Media Criminology and the Death Penalty

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INTRODUCTION

By the time they are old enough to vote or serve as jurors, most citizens in the United States have earned the equivalent of a Ph.D. in "media criminology." The average eighteen-year-old has watched some twenty thousand hours of television programming,1 much of which has been devoted to crime-related news and drama.2 Moreover, adults are afforded seemingly limitless opportunities to obtain continuing, post-doctoral education. Indeed, the typical American household now holds more television sets than people,3 and the sets are on over eight hours per day.4 By most estimates, crime continues to be the industry's mainstay, with approximately one-third of televi-

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2. Among other crime-related content, the more than 20,000 hours to which the average eighteen-year-old has been exposed includes an estimated 200,000 violent acts. See Internet Resources, supra note 1.


4. Nielsen Media Research reported in 2008 that television sets in the average American household were on eight hours and eighteen minutes per day, up about an hour from the year before, and that the average American watched 142 hours of television per month. News Release, Nielson Co., Americans Can’t Get Enough of Their Screen Time: Nielsen Reports that Internet and Mobile Usage Continues to Increase, As TV Usage Rises to an All-Time High (Nov. 24, 2008), http://www.nielsencorporation.com/nl/cms/newsroom/pressreleases/2008/Television-Usage/Television-Usage-November-2008.pdf.

sion programming devoted to crime and law enforcement shows.\textsuperscript{5} News media are also dominated by crime-oriented content.\textsuperscript{6} For example, an estimated one-fifth of local television and newspaper reporting is devoted to crime.\textsuperscript{7}

I have argued elsewhere that the media play a critically important and potentially deleterious role in helping to shape criminal justice policy.\textsuperscript{8} Media myths and misinformation substitute for real knowledge for many members of the public who—as citizens, voters, and jurors—participate in setting policy agendas, advancing political initiatives, and making legal decisions.\textsuperscript{9} Media messages about the causes of crime, the nature of violent criminality, and the most effective strategies for addressing crime-related problems are especially influential because they address topics with which most citizens have little or no direct experience.\textsuperscript{10}

In this Article, I examine in greater depth some particularly problematic aspects of media criminology. I argue that the crime-related media content in which the American public is now steeped and schooled has increased in amount and intensity in recent years, penetrating even more deeply into popular culture and personal consciousness. Thus, it is especially important to examine the “core curriculum” that makes up the educational program from which so many citizens continue to graduate. The potential consequences of its fundamentally misguided lessons are broadly problematic in any con-
text where citizens have direct input into and influence over crime-related policies and decisions. However, this is particularly true in death penalty cases. In no other kind of criminal case does the public’s collective view of the nature of criminality—the upshot of their flawed criminological education—play so significant a role.

Indeed, citizens are absolutely central to the administration of capital punishment in the United States. In part for this reason, public attitudes toward capital punishment are the ones that have historically been most often surveyed.11 Voters are accustomed to taking sides in policymaking debates about the death penalty and also in making electoral choices based in part on the death-penalty-related views and positions of political candidates.12 Yet, the public’s role in actual capital case decision making is truly unparalleled. Citizen-jurors—and only they—are called upon to choose between life and death in capital trials.13 Accordingly, this Article explores some of the ways in which the flawed criminological curriculum and overall media mis-education may affect these jurors in the course of this decision-making process.

Because of the sheer amount of crime-oriented media to which members of the public are exposed, it is tempting to deal in generalities—for example, by bemoaning only the overall bias and distortions


12. As Justice Brennan observed in Furman v. Georgia, “There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death.” 408 U.S 238, 286 (1972) (Brennan, J., concurring). One political commentator summed up the centrality of the death penalty to the electoral campaigns taking place in 1990 this way: “From Texas to Florida to California, governors’ races show how shamelessly politicians adopted the message of the ‘88 Bush campaign: Fear of crime is the hottest button a politician can push. . . . The electric chair has replaced the American flag as your all-purpose campaign symbol.” Sandy Grady, Bush’s Willie Horton Legacy Lives, SAN JOSE MERCURY NEWS, Mar. 18, 1990, at A1. Indeed, Republican presidential candidate Bob Dole actually began his 1996 California primary campaign with a much-publicized visit to death row. Carla Marinucci & Steven A. Capps, Dole Talks Tough in Visit to Death Row, S.F. EXAMINER, Mar. 24, 1996, at A1. “Dole told about 100 prison employees, law enforcement officials, and crime victims he would work to end lenient sentences and wanted to speed up the executions of convicted criminals on death row” by supporting habeas corpus reform. Id. Not to be outdone on the crucial punishment question, his opponent was quick to respond: “[President] Clinton has said he favors such reforms and the White House reiterated the support Saturday.” Id.

13. In Ring v. Arizona, the United States Supreme Court underscored the unique role of the jury in capital cases, ruling that “[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” 536 U.S. 584, 589 (2002).
that collectively characterize the messages that are conveyed. But doing so can lead legal analysts and death penalty attorneys to overlook the truly extreme content and unsettling tenor of the ubiquitous criminological lessons that the media regularly disseminate to citizen-jurors across the country. This is a media genre in which the “devil”—sometimes quite literally—really is in the details. Thus, taking a more in-depth look at some specific, representative examples will more clearly illustrate the nature of the flawed criminology that is being absorbed by citizens and provide a more realistic sense of its likely effects.

Beyond the nature and content of the messages themselves, it is also important to address the increased penetration of the media into the day-to-day lives and consciousness of citizens—that is, to examine some of the new relationships that have developed between crime-related media and the audience members who consume them. An emerging set of media marketing ploys and strategies have added a participatory dimension to the consumption of crime-related messages and products. This industry now encourages its customers to become actively engaged with this material—rather than to passively consume it—and presents audience members with numerous opportunities to do so.

In any event, the full potential of such pervasive criminological content can only be appreciated by examining some examples of the form that it now takes (however jarring it may be to encounter this kind of material in an academic, legal forum). Understanding the potential consequences of this widespread process of mis-education requires us to come to terms with the particulars of the curriculum on which it is based and the different “active learning” contexts in which it is taught.

II. CRIMINOLOGY FOR THE MASSES: THE EVER-EXPANDING MEDIA MARKET FOR CRIME

Media criminology is a commercial product rather than a body of what is ordinarily considered “real” knowledge. Obviously, it is not based on a collection of systematically deduced theoretical propositions or carefully arrived at empirical truths about the realities of crime and punishment. Its substantive lessons are intended to generate audience share rather than to convey accurate information or provide a valid framework for understanding the nature of crime. Simple profitability is not only the primary basis for the media’s continuing obsession with crime-related topics, but also the only standard to which media executives, producers, and programmers are typically
heded accountable. At one level, this is neither surprising nor controversial. More generally, "[i]t is a normal and necessary function in all the media to pursue some subjects and ignore others, to emphasize some material and de-emphasize other. It is within this necessary professional decision making that corporate values and the central aims of owners are embedded."15

Several things follow from the fact that media criminology is judged more by its bottom line than its truth value. The first is that its relationship to the actual realities of crime and punishment is merely incidental. To the extent that it is more profitable for media to appear to be valid—to retain a higher degree of apparent verisimilitude—it will be portrayed and marketed as such; otherwise, it will not. Moreover, the profitability of apparent realism makes it subject to manipulation. That is, convincing the audience that something is accurate, true, or realistic is primarily what matters, not whether this manufactured impression is factually correct. In fact, over time, audience members may come to judge the "accuracy" of media depictions and real-life events with the same metric—one that is derived primarily if not exclusively from their media-based "educational" experiences and no others.16

Second, the amount of crime-related programming bears no necessary relationship to the actual amount of crime that exists at any particular time in the society at large.17 Thus, as a number of commentators have reported, "[b]y the early 1970s the cop show had entirely supplanted the Western as the dominant genre of narrative fiction on U.S. television."18 A little more than a decade later—by the mid-1980s—there were an estimated twenty-eight police and private detective shows on prime time television alone.19 However, despite


17. Richard Sparks has observed that the "massive development of television and its associated industries has historically coincided with a period of chronic, and sporadically acute anxiety about crime and policing." Richard Sparks, TELEVISION AND THE DRAMA OF CRIME: MORAL TALES AND THE PLACE OF CRIME IN PUBLIC LIFE 16 (1992). However, once television and its associated industries became "massively developed," they not only continued to focus on and profit from the public's acute anxiety about crime but also helped to create and maintain it.

18. Id. at 27 (citing Eric Barnouw, TUBE OF PLENTY: THE EDUCATION OF AMERICAN TELEVISION (1975); Todd Gitlin, INSIDE PRIME TIME (1985)).

fluctuations in the crime rate over the next several decades, "cop shows" maintained their new-found dominance. If anything, the popularity of crime drama increased as the overall amount of crime in American society dropped throughout the 1990s.

More remarkably, perhaps, the same pattern applied to crime-related news coverage as well. Network news programs greatly increased their crime focus in the early 1990s, just as crime rates started a consistent decline. As one report noted: "In the real world, homicides declined by 13 percent between 1990 and 1995. On the network news during the same period, coverage of murders increased by 336 percent. . ." Moreover, as I discuss below, entire new genres of crime-related media that blurred the line between fact and fiction and news and drama emerged even as crime rates continued to decrease.

Decoupling crime rates from media crime coverage and the public's concern over crime enabled commercial interests to profit more readily from promoting the fear of crime. The greater the level of such fear and the more extreme the public's obsession with the issue of crime, the larger the potential market not only for crime-related media content but also for a vast array of inter-related crime-control products and services. Indeed, crime-related media and associated crime control enterprises proliferated rapidly during a period of consistently decreasing crime rates.

The public's fascination with crime and punishment, among other things, gradually transformed the nature of television programming. Although crime-related programming had already established itself as "the single most popular story element in the fifty-year history of . . . television," its popularity consistently increased. Shows that focused exclusively on crime-related topics currently pervade the airwaves, many achieving such heights of popularity that they only compete with one another—in spinning off new variations of themselves, or having their often bizarre premises emulated by others.

21. Id. This figure excluded coverage of perhaps the decade's most famous murder and criminal trial—the O.J. Simpson case. Id.
22. For an excellent analysis of these issues, see Murray Lee, Inventing Fear of Crime: Criminology and the Politics of Anxiety (2007).
24. See, e.g., Alessandra Stanley, Moody Loners Vs. Bad Guys, N.Y. TIMES, Sept. 26, 2003, at E1 (finding it notable that among the "more than two dozen crime shows on prime time" in the 2003 season, "fewer than half are satellites of 'CSI' or 'Law and Order'").
25. Some examples are discussed infra at notes 122-129 and accompanying text.
In fact, a whole new genre of television drama—the so-called “police procedural”—emerged over the last several decades to dominate network television programming. Although these shows focus on the most mundane and often distasteful aspects of police work, they nonetheless regularly lead the “top ten” lists for “most watched” television programs. To take a random date from a recent time period: In mid-August 2007, half of the ten most highly rated television shows were crime-related, including episodes of three separate forensic investigation shows, a series devoted to an FBI unit that specializes in finding missing persons (Without a Trace), and another devoted to a detective who concentrated on “crimes that have never been solved” (Cold Case). Given the success of these shows, it is not surprising that in 2008 one of the three major television networks (CBS) announced that, of eleven series that were being renewed for the upcoming year’s programming, eight of them were crime-related. It was a wise business decision: By late October 2008, five of the network’s crime-related shows were listed in broadcast television’s top ten, in-

27. See infra notes 31–34 and accompanying text.
30. CBS announced in February 14, 2008 that the eleven series it had renewed for the 2008-09 season included: Cold Case, a show that follows the exploits of a female homicide detective who combines “her instinctive understanding of the criminal mind” with “today’s new science” to “solve cases that were previously unsolvable,” About Cold Case, supra note 29; Criminal Minds, a series about “an elite team of FBI profilers who analyze the country’s most twisted criminal minds, anticipating their next moves before they strike again,” CBS, About Criminal Minds, http://www.cbs.com/primetime/criminal_minds/about (last visited Apr. 22, 2009); CSI: Crime Scene Investigation, a television series featuring “a team of forensic investigators . . . collecting the irrefutable evidence and finding the missing pieces that will solve the mystery,” CBS, About CSI, http://www.cbs.com/primetime/csi/about (last visited Apr. 22, 2009); CSI: Miami, a spin-off series from CSI that follows another team of forensic investigators, this time in Miami, “who use both cutting-edge scientific methods and old-fashioned police work to solve crimes,” CBS, About CSI: Miami, http://www.cbs.com/primetime/csi_miami/about (last visited Apr. 22, 2009); CSI: New York, another spin-off from the original CSI featuring forensic investigators who “use high-tech science to follow the evidence and solve crimes in the Big Apple,” CBS, About CSI: New York, http://www.cbs.com/primetime/csi_ny/about (last visited Apr. 22, 2009); NCIS, a series that follows special agents who “travel the globe to investigate all crime with Navy Or Marine Corps ties,” CBS, About NCIS, http://www.cbs.com/primetime/ncis/about (last visited Apr. 22, 2009); Numb3rs, a series “[i]nspired by actual events, [Numb3rs] depicts how the confluence of police work and mathematics provides unexpected revelations and answers to the most perplexing criminal questions,” CBS, About Numb3rs, http://www.cbs.com/primetime/numb3rs/about (last visited Apr. 22, 2009); and Without a Trace, a series about a “special task force” that “finds missing persons by applying advance psychological profiling techniques to peel back the layers of the victims’ lives and trace their whereabouts,” CBS, About Without a Trace, http://www.cbs.com/primetime/without_a_trace/about (last visited Apr. 22, 2009).
cluding three separate forensic investigation shows, and two shows about so-called crime "profilers.”

By far the most successful of these programs, *Crime Scene Investigations*, or *CSI*, concentrates on the often gruesome work of forensic scientists. Indeed, "the original, set in Las Vegas, remained the most watched show on television" well into the first decade of the twenty-first century. As one television reviewer wondered about its surging popularity, "[w]hat makes these programs about anal swabs, toenail clippings, and poisoned nipples so popular?" Whatever the basis for its appeal, public fascination with the subject matter continued to grow. The original *CSI* generated its own "spin-off" program, *CSI: Miami* within just a few years of being on the air, with a third following shortly thereafter.

In addition to *CSI*, the other crime-related television "franchise," *Law & Order*, has been a staple of network programming for nearly two decades. Indeed, it not only currently remains a "hit" show, but has achieved the status of "the longest running crime series and second longest running drama series in the history of American broadcast television," representing "the most successful brand in the history of primetime television." Thus, after some eighteen seasons of broadcasting it still "delivers some of the highest ratings on television."

As one media reporter noted in 2001, *Law & Order* was "already the most ubiquitous show on television," when it capitalized on its extraordinary popularity and "spun off not one but two thematically connected series." The spinoffs—*Law & Order: Special Victims*

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31. *Most Wanted: Broadcast Television, October 20 Through 26*, N.Y. TIMES, Nov. 3, 2008, at B11. According to the Times, *CSI*, *CSI: New York*, and *NCIS* were in the top ten, along with *Criminal Minds*, and a CBS newcomer, *The Mentalist*. Id.; see infra notes 128-129 and accompanying text. In fact, crime shows have become so pervasive in network television that a media critic advised the networks—whose ratings were slumping in the "all important 19-49 demographic" not to "become a tacky, utilitarian strip mall of crime procedurals" because, although many of the shows "perform really well," the networks were actually at risk of "delug[ing] the market" by becoming "solely identified with one genre." Matthew Gilbert, *Here are Some Remedies for What's Ailing Network Television*, SANTA CRUZ SENTINEL, Dec. 16, 2008, at A11.


36. Id.

Unit and Law & Order: Criminal Intent\(^\text{38}\)—themselves quickly became extremely popular and often lead the parent show in ratings. One analyst observed in 2005 that “[o]ne notable week last season, one or another ‘Law & Order’ series aired during 12 of NBC’s 22 prime-time hours.”\(^\text{39}\) At the time the article was written, yet another apparent Law & Order spin-off, Conviction, created by the same producer, was getting ready to air.\(^\text{40}\) Conviction focused on the “young, inexperienced and attractive go-getter[ ] [prosecutors] who are pushed to the limit” in the Manhattan district attorney’s office.\(^\text{41}\) The popularity and proliferation of the thematically linked shows prompted one television analyst to ask, seemingly in jest, “[c]an an an All ‘Law and Order’ Network be far behind?”\(^\text{42}\)

In fact, Law & Order is in many ways more a programming “empire” than simply a television series. It was estimated in 2005 that NBC, the network that broadcasts the shows, “reportedly logs as much as $1 billion in annual ad sales from ‘Law & Order’ programming, and counts ‘Special Victims Unit’ its highest rated show.”\(^\text{43}\) By 2008, even though it had slipped somewhat from its primary position in the ratings, Law & Order was still being described as a “venerable series with a devoted following and a basketful of Emmy nomina-

\(^{38}\) The Law & Order spin-offs supposedly develop slightly different aspects of the law enforcement and prosecution process but are hard to distinguish from one another. Thus, for example, although Criminal Intent is described as presenting “crime stories from the criminals’ perspective,” it follows much the same format as the original: “bad guys and gals do bad stuff and detectives pursue them . . . .” Neil Genzlinger, New Television Season in Review: Law and Order: Criminal Intent, N.Y. TIMES, Sept. 28, 2001, at E28. In addition to these two direct Law & Order spin-offs, another show debuted in the same season, with a similar format. See Anita Gates, New Television Season in Review: UC Undercover, N.Y. TIMES, Sept. 28, 2001, at E28. UC Undercover was about “a special-operations unit in the Justice Department that consists exclusively of attractive, tough-talking young people” whose job “is to infiltrate the inner circles of criminals they are out to catch.” \(^{41}\) Indeed, it is difficult to chronicle all of the Law & Order-type shows that have appeared since 2001. For example, in 2005, there was Law & Order: Trial by Jury, described by TV.com as “the latest series from Dick Wolf, architect of the most successful brand in primetime television.” TV.com, Law & Order: Trial by Jury: Summary, http://www.tv.com/law-and-order-trial-by-jury/show/25938/summary.html (last visited Apr. 22, 2009). In 2006, Conviction debuted as a partial Law & Order spinoff (using many of the same sets as Trial by Jury and a character from Special Victims Unit). TV.com, Conviction: Summary, http://www.tv.com/conviction/show/30090/summary (last visited Apr. 22, 2009); Crime Pays for “Law & Order’s” Dick Wolf, MSNBC.com, Oct. 20, 2005, http://www.msnbc.msn.com/id/9766633 [hereinafter Crime Pays]. Like Trial by Jury however, Conviction was short-lived, in part because it could not compete against a new “math police procedural” called Numb3rs.

\(^{39}\) Crime Pays, supra note 38.

\(^{40}\) Id.

\(^{41}\) Id.

\(^{42}\) Genzlinger, supra note 38.

tions—and the cornerstone of a franchise that has generated billions of dollars over the years." Critics expect Law & Order will return for a twentieth season, tying it with Gunsmoke as the longest running drama in television history.

Network programming now represents only a portion of the available television content to which audiences have regular access. Thus, media criminology is almost equally widely disseminated through cable and satellite programming that is received by nearly two-thirds of American households. Not surprisingly, the major networks' enthusiasm for crime-related programming is shared by most of the existing cable networks. For example, one television critic described the unlikely crime-oriented programming of one cable network:

On Lifetime, the channel that branded itself as "television for women," danger and looming death seem to be the unifying concept of the programming. In any given few days, you'll see shows such as those which were described in my on-screen TV guide last week: "After his daughter kills his wife, a California con man weds his wife's sister"; "A deranged gunman kidnaps two teen-age girls"; "Orphaned siblings fall victim to a mentally unstable woman and her husband"; "An assistant district attorney hounds an Oregon woman he suspects has shot her three children"; and "An attorney faces charges of murdering his ex-lover."

Another cable network, Showtime, has an extremely successful television series that represents a bizarre merging of a serial killer and crime scene investigator. Dexter features a "charming blood spatter expert for the Miami Police Department" who also happens to be the city's most prolific serial killer. As the Showtime network's webpage describes the show's protagonist: "He'll charm fellow officers with a doughnut, wile away a Sunday afternoon with his girlfriend Rita, or chop up a victim and package their body parts in plastic bags." As the trailer for the 2007 season put it, Dexter's continuing struggle is that he must "act relentlessly normal" yet control his insatiable thirst for murder. Indeed, when too much time has passed in between satisfying these murderous urges, Dexter's confessional voiceover acknowledges directly to the viewers that "I really need to

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45. Id.
49. Id.
kill somebody" and, in the same way, later proudly refers to his gruesome killings as "my beautiful bodies of work."

Crime drama is more than merely pervasive on television. It is such a central part of the television industry that its best writers, directors, and most accomplished actors work on crime-related shows. The shows themselves are held in the highest regard by television professionals and critics alike. In the last year of the twentieth century, for example, most of the major Emmy awards were won by crime and law-oriented shows. It was not an anomaly; such shows have a long track record of critical acclaim. For example, Hill Street Blues, one of the early police-focused crime dramas, is tied with L.A. Law for most Emmy wins for "Outstanding Drama Series." NYPD Blue, which followed Hill Street Blues in this genre, has the most program nominations in a single award year (twenty-seven nominations in 1994).

The Emmy dominance of these kinds of shows has continued well into the twenty-first century. In 2006, for example, The Sopranos, a highly successful HBO series about a Mafia-style crime family won the Emmy Awards for "Outstanding Writing for a Drama Series," "Outstanding Directing for a Drama Series," and "Outstanding Drama Series," and in 2007 it garnered fifteen separate nominations. Monk, a show about an obsessive-compulsive detective has received a total of twelve Emmy nominations over a five year period and has won six times; the three CSI programs have received thirty-seven Emmy nominations and won four in a seven year period; Dexter was nominated three times in 2007, its first year of eligibility; Law & Order: Special Victims Unit has received thirteen nominations and won twice in its eight years of eligibility. In fact, in every year over the last decade (except for 2004), at least one (and usually two) crime dramas have been among the half dozen shows nominated for "Outstanding Drama Series."

In addition to crime drama, a different kind of crime show began airing in the 1990s. A number of so-called "real life" police shows emerged—programs in which actual police officers are shown interro-

53. Id.
gating citizens, conducting searches and raids, and making arrests.\textsuperscript{54} The first and most popular of these shows was entitled, simply, \textit{Cops}. This show celebrated its twelfth year on television and its 400th episode in 1999—at the time, longevity unmatched by countless other programs that had cost far more to produce and had been promoted with much greater advertising budgets. \textit{Cops}, as one television commentator put it that year, “has spawned many imitators, but is still the king. This show’s conception and ongoing run says all you need to know about America and television.”\textsuperscript{55}

Its success continued. Just eight years later—in 2007—the 700th episode of \textit{Cops} went on the air.\textsuperscript{56} Television critics speculated that the continued longevity of the show spoke to the changed landscape of American television viewing.\textsuperscript{57} As one critic noted, families no longer gathered together on Saturday nights to watch network variety shows or sitcoms.\textsuperscript{58} Instead, the “viewers who remain often answer the siren call of ‘Cops,’ watching arrest after arrest in a series that reinforces the notion that order can always be restored.”\textsuperscript{59}

In addition to the ubiquitous crime dramas and the proliferation of so-called “real life” crime programs (such as \textit{Cops}) on television, crime stories dominate local television newscasts. Indeed, “[s]tudies show that crime is the most frequently covered topic on local television and the most likely to be the lead story.”\textsuperscript{60} Moreover, as two commentators have suggested, “it can be argued that crime news is most important because of [its] dramatic portrayal . . . and the potential influence on viewers.”\textsuperscript{61} Especially when it appears in local news broadcasts, “[c]rime may be depicted as an everyday happening close to home.”\textsuperscript{62} Similarly, \textit{national} news coverage concentrates heavily on crime-related topics. For example, during the first half of the 1990s, as crime rates were declining in the United States, the nation’s three ma-


\textsuperscript{55} Tim Goodman, \textit{Going, Going, Gone—& Not a Bit Too Soon,} \textit{Santa Cruz Sentinel,} May 1, 1999, at D5.


\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} Id.


\textsuperscript{61} Lipschultz & Hilt, supra note 60, at 59-60.

\textsuperscript{62} Id. at 60.
ajor networks still reported on crime more than any other single topic 
during their primetime newscasts.63 By the end of the decade, crime 
had risen to the very top of the list of issues covered in network eve-
ning news shows.64 Its dominance was decisive—on average, “1 out of 
every 10 stories on the network evening news . . . dealt with crime,” 
and the percentage remained steady for years.65

Just as with crime drama, much of the media’s excessive focus on 
crime news is market driven. Not surprisingly, perhaps, news shows 
have found that their ratings increase when they feature crime stories, 
especially highly sensationalized cases. For example, when the Col-
umbine High School shootings occurred in Littleton, Colorado, in 
1999—a tragedy that left thirteen students dead and many others seri-
sously wounded—the news media provided almost around-the-clock 
coverage. Yet the viewing audience never became satiated. As one 
newspaper account reported at the time, “interest by viewers around 
the nation was reflected in the ratings this week.”66 Indeed, “[t]wo 
networks devoted their newsmagazine programs to the Littleton kill-
ings on Wednesday night and scored some of their highest ratings of 
the television season.”67 For example, “‘Dateline’ had a special hour 
long broadcast on the killings and scored a 13.2 rating, the best rating 
for an hour of ‘Dateline’ this season, and the highest ratings NBC has 
scored on Wednesday at 9 p.m. all season.”68

Some networks have flirted with what would amount to an “all 
crime all the time” programming format, and there are several that 
have approximated this over large blocks of programming time. New 
York Times editorial writer Frank Rich wrote about the apparent me-
dia fascination with death and “marathon mourning,” which he de-
scribed as “a hit show-biz formula for generating ratings and 
newsstand sales.”69 The hit formula included “the New Age vocabu-
lary of ‘closure’ [and] the ritualistically repeated slo-mo video clips.”70 
Rich reminded his readers of the recent “milking of the non-celebrity 
carnage of Columbine,” and then quoted a “Hollywood satirist” to the 
effect that: “I think I’m going to start a Mourning Channel . . . . All

63. RAY ELDON HIEBERT & SHEILA JEAN GIBBONS, EXPLORING MASS MEDIA FOR A CHANG-
64. Network News in the Nineties, supra note 20, at 1.
65. HIEBERT & GIBBONS, supra note 63, at 247.
66. Mindy Sink, Media Bring World to Suburb’s Doorstep, S.F. EXAMINER, Apr. 25, 1999, at 
A18.
67. Id.
68. Id.
70. Id.
death all the time.” To this, Rich added: “[I]f so, he’ll have competitors.”

The seemingly limitless commercial potential of media “real crime” coverage may have been established in the O.J. Simpson case in the mid-1990s. The Simpson trial became a public obsession that completely dominated media news coverage—so much so that network coverage of the Simpson case alone was almost enough “to put it on the top ten topic list for the entire decade.”

Beyond the sheer amount of media coverage it generated, sociologist George Lipsitz analyzed the broader commercial impact of the Simpson case:

From start to finish, the O.J. Simpson story demonstrated an eerie engagement with, and an unusual affinity for, the money-making mechanisms within commercial culture. If it was something less than the trial of the century in terms of legal significance, it was certainly the “sale” of the century in terms of its ability to bring together the various apparatuses of advertising, publicity, spectator sports, motion pictures, television and marketing into a unified totality generating money-making opportunities at every turn.

Other analysts marveled that, scarcely two years after the criminal verdict in the case, some sixty-odd books had already been written about it, and the extensive media exposure given to the major trial participants during the case had made “celebrities” out of many of them. Although the Simpson case was unusual in terms of the vol-

71. Id.
74. See, e.g., Craig Wolff, Look Who’s Talking, N.Y. TIMES, Mar. 23, 1997, Book Review, at 30 (reviewing MARK FUHRMAN, MURDER IN BRENTWOOD (1997) and describing Fuhrman’s as “roughly the 60th book on the case to be published so far”).
75. George Lipsitz recounted the media marketing in detail:
A major Los Angeles radio station gave defense witness Brian “Kato” Kaelin his own talk show because of the trial. One outside “expert” frequently employed by television networks during the trial, attorney Gerry Spence, parlayed his guest commentaries on the Simpson case on a variety of program into his own televised talk show on CNBC. The William Morris Agency won a hotly contested battle to serve as theatrical and public relations representative for lead prosecutor Marcia Clark. Edward Billet Productions purportedly offered Judge Lance Ito $1 million to star in a new version of the television program The People’s Court. Industry experts confided to Advertising Age reporters that “Simpson-related marketing could produce as much as $1 billion in media and merchandising sales. During the trial, Simpson had his lawyers take out patent protection for his full name as well as for his nicknames “O.J.” and “The Juice,” and had them file more than fifty lawsuits against merchandisers marketing items bearing his name. In addition, Simpson negotiated deals for a video, a book, pay-per-view interviews, and other projects that might eventually net as much as $18 million.

Lipsitz, supra note 73, at 10.
ume of media coverage it garnered, it helped to firmly establish the highly sensationalized criminal case genre as a media mainstay “with legs.” There are now long-running quasi-news programs based on literally nothing else.

In fact, however, the first channel devoted exclusively to legal programming pre-dates the Simpson case by many years. Court TV first appeared in the 1980s. Although it eventually came to focus almost exclusively on high profile trials—ones involving celebrities or defendants who, because of the intense media concentration on their cases, had been turned into celebrities, Court TV began as a low budget educational channel in which more typical and mundane cases were covered. Once executives grasped the commercial potential of sensationalized trials, they became the channel’s primary focus. Court TV’s Chief Executive Henry Schleiff spoke candidly in 2005, reflecting the perspective the network had adopted by then:

It’s sort of a perfect storm for Court TV. . . . We kind of come out of [the Scott Peterson trial] and it’s like the line in the movie in the storm scene, “She’s not going to let us out,” only we’re not going out, we want to stay in. We’re right into [the trial of actor Robert Blake]. Into, I guess, [the trial of record producer Phil Spector]; we’ve got nothing but celebrities for a while that I can see . . . . And there’s a wonderful opportunity for a Peterson-like trial: that dentist who at the end of the year killed his wife. She died in an identical way to the way the first wife died, which sounds like [a] joke.76

The market for sensationalized crime coverage persists. Thus, on the eve of the inauguration of a new president in 2009, the Paley Center for Media published a commentary by media analyst Max Robins lamenting the fact that, despite the celebratory mood in the country and the sense that the nation’s political atmosphere had finally changed for the better, the “number one news personality among the 25–54 demographic is . . . CNN Headline News ambulance chaser Nancy Grace.”77 Robins suggested that “Grace’s ratings ascension is evidence that we're back to the good old bad days of cable news—a steady diet of murder and mayhem.”78 Grace, a former prosecutor, is widely known for her strident, emotional tone and her program’s exclusive focus on sensational crime stories. She also has a penchant for what Robins called “playing judge, jury, and execu-

78. Id.
tioner” in the course of her coverage. He predicted that “[s]ome media brass, with an eye on the bottom line, will embrace this return to the scene of the crime as manna from the news gods.”

In addition to television drama and news coverage, crime dominates other media outlets as well. For example, as one commentator put it, if the United States “could be said to have a national literature, it is crime melodrama.” Another observed that, in addition to the prominence of serious crime “in news and current affairs programmes, as well, as in a range of popular entertainments,” violent criminality is often central to popular fiction. Indeed, “[c]riminals, psychopaths, and murderers have consistently attracted the attention of writers and readers of all levels of fiction, but it is in popular literature that bloodthirsty murders have been most frequently contemplated.”

The extremely popular Thomas Harris crime novels illustrate the commercial potential of the genre. In May 1999, for example, what was then the newest book in the series—Hannibal—was the most anticipated release of the summer season. Written as a sequel to Silence of the Lambs—a previous Harris novel that had been made into an extremely successful, Academy Award winning film in 1991—Hannibal was named, of course, after the film's psychopathic main character, the mythically diabolical Hannibal Lechter. “Hannibal the Cannibal,” as he is known in the series and to his fans, a demented psychiatrist who, among many other things, was said to have eaten the liver of one of his victims and polished the meal off “with fava beans and a little chianti.” Lechter emerged in these works of fiction as, in the words of one commentator, “preternatural evil: ever present, ever powerful, and incomprehensible.” His incomprehensible evil notwithstanding, so many advance copies of Hannibal were ordered that the book garnered a spot on the bestseller list long

79. Id.
80. Id.
83. Id.
84. THOMAS HARRIS, HANNIBAL (1999).
86. Directed by Jonathan Demme, the film Silence of the Lambs starred Anthony Hopkins and Jodie Foster. It received all five major Academy Awards that year: best picture, best director, best screenplay, best actor, and best actress.
87. Grixti, supra note 82, at 93.
before it was released—and well before book critics had seen the manuscript.

The enthusiastic reception that greeted Hannibal was no anomaly. The New York Times bestseller list for fiction books at the end of the same month Hannibal was released—May 1999—was dominated by books about crime and violence. Excluding a Star Wars volume whose popularity was driven by a movie advertising campaign, three of the top four books on the list were about murderers, including one about “a teen girl whose single mother murders a lover,” another about a woman who “struggles to free herself of the suspicion that she murdered her husband,” and one about a detective who “pursues a woman who is a longtime successful paid killer.” Even though murder rates in the United States were returning to historic lows by the end of the 1990s, interest in the topic obviously had not waned at all.

The sheer volume and dramatic pull of media messages about crime-related issues ensure that citizens simply cannot avoid repeated exposure to its criminological lessons. The continued popularity of crime genres and the corresponding profit they generate mean that this saturation is not likely to subside anytime soon. However flawed, this “criminology for the masses” likely forms a primary if not exclusive base of pseudo-knowledge with the potential to influence the way that many citizens make actual criminal justice decisions.

III. Media “Realism,” Active Criminological Learning, and Cultural Penetration

The content of media criminology and the methods by which its lessons are taught have changed in recent years. Its impact has been extended as a result, well beyond the sheer number of television shows, news segments, and other outlets that are devoted to crime-related themes and topics. Several of these developments bear mention. The first is the degree to which media criminology trades on its apparent realism, no matter how farfetched its premises. The line between fact and fiction—real versus imagined threats, practices, and procedures—has become increasingly blurred. In addition, and in a related way, the false lessons of media criminology have become far more detailed and elaborate. The volume of sustained coverage and

88. Also on the list that month was a novelization of one of the Star Wars episodes: TERRY BROOKS, STAR WARS EPISODE I: PHANTOM MENACE (1999).
90. JANET FITCH, WHITE OLEANDER (1999).
91. MARY HIGGINS CLARK, WE'LL MEET AGAIN (1999).
92. JOHN SANFORD, CERTAIN PREY (1999).
its seemingly in-depth nature are unprecedented. Moreover, the new media encourages audience members to participate directly in various aspects of their favorite crime-related programs, taking media criminology beyond merely vicarious learning. Perhaps as a consequence of these related developments, media criminology has penetrated deeply into popular culture, where media crime-fighting figures have become iconic and the criminal justice values they represent broadly influential.

Let me address “realism” and the blurring of fact and fiction issue first. The success of Cops brings this shift into focus as well as any single program does. The Cops brand was initially so notable in part because its “reality TV” format seemed completely authentic and gritty: a show that not only “brings the police blotter to life,” but one that “displays all the ugliness and ingenuity that even classic first responder shows” that relied on fictional stories and dramatic actors lacked.93 The show’s apparent realism helped to convince viewers that they were seeing the “real thing.” Thus, as one television critic put it: “Dipping into a dozen episodes can teach viewers various ways to spot a suspect, subdue the inebriated and quell mayhem before someone gets hurt.”94

Moreover, the underlying message of Cops—that order can always be restored—requires the show to glorify the police and sanitize many of the activities in which they are engaged. Thus, the police in this presumably “realistic” show never err in their judgments: “Since the series always reaches the same crime-doesn’t-pay conclusion—no one undeserving is handcuffed—police departments from South Florida to Southern California, not surprisingly, have allowed ‘Cops’ crews to ride as passenger.”95 And police officers are always shown operating within the strictures of the law: “Epithets? Racial tensions? Excessive force? The videotape either omits or never captures such presumably common extremes.”96

As two social scientists who studied the Cops phenomenon wrote: “The emergence of ‘reality’ television, then, may be partially explained by the increasing need on the part of organizations in particular to manage their ‘presentation of self.’ Of course, ‘infotainment’ formats are also highly profitable because they measurably enhance

93. Martel, supra note 56.
94. Id.
95. Id.
96. Id.
ratings. ... The *Cops* shows represented a marriage of convenience for two groups—law enforcement and the media—whose mutual interests were obvious: the police were able to manage and improve their media image, garner widespread public support and perhaps greater political and economic leverage, and the media increased profits by elevating ratings.

The *Cops* format has enjoyed continued success and spawned numerous imitators. In fact, an extremely popular variation of the "reality" format has crossed the line from following the police in pursuit of suspected perpetrators to orchestrating their very own "sting" operations and filming the carefully staged events that unfold. Specifically, the television producers for *Dateline NBC*’s *To Catch a Predator* entice people into committing criminal acts as the viewers at home stand by to enjoy the would-be criminals’ inevitable demise. As one commentator described the phenomenon: “ Millions tune in each week to watch *Dateline NBC*’s ‘To Catch a Predator,’ a television exposé in which men who engage in sexually explicit internet chat with a decoy teen are interrogated, humiliated, and arrested in dramatic fashion.”

The program has proven highly controversial and underscores the increasingly blurred line between media entertainment and legitimate law enforcement operations. For example, as one commentator noted, “one of the most troubling aspects of the show is *Dateline NBC*’s relationship with its ‘decoys,’ Perverted Justice”—a watchdog group that is dedicated to deterring would-be pedophiles from “inducing minors into sexual encounters.” The group contracts with *Dateline NBC* to “conduct the stings depicted on the program,” its members have apparently been “deputized by law enforcement,” and they have done so “while at the same time allegedly receiving a ‘consulting fee’ of $100,000 from the show.”


101. Id. Another commentator, discussing the way that “pop culture” had “spurred more widespread concern about sex offenders,” described the program and its impact this way:
In fact, a federal judge refused to dismiss portions of a wrongful death claim that was filed by the relatives of a Texas prosecutor who committed suicide just before he was to be captured on film in a *To Catch a Predator* episode.\(^{102}\) The man reportedly shot himself in his home because he knew that "[w]aiting outside the house were members of the cast and crew of the national television news show Dateline NBC," all there to film his arrest for an upcoming *To Catch a Predator* segment.\(^{103}\) As the judge noted, "[a]pparently unable to face the humiliation of the public spectacle that faced him, [he] took his own life."\(^{104}\) In denying NBC's motion to dismiss the claims, the judge ruled that

[a] reasonable jury could find that NBC crossed the line from responsible journalism to irresponsible and reckless intrusion into law enforcement. Rather than merely report on law enforcement’s efforts to combat crime, NBC purportedly instigated and then placed itself squarely in the middle of a police operation, pushing the police to engage in tactics that were unnecessary and unwise, solely to generate more dramatic footage for a television show.\(^{105}\)

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Dateline NBC’s popular primetime television show *To Catch a Predator* features hidden camera investigations of “potential child predators,” lured to various locations by investigators posing as children in Internet chat rooms. According to NBC, the stings have exposed over two hundred “potential child predators.” *To Catch a Predator*’s host, Chris Hansen, has become a folk hero of sorts and has even authored a successful book, *To Catch a Predator: Protecting Your Kids from Enemies Already in Your Home.*


102. Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 383 (S.D.N.Y. 2008). In this case, the man in question, William Conradt, had refused to go to the “sting house” where the show’s host, Chris Hansen, was waiting to ensnare him. *Id.* Thwarted in enacting the show’s usual humiliating format, “Hansen asked the police for a ‘favor,’ saying, ‘If he won't come to us, we'll go to him.’ He insisted that the police obtain search and arrest warrants for Conradt.” *Id.* at 386 (citations omitted).

103. *Id.*

104. *Id.*

105. *Id.* The judge quoted further from the complaint filed in the case, noting that:

To increase ratings, Dateline seeks “to sensationalize and enhance the entertainment value” of the confrontations, and accordingly it encourages the police officers “to give a special intensity to any arrests, so as to enhance the camera effect.” Indeed, the “mainstay of the show is public humiliation” of the individuals who are lured to the sting houses by the promise of sex with a minor.

*Id.* at 385 (citations omitted). He also underscored the degree to which the media and law enforcement functions were co-mingled in the course of creating each episode of the show:

In producing “To Catch A Predator,” Dateline provides equipment, money, services, and other things of value to local police departments. In return, local law enforcement agrees to participate in the show, permits Dateline to videotape arrests in “dramatically-staged scenarios,” provides Dateline with confidential data, and permits [the show’s host] Hansen to interview suspects even before detectives interview them.

*Id.* (citations omitted).
This same line is being crossed even more explicitly in a new Fox Reality Channel series, *Smile . . . You’re Under Arrest*.\(^{106}\) The initial programs featured Maricopa County, Arizona Sheriff Joe Arpaio participating in a format that the show’s creator described as “Punk’d meets Cops.”\(^{107}\) Here is how the initial show proceeded:

Television producers, with Mr. Arpaio’s enthusiastic assent, sent out notices to scofflaws suggesting that they had won a contest and need only show up to claim a $300 prize. Once there, they are hoodwinked into participating in a fake fashion shows or movie shoots before uniformed deputies come out from behind the curtain and slap bracelets on them.\(^{108}\)

Sheriff Arpaio, no stranger to the media spotlight, was described as “fully engaged in his star turn on Fox Reality.”\(^ {109}\) Indeed, as the duped scofflaws were taken into custody on stage at the show’s climax, Arpaio rose to the occasion: “‘Taken ‘em down!’ he says into a microphone backstage at the night club.”\(^ {110}\)

Another variation in the reality show format can be seen in a new 2009 ABC primetime series, *Homeland Security USA*. Although its protagonists are described by the network as “average men and women working against an epic landscape,”\(^ {111}\) it has been criticized for only “appearing” to be a “reality” show. Thus, one reviewer described it as having “the look and sound of a documentary without the pesky burden of responsibility—it’s homage, not reportage.”\(^ {112}\) Here, too, each episode was developed with the “assistance—and censorship (they call it ‘prescreening’)—of the Department of Homeland Security,” resulting in tone and content that was described as “an exclusive, inside look at a recruitment video.”\(^ {113}\)

In a show that may take the next logical step in mixing pure entertainment and legitimate law enforcement, NBC News has appar-

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108. *Id.*

109. *Id.*

110. *Id.*


ently undertaken in its own "investigation" of "possible perpetrators of human rights abuses in several countries," including making accusations against a Rwandan academic who is teaching at an American college. Unaware of any indictment against him "until NBC News arrived on the campus"—accompanied by a camera crew and a Rwandan official who shared the contents of the charges with the president of the college where he worked—the professor was "[c]onfronted with cameras and microphones" in his classroom after he had finished teaching a class. A Human Rights Watch official characterized these activities as "really highly unusual," and the Department of Homeland Security went even further, noting that "a program of this kind could negatively impact law enforcement's ability to investigate and bring cases against [perpetrators]."

The "reality" television crime shows have several things in common. There is a sanitized—even glorified—portrayal of law enforcement personnel and practices, with little or none of their problematic behavior included. Exactly like their dramatic counterparts, these shows present alleged perpetrators absent background or contextual information that would allow viewers to begin to understand them. In addition, they have now clearly moved beyond detecting crime and apprehending its perpetrators to directly administering humiliating punishment to whomever appears guilty. Indeed, the emotional "highlight" of the shows is the inevitable undoing of the perpetrators, who are typically physically dominated and otherwise humiliated or degraded on-screen before each segment comes to an end. Obviously, the shows also give viewers the feeling that they are being given the unfiltered or "raw" truth about crime and the criminal justice system.

Beyond these "reality" formats, other forms of media criminology blur the line between fact and fiction in different ways. Some represent actual (or what appear to be actual) criminal justice practices in unrealistic ways, such as "reality" shows that never depict improper police behavior or incorrect or unjust outcomes arrived at through unreliable methods. Others portray clearly incredible crime-related procedures "as if" they were real. Yet most of the programs continue to misleadingly trade on their apparent realism, at least enough believability that audience members find them credible enough to watch. Thus, the shows regularly tout their "street cred" and law enforce-

115. Id.
116. Id.
117. Id.
ment bona fides by publicizing the expert story consultants they employ, and seeking complimentary characterizations as "raw" and "gritty." The success of the highly popular Law and Order series, for example, is attributed in part to its "distinct ripped from the headlines format" and "gripping headline-inspired storylines." If the success of Law & Order can be attributed to its "ripped from the headlines" authenticity, other crime shows have succeeded with truly incredible premises that are nonetheless portrayed as "realistic." In this way, of course, the shows regularly push viewers past the boundary that separates the factual and fantastical. For example, one such successful series—Profiler—features a protagonist who purportedly solves crimes by "feeling the vibrations at the crime scene." A website that advertises its DVDs described the show's main character as "a female forensic psychologist with a very powerful and unique gift that allows her to see past the physical evidence and get a glimpse into the mind of the criminal, as well as the victim and visualize the crime in a way not many others can." Once her gift was eventually recognized, she was asked to join "a team of investigative professionals . . . the Violent Crimes Task Force (VCTF)." Despite this extraordinary premise, the show was first televised in 1996 and was successful enough to last until 2000 on network television.

Indeed, Profiler's success inspired a direct imitator—Medium—which ratcheted up the claim of realism. Thus, Medium's main character not only "sees crimes as they happened," but she is also said to be "based on a real person." The real person in question, Allison DuBois, is described as a "bright light" in the "medium business" because she has outspokenly suggested that "there are a lot of charlatans" in the "field" of "research medium and criminal profiler." The publicity for Medium does not explain exactly what a "research medium" is or what in particular distinguishes someone as a charlatan in this line of work. Nonetheless, Ms. DuBois, the inspiration for the series, is said to have had "relentless and brutal visions of dead people or murderers" that police departments around the country supposedly used to solve cases.

118. TV.com, supra note 35.
121. Id.
122. Tim Goodman, It Doesn't Take a Sixth Sense to Figure Out Weakness of "Medium," S.F. CHRON., Jan. 3, 2005, at C1.
123. Id.
In a clever twist of this apparently popular premise, CBS aired a new series in Fall 2008, *The Mentalist*, whose protagonist works as an "independent consultant" for the fictitious "California Bureau of Investigation." His "remarkable track record for solving serious crimes" is said to derive from his "razor sharp skills of observation." However, the "psychic-profiler" twist in the show is based on its main character's notorious reputation—specifically, his "semi-celebrity past as a psychic medium," but one "whose paranormal abilities he now admits he feigned." Despite this checkered past, his "role in cracking a series of tough, high profile cases" has made him "greatly valued by his fellow agents." The show’s advance advertising was successful in generating a large audience for its debut. Newspapers reported that “[r]atings for the new crime show *The Mentalist* helped CBS eke out a victory on Tuesday as the most-watched network.” According to Nielsen’s ratings estimates, the show “attracted 15.5 million viewers” in its first broadcast, appearing in a time slot in between two other CBS prime time crime shows, *NCIS* (which itself “garnered its largest premiere in six seasons,” with some 17.7 million viewers), and *Without a Trace* (which had 11.4 million viewers in the following time slot).

A related change in the nature and content of media criminology involves the amount of seemingly in-depth coverage to which the public now has access, well beyond anything available even a decade ago. For example, over the last several years, MSNBC emerged as the nation’s fastest growing cable network. Commentators have attributed much of the network’s recent success to its politically progressive

125. Id.
126. Id.
127. Id.
129. The remarkable success of *The Mentalist* notwithstanding, its "psychic with a twist" premise was not an original one. See Toff, *supra* note 128. Another cable crime drama series, *Psych*, had debuted in July 2006, featuring a young crime consultant for the Santa Barbara, California Police Department whose "heightened observational skills" had convinced people that he was a psychic. The Futon Critic: Psych Debuts as This Year’s Most Watched New Show in Basic Cable, http://www.thefutoncritic.com/news.aspx?id=20060711usa01 (last visited Apr. 22, 2009). When the show debuted, it was the most watched show on cable television. *Id.*
news shows. However, MSNBC also began airing a steady diet of crime-and-punishment-oriented programs that appear to have contributed to its growing popularity among viewers. Many of these shows focus on notorious murders, typically contain extremely graphic "reenactments" of what are often gruesome or salacious crimes, and underscore their horrible impact through lengthy, emotional interviews with surviving family members and friends of the victims. If defendants or perpetrators appear at all in these episodes, it is usually only briefly—at the time of arrest, sitting in the courtroom at the trial, or in a prison cell after conviction. The predictable exceptions occur when defendants present themselves as particularly bizarre, openly remorseless, or chillingly matter-of-fact.

MSNBC's programs are advertised in on-air "trailers" as well as website text with graphic and sensationalistic language that matches their themes and content. The volume of such programming on what is ostensibly a legitimate news network is unprecedented. For example, television viewers who tuned in to MSNBC on May 11, 2008—Mother's Day that year—were treated to Massacre at Closing Time (a show that featured a reenactment of what was described as "a brutal seven-person massacre in a quiet Chicago suburb," allegedly perpetrated by two young men for "the thrill of it," and included emotional interviews with the victims' now grown daughters who had been orphaned by the tragedy). That program was followed by another show, entitled Murder on Lover's Lane (about crimes perpetrated by someone dubbed "The Monster of Florence" whose killings were described as so horrible "the devil himself might be behind them"), and then Dark Heart, Iron Hand (about a perpetrator who was described as "8 times a killer" in a televised trailer for the show that invited the audience to "meet the most brutal serial killer you've never heard of"). In the course of the day, a number of crime-related offerings that the network had scheduled for later in the week were advertised on air with this tag line: "They don't think like you. They don't act like you... From beginning to end, these brains are bad." Various individual shows were then advertised from MSNBC's "Doc Block" lineup—the several hour block of documentary films that is part of the network's regular late night, crime-oriented programming—to be aired in the days ahead.


132. See 2007 Numbers, supra note 130 ("MSNBC is also experiencing substantial growth in 10 PM–midnight (ET), the 'Doc Block.' MSNBC's documentary is up 32% in total viewers.").
Direct crime-related programming is not the network's only contribution to media criminology. In addition to the shows that focus on gruesome and sensational individual crimes, MSNBC supplements its playlist with a series of related documentaries depicting some of the nation's most notorious prisons, often featuring their most extreme or frightening prisoners. In fact, although the series is ostensibly about the prisons, the programs rarely dwell on conditions of confinement or the psychological consequences of incarceration. Instead, the emphasis is typically on the most bizarre and fearsome inmates housed inside these facilities (inmates who are often depicted as surprisingly well adjusted to their harsh surroundings).\(^{133}\) In fact, MSNBC adopted a practice of airing what it called "Lockup Marathons" on holidays, presumably when people with little else to do could spend most of the day in front of their televisions.\(^{134}\)

\(^{133}\) For example, according to MSNBC's website in May 2008, the lineup for the week of May 11, 2008 had several additional entries from the Lockup series, including: on Monday, Inside Kern Valley ("California's newest prison"); on Tuesday, Return to Pelican Bay, where "[j]ust about every inmate . . . is a gang member") and also New Mexico (filmed inside the remnants of a penitentiary that was "the site of one of the bloodiest prison riots in 1980" and where viewers were promised they could still see "disturbing physical reminders of the carnage"); Inside San Quentin (where the filmmakers had gotten "unprecedented access" to the prison, "including a rare look inside California's death row"); on Thursday, Holman (about a prison in Alabama that was described as "notorious for being overcrowded and violent"); on Friday, Rikers Island (where viewers were promised a look at a unit housing "some of the toughest and most unruly criminals"), Inside Folsom (about a prison with "a violent and bloody reputation" that is "known as 'the end of the world' by inmates"), and Pendleton Juvenile (a facility where "violent teenagers pose a serious threat to officers"). On Saturday, the week ended with Return to Valley State (a women's prison described as "full of murderers, violent criminals and drug dealers"), and Wabash (a prison that "houses some of the most violent offenders and also the mentally ill"). Other shows—not shown that particular week but advertised on the station's website—included Conviction: Monster in the Mirror, Conviction: I Put Fear in Your Life, Conviction: The Orchard Massacre, In Cold Blood, Deadly Exchange, and Lockup Raw: Criminal Minds.

Yet that was not the full extent of the network's crime-and-punishment-related programming. In addition to the sensational prison documentaries and day-long lineup of heinous crimes shown during the "Mother's Day Marathon" that began the week, the network interspersed its programming on subsequent days with even more shows depicting frightening, salacious crimes: on Tuesday, Into the Woods (about a "soft-spoken teenager heading home from school" who "meets a stranger with plans of his own"); on Wednesday, The Mind of Manson (in which FBI "profilers" discuss "never before seen parts" of a more than twenty-year-old interview with Charles Manson, who is described as "unshackled and unapologetic"; on Thursday, Gladiator Days (about "the culture of institutional violence" as represented by "one brutal prison murderer"), and Cult Killer (about a Christian sect whose ideas "got out of hand when it began to turn towards prostitution and pedophilia").

\(^{134}\) For example, on New Year's Day, 2004, its "New Year's Marathon" featured day-long series of films whose producers boasted of "gaining extraordinary access" to many a number of maximum security prisons, including a film on San Quentin (this time described as a "crumbling" facility plagued by "an overwhelming increase in the number and severity of brutal assaults by inmates"), followed by a film on the Stateville Correctional Center located outside of Chicago (said to be "home to some of the state's most violent criminals"), another one that took viewers
The *Lockup* series was so successful during its first several years that it spawned another series, *Lockup Raw*, which began airing in early 2008. It was described by its producers as featuring "never before aired footage of some of *Lockup*'s most memorable inmates."\(^{135}\) Four of the episodes included "dramatic accounts" from producers who described "what it's like to be locked in cells for interviews with killers" who, it was said, were so dangerous that the filmmakers felt they had "risk[ed] their own personal safety" in order to talk to them in person.\(^{136}\) The first four episodes were titled: "Hell in a Cell," "Violence Behind Bars," "The Convict Code," and "Criminal Minds."\(^{137}\)

Although MSNBC has devoted a substantial portion of its television line-up to crime and prisons, another network finally made the leap to *around-the-clock* criminal justice programming. As a newspaper headline put it in late 2007, "Discovery Hope for Payoff on Crime inside Folsom Prison (described again as having "the reputation of being a violent and bloody place" that prisoners called "the end of the world"), and concluding with a two-hour film on the Los Angeles County Jail (where viewers were told they'd be taken "behind the walls of this overcrowded and violent jail system, including the dangerous Super Max facility"). The "*Lockup*" Series: *New Years Marathon*, http://www.msnbc.msn.com/id/3080749 (last visited Apr. 22, 2009). The "holiday marathons" have continued. Thus, just in time for the most festive season of the year, MSNBC more recently promoted what it called its “Three Days of Christmas Marathon” in December 2008, featuring *Conviction, Crime & Punishment,* and *Lockup,* on Christmas Eve, Christmas Day, and the day after Christmas respectively, and advertised the extravaganza on the network all Christmas week, beginning December 22, 2008. The show *Crime & Punishment* is one that MSNBC acquired the rights to in November 2006. See MSNBC Acquires Rights To ‘Super Size Me,’ ‘Crime & Punishment,’ Indie Docs to Mediabisto, http://www.mediabistro.com/tvnewser/msnbc/msnbc_acquires_rights_to_super_size_me_criminal_punishment_indie_docs_48156.asp (Nov. 27, 2008 11:12 AM). Dubbed “the real life ‘Law and Order,”’ the “Crime & Punishment” series used a documentary format to focus on the work of a group of actual San Diego County prosecutors. The MSNBC trailer promoting the show described it as depicting “real prosecutors, real victims, real justice” and enticed potential viewers by telling them: “from Dick Wolf, the creator of ‘Law and Order’ comes a series is so raw, so powerful, it could only be real.” Veoh.com, MSNBC Crime & Punishment Promo, http://www.veoh.com/collection/s601811/watch/e167560X6hRysC (last visited Apr. 22, 2009).

Appropriately, it would seem, MSNBC followed up its 2008 “Three Days of Christmas Marathon” with a “New Year’s Eve Marathon,” the trailers for which were broadcast throughout the week between Christmas and New Year’s Eve—including during the station’s day-long and widely watched news and politics programming. The network enticed potential viewers by showing footage of fearsome looking convicts, as a voiceover repeated what were characterized as the “three rules of prison survival,” including “kill or be killed,” “trust no one,” and “pray for tomorrow.” The trailer ended with a prisoner’s menacing observation that “human beings are the most dangerous animals on earth.”


\(^{136}\) *Id.*

\(^{137}\) *Id.*
Indeed, the Discovery Communications company (parent company to several other cable channels, including Planet Green, Discovery Kids, The Learning Channel, and The Military Channel, and once in partnership with the New York Times) launched an "all crime, all the time" channel. A press report described the channel's programming this way:

To program the new channel, Discovery plans to draw on hundreds of hours of crime shows in its library, such as "The FBI Files" and "Most Evil," the company said. Discovery is also in talks with CBS, to acquire episodes of "48 Hours," and NBC Universal, to acquire episodes of "Dateline NBC." Discovery plans to produce 200 hours of original programming next year, said John Ford, chief executive of the channel.139

The motivation for the creation of the new "all crime all the time" channel was straightforward. Company executives reported that "[w]ithin months" of shifting crime-related programming into one of their underperforming channels, they discovered that "Nielsen ratings rose."140 As a result, they quickly concluded that "the channel could make a business in the crime niche."141 As one of them put it, the new all-crime network embodied a "programming vision that viewers could connect with, that could be a strong economic engine," one that would allow the channel to "be the home base for a huge number of people around America who love this content."142

Citizens can now watch enough of this kind of programming—all of it couched in "realistic" (even "documentary") terms—to begin to feel like genuine experts about a topic with which they will have been given no actual systematic knowledge and had no direct contact whatsoever. In addition, however, avid consumers of media criminology are also the beneficiaries of new technology that both allows them to do extra "studying" on their own and encourages them to take a more active role in the "learning" process. For example, like many other media outlets, Investigation Discovery created its own crime-related website, which advertises the channel as "Investigation Discovery: Hollywood Crimes, Forensics, Murderers,"143 and gives visitors opportunities to engage more deeply with a range of crime-related subject matter. They are invited to calculate their "investigation IQ" (for ex-

139. Id.
140. Id.
141. Id.
142. Id. (quoting Discover Chief Executive David M. Zaslav).
ample, to “test [their] knowledge of forensic entomology—the use of insect evidence to solve crime”), check in on that day’s “criminal report daily blog” to “get [their] daily dose of the latest and most probing [police] investigations” currently underway around the country, and watch one of the numerous online videos that are available. It also allows visitors to read in-depth articles on things like “how autopsies work,” or see and hear about what is described as “Dr. Stone’s ‘Most Evil Scale’” (presented “in its entirety” and, it turns out, narrated in Dr. Stone’s own voice!).

Many other crime-oriented networks and programs also have their own websites that they use in similar ways—to not only extend their fan base but also to intensify the level of viewer engagement that citizens can have with a range of crime-and-punishment-related issues and practices. For example, although the previously described Court TV network continued to be operated as part of Turner Entertainment Networks and owned by Time Warner, in 2007, Court TV became “truTV”—complete with a new trademarked motto, “Not Reality. Actuality.” TruTv describes itself as the “destination for

144. Id. These videos include one on Deadly Women: Female Psychopaths and another, Depranged, that promises to “take you inside the original investigations of the most notorious killers in recent history” as well as allowing you to “watch deleted scenes and more.” Id.

145. Dr. Stone’s “Most Evil Scale,” http://investigation.discovery.com/tv/most-evil/evil-scale/evil-scale.html (last visited Apr. 22, 2009) [hereinafter Dr. Stone’s “Most Evil Scale”]. The scale is supposedly the product of “Dr. Michael Stone,” described in the press as a professor of psychiatry at Columbia University, who “examined the biographies of more than 500 killers in New York’s Mid-Hudson Psychiatric Centre and developed a 22-level ‘gradations of evil’ list.” Charles Laurence, Psychiatrists Devise “Depravity Rating” to Help Courts Decide on Death Sentences, TELEGRAPH, Feb. 20, 2005, available at http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1483959/Psychiatrists-devise-depravity-rating-to-help-courts-decide-on-death-sentences.html. According to Stone: “After years of study, we have learned to recognize the traits of these people: what they do and why they do it,” he said. “It is time to give them the proper appellation—evil.” Id. In fact, Dr. Stone hosted his own Investigation Discovery television show, “Most Evil,” that aired between 2006 and 2008, and followed Stone “as he attempt[ed] to better understand the minds of the world’s most infamous criminals.” TV.com: Most Evil Show Overview, http://www.tv.com/most-evil/show/75579/summary.html (last visited Apr. 22, 2009). The show was put “on hiatus” in April, 2008, but the “Most Evil Scale” survives. The Investigation Discovery website describes the scale as one in which Stone “examines the criminal mind with a scale he created that decodes a killer’s motive, method and mind.” Dr. Stone’s “Most Evil Scale,” supra. Visitors to the website are provided with a numbered “scale of evil” that rank orders types of murder and specific murderers along a continuum that supposedly represents their degrees of “evil.” Id. It starts with murder committed in self defense (at point 1 on the scale) and ending, some 21 points later, with “psychopaths who inflict extreme torture on their victims and then murder them.” Id. Each point on “Dr. Stone’s Most Evil Scale” contains a photograph of the criminal said to typify that level of evil, and a short description of the crime for which he or she was convicted. For example, Level 22 of evil was supposedly typified by Dennis Rader, the so-called “BTK Killer” arrested in Kansas for the rape and murder of his victims. Id. The website invited visitors who thought they knew “everything” about the BTK Killer to “[t]ake our Dennis Rader quiz” and find out. Id.
real-life stories told from an exciting and dramatic first-person perspective” that gives viewers “access to places and situations they can’t normally experience.” In addition to its extensive crime-related programming, truTV maintains a “Crime Library” on its website, which it describes as “a collection of more than 1000 nonfiction feature stories and photo galleries relating to crime, criminals, trials, forensics and criminal profiling by prominent writers.” The website library’s “card catalogue” consists of sections devoted to specific topics under the headings of “Serial Killer,” “Notorious Murders,” “Criminal Mind,” “Terrorists & Spies,” “Gangsters,” and “Most Controversial” crime stories.  

Another popular cable crime drama, Psych, which started out as the most watched show on cable television, also made efforts to establish a more “personal” connection with its audience. Viewers of the show were encouraged to “sign up for Psych mobile alerts” that promised them weekly questions designed to “[t]est [their] skills of observation,” so-called “character updates” from one of the show’s two main characters, and “tune-in reminders” sent directly to their mobile phone numbers. What’s more, the “Spanish version of the Psych theme song, ‘Lights, Camera . . . Homicide’” had apparently “caused such a stir” that it was being made “available as a FREE ringtone!”

In addition to the crime show-related websites, USA Today reported that CSI had made “a move that brings interactivity to new heights.” Specifically, the recently opened National Museum of Crime & Punishment is designed to “teach visitors the tricks of the crime-scene investigators (plus the actors on all those CSI shows).” Indeed, free workshops were held “in the museum’s mock crime-scene lab, where graduate students from George Washington University will demonstrate fingerprinting, evidence collection, identification via dental records, and other [crime-scene investigator] skills” featured on CSI.

148. See Psych Debuts as This Year’s Most Watched New Show in Basic Cable (July 11, 2006 12:00 AM), http://www.thefutoncritic.com/news.aspx?id=20060711usa01. Although its ratings dwindled somewhat, Psych was renewed for a third season that began airing in January 2009. Id.
150. Id.
151. Jayne Clark, Learn the Tricks of the “CSI” Trade, USA TODAY, Oct. 17, 2008, at 1D.
152. Id.
153. Id.
The cable television series *Dexter* also maintains its own website, which contains show-related information and invites fans to experience the series at a more participatory level. Thus, visitors to the *Dexter* website are invited to click an “investigate now” button that promises them “all the gory details about Dexter’s victims,” including “who they are, why Dexter killed them, and how Dexter stalked them down.”154 The *Dexter* website also has an interactive “Community” page that includes a chat room, message board, and “blog buzz” section, complete with direct links to Wikipedia and other sites such as Facebook.155 In addition, it contains a page that allows viewers to sign up for “email and wireless updates” so that they can “stay in the loop with Dexter” and receive “scheduling reminders, episode previews, and facts about the show,”156 as well as a direct link to the “Dexter Store,” where fans can purchase “Power-Saw to the People” posters and Dexter “slice of life” tee shirts, among other things.157

In addition to its interactive and participatory website, *Dexter’s* sardonically macabre marketing ploys underscore the extent to which crime drama has penetrated deeply into our popular culture. For example, the cable network where the show appears, Showtime, sponsored the creation of what *Business Wire* described as “unforgettable scenes in landmark locations” as part of a “Dexter’s Red Fountains” advertising event.158 In fact, on September 27, 2007, the network unveiled a series of “artistic water exhibits” that involved dying water in existing or specially constructed large fountains a blood red color—simulating fountains of blood—in open public spaces in fourteen cities around the United States.159 The fountains—dubbed “Dexter’s Red Fountains” by the network—were all “cordoned off” with what appeared to be official police “crime scene” yellow tape, and were presided over by “street teams . . . adorned in Dexter forensic lab coats,” who stood by, distributing show-related paraphernalia, “touting the season premiere of Dexter.”160

Indeed, Showtime promoted Dexter himself as “America’s favorite serial killer,” and the show’s ratings seemed to confirm the claim.
Showtime reported that *Dexter* was its “most popular original series,” with an average weekly viewership of 2.4 million persons. In fact, when episodes of *Dexter* ran on the CBS network in February through May 2008, the size of the audience almost tripled, with each episode averaging 7.1 million viewers.

An even more ambitious marketing strategy was used to publicize the start of the show’s next season. As the *New York Times* reported, *Dexter’s* 2008 nationwide advertising campaign involved simulated cover pages that were published in a dozen or so mainstream magazines.161 In each of the full page, realistic ads, the serial killer protagonist was featured as a “serial cover boy”—made to look as though he actually appeared on each of the magazine covers, ranging from *Wired* to *The New Yorker*. The glossy full-page ads were distinguished from the real thing only by their placement in the magazines—either on the back covers or as part of a several page advertising spread contained inside—and the fact that they “all are labeled with the word ‘advertisement’ in small type atop each page.”162 One magazine company executive said that the campaign was “all very fun” and “shouldn’t confuse the reader,” while another one commented that the ads were simply intended “to connect with the reader in a resonant way.”163

Of course, the campaign also celebrated the fact that the *Dexter* brand had become part of the mainstream popular culture. As one of Showtime’s marketing executives pointed out, the new campaign was designed to suggest that the serial killer character had reached the status of “a celebrity, part of popular culture, a cover boy.”164 As such, *Dexter’s* popular culture status seemed to normalize the vigilantism at the core of the show and, among other things, legitimize the premise that killers deserve to be killed.165

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162. *Id.* The “advertisement” label is a requirement of the American Society of Magazine Editors, done to distinguish actual editorial content from advertising. *Id.* The *Dexter* ads were elaborately produced and extremely realistic. For example, the *US Weekly* ad was a full seven-page glossy spread beginning on the magazine’s back cover, including such macabre double entendres as “Dexter Morgan spills his guts,” a list of “Dead Giveaways” that “You’re Dating a Serial Killer,” descriptions of the show’s female actresses as “Drop Dead Gorgeous,” and a question to readers asking if they were “Dying for More?” *US Weekly,* Sept. 29, 2008, at 108–14.


164. *Id.*

165. For example, in *Dexter’s* fictitious interview in *US Weekly,* he answered the question, “Dexter—you kill people. What’s the deal?” by saying, “I don’t kill good people and I don’t kill children. It’s not personal, really. If you’re scum, I’m coming for you. And I’m good at what I do.” *US Weekly,* *supra* note 162, at 114. Similarly, in the mock “profile” done of him that
The impact of media criminology's normalizing and even glorifying of law-and-order perspectives on the mainstream popular culture is difficult to assess. However, its powerful influence may be reflected in the dramatic rise in popularity of the "criminal justice" major in American colleges and universities. By the end of the 1990s, it had become the fastest growing major in the country. Some of the motivation for this newly created interest was economic, reflecting the greatly improved economic status of criminal justice professionals as the crime and punishment industry became more established, respected, and profitable. But much of this new-found popularity also appeared to be tied in some ways to the pervasiveness of media criminology and the broad cultural acceptance of the mindset and value system that it represents.

Indeed, as one 1998 report conceded: "specialists in criminal justice are quick to admit that their field has also benefitted from movies, television and widely covered trials like that of O.J. Simpson."\textsuperscript{166} One educator was quoted as saying that "[t]he largest single impact on criminal justice enrollment in the past 10 years was 'Silence of the Lambs' . . . ."\textsuperscript{167} This combination of media and economic forces had a powerful effect on turn-of-the-century college educators. Indeed, "[w]ith all the interest in crime," criminal justice studies was described as having "taken on a gold rush feel" in these years, with college administrators pressuring their faculty to start criminal justice programs "to respond to the market demand."\textsuperscript{168}

Once set in motion, these trends became mutually reinforcing, further insinuating the media's view of criminal justice "reality" into actual law enforcement functions, and increasingly distorting the public's view of "truth." For example, the media's role in legitimating criminal justice occupations, elevating their status, and enhancing the desirability of the college major also helped to strengthen its relationship with the law enforcement establishment, raising concerns in some quarters over the beginning of a "symbiotic transformation underway appeared in The New Yorker, Dexter is described as "America's favorite serial killer," largely because he has "something most of his fellow serials lack: standards. You see, he's a serial killer who kills other serial killers." New Yorker, Sept. 19, 2008, at 44. The advertisement includes this tidbit of pop criminology: "Experts on the minds of psychopaths explain that it's difficult to treat or even identify these individuals, because you are not dealing with a complete man. Instead, the individual is a carefully constructed machine that mimics a healthy human personality." Id.


\textsuperscript{167} Id.

\textsuperscript{168} Id.
regarding the roles played by police and media agents." In particular, Hallett and Powell elaborated:

We had police agencies involved in what was formerly a strictly media function (i.e., editing) and media officials increasingly willing to exert their presence in a law enforcement capacity (i.e., cameramen offering to physically help out police officer/actors if they get into trouble) . . . . It is common nowadays, for example, to have local television news divisions inviting members of the public to "call channel 2" if they see something suspicious—rather than call the police.

Among other things, the amount of access that the producers of these shows often have been granted to previously off-limits police practices may have fundamentally altered the relationship between the criminal justice system and the media. For example, executive producers of CSI got ideas for episodes by palling around with actual police investigators and dropping in on crime labs to talk with crime scene and evidence technicians. The blurring of the lines between the professions was not lost on the police. As one of the crime lab technicians was quoted telling several CSI producers, "Explaining a crime scene to a jury is almost like writing a movie script. You have your beginning, your high point—the shooting—and your denouement." To which one of the producers gushed, "That is why you guys are heroes! You're creating order out of chaos."

But increasingly the police (and prosecutors) are creating order out of chaos in front of juries who think they have seen these things done many times before and know exactly how the story should end. That is, they believe they have watched the "police" directly on the job, and witnessed countless "crime" scripts played out and "crime scenes" scoured for the telling clues. They have repeatedly seen what they believe are normative "patterns" of criminal behavior on display and have ostensibly observed the mind and motives of the typical violent "criminal" relentlessly probed. Of course, the heavy dose of police-directed inspiration in the construction of the shows, and their influence over the editing process mean that even the supposedly crime-related "reality" shows are less "raw" than "cooked." Audiences are getting their education from programs in which, among other things, any questionable, gratuitously violent, or otherwise problematic incidents are routinely edited out, unreliable or faulty procedures carefully omitted, and nuanced contextual explanations for crime

169. Hallett & Powell, supra note 97, at 124.
170. Id.
172. Id.
scrupulously avoided. The public is left with false images of both the police and the criminals they pursue in crime drama as well as "reality" cop shows, and its core criminological knowledge base has been degraded as a result.

Thus, notwithstanding its popular culture cache, the all-pervasive media criminology—including a continued chronic disregard for the distinction between fact and fiction and an unquestioned faith in law enforcement to manage the problem of crime—has undercut rather than enhanced the public's genuine understanding of these issues. A core of criminological "pop" or pseudo-knowledge has grown larger, more sustained and participatory, and become a fixture in mainstream culture—without leaving citizens in general any more informed about criminal justice issues.

IV. MEDIA LESSON PLANS: CRiminological MIS-Education AND THE DEATH PENALTY

Despite long-standing concerns about the power of the media to shape citizens' views of crime and punishment, their influence appears only to have broadened and deepened over the years. Scholars and critics have advanced the commonsense proposition that heavy media consumers "will be more likely to perceive the real world in ways that reflect the most stable and recurrent patterns of portrayals" to which they are repeatedly exposed. Yet, media criminology is now so widely and effectively disseminated that most persons—including most voters and jurors—can be considered heavy consumers by almost any measure. The flawed lessons of this "virtual discipline" are a pervasive source of public mis-education.

As I noted earlier, problematic crime-related media effects are unusually strong (and potentially more pernicious) because readers and

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173. Criticism of the media's role in promoting and distorting crime-related issues dates to at least the nineteenth century. As Joseph Holmes observed in 1929, "[s]ince the rise of criminology in the middle of the past century there is no writer of note on the subject who has failed to comment on the evil influence of the [media]." Joseph L. Holmes, Crime and the Press, 20 J. AM. INST. CRIM. L. & CRIMINOLOGY 6, 6 (1929). For a discussion of the way that media portrayals may have biased jurors at the turn of the last century, as well as references to very early criticism of the role of the press in reinforcing social prejudices that compromised the administration of justice. See Shannon Peterson, Yellow Justice: Media Portrayal of Criminal Trials in the Progressive Era, 1 STAN. J. LEGAL STUD. 72 (1999).

viewers have access to so few alternative sources of information. Even persons who are the victims of crime, or are closely related to those who have been victimized, learn little or nothing about its causes. Most graduate degrees in media criminology are thus being awarded to persons who lack other ways to obtain knowledge with which to truly understand criminality. In addition, however, the media's criminological lessons are depicted as highly "realistic" and complete, that is, as if there was nothing more to say or know about them. As Thomas Mathiesen observed, television news and drama, especially, create the impression that they are "depicting the truth about crime. How can you doubt your own eyes?" Indeed, a "generalized consciousness emanates: such is crime; such is, in fact, the world." Moreover, many forms of media are so compelling that they appear to undermine the audience's natural tendency to critically scrutinize the messages that are being conveyed. The storylines and dramatic techniques are engaging enough that they may suppress the implicit "counterarguing" that ordinarily would take place when people are exposed to potentially persuasive communications.

These pervasive, seemingly realistic, categorically delivered criminological messages are likely to have real world consequences. By giving citizens, voters, and jurors flawed frameworks for understanding a whole range of important crime-and-punishment-related issues, media criminology may undermine the nature and quality of their thinking about crime and their criminal justice decision making. Moreover, as I suggested at the outset of this Article, these negative influences are likely to be especially powerful and problematic in death penalty cases. In this final section, I address some of the reasons why this might be so.

Much has been made of the role of fear in contemporary American society, and rightly so. Sociologists have observed that many citizens now live in a "culture of fear," and other commentators have identi-
fied "ecologies of fear" where people's lives are especially dominated by these concerns. The commercial interests that create and maintain media criminology are advanced by this emphasis on fear-arousing sensationalism. That is, in order to attract the widest possible audiences, crime-related news and drama typically focus on the most graphic, salacious, and bizarre details of whatever story is being told. By generating a potent combination of fear, morbid curiosity, and anger the media compel readers, listeners, and viewers to pay attention. Once afraid and enraged, a highly engaged audience is more likely to stay "tuned in" until their anxieties are allayed and their fury dissipated (usually through the application of an especially forceful and definitive law enforcement response).

In fact, media criminology may have succeeded so well in this regard that it has helped transform the surrounding cultural landscape. Thus, David Garland contends that the fear of crime has become "the seemingly perennial fear of the late modern Western world," so powerful and pervasive that it has become a "prominent cultural theme" in contemporary society. Media criminology contributes directly to this prominent cultural theme by exaggerating the apparent magnitude of the crime problem, both by misrepresenting the frequency of criminal victimization (suggesting to audience members that their chances of being a crime victim are greater than, in fact, they are) and overestimating the extent to which serious and sensationalistic violent crime—the primary focus of news coverage and crime drama—occurs.

180. See, e.g., Danielle Soulliere, Prime-Time Crime: Presentations of Crime and Its Participants on Popular Television Justice Programs, 26 J. Crime & Just. 47 (2003). See also Kenneth Dowler, Comparing American and Canadian Local Television Crime Stories: A Content Analysis, 46 Canadian J. Criminology & Crim. Just. 573, 587 (2004), who found that, although there were very few significant differences in the types of crimes covered in local newscasts in American versus Canadian media, the American broadcast coverage tended to be more "sensationalistic" in nature. Dowler suggested that this likely stemmed from the greater range of crime news from which American news producers could pick that, in turn, allowed them to select the more sensationally slanted stories, and also from the tendency for the American media to "adopt . . . strategies that encourage sensationalistic coverage of relatively routine stories" in an apparent "attempt to attract viewers." Id.
181. See, e.g., Lee, supra note 22, at 165 (noting that "media organizations have increasingly discovered that the public fear of crime can sell newspapers, attract listeners, and attract viewers if it is invoked with just the right editorial zeal and is aimed at mobilizing deep-seated anxieties in the public"). For an early demonstration and discussion of the anxiety-arousing aspect of media crime programming, see Jennings Bryant, Rodney Carveth & Dan Brown, Television Viewing and Anxiety: An Experimental Examination, 31 J. Comm. 106 (1981).
curs. Not surprisingly, studies have shown that viewing local television news—the outlet on which citizens rely for most of their news—increases citizens' "perceived risk of crime" and their belief that "crime is an important local problem." Their impact on the larger culture notwithstanding, all aspects of the media's pervasive fear-mongering and anger-generating are problematic for the fair administration of the death penalty. Intense public fear over violent crime, anxiety over the perceived threat of victimization, and fury directed at perpetrators can drive up support for the death penalty in general. Because of the way that homicide is over-represented in media portrayals of crime, citizens receive a distorted sense of the level of societal threat that it, in particular, represents. The over-representation of homicide is problematic also because of the way that the death penalty—as the most forceful and definitive law enforcement response possible—is explicitly offered or implicitly sug-


184. Daniel Romer, Kathleen Hall Jamieson & Sean Aday, Television News and the Cultivation of Fear of Crime, 53 J. Comm. 88, 94, 98 (2003). Romer et al. found "strong support for the television-exposure hypothesis," that is, that viewers of local television news should experience "heightened perceptions of crime risk on both a personal and societal level." Id. at 99. Moreover, exposure to local news appears to have especially strong fear-generating effects when it "resonates" with the experience or "crime reality" of its consumers (for example, when they live in high crime areas or have recently been the victims of crime). See Ted Chiricos, Kathy Padgett & Marc Gertz, Fear, TV News, and the Reality of Crime, 75 Criminology 755 (2000). See generally Jeffrey J. Strange & Cynthia C. Leung, How Anecdotal Accounts in News and Fiction Can Influence Judgments of a Social Problem's Urgency, Causes, and Cures, 25 Personality & Soc. Psychol. Bull. 436 (1999).

185. For example, one study found that nearly eighty percent of the crimes depicted in NYPD Blue in its 2000 season were homicides, as were over ninety percent of the crimes on Law & Order that same year. Sarah Eschholz, Matthew Mallard & Stacey Flynn, Images of Prime Time Justice: A Content Analysis of "NYPD Blue" and "Law & Order," 10 J. Crim. Just. & Popular Culture 161, 171 tbl.5 (2004).
gested as the only appropriate way to address these worst possible crimes.

In addition to amplifying fears about potentially capital crimes and endorsing the most severe punishments as the most appropriate response, media criminology repeatedly reinforces a dominant cultural narrative about the origins of violent criminality—one that implies something about the nature of the persons who perpetrate such crimes and the societal policies that are needed to properly address them. Elsewhere I have termed this a "crime master narrative," and suggested that it depicts criminal behavior "as entirely the product of [the individual perpetrator's] free and autonomous choice-making, unencumbered by past history or present circumstances." Media criminology fully embraces and consistently legitimates the crime master narrative, effectively teaching the public its core causal lesson—that individuals alone are responsible for violent crime, and that their extreme behavior stems entirely from deep-seated personal traits—depravity, narcissism, psychopathology, and the like.

In this sense, media criminology operates with an implicit model of human nature akin to what social psychologists have termed "entity theory"—the notion that behavior emanates from human qualities and tendencies that are largely fixed and that people possess in vary-


188. See also, e.g., SHANTO IVENGAR, IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES (1991); David Fabianic, Television Dramas and Homicide Causation, 25 J. CRIM. JUST. 195 (1997); Danielle Soulliere, Prime-Time Murder: Presentations of Murder on Popular Television Justice Programs, 10 J. CRIM. JUST. & POPULAR CULTURE 12 (2003).
Research suggests that persons who endorse "entity theory" views conversely are less likely to consider situational or contextual information in making judgments about others. Not surprisingly, this perspective on human nature leads to greater punitiveness in general, and to an increased likelihood of imposing the death penalty in particular.

On the other hand, social contextual or structural explanations for crime are virtually absent from media criminology. They rarely if ever appear in the day-to-day news reporting about local crimes that dominates regional newspapers, and are similarly ignored in local or national television news broadcasts. Such explanations also are missing from crime-related entertainment media (especially the ubiquitous television crime drama). As Murray Lee explained:

The media rarely acknowledge complicated and contingent processes by which events develop out of often mundane situations that produce them. Thus, it is the elevated event, pure event, decontextualized and dehistoricized, which is flashed and reflected, often fleetingly, on to the psyche of the "news consuming" public or community.


193. For example, Fabianic concluded that the persistent tendency of television crime drama to absolve social factors and blame perpetrators alone repeatedly reaffirms the view that "individuals have complete control over who and what they are and therefore, are entirely accountable and responsible for their behavior." Fabianic, supra note 188, at 201. This, correspondingly, serves as apparent validation for "the principle that focusing on the offender, rather than social conditions or circumstances, is the proper method of confronting the problem of homicide." Id.

194. LEE, supra note 22, at 188. Many analysts have reached a similar conclusion. For example, Kenneth Dowler concluded:

[Crime portrayals are almost always based exclusively on individual characteristics rather than on social conditions, and the causes of crime are perceived to be rooted in individual failings rather than social explanations. Deviant behavior is viewed as individual choice, while social, economic, or structural explanations are ignored or deemed irrelevant. Dowler, supra note 180, at 575; see also, e.g., L. Dorfman, K. Woodruff, V. Chavez & L. Wallack, *Youth and Violence on Local Television News in California*, 87 AM. J. PUB. HEALTH 1311 (1997).]
Thus, whatever else citizens might take from the media criminology curriculum to which they are exposed, they repeatedly learn that violent criminality stems from the morally blameworthy choices of its individual perpetrators. These bad acts are the simple but condemnable extensions of the evil or pathology that dwells within the bad people who perform them. In Thomas Harris’s chilling *Silence of the Lambs*, for example, Hannibal Lecter’s fearsomeness is underscored by his assertion of precisely this view. When Officer Starling seeks some other form of explanation, he mocks this attempt at contextualizing his behavior by taunting her:

Nothing happened to me, Officer Starling. I happened. You can’t reduce me to a set of influences. You’ve given up good and evil for behaviorism, Officer Starling. You’ve got everything in moral dignity pants—nothing is ever anybody’s fault. Look at me, Officer Starling. Can you stand to say I’m evil? Am I evil, Officer Starling?  

In addition, however, beyond reinforcing the master crime narrative by individualizing and decontextualizing crime, media criminology consistently dehumanizes and demonizes perpetrators and effectively exoticizes their criminality. This is accomplished in a variety of ways. Some of it comes about through the pervasive use of degrading and derogatory language to refer to suspects and perpetrators. It is also accomplished through a persistent focus on the most obviously disturbed lawbreakers and the disproportionate depiction of the most bizarre kinds of crimes. For example, media criminology is replete with shorthand expressions that have been concocted to supposedly describe certain “types” of extreme killers, allegedly capturing the frightening essences of the persons who commit these especially heinous crimes. Thus, there are “thrill killers,” “stone killers,”

196. For example, here is how Sarah Eschholz, Matthew Mallard, and Stacey Flynn described the language used in the shows they analyzed:  
The “us” against “them” mentality pervading the programs often depicted the criminals as less than human, where any means necessary was appropriate for their capture. On “NYPD Blue,” the terms “asshole,” “dickhead,” “deadbeat scumbag,” “jerk,” “skank,” and “idiot” were all synonymous with suspect. Similarly, on “Law & Order,” defendants were referred to as “dirt bags,” “low lifes,” “riff-raffs,” “bitches,” “bastards,” “thugs,” “faggots,” and “freaks.” An “NYPD Blue” detective once told a suspect during interrogation: “the fact is we don’t want you to talk, you might express remorse and we want you to go into trial a picture of evil.”  
Eschholz, Mallard & Flynn, supra note 185, at 173.  
197. The term is not only the title of a 1964 movie (*Thrill Killers*, released by Morgan-Steckler Productions) and books—for example, Raymond Pingitore & Paul Lonardo’s *Thrill Killers: A True Story of Innocence and Murder Without Conscience* (2008)—but also has been used by the press to refer to actual cases, or alleged patterns of cases. See, e.g., Bob Egelko, *Death Sentence Upheld for Sacramento “Thrill Killer,”* S.F. CHRON., May 17, 2007,
“psycho killers,”199 “rampage killers”200 and, of course, “natural born killers.”201 The invented terminology is so evocative that the labels


198. Scott Minerbrook, A Generation of Stone Killers: What Makes Cold Blooded Kids Do What They Do, U.S. NEWS & WORLD REP., Jan. 17, 1995, at 33. Readers of this article were told that “the responses of the killers are chilling . . . . And their malign ethos has metastasized to the suburbs.” Id.


200. See Ford Fessenden, Rampage Killers: They Threaten, Seethe and Unhinge, Then Kill in Quantity, N.Y TIMES, Apr. 9, 2000, at A1. The Times ran an entire four-part series on “rampage killers” beginning with a front page headline story and continuing over successive days. Despite acknowledging that the “attacks are rare when compared with other American murders”—indeed, “extremely rare, much less than 1 percent of all homicides”—the Times justified the unprecedented attention it gave the topic by suggesting that “rampage killers”—a term the newspaper itself may have coined—“have provoked intense national discussion about crime, education, and American culture” (indeed, discussion of precisely the sort that the Times series contributed mightily to). Id.; see also NYTimes.com, Television, Rampage Killers: Looking for Signs, http://movies.nytimes.com/movie/249498/nvestigative-Reports-Rampage-Killers-Looking-for-Signs/overview (last visited Apr. 22, 2009) (describing the television special as a “[d]ocumentary that examines why our society is plagued by apparently random and unpredictable acts of mass murder”). Id.

201. Natural Born Killers was a 1994 Oliver Stone movie supposedly intended to satirize the media’s sensationalistic coverage of crime and criminals. However, the film’s satiric qualities were undermined by an inability to clearly distinguish its own intended “over the top” coverage from what seemed like documentary footage—that is, a more or less accurate representation of how the media actually would cover such a case. Indeed, film critic Roger Ebert’s review evaluated the movie less as satire than as an attempt to realistically portray criminality. Roger Ebert, Natural Born Killers, CHI. SUN TIMES, Aug. 26, 1994, available at http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19940826/REVIEWS/408260302/1023. He did so, among other things, by noting what he perceived to be similarities between Stone’s protagonists—Mickey and Mallory—and a real life defendant whose trial was being televised at approximately the same time—O.J. Simpson. Id. Thus, Ebert suggested that Stone had captured the same “odd emptiness” and “moral inattention” he had observed in Simpson during the latter’s televised trial, observations that had troubled Ebert as he watched actual news coverage the case. Id. Ebert also praised the way in which the two main actors in Natural Born Killers were able to convey what he believed was an accurate image of criminality: “The casting is crucial: Woody Harrelson and Juliette Lewis are both capable of being frightening, both able to project amorality and disdain as easily as Jack Lemmon projects ingratiation.” Id. However, Ebert also suggested, correctly, I believe, that when it comes to the way the media sensationalizes crime “it’s almost impossible to satirize the situation—to get beyond real life.” Id. New York Times film critic Janet Maslin touched on the same theme a bit differently, arguing that a number of actual, highly publicized cases “are spectacles that cast a long shadow,” and that Stone’s film “never digs deep enough to touch the madness of.” She concluded that “Mr. Stone’s vision is impassioned, alarm-
themselves require no further explanation; it is assumed (correctly) that the audience can easily conjure what they must mean. Media commentators employ these terms without bothering to precisely define them, let alone including any systematic (rather than anecdotal) or scientifically grounded discussions of their origins or prevalence. The bogus typologies that they represent help to reinforce the persistent message that nothing beyond the inherent evil or pathology of the perpetrators themselves is at work.

Moreover, most of the media's extended treatments or "analyses" of violent criminality reflect the same premises as those encapsulated by the shorthand labels used to describe the worst of it. Thus, for example, there is no mistaking the core message lurking within MSNBC's extensive, in-depth crime and prison programming—there are terrifying predators roaming the country, they engage in the most heinous crimes imaginable for the vilest of motives (or no apparent motive at all), and the nation's prisons are struggling to house a seemingly endless supply of these evil misfits. In this way, media criminology helps make the perpetrators of crime much easier to fear and despise, rendering them fit targets of widespread public anger and little else.

In some instances, the "demonization" of criminality is nearly literal. Indeed, the term "monster" is now used explicitly and with some regularity in media commentaries and published accounts of crime. Janet Maslin, Film Review: Natural Born Killers; Young Lovers With a Flaw That Proves Fatal, N.Y. Times, Aug. 26, 1994, at C20.

202. See Steve Jackson, Monster (1999); Douglas Preston, The Monster of Florence: A True Story (2008); Robert Mladich, From the Mouth of the Monster: The Joel Rifkin Story (2002); Robert Ressler, Whoever Fights Monsters: My Twenty Years Tracking Serial Killers for the FBI (1993); Robert Ressler & Tom Shachtman, I Have Lived in the Monster (1997); Robert Scott, Monster Slayer (2005); Brandon Stickney, All American Monster: The Unauthorized Biography of Timothy McVeigh (1996); Carol Topolski, Monster Love (2008); Peter Vronsky, Serial Killers: The Methods and Madness of Monsters (2004); Peter Vronsky, Female Serial Killers: How and Why Women Become Monsters (2007); Aileen Wournos, Monster: My True Story (2006). There are other supposedly non-fiction works about notorious criminals whose titles emphasize the fundamental "otherness" of their subject. For example, see the works of Harold Schechter, whose "true crime" books include: Bestial: The Savage Trail of a True American Monster (1998); Deviant: The Shocking True Story of Ed Gein, The Original Psycho (1998); Fiend: The Shocking True Story of America's Youngest Serial Killer (2001); Deranged: The Shocking True Story of America's Most Fiendish Killer (2005). See also Ronald Markman & Dominick Bosco, Alone With the Devil: Famous Cases of a Courtroom Psychiatrist (1989). Book titles notwithstanding, the term "monster" is used in other mainstream media to refer to notorious criminals. For example, Newsweek headlined an article by Malcolm Jones as The Man Who Sired a Monster, reviewing a book by Jeffrey Dahmer's father who, as the reviewer put it, "craves to understand what made his son a monster"; the May 3, 1999 cover of Time carried the photos of the two boys who
As Edward Ingebretsen has pointed out, the term "directs otherwise unacceptable excesses of violence and passion toward sanctioned political ends," in part because defining someone as a "monster" renders them "beyond any need for human courtesy or decency."\(^{203}\) Of course, the term "monster" (and the "rhetoric of monstrosity" as Ingebretsen puts it), carries surplus meaning: "[T]he heinousness of the crime or criminal is buttressed by appealing to outside agency. Allusions are made to supernaturalist mythologies, cinematic metaphors and literary characters the (alleged) killer is thought to embody."\(^{204}\)

In substantive terms, then, media criminology includes the repeated, consistent contention that criminals are not only fundamentally different from others—in terms of the behavior in which they have engaged—but also that they are essentially and even inherently so. Thus, the perpetrators of violent crime may be characterized as wild and animalistic,\(^{205}\) genetic misfits who are born to pillage and plunder,\(^{206}\) psychopathological or psychologically defective miscreants,\(^{207}\) or as just plain evil.\(^{208}\)

Reducing violent criminality to these constituent terms clearly "serve[s] ideologically weighted functions" that include, as Joseph


204. Id. at 29.


Grixti put it, "providing challenging reminders about the need for constant vigilance, or offering reassurance about the ultimate rightness of law-enforcement structures as guardians and embodiments of the social and moral order." Perpetrators of extreme forms of violence are commonly represented in media criminology as "neither civilized nor really human," in ways that "stress their monstrosity so as to perceive them as belonging to the realm of the other."

Of course, these flawed media frameworks are likely to have real consequences when the persons who are immersed in them are asked to make judgments about crime-related policies or participate in criminal justice decision making. One social scientist who has studied the media's tendency to mis-educate audiences about these issues has even suggested that "[f]or students of criminology, who are exposed to the individualistic explanations of crime offered by entertainment television, it may take several intensive sociology courses to counteract these media-created impressions." In actual criminal cases, however, jurors are regularly called upon to perform their duties without the benefit of this intensive, counteracting coursework. Instead, media criminology and its pervasive stereotypes may distort their processing of evidence and compromise the life-altering decisions that they are required to make. In general, inaccurate stereotypes, flawed causal analyses, and dehumanizing and demonizing images may undermine the quality of justice routinely dispensed.

In death penalty cases, the myths and misinformation represent a more significant threat because of their effect on the capital jury's unique and critically important sentencing function. As Justices Marshall and Brennan once noted, the risk of media bias is greater in capital cases because "the jury wears an altogether different hat when it sits as sentencer. It must make a moral decision whether a defendant already found guilty deserves to die for his crime." Yet, the biased

208. See, e.g., Sharon Begley, In Search of the Roots of Evil, NEWSWEEK, May 21, 2001, at 30; see also Benedict Carey, For the Worst of Us, the Diagnosis May Be "Evil," N.Y. TIMES, Feb. 8, 2005, at F1.
209. Grixti, supra note 82, at 87.
210. Id. at 88.
211. Soulliere, supra note 188, at 32.
212. Brecheen v. Oklahoma, 485 U.S. 909, 913 (1988). Justices Marshall and Brennan dissented from the Court's denial of certiorari in a capital case that involved a denied change of venue motion. Thus, the particular media bias in Brecheen resulted from case-specific pretrial publicity. Media criminology is in some ways more problematic and insidious because it forms a generic background of erroneous beliefs on which case-specific pretrial publicity often builds. Moreover, because media criminology is so pervasive, it comes to be regarded as "commonsense"—what everyone "knows" to be true. Thus, it is difficult to use voir dire in order to identify and eliminate those potential jurors who have been most affected (in part because they
and simplistic lessons of media criminology may distort the conceptual frameworks that are available to capital jurors and shift the norms of punishment they feel compelled to apply. More specifically, if the stereotypes and flawed lessons that characterize media criminology go unchallenged in a capital case, they may jeopardize the jury's ability to engage in the kind of individualized sentencing that is supposed to be the hallmark of modern death penalty jurisprudence.  

For many years now, mitigation—typically, evidence about the client’s background, social history, and present life circumstances—has taken “center stage in death penalty cases as potentially the only way defense counsel could humanize the client and save his life.” The mitigating counter-narrative that is typically employed stands in stark contrast to the simplistic and misleading stereotypes that are so prevalent in media lesson plans to which many capital jurors have likely been exposed. As one death penalty lawyer has put it, although there is “no blueprint” for gathering, analyzing, and presenting the kind of mitigation that is likely to save a client’s life, defense attorneys strive to find whatever “compelling details [have] the potential to transform the prosecution’s ‘monsters’ and ‘cold-blooded killers’ into tragic figures for whom juries could find mercy.” Yet the prosecution’s monsters and cold-blooded killers will be all too familiar to many jurors, who have already repeatedly encountered them in the media. Capital defendants are easily mis-portrayed in the courtroom to jurors predisposed to see them that way, namely, as protagonists in the crime master narrative, and exactly the kinds of persons whose nature a pervasive media criminology has presumed to “explain.”

In modern capital jurisprudence, precisely because the penalty phase of a capital case requires issues of blameworthiness and culpability to be explicitly addressed, jurors are legally mandated to consider evidence about the defendant’s social history, past circumstances, and relevant social context. Capital cases are supposed to focus on the background and character of the defendant in the broadest possible terms—typically making who he is and why abso-
lutely central to the jury’s decision-making process. Yet, the terms of the struggle between opposing counsel over the nature and relevance of the specific social forces that shaped the defendant’s life course, the causes of his past criminality, and even his chances for a successful and perhaps productive future life in prison may be badly distorted by the media misinformation to which so many jurors have been exposed.

Thus, the pervasiveness of the media criminology I have described in the preceding pages is fundamentally at odds with the kind of mitigating counter-narrative that is designed to broaden the jury’s understanding of the defendant and the life he has lived. This counter-narrative is one that few jurors are likely to have explicitly encountered before, and certainly not in the mass media lesson plans to which they have been exposed. Instead, by discounting or ignoring social factors and blaming perpetrators alone for their actions, media criminology implicitly “insists that individuals have complete control over who and what they are, and therefore, are entirely accountable and responsible for their behavior.” 216 This, correspondingly, “endorses the principle that focusing on the offender, rather than social conditions or circumstances, is the proper method of confronting the problem of homicide.” 217

On the other hand, not surprisingly, the more that citizens can acknowledge the role of variables such as poverty, maltreatment, and discrimination in crime causation—precisely the framework of understanding that is lacking from media criminology—“the less likely they [are] to be punitive, and the less likely to support capital punishment.” 218 In order to facilitate this recognition, however, jurors must be “re-educated” and the erroneous criminological lessons essentially unlearned. Thus, an effective mitigating counter-narrative must necessarily debunk at least some of the worst stereotypes and misconceptions that are likely to linger from past media exposure. Otherwise, jurors may cling to an oversimplified and inaccurate view—the only one to which they have had access—and to favor the harsh punishments it both implies and seems to sanction. 219

In this regard—and consistent with the crime master narrative to which it significantly contributes—media criminology can increase the emotional distance or “empathic divide” that exists between the pe-

216. Fabianic, supra note 188, at 201.
217. Id.
petrators of crime and the persons who judge them.\textsuperscript{220} Elsewhere I have suggested that the empathic divide is particularly broad and deep when defendants of color are judged by white jurors, a dynamic that is likely to occur more often in death penalty cases because of the way in which death qualification disproportionately eliminates non-whites from participating on capital juries.\textsuperscript{221} But a pervasive media criminology and its repetitive and consistent lessons help to create and maintain the empathic divide between jurors and defendants, long before they meet in the courtroom. Although the media-generated divide is in some ways independent of racial dynamics of the case, those dynamics can certainly exacerbate and increase the psychological distance between jurors and defendants.\textsuperscript{222}

As I have noted, in addition to so completely internalizing the causes of crime and demonizing its perpetrators, media criminology wholeheartedly embraces a conventional law enforcement approach to crime control, one in which the death penalty becomes the logical last step in an escalating arsenal of what are portrayed as entirely appropriate and largely necessary societal responses. Heightened punishment is made to appear so commonsensical that it becomes reflexive and matter-of-fact, absolutely vital to the preservation of social order and the maintenance of public safety. Although media criminology may increasingly depict the failings and foibles of individual law enforcement personnel,\textsuperscript{223} it nonetheless still fully and unques-

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\textsuperscript{220} Craig Haney, Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide, 53 DEPAUL L. REV. 1557, 1558 (2004).

\textsuperscript{221} Racial minorities are less likely to support capital punishment. See, e.g., James Unnever & Francis Cullen, Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race, 44 J. RES. CRIME & DELINQUENCY 124 (2007). Because death qualification excludes persons on the basis of their death penalty views, it results in the underrepresentation of minorities, especially African Americans, on capital juries. The racially targeted use of peremptory challenges can exacerbate this effect. See, e.g., David Baldus et al., The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis, 3 U. PA. J. CONST. L. 3 (2001).

\textsuperscript{222} See Mary Beth Oliver's research suggesting that the stereotypes that pervade media criminology actually may be applied more readily and erroneously to African Americans than others. Mary Beth Oliver, Caucasian Viewers' Memory of Black and White Criminal Suspects in the News, 49 J. COMM. 46 (1999); Mary Beth Oliver & Dana Fonash, Race and Crime in the News: Whites' Identification and Misidentification of Violent and Nonviolent Criminal Suspects, 4 MEDIA PSYCH. 137 (2002); Mary Beth Oliver, Ronald Jackson, Ndidi Moses & Celnisha Dangerfield, The Face of Crime: Viewers' Memory of Race-Related Facial Features of Individuals Pictured in the News, 54 J. COMM. 36 (2004).

\textsuperscript{223} As Cavender and Deutsch note, for example, tensions between law enforcement characters "still occur but they are more like disagreements among friends or family members." Cavender & Deutsch, supra note 176, at 73. Indeed, the describe this approach as a "police family device," one they suggest "may resonate with the audience because it normalizes the characters who are like our own families, but it also circulates an image of the police as a moral authority." Id. For an early discussion of the way television crime drama juxtaposes the normality of law
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tioningly embraces a traditional approach to crime control that is exclusively punishment-oriented. Thus, media criminology implies a corresponding penology: crime precipitates punishment, and the most serious crime must be met with the most severe punishment, to the exclusion of any alternative approach.\textsuperscript{224}

In fact, in spite of its bizarre premise, the successful cable network series \textit{Dexter} epitomizes the media’s vengeful, punitive logic. The conventional message at the core of the program is in large part what makes its gruesomeness and “serial-killer-as-hero” theme palatable to viewers: Dexter is committed to only “stalking and murdering the guilty.”\textsuperscript{225} This is the very element that renders the show—despite its self-conscious “edginess”—fundamentally consistent with all other mainstream television crime dramas. Thus, according to Dexter’s repeatedly stated ethos, “killing must serve a purpose” (that is, a law enforcement purpose). In this way, viewers are told, Dexter “channels his urge to kill into something productive—he kills people who deserve it,” including drug dealers (some of whom are labeled on the show’s website as “illegals”), pimps, child molesters—most (but not all) of whom have committed murder themselves.\textsuperscript{226} As Dexter puts it: “Live a good life, and society will take care of you. But if society drops the ball, then someone else has to pick up the slack. That’s where I come in.”\textsuperscript{227}

In a certain sense, then, Dexter represents the very embodiment of the death penalty—a one man capital punishment machine, if you will, and one that reflects and enacts the media’s core message about violent crime. Despite the violence that Dexter himself dispenses, he is depicted as a force for good, a champion with whom the audience is encouraged to (and does) readily identify—he is clearly on their side—and they naturally find themselves rooting for him to prevail. Accordingly, television critics have even suggested that Dexter is “fundamentally an altruist at heart,” someone whose “demonic poten-

\textsuperscript{224} Of course, there are alternative approaches that the media could present. In fact, there is empirical evidence that persons who are only briefly exposed to these other more scientifically defensible perspectives can and do change their views of crime causation and crime control. See Renita Coleman & Esther Thorson, \textit{The Effects of News Stories That Put Crime and Violence Into Context: Testing the Public Health Model of Reporting}, 7 J. HEALTH COMM. 401 (2002).


\textsuperscript{227} Gina Bellafante, \textit{Ah, for a Simpler Time, When a Serial Killer Had No Moral Qualms}, N.Y. TIMES, Sept. 27, 2008, at A31 (quoting Dexter Morgan).
tial” has been so effectively molded toward the “public good” (by killing the perpetrators of violent crimes) that the series risks “moral absolutism.”228 The show has gone as far as suggesting that its protagonist’s vigilante motives are so righteous that they might be the product of divine intervention. Thus, in the trailer for the show’s third season, Dexter speculated that his remarkable good fortune in narrowly avoiding detection for so long must be the work of “some higher power” that apparently “wants me to keep doing what I’m doing.”229

Indeed, Dexter’s violence and his distorted sense of right and wrong are not only justified—he’s killing only presumably “deserving” victims after all—but his murderous aggression is also contextualized in terms of past trauma that he suffered—specifically, his having witnessed his mother brutally murdered when he was a child. Of course, the behavior of Dexter’s apparently despicable and supposedly deserving victims is not handled by the scriptwriters in remotely the same way; their criminality either goes unexplained or is depicted as the product of pure evil. This is just one of the myriad ways that the show’s protagonist is, in the words of one enthusiastic reviewer, “continually differentiating himself, in ways both philosophical and mundane, from the street-grade sociopaths pulp fiction and local news have accustomed us to.”230 It is also a distillation of some of the many ways that media criminology in general accomplishes much the same thing—portraying crime as the exclusive product of decontextualized “street-grade sociopaths” (or much worse) and elevating the status of the most extreme and extremely punitive response possible, no matter how otherwise morally questionable, odious, or counterproductive it is.

V. Conclusion

Media criminology is so pervasive in American society that its lessons are impossible to avoid. Citizens are bombarded with a largely consistent (and consistently problematic) perspective on criminality, conveyed in powerfully dramatic and increasingly engaging ways. The media’s criminological “teachings” consistently misrepresent the nature and magnitude of the crime threat, generating ever-increasing audience shares (and profits) by making the public very afraid, very angry, and very invested in making sure that criminals pay dearly and

228. Id.
definitively for their misdeeds. By obsessing over the most extreme and frighteningly bizarre yet statistically rare kinds of crimes, media criminology implicitly legitimates the most punitive possible responses to wrongdoing—including, of course, the death penalty. Citizens thus learn not only that crime must be met exclusively with harsh punishment but also that the more serious the crime and seemingly intractable the criminal, the more severe the punishment that must be administered.\textsuperscript{231} The simplicity of the media’s core criminological message and the failure to present any broader or more complex alternative views seemingly excludes any other approach.

Beyond contributing in this way to the perceived need for the most severe punishments, media criminology maintains and reinforces a powerful crime master narrative—one that it has helped to create and that now dominates the public’s thinking about crime. This narrative and the media messages that repeatedly legitimize and amplify it decontextualize criminal behavior, individualize and internalize its causes, and demonize the persons who engage in it. Broad-based, nuanced, and scientifically valid perspectives on crime that acknowledge and explain its social historical and contextual roots are absent from the media’s all-pervasive criminological lesson plans.

Media criminology also widens the empathic divide between citizens and the criminal defendants whose actions they may be called upon to judge. This is particularly problematic in a capital case because the consumers of these biased and inaccurate media messages are empowered to base life and death decisions at least in part on the frameworks of understanding that they have drawn from them. Broadening the perspectives and improving the knowledge base with which capital jurors operate in discharging their daunting responsibilities requires the construction of a more valid and comprehensive counter-narrative, one based on painstakingly in-depth investigations of the lives of capital defendants. The essential logic of the mitigating counter-narrative thus deepens the jurors’ insights into the causes of criminal behavior, provides them with a meaningful and valid framework that balances the one-sidedness of the crime master narrative, and enables them to reach a fairer and more informed assessment the defendant’s culpability.

\textsuperscript{231} Not surprisingly, then, all forms of crime-related television viewing—crime drama, crime news, and police “reality” shows—appear to predict higher levels support for the death penalty. See, e.g., Lance Holbert, Dhavan Shah \& Nojin Kwak, \textit{Fear, Authority, and Justice: Crime-Related TV Viewing and Endorsements of Capital Punishment and Gun Ownership}, 81 JOURNALISM \& MASS COMM. Q. 343 (2004).
Done properly, such counter-narratives must directly rebut many of the things that media-saturated citizens believe they already know about capital defendants. Recognizing the powerful and problematic nature of media criminology underscores the importance of amassing detailed social historical and other psychologically significant facts about the defendant that can compete with and counterbalance the stereotypical misunderstandings that are so widely and effectively disseminated. Pervasive but flawed media lesson plans highlight the necessity of developing a set of cogent and coherent mitigating counter-narrative themes and effectively presenting them to jurors who would otherwise be left to rely on a biased and incomplete framework with which to filter evidence, assess culpability, and render verdicts.

Attorneys who are committed to transcending these mistaken media stereotypes and to broadening the perspective and knowledge base of capital jurors have one important advantage in achieving this task. Despite its power and pervasiveness, the “virtual discipline” of media criminology is bad science; in fact, it is no science at all. Indeed, because its relationship to the truth is merely accidental, media-saturated citizens have been encouraged to obtain their advanced degrees in what might be termed the “ultimate junk science.” When the crime master narrative and the media criminology that supports it are effectively challenged—with real science that contextualizes behavior and explains the forces and factors that have helped to shape a defendant’s life course—death will no longer serve as the default option for jurors who have become “expert” on these issues by mastering the false criminological lessons that the media has provided them about who commits serious violent crime and why.