrator were more likely to rate a subsequent unambiguously guilty perpetrator as culpable. No such culpability rating differences occurred among participants who were light television news viewers, nor did they occur when the heavy viewers had been exposed to light- or dark-skinned black perpetrators. *Id.*

244. In his presidential candidate study, Valentino found that study participants' exposure to racially stereotypic crime news increased the association between Clinton's performance on welfare issues and his overall evaluation. When minorities were portrayed as suspects in a crime news segment, Clinton's handling of welfare issues had a large and statistically significant impact on his overall performance rating. Valentino, *supra* note 213, at 307-09. By contrast, these same news segments did not prime Clinton's performance on balancing the budget or taxes, domains less obviously linked to race in the participants' associative network. *Id.*

a crime news story triggers awareness of other seemingly unrelated issues by activating memory nodes.[245]

Because even the most carefully designed experimental simulations cannot reproduce all of the real world's features, researchers have supplemented the simulation studies with survey research designed to explore the influence of television crime news. A comparison of the views of persons who reported watching television news daily with other residents of the same area found that the two groups had significantly different views on criminal justice policy and on race. Compared to those who seldom watched television news, those who reported watching the news daily were "16 percent more likely to support punitive remedies and endorse the view that blacks are less intellectually able" than whites.[246] Racial attitudes played an important role in support for punitive policies. Daily news watchers who espoused "new racism" attitudes[247] were 28% more likely to support punitive criminal justice policies than other residents of the same area.[248]

By themselves, the survey results raise the issue of cause and effect. One could easily hypothesize that people who hold punitive views might have a much greater taste for local news. That hypothesis, however, would not explain the finding in experimental studies that exposure to news stories about crime increased support for punitive policies. Together, the simulation studies and survey research provide strong evidence that exposure to the typical

---

245. The stronger the association between nodes, the greater the likelihood that other nodes will be brought into awareness. CAPPELLA & JAMIESON, *supra* note 4, at 61.

246. Gilliam & Iyengar, *supra* note 233, at 570-71. The authors analyzed surveys in which residents of Los Angeles County were asked about their local-television-news-viewing habits and their attitudes on race and crime. *Id.*

247. The "new racism" index was developed to address the fact that calling blacks "lazy" or "stupid" is now generally considered socially unacceptable. *Id.* at 566. If racism thus still exists, it is manifested under a different guise referred to as new racism. *Id.* Gilliam and Iyengar use Kinder and Sanders's definition of new racism: "(1) a denial that discrimination against African-Americans continues; (2) a sense that blacks have violated traditional American values of hard work and self-reliance; (3) a perception that blacks make illegitimate demands; and (4) the belief that blacks receive undeserved benefits from government." *Id.* (citing D.R. KINDER & L.M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS (1996)).

248. *Id.* at 571.

episodic crime script employed on television can increase support for punitive crime policies.

Although the research described above supports the view that the way the news frames crime stories encourages punitive attitudes, more experimental and survey work will be required to establish this point. The leading priming and framing studies that focus on crime news[249] were conducted in California shortly after the Rodney King and O.J. Simpson trials galvanized the public, focusing attention on race, crime, and the link between them. Perhaps experimental studies conducted elsewhere would have yielded different results; or perhaps using a candidate other than Bill Clinton might have made a difference. Moreover, even assuming that the findings can be replicated, a gap would still exist between what can be measured in an experimental setting and what occurs in real life. For example, despite the researchers' efforts to simulate a realistic setting,[250] participants in these studies may nonetheless have been more attentive than viewers at home, who frequently watch television while cooking or engaging in other activities. Additional survey work may help to measure the impact of news consumption. Finally, the framing studies should be supplemented with research that focuses on particular aspects of the news media's impact on viewers. Two aspects, the media's creation of fear and its reinforcement of racial typification, are discussed in the following subsections.

249. *See supra* Part IV.B (discussing Valentino's and Gilliam and Iyengar's studies).

250. Gilliam and Iyengar furnished the viewing room casually, and allowed participants to browse books and magazines, snack, and chat with other participants. Gilliam & Iyengar, *supra* note 233, at 564. Valentino decorated the site for the study to look "as much as possible like ... a typical living room." Valentino, *supra* note 213, at 301.

b. Fear[251]

A theory often proposed by both criminologists and media scholars posits that the media's focus on violent crime produces an affective reaction in viewers: fear of crime. According to this theory, fearful individuals opt for immediate and extreme solutions to the crime problem, causing their policy preferences to become punitive rather than preventative.[252] The evidence concerning the relationship between fear of crime and support for punitive policies is inconsistent. Although some studies have found such a relationship,[253] other studies have found that fear of crime is not a significant factor in predicting support for punitive policies when other variables are controlled.[254] If there is a relationship between

---

251. For a definition of the term fear, see Matthew D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977, 985 (2004) (giving philosophic definition as "a package of belief, desire, physical arousal, and unpleasant affect" and distinguishing anxiety, which has a more indefinite object or one the subject cannot flee (footnote omitted)). Adler argues that environmental, health, and safety regulators should seek to quantify and monetize the fear states that would result for regulatory choices and include them in cost-benefit analyses. *Id.* at 986-89. Extending this analysis, one could argue that a diminution of fear of crime is itself a good that could be quantified and included in a cost-benefit analysis of criminal justice policies.

252. Mira Sotirovic, *Affective and Cognitive Processes as Mediators of Media Influences on Crime-Policy Preferences*, 4 MASS COMM. & SOC'Y 311, 324 (2001); *see also* RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES 207 (2d ed. 1998) ("Fear-of-crime levels are socially important because they influence support for punitive criminal justice policies and encourage social isolation."); *cf.* Sharon Lamb, *The Psychology of Condemnation: Underlying Emotions and Their Symbolic Expression in Condemning and Shaming*, 68 BROOK. L. REV. 929, 930-31 (2003) (discussing the psychology of condemnation and suggesting that fear serves as a motivator of condemnation for criminals).

253. *See, e.g.*, Robert H. Langworthy & John T. Whitehead, *Liberalism and Fear as Explanations of Punitiveness*, 24 CRIMINOLOGY 575 (1986) (exploring the relationship between liberalism, victimization experience, fear of victimization, and attitudes towards purposes of incarceration); Richard C. McCorkle, Research Note, *Punish and Rehabilitate? Public Attitudes Toward Six Common Crimes*, 39 CRIME & DELINQ. 240 (1993) (examining how support for goals of treatment and assistance varies across six common crimes); J.L. Miller et al., *Perceptions of Justice: Race and Gender Differences in Judgments of Appropriate Prison Sentences*, 20 LAW & SOC'Y REV. 313 (1986) (finding subjective proximity to crime has stronger implications than objective proximity for judgments of punishment); Ira M. Schwartz et al., *Public Attitudes Toward Juvenile Crime and Juvenile Justice: Implications for Public Policy*, 13 HAMLINE J. PUB. L. & POL'Y 241, 241 (1992) (finding significant relationships between fear of victimization by violent crime and support for punitive policies). A helpful review of the literature is contained in Ted Chiricos et al., *Racial Typification of Crime and Support for Punitive Measures*, 42 CRIMINOLOGY 359, 364-68 (2004).

254. *See, e.g.*, Philip E. Secret & James B. Johnson, *Racial Differences in Attitudes Toward*

fear of crime and punitiveness, news may play an important role in creating or enhancing that fear.

Although some scholars have suggested alternative explanations,[255] several recent studies have linked increased fear to exposure to the news media.[256] These studies buttress an earlier hypothesis that linked the reiteration of violent episodes in the media to the public's exaggerated view of crime,[257] and suggest that high television viewing may actually be the cause of excessive fear. For example, recent research found a positive correlation between frequency of television watching and fear, though only for certain program types. These studies found fear levels were heightened among viewers who watched more local news, reality, and tabloid programs, though consumption of national news and news magazine were not related to fear.[258] The researchers attributed this

---

Crime Control, 17 J. CRIM. JUST. 361, 361-64 (1989); Jane B. Sprott, *Are Members of the Public Tough on Crime?: The Dimensions of Public "Punitiveness,"* 27 J. CRIM. JUST. 467, 467-68 (1999).

255. *See, e.g.*, Michael Hughes, *The Fruits of Cultivation Analysis: A Reexamination of Some Effects of Television Watching*, 44 PUB. OPINION Q. 287, 287-88 (1980) (concluding that gender and size of city of residence correlated more closely with fear than did television watching); Jacob Wakshlag et al., *Selecting Crime Drama and Apprehension About Crime*, 10 HUM. COMM. RES. 227, 229 (1983) (finding greater support for a hypothesis of a selective preference for crime viewing based upon prior anxieties).

256. *See* Ted Chiricos et al., *Crime, News and Fear of Crime: Toward an Identification of Audience Effects*, 44 SOC. PROBS. 342 (1997) [hereinafter Chiricos et al., *Toward an Identification*] (employing a survey model to evaluate the effects of different factors on fear levels); Ted Chiricos et al., *Fear, TV News, and the Reality of Crime*, 38 CRIMINOLOGY 755, 755-57 (2000) [hereinafter Chiricos et al., *Fear*] (studying the relationship between direct and indirect experience with crime, and media-induced fear levels); Sarah Eschholz et al., *Television and Fear of Crime: Program Types, Audience Traits, and the Mediating Effect of Perceived Neighborhood Racial Composition*, 50 SOC. PROBS. 395, 410 (2003) (using survey data to study the differential effects of program types on fear and to determine how the racial mix of individuals' neighborhoods impacts the media-fear relationship).

257. *See, e.g.*, George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, J. COMM., June 1976, at 193; George Gerbner & Larry Gross, *The Scary World of TV's Heavy Viewer*, PSYCHOL. TODAY, Apr. 1976, at 89. The authors advanced a "cultivation hypothesis," which posited that heavy television watchers held distorted views about the prevalence of crime. *Id.* For a recent Belgian study of entertainment programming that found support for the cultivation hypothesis, see Jan Van den Bulck, Research Note, *The Relationship Between Television Fiction and Fear of Crime: An Empirical Comparison of Three Causal Explanations*, 19 EUR. J. COMM. 239, 247 (2004).

258. Eschholz et al., *supra* note 256, at 410-11; *see also* Sotirovic, *supra* note 252, at 321 (revealing that local news consumption is related to higher fear levels); Allen E. Liska & William Baccaglini, *Feeling Safe By Comparison: Crime in the Newspapers*, 37 SOC. PROBS. 360, 366-67 (1990) (finding that newspaper stories about local homicides in the first fifteen

result to both the low rates of violence depicted in national news and the low level of proximate relevance in national stories.[259]

The media's ability to instill fear in viewers varies from person to person. For example, one researcher found that local news consumption impacts the fear levels of women and blacks much more than it impacts the levels of men and whites.[260] Other factors may also influence the link between fear and the media. Measuring the effects of the "reality of crime," researchers discovered that local news consumption has a statistically significant relationship to fear for individuals who live in high-crime areas, for viewers with recent victim experience, and for those who view local news as realistically portraying crime.[261] These findings suggest that local news consumption raises fear levels regardless of direct experience with crime.[262] In contrast, agenda setting generally has its greatest impact on issues of which the reader or viewer has little personal knowledge.[263]

The relationship between television watching, fear of crime, and increased support for punitive policies appears to be affected by residential patterns and race. For both blacks and whites who perceive themselves to live in neighborhoods with a high percentage of blacks, fear of crime increases when television watching in-

---

pages of newspaper were positively correlated with increased fear of crime, but coverage of nonlocal crimes was negatively correlated, which they hypothesized might indicate that readers felt "safe by comparison"); Daniel Romer et al., *Television News and the Cultivation of Fear of Crime*, 53 J. COMM. 88 (2003) (finding support for the cultivation theory from data showing that viewing local television news—but not national news or local newspapers—was related to heightened perceptions of crime risk). *But see* 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 (2003) (finding that watching local news did not cultivate increased fear of crime, although it did make viewers more likely to mention crime as an important problem facing their community).

259. Eschholz et al., *supra* note 256, at 410.

260. Chiricos et al., *Fear*, *supra* note 256, at 772 (showing that the group most affected by local television news is black women).

261. *Id.* at 775-76. However, for females, blacks, those with low incomes, and those in the 30-54 age group, local news induces fear regardless of the perceived reality of crime news. *Id.*

262. *Id.* This finding contradicts the earlier belief that media effects are stronger when an individual lacks experience with an issue. *See* SURETTE, *supra* note 252, at 205.

263. *See supra* note 205 and accompanying text.

creases.[264] But in the case of racially mixed neighborhoods, fear may not translate into support for punitive policies. One recent experimental simulation concluded that, when exposed to racially stereotypic news coverage, white subjects who lived in homogenous neighborhoods supported more punitive policies, whereas whites who lived in heterogenous neighborhoods were either unaffected by the coverage or endorsed less punitive policies.[265] The authors reasoned that racially isolated whites, who have less direct experience with minorities, are more vulnerable to the media's influence.[266] In contrast, whites who lived in more racially mixed neighborhoods were less likely to be affected by media stereotypes that conflict with their personal experiences.[267] The media's ability to promote racial stereotypes relates to racial typification, which is explored in the next subsection.

The news media's role in inducing fear has also been noted in scholarship describing the development and effect of social panics that have led to the adoption of punitive criminal legislation. These accounts of the social construction of crime provide a related and largely consistent explanation for the relationship among the news media's treatment of crime, the promotion of fear of crime, and public support for punitive policies. The term moral panic refers to periodic episodes of sharply increased public anxiety about the threat some group or condition poses to society's values and well being.[268] Moral panics are characterized by exaggerated perceptions

---

264. Eschholz et al., *supra* note 256, at 409.

265. Franklin D. Gilliam, Jr. et al., *Where You Live and What You Watch? The Impact of Racial Proximity and Local Television News on Attitudes About Race and Crime*, 55 POL. RES. Q. 755, 769-70 (2002). To study the interaction between neighborhood context and racially stereotypic news, the authors collected data about the racial mix of the respondents' neighborhoods and then exposed the subjects either to racially stereotypic or nonstereotypic crime stories on local news programs. *Id.*

266. *Id.* at 760.

267. *Id.*

268. The concept of moral panics was developed by British criminologists. *See generally* ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE (1994); PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA (1998); TONRY, *supra* note 1, at 85-96. The classic definition of a moral panic refers to a situation in which

> [a] condition, episode, person, or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned

of the prevalence and importance of a phenomenon or group. Although scholars do not agree on the triggering mechanism for moral panics,[269] the media's sensationalized treatment often plays a central role in their development and spread.[270] Moral panics have often focused on criminal activity and led to the rapid passage of harsh legislation to deal with the perceived crisis.[271] During the 1990s, moral panics about child abductions and sexual predators galvanized state and federal lawmakers. Cass Sunstein provides a related account of risk panics.[272] Beginning with an account of various defects in human risk perception, he argues that these defects are greatly amplified by the social forces of availability

---

> by editors, bishops, politicians, and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions ....

STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS 1 (3d ed. 2002); *see also* Daniel M. Filler, *Terrorism, Panic, and Pedophila*, 10 VA. J. SOC. POL'Y & L. 345, 359 (2003) (quoting Stanley Cohen's definition of moral panic).

269. *See* Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law*, 89 IOWA L. REV. 1535, 1583 n.218 (2004) (noting, describing, and providing scholarly sources for three competing models: (1) the "grassroots model" of panics triggered by a groundswell of public concern, (2) the "interest model" in which interest groups commandeer incidents to promote themselves and their agendas, and (3) the "elite-engineered" model in which a triggering mechanism starts from politicians and other political elites).

270. *See* JOEL BEST, RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS 1-2, 29-30, 32-35, 37-47, 63-64 (1999) (noting the traditional role of news media in fostering moral panics and describing the role played by news media—as well as activists, experts, and government officials—in the development of the concept of "random violence," including "wilding," "road rage," and gang crime). However, several scholars have noted that not every high profile crime creates a moral panic; they occur only when other social conditions provide receptive soil. *See* Filler, *supra* note 269, at 363; Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 877-82 (2000) (emphasizing that neither media emphasis nor efforts by activist groups and politicians–"claimsmakers"–are uniformly successful in creating moral panics; success depends upon the receptivity of the audience, which varies over time). Thus the media's role may be significant, but it is not, by itself, sufficient.

271. *See, e.g.*, Filler, *supra* note 269, at 360-63 (describing legislation enacted as a result of moral panic about sexual predators following the abduction and murder of Megan Kanka by a previously convicted sex offender). For a discussion of moral panics over so called "new crimes" such as road rage, drive-by shootings, and various gang crimes, see BEST, *supra* note 270, at 28-47. For a discussion of moral panic and the post-Enron efforts to respond to accounting fraud and other white collar offenses, see José Gabilondo, *Financial Moral Panic! Sarbanes-Oxley, Financier Folk Devils, and Off-Balance-Sheet Arrangements*, 36 SETON HALL L. REV. 781 (2006).

272. CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 6 (2005). For a cultural cognition critique of Sunstein, see Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071 (2006).

cascades and group polarization.[273] Sunstein notes that such availability cascades—which result when fear inducing accounts with high emotional valence are repeated—lead to cascade effects that help explain moral panics about subjects such as drug crimes and teenage gangs.[274]

c. Racial Typification

Other scholars in the disciplines of media studies and criminology have identified racial typification as a cause of increased punitiveness. Racial typification refers to the media's stereotypical portrayal of crime as a minority phenomenon.[275] Initial studies of media coverage found skewed crime content portraying some groups, such as juveniles and minorities, as more criminally dangerous than others. For example, researchers have found that media coverage exaggerates the prevalence of juvenile crime,[276] provoking increased fear of youth "predators."[277] Although juveniles were arrested for only about 9% of homicides in 1999, in one survey the public estimated this figure to be 43%.[278]

---

273. SUNSTEIN, *supra* note 272, at 6.

274. *Id.* at 98.

275. *See* Ted Chiricos & Sarah Eschholz, *The Racial and Ethnic Typification of Crime and the Criminal Typification of Race and Ethnicity in Local Television News*, 39 J. RES. CRIME & DELINQ. 400, 402 (2002).

276. *See* DANILO YANICH, CTR. FOR CMTY. DEV. & FAMILY POL'Y, KIDS, CRIME & LOCAL TV NEWS 17, 42 (1999), *available at* http://www.localtvnews.org/papers/KidsCrime&LocalTVNews.pdf (finding that, in Baltimore and Philadelphia, 51% of local news stories about juvenile offenders and 42% of stories about adult offenders involved murder even though murder represented only 0.3% of juvenile arrests and 0.9% of adult arrests); LORI DORFMAN & VINCENT SCHIRALDI, BUILDING BLOCKS FOR YOUTH, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 17 (2001), http://www.buildingblocksforyouth.org/media/media.pdf (studying sixteen social science articles examining media portrayals of juveniles and finding a consensus among them that news coverage of youth often involves violence).

277. *See* MARK SOLER, BUILDING BLOCKS FOR YOUTH, PUBLIC OPINION ON YOUTH, CRIME AND RACE: A GUIDE FOR ADVOCATES 5 (2001), http://www.buildingblocksforyouth.org/advocacyguide.pdf (pointing out that, despite a 68% decline in juvenile homicide between 1993 and 1999, 62% of poll respondents in 1999 thought juvenile crime was increasing); YANICH, *supra* note 276, at 25 (citing Ted Chiricos, Fear of Crime and Related Perceptions: A Statewide Survey of Florida 1996 (1997), http://www.criminology.fsu.edu/TA/fear/ (showing that about 90% of Florida adults across all age groups viewed teenagers as more violent than adults and as more apathetic toward the consequences of their behavior, and that 64% of young adults and 76% of seniors said teen criminals were "like predators")).

278. Vincent Schiraldi, Op-Ed., *Juvenile Crime Is Decreasing—It's Media Coverage That's*

Other research found that distorted crime coverage along racial lines causes viewers to link the threat of crime to minorities. A study of Chicago local television news broadcasts[279] revealed an overrepresentation of white victims as opposed to black victims, as well as a discrepancy in the amount of screen time the average story devoted to victims of different races (185 seconds for white victims compared to 106 seconds for black victims).[280] This resulted in a 3:1 disparity in total time devoted to white as opposed to black victims.[281] Similar studies have confirmed that minorities appear more frequently on the news as criminal suspects than they do as crime victims, police officers, or role models.[282] Evidence also suggests that local news disproportionately portrays minorities in menacing contexts, with blacks more likely than whites to be shown in mug shots,[283] in the physical custody of law enforcement,[284] and

---

Soaring, L.A. TIMES, Nov. 22, 1999, at B7.

279. ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 78-106 (2000). Entman and Rojecki examined Chicago local television news broadcasts for a ten-week period during 1993-1994. *Id.*

280. *Id.* at 81 (discovering an overrepresentation of white victims compared to black victims at a ratio of 1.5:1, even though blacks are more likely to be victimized).

281. *Id.*

282. Chiricos & Eschholz, *supra* note 275, at 414 (studying television news in Orlando during 1998 and finding that "the ratios of suspect/victim (4.0), suspect/police (0.6), and suspect/role model (1.1) were between three and more than five times higher [for Blacks] than the same ratios for Whites"); Travis L. Dixon & Daniel Linz, *Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News*, 50 J. COMM. 131 (2000) (finding black defendants were overrepresented and Latinos underrepresented as criminal defendants on Los Angeles and Orange County television news compared to crime reports); Travis L. Dixon & Daniel Linz, *Race and the Misrepresentation of Victimization on Local Television News*, 27 COMM. RES. 547 (2000) (finding blacks overrepresented as defendants and whites overrepresented as victims); *cf.* Travis L. Dixon & Daniel Linz, *Television News, Prejudicial Pretrial Publicity, and the Depiction of Race*, 46 J. BROADCASTING & ELECTRONIC MEDIA 112 (2002) (finding blacks and Latinos to be twice as likely as whites to be associated with prejudicial pretrial statements on Los Angeles television news, and Latinos who victimized whites to be three times as likely as white defendants to be associated with prejudicial pretrial statements). One study, however, found that in network news whites were overrepresented and blacks underrepresented as victims and police officers, but whites were more likely to appear as perpetrators. Travis L. Dixon et al., *The Portrayal of Race and Crime on Television Network News*, 47 J. BROADCASTING & ELECTRONIC MEDIA 498 (2003).

283. ENTMAN & ROJECKI, *supra* note 279, at 82 (finding that, of the ten mug shots displayed during the ten-week study, eight were of black offenders); Chiricos & Eschholz, *supra* note 275, at 411 (finding that Orlando news displayed the mug shots of black offenders almost twice as often as they displayed the mug shots of white offenders).

284. ENTMAN & ROJECKI, *supra* note 279, at 83 (finding that 38% of blacks were depicted

in street or prison clothing.[285] Additionally, minorities are shown more often victimizing strangers and members of different races or ethnicities.[286] These findings have led some scholars to conclude that unequal media representations cause the public to exaggerate the number of blacks arrested for crimes, overestimate the likelihood that they will be victimized by minorities, and attribute the crime problem to blacks as a group.[287]

Some evidence suggests a positive correlation between racial typification of crime and punitive attitudes, which suggests that skewed crime coverage may contribute to increased punitiveness. Researchers who surveyed attitudes about punishment and black involvement in crime found that white individuals who associated crime with blacks held more punitive attitudes.[288] This finding is broadly consistent with earlier studies finding negative perceptions of blacks and minorities to be related to various punitive attitudes.[289] However, the perception that crime is

---

in police custody, compared to only 15% of whites). *But see* Chiricos & Eschholz, *supra* note 275, at 411 (revealing that in their study 47% of whites were shown in the physical custody of law enforcement compared to only 38% of blacks).

285. ENTMAN & ROJECKI, *supra* note 279, at 83 (finding that blacks were shown in prison or street clothing 54% of the time, whereas whites were shown in the same way only 31% of the time). In this context, street clothing seems to refer to the type of clothing that might signal gang membership or otherwise evoke fear, rather than a more neutral typical use of the term street clothes.

286. Chiricos & Eschholz, *supra* note 275, at 412. Blacks were shown one-third of the time and Hispanics were shown 100% of the time as victimizing members of different races, though whites were never shown this way. *Id.*

287. *Id.*; *see also* DORFMAN & SCHIRALDI, *supra* note 276, at 4 (indicating that Americans believe they have a much higher chance to be victimized by minorities than whites when, in actuality, they are three times more likely to be victimized by whites).

288. Chiricos et al., *Toward an Identification*, *supra* note 256, at 376.

289. *See* PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 197-99 (1997) (finding that respondents who said they would prefer fewer civil rights for minorities were more punitive toward all crimes and were more supportive of the death penalty). Other researchers have found more limited connections between racial attitudes and punitiveness. One researcher who used measures of racial antipathy and racial stereotyping found that both were significantly related to punitiveness for "nonsouthern" respondents, but not for her full national sample or for her "southern" respondents. Marian J. Borg, *The Southern Subculture of Punitiveness? Regional Variation in Support for Capital Punishment*, 34 J. RES. CRIME & DELINQ. 25, 41 (1997). A study of the attitudes of juvenile court personnel found that a belief in racial differences was correlated with support for the death penalty being applied to juveniles, but not with other punitive policies for juvenile offenders. *See generally* Michael J. Leiber & Anne C. Woodrick, *Religious Beliefs, Attributional Styles, and Adherence to Correctional Orientations*, 24 CRIM. JUST. &

disproportionately committed by blacks correlated with punitiveness only for whites who rated relatively low on the measure of concern for crime—which the researchers defined as a cognitive expression of the crime issue's importance, not an affective measure of fear.[290] This finding raises interesting questions about the relationship between different factors associated with punitiveness, such as holding conservative attitudes and living in the South. Some scholars have suggested that racial typification of crime can substitute for heightened crime salience caused by other factors—such as conservatism and southern residence—provoking similar punitive attitudes.[291] At some point, however, punitiveness reaches a high enough level that media exposure and racial stereotypes produce no increase. On the other hand, viewers who are not already concerned with crime may develop more punitive attitudes when they see distorted crime coverage.

Jerry Kang has argued that local news programming is so "dense with images of racial minorities committing violent crimes," and so damaging in its effects, that it should be analogized to a Trojan Horse computer virus.[292] Like a virus that secretly attaches itself to a program, later corrupting files or e-mailing spam, local news projects images that alter our racial schema[293] and are far more powerful than words.[294] This effect is especially insidious because viewers are unaware that it is occurring.

BEHAV. 495 (1997).

290. *See* Chiricos et al., *Toward an Identification*, *supra* note 256, at 374-76 (reasoning that, for other individuals, crime salience is so high already that racial stereotypes cannot push punitive attitudes much further—what the authors refer to as the "'ceiling effect'"); *id.* at 372 (defining "concern"). The study involved a national survey of 885 households that used punitive attitudes toward crime as the dependent variable. The authors controlled for factors that already predict punitiveness, including the belief that crime is disproportionately violent, political conservatism, and southern residence. *Id.* at 369-70.

291. *Id.* at 377.

292. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1553-54 (2005).

293. Kang defines "racial schema" as "racial categories, racial mapping rules, and racial meanings." *Id.* at 1499-501.

294. *Id.* at 1554.

3. Different Groups, Different Media, and Different Settings

As mentioned above,[295] individuals may respond to the news media's portrayal of crime in different ways, depending on factors such as demographics, political attitudes, and victim experience. For example, news broadcasts about crime appear to have relatively little effect on the attitudes of viewers who already have a high level of concern about crime and highly punitive attitudes. This phenomenon, referred to as the "ceiling effect," has been observed in research that explored the link between punitive views and conservative attitudes, southern residence, and the belief that crime is very violent.[296] Research about the sources of punitive attitudes and fear of crime has identified other factors linked to punitiveness, including perceptions about diversity and disorder in the community, and concerns with social values and their judgments about social conditions.[297] Whether the same kind of ceiling effect may exist when individuals who rate high on these predictors for punitive attitudes are exposed to crime coverage in the news media remains to be seen.

The media's ability to influence news consumers may also depend on media choice and exposure, which differs among individuals and demographic groups. For example, blacks watch more television than any other segment of the population across all age groups,[298] and both blacks and Hispanics prefer to get their news from television.[299] In contrast, whites are more likely to get their news from a variety of sources, including newspapers, television, and the

295. *See supra* Part IV.B.

296. *See supra* notes 290-92 and accompanying text.

297. In a survey assessing support for California's harsh three-strikes initiative and general punitiveness, researchers found that individuals' concerns with social values and their judgments about social conditions were the most influential factors. *See* Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC'Y REV. 237 (1997); *cf.* GARLAND, *supra* note 1, at 77-78 (emphasizing the role social changes in late modernism had on U.S. support for harsh criminal justice policies).

298. Nielsen Media Research, More About the Ethnic Television Audience, http://www.nielsenmedia.com/ethnicmeasure/moreethnicaudience.html (last visited Oct. 7, 2006).

299. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 169. Thirty-seven percent of blacks, 32% of Hispanics, and 47% of whites read newspapers daily. Fifty-nine percent of blacks, 56% of Hispanics, and 56% of whites watch television news broadcasts daily. *Id.*

Internet.[300] Age and education also influence media choice. Many younger Americans have developed "news grazing" habits, which means they check the news on a less regular basis than older Americans. In fact, those aged sixty-five and older are about twice as likely as those under age thirty to both read newspapers and watch network nightly news on a daily basis.[301] Finally, less-educated people rely heavily on television and radio for news content, whereas upper-income people use a variety of media sources.[302] As scholars have suggested, this discrepancy may arise because print media sources cater to upper-income people and ignore the concerns of low-income people,[303] and because less-educated people prefer entertaining news content that stirs the emotions.[304]

Although little evidence of the differential media effects from print and television sources exists,[305] some scholars have posited a connection between media use patterns and criminal policy preferences. One study suggested that complex media content and hard news promote analytical thinking, which leads news consumers to prefer preventative policies over punitive policies.[306] In contrast, simple news content—such as local news, reality television, and talk radio—was found to limit complex thinking and

---

300. *See id.*

301. *Id.*

302. DORIS A. GRABER, MASS MEDIA AND AMERICAN POLITICS 202 (6th ed. 2002).

303. *Id.*

304. *Id.*

305. In addition to the studies cited *infra* note 317, see Adrian Furnham & Barrie Gunter, *Effects of Time of Day and Medium of Presentation on Immediate Recall of Violent and Non-Violent News*, 1 APPLIED COGNITIVE PSYCHOL. 255, 255 (1987) (finding that print is the most effective medium in producing cued recall); and John P. Robinson & Dennis K. Davis, *Television News and the Informed Public: An Information-Processing Approach*, 40 J. COMM. 106, 116 (1990) (finding that participants who reported reading newspapers had higher levels of news information than those who reported watching television news). *But see* Robert H. Wicks, *Remembering the News: Effects of Medium and Message Discrepancy on News Recall over Time*, 72 JOURNALISM & MASS COMM. Q. 666, 674 (1995) (finding no significant difference between media in recall over time). Besides research on memory, however, different media sources have not been shown to have different effects on public opinion. *See* GRABER, *supra* note 302, at 197 ("[T]here is no evidence of *consistent* significant differences in the ability of different media to persuade, inform, or even to instill an emotional response in audience members." (quoting W. RUSSELL NEUMAN, THE FUTURE OF THE MASS AUDIENCE 102 (1991) (emphasis added))).

306. Sotirovic, *supra* note 252, at 324.

encourage affective responses.[307] These findings suggest that the media has a greater impact on the policy preferences of minorities, younger people, and less-educated people, because they use fewer and less complex media sources. Nonetheless, as the author of the study admits, "[t]he presence of a relation between the media use and complexity and fear does not necessarily imply a cause-and-effect relation between them."[308] In other words, individuals with more sophisticated thinking processes may self-select more complex media sources, which would mean that media use patterns have little independent influence on policy preferences. More research will be needed to determine the actual impact of media use patterns.

New scholarship on cultural cognition suggests that there may be other ways to understand how different individuals are affected by news. Dan Kahan and his colleagues argue that an individual's cultural world view is a strong predictor of his attitudes toward various criminal justice policies and his perceptions of risk.[309] To the extent that these world views shape and orient opinions through cultural mechanisms, they may also shape the effects of exposure to news about crime, interacting with or even overriding other factors.

As the availability of different media channels increases, the audience has more choices, and these choices also may impact the media-punitiveness relationship. Because all-news cable stations and the Internet are relatively new, there has been little research on the impact of these media sources on public opinion. One recent study does suggest that cable access produces greater political polarization, because (1) cable viewers who are interested in politics

---

307. *Id.*

308. *Id.*

309. *See* John Gastil et al., The 'Wildavsky Heuristic': The Cultural Orientation of Mass Political Opinion (Oct. 15, 2005) (Public Law & Legal Theory Research Paper Series, Research Paper No. 107), *available at* http://papers.ssrn.com/abstract_id=834264 (systematizing Wildavsky's theory and presenting survey results finding that cultural orientations account for policy-related attitudes on gun control, capital punishment, and other issues). Kahan and his colleagues argue that cultural cognition plays an important role in risk perception. Dan M. Kahan & Donald Braman, Essay, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 155-60 (2006); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1294-95 (2003).

can watch more news, and (2) those more interested in entertainment can easily avoid news.[310] Because people who prefer entertainment are less likely to vote, cable access may result in a larger voting gap.[311] Additional research is needed in the criminal justice area to assess how cable access impacts punitive attitudes. For example, will lower-income people who cannot afford cable experience different media effects?

The Internet also poses many interesting questions. A wide gap already exists among Internet users, with whites, younger Americans, and higher-income people accessing the Internet more often for news than other groups.[312] One important question is whether the Internet will change the policy preferences of groups and individuals. Also, will the fact that the Internet combines all three traditional media sources into one—audio, visual, and print—have any effect on news consumers?

4. What the Research Doesn't Tell Us

As described in the preceding sections, the mechanisms that link exposure to news media and punitive attitudes are not yet well understood, and researchers have proposed competing theories. Assuming that the mechanism or mechanisms are identified, many fundamental questions will nonetheless remain.

First, most of the experimental studies described above demonstrate only that participants' attitudes were influenced immediately after exposure to the simulated broadcasts. In the real world, of course, the question is whether any effects persist for days, weeks, or months (or until the next election), and little work has been done on this question.[313] Common sense suggests that brief exposure to

310. Markus Prior, Avoiding Politics: The Relation of Entertainment Preference and Partisan Feelings 17 (paper presented at annual meeting of American Political Science Association, Aug. 30-Sept. 2, 2001) (on file with the author).

311. *Id.*

312. News Release, Pew Research Ctr. for the People & the Press, Americans Lack Background To Follow International News: Public's News Habits Little Changed by Sept. 11 (June 9, 2002) (on file with the author). In 2002, 36% of whites and 26% of blacks, 44% of those between 18-29 and 9% of those 65 and older, and 57% of college graduates and 11% of less than high school graduates went online for news. *Id.*

313. One study, described above, found that an agenda-setting effect persisted for one week. *See supra* text accompanying note 208.

a news broadcast may soon be outweighed by other influences, but one study found that the effect of a broadcast on the subjects' perceptions was greater, rather than reduced, twelve to fourteen days after exposure to a broadcast including compelling visual images.[314] If this research, which dealt with the risk of skin cancer, could be replicated with crime news, it would simply open up new questions. In the case of crime, unlike the risk of skin cancer, the public is exposed to a continuing stream of news broadcasts; information from other sources, including the personal experiences of friends and relatives; and entertainment media, including television drama, movies, and books. What long-term impact does a single broadcast, or multiple broadcasts, have in a world with so many other stimuli?

The last point is related to the most fundamental question: are the news media responsible for the schema or scripts that are triggered when television viewers see crime stories? As noted above, when *no suspect* was shown, 60% of the participants in an experimental setting incorrectly recalled that they had seen a suspect, and in 70% of those cases they recalled seeing *a black suspect*.[315] These studies present no evidence that the news media constitute the original—or even the most important—source of the prejudices and stereotypes that gave rise to such errors or influenced the participants' responses to the other portions of the studies. In assessing the importance of the media's role, one should consider the impact of the other sources of the racist attitudes that viewing crime news seems to prompt.[316] Does the news play a significant role in reinforcing, if not creating, these scripts; or is the media's influence outweighed by other factors, including personal experiences at home, school, and work?

A host of critical questions also focus on the differential impact of various media channels, and on different subgroups of the

314. Dolf Zillmann & Su-lin Gan, *Effects of Threatening Images in News Programs on the Perception of Risk to Others and Self*, 8 MEDIENPSYCHOLOGIE 288, 298-300 (1996).

315. *See supra* text accompanying notes 240-41 (discussing Gilliam & Iyengar).

316. Another interesting question is the validity of the new racism index employed in the Gilliam and Iyengar study, *supra* note 233, at 566 n.12, which treats attitudes such as opposition to affirmative action as new racist attitudes. It seems questionable to label all opposition to affirmative action as evidence of a new subtle form of racism. *See* Kang, *supra* note 292, at 1507 (noting the risk of equating political conservatism with racism).

audience. Researchers have probed the impact of different media on recall of factual information,[317] and have examined the effect of different kinds of images, such as graphic images, negative images,[318] and facial images.[319] Not surprisingly, this research is beginning to reveal a complex picture. Print may be more effective than video for some audiences, but not for others.[320] The

---

317. *See, e.g.*, Melvin L. DeFleur et al., *Audience Recall of News Stories Presented by Newspaper, Computer, Television and Radio*, 69 JOURNALISM Q. 1010 (1992) (finding recall was higher for news stories presented by print or computer screen than stories presented by television or radio); William P. Eveland, Jr. et al., *Learning from the News in Campaign 2000: An Experimental Comparison of TV News, Newspapers, and Online News*, 4 MEDIA PSYCHOL. 355 (2002) (finding recall was more accurate for news stories presented by newspaper and television, but that online news was better for producing more structured knowledge); Barrie Gunter et al., *Memory for the News as a Function of the Channel of Communication*, 3 HUM. LEARNING 265 (1984) (finding recall of content of news stories was best from print and worst from audio-visual, and that "[v]iolent content was recalled better overall than nonviolent content, and significantly so in the audio-only and print modes"); Matthew Koehler et al., *What Is Video Good For? Examining How Media and Story Genre Interact*, 14 J. EDUC. MULTIMEDIA & HYPERMEDIA 249 (2005) (finding no difference between video and text on measures of immediate recall, but suggesting that video presentations may enhance viewers' perceptions of the quality of the information); David Tewksbury & Scott L. Althaus, *Differences in Knowledge Acquisition Among Readers of the Paper and Online Versions of a National Newspaper*, 77 JOURNALISM & MASS COMM. Q. 457 (2000) (finding that online readers had lower levels of recall and recognition than those who read the print version); Juliette H. Walma van der Molen & Tom H. A. Van Der Voort, *The Impact of Television, Print, and Audio on Children's Recall of the News: A Study of Three Alternative Explanations for the Dual-Coding Hypothesis*, 26 HUM. COMM. RES. 3, 20-24 (2000) (finding that both adults and children learned more from television news stories presented in a children's news format, and suggesting that correspondence between verbal and visual content of television stories is decisive for effectiveness of television and print); Juliette H. Walma van der Molen & Marlies E. Klijn, *Recall of Television Versus Print News: Retesting the Semantic Overlap Hypothesis*, 48 J. BROADCASTING & ELECTRONIC MEDIA 89 (2004) (finding that when there is a good match between verbal and visual information, television presentations produce superior recall over print, but when the verbal and visual information do not match, print presentations produce better recall); *supra* note 305.

318. *See, e.g.*, Annie Lang et al., *Negative Video as Structure: Emotion, Attention, Capacity, and Memory*, 40 J. BROADCASTING & ELECTRONIC MEDIA 460 (1996) (finding the presence of negative video in news stories increases attention, ability to retrieve the story, and recognition of information presented during the negative video, but decreases the ability to recall information presented before the negative video).

319. *See, e.g.*, Claudette Guzan Artwick, *Blood, Body Bags, & Tears: Remembering Visual Images from Local Television Crime News*, VISUAL COMM. Q., Spring 1996, at 14, 14-17 (analyzing which images were perceived to be the most compelling, and which were most frequently recalled; and finding that the image of a murder victim's mother, though not as compelling as the image of a body bag on a stretcher, was recalled more frequently).

320. Johannes W. J. Beentjes & Tom H. A. van der Voort, *Television Viewing Versus Reading: Mental Effort, Retention, and Inferential Learning*, 42 COMM. EDUC. 191 (1993)

effectiveness of different media channels seems to vary depending on the story's subject matter.[321] A channel that is effective in conveying information may not be equally effective at creating an affective impact.[322] To fully understand the effect of crime news, a more detailed analysis that considers these and other factors is necessary.[323]

C. It's Not All the Media

In focusing on the news media's role in promoting public support for punitive criminal justice policy, I do not mean to imply that other forces are not at work as well. To the contrary, the news clearly is but one piece of the puzzle, albeit, I argue, an important one. Other factors clearly play a role in promoting punitive public attitudes and the adoption and maintenance of harsh criminal justice policies in the United States. American culture and the American political system do differ in some respects from their European counterparts, and those differences seem to play a significant role in promoting punitive policies. Although they are independent factors, our culture and political system also interact with the news media, with each potentially reinforcing the other to increase support for punitive policies.

(finding that children recalled print and television stories equally well on immediate recall measures, but television viewers scored higher on inferential learning and delayed recall tests); Ann N. Crigler et al., *Interpreting Visual Versus Audio Messages in Television News*, 44 J. COMM. 132, 134 (1994) (describing earlier studies finding video more effective for audience members with low cognitive skills, and print more effective for those with high cognitive skills); Barrie Gunter et al., *Children's Memory for News: A Comparison of Three Presentation Media*, 2 MEDIA PSYCHOL. 93 (2000) (finding children's news recall was better from television than from either print or audio presentations).

321. Crigler et. al., *supra* note 320, at 134.

322. *Id.* (finding audio alone to be just as effective as combined audio and video presentations for conveying information, but finding subjects were most emotionally aroused by the combined presentation).

323. The effect may also vary depending on the style of presentation. Although tabloid-style reporting draws in more viewers, the viewers generally see it as less reliable than traditional reporting styles. *See* Maria Elizabeth Grabe et al., *Packaging Television News: The Effects of Tabloid on Information Processing and Evaluative Responses*, 44 J. BROADCASTING & ELECTRONIC MEDIA 581 (2000). As noted above, framing a story in terms of human interest may also diminish recollection by drawing viewers away from the facts. *See supra* note 226 and accompanying text.

1. American Culture

As several recent events have made clear, American culture is significantly different from the culture of the European Union. These differences have been highlighted by recent events, such as the European resistance to the invasion of Iraq, and the reluctance of several European countries to cooperate in the prosecution of suspected terrorists because they could be subject to capital punishment in the United States.[324] Scholars from many different fields have probed the exceptionalism of American culture.[325] A general assessment of American culture is beyond the scope of this Article, but it is possible to identify several distinctive facets that likely bear on punitiveness.

A number of characteristic features of American culture may support punitive attitudes. The traditional American emphasis on the values of individualism, self-reliance, and personal responsibility[326] is consistent with an understanding of crime as an individual choice rather than the result of socioeconomic conditions. From here, it can be a short step to the conclusion that society should punish crime more harshly to deter it, while at the same time emphasizing personal responsibility rather than the excessive lenience of liberal programs such as welfare.[327] These attitudes

---

324. *See, e.g.*, Suzanne Daley, *A Nation Challenged: Legal Procedure—Paris Fights Death Penalty*, N.Y. TIMES, Dec. 13, 2001, at B5 (discussing European Union countries' traditional refusal to extradite defendants potentially facing the death penalty); Steven Erlanger, *German Chancellor Hopes To Release Evidence Soon*, N.Y. TIMES, June 12, 2002, at A26 (discussing the refusal of Germany, and other European nations, to release evidence that could be used for securing the death penalty against an extradited defendant, such as twentieth hijacker Zacarias Moussaoui, and mentioning those nations' traditional refusal to extradite defendants facing the death penalty).

325. For a general discussion of American exceptionalism, see IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM (Byron E. Shafer ed., 1991); JOHN W. KINGDON, AMERICA THE UNUSUAL (1999); DEBORAH L. MADSEN, AMERICAN EXCEPTIONALISM (1998).

326. *See, e.g.*, KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 116-17 (2d ed. 2004) (noting that American political culture is rooted in values of self-reliance and individualism); GARLAND, *supra* note 1, at 15 (describing the shift of criminological thought in the 1970s toward a greater emphasis on self-control and social control). Not all Americans place an equal weight on individualistic values. One of the two dimensions of the cultural cognition model proposed by Kahan and his colleagues is individualistic versus solidaristic orientation. *See* Kahan & Braman, *supra* note 309 *passim*.

327. *See* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY

clearly distinguish the United States from the welfare states of the European Union. There may also be lingering consequences of the frontier vigilante tradition, particularly in the American South and West, where support for punitive measures is typically the highest.[328] Another aspect of American culture that stands in contrast to our European counterparts is our greater emphasis on religion.[329] Support for punitive policies such as the death penalty is highest in the Bible Belt,[330] where religious belief and observance are the strongest. Research on the death penalty also suggests that certain groups, such as Southern Baptists, support the death penalty more strongly than other groups.[331]

America's heterogenous melting-pot society may also predispose us to support punitive crime measures. A study of supporters of California's three-strikes law found that the most significant factors correlating with support for these measures were not directly related to crime, but rather were general concerns about diversity in society and the breakdown of morality and discipline in the family and in society in general.[332]

AMERICAN POLITICS 48-52 (1997). For a general discussion of Americans' attitudes toward the welfare state, see MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY (1999).

328. Frank Zimring has correlated the historical use of lynching and other aspects of vigilante justice in specific regions to support for capital punishment. He theorizes that the vigilante tradition of regarding the punishment of criminals as a matter of local concern neutralizes one key argument against capital punishment—fear of government power—and creates a receptive climate for the argument that the relatives of victims deserve capital punishment to bring them closure. *See generally* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003) (attempting to explain "the contradictions in American culture that generate conflict over the death penalty").

329. *See* RONALD INGLEHART ET AL., HUMAN VALUES AND BELIEFS: A CROSS-CULTURAL SOURCEBOOK tbl.V9 (1998).

330. In 2005, 68% of those in the South favored the death penalty for persons convicted of murder, compared to 65% in the West, 64% in the Midwest, and 59% in the East. 2003 SOURCEBOOK, *supra* note 71, at tbl.2.52.2005, http://www.albany.edu/sourcebook/pdf/t2522005.pdf. Frank Zimring sees less difference in support for the death penalty in different regions than in its enforcement. *See* ZIMRING, *supra* note 46, at 11-12 (stating that "[p]ublic support for the death penalty is spread fairly evenly across regions," but the level of executions varies by more than 100 to 1).

331. Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 332-33 (2003).

332. Tyler & Boeckmann, *supra* note 297, at 237; *see also* Jodi Lane & James W. Meeker, *Subcultural Diversity and the Fear of Crime and Gangs*, 46 CRIME & DELINQ. 497, 497-98 (2000) (finding fear about "subcultural diversity" to be a strong predictor of both fear of crime

Finally, crime and violence are staples of the American entertainment media. The entertainment industry's emphasis on crime, though not unique to the United States, may reinforce the impact of the news media on public opinion. Entertainment media may reinforce the news media's agenda-setting effects, though this effect may be offset to a degree by the recognition of the programming's fictional quality. Perhaps more important, the entertainment media generally portray individual crimes in a manner that reinforces the assumption that crime arises from individual decisions, rather than societal causes. As noted above, this framing may lead to support for punitive policies.[333]

2. American Politics

There is also an important political aspect to the story of public concern about crime and support for punitive policies. Various theories have been proposed regarding the politics of crime control in the United States. Katherine Beckett has highlighted the role of political initiatives and shown that during key periods political initiatives and media coverage preceded heightened levels of public concern about crime.[334] Tougher criminal sentences are especially effective as political initiatives because they are easier for the public to grasp than changes in criminal law doctrines,[335] particularly when they are associated with a catchy phrase like "three strikes." Supporting punitive policies also provides the public with a way to express moral outrage against crime.[336] Moreover, longer sentences are popular with several key interest groups,[337] and public choice theory predicts that such groups will prevail in the legislative process.[338] During the 1990s, well-funded private interest

---

and fear of gangs).

333. *See supra* Part IV.B.2.

334. BECKETT, *supra* note 327, at 16-27.

335. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2001).

336. *See, e.g.*, *id.* at 531-32 (relating the importance of legislators "taking popular symbolic stands" to please voters).

337. For a discussion of interest group theory in the context of federal criminal legislation, see Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1248-53 (2000).

338. Ronald Wright has noted that, for purposes of public choice analysis, criminal justice

groups representing the prison industry played a substantial role in supporting the adoption of some punitive policies and the election of officials who support such policies.[339] Victims' rights advocacy groups have also been key players supporting the current tough on crime policies.[340] In the context of criminal justice legislation, law enforcement officials function as an important interest group.[341] Prosecutors consistently favor laws that make it easier to get

---

legislation falls into several different categories. Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 255-60 (2004). In the case of changes-in-punishment statutes, prosecutors, and in some cases victims' groups, are recognized in addition to the organized interest groups who normally prevail in the legislative process. *See id.* at 258. Legislation faces little resistance even though it will impose large costs on the public at large, because those costs will be diffuse, not immediate, and difficult to trace. *See id.* However, as Wright notes, new procedures may help legislatures make the budgetary connections between costs and benefits, increasing legislative restraint. *Id.* at 258-59. For further discussion of the effect of budgetary constraints as a limiting factor, see *infra* notes 339-44 and accompanying text.

339. For example, the California Correctional Peace Officers Association (CCPOA) played a major role in the adoption of the state's three-strikes law and in the election of its recent governors who strongly supported longer prison sentences and the construction of more prisons. *See* Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 436 n.242 (1997) (describing CCPOA as the second-largest campaign donor in California and stating that CCPOA donated the second largest amount in support of the three-strikes initiative, Proposition 184). The CCPOA reportedly donated $1.5 million to the campaign of Governor Pete Wilson, who strongly supported both three strikes and prison construction, and spent $2.3 million to elect Governor Gray Davis. *Developments in the Law III. A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1873 nn.33 & 34 (2002); *see also* Vitiello, *supra*, at 481 n.242 (noting that as governor "Wilson launched the most expensive prison construction plan that any state has ever undertaken"). Prison guards in California are well paid: in 1997 the average starting salary of a guard with a high school diploma and six years experience was nearly $2,000 more than an associate professor with a Ph.D. starting at the University of California. Walter L. Gordon III, *California's Three Strikes Law: Tyranny of the Majority*, 20 WHITTIER L. REV. 577, 608 (1999) (citing CAL. DEP'T OF CORR., CDC FACTS, 1 (1997)). For a general argument that "the prison-industrial complex" has become a powerful lobbying group, see THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION (Steven R. Donziger ed., 1996); Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, *available at* http://www.theatlantic.com/issues/98dec/prisons.html.

340. In the United States these groups have generally supported harsher penalties rather than other initiatives, such as financial support and services for crime victims. Although multiple reasons for this policy preference may exist, some groups have a significant financial stake in the current punitive policies as well as strong ties to other groups with a direct financial stake. *See* Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 430 (noting that some victims' rights groups are financed by criminal fines and forfeitures, and that the state prison guards' union provided 78% of funding for leading California victims' rights group).

341. *See id.* at 534.

convictions,[342] and longer sentences can serve this function by giving prosecutors increased leverage in plea negotiations.[343] Few if any countervailing interest groups exist. Indeed many of the people most likely to be subjected to punitive measures, such as three-strikes laws, have lost their civil rights, including the right to vote.[344] Some scholarship has emphasized the importance of the opportunity for political realignment in the South following the passage of national civil rights legislation, and the Republican Party's subsequent emphasis on crime issues.[345] Southerners have generally favored more severe sentences and more conservative criminal justice policies,[346] so the Republicans' "get tough on crime" campaigns played particularly well in the South. The general rise in political conservatism in the United States may also have played a role in increasing the support for punitive criminal justice policies.

Some features of the American political system appear to make it particularly receptive to punitive policy initiatives. In addition to the cultural aspects noted above, certain structural features of the American political system differ from those in most of our European counterparts and may provide a partial explanation for the policy

---

342. *See* Stuntz, *supra* note 335, at 529.

343. *See* Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1676-80 (2002) (describing how increased gun penalties have enhanced federal prosecutors' leverage, resulting in higher conviction rates but surprisingly low numbers of cases in which mandatory sentences were imposed).

344. For a general discussion of felony disenfranchisement, see THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2006), http://www.sentencingproject.org/pdfs/1046.pdf; CHRISTOPHER WAGGEN & JEFF MANZA, THE SENTENCING PROJECT, SUMMARY OF CHANGES TO STATE FELON DISFRANCHISEMENT LAW 1865-2003 (2003), http://www.sentencingproject.org/pdfs/UggenManzaSummary.pdf; Afi S. Johnson-Parris, Note, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109 (2003).

345. BECKETT & SASSON, *supra* note 326, at 48-82; Beale, *supra* note 2, at 40-43. Interestingly, William Stuntz suggests that a countervailing influence may also have prevailed, and that crime was depoliticized during the Civil Rights Era of the 1960s and into the 1970s because politicians did not want to be associated with segregationists. Stuntz, *supra* note 335, at 584-85.

346. *See generally* 2003 SOURCEBOOK, *supra* note 71, at tbl.2.47, http://www.albany.edu/sourcebook/pdf/t247.pdf (comparing regional support from 1985 to 2002 for the statement that local courts do not deal harshly enough with criminals); Borg, *supra* note 289 (comparing Southerners' attitude toward capital punishment with a "southern subculture of violence").

differences noted here. Public opinion on sentencing translates more readily into law in the United States than in other western democracies.[347] A comparative study of legislatures in the United States, Britain, and Germany concluded that the U.S. system produces extreme electoral vulnerability,[348] creating especially strong incentives for symbolic politics—such as "get tough on crime" initiatives—that play on voters' anxieties. The California voter initiative to recall Governor Gray Davis just a few months after his reelection is a powerful example of the instability created by the American political system's populist features.[349] Politicians in at

---

347. *See* ZIMRING ET AL., *supra* note 64, at 185-87 (comparing degree of popular control over sentencing in the United States and other G-7 nations).

348. ANTHONY KING, RUNNING SCARED: WHY AMERICA'S POLITICIANS CAMPAIGN TOO MUCH AND GOVERN TOO LITTLE 44-46 (1997). That is not to say that European systems are immune from the politics of crime. For an interesting discussion of the role French television news regarding crime (*l'insécurité*) played in the presidential election of 2002, when National Front Leader Jean-Marie Le Pen scored a noteworthy preliminary victory, see generally Raymond Kuhn, *'Be Very Afraid': Television and l'Insécurité in the 2002 French Presidential Election*, 20 EUR. J. COMM. 181 (2005). During the three-month run up to the election, *l'insécurité* was the dominant theme on the major commercial French television channel, TF1, which ran about twice as many stories as the state-run competitor, France 2. *Id.* at 183-85. Kuhn concludes that although news coverage did provide support for Le Pen's campaign themes, television did not set the campaign agenda. *Id.* at 195. For a brief discussion of the impact of talk radio, the tabloid press, and current affairs television programming on criminal justice policy in Australia, see Nicholas Cowdery, The Impact of Media on Public Perception, Political Action and Decision Making in the Justice System (2001), *available at* http://isrcl.org/Papers/Cowdery.pdf. Cowdery was named the Director of Public Prosecutions in New South Wales in 1994.

349. For a general description of the Davis recall, see Howard Fineman & Karen Breslau, *State of Siege*, NEWSWEEK, July 28, 2003, at 26-32. Many states, including California, also have other forms of direct voter control. Twenty-one states and the District of Columbia permit voters to propose and enact voter "initiative" statutes without legislative approval. Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 113-14 (1995). Comprehensive studies of voter behavior suggest that voters rely heavily on mass media advertising for information on propositions. *Id*. at 131-38. For accounts of recent voter initiatives, see James E. Castello, *The Limits of Popular Sovereignity: Using the Initiative Power To Control Legislative Procedure*, 74 CAL. L. REV. 491 (1986) (discussing California's Proposition 24, which significantly altered the state legislature's internal procedures); Kenneth Janda, *Do Our People's Republics Work?*, NEWSDAY, Aug. 6, 2003, at A27 (noting that twenty-four states have some form of voter referendum or initiative, and eighteen states allow popular recall of elected officials); Roberto Suro, *California's SOS on Immigration; Initiative Would Cut Off Illegals' Benefits, Schooling*, WASH. POST, Sept. 29, 1994, at A1 (outlining the battle for California's controversial anti-immigrant Proposition 187). Direct democracy is concentrated in western states. Fourteen states east of the Mississippi, including New York, have no referenda, initiative, or recall available to their voters, whereas only three west of the Mississippi—Iowa, Minnesota, and

least some European nations are more closely tied to their parties, and much less at the mercy of the electorate. In contrast to the United States, where elected officials are increasingly independent from their political party and directly accountable to their constituencies, politicians in Germany appear to be less affected by public opinion, from which they are at least partially shielded by the bureaucratized social organization.[350] The heavy involvement of large neocorporate welfare organizations, such as unions, in the development and implementation of public policy and in the regulation of major portions of the news media,[351] appear to be associated with greater stability in German public opinion as compared with the United States.[352] Although not all European democracies share these features of German society and government, many do have greater party discipline, more bureaucratized societies, and other social and political factors that buffer politicians from the public.[353] The European democracies also have less "social inequality, racial conflict, and poverty."[354] The differences between the societies may make the deterrence models that emphasize punishment as a response to crime more attractive in the United States than in European states more similar to Germany.[355]

3. The News Media Interact with Culture and Politics

These political and cultural explanations are by no means inconsistent with the argument presented here that the media's crime coverage increases public receptivity to and support for

---

Texas—lack at least one of these measures. Janda, *supra*.

350. Savelsberg, *supra* note 63, at 931.

351. *Id.* at 929 (discussing the role of neocorporate organizations, such as unions, employers' associations, churches, and political parties, in parliamentary testimony and in controlling the governing boards of major portions of the German news media).

352. *See id*. at 929.

353. The abolition of the death penalty in various European countries is a good example of this buffering. The legislatures acted despite strong public support for capital punishment. At the time of abolition, approximately 60% of the French public and 80% of the British public supported the death penalty. *See* Beale, *supra* note 340, at 430-31.

354. Gary LaFree, *Too Much Democracy or Too Much Crime? Lessons from California's Three-Strikes Law*, 27 LAW & SOC. INQUIRY 875, 888 (2002).

355. Savelsberg, *supra* note 63, at 938-39.

punitive crime initiatives. The news media unquestionably play a vital role in communicating political initiatives and covering political campaigns. But more important for the purposes of this Article, news coverage of criminal activity can prepare the way for coverage of crime initiatives. Political candidates use the news media to garner support, which in the United States has often meant campaigning on issues of crime and punishment.[356] As noted above, media coverage of crime helps to set the political agenda and prime the public to judge candidates by their actions and stands on criminal justice issues.[357] Similarly, culture likely shapes the news media—which inevitably reflect cultural assumptions—and is in turn shaped by it. The media both create and transmit norms.[358]

CONCLUSION

Fundamental economic forces have reshaped the news media in the United States, and market forces are determining to a substantial degree the extent and content of the news media's treatment of crime and the criminal justice system. Evidence that these changes are not neutral is accumulating. My focus has been on the media's treatment of crime from 1990 onward. During that period, crime fell, but the news media's focus on crime, especially violent crime, increased. Remarkably, at least half of the public remained ignorant of the reduction in crime, and a large majority continued to rate crime as one of the nation's most serious problems and to support even harsher measures. During the same period, a wide range of punitive laws and policies were promulgated, and recently adopted laws were implemented with a vengeance, leading to unprecedented rates of incarceration. Although the research

356. For a discussion of the political use of crime and the media coverage of crime in the context of the French presidential election, see *supra* note 348.

357. *See supra* Part IV.B.1.

358. Susan Bandes makes a similar point:

> Law and media exist in a complex feedback loop. Television, with some help from other media, has become our culture's principal storyteller, educator, and shaper of the popular imagination. It not only transmits legal norms, but also has a role in creating them. We are constantly constructing and interpreting our notions of law and justice based on what we know, or what we think we know.

Bandes, *supra* note 127, at 585.

discussed above is not definitive, it supports the view that the news has been playing an important role in increasing both the political salience of crime and public support for punitive policies, and doing so in a manner that activates racist attitudes. According to this analysis, the news media are playing a critical—though unplanned and largely unexamined—role in the formulation of criminal justice policy. Though it does not address the origins of the swing toward punitiveness in the 1970s, the present research does suggest that the news media's treatment of crime has amplified or bolstered other forces, and has retarded responses that might have mitigated these policies.

Although news coverage may improve with awareness of the trends described, the changes are likely to be minimal absent a shift in market pressures. In light of the First Amendment and the values it reflects, it is unlikely that Congress or the FCC would seek to regulate the content of news media, or that such regulation would be valid if adopted.[359] Some media self-monitoring, however, may occur. For example, the news media's awareness of the significant differences in treatment of black and white victims[360] might spur greater efforts at evenhandedness. In addition, various groups of journalists, as well as policy centers and institutes, have attempted to articulate standards and provide background materials that encourage journalists to write thematic stories or add thematic elements to stories whose main focus is episodic.[361] Journalists might also find preparing thematic stories about crime,

---

359. Jerry Kang has suggested, however, that the FCC could impose a 15% cap on crime stories on the local news or require "de-biasing public service announcements" as a means of decreasing implicit bias against minorities. Kang, *supra* note 292, at 1573, 1580.

360. *See supra* notes 280-82 and accompanying text.

361. Organizations like the American Press Institute, Criminal Justice Journalists, the Project for Excellence in Journalism, and the Poynter Institute are promoting efforts to report stories in meaningful context and to cover stories in proportion to their social and community significance. *See* API Home Page, http://www.americanpressinstitute.org (last visited Oct. 7, 2006); Criminal Justice Journalists Home Page, http://www.reporters.net/cjj (last visited Oct. 7, 2006); http://www.journalism.org (last visited Oct. 7, 2006); Poynter Online Home Page, http://www.poynter.org (last visited Oct. 7, 2006).

Building Blocks for Youth, an independent policy institute focusing on youth offenders, recommends expanding sources, providing context, increasing investigative journalism, balancing crime stories with positive stories about youths, conducting periodic and transparent audits of news content, and utilizing restraint in the story selection process. DORFMAN & SCHIRALDI, *supra* note 276, at 27-35.

and a variety of hard news stories, easier and less expensive if government or private institutions made more of an effort to provide information.[362] Finally, some media outlets may even try, from time to time, to decrease their focus on crime.[363] But given market forces, these changes are likely to be on the margins as long as graphic, episodic, tabloid-style crime stories increase viewers or readers and thus revenues.[364]

If the media does not change, are there any countervailing forces, or any mechanisms that might counter this one-way rachet? The most significant force is already operating. At the state level, significant budgetary pressures—indeed, crises in many states—have forced a reexamination of sentencing policies in order to cut costs.[365] Even states, such as Louisiana, that have traditionally been among the most punitive are now adopting changes to reduce their prison population in order to make the state budget balance.[366] At the state and local level the astronomical costs of our high rates

---

362. *Cf.* HAMILTON, *supra* note 99, at 9-18 (describing the economic theory of information demand by television viewers).

363. For example, in the mid-1990s, KVUE, a television station in Austin, Texas, limited its coverage of crime stories by instituting a five-prong test that asked: "1) Does action need to be taken? 2) Is there an immediate threat to safety? 3) Is there a threat to children? 4) Does the crime have significant community impact? 5) Does the story lend itself to a crime-prevention effort?" Joe Holley, *Should the Coverage Fit the Crime? A Texas TV Station Tries To Resist the Allure of Mayhem*, COLUM. JOURNALISM REV., May/June 1996, at 28, *available at* http://archives.cjr.org/year/96/3/coverage.asp. Stories were pulled if they could not pass the test. *See id.* Apparently this policy is no longer a priority at KVUE, although it may never have been repudiated. In 2002, the news director of KVUE indicated that the station had relaxed the rules to some degree: "'We had gone too far,' he said. 'Under those rules, we wouldn't have said anything about the O.J. Simpson case or JonBenet Ramsey. We don't show gruesome video. But we do cover the sniper case.... It's something local people are talking about.'" Bud Kennedy, *Local Media Miss the Real Stories*, FORT WORTH STAR-TELEGRAM, Oct. 24, 2002. The station's current website makes no reference to the policy, and local reporters now refer to the policy in the past tense. *See* Sharyn Wizda Vane, *The Scoop on Media in America: Veteran Editors Criticize the Way News Is Reported*, AUSTIN AM.-STATESMAN, Mar. 7, 2002, at E1 (referring to KVUE's "experiment in the 1990s").

364. In fact, had KVUE not been the ratings leader in the Austin market, it may not have been so willing to eschew sensationalistic crime reporting. *See* Holley, *supra* note 363.

365. *See, e.g.*, ROBIN CAMPBELL, VERA INSTITUTE OF JUST., DOLLARS AND SENTENCES: LEGISLATORS' VIEWS ON PRISONS, PUNISHMENT, AND THE BUDGET CRISIS 3-4 (2003), *available at* http://www.vera.org/publication_pdf/204_398.pdf; Beale, *supra* note 340, at 435-37; Vincent Schiraldi, *Digging Out: As U.S. States Begin To Reduce Prison Use, Can America Turn the Corner on Its Imprisonment Binge?*, 24 PACE L. REV. 563, 566 (2004); Seth Stern, *Lean Times Spur Hard Look at Prison Population Boom*, CQ WEEKLY, Sept. 11, 2006, at 2365.

366. Beale, *supra* note 340, at 436.

of imprisonment are imposing financial costs that can no longer be ignored. Correctional costs now make up a very significant percentage of the states' budgets.[367] Many states are constitutionally required to balance their budgets, and some, like California, face severely limited sources of revenue. At the state and local level, thus, a natural corrective is built into the system. On the other hand, these correctives are largely absent in the federal system, where correctional costs are less than a drop in the federal budget bucket,[368] and budget deficits are commonplace.[369] For that reason it is not surprising that in 2003 Congress overwhelmingly passed legislation to increase federal sentences.[370] Between 2000 and 2005, the number of federal inmates grew four times faster than the number of state inmates.[371]

Current events, the media themselves, public opinion, and crime are all dynamic, and changes in each are likely to affect the trends described in this Article. In the past five years a series of important events have altered the media's focus and diverted the public, at least to some degree, from concern with garden variety domestic crime. These events included the terrorist attacks of September 11, the dissemination of Anthrax letters and looming threat of other terrorist attacks, the wars in Afghanistan and Iraq, the collapse of corporate giants such as Enron, and the dramatic fall in the stock

---

367. For example, in 2003 prison expenditures accounted for one-fourteenth of California's state budget. *See id.*

368. The federal prison system in 2002 accounted for only $4.617 billion of the $2.011 trillion federal budget. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004, at 195, 311 (2003), *available at* http://www.gpoaccess.gov/usbudget/fy04/pdf/budget.pdf.

369. *See id*. at 311.

370. The Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 ("PROTECT Act") was intended in part to preclude federal judges from departing downward from the Sentencing Guidelines, imposing what Congress viewed as unduly lenient sentences. *See* Pub. L. No. 108-21, § 5K2.22, 117 Stat. 650, 669-76 (2003). In contrast to the situation in many states, where funding has leveled off or been reduced, Congress has continued to provide money to build new prisons and the federal prison population is continuing to expand significantly. In 2003 the federal prison population was predicted to continue to expand by 9000 inmates per year; three new federal prisons opened in 2003, and nine in 2004. *See* Crime and Justice News, 216,000 Federal Inmates Projected by 2010, http://cjj.mn-8.net/login.asp?link= (follow "Enter as a Guest" hyperlink; then follow "Our News Archive" hyperlink; then select "CJN Stories—Search Entire Archive"; then search for the article's title) (last visited Oct. 7, 2006).

371. *See* Stern, *supra* note 365.

market and other economic indicators. These events occurred at a time when public opinion polls had revealed a softening of some of the punitive attitudes that increased or held steady during most of the 1990s. One cannot yet say how support for punitive measures will be affected by these events, except that the public favors harsher treatment of financial crimes.[372]

Profound changes are also underway within news media. The traditional news sources—newspapers, newsmagazines, local and network television, and radio—have all continued to lose readers or viewers, while the Internet has become an increasingly important source of news and twenty-four hour cable news networks have proliferated.[373] Will less exposure to the news mean less fear and less punitiveness? Or will media outlets try to lure back viewers with even more crime and violence? Further research is necessary to explore the implications of these changes, particularly in light of research indicating that various demographic groups tend to have different media preferences.

Finally, one of the most important trends noted in this Article may have run its course. Data from both victimization surveys and reported crime suggest that crime rates are stabilizing, rather than falling, with small increases in some categories of crime for the first

372. Public opinion polls reveal a variety of changes in public opinion, rather than a single trend. Some pollsters suggest that punitiveness has run its course and the public is increasingly supportive with alternative sanctions. *See, e.g.*, PETER D. HART RESEARCH ASSOCIATES, INC., THE OPEN SOCIETY INSTITUTE, CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM 1 (Feb. 2002) (finding support for long prison terms "waning" in favor of a "balanced, multifaceted solution that focuses on prevention and rehabilitation in concert with other remedies"). On the other hand, a poll in early 2006 found that within the last year a variety of demographic groups, including women, college graduates, and 18- to 29-year-olds, ranked reducing crime as an important national priority. PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, EMERGING PRIORITIES FOR '06–ENERGY, CRIME, AND ENVIRONMENT: ECONOMY NOW SEEN THROUGH PARTISAN PRISM 9 (Jan. 24, 2006), *available at* http://people-press.org/reports/pdf/268.pdf (finding that in January 2006, 69% of women and 68% of 18- to 29-year-olds identified reducing crime as something that should be a top priority for Congress).

373. Both broadcast news and cable outlets lost viewers in the summer of 2003, perhaps due to "[n]ews [b]urnout" caused by increased coverage of terrorism and the War in Iraq. Jim Rutenberg, *Suffering News Burnout? Rest of America Is, Too*, N.Y. TIMES, Aug. 11, 2003, at C1.

time in a decade.[374] It remains to be seen how these changes will impact the story of media influence presented in this Article.

374. The Bureau of Justice Statistics reported in September 2005 that the "[v]ictimization rates for every major type of crime measured were unchanged from their 2003 levels," and "[t]aken together, the 1-year (2003-2004) and 2-year (2001-2002 to 2003-2004) change estimates indicate that crime rates remain stabilized at the lowest levels experienced since 1973." *See* CATALANO, *supra* note 32, at 1. The FBI's Uniform Crime Reports, however, indicate a slight increase in murder and nonnegligent manslaughter in 2003. *See* CRIME IN THE UNITED STATES, *supra* note 34, at tbl.1.