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Rituals Upon Celluloid: The Need For Crime and Punishment in Contemporary Film

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RITUALS UPON CELLULOID: THE NEED FOR CRIME AND PUNISHMENT IN CONTEMPORARY FILM

J.C. OLESON*

ABSTRACT

Most members of the public lack first-hand experience with the criminal justice system; nevertheless, they believe that they possess phenomenological knowledge about it. In large part, the public's understandings of crime and punishment are derived from television and film, which provide modern audiences with a vision of institutions that are normally occluded from view. While public rituals of punishment used to take place on the scaffold, equivalent moral narratives about crime and punishment now occur on film because modern punishment is imposed outside of the public gaze. Yet because crime films distort what they depict, the public's view of crime and punishment may not correspond to social realities. Thus, instead of building social solidarity as Adam Smith, Émile Durkheim, and Kai Erikson suggest, mass media may actually increase the public's fear of crime, increase rates of offending, and fuel a cycle of punishment-as-entertainment and penal populism.

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I. INTRODUCTION

Most people lack first-hand knowledge of the criminal justice system.¹ Nevertheless, curiously, people believe that they possess phenomenological

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¹ Leonidas K. Cheliotis, *The Ambivalent Consequences of Visibility: Crime and Prisons in the Mass Media*, 6 CRIME MEDIA CULTURE 169, 178 (2010) ("The overwhelming majority of people have no direct knowledge of the worlds of crime and criminal justice. Save for criminal justice professionals, lawbreakers and their 'significant others,' victims and social researchers grappling with pertinent issues, the rest cannot but glean information solely from mass-mediated representations."). *But see* PEW CENTER ON THE STATES, ONE IN THIRTY-ONE: THE LONG REACH

knowledge about it.² Using a variety of sources (including personal experience, vicarious experience, and mass media) as heuristics, people construct folk criminologies to make sense of crime and punishment.

While academic criminologists sometimes draw their conclusions from empirical research, most laypeople—and, in all likelihood, even those criminologists—often rely upon popular depictions of crime and punishment in constructing claims of knowledge.³ The influence of popular culture dwarfs the influence of all academic criminology combined.⁴ Many people learn about crime and punishment through newspapers, news magazines, and radio or television news broadcasts, yet it is not only the *news* that shape the public's view of crime and punishment; entertainment media also play an important role in shaping public views and constructing social attitudes.⁵ “Mass entertainment media today form much of the reality of crime and justice.”⁶ Many forms of popular culture shape the public understanding of crime and punishment—newspapers, magazines, novels, music, theatre, and internet blogs, among others—but television and film appear to play particularly crucial roles in this process.⁷ Although most members of the public are not criminologists, Hollywood allows them to believe that they know something real about the etiology of crime, its correlates, and its relationship to punishment.

Many members of the public believe that they know something about the justice system because they watch television and films. They think that they know about organized crime because they have seen films like *The Godfather*⁸ or *Goodfellas*,⁹ and

OF AMERICAN CORRECTIONS 4 (2009) (noting that more than one in 100 adults in America *were* incarcerated in jail or prison in 2008).

² See Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. CRIM. JUST. & POPULAR CULTURE 1, 3 (1995).

³ Kimberlianne Podlas, *Testing Television: Studying and Understanding the Impact of Television's Depictions of Law and Justice*, in LAW AND JUSTICE ON THE SMALL SCREEN 87, 88 (Peter Robson & Jessica Silbey eds., 2012) (“[R]esearch reveals that most of what the public knows, or thinks it knows, about law and the legal system comes from television. For example, although few people have had personal experience with courts, trials, or lawyers, millions have seen them on TV.”).

⁴ NICOLE RAFTER & MICHELLE BROWN, CRIMINOLOGY GOES TO THE MOVIES: CRIME THEORY AND POPULAR CULTURE 2-3 (2011).

⁵ See, e.g., YVONNE JEWKES, MEDIA & CRIME (2004); Robert Reiner, *Media-Made Criminality: The Representation of Crime in the Mass Media*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, 302-337 (Mike McGuire et al. eds., 4th ed. 2007) (both describing role of entertainment media in shaping public attitudes).

⁶ RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE 25 (2d ed. 1998).

⁷ See generally, e.g., NICOLE RAFTER, SHOTS IN THE MIRROR: CRIME FILMS AND SOCIETY (2d ed. 2006); DAVID WILSON & SEAN O'SULLIVAN, IMAGES OF INCARCERATION: REPRESENTATIONS OF PRISON IN FILM AND TELEVISION DRAMA (2004) (both expressing importance of television and film in shaping public understandings).

⁸ THE GODFATHER (Paramount Pictures 1972).

⁹ GOODFELLAS (Warner Bros. 1990).

have seen television programs like *Sons of Anarchy*,¹⁰ *Boardwalk Empire*,¹¹ or *The Sopranos*.¹² They know drug abuse because they have seen films like *Rush*,¹³ *Traffic*,¹⁴ or *Requiem for a Dream*¹⁵ and television programs like *The Wire*,¹⁶ *Breaking Bad*,¹⁷ or *Weeds*.¹⁸ And because they are familiar with Anthony Hopkins in *The Silence of the Lambs*,¹⁹ Kevin Spacey in *Se7en*,²⁰ Mads Mikkelsen in *Hannibal*,²¹ or Michael C. Hall in *Dexter*,²² even serial murder seems to lie within their ken. Similarly, although most people have never worn the uniform, members of the public believe that they know what it is like to be a detective, all because they have seen films like *Fargo*,²³ *Dirty Harry*,²⁴ and *L.A. Confidential*²⁵ and television crime dramas such as *CSI*,²⁶ *Law &*

¹⁰ *Sons of Anarchy* (FX 2008-2014).

¹¹ *Boardwalk Empire* (HBO 2010-2014).

¹² *The Sopranos* (HBO 1999-2007).

¹³ *RUSH* (MGM Studios 1991).

¹⁴ *TRAFFIC* (USA Films 2000).

¹⁵ *REQUIEM FOR A DREAM* (Artisan Entertainment 2000).

¹⁶ *The Wire* (HBO 2002-2008).

¹⁷ *Breaking Bad* (AMC 2008-2013).

¹⁸ *Weeds* (Showtime 2005-2012).

¹⁹ *THE SILENCE OF THE LAMBS* (Orion Pictures 1991).

²⁰ *SE7EN* (New Line Cinema 1995).

²¹ *Hannibal* (NBC 2013-).

²² *Dexter* (Showtime 2006-2013).

²³ *FARGO* (Gramercy Pictures 1996). *Fargo* has also been adapted into a television series. *See Fargo* (FX 2014-).

²⁴ *DIRTY HARRY* (Warner Bros. 1971).

²⁵ *L.A. CONFIDENTIAL* (Warner Bros. 1997).

²⁶ *CSI: Crime Scene Investigation* (CBS 2000-). *CSI* has produced three spin-offs — *CSI Miami* (CBS 2002-2012), *CSI: NY* (CBS 2004-2013), and *CSI: Cyber* (CBS 2015-). The program has also been adapted into novels, comic books, and video games. *See generally* ALLEN MICHAEL, *READING CSI: CRIME TV UNDER THE MICROSCOPE* (2007) (describing social responses to *CSI* series).

Order,²⁷ *NCIS*,²⁸ *Criminal Minds*,²⁹ *True Detective*,³⁰ or *Sherlock*.³¹ Indeed, because they have seen Denzel Washington in *Training Day*³² and Harvey Keitel in *Bad Lieutenant*,³³ they think that they know the face of police corruption; and because they have seen Al Pacino in *Serpico*³⁴ and Kevin Costner in *The Untouchables*,³⁵ they think that they know honest cops. Despite their lack of direct experience, members of the public also believe that they understand the courtroom. Legal dramas such as *LA Law*,³⁶ *Boston Legal*,³⁷ *The Good Wife*,³⁸ and *Suits*³⁹ have created a nation of armchair attorneys. Because they have seen Kelly McGillis stand up for Jodie Foster in *The Accused*,⁴⁰ they know what it is to prosecute a case; and because they have seen Gregory Peck fight the good fight in *To Kill a Mockingbird*,⁴¹ to know what it means to defend one. Enlightened by Orson Welles in *The Trial*⁴² and Spencer Tracey in *Judgment at Nuremberg*,⁴³ they think they know what it is to sit in judgment; and in a like manner, because they remember Henry Fonda's nagging, persistent curiosity in *12 Angry Men*,⁴⁴ even those who have never served on a criminal jury feel as if they understand its inner workings. Corrections, too, seem familiar. Even people who have never been arrested, much less spent any time in jail, often think they know what it is like to 'do time' in general population (*Cool Hand Luke*,⁴⁵ *The Shawshank*

²⁷ *Law & Order* (NBC 1990-2010). *Law & Order* has produced multiple television spin-offs: *Law & Order: Special Victims Unit* (NBC 1999-), *Law & Order: Criminal Intent* (NBC 2001-2011), *Law & Order: Trial by Jury* (NBC 2005-2006), and *Law & Order: LA* (NBC 2010-2011).

²⁸ *NCIS: Naval Criminal Investigative Service* (CBS 2003-). *NCIS* has produced two spin-offs — *NCIS Los Angeles* (2009-) and *NCIS New Orleans* (2014-).

²⁹ *Criminal Minds* (CBS 2005-).

³⁰ *True Detective* (HBO 2014-).

³¹ *Sherlock* (BBC 2010-). A modern Sherlock Holmes also appears in the series, *Elementary* (CBS 2012-).

³² *TRAINING DAY* (Warner Bros. 2001).

³³ *BAD LIEUTENANT* (Bad Lt. Productions 1992).

³⁴ *SERPICO* (Paramount Pictures 1973).

³⁵ *THE UNTOUCHABLES* (Paramount Pictures 1987).

³⁶ *L.A. Law* (NBC 1986-1994).

³⁷ *Boston Legal* (ABC 2004-2008).

³⁸ *The Good Wife* (CBS 2009-).

³⁹ *Suits* (USA 2011-).

⁴⁰ *THE ACCUSED* (Paramount Pictures 1988).

⁴¹ *TO KILL A MOCKINGBIRD* (Universal Pictures 1962).

⁴² *THE TRIAL* (Astor Pictures Corporation 1962).

⁴³ *JUDGMENT AT NUREMBERG* (United Artists 1961).

⁴⁴ *12 ANGRY MEN* (United Artists 1957).

⁴⁵ *COOL HAND LUKE* (Warner Bros./Seven Arts 1967).

Redemption,⁴⁶ *Oz*,⁴⁷ or *Orange Is the New Black*⁴⁸), to be thrown into “the hole” (*Papillon*,⁴⁹ *Murder in the First*⁵⁰), and to escape from prison (*The Prisoner*⁵¹ and *Prison Break*⁵²). Because they have seen *In Cold Blood*,⁵³ *Dead Man Walking*,⁵⁴ and *The Green Mile*,⁵⁵ many people even have the audacity to believe that they know death row and—fantastically—what it is like to die in the execution chamber.

Of course, folk criminologies are not constructed entirely from Hollywood films. Much of what the public knows about the justice system is gleaned from the news media. Although the consumption of newspapers is in steep decline,⁵⁶ and although the future of traditional television programming is unclear given the emergence of on-demand content,⁵⁷ an enormous body of criminological work on media and crime has been produced on the subject of newspaper and television news.⁵⁸ This is appropriate, as crime stories constitute a substantial portion of their total content:

Within newspapers, crime news accounts for from 4 percent to 28 percent of all the news reported, averaging about 7 percent overall Crime-and-justice news consistently is found to constitute one of the top five subject categories for newspapers. The range for national television is from 10 percent to 13 percent of total news as crime news.⁵⁹

Newspapers and television are also appropriate objects of criminological analysis because they shape public views of crime—far more than official crime rates do.⁶⁰ In an early study, F. James Davis found that public perceptions of crime related closely

⁴⁶ THE SHAWSHANK REDEMPTION (Columbia Pictures 1994).

⁴⁷ *Oz* (HBO 1997-2003).

⁴⁸ *Orange Is the New Black* (Netflix 2013-).

⁴⁹ PAPILLON (Allied Artists Pictures 1973).

⁵⁰ MURDER IN THE FIRST (Warner Bros. 1995).

⁵¹ *The Prisoner* (ITV 1967-1968).

⁵² *Prison Break* (Fox 2005-2009).

⁵³ IN COLD BLOOD (Columbia Pictures 1967).

⁵⁴ DEAD MAN WALKING (Gramercy Pictures 1995).

⁵⁵ THE GREEN MILE (Warner Bros. 1999).

⁵⁶ See SUZANNE M. KIRCHHOFF, THE U.S. NEWSPAPER INDUSTRY IN TRANSITION 1 (2010) (outlining decline in newspaper sales), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1639&context=key_workplace.

⁵⁷ See Issie Lapowsky, *What Television Will Look Like in 2025, According to Netflix*, WIRED (May 19, 2014, 6:48 PM), <http://www.wired.com/2014/05/neil-hunt/>.

⁵⁸ See generally, e.g., MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME: STUDIES IN NEWSMAKING CRIMINOLOGY (Gregg Barak, ed., 1994); RICHARD L. FOX & ROBERT W. VAN SICKEL, TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY (2001); GARY W. POTTER & VICTOR E. KAPPELER, CONSTRUCTING CRIME: PERSPECTIVES ON MAKING NEWS AND SOCIAL PROBLEMS (2d ed. 2006) (all describing role of media in the construction of crime news).

⁵⁹ SURETTE, *supra* note 6, at 67.

⁶⁰ See generally McNeely, *supra* note 2, at 3.

to newspaper coverage but had almost no relationship to official crime statistics.⁶¹ This finding was replicated when researchers concluded that a dramatic spike in public fear of crime between 1992 and 1994 was significantly more correlated to network news-related variables than to actual crime rates.⁶²

Yet public perceptions of crime and punishment may be even more influenced by entertainment media (e.g., television and film) than by news reporting.⁶³ Crime figures even more prominently in entertainment film and television than it does in newspaper or television news.⁶⁴ “The fascination with criminal activity and law enforcement is at the very heart of popular culture.”⁶⁵ Ray Surette has reported that crime and law enforcement constitute approximately one-quarter of television shows on prime time, leading him to observe, “[c]rime is seen to be the single most popular story element in the fifty-year history of U.S. commercial television.”⁶⁶ This is also true of cinema. “In most years, around 20 per cent of all films are crime movies, and around half of all films have significant crime content.”⁶⁷

Crime and punishment may figure so prominently in television and film because there are fundamental differences between news and entertainment media. When a television news anchor reports that police have raided a drug laboratory, viewers may learn the location of the bust, the street value of the seized drugs, and the names of those arrested. Viewing the newscast may confirm their stereotypes about drug dealers,⁶⁸ increase their sense of fear and insecurity,⁶⁹ or reassure them of a morally defensible divide between those employed in the pharmaceuticals industry and those dealing drugs on the street.⁷⁰ Watching the news is *cognitive*: viewers learn facts and think about ideas. But feature films and television series are *affective*.⁷¹ When viewers

⁶¹ F. James Davis, *Crime News in Colorado Newspapers*, 57 AM. J. SOC. 325, 330 (1952).

⁶² Dennis T. Lowry et al., *Setting the Public Fear Agenda: A Longitudinal Analysis of Network TV Crime Reporting, Public Perceptions of Crime, and FBI Crime Statistics*, 53 J. COMM. 61, 69-70 (2003).

⁶³ See James M. Carlson, *Crime Show Viewing by Preadults: The Impact on Attitudes Toward Civil Liberties*, 10 COMM. RES. 529, 531 (1983); Joseph Turow, *Television Entertainment and the US Health-Care Debate*, 347 LANCET 1240, 1240 (1996).

⁶⁴ Reiner, *supra* note 5, at 312 (describing overwhelming popularity of crime fiction in cinema).

⁶⁵ PHILIP SCHLESINGER & HOWARD TUMBER, *REPORTING CRIME: THE MEDIA POLITICS OF CRIMINAL JUSTICE* 6 (1994).

⁶⁶ SURETTE, *supra* note 6, at 24.

⁶⁷ Reiner, *supra* note 5, at 312.

⁶⁸ See JEWKES, *supra* note 5 (describing general stereotype confirmation in the news).

⁶⁹ See DAVID L. ALTHEIDE, *CREATING FEAR: NEWS AND THE CONSTRUCTION OF CRISIS* (2002).

⁷⁰ See Joshua Wolf Shenk, *America's Altered States: When Does Legal Relief of Pain Become Illegal Pursuit of Pleasure?*, HARPER'S MAG, May 1999, at 38, 44.

⁷¹ See SKIP DINE YOUNG, *PSYCHOLOGY AT THE MOVIES* 101-109 (2012); Joshua Meyrowitz, *Media Evolution and Cultural Change*, in HANDBOOK OF CULTURAL SOCIOLOGY 52-63 (John R. Hall et al. eds., 2010).

watch a drug bust in a feature film, the emotional centers of their brains light up.⁷² The lived experience of crime, after all, can be glamorous, exciting, and fun.⁷³ Consequently, film viewers enjoy a qualitatively different experience than do viewers watching the news. Watching a drug bust in *Traffic* is richer than the corresponding news item, not only because it runs for two hours instead of two minutes, but also because the members of the film audience are invested in a narrative.⁷⁴ Viewers come to know the backstories of the characters involved in the production of the drugs; they appreciate the heroic and the villainous in them; and they may glean normative and moral lessons from the characters.⁷⁵ Simultaneously, all of the artistic elements of cinema (e.g., acting, scripting, scoring, and cinematography) combine to create vivid subjective experiences for the viewer.⁷⁶ Viewers of crime programs may genuinely care for film characters. They may identify with them,⁷⁷ and may develop strong and affective parasocial relationships with them,⁷⁸ feeling as if the characters were not fictional figures at all, but intimate friends. Some viewers even experience grief and mourning when their favorite programs end.⁷⁹

⁷² See Jessica Hamzelou, *Brain Imaging Monitors Effect of Movie Magic*, 2777 NEW SCIENTIST 8 (2010).

⁷³ See generally JACK KATZ, *SEDUCTIONS OF CRIME* (1988) (describing the sensual attractions of violating the law).

⁷⁴ Jill Sinclair Bell, *Narrative Inquiry: More Than Just Telling Stories*, 36 TESOL Q. 207, 207 (2002).

⁷⁵ See Arthur A. Raney & Jennings Bryant, *Moral Judgment and Crime Drama: An Integrated Theory of Enjoyment*, 52 J. COMM. 402 (2002). Raney and Bryant suggest that viewer enjoyment when watching crime drama depends upon the amount of agreement between the viewer's subjectively-held view of justice and that depicted:

The viewer (on some level of consciousness) compares his or her notion of proper justice to the one presented in the drama through the justice sequence. Therefore, the process of ascribing enjoyment to a crime drama is dependent upon the relative degree of correspondence between the viewer's sense of justice and the statement made about justice in the drama.

Id. at 407. While both affective elements (based on sympathy for characters) and cognitive elements (based on judgments of justice and deservedness) influence enjoyment of crime drama, there was no significant correlation between the two measures. *Id.* at 410-11.

⁷⁶ See generally, e.g., JAMES MONACO, *HOW TO READ A FILM* (3d ed. 2000); KRISTIN THOMPSON & DAVID BORDWELL, *FILM HISTORY: AN INTRODUCTION* (1994) (both describing elements of film).

⁷⁷ See Jonathan Cohen, *Defining Identification: A Theoretical Look at the Identification of Audiences with Media Characters*, 4 MASS COMM. & SOC'Y 245, 252 (2001).

⁷⁸ See David C. Giles, *Parasocial Interaction: A Review of the Literature and a Model for Future Research*, 4 MEDIA PSYCHOL. 279 (2002); Donald Horton & R. Richard Wohl, *Mass Communication and Parasocial Interaction: Observation on Intimacy at a Distance*, 19 PSYCHIATRY 215 (1956) (both describing relationships formed between audiences and media characters).

⁷⁹ Susan Donaldson James, *TV Series Addicts Lost without "Lost,"* ABC NEWS (May 24, 2010), <http://abcnews.go.com/Health/MindMoodNews/lost-addicts-mourn-loss-popular-television-series/story?id=10729952#.T5aU3sWUWTS>. Of course, the mention of "programs" reflects an increasingly dated conception of media. The boundaries between various forms of

Three different organizations devoted to the advancement of cinema (i.e., the American Film Institute, the British Film Institute, and the Internet Movie Data Base) have ranked the greatest films of all time, and crime occupies a dominating role in each of their lists. Other genres such as horror, romance, and westerns do not appear with such frequency. Indeed, for many years—and at the time of the writing of this article—the highest-ranked film on the IMDB's top-250 list is *The Shawshank Redemption*, a 1994 crime film.⁸⁰ In the realm of television, the Writers Guild of America named *The Sopranos*—a crime drama—as the best-written television series of all time, beating out *Seinfeld*, *The Twilight Zone*, and *M*A*S*H*.⁸¹ Of course, what precisely constitutes a “crime film” is debated by scholars.⁸² Some limit the term to films set within the justice system or that employ crime as their primary theme.⁸³ Others include any film that has something significant to say about the justice system within the taxonomy.⁸⁴ Others go further. Howard Hughes suggests that crime films extend from “westerns to horror movies, murder mysteries to historical epics: in fact any film in which the law is broken.”⁸⁵ Yet, however they are defined, crime films provide viewers with a glimpse into shadowy worlds of crime and punishment that most people will never know directly. These films serve as vehicles of vicarious learning,⁸⁶ and teach people about social—and antisocial—worlds that are normally

social and mass media are collapsing and the dichotomy of television versus cinema is being rendered meaningless. This is an age of successful cable television dramas (often replete with adult language and themes, nudity, explicit sex, and graphic violence); television series packaged and sold as DVD boxed sets; pay-per-view programming, satellite dishes, streaming video, TiVO, and YouTube; video content available on iPods and cell phones; and ubiquitous big-screen home entertainment centers. Accordingly, it might prove more fruitful to consider the convergence of entertainment media in a plenary manner, rejecting the distinction between television and cinema, and to think about the role of the “crime film” in the construction of the public imagination, whether this “film” is screened in a movie theatre, played on a television, or displayed on a computer screen.

⁸⁰ *Top 250*, INTERNET MOVIE DATABASE, <http://www.webcitation.org/6OfLypC9F> (last visited Feb. 16, 2015) (showing the Internet Movie Database Top 250 webpage as it appeared on July 24, 2014).

⁸¹ *Sopranos Named Best-Written TV Series*, REUTERS (June 3, 2013, 12:55 PM), <http://www.reuters.com/article/2013/06/03/television-writing-idUSL1N0EF0L320130603>.

⁸² See Jamie Bennett, *The Good, the Bad and the Ugly: The Media in Prison Films*, 45 HOWARD J. CRIM. JUST. 97, 98 (2006); Paul Mason, *Prison Decayed: Cinematic Penal Discourse and Populism 1995-2005*, 16 SOC. SEMIOTICS 607, 611 (2006).

⁸³ See, e.g., Mike Nellis, *British Prison Movies: The Case of 'Now Barabbas'*, 27 HOWARD J. CRIM. JUST. 2, 2 (1988).

⁸⁴ See, e.g., Sean O'Sullivan, *Representations of Prison in Nineties Hollywood Cinema: From Con Air to The Shawshank Redemption*, 40 HOWARD J. CRIM. JUST. 317, 319 (2001).

⁸⁵ HOWARD HUGHES, CRIME WAVE: THE FILMGOERS' GUIDE TO THE GREAT CRIME MOVIES vii (2006) (emphasis added). Content analysis reveals that “[a]lthough crime films comprise 38% of all films with crime content central to the narrative, 62% of films with central crime content are classified into other genres.” Jessica Allen et al., *The Changing Generic Location of Crime in Film: A Content Analysis of Film Synopses, 1945-1991*, 47 J. COMM. 89, 98 (1997).

⁸⁶ See ELLIOT ARONSON, THE SOCIAL ANIMAL 281 (8th ed. 1999).

concealed from the public's gaze.⁸⁷ In fact, members of the public develop their attitudes about crime and the justice system based upon what they view on the screen.⁸⁸

Crime films provide modern audiences with a very important form of spectacle.⁸⁹ Indeed, television, video, and film are the new media for an ancient ceremony.⁹⁰ They allow anomic, heterogeneous audiences to engage in a shared understanding about the causes of crime, the nature of justice, and the corrective of punishment.⁹¹

II. FUNCTIONS OF PUNISHMENT

Punishment is imposed to serve four key objectives related to the offender: retribution, deterrence, incapacitation, and rehabilitation.⁹² But the ceremonies surrounding crime and punishment also serve essential social functions. In *The Theory of Moral Sentiments*, Adam Smith suggested that human beings have a natural affinity for a smoothly-operating society. They resort to punishment only when gentle and fair means cannot ensure social function.⁹³ Rituals of punishment are pragmatic because they can shame the offender and deter others from similar conduct.⁹⁴ But, Smith suggests, rituals of punishment do something more: they also cultivate the public's sense of compassion and mercy:

When the guilty is about to suffer that just retaliation, which the natural indignation of mankind tells them is due to his crimes; when the insolence of his injustice is broken and humbled by the terror of his approaching punishment; when he ceases to be an object of fear, with the generous and humane he begins to be an object of pity. The thought of what he is about to suffer extinguishes their resentment for the sufferings of others to which he has given occasion. They are disposed to pardon and forgive him, and to save him from that punishment, which in all their cool hours they had considered as the retribution due to such crimes. Here, therefore, they have occasion to call to their assistance the consideration of the general interest of society. They counterbalance the impulse of this weak and partial humanity by the dictates of a humanity that is more generous and

⁸⁷ See generally JON FRAULEY, *CRIMINOLOGY, DEVIANCE, AND THE SILVER SCREEN: THE FICTIONAL REALITY AND THE CRIMINOLOGICAL IMAGINATION* (2010) (noting that the "fictional reality" of crime film can teach observers about the theory of crime).

⁸⁸ See Linda Heath & Kevin Gilbert, *Mass Media and Fear of Crime*, 39 AM. BEHAV. SCI. 379, 380 (1996); McNeely, *supra* note 2, at 3.

⁸⁹ See generally GUY DEBORD, *SOCIETY OF THE SPECTACLE* (1994) (identifying a pseudoworld of images and representations that mirror – and replace – formerly-lived realities).

⁹⁰ See generally MARK PIZZATO, *THEATRES OF HUMAN SACRIFICE* (2005) (suggesting that media representations of violence operate as modern analogues of rituals of human sacrifice).

⁹¹ See George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, 26 J. COMM. 173, 174 (1976).

⁹² See J.C. Oleson, *The Punitive Coma*, 90 CAL. L. REV. 829, 838 (2002) (identifying "the four cornerstones of penology").

⁹³ See generally ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (Filiquarian Publishing, LLC 2007) (originally published in 1759).

⁹⁴ *Id.* at 109.

comprehensive. They reflect that mercy to the guilty is cruelty to the innocent, and oppose to the emotions of compassion which they feel for a particular person, a more enlarged compassion which they feel for mankind.⁹⁵

Similarly, Émile Durkheim viewed the operation of the justice system as an affirmation of a community's morality.⁹⁶ The transgressing offender, by infringing upon community norms, becomes a common enemy who affirms morality, evokes solidarity, and restores normative equilibrium.⁹⁷ Through its criminal proceedings, Durkheim claimed, the community is morally integrated. Durkheim also suggested that punishment provided a mechanism for society to evolve its norms. Behavior that is punished as criminal today may be the precursor of future morality.

According to Athenian law, Socrates was a criminal, and his condemnation was no more than just. However, his crime, namely the independence of his thought . . . served to prepare a new morality and faith which the Athenians needed since the traditions by which they had lived until then were no longer in harmony with the current conditions of life.⁹⁸

In this way, the spectacle of public punishment serves a communicative function, operating upon the moral sentiments of the public to foster social solidarity and advance social evolution.⁹⁹ Working in the tradition of Durkheim, Erving Goffman suggests that rituals involve: (1) the situational co-presence of two or more persons; (2) engaged in focused interaction; (3) in a way that produces social solidarity; (4) thereby honoring socially-valued "sacred objects"; experiencing (5) moral uneasiness when ritual proprieties are violated.¹⁰⁰

In *Wayward Puritans*, Kai Erikson demonstrated that seventeenth-century Puritans created and policed deviant behavior in many of the ways that Durkheim described.¹⁰¹ Erikson concluded that the Puritans' hysteria about witchcraft served several purposes: effectively uniting the Puritan community; deterring aberrant conduct; and refocusing people on their religious values.

But as Jack Katz has observed, there are fundamental differences between the social meaning associated with the public ceremonies described by Durkheim and Erikson and the social meaning associated with contemporary crime media. Writing about crime news, Katz wrote:

⁹⁵ *Id.*

⁹⁶ See ÉMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 70-71 (Sarah A. Solovay & John H. Mueller trans., George E.G. Catlin ed., 1950).

⁹⁷ *Id.*

⁹⁸ *Id.* at 71.

⁹⁹ See generally JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* (1970).

¹⁰⁰ See RANDALL COLLINS, *INTERACTION RITUAL CHAINS* 23-25 (Paul J. DiMaggio et al. eds., 2004) (summarizing elements of Goffman's theory of ritual).

¹⁰¹ See generally KAI ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* (1966) (applying Durkheim's analysis to Puritan society).

There is a fundamental, historical difference between the social meanings of contemporary crime news and those of the public ceremonies of labeling deviants that Durkheim had in mind and that Kai Erikson documented in his celebrated book on seventeenth-century Puritans. Contemporary news stories on crime focus on stages in the criminal justice process before punishment On the surface, the contemporary reading of crime news disconcerts rather than reassures.¹⁰²

Katz also notes that the modern newspaper focuses upon criminal acts and trials, not upon punishment.¹⁰³ Accordingly, the pre-industrial rituals of punishment described by Durkheim and Erikson function very differently than newspaper accounts of crime:

Before the nineteenth century, public viewing of deviance may have had a morally integrative effect on the community; but to make the same analysis of today's crime news is to ignore its distinctive contemporary social organization. Metropolitan daily news stories on victimization and arrest are routine and are only in the extraordinary case followed up by stories on conviction and punishment.¹⁰⁴

The contemporary focus on crime, the criminal, and arrest (and the corresponding lack of focus on the victim, on conviction, or on punishment) is—at least in part—a function of the disappearing of public punishments. Katz notes, “in post-Enlightenment society . . . punishment retreated to the privacy of the prisons, emerging into publicity only rarely and then in shame.”¹⁰⁵ Historians of punishment like Michel Foucault and Pieter Spierenberg have produced seminal scholarship about this fundamental shift from public to concealed punishments during the Enlightenment.¹⁰⁶

III. THE RISE OF THE PRISON

Throughout most of human civilization, criminal punishments were highly public events. Spierenberg writes, “we may say that preindustrial people were familiar with the existence of public executions. These were part of life for them and on the whole were not considered as objectionable.”¹⁰⁷ These preindustrial public executions were brutal and painful affairs,¹⁰⁸ not at all sanitized and bloodless in the way that modern executions strive to be.¹⁰⁹ Michel Foucault opened his seminal work, *Discipline and Punish* (1977), with a harrowing recounting of the 1757 public execution of Damians the Regicide by drawing- and-quartering:

¹⁰² Jack Katz, *What Makes Crime 'News'?*, 9 MEDIA, CULTURE & SOC'Y 47, 64 (1987).

¹⁰³ *Id.* at 66.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., PIETER SPIERENBURG, THE SPECTACLE OF SUFFERING 87 (1984); MICHEL FOUCAULT, DISCIPLINE AND PUNISH 4 (Alan Sheridan trans., 1977).

¹⁰⁷ SPIERENBURG, *supra* note 106, at 87.

¹⁰⁸ See ROBERT MILLS, SUSPENDED ANIMATION: PAIN, PLEASURE AND PUNISHMENT IN MEDIEVAL CULTURE 16 (2005).

¹⁰⁹ See AUSTIN SARAT, WHEN THE STATE KILLS 81 (2001).

The horses tugged hard, each pulling straight on a limb, each horse held by an executioner. After a quarter of an hour, the same ceremony was repeated and finally, after several attempts, the direction of the horses had to be changed, thus: those at the arms were made to pull towards the head, those at the thighs towards the arms, which broke the arms at the joints. This was repeated several times without success. He raised his head and looked at himself. Two more horses had to be added to those harnessed to the thighs, which made six horses in all. Without success.¹¹⁰

Damiens' joints had to be hacked to pieces. His muscles were then peeled away from his bones by iron pincers and he was reduced to ashes (possibly while still alive). In the pages that follow, however, Foucault contrasts this sloppy and horrific execution against the well-ordered regulation of young Parisian prisoners, documenting the profound shift from pre-Enlightenment punishments (that were very public and very, very corporal) to post-Enlightenment punishments just eighty years later (that were—and still are—occluded from public view and carceral in nature).¹¹¹

Pre-Enlightenment executions often drew hundreds, even thousands, of spectators. In fact, the last public execution in the United States, the 1936 hanging of Rainey Bethea, drew more than twenty thousand people.¹¹² But the rise of the prison equaled the fall of public executions. Steven Wilf writes:

A mid-eighteenth-century traveler noted with surprise that parents in London regularly took their children to watch hangings. Upon returning home, the children would be whipped so that they would remember the spectacle. Yet by the 1780s, such literal dependence upon the visual as part of punishment was in retreat. Increasingly, the criminal justice system relied on what remained unseen but imagined.¹¹³

Today, it is not executions but trials that constitute public spectacles (e.g., the trial of Leopold and Loeb, the Scopes "Monkey" trial, the Hauptman [Lindbergh Baby] case, and—spectacularly—the O.J. Simpson trial all have been lauded as iconic "trials of the century")¹¹⁴ while punishment is imposed behind the walls of the prison.¹¹⁵

¹¹⁰ FOUCAULT, *supra* note 106, at 4.

¹¹¹ See generally LOUIS MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865 (1989) (describing the eighteenth and nineteenth century shift from public executions to confinement in penitentiaries); SPIERENBURG, *supra* note 106 (describing the transition from public punishment to non-public incarceration).

¹¹² See Renee Montagne, *The Last Public Execution in America*, Morning Edition, NATIONAL PUBLIC RADIO (May 1, 2001), available at <http://www.npr.org/programs/morning/features/2001/apr/010430.execution.html>.

¹¹³ Steven Wilf, *Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England*, 5 YALE J.L. & HUMAN. 51, 51 (1993).

¹¹⁴ See generally 1 CRIMES AND TRIALS OF THE CENTURY (Steven Chermak & Frankie Y. Bailey eds., 2007) (describing high profile "crimes of the century").

¹¹⁵ See Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461, 462 (1995).

Modern executions are often conducted in the dead of night,¹¹⁶ observed only by prison officials, surviving family members of the victim, media representatives, and a handful of citizen witnesses.¹¹⁷ But removing punishment from the public gaze may leave society with an unsatisfied appetite for ritualized punishment. David Garland writes:

Of course the penal institutions of modern society deny their association with cruelty, and popular sadism is frowned upon by the high-minded moralists of the community, but Nietzsche insists that beneath this hypocrisy . . . these passions continue to exist: “. . . pleasure in cruelty is not really extinct today; only, given our greater delicacy, that pleasure has had to undergo a certain sublimation.”¹¹⁸

Society used to enact a cathartic ritual through public punishment, a kind of ceremonial death and rebirth.¹¹⁹ In the same way that dying-god rites were conducted by early societies in an attempt to restore withered crops through the use of sympathetic magic,¹²⁰ public rituals of punishment may have represented an attempt to wield control over criminal behavior. The offender was publicly transformed from a citizen into a criminal and was denounced for his transgressions. The criminal (who had victimized the community through his offense) was in turn punished (i.e., made victim), and a kind of moral equilibrium was thereby restored.¹²¹ In cases of non-lethal punishment (e.g., flogging or the pillory), the ritual of public punishment allowed for the possibility of redemption and reintegration.¹²² Thus, as a variation on the morality play,¹²³ public punishment communicated important moral lessons to audience members and reinforced social solidarity.¹²⁴ Members of the community were reassured of their safety. And in seeing the offender punished for his crimes, community members were reassured that they were doing the right thing by adhering to norms and obeying laws.

¹¹⁶ See JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 81 (1997).

¹¹⁷ *States Go Hunting for Execution Witnesses*, JACKSON SUN, <http://orig.jacksonsun.com/fe/exec/witnesses.shtml>.

¹¹⁸ DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 63 (1990).

¹¹⁹ See MARTHA GRACE DUNCAN, *ROMANTIC OUTLAWS, BELOVED PRISONS* 32-37 (1996). See generally MILLS, *supra* note 108 (drawing connections between medieval hangings of criminals and traitors and execution imagery of Christ and saints).

¹²⁰ See 1 JAMES GEORGE FRAZER, *THE GOLDEN BOUGH* 52-54 (3d ed. 1935).

¹²¹ See Herbert Morris, *Persons and Punishment*, 52 *THE MONIST* 475, 478 (1968).

¹²² See generally, e.g., JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989) (articulating theory of restorative justice).

¹²³ See generally ROBERT POTTER, *THE ENGLISH MORALITY PLAY: ORIGINS, HISTORY, AND INFLUENCE OF A DRAMATIC TRADITION* (1975) (describing the development of a genre in which the protagonist confronts characters that personify various moral qualities, urging him to choose a moral life over an evil one).

¹²⁴ DURKHEIM, *supra* note 96, at 70-71.

IV. MEDIA

Society used to enact a ritual of crime and punishment upon the scaffold but with the Enlightenment-era sequestration of punishment, society was denied the direct spectacle and grew reliant upon media accounts.¹²⁵ Of course, even before the advent of film and television, tales of crime, deviance, and punishment were extraordinarily popular. “The best sellers were the literature of the gallows. These were the last dying confessions of murderers and an account of their executions.”¹²⁶ Today, because capital punishment is semi-covert, imposed behind prison walls otherwise barred against the eyes of the wider public,¹²⁷ this ritual must take place upon celluloid.¹²⁸ “Increasingly, then, it is television crime shows and big budget detective movies . . . that constitute Foucault’s ‘hundreds of tiny theatres of punishment.’”¹²⁹ Television

¹²⁵ See Cheliotis, *supra* note 1, at 178; Wilf, *supra* note 113, at 51. Mark Pizzato writes:

The repetition of violence onstage or onscreen, in its fictional safety as “just play,” might appear quite distinct from actual human or animal bloodshed in religious sacrifice. (“No animals were harmed in the making of this movie,” the screen sometimes professes.) Yet theatre’s sublimation of ritual bloodshed towards fictional violence still involves the investment of emotion and time by actors, directors, designers, technicians, and spectators. With cinema there is a lapse in time between the film artists’ sacrifices and the audience’s ritual participation. But bodies and minds also submit to the rite on both sides of the screen.

PIZZATO, *supra* note 90, at 3.

¹²⁶ HELEN MACGILL HUGHES, *NEWS AND THE HUMAN INTEREST STORY* 140 (1940); *accord* WENDY KAMINER, *IT’S ALL THE RAGE: CRIME AND CULTURE* 51 (1995).

In addition to monsters and murders, executions were staples for early presses. Eighteenth-century broadsheets circulated the scaffold speeches of the condemned. Stories of executions, like executions themselves, were supposed to be instructive as well as entertaining; ballads purportedly memorializing the confessions of notorious criminals were presented as moral tales about the perils and costs of crime. The tradition of gallows literature continued in nineteenth-century America. Indeed, public reports of executions gained new importance as public executions were replaced by private, invitation-only procedures within prison walls.

Id. at 51. Between April 30 and December 23, 2013, the University of Cambridge Library presented an exhibit entitled “Read All about It: Wrongdoing in Spain & England in the Long Nineteenth Century.” The assembled collection of chapbooks – printed broadsides and pamphlets about “entertaining accounts of criminals and their crimes” – contrasted published works from 1860s Spain (where only ~20% of the population could read, and chapbooks therefore employed dramatic visual content and easy-to-remember verses) with works from 1860s England (where approximately two-thirds of the population could read, and chapbooks therefore used more sophisticated language to communicate stories about criminal wrongdoing). See *Wrongdoing in Spain and England in the Long Nineteenth Century*, CAMBRIDGE UNIVERSITY LIBRARY, <https://exhibitions.lib.cam.ac.uk/wrongdoing/>.

¹²⁷ See Madow, *supra* note 115, at 462.

¹²⁸ See Gerbner & Gross, *supra* note 91, at 178 (noting that television communicates a great deal to audiences “about social norms and relationships, about goals and means, about winners and losers, about the risks of life and the price for transgressions of society’s rules”).

¹²⁹ Jeff Ferrell, *Cultural Criminology*, 25 ANN. REV. SOC. 395, 408-09 (1999) (citations omitted).

(and film) provides the public with a common cause.¹³⁰ Contemporary moral rituals do not occur through the news media, since if-it-bleeds-it-leads newspapers and television news focus upon criminal acts, not upon criminal actors. They report another violent crime, another arrest, but they do not construct crime as a moral or normative question. Although newspaper stories may, as Katz suggests, prompt readers to work out their own moral positions “on dimensions of moral callousness, personal audacity and faith in collective enterprises,”¹³¹ it is also entirely possible that the proliferation of graphic media accounts of crime and punishment may cheapen authentic experiences, desensitize viewers, and inhibit the willingness of viewers to act in the face of real atrocity.¹³² The moral sympathies identified by Adam Smith as operative in public punishment are not invoked, since the media, in striving for objective fact, extirpate the normative and dramatic dimensions of crime that make public rituals of punishment so symbolically meaningful.

V. RITUAL

Therefore, to find normative guidance in crime and punishment, modern audiences must turn from news to entertainment media; for in crime films, there is still a moral ritual at work. “Film is not the same as ritual but just what substitutes for it in a modern, secular, and egalitarian society, which is therefore massively deritualized, desacralized.”¹³³ Heroes prevail and wrongdoers fail. Villains (usually) get caught. If arrested, criminals are found guilty at trial, while those who will not come quietly rarely escape. If the conflict should be resolved with a shootout, the bad guys cannot manage to shoot heroic police officers, no matter how many bullets they fire; on the other hand, superhero cops seem to have magic guns and—like the Canadian Mounties—always seem to get their man. In this way, crime films provide viewers with an explanation of crime and a sense of dramatic catharsis,¹³⁴ just as the imposition of an actual criminal sanction might.¹³⁵ Some legal thinkers suggest that in order to constitute punishment, an act must be “imposed and administered by an authority constituted by a legal system against which the offense is committed,”¹³⁶ but even if the “punishment” is not imposed by courts and prisons, but through divine retribution

¹³⁰ See ELAYNE RAPPING, *LAW AND JUSTICE AS SEEN ON TV* 264 (2003) (noting that “television . . . has ‘chosen’ crime as the issue and ‘criminals’ as the enemy against whom we as Americans can most readily and passionately unite—at a time when social fragmentation, disaffection, and alienation are increasingly serious threats to the national spirit”).

¹³¹ Katz, *supra* note 102, at 71.

¹³² See generally SUSAN SONTAG, *ON PHOTOGRAPHY* (1977); SUSAN SONTAG, *REGARDING THE PAIN OF OTHERS* (2003) (both describing desensitizing aspects of photographic representations).

¹³³ Andrew J. McKenna, *Public Execution*, in *LEGAL REELISM: MOVIES AS LEGAL TEXTS* 225, 238 (John Denvir ed., 1996).

¹³⁴ See generally Aristotle, *Poetics*, in *THE BASIC WORKS OF ARISTOTLE* 1455, 1455-1487 (Richard McKeon ed., 1941).

¹³⁵ See John Stannard, *Retaliation, Catharsis and the Criminal Process*, 52 N. IR. LEGAL Q. 162, 167 (2001).

¹³⁶ H. L. A. Hart, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 1, 5 (1968).

and instant karma, crime films provide viewers with moral narratives. Certainly, there are counter-traditional films in which evil triumphs and the justice system fails,¹³⁷ but the fundamental sacrificial rituals of public punishment continue to operate in most crime films.¹³⁸

Crime films, however, may not reinforce society in the manner that Durkheim and Erikson envisioned.¹³⁹ While crime films reflect society and society's preoccupation with crime and punishment, they also distort what they reflect.¹⁴⁰ For example, property crimes like theft, larceny, and destruction of property are the most common category of offense, comprising approximately 88.1 percent of the crime in the United States.¹⁴¹ But common theft does not make for compelling drama in the way that rape and murder do, and is therefore underrepresented in film. Conversely, while violent crimes (murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault) constitute only 11.9 percent of the crime in the United States,¹⁴² they dominate entertainment programming. Indeed, about two-thirds of the crimes depicted on prime time television are murder, assault, or armed robbery.¹⁴³ These representations can lead the viewing public to fear the wrong things¹⁴⁴—overestimating the incidence of violent crime while simultaneously underestimating the risk of property crime.

Just as crimes are distorted in the entertainment media, so, too, are the depictions of the criminals who commit them. Of the 1.6 million state and federal prisoners confined in U.S. prisons, most are young,¹⁴⁵ male (males are imprisoned at a rate 14 times higher than females),¹⁴⁶ and of either Black (38.8 percent) or Hispanic (22.6

¹³⁷ See FRAULEY, *supra* note 87, at 48-49; RAFTER, *supra* note 7, at 213-33.

¹³⁸ See PIZZATO, *supra* note 90, at 15-17.

¹³⁹ See Katz, *supra* note 102, at 64 (“There is a fundamental, historical difference between the social meanings of contemporary crime news and those of the public ceremonies of labelling deviants that Durkheim had in mind that Kai Erikson documented . . .”) (citation omitted).

¹⁴⁰ See SURETTE, *supra* note 6, at 47 (“Whatever the media show is the opposite of what is true. In every subject category—crimes, criminals, crime fighters, the investigation of crimes, arrests, the processing and disposition of cases—the entertainment media present a world of crime and justice that is not found in reality.”).

¹⁴¹ See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2013 tbl. 1 (2014) (reporting an estimated 1,163,146 violent crimes and an estimated 8,632,512 property crimes during the year).

¹⁴² See *id.* at tbl. 1 (noting that murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault comprise approximately 11.9% of the estimated crimes in the Uniform Crime Reports).

¹⁴³ James Garofalo, *Crime and the Mass Media: A Selective Review of Research*, 18 J. RES. CRIME & DELINQ. 319, 326 (1981).

¹⁴⁴ See generally BARRY GLASSNER, THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS (1999) (noting that while actual risk has not increased, the perception of danger has increased dramatically in the last twenty years).

¹⁴⁵ See DEP'T OF JUST. PAUL GUERINO ET AL., PRISONERS IN 2010 tbl. 13 (2012) (noting that 29.7% of prisoners are between 18 and 29 years old).

¹⁴⁶ *Id.* at 7 (noting male imprisonment rate of 943 per 100,000 male U.S. residents and female imprisonment rate of 67 per 100,000 female U.S. residents).

percent) descent.¹⁴⁷ Most prisoners are poor.¹⁴⁸ But curiously, media criminals are often depicted as mature, white, male, and of high social status.¹⁴⁹ They are portrayed as urbane masterminds, villains who are motivated by pathological greed, incorrigible psychopathy, or a thirst for revenge.¹⁵⁰ But these “psychopathic villains” of television and film do not accord with the reality of clinical psychopathy.¹⁵¹ This can create unrealistic expectations in the minds of viewers, and can ultimately color their voting behavior in matters related to punishment and justice.¹⁵²

Thus, crime films may not unite anomic communities. In fact, they may affirmatively increase (rather than decrease) the fear of crime.¹⁵³ They may criticize the justice system (fostering cynicism) rather than reinforcing respect for the idea of the rule of law.

In the mass entertainment media vision of society, evil and cunning predator criminal wolves create general mayhem and prey on weak, defenseless—and often stupid—victim sheep (women, the elderly, the general public), while good crime-fighting hero sheepdogs (middle-class, white, and male) intervene and protect the sheep in the name of retributive justice. Over the course of this century the character of this portrait has darkened. Media criminals have become more animalistic, irrational, and predatory—as have media crime fighters—and media crimes more violent, random, senseless, and sensational. In parallel, media victims have become more innocent. The differences portrayed between the general public and criminals have thus swollen. In a subtle shift, the earlier predatory but rational criminal wolves have become unpredictable, irrational mad dogs, while over the years the noble sheepdogs have become wolflike vigilantes for whom the law is an impediment to stopping crime.¹⁵⁴

Today, fear of victimization and a belief that society is disintegrating combine to create enormous interest in the problem of crime and the solution of punishment. But

¹⁴⁷ *Id.* at tbl. 12 (reporting male and female imprisonment rates for Whites, Blacks, and Hispanics).

¹⁴⁸ See JEFFREY H. REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON* 109-110 (6th ed. 2001).

¹⁴⁹ See Brendan Maguire, *Image vs. Reality: An Analysis of Prime-Time Television Crime and Police Programs*, 11 *CRIME & JUST.* 165 (1988).

¹⁵⁰ See, e.g., Garofalo, *supra* note 143, at 326 (noting that in one study of television programming “fully three-quarters of the criminals were motivated by greed”).

¹⁵¹ See Samuel J. Leistedt & Paul Linkowski, *Psychopathy and the Cinema: Fact or Fiction?*, 59 *J. FORENSIC SCI.* 167, 172 (2014) (reporting that in an analysis of 400 feature films depicting psychopaths, cinematic representations usually deviated from clinical realities—the “psychopaths” of film legend were not psychopathic in any clinical sense).

¹⁵² See Cheliotis, *supra* note 1, at 178 (“the media play upon public fears by overstating the danger of criminal victimisation, targeting weak and marginalised swathes of the population, criticising the authorities for laxity, calling for more and harsher punitive measures, and blocking or neutralising the imagery of human suffering thereby caused”).

¹⁵³ See Lowry et al., *supra* note 62, at 69.

¹⁵⁴ SURETTE, *supra* note 6, at 49.

because the public no longer participates in the ritual of the scaffold, and because modern punishments are concealed from the public gaze, viewers must turn to popular culture for their symbolic rituals.

However, watching increasingly graphic depictions of crime on the silver screen can actually magnify society's pre-existing fear of crime and incite the public to ever-increasing levels of punishment.¹⁵⁵ As celluloid replaces the scaffold, media rituals of crime and punishment can fuel moral panics about criminal behavior,¹⁵⁶ thereby contributing to an increasing willingness to incarcerate more and more people,¹⁵⁷ for longer and longer periods of time, under conditions that may strain the very boundaries of human endurance.¹⁵⁸ This drift toward more (and more severe) punishment has been decried by a number of researchers.¹⁵⁹ Such penal populism is characterized by grassroots support for three strikes legislation,¹⁶⁰ expanded use of supermax

¹⁵⁵ See Cheliotis, *supra* note 1, at 178; Mason, *supra* note 82, at 620.

¹⁵⁶ See generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND THE ROCKERS* (1972) (describing structure of moral panics); ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* (1994) (same); Enver Solomon, *Is the Press the Real Power behind Punitivism?*, 59 CRIM. JUST. MATTERS 34 (2005) (considering the role of the media to shape criminal justice policy).

¹⁵⁷ See J.C. Oleson, *A Decoupled System: Federal Criminal Justice and the Structural Limits of Transformation*, 35 JUST. SYS. J. 383, 384 (2014).

[T]he United States is an outlier in terms of imprisonment rates. "A far higher proportion of adults is imprisoned in the United States than in any other country in the entire world. Our incarceration rate, which is nearly 750 individuals per 100,000 in the population, is now roughly five to ten times the rate of most other Western industrialized nations." Jails and prisons in the United States house a collective 2.3 million inmates, representing an astonishing imprisonment rate of 743 per 100,000 Americans. Worldwide, Rwanda has the second-highest incarceration rate (595 per 100,000) and Russia has the third-highest rate (568 per 100,000), yet it is reported that the U.S. rate exceeds the rate of the top 35 European countries *combined*. Also disturbing is the pronounced racial imbalance in American prisons. For white men between the ages of 18 and 64, 1-in-87 is incarcerated; for Hispanics, the rate is 1-in-16; yet for black men, the rate is 1-in-12. It is an unflattering and worrying portrait of American penal exceptionalism.

Id. at 384-85 (citations omitted).

¹⁵⁸ See CRAIG HANEY, *REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT* 9-13 (2006).

¹⁵⁹ See generally GARLAND, *supra* note 118; JOHN PRATT ET AL., *THE NEW PUNITIVENESS: TRENDS, THEORIES AND PERSPECTIVES* (2005); JULIAN V. ROBERTS ET AL., *PENAL POPULISM AND PUBLIC OPINION* (2003); LORD WINDLESHAM, *PUNISHMENT, POLITICS, AND POPULISM* (1998); Natasha Frost, *Beyond Public Opinion Polls: Punitive Public Sentiment & Criminal Justice Policy*, 4 SOC. COMPASS 156 (2010) (all criticizing the punitive turn in punishment).

¹⁶⁰ See generally MIKE REYNOLDS & BILL JONES, *THREE STRIKES AND YOU'RE OUT!* (1996); FRANKLIN ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* (2001); J.C. Oleson, *Habitual Criminal Legislation in New Zealand: Three Years of Three-Strikes*, AUSTL. N.Z. J. CRIMINOLOGY (2014), available at <http://anj.sagepub.com/content/early/2014/06/05/0004865814532660.full.pdf+html> (last visited Aug. 8, 2014) (all describing the popular origins of California's three strikes legislation).

incarceration,¹⁶¹ continuing use of capital punishment,¹⁶² and over-reliance on the prison as a vehicle of punishment.¹⁶³

Thomas Mathiesen cautions that in the media, the prison is viewed as “a necessary if not always fully successful method of reaching its purported goals. The prison solution is taken as paradigmatic, so that a rising crime rate is viewed as still another sign showing that prison is needed.”¹⁶⁴ Even the dismal recidivism rates associated with modern prisons—67.5 percent of prisoners are rearrested within three years from their release from prison¹⁶⁵—are not enough to stem the public’s seemingly-insatiable appetite for increasing levels of incarceration.¹⁶⁶

There are, of course, signs that penal populism may be declining (or, at least, is being constrained by the unsustainable fiscal costs of a runaway justice system). For example, after 40 years of year-on-year increases in prison populations, “[t]he overall U.S. prison population declined in 2010 for the first time since 1972.”¹⁶⁷ Similarly, some of the most egregious excesses of California’s three strikes law were ameliorated by voter initiative in 2012.¹⁶⁸ At approximately the same time, the Supreme Court ordered California to reduce its prison population by 46,000 inmates (down to 137.5% of the prison system’s design capacity) within two years.¹⁶⁹ The death penalty has been

¹⁶¹ See generally JAMES H. BRUTON, *THE BIG HOUSE: LIFE INSIDE A SUPERMAX SECURITY PRISON* (2004) (describing the operation of a super-maximum security prison).

¹⁶² See SARAT, *supra* note 109.

¹⁶³ See generally DANIEL BURTON-ROSE, *THE CELLING OF AMERICA* (1998); MICHAEL J. LYNCH, *BIG PRISONS BIG DREAMS* (2007); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006) (all describing aspects of mass incarceration in the United States).

¹⁶⁴ THOMAS MATHIESEN, *PRISON ON TRIAL* 144 (2000).

¹⁶⁵ See PATRICK A. LANGAN & DAVID J. LEVIN, *RECIDIVISM OF PRISONERS RELEASED IN 1994* 1 (2002).

¹⁶⁶ See Richard L. Nygaard, *The Myth of Punishment: Is American Penology Ready for the 21st Century?*, 5 REGENT U. L. REV. 1, 4-9 (1995). Nygaard writes:

American penology . . . is in shambles The law predetermines to hold responsible and punish any should they transgress the law. For most, the punishment is prison. Few question why. Society seems somehow to think collectively that we must only imprison. It is a seemingly fitting epilogue to a criminal trial. Prison [however] is systemically unsuccessful except as a temporary human warehouse, a social bandaid Is it not time we recognize the hard fact that our system is not correcting significant numbers of malefactors? Not preventing crimes? Not deterring criminals? Not assuring anyone's safety? . . . Our penological system stumbles uncertainly in darkness, clinging to antiquated and ineffective notions. The American prison is like a cathedral to a false god. Our response—build more of them.

Id. at 4-9.

¹⁶⁷ PAUL GUERINO ET AL., *PRISONERS IN 2010* 1 (2012).

¹⁶⁸ See Matt Taibbi, *Cruel and Unusual Punishment: The Shame of Three Strikes Laws*, ROLLING STONE, Mar. 27, 2013, <http://www.rollingstone.com/politics/news/cruel-and-unusual-punishment-the-shame-of-three-strikes-laws-20130327> (describing passage of California’s three strikes law and effects of 2012’s Proposition 36).

¹⁶⁹ *Brown v. Plata*, 563 U.S. ___, 131 S. Ct. 1910, 1917 (2011).

rejected by several state jurisdictions in recent years,¹⁷⁰ while its application has been restricted by a number of key Supreme Court holdings.¹⁷¹ In many jurisdictions, officials are looking seriously at prisoner reentry in an effort to stem the revolving door of prison recidivism.¹⁷² Evidence-based practice—the notion that practical decisions should be based on empirical, quantifiable research data—has been adapted from medicine to community corrections.¹⁷³ Drug courts and other problem-solving courts are proliferating.¹⁷⁴ Indeed, the concept of rehabilitation, which very nearly died in the 1970s,¹⁷⁵ is enjoying a renaissance of serious scholarly attention.¹⁷⁶ But it would be premature to suggest that these initiatives are proof of any genuine transformation in criminal justice.¹⁷⁷ Incarceration rates in the United States remain at near-record highs,¹⁷⁸ prison remains a default response to law breaking (even non-violent

¹⁷⁰ DEATH PENALTY INFORMATION CENTER, *States With and Without the Death Penalty*, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Aug. 8, 2014) (noting that the death penalty was abolished in New York and New Jersey in 2007, in New Mexico in 2009, in Illinois in 2011, in Connecticut in 2012, and in Maryland in 2013).

¹⁷¹ See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding that states may not execute offenders for crimes against the person that do not result in death of the victim); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that execution of those who were younger than eighteen at the time of their offense violates the Eighth Amendment prohibition on cruel and unusual punishment); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that execution of mentally retarded defendants violates the Eighth Amendment prohibition on cruel and unusual punishment).

¹⁷² See Oleson, *supra* note 157, at 387-90, 395-96 (describing state and federal efforts to improve prisoner reentry).

¹⁷³ See generally, e.g., William D. Burrell & Edward E. Rhine, *Implementing Evidence-Based Practices in Community Corrections*, 15 JUST. RES. POL'Y 143 (2013) (outlining application of evidence-based practices model to probation and parole practice).

¹⁷⁴ See C. WEST HUDDLESTON, III, DOUGLAS B. MARLOWE & RACHEL CASEBOLT, *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES* 1, 1 (2008) (displaying a timeline that shows the increase of drug and problem-solving courts from the first drug court in 1989 to 2147 drug courts and 3204 problem-solving courts by 2007).

¹⁷⁵ Francis T. Cullen, *The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference*, 43 CRIMINOLOGY 1, 4 (2005).

¹⁷⁶ See generally, e.g., LEAM A. CRAIG ET AL., *WHAT WORKS IN OFFENDER REHABILITATION* (2013); BONITA M. VEYSEY ET AL., *HOW OFFENDERS TRANSFORM THEIR LIVES* (2009); TONY WARD & SHADD MARUNA, *REHABILITATION* (2007); Francis Cullen, *Taking Rehabilitation Seriously*, 14 PUNISHMENT & SOC'Y 94 (2012) (all describing growing recognition of the value of rehabilitation).

¹⁷⁷ See Oleson, *supra* note 157, at 396-99 (describing structural barriers to transformation in the criminal justice system).

¹⁷⁸ *Id.* (describing United States incarceration rates).

violations),¹⁷⁹ and fear of crime remains high.¹⁸⁰ And crime entertainment continues to fill our screens.¹⁸¹

VI. CONCLUSION

Given society's increasing reliance upon the film imagery to understand crime and punishment, it is entirely possible that a spiral of distorted media images and penal populism has enthralled the modern public.

[R]ather than cultivating communitarianism and deliberative democracy, the media play upon public fears by overstating the danger of criminal victimisation, targeting weak and marginalised swathes of the population, criticising the authorities for laxity, calling for more and harsher punitive measures, and blocking or neutralising the imagery of human suffering thereby caused.¹⁸²

The logic is straightforward. Watching fictional criminals prey upon fictional victims, audiences internalize the increasingly graphic depictions that they see on the screen. They come to believe that criminals are bestial, irrational villains who—unless forcibly stopped—will stop at nothing to injure or kill innocent people. Presented with this message, audiences grow ever more fearful of victimization¹⁸³ and therefore support punitive measures that promise to be tough on crime. Once enacted, these measures are used to widen the net of the criminal justice system and to incarcerate individuals who would not have otherwise gone to prison. Already-fearful viewers can then interpret the resulting increase in the rate of imprisonment as further confirmation of rampant criminality and lawlessness, further fuelling a cycle of punishment-and-fear.

¹⁷⁹ See MATHIESEN, *supra* note 164, at 144 (describing prison as paradigmatic).

¹⁸⁰ See, e.g., U. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *Respondents Reporting Fear of Walking Alone at Night*, available at <http://www.albany.edu/sourcebook/pdf/t2372011.pdf> (showing relatively stable fluctuations in fear of crime between 1965 and 2011).

¹⁸¹ See, e.g., Lynette Rice, *Top 50 Most-Watched Shows of 2013-14*, ENT. WKLY. (May 23, 2014), available at <http://insidetv.ew.com/2014/05/23/top-50-most-watched-shows-2013-14/> (last visited Aug. 8, 2014). Sixteen of these 50 television programs (32%) were identified as “crime” programs by the Internet Movie Database: *NCIS*, *NCIS-LA*, *The Blacklist*, *Blue Bloods*, *Criminal Minds*, *Castle*, *CSI*, *Elementary*, *Hawaii Five-O*, *The Good Wife*, *The Mentalist*, *Unforgettable*, *Bones*, *The Following*, *Law & Order SVU*, and *Almost Human*.

¹⁸² Cheliotis, *supra* note 1, at 178.

¹⁸³ See Heath & Gilbert, *supra* note 88, at 380.