

What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law

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In a 1996 book about the divergence between the opinions of experts and those of the general public regarding the environment and the regulation of risks, psychologist Howard Margolis writes:

Every knowledgeable reader will be able to think of policy areas where what we are choosing as a society runs contrary to what almost everyone with close knowledge of the topic thinks makes much sense. We spend generously on programs that virtually no well informed person thinks can accomplish much. We are unable to muster support for other programs which promise much more, in part because such discretionary spending as is available is preempted by spending on programs that will go nowhere. And although it is never easy to get a broad consensus on what affirmatively should be done (or that nothing can usefully be done), no one doubts that we would all be better off if we could at least avoid commitments that exhaust major resources with no serious prospect of reasonable returns.¹

This paper begins from the premise that many of the recent federal (and state) criminal justice initiatives are indeed "contrary to what almost everyone with close knowledge of the topic thinks makes much sense,"² and examines

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1. HOWARD MARGOLIS, *DEALING WITH RISK: WHY THE PUBLIC AND THE EXPERTS DISAGREE ON ENVIRONMENTAL ISSUES* 5 (1996).

2. Indeed, a recent article examined the question why the views of criminal justice experts are "ignored" in the current public debates. Samuel H.

the question why we have policies that so many of the experts believe to be unwise or even counterproductive.

The most significant criminal justice initiatives in the past decade have involved sentencing. In the 1990s these involved more mandatory minimums, three strikes provisions, and extending the death penalty to more offenses. The 1980s saw several waves of anti-drug legislation imposing significant increases in the penalties³ and the enactment of the legislation authorizing of the Federal Sentencing Guidelines, which received bipartisan support because the Guidelines would decrease disparity and prevent lenient sentences.⁴ These "reforms" have resulted in longer sentences for federal prisoners⁵ and a huge increase in the size of the federal prison population.⁶ Between 1988 and

Pillsbury, *Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice*, 31 CRIM. L. BULL. 305 (1995). Professor Pillsbury lays much of the blame at the feet of criminal justice experts who have relied on statistics without coming to grips with the special emotional quality of crime, been overly specialized and partisan, and focused on the long view when the public demanded some immediate change.

3. See NATIONAL CRIMINAL JUSTICE COMMISSION, *THE REAL WAR ON CRIME* 14-16 (Steven R. Donziger ed., 1996) (describing the federal anti-crime legislation passed in 1984, 1986, 1988, and 1994) [hereinafter *THE REAL WAR ON CRIME*]. For a description of the sentencing bills enacted in the 1980s, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 259 & nn.211-12 (1993).

4. See *id.* at 230-43, 257-69 (tracing the evolution of the sentencing reform proposals during the 1970s and 1980s, with crime as an increasingly powerful political issue, and noting that the bill finally enacted in 1984 was supported by conservatives, such as Senator Thurmond, as a means of curbing lenient sentencing).

5. See, e.g., 2 UNITED STATES SENTENCING COMMISSION, *THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING* 378-81 (1991) (concluding that mean sentence lengths across all offenses nearly doubled between 1984 and 1990 as a result of the Anti-Drug Abuse Act of 1986, the initial implementation of the Guidelines, and the Supreme Court's decision upholding the constitutionality of the Guidelines; and analyzing trends for various categories of offenses).

6. See Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L. REV. 1277, 1289-90 (1995) (noting that number of federal inmates grew 263 percent from 1980-1993, making the federal prison system

1993 the growth rate for the federal prison population was 51 percent faster than the growth rate of state prison populations.⁷

Although the goal of increasing sentence severity consistently garners the support of at least 80 percent of the public,⁸ few criminal justice professionals believe that further increasing the length of sentences will greatly increase public safety or reduce crime. There are a few criminal justice experts who support harsher sentences, but they are in the distinct minority.⁹ Michael Tonry and David Farrington stated the orthodox view in 1995:

the second largest prison system in the United States).

7. Kevin R. Reitz, *The Federal Role in Sentencing Law and Policy*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 123 (1996).

8. For example, annual polling by the National Opinion Research Center from 1990 to 1994 found that at least 80 percent of respondents in a national sample stated that courts in their own area did not deal harshly enough with criminals. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994, table 2.43 (Kathleen Maguire & Ann L. Pastore eds., 1994). In 1994, 85 percent of the respondents felt that sentences were not harsh enough, and only 3 percent felt sentences were too harsh. *Id.* An ABC News/Washington Post poll of a national sample in 1994 found that 86 percent supported requiring a mandatory life term for anyone convicted of a third violent felony. *Id.* at table 2.44. Two other polls conducted in 1994 found that 73 percent of respondents would approve of building more prisons so that longer sentences could be given, *id.* at table 2.48, and 85 percent stated that they would support increased taxes to build more prisons. *Id.* at table 2.49. A national poll in 1993 found that 61 percent of respondents stated that the government needed to make a greater effort to punish violent offenders, while only 25 percent thought it should make greater efforts to rehabilitate offenders. *Id.* at table 2.46.

9. See John J. DiIulio, Jr., *Help Wanted: Economists, Crime and Public Policy*, 10 J. ECON. PERSP. 3, 7-15 (1996) (arguing that the trend toward stronger punishments has been greatly exaggerated, and that sentences for many serious offenders are still too lenient); James Q. Wilson, *Crime and Public Policy*, in CRIME 449 (James Q. Wilson & Joan Petersilia eds., 1995) (stating general agreement with the public's desire for longer sentences, but cautioning that "the average person exaggerates the faults of the present system and the gains of some alternative (such as 'three strikes and you're out')"). Both DiIulio and Wilson recognize that theirs is a minority view. See DiIulio, *supra*, at 12 (noting that most criminologists believe that "the real problem is not revolving door justice but its opposite—public policies that incarcerate too many convicted criminals for too long"); Wilson, *supra*, at 499 ("many (probably most) criminologists think we use prison too much and at too great a cost and that this excessive use has had little beneficial effect on the crime rate").

There is widespread agreement over time and space that alterations in sanctioning policies are unlikely substantially to influence crime rates. In the United States, this was the conclusion of the President's Commission on Law Enforcement and the Administration of Justice (1967), the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects (Blumstein, Cohen, and Nagin 1978), and the National Academy of Sciences Panel on the Understanding and Control of Violent Behavior (Reiss and Roth 1993).¹⁰

The 1993 National Academy of Sciences Panel concluded that tripling the average length of incarceration per crime between 1975 and 1989 apparently had "very little" impact on the crime rate, and that further increases would have an "even smaller incapacitation effect than the increase that occurred between 1975 and 1989."¹¹ The same panel concluded that an increase in the probability of detection would prevent *twice as much* violent crime as the same increase in the length of incarceration.¹² Of course any increases in incarceration have *some* effect through incapacitation,¹³ and incapacitation of a large enough fraction

10. Michael Tonry & David P. Farrington, *Strategic Approaches to Crime Prevention*, 19 CRIME & JUST. 1, 6 (1995).

11. UNDERSTANDING AND PREVENTING VIOLENCE 6 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993).

12. *Id.* Stephen Schulhofer has raised a similar point in another context, a response to the claim that the *Miranda* decision lowered the crime clearance rate. Schulhofer demonstrates that the rise in the rate of violent crime in the 1960s coincided with a significant drop in both the crime clearance rates and the "clearance capacity," i.e., the number of police officers per known violent offense. See Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278 (1996). Schulhofer demonstrates that crime clearance rates are extremely sensitive to clearance capacity. When police resources declined, the clearance rate dropped. In 1955, the U.S. had 121 police officers per 100 reported violent offenses, and the clearance rate for these offenses was 64 percent; by 1974 the number of police had fallen to 45 per 100 reported offenses, and by 1994 to only 28 per 100 offenses. *Id.* at 288. To return to half the police clearance capacity we had in the 1950s would require hiring 600,000 police officers. *Id.* at 289.

13. For the most sophisticated effort to date to measure the degree of deterrent effect of increases in imprisonment, see FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT*

of the population will necessarily bring about some crime reduction (as would imprisoning all males between the crime-prone ages of 15 and 24). The dominant expert view is that further increases in sentence length will, at best, bring about modest reductions in crime, while measures not being pursued hold more promise.

What about mandatory minimum sentences, the principal mechanism used by Congress and the state legislatures to increase the length of sentences? The weight of the available evidence suggests that there is little to recommend them. The Judicial Conference of the United States, the Federal Courts Study Committee, and the United States Sentencing Commission—the expert federal agency—all oppose the use of mandatory minimum sentences.¹⁴ In 1994 the Federal Judicial Center reviewed the available research, and concluded that mandatory minimums “have had no observable effect on crime.”¹⁵ On the other hand,

OF CRIME 100-27 (1995). After modeling the expected increases in crime rates by four different methods and comparing the actual crime rates, Zimring and Hawkins concluded that the increases in incarceration in California during the 1980s may have resulted in roughly a 15 percent reduction in crime (based on the 1990 volume), and that the reductions were concentrated in the burglary and larceny categories, with some influence on rape, and no substantial incapacitation benefits for homicide, assault, and robbery. However, another aspect of the study cast doubt on the conclusion that incapacitation played the dominant role in producing the reduction in burglary and larceny, because the lower rates were concentrated among juveniles rather than the adults who were the principal subjects of the increased incarceration. Zimring and Hawkins also identify a variety of methodological flaws in two earlier studies which found greater incapacitative effects and a higher net social benefit for increased incarceration. *Id.* at 131-54 (discussing earlier studies by Mark Cohen and Edwin Zedlewski).

14. See UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991). The Special Report restates the positions of the Federal Courts Study Committee and the Judicial Conference. *Id.* at 90-91. The resolutions of the Judicial Conference and similar resolutions adopted by the Judicial Conferences of 11 circuits, and by the chief district judges of the Ninth Circuit, are reprinted at G-1 to G-24.

15. BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 14 (1994). See also MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 173-81 (1995); Michael Tonry, *Mandatory Penalties*, 16 CRIME & JUST. 243-73 (1992).

mandatory minimum sentencing laws do have serious undesirable effects. They are not applied uniformly, and they transfer discretion from neutral judges to adversarial prosecutors.¹⁶ The mandatory sentencing provisions in the federal system have had a disparate effect on non-white offenders.¹⁷ In fact, mandatory minimum sentencing laws for drug offenses may even undermine public safety by requiring courts and prison authorities to release more dangerous violent offenders.¹⁸ Indeed, Richard Allen Davis, who was executed for kidnapping and killing Polly Klass, had been released early after two prior kidnappings because of mandatory sentencing laws and prison overcrowding, not because of an unduly lenient sentence.¹⁹ Truly mandatory minimum sentencing laws impose additional costs on the judicial system because trial rates and case processing times increase.²⁰ Mandatory sentencing laws also prevent the courts from individualizing sentencing, equalizing the sentences of minor participants and organizers, and undermining the purposes of sentencing reform.²¹

There are many other possible examples of current policies that fly in the face of expert opinion, such as the 100:1 ratio used for calculating federal sentences for crack and powdered cocaine, which results in harsher sentences

16. VINCENT & HOFER, *supra* note 15, at 17-22. See also Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202-08 (1993).

17. VINCENT & HOFER, *supra* note 15, at 23-25.

18. See Susan Estrich, *Hard Time Won't Fit All the Crime*, USA TODAY, July 18, 1996, at 15A (citing a CATO Institute report that calls lengthy prison terms for drug offenders "the best things that ever happened to violent criminals" who "end up being released to make room").

19. Susan Estrich, *Three Strikes: Judges' Discretion Advised*, USA TODAY, June 27, 1996, at 13A.

20. See, e.g., Schulhofer, *supra* note 16, at 207-08 (New York's mandatory Rockefeller drug law increased the probability of incarceration upon conviction, but it also led to a decline in the probability of indictment and conviction, so that the net probability of incarceration given arrest remained unchanged, while trial rates and case processing times rose sharply).

21. VINCENT & HOFER, *supra* note 15, at 26-32. See also Schulhofer, *supra* note 16, at 208-14.

for black defendants convicted of dealing in crack than for white defendants dealing in powdered cocaine,²² and the three strikes laws enacted in California²³ and other states.

Why have these policies been adopted? The epithet "soft on crime" is the contemporary equivalent of "soft on Communism." In the United States, politicians have learned that to win you need to convince the public that you are tough on crime. In contrast, in other countries, such as England, Canada, and Finland, where there is a tradition of empirical research as a guide to criminal justice policy, there is a greater recognition that the deterrent effect of criminal prosecutions is likely to be modest. There is interest in alternative governmental policies to reduce crime. Why is there no greater interest in basing our criminal justice policy on what works to prevent crime, rather than on an exclusively punitive model with increasingly harsher sanctions, including Alabama's brief return to chain gangs? As Marc Mauer wrote:

In other areas of our life, our societal response is more proactive. For example, since we know that improving diet and exercise is a better way to fight heart disease than building hospital beds for heart attack patients, we have taken great strides in emphasizing this kind of preventive health care.

22. In 1995, the U.S. Sentencing Commission unanimously concluded that the current 100-to-1 ratio found in the mandatory minimum penalty statutes and replicated in the guidelines should be changed. UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995). Accordingly, the Commission's 1995 submission to Congress included a guideline amendment as well as a legislative proposal that would employ a 1-to-1 quantity ratio for sentencing offenses involving crack and powdered cocaine. Although all members of the Commission concurred on the desirability of modifying the 100-to-1 ratio, the Commission was divided on whether to move to a 1-to-1 ratio for all offenses. The Commission's submission to Congress and the Justice Department's rebuttal are reprinted at 7 FED. SENT. REP. 312 (1995). Congress enacted legislation rejecting all aspects of the Commission's proposal, including those aspects which had the unanimous support of all members of the Commission. Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334.

23. For a discussion of the irrationality of California's three strikes law, see Pillsbury, *supra* note 2, at 307-13; Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997).

Yet when it comes to crime control, we are still conditioned to think that building an \$80,000 prison cell is the best way to address the problem.²⁴

A 1996 report by the RAND Corporation concluded that preventive measures are significantly more cost effective than longer sentences of imprisonment.²⁵ Unfortunately, the proactive or preventive model seems to have little or no current political support. The public seems convinced that we have been unduly lenient on criminals and that a tougher stance will cure the problem.

What about the costs of these policies? Although some of these initiatives have been window dressing with little effect,²⁶ many other measures have imposed cruel and unjustified punishments on thousands of individuals and their families while diverting scarce public funds from other programs that have a greater chance of increasing public safety or achieving other socially desirable goals. Evidence of the tradeoffs is beginning to accumulate. California will spend \$3.5 billion on prisons in 1996, which is \$1.2 million more than the 22-campus California State University system will receive.²⁷ The RAND Corporation has concluded

24. Marc Mauer, *Take a Life Out of Crime*, RECORDER, Sept. 11, 1996, at 4.

25. *Frustrations in the Fight Against Crime*, U.S. NEWS & WORLD REP., July 1, 1996, at 10 (citing RAND Corp.'s conclusion that for each \$1 million spent over thirty years, graduation incentives would avert 258 serious crimes, parent training would avert 157 serious crimes, and three strikes legislation would avert 63 serious crimes). Other studies have demonstrated similar effects. See, e.g., Ted Guest et al., *Popgun Politics*, U.S. NEWS & WORLD REP., Sept. 30, 1996, at 30 (citing a study of more than 2,000 drug abusers in Oregon which concluded that for every dollar the state spent on treatment it saved \$5.60 in the costs of prisons, welfare, and other expenses).

26. See, e.g., Fox Butterfield, *"Three Strikes" Rarely Invoked in Courtrooms*, N.Y. TIMES, Sept. 10, 1996, at A1 (discussing studies by the National Council on Crime and Delinquency and Campaign for an Effective Crime Policy which conclude that the three strikes statutes in force at the federal level and in states other than California are invoked infrequently and have had no effect; despite the political rhetoric, three strikes added little to laws already in force).

27. Clark McKinley, *California Balks at High Price of Criminals*, UPI, Aug. 15, 1996. For a discussion of the increasing competition between expen-

that 30 percent of qualified applicants will be turned away from California colleges in ten years if current budget trends continue.²⁸ The author of the report notes that "asking the state Legislature for a higher level of funding is unrealistic given California's constitutional mandate to spend more money for prisons under the 'three strikes, you're out' anti-crime law."²⁹ Given the current rate of growth of California's prison population, by 1997 the number of inmates in the state's prisons will exceed the number of students in the California university system.³⁰ The current criminal justice policies have had a particularly devastating effect on the African-American community. Five different studies conducted between 1990 and 1992 found that between 23% and 56% of young black males—using various age cutoffs—were under the control of the justice system.³¹ The high rate of imprisonment has harsh effects on both individuals and the community. It diminishes the number of employable and marriageable males, and destabilizes traditional neighborhood and community controls on individual behavior.³²

The question I want to explore is why the public—and hence the politicians—treat crime as such a highly salient political issue. They resoundingly favor increasingly harsh sentences as the major solution to crime, even in the face of expert opinion that harsher sentences may not produce additional deterrence and that other approaches may be more fruitful. The public and the politicians favor this solution though the cost is growing exponentially and putting at risk other important governmental programs. While

ditures for criminal justice—and especially prisons—and expenditures for other government programs, such as education, see Marc L. Miller, *Cells vs. Cops vs. Classrooms*, in *THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE* (Lawrence Freedman & George Fisher eds., forthcoming 1997).

28. See David J. Smollar, *Closed Doors Ahead*, ORANGE COUNTY REG., June 6, 1996, at A20.

29. *Id.*

30. Peter Schrag, *How California Spends Its Money*, SAN DIEGO UNION TRIB., July 11, 1996, at B-11.

31. TONRY, *supra* note 15, at 30, table 1-3.

32. Mauer, *supra* note 24, at 4.

others argue that the majority of experts are wrong and that the public is indeed correct,³³ I will consider the implications of the possibility that the experts are right and that the public—and hence our policies—are dramatically wrong.

Part I will briefly review the history and politics of crime in the United States. Part II will survey public opinion on crime and the media's treatment of crime and violence. Part III will turn to the literature of psychology to find paradigms that shed light on the public attitudes toward crime and the current political dynamic. There are many other avenues of research not addressed in this paper that may shed light on these issues, such as modern theories of legislative behavior and research into the role of race in social and political activity. I hope to turn to other facets of this problem in the future.

I. A BRIEF HISTORY OF CRIME AND THE POLITICS OF CRIME IN THE UNITED STATES

One answer to the question why crime and tough anti-crime measures have become hot button political issues is that crime has increased or the nature of crime has changed, frightening the public and requiring tough new responses. Although there is a degree of truth to this response, I will argue that it does not provide a complete answer, and that we must look elsewhere for other factors.

A. National Crime Picture

The stage for the current debate over crime was set in the 1960s. Barry Goldwater pioneered the use of crime at

33. See, e.g., DiIulio, *supra* note 9, at 12-15; Wilson, *supra* note 9, at 498-503 (supporting increases in imprisonment, but cautioning that very large increases in the prison population will produce only modest reductions in the crime rate, since most serious offenders are already serving long terms which cover most or all of the average criminal career, and that decreases in the probability of arrest and conviction can nullify any increased deterrent effect of longer terms of imprisonment).

the national political level in 1964, and the issue took a firm hold in 1968. A number of events between 1964 and 1968 made crime a politically salient issue. In 1965 the Watts riot in Los Angeles killed 34, injured more than 800, and led to almost 4,000 arrests and an estimated \$40 million in property damage.³⁴ There were nearly 100 additional riots in 1966 and 1967, including riots in Detroit and Newark, which were on the same order of magnitude as Watts.³⁵ By the end of 1967, more than 200 people had died as a result of urban rioting.³⁶ During the same period there were widespread demonstrations against the Vietnam War. Then, 1968 brought the assassinations of Martin Luther King, Jr. (followed by riots in 175 cities) and Robert Kennedy.³⁷ The anti-war protests also turned to violence outside the Democratic National Convention in Chicago.

What about the general crime rates? Although there is general agreement that crime increased in the 1960s,³⁸ there are two schools of thought about what happened thereafter. Some experts believe that crime rates continued to rise, but there is a competing school of thought that crime rates have remained fairly stable since the 1970s, with some decline from their peak levels in the mid-1970s.³⁹ The confusion stems in part from the existence of two measures of crime in the United States: the Uniform Crime Reports (UCR) compiled by the FBI based on arrest information submitted by 17,000 police departments, and the National Crime Victimization Survey (NCVS), which

34. DAVID C. ANDERSON, *CRIMES OF JUSTICE* 42 (1988).

35. *Id.*

36. *Id.*

37. *Id.*

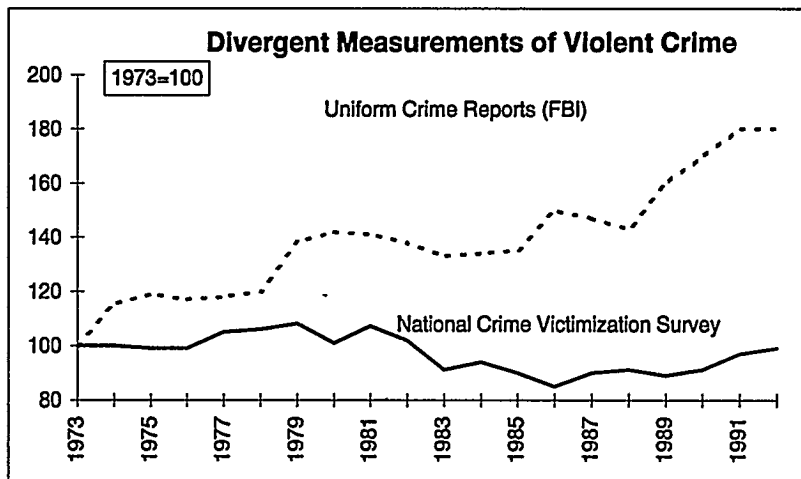
38. A crime wave in the 1930s was followed by a gradual decline in crime rates until the early 1960s, when there was a pronounced increase in both violent crime and property offenses. Ted Robert Gurr, *Historical Trends In Violent Crime: A Critical Review Of The Evidence*, 3 *CRIME & JUST.* 295, 323 (1981).

39. See *THE REAL WAR ON CRIME*, *supra* note 3, at 1-10. See also Wilson, *supra* note 9, at 489-90 (noting crime increased in the United States in the 1960s and 1970s, and that except for homicide, crime rates have been falling for more than a decade).

uses a telephone survey of households to determine how many people were victimized by crime in the preceding year.⁴⁰

Figure 1, taken from a report by the National Criminal Justice Commission, shows the difference in how crime trends since 1970 are viewed. The UCR indicates a general increase in crime continued through the 1970s, 1980s, and 1990s, while the NCVS indicates that crime rates rose slightly until 1981, and have declined steadily since that time.

Figure 1



Note: Figures were scaled to 100 in 1973 and have been adjusted to take into account population increases.

Source: STEVEN DONZIGER, *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 7* (1996) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993*, 247, 352 (1994)).

40. For a discussion of the methodological difficulties in computing crime rates, see *THE REAL WAR ON CRIME*, *supra* note 3, at 3-7; *UNDERSTANDING AND PREVENTING VIOLENCE*, *supra* note 11, at 42-50; Gurr, *supra* note 38, at 298-303 & n.1.

What explains this startling discrepancy? Proponents of the NCVS cite several problems with the UCR data. First, computers have improved reporting and record keeping. In contrast to 1973, when the police reported less than half of the aggravated assaults reported to them, by 1988 police reports captured more than 96 percent of such assaults. While the UCR reported that assaults increased from 421,000 to 910,000 between 1973 and 1988, the number reported by citizens increased by less than 80,000 over this period.⁴¹ Similar patterns were observed for robbery and rape.⁴² Another problem with UCR data is that they count arrests rather than crimes: if two or more offenders are arrested for the same offense, they are counted separately.⁴³ Finally, because increased crime rates have been used to justify budgetary increases for criminal justice agencies (e.g., allocations under the 1994 Federal Crime Control Act, which provide more funds to states with higher reported levels of crime), there has been an incentive for these agencies to pad their figures.⁴⁴ On the other hand, proponents of the UCR data have noted that there is actually a contrary incentive for localities to report lower crime rates to reassure the public and avoid providing political opponents with a ready-made issue.

Homicide is generally not subject to the debate about statistics, and most experts regard the data on homicides as particularly reliable. As figure 2 demonstrates, the data reveal that current homicide rates are about the same as they were in the early 1970s.

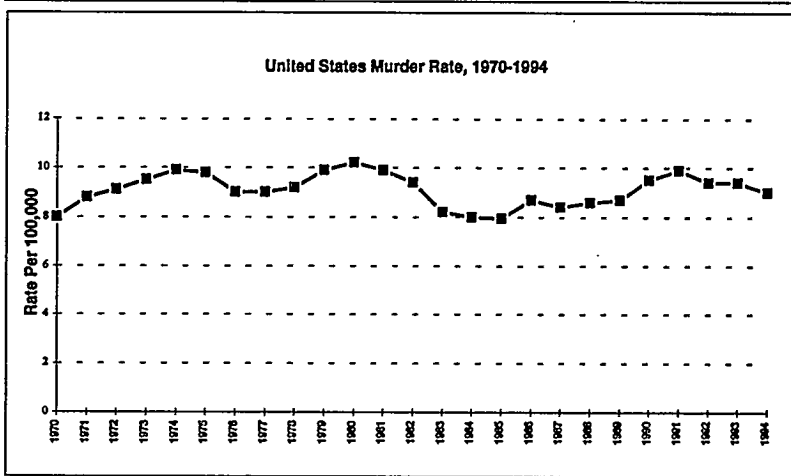
41. THE REAL WAR ON CRIME, *supra* note 3, at 4.

42. *Id.*

43. *Id.*

44. *Id.*

Figure 2



Source: STEVEN DONZIGER, *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 5* (1996) (citing preliminary data for 1994 provided by the Criminal Justice Information Services Division, Federal Bureau of Investigation, U.S. Dep't of Justice).

Homicide rates fell to little more than 4 per 100,000 in the 1950s,⁴⁵ and then increased to 10.4 per 100,000 in 1979-81.⁴⁶ Since the 1970s the homicide rate has vacillated. The most recent peak of 9.4 homicides per 100,000 in 1990 is somewhat below the previous peaks of 9.5 in 1931-34 and 10.4 in 1979-81.⁴⁷ The most recent homicide data, released in 1996, indicate that the homicide rate has now fallen to 8 per 100,000, which is approximately the same as the rate in 1970.⁴⁸

The increase in crime is neither randomly nor equally distributed throughout American society. Crime is signifi-

45. *Id.* (the homicide rate fell to 4.5 in the early 1960s); Butterfield, *supra* note 26 (homicide rate of 4.6 in 1963).

46. UNDERSTANDING AND PREVENTING VIOLENCE, *supra* note 11, at 50.

47. *Id.*

48. Fox Butterfield, *Gun Violence May be Subsiding, Studies Find*, N.Y. TIMES, Oct. 14, 1996, at A10.

cantly localized within large cities and within certain neighborhoods of large cities. For example, the homicide rate in the Philadelphia area varies from 2 per 100,000 in the suburbs to 66 per 100,000 in the near northeast and more than 100 per 100,000 in the heart of North Philadelphia.⁴⁹ The same radical differences exist in New York City. In 1993 44 percent of all homicides occurred in 12 of New York City's 75 precincts, and one precinct had no homicides.⁵⁰ Sixty-seven percent of prison inmates in New York State come from seven neighborhoods in New York City.⁵¹ In fact, differences in crime rates among communities can be predicted with 75-90 percent accuracy by six or seven factors: income, employment, education, race, number of households headed by women, and home ownership.⁵² It is extremely misleading to average crime rates across different neighborhoods and geographic areas, as if all citizens shared the average risk of crime.

In fact, victimization rates vary enormously by race, age, gender, and other demographic variables. For example, in 1989 the rate of death by homicide varied from a low of 2.8 per 100,000 for white females to a high of 61.5 per 100,000 for black males.⁵³ In 1987 it was estimated that a black male had a cumulative lifetime risk of 4.16% that he would die as a result of homicide, compared with a risk of .62% for white males and .26% for white females.⁵⁴ Since 1930 the victimization rates for black males have been the most variable, with large peaks in the 1930s, the 1970s, and in the period from the late 1980s to the early 1990s.⁵⁵

With the exception of homicide, the United States does not have a high crime rate compared with other Western nations; comparable countries actually have higher rates of

49. David H. Bayley, *My Crime Policy*, 32 CRIM. L. BULL. 467 (1996).

50. *Id.*

51. *Id.*

52. *Id.*

53. UNDERSTANDING AND PREVENTING VIOLENCE, *supra* note 11, at 66 (table 2-4).

54. *Id.* at 63 (fig. 2-3).

55. *Id.* at 51 (fig. 2-1).

victimization than the United States for many crimes.⁵⁶ Both Canada and Australia, for example, have a higher rate of assault with force than the United States; the rate of car theft is higher in both Australia and England than it is in the United States.⁵⁷ Indeed, a study by criminologists in the Netherlands and the United Kingdom found that the United States had the highest rates in only two of fourteen offenses, homicide and attempted burglary.⁵⁸ Another study concluded that the United States has approximately the same rate of crime as New Zealand, Australia, Canada, and the Netherlands.⁵⁹ Similarly, a comparison of crime rates between cities of roughly the same size indicates that in 1990 London had 67% more theft per 100,000 residents than New York, and 57% more burglary.⁶⁰ Similarly, in 1992 Sydney had a higher rate of burglaries per 100,000 than Los Angeles.⁶¹ However, because of the availability of firearms, the United States does have a far higher rate of homicide than other comparable countries.⁶²

By themselves, these data do not seem sufficient to explain the salience of the fear of crime and the political support for punitive crime policies. While homicide rates in

56. See Wilson, *supra* note 9, at 489 (stating that "most industrialized nations have crime rates that resemble those of the United States," and noting that British homes are more likely to be burgled than American homes, automobiles are more likely to be stolen in France than in the United States, and certain forms of theft are more common in Australia and Sweden than they are in the United States). Wilson concludes that "for most property crimes, most of the world has caught up and even passed us by." *Id.* at 490.

57. THE REAL WAR ON CRIME, *supra* note 3, at 10.

58. *Id.* at 12-13 (citing JAN J. VAN DIJK & PAT MAYHEW, CRIMINAL VICTIMISATION IN THE INDUSTRIALIZED WORLD (1992)).

59. ZIMRING & HAWKINS, *supra* note 13, at 52.

60. Franklin E. Zimring & Gordon Hawkins, *Is American Violence a Crime Problem?*, 46 DUKE L.J. 43 (1996) (noting that London had 166.5 thefts and 157 burglaries per 100,000 residents in 1990, compared to 100 per 100,000 residents in New York).

61. *Id.* at 45-46.

62. THE REAL WAR ON CRIME, *supra* note 3, at 10 (noting that approximately 22,000 homicides per year in the United States is roughly 10 times the per capita murder rate in most European countries); ZIMRING & HAWKINS, *supra* note 13, at 52 (comparing U.S. homicide rate of 9.9 per 100,000 with the rates in 19 other industrialized countries, which ranged from 0.6 to 2.3 per 100,000).

the United States are very high compared to other Western nations, the risk of death from homicide is high only in small discrete pockets of American society. As a whole, the homicide rate has not increased since the 1970s. The homicide rate, and the rate of crime in general, is actually lower, at present, than it has been in the last twenty years in most suburban neighborhoods. Yet much of the political support for the law and order agenda appears to come from the suburbs, not the inner cities; from white voters whose victimization rates are comparatively low.⁶³ The public's fear of crime may also reflect changes in the nature of crime, rather than the absolute volume of crime,⁶⁴ or the burden of precautions that are now deemed necessary to prevent crime.⁶⁵

63. There is now a substantial body of research into fear of crime, which indicates that although fear bears some relationship to crime rates, it "exists independently and cannot be seen as a mere function of levels of criminal activity at any given time." Lucia Zedner, *Victims*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 1207, 1218 (Mike Maguire et al. eds., 1994). Levels of fear "are far from closely correlated with risk." *Id.* There is research showing that among whites residential proximity is related to fear of crime, even when other factors are held constant. Wesley G. Skogan, *Crime and Racial Fears of White Americans*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 59 (1995). Other work suggests that perceptions of the risk of crime are driven not only by the incidence of crime, but also by perceptions of social and physical incivilities, which reflect a "distinct middle class bias." Randy L. Lagrange et al., *Perceived Risk and Fear of Crime: Role of Social and Physical Incivilities*, 29 J. RES. CRIME & DELINQ. 311, 328 (1992). On the other hand, Andrew Leipold has pointed out that substantial majorities of African Americans view crime as a serious problem and support many aspects of the law and order agenda. Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification*, 44 UCLA L. REV. 109, 117 (1996) (noting that 76 percent of African Americans favored the imposition of more severe sentences to deal with the crime problem, 68 percent approved of higher taxes to pay for more prisons and longer prison terms, and two-thirds favored three strikes legislation). Indeed, Skogan found blacks to be more fearful of crime than whites. Skogan, *supra*. For a general discussion of research into fear of crime, see 539 ANNALS AM. ACAD. POL. SOC. SCI. (1995) (issue dedicated to "Reaction to Crime and Violence").

64. For example, it has been suggested that the public's increased fear of crime reflects the fact that more serious violent crime is now committed by strangers, see Pillsbury, *supra* note 2, at 320 n.30, and that a new much more dangerous type of juvenile offender has appeared. See DiIulio, *supra* note 9, at 7-8.

65. For example, home security systems and anti-theft systems in automobiles are now common, as are cellular telephones, which many regard as

B. Crime and National Political Discourse

For the first 150 years of the Republic, crime was not an issue on the national political agenda. It was not until Herbert Hoover that a president even mentioned crime in his inaugural address.⁶⁶ Crime first became a major issue in national politics in the 1960s.⁶⁷ The emergence of this issue coincided with the Republican Party's aggressive pursuit of Southern voters, characterized by its opposition to civil rights legislation and emphasis on crime control, among other issues.⁶⁸ The Republican strategy set in motion a chain of events that ultimately led to the rejection of the Democrats' more traditional liberal positions on crime, and their attempt to reposition themselves as equally "tough on crime." Other factors, such as the growing political salience of issues of concern to women and the victims' rights movement, also played a role.

In 1964 Barry Goldwater was the first presidential candidate to focus on the crime issue. Goldwater "vowed to make 'the abuse of law and order' a major campaign issue,"⁶⁹ arguing that crime was rising much faster than the population was growing, and that "[i]t was all part of general moral decay . . . tolerated, if not encouraged, by Democratic administrations."⁷⁰ Goldwater also pioneered the Republicans' southern strategy, opposing civil rights and mixing the issues of race and crime. Goldwater denounced

principally a safety device. Similarly, many persons now restrict their activities outside the home, especially after dark.

66. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 273 (1993). Noting that crime was increasing, Hoover proposed the creation of a federal commission to study the problem. The Wickersham Commission published a 14-volume report in 1931, dealing with issues ranging from police behavior to the causes of crime. *Id.*

67. For a general discussion of federal criminal justice policy from 1960 onwards, see NANCY E. MARION, *A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-93* (1994).

68. For an argument that the theme animating Republican policies since the 1960s is Southern Bourbon conservatism, see Michael Lind, *The Southern Coup*, *NEW REPUBLIC*, June 19, 1995, at 20.

69. ANDERSON, *supra* note 34, at 46 (1988).

70. *Id.* at 47.

Richard Nixon and Nelson Rockefeller for supporting measures to end segregation and discrimination, and he explained to a southern audience, "We're not going to get the negro vote as a block in 1964 and 1968, so we ought to go hunting where the ducks are."⁷¹ Thus, Goldwater "sought to link the fears generated by urban riots, the militance of civil rights activism, and common street crime."⁷²

Although it was not a successful issue for the Republicans in 1964, crime became one of the principal issues in future presidential campaigns. Richard Nixon ran on a tough law and order platform, promising to make the streets safe. He also reiterated Goldwater's charge that liberal Democratic permissiveness was the cause of crime and violence.⁷³ Watergate temporarily derailed the Republican strategy, but the crime issue was back in full force in later campaigns.⁷⁴ The Republicans used the crime issue—and the linkage with race—because it worked. In 1988, for example, when George Bush's negative rating was at a "near lethal level of 41" (compared to 15 for Dukakis), Lee Atwater sent campaign aides to a shopping mall in Paramus, New Jersey, where they met with a focus group of white Democrats who had voted for Reagan but were leaning to Dukakis.⁷⁵ The aides taped the group discussing a series of issues Atwater had jotted down on an index

71. Lind, *supra* note 68.

72. ANDERSON, *supra* note 34, at 46.

73. Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. LEGIS. 527, 533 & n.28 (1996).

74. For example, Wendy Kaminer has written:

Despite his sunniness about America, Ronald Reagan presented a much darker view of criminality, which still holds popular appeal. There are no social solutions to crime, Reagan asserted in 1981, because crime is not a social problem; "it's a problem of the human heart." Reagan cited what he viewed as the dual liberal fallacy about crime—the conviction that ameliorating poverty might reduce crime and the assumption that "there is nothing permanent or absolute about man's nature."

Wendy Kaminer, *Federal Offense: The Politics of Crime Control*, ATLANTIC MONTHLY, June 1994, at 102.

75. SIDNEY BLUMENTHAL, PLEDGING ALLEGIANCE: THE LAST CAMPAIGN OF THE COLD WAR 259 (1990).

card, including "McGovern/Kennedy/Jackson liberal: prison furloughs . . . 'card carrying member of the ACLU' . . . vetoed Pledge of Allegiance."⁷⁶ A videotape of the discussion in which more than half of these voters switched to Bush convinced Bush to authorize the negative campaign strategy that emphasized Willie Horton and the prison furlough issue.⁷⁷

In 1992 Bill Clinton positioned himself as tough on crime from the outset, drawing attention to his support of the death penalty in Arkansas and his supervision of executions, and accentuating the contrast with his early Democratic rival, Mario Cuomo.⁷⁸ He also used crime as a positive issue, devising a powerful image to symbolize his anti-crime position: his proposal for federal funds to put 100,000 police on the streets. In his campaign for reelection, Clinton again relied heavily on the issue of crime, especially his support for the death penalty,⁷⁹ his success in obtaining passage of the Brady Bill, and the funds to put 100,000 additional police officers on the street.

There was also a major transformation in the approach of Congressional Democrats, who realized in the 1990s that their traditional support of more liberal crime policies had become a major political liability. Democratic Congressional leaders deliberately adopted a strategy of taking the crime issue away from the Republicans.⁸⁰ Congressional and presidential politics have also been affected by the growing political strength of the women's movement and the

76. *Id.*

77. *Id.* at 260.

78. See Stephen B. Bright, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 73 B.U. L. REV. 759, 772 (1995) (noting that Clinton embraced the death penalty after losing a bid for reelection as governor in 1980, and that he presided over an execution shortly before the New Hampshire primary in 1992); Chernoff et al., *supra* note 73, at 542.

79. See Bright, *supra* note 78, at 772 (noting the first three television ads in Clinton's bid for reelection as president—which ran 18 months before the election—all focused on crime and Clinton's support for an expanded death penalty).

80. For a discussion of the Democratic Congressional strategy from 1989-92, see Chernoff, *supra* note 73, at 538-42.

victims' rights lobby, both of which championed anti-crime initiatives.⁸¹ The adoption of the Violence Against Women Act⁸² and legislative amendments to the Federal Rules of Evidence to permit the introduction of evidence of prior criminal acts in rape and child sex abuse prosecutions⁸³ reflect the strength of these constituencies, to whom both Democrats and Republicans sought to appeal. By 1996, it was hard to find a difference between the positions of the Republicans and Democrats on crime issues. Hence, there is little if any political resistance to changes such as harsher sentences for federal offenders, more broadly defined federal crimes, and a narrower scope for federal review of state convictions on the writ of habeas corpus.

A recent article surveys the history of the past 25 years and concludes as follows:

From 1968 to 1988, Republicans controlled the crime issue. They won six out of seven Presidential elections during that time. In 1992, the Republicans failed to stress crime, and lost. In 1994, Democrats failed to stress crime, and lost. Political consultants and commentators continue to argue whether economic or social issues like crime are more important to electoral success. Results, however, suggest a simple rule: control of the crime issue is a necessary, though perhaps not sufficient, requirement for political victory in America.⁸⁴

81. See Robert P. Mosteller, *Syndromes, Abuse, and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. (forthcoming 1997) (arguing that political forces—particularly the response to violence against women and children—are playing an important and more explicit role in shaping evidence law). For an account of the pivotal role the father of murder victim Kimber Reynolds played in the adoption of California's three-strikes law, see Vitiello, *supra* note 23, at text accompanying nn.82-153.

82. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

83. Act of Sept. 13, 1994, Pub. L. No. 103-322, §§ 320935-37, 108 Stat. 2135 (amending Federal Rules of Evidence § 412).

84. Chernoff, *supra* note 73, at 577. See also Bright, *supra* note 78, at 774 (quoting an official of the National Governor's Association who stated that in 1994 "the top three issues in gubernatorial campaigns this year are crime, crime, and crime," and describing the role crime and the death penalty played in the gubernatorial races in Florida, Texas, Illinois, and New York) (footnote

Questions still persist. Why is the issue so powerful politically? Why did it help to propel Republican candidates to victory, driving the Democrats to compete to present the toughest, most punitive anti-crime measures?

II. PUBLIC OPINION AND THE TREATMENT OF CRIME AND VIOLENCE IN THE MEDIA

A. *Public Opinion and the Fear of Crime*

In the 1990s, fear of crime reached an all-time high. In August 1994, a Gallup poll found that 52 percent of a nationwide sample stated that crime was the most important problem facing the nation.⁸⁵ Fear was prevalent even in places that had experienced little or no violent crime. For example, during the 1994 election campaign the residents of a small town in rural Virginia listed fear of crime as their major concern despite the fact their town had virtually no violent street crime. There had been no homicides in this county in more than two decades.⁸⁶ Similarly, although crime rates on Long Island are now lower on than they have been in 20 years, residents appear to be more fearful than ever. More than 56 percent said they are now less likely to shop after dark, and more than a quarter said they were less likely to attend local gatherings or visit friends at night.⁸⁷ Yet the rates of major crimes (murder, rape, robbery, aggravated assault, burglary, larceny, and auto theft) have dropped 21 percent between 1975 and 1994.⁸⁸ The odds of being a murder victim are 1 in 5,000 in New York City, 1 in 10,000 nationwide, and 1 in 38,000

omitted).

85. Sandy Hume, *Crime a Non-Issue in the '96 Campaign*, HILL, Mar. 6, 1996, at 1.

86. Steven Donziger, *The Prison-Industrial Complex; What's Really Driving the Rush To Lock 'Em Up*, WASH. POST, Mar. 17, 1996, at C3.

87. Harvey Kushner, *Is Long Islanders' Fear of Crime Overblown?*, NEWSDAY, Feb. 11, 1996, at A49.

88. *Id.*

on Long Island.⁸⁹ Still, Long Islanders are frightened as never before.

Although national polling data in 1996 indicate that fear of crime is at lower levels than it was in 1994,⁹⁰ crime is still the top concern in many localities. For example, crime was the second most important issue in Ohio⁹¹ and Texas,⁹² surpassing other issues such as the economy and education.

B. The Media Focus on Crime and Violence

Crime and violence are at center stage in both the news and entertainment media. To what degree do they shape public attitudes and political agendas on the issue of crime?

Depictions of crime have risen meteorically in the news media, giving rise to the industry adage "If it bleeds, it leads." In 1995 television news coverage of crime reached historic levels. The three major networks carried a staggering total of 2,574 stories about crime in their evening newscasts, up 32 percent from 1994 and 52 percent from 1993.⁹³ In 1991 the three networks carried only 624 stories.⁹⁴ In comparison, there were 2,604 stories on the Gulf War in 1991, 2,427 stories on the presidential campaign in 1992.⁹⁵ Even after excluding both the Oklahoma City bombing and the O.J. Simpson murder trial, the three major network news shows aired 1,364 stories about other crimes, including 375 stories about other murders. This was more than any other news topic.⁹⁶

89. *Id.*

90. See Hume, *supra* note 85, at 1.

91. Joe Frolik, *Ohioans Fearful of Crime; Fear of Crime Common Thread in Ohio*, CLEVELAND PLAIN DEALER, Mar. 3, 1996, at 1A.

92. Michele Kay, *In Poll, Texans Rate Crime as the Top Problem, Over Economy, Schools*, AUSTIN AMERICAN-STATESMAN, Mar. 10, 1996, at B1.

93. Media Monitor, *1995 Year in Review* (visited Sept. 30, 1996) <<http://www.proxima.com:8080/cmpa/html/janfeb96.html#crimewave>>.

94. *Id.*

95. *Id.*

96. *Id.*

Violence and crime are also staples of the entertainment industry. In the movies, highly violent destructive encounters are presented with increasing frequency.⁹⁷ In commercial television, a 1996 study found that network TV series are becoming less violent, and that the networks are airing fewer violent made-for-TV movies.⁹⁸ On the other hand, the same study found that violence was present in almost all children's programming, and that disturbing violence also appeared in TV commercials promoting movies for theatrical release and in prime-time specials featuring subjects such as animal attacks and human deaths.⁹⁹ The study also noted the emergence of UPN, a new mini-network that appears to be employing more violent programming.¹⁰⁰

Similarly, crime and violence are a staple of local news programming. An analysis of news broadcasts from 100 channels on a single day in 1995 found that crime accounted for 30.2 percent of the average news time on a station and that violent crime was the most frequent type of crime covered.¹⁰¹ Similarly, a study of weekday dinner hour newscasts on 57 different stations in 19 markets in 1993 found that programming about crime occupied a minimum of 17.7 percent of a station's stories to a maximum of 42.4 percent, with an average of 30 percent of those stories dealing with murder.¹⁰² An important finding of this re-

97. See, e.g., NANCY SIGNORIELLI & GEORGE GERBNER, *VIOLENCE AND TERROR IN THE MASS MEDIA: AN ANNOTATED BIBLIOGRAPHY* (1988); Barry S. Sapolsky & Fred Molitor, *Content Trends in Contemporary Horror Films*, in *HORROR FILMS: CURRENT RESEARCH ON AUDIENCE PREFERENCES AND REACTIONS* 31-48 (James B. Weaver III & Ronald C. Tamborini eds., 1996); *THE KILLING SCREENS: MEDIA AND THE CULTURE OF VIOLENCE* (Media Educational Foundation 1995).

98. Paul Farhi, *Is TV Pulling Its Punches?: UCLA Study Finds Decline in Violent Network Programs*, WASH. POST, Oct. 16, 1996, at B1.

99. *Id.*

100. *Id.*

101. ROCKY MOUNTAIN MEDIA WATCH, *PAVLOV'S TV DOGS, A SNAPSHOT OF LOCAL TV NEWS IN AMERICA 9/20/95, EXECUTIVE SUMMARY*, cited in James P. Hamilton, *Channeling Violence: The Economic Market for Violent Television Programming* (forthcoming 1998).

102. Hamilton, *supra* note 101.

search was that stations differed considerably in their treatment of crime and that these differences were not closely correlated with the amount of crime occurring in the cities studied. There was also a clear segmentation in the stations' approaches to local crime coverage, with some stations choosing a high crime strategy aimed at younger viewers.¹⁰³ The packaging and presentation of the stations varied depending upon the size of the likely viewing audiences: as the likely audience for crime coverage increased (as measured by certain demographics), broadcasters offered a more entertaining style of news.¹⁰⁴

C. Research on the Effect of Crime and Violence in the Media

Research has identified two means by which crime and violence in the media may influence public opinion: directly by increasing the public's fear of crime and by inflating its view of the prevalence of crime, and indirectly by setting the agenda, so that crime comes to be seen as a salient political topic.

1. Media's Direct Influence on the Public's Fear of Crime and Perception of the Prevalence of Crime

Although some researchers have found that high consumption of programming depicting crime and violence is correlated with high fear of crime and an exaggerated perception of crime rates, to date no definitive cause and effect relationship has been established. Some researchers have posited that television viewing causes these exaggerated views. For example, George Gerbner has advanced a "cultivation hypothesis," which posits that the reiteration of violent episodes cultivates a misleading and exaggerated view of the incidence of such episodes in the world.¹⁰⁵ Ac-

103. John H. McManus, *How Local News Learns What Is News*, 67 JOURNALISM Q. 672 (1990), cited in Hamilton, *supra* note 101, at 9-12.

104. Hamilton, *supra* note 101.

105. See, e.g., George Gerbner & Larry Gross, *Living with Television: The*

according to the cultivation hypothesis, this distortion affects those who watch the most television differentially.¹⁰⁶

The attempt to demonstrate that a high television viewing *causes* exaggerated fear of crime has been subjected to many critiques.¹⁰⁷ One avenue of attack has been the suggestion that a correlation does exist between high consumption of media violence and excessive fear of crime, but television viewing cannot be shown to be the causal factor. For example, one researcher concluded that the strongest determinant of viewing was the amount of time available in which to view, which is related to socio-economic conditions (particularly age and gender); with adjusted controls, gender and size of city of residence correlated more closely with fear than did television viewing.¹⁰⁸ Other researchers have argued that there is greater support for a hypothesis of a selective preference for crime viewing based upon prior anxieties.¹⁰⁹

At best, this research is inconclusive. There is no agreement on the question whether, and to what degree, media portrayals of crime and violence shape the public's perceptions of reality or their political opinions. Research is only beginning on the related question why violence is attractive to media consumers, an inquiry that might also shed light on the reason for the political salience of the issue of crime.¹¹⁰

Violence Profile, 26 J. COMM. 173 (1976); George Gerbner & Larry Gross, *The Scary World of TV's Heavy Viewer*, PSYCHOL. TODAY, Apr. 1976, at 89.

106. See SIGNORIELLI & GERBNER, *supra* note 97, at 25-26.

107. For a general discussion of Gerbner's work and its critics, see RICHARD SPARKS, *TELEVISION AND THE DRAMA OF CRIME: MORAL TALES AND THE PLACE OF CRIME IN PUBLIC LIFE* 86-93 (1992).

108. Michael Hughes, *The Fruits of Cultivation Analysis: A Re-examination of Some Effects of Television Watching*, 44 PUB. OPINION Q. 287 (1980).

109. See, e.g., Jacob Wakshlag et al., *Selecting Crime Drama and Apprehension About Crime*, 10 HUMAN COMM. RES. 227, 229 (1983). For a general discussion of the research into fear and viewing preferences, see SPARKS, *supra* note 107, at 93-97.

110. Two efforts are underway to fill this gap: a study supported by the Guggenheim Foundation on the attractions of violence to media consumers, *WHY WE WATCH: THE ATTRACTIONS OF VIOLENT ENTERTAINMENT* (Jeffrey Goldstein ed., forthcoming 1997), and Hamilton, *supra* note 101.

Another branch of the research has focused on the effects of crime coverage on political views. Shanto Iyengar conducted laboratory experiments on the effects of framing crime stories, finding that people who saw episodic coverage of crime, which focused on individuals, were more likely to believe crime emerges from individual rather than social circumstances.¹¹¹ Such an episodic treatment is consistent with the entertainment mode of presentation increasingly favored by many stations, particularly those which appeal to younger viewers. This tilt in perceptions may have political significance, for persons who attribute crime to social causes were less likely to evaluate the president favorably. Thus, the drive towards an entertainment mode of presentation may influence voters' evaluations of policies and politicians.¹¹²

2. Media's Indirect Influence in Putting Crime on the Political Agenda

Research has also focused on the media's influence in setting the agenda of important issues for individuals and for the public. Substantial experimental work supports the hypothesis that the news media play an important agenda setting role.¹¹³ Agenda setting supports the notion that the media's focus on crime plays a role in determining issue salience.

One of the foundational studies on agenda setting compared the attitudes of undecided voters in the 1968 presidential election, finding a high degree of correspondence between these voters' agendas and the agendas reported in the media that they consulted frequently (local

111. SHANTO IYENGAR, *IS ANYONE RESPONSIBLE?: HOW TELEVISION FRAMES POLITICAL ISSUES* (1991).

112. This research is discussed in Hamilton, *supra* note 101, at 9-42 to 9-43 (discussing Robert Entman, who argues that crime coverage in the local news may foster anti-black feelings and racial resentment).

113. For a general account of agenda setting research see Maxwell E. McCombs & Donald L. Shaw, *The Evolution of Agenda Setting Research: Twenty Five Years in the Marketplace of Ideas*, 43 J. COMM. 58 (1993).

and national media, both print and broadcast).¹¹⁴ Even the agendas of the voters who were leaning toward one candidate generally matched the total agenda of issues reported in the news, rather than the agenda of the party toward which these voters had been leaning.¹¹⁵ Another study by Funkhouser provides support for the agenda setting hypothesis in the context of public opinion trends in the 1960s,¹¹⁶ finding a greater correspondence between public opinion of the most important problem facing the nation and press coverage of such issues as Vietnam, campus unrest, and urban riots than between public opinion and various "reality" indicators. For example, both press coverage and public opinion on issues peaked considerably in advance of the peak in the number of troops committed, the number of campus demonstrations, and the number of civil disturbances.

Later research has focused on attempts to identify the elements in the news and its presentation that influence audience perceptions of what are the important topics of the day.¹¹⁷ Typically, researchers have found that frequency of repetition is an important cue: an item is perceived to be more important when it is repeated. There is also some evidence of the importance of other elements, such as the prominence with which items are displayed and the degree of conflict present in a news report. Framing also appears to play a role. For example, one study suggested that stories about individual crimes would have less impact on agenda setting than a story about the problem of crime or crime rates.¹¹⁸ There is also evidence that the

114. Maxwell E. McCombs & Sheldon Gilbert, *News Influence on Our Pictures of the World*, in *PERSPECTIVES ON MEDIA EFFECTS* 1, 4-5 (Jennings Bryant & Dolf Zillman eds., 1986) (describing Maxwell McCombs & Donald Shaw, *The Agenda-Setting Function of Mass Media*, 36 *PUB. OPINION Q.* 176 (1972)).

115. *Id.* at 5.

116. *Id.* (describing G. Ray Funkhouser, *The Issues of the Sixties: An Exploratory Study on the Dynamics of Public Opinion*, 37 *PUB. OPINION Q.* 62 (1973)).

117. For a brief survey of this research, see *id.* at 7-8.

118. *Id.* at 8.

agenda-setting potential, over time, is different for television than for print media, with television playing a more important role later in the electoral process.

Not surprisingly, the influence of the media is greatest when it is the principal source of information; the media has less influence when the public has a great deal of contact with the issue. In the case of the latter, media cues operate as no more than a secondary source of orientation. For example, when two populations watched news broadcasts in which the coverage of different topics was manipulated, increases in the coverage of defense preparedness and pollution resulted in an increase in the subjects' perception of the salience of these issues, while increased coverage of inflation did not.¹¹⁹

This model of the function of media in the formation of public opinion provides a second mechanism explaining how the issue of crime has increased in salience as the media's emphasis has increased. This research also suggests several questions. Is crime an issue on which most members of the public have a significant personal experience or other sources of information that would outweigh the effects of media? And does the media's emphasis on stories about individual crimes have as great an agenda-setting effect as stories about crime rates and trends? What is the relative importance of different forms of media, such as local and national television news, print media, and entertainment media (including shows such as "America's Most Wanted," which might be seen as falling between those categories)?

III. A PSYCHOLOGICAL FRAMEWORK FOR ANALYSIS

Although research on the media has not established a cause and effect relationship between public attitudes to-

119. *Id.* at 12 (describing Shanto Iyengar et al., *Experimental Demonstration of the "Not-So-Minimal" Consequences of Television News Programs*, 76 AM. POL. SCI. REV. 848 (1982)).

ward crime and media portrayals, research into the psychology of cognition and risk assessment provides several models that can be adapted to explain the salience of the crime issue and the divergence between public and expert opinion on criminal justice policy.

In the context of risk perception, the divergence between the views of experts and those of the public have been clearly documented and studied extensively.¹²⁰ Sev-

120. There is an extensive literature about public perceptions of risk, and their role in law and policy. *See, e.g.*, STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD MORE EFFECTIVE RISK REGULATION* (1993) (showing the divergence between expert and public evaluations of risk; arguing that the public's attitudes toward risk are fundamentally erroneous, leading to misallocation of risk-prevention efforts and hence the sacrifice of many lives, and urging that the public be educated, but also that risk regulation be guided by a cadre of experts more insulated from public pressure than is the Congress); MARGOLIS, *supra* note 1 (arguing that public perceptions of risk typically described as value-based are actually the result of deep-seated cognitive errors); KRISTEN SHRADER-FRECHETTE, *RISK AND RATIONALITY: PHILOSOPHICAL FOUNDATIONS FOR POPULIST REFORMS* (1991) (arguing that regulation should be based on both science and populism, with a heavy bent toward populism; arguing that public value-based attitudes are not "irrational" and that expert science is socially constructed, not objective); Frank Cross, *The Public Role in Risk Control*, 24 ENVTL. L. 887 (1994) (arguing against general reliance on public attitudes about risk in shaping regulation); Donald Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562 (1992) (criticizing expert evaluations of risk for failure to recognize the value-based nature of public attitudes, and urging that regulation be based not on comparative risk analyses of which actions will reduce risk "most" but rather on notions of what is "moral" and "equitable"); James Krier & Clayton Gillette, *Risk, Courts and Agencies*, 138 U. PA. L. REV. 1027, 1072-78 (1990) (arguing, based on work by Slovic et al., that regulation should take greater account of the public's "richer" value-based appreciation of risk); Roger Noll & James Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747 (1990) (drawing on work by Slovic et al. and by Kahneman & Tversky to argue that many human perceptions of risk are distorted by "heuristic" short-cuts, leading to errors in decisions); Richard Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 33-64 (1995) (in response to BREYER, *supra*, laying out the differences between "expert" and "public" perceptions of risk and arguing, with several caveats, that as long as the public is well informed and therefore not making factual errors, then public attitudes toward risk are value-based, and regulation in a democracy should be driven by public values about risk attributes, not expert choices); Paul Slovic, *Perception of Risk*, *Science*, Apr. 17, 1987, at 280-85 (classic article explaining lay public perceptions of risk as derived from multiple qualitative aspects—e.g., voluntariness, fairness, dread,

eral schools of thought have developed, two of which have the greatest promise for our purposes.¹²¹ According to the *rival rationalities* school of thought, the public tends to evaluate risks differently than experts, but those differences do not indicate the inferiority of the public's judgment. Rather, the public's judgment reflects different values than those which underlie expert opinion.¹²² A competing school of thought rejects the claim that lay opinion is rational, instead seeing it as a product of identifiable *cognitive*

unfamiliarity, trust, etc.—not just the quantitative magnitude of risk); Paul Slovic et al., *Facts versus Fears: Understanding Perceived Risk*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 1982) (showing divergence between expert—quantitative, fact-based—and public—qualitative, value-based—perceptions of risk).

121. The other two explanations are (1) that conflicts about risk are really conflicts about ideology and values, or (2) that the conflicts are about risk, but they arise because the public has lost its trust in the institutions that regulate risk. See MARGOLIS, *supra* note 1, at 21-32.

The ideological view might seem to offer promise as a way of understanding public attitudes about crime and criminal punishments. As an ideological matter, the American public might generally prefer to view crime as individually motivated behavior resulting from the evil choices of autonomous moral beings who must suffer appropriate punishments. For example, Stuart Scheingold contrasts individual and structural explanations of criminal behavior, and suggests that American political discourse has always privileged individual volitional explanations, which trace their ancestry to Hobbes and Locke, rather than structural explanations, which have their roots in Rousseau and Marx. STUART A. SCHEINGOLD, *THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION* 4-28 (1991). The ideology of individual pathology might seem to be closely linked to punitive criminal justice policies.

This ideological explanation seems deficient on several grounds. First, it fails to explain the widespread support earlier this century for the rehabilitative ideal of the criminal justice system. See generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981). Nor does it explain the popular support for many other governmental programs that adopt a structural approach to societal problems, such as unemployment, health care, etc., which might seem to have their roots in Rousseau and Marx rather than Hobbes and Locke. This disjunction seems merely to restate the question with which I began. What explains the public's rejection of structural explanations for and responses to crime—though such explanations may be accepted as the basis for other government programs—and its preference for individual explanations and punitive responses to crime?

122. See, e.g., SHRADER-FRECHETTE, *supra* note 120; Hornstein, *supra* note 120; Krier & Gillette, *supra* note 120; Pildes & Sunstein, *supra* note 120; Slovic, *supra* note 120; Slovic et al., *supra* note 120.

errors.¹²³

Both the rival rationalities and the cognitive error schools of thought shed light on the public's views on the criminal justice system.

A. *Rival rationalities*

Dan Kahan's analysis of public attitudes toward alternative sanctions provides some support for a rival rationalities view of public opinion regarding criminal justice issues. Kahan explores an expressive theory of criminal punishment and its implications for alternative criminal sanctions.¹²⁴ Beginning from the premise that the distinctive meaning of criminal wrongdoing is that it denies some important value, such as the victim's moral worth,¹²⁵ he argues that the political acceptability of alternative sanctions turns upon whether they are seen socially as expressing appropriate condemnation. Economists regard fines and community service as preferable to imprisonment in many cases because they are as effective and less costly for society, but the public has been hostile to these alternatives. Kahan argues that fines and community service have proved to be politically unacceptable as a substitute for imprisonment because the public regards them as insufficiently expressive of condemnation.¹²⁶ In contrast to imprisonment, which invariably condemns, fines are objectionable because the public sees them as a *price* for doing what is *permitted*, rather than as a *sanction* for conduct that is *prohibited and condemned*.¹²⁷ This analysis is supported by opinion surveys in which the majority of subjects indicated that no fine of any amount would be an appropriate substitute for a prison sentence for a variety of serious

123. See, e.g., BREYER, *supra* note 120; MARGOLIS, *supra* note 1; Cross, *supra* note 120; Noll & Krier, *supra* note 120.

124. Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

125. *Id.* at 597-98.

126. *Id.* at 617-30.

127. *Id.* at 621-22.

offenses, including nonviolent offenses.¹²⁸ Kahan concludes that his findings "suggest that politically acceptable exchange rates for fines and imprisonment cannot be constructed for at least some offenses," and that public opinion constrains political reform.¹²⁹ Similarly, the public's antipathy toward community service as an alternative for imprisonment in appropriate cases is based on the fact that community service sentences do not express proper condemnation. Since we generally admire persons who perform community service, using community service as a sanction is jarring: it fails to say that the offender deserves condemnation, and seems to degrade community service as well.¹³⁰ Thus, using community service as a sanction threatens the positive values associated with community service.¹³¹

Research on public views of the comparative seriousness of various crimes provides further support for the rival rationalities view. One example should suffice to make the point. The American Law Institute's Model Penal Code punishes attempt, conspiracy, and solicitation at the same level as the completed offense. The defendant's intent is the critical factor since success or failure may be wholly fortuitous.¹³² In contrast, public conceptions of seriousness emphasize the consequences of the crime and the harm done, rather than the offender's intent or the potential for harm. Inchoate offenses are not thought to justify serious sanctions.¹³³ The public's emphasis on results, not intention,

128. *Id.* at 623 (citing Anthony Doob & Voula Marinos, *Reconceptualizing Punishment: Understanding the Limits on the Use of Intermediate Punishments*, 2 U. CHI. L. SCH. ROUNDTABLE 413 (1995)).

129. Kahan, *supra* note 124, at 624.

130. *Id.* at 625-30.

131. *Id.* at 629.

132. See MODEL PENAL CODE §§ 5.01-5.05 (Final Proposed Draft 1962). For a more general discussion of the relevance of harm, see Stephen J. Schulhofer, *Harm and Punishment: A Critique of the Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

133. See Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 136 (1992) (citing research by Reidel, Sebba, Dejoy, and Klippel).

underlies the continuing political popularity of the felony murder rule, which has received nearly universal scholarly condemnation.¹³⁴

The rival rationalities approach also suggests the possibility that the public and the experts hold different views on the proper aims of sentencing. Perhaps the public's lack of interest in expert claims that longer sentences will not deter or prevent crime is a function of its acceptance of a retributive (or just deserts) theory of sentencing, rather than a deterrent or positivist ideology.¹³⁵ This might explain public support for capital punishment regardless of whether it can be shown to have a deterrent effect.¹³⁶ It is less clear, however, that public acceptance of a retributive theory of punishment would generate strong public support for higher and higher punishments across the board (as opposed to longer sentences for particular offenses that might be viewed as having been treated too leniently in the past). What of the sentences for drug offenses, which have been a special target of Congress? It seems doubtful whether drug offenses evoke the strongest retributive impulses. It seems more likely that three strikes and mandatory minimum legislation is based upon a deterrent view of the purposes of criminal sanctions.

134. See generally MODEL PENAL CODE AND COMMENTARIES, § 210.2, commentary at 37-42 (1980) (commenting that "[p]rincipled argument in favor of the felony murder rule is hard to find," but noting the continued adherence to the rule in almost all U.S. jurisdictions despite its abolition in other countries). For an effort to defend the felony murder rule, see David Crump & Susan W. Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J. L. & PUB. POL. 359 (1985).

135. For a brief introduction to the theories of punishment and the evolving scholarly debate about them, see ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 3-16 (1985). For a more detailed account of the retributive theory, see ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

136. See Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1667 (1986) (arguing in the context of the death penalty that retribution "is an independent moral justification").

B. Cognitive Errors

In contrast, researchers who focus on cognitive errors deny that the variance between the public view of environmental risks is rational, attributing the divergence instead to various deep-seated errors of cognition.¹³⁷ Julian Roberts has made an initial effort to apply the psychology of knowledge acquisition and attitude formation to the context of criminal justice, identifying several mechanisms at work: overgeneralization, availability, (over)confidence, and biased processing of information.¹³⁸

1. Overgeneralization

Roberts notes that the empirical work of Tversky and Kahneman, among others, demonstrates the principle of overgeneralization, i.e., the excessive degree to which people base general views on a few cases or even a single case.¹³⁹ For example, the opinions of experimental subjects who viewed a videotape of a single interview with a prison guard were heavily influenced by the behavior of that single individual, *even though they were told he was not typical* of other guards: those who saw the version in which the guard acted warm and humane expressed the opinion that guards typically are warm humane individuals, and those who saw the version in which the guard was cold and uncaring said that all guards are inhumane.¹⁴⁰

137. For example, Kahneman and Tversky identify three heuristic principles that can lead to severe and systematic errors in assessing risk: representativeness, availability, and adjustment and anchoring. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al., eds., 1982). For an account of other cognitive errors that interfere with the rational wealth maximization, see RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991).

138. Roberts, *supra* note 133, at 24.

139. *Id.* (citing Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207 (1973)).

140. Roberts, *supra* note 133, at 121-22 (describing Ruth Hammill et al., *Insensitivity to Sample Bias: Generalizing from Atypical Cases*, 39 *J. PERSONALITY & SOC. PSYCHOL.* 578 (1980)).

Similarly, the public tends to overgeneralize from the cases of Willie Horton and the killer of Polly Klass, believing that rapes and murders by persons on furlough or parole are much more common than they are.¹⁴¹ Similarly, information about a single sentence that is perceived to be too lenient will lead too quickly to a general view that all criminal sentences are lenient. Even if the public is informed that a case is atypical—a point made repeatedly about the O.J. Simpson case—the public tends to generalize from it.

2. Availability

Opinions are affected by the cognitive availability of various occurrences and examples. Cognitive availability is “accessibility in the processes of perception, memory, or construction from imagination.”¹⁴² The availability heuristic biases judgment because certain examples and events come to mind much more easily than others. Unusual and startling examples stand out in our minds and are more available than usual events. Media coverage also plays an important role. Empirical studies have demonstrated that the public overestimates causes of death covered by the media—particularly homicide—and underestimates other causes of death that are not covered by the media—such as suicide.¹⁴³ This work lends support to the view that the media’s increasing emphasis on reporting murder and other violent crimes will create exaggerated public estimates of the frequency of such crimes. It also explains why particularly horrible crimes, such as the kidnapping and murder of Polly Klass, evoke not only anger and distress about the

141. Although there is a public perception that Polly Klass’s killer was paroled, in fact he served only portions of two earlier sentences for kidnapping because of a mandatory sentencing law which required the recalculation of his first sentence and a statute responding to prison overcrowding by requiring all prisoners to be released after serving one-half of their sentences. See Estrich, *supra* note 19.

142. Roberts, *supra* note 133, at 122 (quoting RICHARD E. NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 18 (1980)).

143. *Id.*

particular case, but call for a wholesale revamping of the sentencing system. Similarly, reports of a single lenient sentence or an acquittal (as in the Simpson case) are highly available and will play a disproportionate role in shaping public opinion.

3. Confidence

Many empirical studies have demonstrated that even opinions based on the slimmest bits of information, once formed, tend to be held with great confidence. This holds true even when it can be demonstrated that the individual had no basis for the opinion (as in an experiment where subjects were asked to select the "best" pair of nylon stockings from a group that—unknown to the subjects—were actually identical¹⁴⁴). In the context of criminal justice, researchers found, for example, that subjects reported that they were "very confident" of their views on the appropriate sentence in cases in which they had read only a very brief press account.¹⁴⁵ When attitudes are held with a high degree of confidence, they are more resistant to change, more susceptible to cognitive errors, and less responsive to relevant information. In the context of the criminal justice system, this means that the judgments reached under the influence of overgeneralization, based upon the sensational cases that are most available, are then held with undue confidence.

4. Biased Processing of Information

Experimental social psychologists have demonstrated that, once individuals adopt an opinion or point of view, they process new information in a highly biased fashion. For example, researchers presented both proponents and opponents of capital punishment with descriptions of two

144. See MARGOLIS, *supra* note 1, at 103.

145. Roberts, *supra* note 133, at 123 (discussing ANTHONY DOOB & JULIAN V. ROBERTS, *AN ANALYSIS OF THE PUBLIC'S VIEW OF SENTENCING* (1983)).

research studies; one study showed capital punishment was an effective deterrent, and the other showed there was no deterrent effect. In other words, the evidence was mixed. Despite the fact that both reports were prepared by the same researchers, who considered them equally balanced, the subjects typically found the study supporting their own views not only more convincing, but also more scientific. Moreover, after reading this mixed evidence, proponents of each view became *more* polarized, ignoring the contrary evidence and accepting only the evidence that supported their own position.¹⁴⁶

Taken together, it is easy to see how the cognitive errors that bias public opinion in favor of generalizations based upon a few sensational cases produce fear of crime and support for politicians who promise to make the streets safe by enacting harsher penalties.

C. The Margolis Risk Matrix

Building on prior work on cognitive errors, Howard Margolis has developed a new risk matrix to explain the frequent divergence of expert and lay analysis of environmental risks. Margolis argues that public attitudes are founded on a visceral sense of danger (an "affective 'vigilance' response") that is the product of our unconscious response to cues that prompt us to vigilance.¹⁴⁷ He suggests that expert and lay opinions tend to diverge on issues of statistical risks that are smaller than the risks we deal with on an everyday basis and that the cuing that develops from everyday experience does not work very well in this context. Moreover, intuitive responses based upon such cuing are held with great confidence and ordinarily cannot be dislodged merely by logical arguments alone.¹⁴⁸ The

146. Roberts, *supra* note 133, at 123-24 (describing Charles Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098 (1979)).

147. MARGOLIS, *supra* note 1, at 45.

148. *Id.* at 51.

difference between expert and lay opinion results from the fact that the expert has a different repertoire of patterns available to him or her.¹⁴⁹

Margolis presents a four cell risk matrix, with the costs of taking precautions on the vertical axis, and the costs of doing nothing on the horizontal axis:

Figure 3

		OPPORTUNITY	
DANGER	Yes	Fungibility ①	"Better Safe than sorry" ②
	No	"Waste not, want not" ③	Indifference ④

Source: HOWARD MARGOLIS, DEALING WITH RISK: WHY THE PUBLIC AND THE EXPERTS DISAGREE ON ENVIRONMENTAL ISSUES 76 (University of Chicago Press). © 1996 by the University of Chicago

In cell 4 you are indifferent to the issue, which is not on your mental viewing screen at all. In cells 2 and 3, you are aware of the problem, but you see only one side of the story. In cell 2, you feel that it is "better to be safe than sorry," and the risk of going ahead and being wrong seems most salient. In cell 3, you adopt the "waste not, want not" mode or "nothing ventured, nothing gained" way of thinking, and you fear the cost of not acting the most. In cell 1 you see the risks and tradeoffs on both sides. Gener-

149. *Id.* at 67-68.

ally, we begin in cell 4, unaware of a problem. We then move into either cell 2 or 3 as we see one side of the problem. If we then saw the other side of the story, we would then move to cell 1, where we would be alert to the trade-offs (and, in the context of environmental risks, would be likely to accept expert judgments about tradeoffs).

Margolis argues that the lay public tends to get locked into either cell 2 or 3, as a visceral sense of one risk or another results from cuing. Because of the confidence with which such intuitive judgments are held, the views of persons in cells 2 or 3 cannot be changed just by logical appeals. The only thing that will move most such persons to a sense of the tradeoffs is something quite striking. Margolis buttresses this view by a review of research indicating that human cognition tends toward dichotomous thinking. We tend to treat risks as either zero probability or as very substantial or significant risks, and have difficulty dealing with smaller, but significant, risks.¹⁵⁰ Similarly, we tend towards other binary polarized intuitions, such as friend or foe, good or evil, toxic/non toxic. At some point, we cross a threshold.

What causes individuals to move into cell 2 or cell 3? Psychological alerts are triggered by things that are out of line in our usual experience, and by things experience has taught us to be wary of.¹⁵¹ We also pay more attention to risk of loss than to gain.¹⁵² However, the matrix does not establish the baseline. One could see an incremental danger as a loss from the status quo, but giving up an opportunity can also be seen as a loss.

While framing and the identification of the baseline are difficult issues in the context of many environmental risks, Margolis's model is probably easier to apply to criminal justice issues. It is easy to see that it is the visceral sense of danger that pops up on our view screens when the media alert us to what appears to be the increased danger of

150. *Id.* at 81-86.

151. *Id.* at 89.

152. *Id.* at 93.

crime. At that point, many people move to—and are locked into—the position of believing that more action is needed to ensure public safety. Politicians have typically translated that into calls for longer sentences for dangerous criminals. The public is generally not swayed by logical appeals premised on the fact that we cannot afford to keep all the criminals locked up forever, and that cases such as Willie Horton and Polly Klass are very unusual. What are perceived as visceral fears move us instinctively to a confidently held position. Indeed, several of Margolis's observations seem tailor-made for the criminal justice context: when children are the victims, expert opinions based upon "a cold calculation of costs against benefits or comparative risk" are not merely unpersuasive, they prompt a sense of "revulsion" on the part of the public.¹⁵³ "Hot cognitions" and affective responses—like those evoked by violent crime—are especially strong and impervious to persuasion.¹⁵⁴

Margolis argues that it takes striking events or information to overcome such a visceral response to danger, and to push the lay public into an understanding of tradeoffs. For example, in the case of the discovery that asbestos had not been removed from the New York City public schools over the summer as scheduled, the initial lay attitude overwhelmingly favored closing the schools, regardless of official assurances that the situation was quite safe. A few weeks after the schools closed, however, the public became unavoidably aware of the tradeoffs, as children were not learning and were in fact exposed to many other dangers. Within just a few weeks public opinion, which had been totally against opening the unsafe schools, now swung completely around to seeing the asbestos danger as negligible (and recognizing the asbestos had been there a long time and would be costly and dangerous to remove).

It is easy to suggest parallels to Margolis's example. In California, the public was informed during the debate over the three strikes law that it would be costly, but this argu-

153. *Id.* at 116.

154. *Id.*

ment made little headway. The situation may change, however, when voters themselves confront the tradeoffs, such as finding that their children cannot attend college in the state university system.¹⁵⁵ Margolis' model also explains why programs to get tough on crime and pass longer sentences have less appeal to the poor and minorities—who are the chief victims of crime—than to more affluent white suburban voters—who have less exposure to crime. In the poor and minority community, personal experience with offenders and their families forces the public to see the tradeoffs that result from longer terms of imprisonment.

IV. CONCLUSION

This paper considers a number of influences that help to explain the prominence of crime as a political issue and the prevailing public support for harsher criminal sanctions. The coincidence of an increase in the post-war crime rates at a time of antiwar and civil rights disturbances sets the stage for opportunistic political behavior. The Republicans used the crime issue to gain national political strength, particularly in the South where the Democratic Party's support of civil rights legislation left it vulnerable. The news and entertainment media have also had a role to play, significantly increasing the coverage of crime and violence. Although no definitive proof of cause and effect has been established, an increased fear of crime and an erroneous belief in a high crime rate have been shown to be correlated with high consumption of violent programming. There is also evidence that the news media's focus on crime may shape political views and/or perform an important agenda-setting function. Perhaps most important, a review of cognitive psychology provides a model that could explain the current public attitudes about the criminal justice sys-

155. Indeed, Marc Miller has argued persuasively that tradeoffs between corrections expenditures and other competing governmental programs will emerge most quickly in local politics, where there are smaller budgets and more obvious competition for a limited number of dollars. Miller, *supra* note 27, at 26-27.

tem, and the widespread support for severe sentencing policies that many experts believe are not the most effective way to fight crime.

Unfortunately, the research surveyed here does not tell criminal justice experts how they should respond to the public attitudes and political forces that are described here. Supreme Court Justice Stephen Breyer has argued that the public's attitude toward risk is so fundamentally flawed by cognitive errors that risk regulation should be guided by a cadre of experts more isolated from political pressures than Congress.¹⁵⁶ In the criminal justice context, the institution most likely to play such a role would be the U.S. Sentencing Commission. Breyer's proposal to buffer environmental policy from democratic control has been highly controversial in the context of risk regulation,¹⁵⁷ and it is doubtful whether it could (or should) be extended to the criminal justice context. There are strong political incentives for elected officials at the state and federal level to retain control of criminal justice policy and to employ the crime issue to increase their own political support. Indeed, when the Sentencing Commission took a controversial stand on crack cocaine, Congress overrode the proposed guideline.¹⁵⁸ There is also a tradition in the United States of treating criminal justice issues as policy questions on which expert opinion may be considered but should not govern. Thus in drafting the Model Penal Code the American Law Institute never sought to achieve uniformity throughout the nation, deeming it "inevitable that substan-

156. See BREYER, *supra* note 120, at 59-81.

157. When Breyer was nominated to the Supreme Court, Senator Joseph Biden characterized aspects of Breyer's proposal for the management of risk regulation as "incredibly presumptuous and elitist," concluding that he was "delighted that as a judge, you are not going to be able to take your policy prescriptions into the Court." *Confirmation Hearing of Stephen G. Breyer to be an Associate Justice of the United States Supreme Court, Senate Committee on the Judiciary*, 103d Cong., 2d Sess. 6 (July 12, 1994), quoted in Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 51 n.181 (1995).

158. For a discussion of the Sentencing Commission's crack cocaine proposal and the congressional response, see *supra* note 22.

tial difference in social situation or *point of view* among the states should be reflected in substantial variation in their penal laws."¹⁵⁹

159. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1427 (1968) (emphasis added).