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VIRTUE AND VICE:

WHO WILL REPORT ON THE FAILINGS OF THE
AMERICAN CRIMINAL JUSTICE SYSTEM?

William R. Montross, Jr. & Patrick Mulvaney

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INTRODUCTION

Above the fold:

HUNTSVILLE, Texas—Texas executed [name of inmate or description of inmate as a killer] on [day of week] for [brief description of crime for which inmate was sentenced to death].

“[Final statement of inmate, made from lethal injection gurney],” [name of inmate] said. He was pronounced dead at [time], [number] of minutes after the lethal drugs began to flow.

[Inmate’s victim’s family members’ names] [and/or] [inmate’s family members’ names] watched through a window. “[Comment on execution]” they said / [they declined to speak to reporters] / [there was or was not eye contact between inmate and victim’s family members].

[More detailed description of inmate’s crime, perhaps explaining aggravating circumstances such as prior crimes.]

[Whether [name of inmate] maintained his innocence / said the killing was accidental.]

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[Name of inmate] was the [ordinal number] person executed this year in Texas, the nation's most active death penalty state.

Insert the name of the condemned man and some facts about the crime; add a paragraph quoting the victim's family; note any last-minute protestations of innocence or expressions of remorse on the part of the defendant; and update the execution tally. In a matter of grave national importance—the execution of Americans by this country's most notorious killing state, Texas¹—this formulaic ritual constitutes American crime reporting. After a brief suspension during the United States Supreme Court's consideration of the constitutionality of lethal-injection procedures in *Baze v. Rees*,² Texas resumed executions in June 2008.³ From that point until the end of the year, it executed eighteen people.⁴ Each of the eighteen men killed by the state of Texas raised substantial questions about the fairness and validity of their convictions and

1. At the close of 2008, Texas had executed 423 people in the “modern era” of capital punishment, which is defined as the period beginning with the resumption of executions following *Gregg v. Georgia*, 428 U.S. 153 (1976). The United States Supreme Court had invalidated all death penalty statutes in the United States in *Furman v. Georgia*, 408 U.S. 238 (1972). In *Gregg*, the Supreme Court permitted the states to resume executions following modifications of their death penalty statutes to address constitutional defects identified by the Court in *Furman*. Therefore, *Gregg* marks the beginning of a new era of capital punishment. At 423 executions, Texas had executed more than four times as many people in the modern era as any other state in the nation. As of December 15, 2008, it had executed exactly the same number of people as the following twenty-nine death penalty states combined: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Washington, and Wyoming. There are fourteen states without the death penalty, so excluding six Southern states—Alabama, Florida, Georgia, Louisiana, Mississippi, and Virginia—Texas had executed the same number of people as the rest of the nation. Death Penalty Info. Ctr., Executions in the United States, 1608-1976, By State, <http://www.deathpenaltyinfo.org/executions-united-states-1608-1976-state> (last visited Dec. 15, 2008).

2. 128 S. Ct. 1520 (2008) (holding that Kentucky's protocol and similar procedures employed throughout the nation do not violate the Eighth Amendment's prohibition on cruel and unusual punishment). The Court began issuing stays of execution to inmates throughout the country shortly after it granted certiorari in *Baze* on September 25, 2007. *Baze v. Rees*, 128 S. Ct. 34, 34 (2007); see, e.g., *Berry v. Epps*, 128 S. Ct. 531 (2007) (issuing a stay of execution to Earl Berry, who was facing execution in Mississippi, in light of *Baze*); see also Linda Greenhouse, *Justices Stay Execution, A Signal to Lower Courts*, N.Y. TIMES, Oct. 31, 2007, at A1 (explaining the implications of the Court's issuance of a stay of execution to Mr. Berry).

3. Texas executed Karl Chamberlain on June 11, 2008, which was its first use of the lethal injection gurney since it executed Michael Richard on September 25, 2007. Death Penalty Info. Ctr., Searchable Execution Database, <http://deathpenaltyinfo.org/executions> (follow “Search by Details”; enter “2007” and “2008” for the Year; enter “TX” for the State; scroll down for results).

4. *Id.* (follow “Search by Details”; enter “2008” for the Year; enter “TX” for the State; scroll down for results).

death sentences: representation by ineffective trial counsel, mental illness, violations of international covenants, and failures by state and federal appellate courts to reach meritorious issues because of procedural bars. But such information has no place in the fill-in-the-blanks template employed by the newspapers providing coverage of the executions. Consider a few examples:

HUNTSVILLE, Texas—Texas executed a condemned inmate on Thursday for orchestrating and taking part in the robbery and killing of a man in Amarillo 13 years ago.

“Blessed are they that mourn, for they shall be comforted,” Larry Donnell Davis said in his final statement, quoting from the Bible. “It is finished.”

The parents of Davis’ victim watched through a window a few feet from him but he never looked at them. He was pronounced dead at 6:19 p.m. CDT, eight minutes after the lethal drugs began to flow.

Davis, 40, had been out of prison less than four months when authorities said he and several friends were involved in robbing an acquaintance, Michael Barrow, 26, and killing him at Barrow’s home.

Davis’ execution was the fourth in Texas this year and the second in as many weeks. Davis was among at least 15 condemned prisoners with death dates in the coming months, including six in August.

Davis acknowledged he was at Barrow’s home the day of the killing and kicked the victim who had broken free of restraints on his hands and feet. But he insisted in a recent interview with The Associated Press he was not responsible for the fatal wounds.

“They finished him,” he said of his friends, who accepted plea deals for lesser sentences. “I don’t mind being punished for something I did—not for something I didn’t do.”

In a detailed confession to police, Davis said he tied Barrow’s hands, held him down while an accomplice stabbed him and handed his accomplice the weapons, including an ice pick, a knife and a lead pipe.⁵

* * *

HUNTSVILLE, Texas—Texas executed a former New York City hair stylist with a long criminal record Thursday for the robbery, rape and murder of an Army medic at her apartment near Fort Hood.

5. Michael Graczyk, *Texas Executes Man Who Killed, Robbed Acquaintance*, Associated Press, Aug. 1, 2008. Associated Press articles like this one often go out in different lengths, and there is a longer version of this article. See Michael Graczyk, *Killer in Amarillo Robbery Executed*, Associated Press, Aug. 1, 2008. However, that version does little to change the tenor. In fact, one of the major additions is the following quote from an assistant district attorney about the executed inmate: “This is a bad dude.” *Id.*

“From Allah he came and from Allah he shall return,” Denard Manns said from the death chamber gurney.

Manns, 42, criticized or thanked various attorneys who had represented him, expressed love to friends and said, “I’m ready for the transition.” He uttered what appeared to be a brief prayer three times and was pronounced dead 10 minutes after the lethal drugs began to flow.

Manns’ appeals in the courts were exhausted and the Texas Board of Pardons and Paroles, acting Wednesday on a petition filed by his lawyer, refused to commute his sentence to life in prison.

Manns was convicted of raping and murdering 26-year-old Michelle Robson in 1998. The former mural painter from New York City had moved to Texas that year after being paroled after serving nearly six years in prison for armed robbery—his second stint in jail for the crime.

He maintained he had nothing to do with the death of Robson, who lived with her husband a few doors down from where Manns was staying with his half brother and cousin in Killeen, in central Texas.

Asked last week if he knew who committed the murder, Manns told The Associated Press from a tiny visiting cage outside death row: “That’s not for me to discuss. Police get paid to ask those questions and find out. I would never tell them.”

Prosecutors said DNA and fingerprint evidence implicated Manns, who also was found with some of the slain woman’s property.

Investigators believed Robson, from Newton, Iowa, at least recognized her killer because there was no indication of a break-in at the apartment where she lived with her husband, Clay Wellenstein, also a soldier stationed at Fort Hood. He had gone home for a Thanksgiving visit to his family in upstate New York when he learned of his wife’s slaying.

Robson was found dead in a bathtub, shot five times with a .22-caliber pistol.

Manns’ cousin, Eric Williams, owned such a pistol, found a bullet on the floor in his room and turned the gun over to police after learning of his neighbor’s death with a similar weapon. Tests showed at least one of the bullets recovered from the woman had been fired from the gun. Tests also showed Manns’ fingerprint on the weapon. Other evidence showed Manns left a jacket belonging to Robson at the home of a friend the day her body was discovered and that he had a ring of Robson’s.

Manns was arrested the following month and tried in 2002.

Manns was the 17th convicted killer executed this year in the nation's most active death penalty state and the second in as many days. Another three lethal injections are scheduled for next week in Texas.⁶

* * *

HUNTSVILLE, Texas—Texas executed a man Wednesday who was convicted of killing a woman and her child, while Mississippi put to death a man who took part in the fatal beating of another man.

Derrick Sonnier shook his head “no” when asked if he had any final statements. He was pronounced dead at 6:18 p.m. CDT, eight minutes after the lethal dose was administered.

Sonnier was convicted of murdering Melody Flowers, 27, and her 2-year-old son, Patrick, in their Houston apartment in 1991. Flowers was raped, stabbed, strangled and beaten with a hammer until its handle broke. Her son was stabbed eight times. Her body was dumped into a bathtub filled with water and the child's body was tossed on top of her.

Sonnier, 40, maintained his innocence. He made a similar trip to the death house seven weeks ago but was spared when the Texas Court of Criminal Appeals stopped his scheduled punishment after lawyers raised questions about the legality of the lethal injection procedures.

That appeal subsequently was rejected, Sonnier's death date was reset for Wednesday evening and his legal avenues to avoid execution were exhausted.

...⁷

* * * * *

At a time when the attention of the citizens of Texas, and the whole nation, is most focused on Texas's death machine—as the act of execution occurs—the articles above, all from the Associated Press, constitute the near totality of information reported on these men and their cases. Nothing in these articles suggests that there was any reason not to kill these men. Almost entirely absent from the stories is any mention of the defense case or the defendant, other than a voyeuristic fascination with the condemned's last words. The above are examples of American crime reporting. They are succinct, superficial, and devoid of context.

There is also criminal justice reporting. Where crime reporting purports to answer the questions, “Who? What? When? and Where?,” criminal justice

6. Michael Graczyk, *Texas Executes NY Ex-Convict for Soldier's Slaying*, Associated Press, Nov. 14, 2008. There is a slightly longer version also. See Michael Graczyk, *Ex-Con from NY Executed for Soldier's Slaying*, Associated Press, Nov. 14, 2008.

7. Michael Graczyk, *Convicted Killers in Texas, Miss., Put to Death*, Associated Press, July 24, 2008 (omitting Mississippi execution from cited material). There is a longer version also. See Michael Graczyk, *Texas Inmate Dies for Slaying Mom, Child*, Associated Press, July 24, 2008.

reporting attempts to initiate conversation and debate about the far harder question of “Why?” Why is this man on death row? Why are people who kill a white person 400 to 500 percent more likely to receive the death penalty than people who kill a black person?⁸ Why do courts seem more concerned with protecting a death verdict than ensuring that justice was done? Criminal justice reporting is the opposite of crime reporting.⁹ Where crime reporting is salacious, criminal justice reporting is reasoned; where crime reporting ignores nuance, criminal justice reporting is full of complexity. Crime reporting appeals to a limited range of base emotions; criminal justice reporting elicits a far more complex emotional response, and, more importantly, it engages the intellect. Unfortunately, crime reporting increasingly dominates the American newspaper and criminal justice reporting has become an endangered species. The future of newspaper reporting on complex matters of crime and criminal justice is not in-depth investigative reporting, but superficial and callous treatment of complicated issues.

We are not journalists. Nor do we profess to be experts on journalism. Both of us are attorneys whose practice is devoted exclusively to representing individuals who face execution in the Deep South. We represent clients on death row. We do not have the ear of the American public. But if the public has learned and come to understand critical information about the criminal justice system—its inequities, its biases, its failures—it has done so because newspapers provided that information.

Our concern is that criminal justice reporting is appearing less and less in American newspapers. In its place, crime reporting is on a steady ascent. Our concern is for our clients and other people like our clients. Who will tell the American public about the generally abhorrent quality of representation afforded indigent persons accused of crimes in this country? Who will inform the American public about a criminal justice system more concerned with procedure and technicalities designed to streamline executions than the actual merits of a case? Who will reveal to the American public cases in which the defense attorney was drunk during his client’s capital trial,¹⁰ or the attorney

8. See RICHARD C. DIETER, *THE DEATH PENALTY IN BLACK & WHITE: WHO LIVES, WHO DIES, WHO DECIDES* (1998), available at <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides> (compiling findings from various sources, including the United States General Accounting Office and a report prepared for the American Bar Association, and explaining “race-of-victim discrimination” in capital sentencing in states across the nation).

9. See generally, DAVID J. KRAJICEK, *SCOOPED! MEDIA MISS REAL STORY ON CRIME WHILE CHASING SEX, SLEAZE, AND CELEBRITIES* (1998).

10. See *Haney v. State*, 603 So. 2d 368, 377-78 (Ala. Crim. App. 1991). A brief synopsis of Haney’s representation is as follows: “Judy Haney was represented by two lawyers at her trial in Alabama. One of the lawyers showed up so intoxicated one morning at trial that the judge had no choice except to send the jury away and lock the lawyer up for a day to dry out. The next morning he brought the jury back and produced both Ms. Haney and her lawyer from jail. A few days later, the death penalty was imposed. Her other court-appointed lawyer was later disciplined by the Alabama Bar for missing the statute of

slept through his client's capital trial,¹¹ or the attorney presented no evidence or testimony to the jury to attempt to save his client's life?¹² In the past, American newspapers told these stories; we fear that in the future, they will not be able.

We would have fewer concerns if an alternative medium existed where issues of criminal justice could be reported. We recognize that many Americans receive their news from television, but our focus remains on written work in recognition of its unique ability to transcend sound bites, as well as the reality that written work so often serves as "the source from which other media draw."¹³ In the words of Henry Weinstein, "[a]n awful lot of the reporting, to the extent there is any, on television about criminal justice is very derivative from newspapers."¹⁴ And as we look around the media landscape,¹⁵

limitations in two workmen's compensation cases. That is the legal talent that Judy Haney had to represent her in a death penalty case." Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 492-93 (1995) (footnotes omitted).

11. See *Burdine v. Johnson*, 262 F.3d 336, 339 (5th Cir. 2001) (explaining that the defendant's attorney dozed repeatedly as the State questioned witnesses and presented evidence).

12. See, e.g., *Bell v. Cone*, 535 U.S. 685, 691-92 (2002) (explaining that defense counsel did not present any mitigating evidence during the penalty phase of the defendant's capital trial).

13. Peter Johnson, *Web Revolution Leaves Newsgathering in a Lurch, Report Finds Newspapers Struggling to Save Resources*, USA TODAY, Mar. 12, 2007, at D4 (quoting former *Des Moines Register* editor Geneva Overholser, who went on to note, "When I was editor, I found our paper on desks wherever I traveled across the state—radio, television, other dailies."). We also observe that like newspapers, television stations, as well as radio organizations, are cutting news positions rapidly and seeking more affordable means of acquiring content. See, e.g., Bill Carter, *CBS Moves Ahead with Layoffs in News*, N.Y. TIMES, Apr. 2, 2008, at C3 ("News operations at CBS stations in several cities started a series of job cuts this week even as the CBS News network moved ahead with plans to lay off about 1 percent of its nearly 1,200 employees."); Paul Farhi, *NPR to Cut 64 Jobs and Two Shows*, WASH. POST, Dec. 11, 2008, at C01 ("Faced with a sharp decline in revenue, National Public Radio said Wednesday it will pare back its programming and institute its first organization-wide layoffs in 25 years."); *TV Stations Cut Two Jobs*, BAKERSFIELD CALIFORNIAN, Dec. 4, 2008 (quoting the station's general manager as saying "the cutbacks are among other changes at the stations, including having the California Highway Patrol provide traffic reports directly and possibly bringing in sponsors instead of an on-air host to provide local content for morning trend show Better Bakersfield").

14. Henry Weinstein is a Professor of the Practice of Law and Senior Lecturer in Literary Journalism at the University of California at Irvine School of Law. Prior to that he was a longtime legal affairs reporter for the *Los Angeles Times*. Professor Weinstein made the observation quoted above at the symposium for which this paper was written. See Henry Weinstein, Panel on the Future of Criminal Justice Reporting at the 2009 Stanford Law Review Symposium: Media, Justice, and the Law (Jan. 31, 2009), available at http://www.law.stanford.edu/calendar/details/2411/#related_information_and_recordings (at 1:52:48).

15. We also have chosen not to focus on magazines. We have seen no evidence for the proposition that magazines can or have filled the void of criminal justice reporting in the wake of newspapers' collapse. We also note that many magazines are themselves engaging

particularly at the proliferation of new media, we see no forum where criminal justice reporting and writing can continue to exist, never mind flourish.

To pursue the information necessary to publish credible, detailed, and compelling stories about this country's criminal justice system—its courts, its jails and prisons, its methods of execution—enormous resources must be expended. For all the virtues of new media, they do not possess either the resources or institutional power that newspapers once did. And to the extent that new media offer a participatory process—in effect, a democratization of the journalistic endeavor—the very community on which it relies excludes individuals immersed in the criminal justice system: those awaiting trial in jails throughout the country, those serving sentences in state and federal prisons, those awaiting the date of their execution on death row. In such a climate, “what will become of those people . . . who depend on . . . journalistic enterprises to keep them safe from various forms of torture, oppression, and injustice[?]”¹⁶ For our clients and people like them across the country, it is the answer to this question we fear.

Part I of this Article examines the quality of criminal justice reporting that American newspapers once published and examines why such reporting, never widespread to begin with, is becoming far rarer. Part II examines what we have witnessed as the modern incarnation of crime reporting, where, more and more, newspapers have come to rely exclusively on news services to produce brief pieces devoid of content or context or, in the alternative, acceptance by newspapers of “prepackaged” stories provided by relevant law enforcement agencies. Part III examines the rise of new media and, while acknowledging their capabilities, asserts that new media are particularly ill-equipped to produce the type of comprehensive criminal justice reporting necessary to drive a national public discourse.

I. THE VIRTUES OF CRIMINAL JUSTICE REPORTING

On June 11, 2000, the *Chicago Tribune* published the first of a two-part series examining the death penalty system in Texas.¹⁷ The impetus for the

in severe job cuts. *See, e.g.*, Russell Adams & Shira Ovide, *Newsweek to Cut Back Staff, Slim Magazine in Makeover*, WALL ST. J., Dec. 11, 2008, at B1 (“Newsweek magazine is planning staff cuts as part of a major makeover that is likely to result in a slimmer publication with fewer subscribers and more photos and opinion . . .”).

16. Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, NEW YORKER, Mar. 31, 2008, at 48. In urging that society needs to consider that question, Alterman quotes *Night and Day*, Tom Stoppard's 1978 play: “People do awful things to each other. . . . But it's worse in places where everybody is kept in the dark.” *Id.* (internal quotation marks omitted).

17. Steve Mills, Ken Armstrong & Douglas Holt, *Flawed Trials Lead to Death Chamber*, CHI. TRIB., June 11, 2000, at C1 [hereinafter Mills et al., *Flawed Trials*]; Ken Armstrong & Steve Mills, *Gatekeeper Court Keeps Gates Shut*, CHI. TRIB., June 12, 2000, at N1 [hereinafter Armstrong & Mills, *Gatekeeper*]. The two-part series was titled, *State of*

investigation was the pending candidacy of George W. Bush for the presidency of the United States. During Bush's six years as governor, 150 men and 2 women were executed in Texas; far and away, Bush presided over more executions than any governor in the modern era¹⁸ of capital punishment.¹⁹

Setting the stage for the *Chicago Tribune's* Texas series, well-documented and highly publicized flaws in the death penalty system in Illinois, also exposed in part by the *Tribune*,²⁰ had resulted in Governor George Ryan's moratorium on executions in the state on January 31, 2000.²¹ Those flaws also led to Ryan's subsequent commutation of all 167 death sentences in the state on January 11, 2003.²² At the time he imposed the moratorium on executions in Illinois, Ryan stated:

I now favor a moratorium, because I have grave concerns about our state's shameful record of convicting innocent people and putting them on death row . . . I cannot support a system, which, in its administration, has proven to be so fraught with error and has come so close to the ultimate nightmare, the state's taking of innocent life. Thirteen people have been found to have been wrongfully convicted.²³

However, Bush refused to acknowledge a similar problem in Texas. When asked if a moratorium was necessary in Texas, he responded that he was certain that the infirmities of the Illinois system had not infected Texas's death penalty process. "Maybe they've had some problems in their courts . . . Maybe they've had some faulty judgments. I've reviewed every case, . . . and I'm confident that every case that has come across my desk . . . I'm confident of the

Execution: The Death Penalty in Texas.

18. See *supra* text accompanying note 1 (recognizing the modern era as beginning with the United States Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976) (permitting states to resume executions), and continuing to the present day).

19. Alan Berlow, *The Texas Clemency Memos*, ATLANTIC MONTHLY, July/Aug. 2003, at 91 ("During Bush's six years as governor 150 men and two women were executed in Texas—a record unmatched by any other governor in modern American history.").

20. From November 14-18, 1999, the *Chicago Tribune* published a five-part series entitled *The Failure of the Death Penalty in Illinois* that extensively detailed the failings and injustices of Illinois's death penalty system. Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, at C1; Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts*, CHI. TRIB., Nov. 15, 1999, at N1; Steve Mills & Ken Armstrong, *The Inside Informant*, CHI. TRIB., Nov. 16, 1999, at N1; Steve Mills & Ken Armstrong, *A Tortured Path to Death Row*, CHI. TRIB., Nov. 17, 1999, at N1; Steve Mills & Ken Armstrong, *Convicted by a Hair*, CHI. TRIB., Nov. 18, 1999, at N1.

21. Press Release, Governor's Press Off., Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=359>.

22. Maurice Possley & Steve Mills, *Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, CHI. TRIB., Jan. 12, 2003, at C1 ("In all, Ryan commuted 164 death sentences to life without parole. . . . Another three Death Row inmates had their sentences shortened to 40-year terms.").

23. Press Release, Governor's Press Off., *supra* note 21 (internal quotation marks omitted).

guilt of the person who committed the crime.”²⁴ In June 2000, Johnny Sutton, Bush’s criminal justice policy director, stated:

We have a system in place that is very careful and that gives years and years of super due process to make sure that no innocent defendants are executed and that the defendant received a fair trial We think we have a good criminal justice system in Texas. It’s not perfect, but it’s one of the best around.²⁵

The *Chicago Tribune* disagreed. In the course of conducting the “first comprehensive examination of every execution during [Bush’s] administration[.]” *Tribune* investigative reporters Steve Mills, Ken Armstrong, and Douglas Holt “examined trial transcripts, legal briefs, appellate rulings and lawyer disciplinary records, and . . . interviewed dozens of witnesses, lawyers and judges.”²⁶ Extensive time and money were expended on the investigation, thousands upon thousands of pages of documents and transcripts were reviewed, and months were spent talking to sources. The result was an incisive series that belied the claim that Texas provided “years and years of super due process” to condemned men and women on Texas’s death row.²⁷ The *Tribune*’s examination of the Texas death penalty system uncovered and presented evidence that defense attorneys in forty cases “presented no evidence whatsoever or only one witness during the trial’s sentencing phase.”²⁸ Examining the prosecution practice of presenting evidence of an individual’s “future dangerousness” at the penalty phase of a capital trial, and particularly focusing on Texas’s prosecutors’ reliance on a psychiatrist known as “Dr. Death”²⁹ for these suspect assessments, the *Tribune* found that in at least

24. Carl M. Cannon, *The Problem with the Chair: A Conservative Case Against Capital Punishment*, NAT’L REV., June 19, 2000, cover (internal quotation marks omitted).

25. Mills et al., *Flawed Trials*, *supra* note 17 (internal quotation marks omitted).

26. *Id.*

27. *Id.*; see also Armstrong & Mills, *Gatekeeper*, *supra* note 17. The two-part series, as noted above, was titled *State of Execution: The Death Penalty in Texas*.

28. Mills et al., *Flawed Trials*, *supra* note 17.

29. In the series for the *Tribune* on the flawed Texas death penalty system, Mills et al. expertly chronicled the use of “Dr. Death” to obtain capital convictions and death sentences:

In the annals of the death penalty in Texas, few figures have proved as controversial as James Grigson, a Dallas psychiatrist who came to be known among defense attorneys and the media as “Dr. Death.”

Grigson was reprimanded twice in the early 1980s by the American Psychiatric Association, then expelled from the group in 1995 because it found his testimony unethical and untrustworthy. In his heyday from the mid-1970s through the late 1980s, Grigson helped send scores of people to Texas’ Death Row.

Grigson repeatedly claimed that he could predict that defendants would be violent again—even though in many of those cases Grigson never even examined the defendants. Instead, he responded to hypotheticals posed by prosecutors in which they described a defendant’s criminal history.

This type of psychiatric testimony played a critical role in the cases of at least 29 defendants executed in Texas since Bush became governor. Grigson testified in 16 of those cases.

twenty-nine cases, the prosecution presented “damaging testimony from a psychiatrist who, based upon a hypothetical question describing the defendant’s past, predicted the defendant would commit future violence.”³⁰ In most of those cases, the *Tribune* continued, “the psychiatrist offered this opinion without ever examining the defendant. Although this kind of testimony is sometimes used in other states, the American Psychiatric Association has

Grigson said recently that over his career he has testified in 166 capital cases in Texas, all but nine for the prosecution.

With his folksy charm, Grigson made things easy for juries. He measured defendants on a 1-to-10 scale, with 10 representing the worst kind of sociopath. He placed many there—and some past that point, up to 12, 13, even 14.

On questions of future dangerousness, Grigson also offered guarantees. He testified that Bernard Amos “most certainly” would be violent in the future, though he did not examine him.

James Clayton was “absolutely certain” to be a repeat offender, Grigson told a jury. Asked by a prosecutor if William Little would be violent in the future, Grigson left no room for doubt. “It’s an absolute,” he testified. “It’s not 99.5 or 99.8. It’s absolutely 100 percent sure.” Grigson hadn’t examined Clayton or Little, either.

Some jurors say Grigson’s testimony had a significant impact. “You couldn’t help but listen to what he was saying. [He’s] a doctor. He had a lot of influence on what we decided,” said Myron Grisham, one of the jurors in [a case in which Grigson testified].

Another psychiatrist, E. Clay Griffith, often testified along the same lines as Grigson—making predictions without examinations. Danny Lee Barber was a “10 plus” on a scale of 1 to 10. Griffith testified that James Fearance would be at the “highest number, however you’re going to judge it.” David Wayne Spence, Griffith testified, was as “severe, in my opinion, as one can get.”

Such bold predictions sometimes misfired. Grigson, who had testified during the punishment phase of Randall Adams’ 1977 trial, described Adams as a “severe sociopath.” Adams had no prior criminal record and eventually was freed from Death Row, thanks in large part to the documentary, “The Thin Blue Line.”

Grigson has made a career of testifying in criminal cases. He charges \$150 an hour, and in the 1980s he was in such demand from prosecutors that he usually earned more than \$150,000 a year, according to court records.

The controversy surrounding Grigson made him less attractive to prosecutors. He now only testifies in one or two capital cases a year, although he remains busy with other court cases.

In an interview, he defended his work. “I feel like I really have helped the image of psychiatry rather than hurt it,” Grigson, 68, said. “I’ve really brought psychiatry out of the clouds.”

Although the U.S. Supreme Court has ruled this kind of psychiatric testimony admissible, it has been repeatedly criticized by other courts.

Just last month, Judge Emilio Garza of the U.S. Court of Appeals for the 5th Circuit sharply criticized the use of hypothetical psychiatry in a Texas case.

“[W]hat separates the executioner from the murderer is the legal process by which the state ascertains and condemns those guilty of heinous crimes,” Garza wrote. “If that process is flawed because it allows evidence without any scientific validity to push the jury toward condemning the accused, the legitimacy of our legal process is threatened.”

Id.

30. *Id.*

condemned it as unethical and untrustworthy.”³¹ Confirming the suspicion that the death penalty is not reserved for those who commit the worst crimes, but for those who have the worst attorneys,³² the *Tribune* concluded: “While capital cases make the greatest demands on defense attorneys, the lawyers in these cases do not always represent the legal community’s best.”³³ Specifically:

In 43 cases, or one-third, a defendant was represented at trial or on initial appeal by an attorney who had been or was later disbarred, suspended or otherwise sanctioned. Though most were punished after they handled these cases, their disciplinary records raise questions about their suitability for such a complex job.³⁴

The *Chicago Tribune*’s reporting was not limited to critiques of the attorneys who represented capital defendants and the prosecutors who sought their conviction and death. The *Tribune* took direct aim at the Texas Court of Criminal Appeals, criticizing the court’s tolerance of appointed attorneys who were clearly incapable or unwilling to provide any semblance of effective representation to their clients:

The Court of Criminal Appeals also has refused relief to Death Row inmates represented by an attorney who slept at trial. It refused relief to a defendant who, a psychologist testified, was more likely to commit future acts of violence because he is Hispanic—testimony that even the state attorney general’s office found objectionable. . . .

The court has even refused relief to a convicted rapist, Roy Criner, even though DNA testing conducted after trial showed the semen found in the victim wasn’t his. The case is so problematic that one judge who voted with the majority told the *Tribune* he now believes his vote in the case was wrong and Criner should get a new trial.

The *Tribune*’s investigation of the death penalty in Texas found deep-seated problems that call into question the system’s integrity. In dozens of instances, Death Row inmates were represented at trial or in their initial appeals by attorneys who have been sanctioned over the course of their careers.³⁵

Criminal justice issues—particularly the application and use of capital punishment—are complex. *Tribune* reporters Mills and Armstrong not only had to understand the relevant procedures and procedural law governing capital cases (trial and direct appeal, the state post-conviction process, the federal habeas process), substantive law (intent, sentencing), standards of review (“harmless error beyond a reasonable doubt,”³⁶ “reasonable probability that,

31. *Id.*

32. See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

33. Mills et al., *Flawed Trials*, *supra* note 17.

34. *Id.*

35. Armstrong & Mills, *Gatekeeper*, *supra* note 17.

36. See *Chapman v. California*, 386 U.S. 18, 24 (1967) (holding that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was

but for counsel's unprofessional errors, the result of the proceeding would have been different"³⁷), procedural bars and default (exhaustion, waiver),³⁸ but they also had to communicate that knowledge to a lay readership. Both the facts uncovered during the course of their investigations and the implications of those facts needed to be presented in a manner that was coherent, understandable, and engaging. A comparison between the reality of the Texas death penalty process and its characterization as "years and years of super due process" was not reducible to summary points or sound bites. Print media was essential to the effective presentation of this information. The newspaper provided both space and time for the authors to introduce the issues, present factual information, offer opinions of experts, and reach conclusions.

The *Chicago Tribune* series is only one example of comprehensive and detailed reporting on issues of criminal justice. In November 2005, the *Birmingham News* conducted a six-day exploration of the death penalty in Alabama.³⁹ In September 2006, the *New York Times*, in a series entitled "Broken Bench," detailed the absence of both process and law in the town and village court systems of the state of New York.⁴⁰ In September 2007, investigative reporters for the *Atlanta Journal-Constitution* authored a comprehensive and authoritative four-day series, entitled "A Matter of Life or

harmless beyond a reasonable doubt").

37. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (explaining the standard for ineffective assistance of counsel); see also *Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003) (reversing a death sentence under *Strickland* where the defendant's trial counsel unreasonably decided not to expand their investigation of the defendant's life history for mitigation, and that decision prejudiced the defendant).

38. In order to exhaust state remedies, a federal habeas petitioner must have fairly presented both the legal and factual bases of all claims to the state courts that the petitioner later raises on federal habeas corpus review. 28 U.S.C. § 2254 (2006); *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) ("[W]e ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts . . ." (emphasis omitted)); *Frederickson v. Wood*, 87 F.3d 244, 245 (8th Cir. 1996). "In *Wainwright v. Sykes*, 433 U.S. 72 (1977), and the cases which followed its lead, the Court declared that state prisoners who fail to raise claims in state proceedings are barred from doing so in federal habeas proceedings unless they can establish both 'cause and prejudice.'" CHARLES DOYLE, *FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW* 21-22 (2006).

39. Tom Scarritt, *Presenting a Case for Life*, BIRMINGHAM NEWS, Nov. 6, 2005, at B1; Editorial, *A Death Penalty Conversion*, BIRMINGHAM NEWS, Nov. 6, 2005, at B2; Editorial, *Many Murders, Few Executions*, BIRMINGHAM NEWS, Nov. 7, 2005, at A6; Editorial, *Poor System Can Mean Poor Results*, BIRMINGHAM NEWS, Nov. 8, 2005, at A10; Editorial, *When Death Is on the Line*, BIRMINGHAM NEWS, Nov. 8, 2005, at A10; Editorial, *A Question of Innocence*, BIRMINGHAM NEWS, Nov. 9, 2005, at A10; Editorial, *No Airtight Case for Death*, BIRMINGHAM NEWS, Nov. 10, 2005, at A8; Editorial, *Embracing a Culture of Life*, BIRMINGHAM NEWS, Nov. 11, 2005, at A8.

40. William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1; William Glaberson, *Delivering Small-Town Justice, with a Mix of Trial and Error*, N.Y. TIMES, Sept. 26, 2006, at A1; William Glaberson, *How a Reviled Court System Has Outlasted Many Critics*, N.Y. TIMES, Sept. 27, 2006, at A1.

Death,” on Georgia’s death penalty system.⁴¹ There are others.⁴² In a morass of crime reporting that was too often either dull and uninformed or sensationalist and misleading, the occasional presence of criminal justice reporting of the type published by the *Chicago Tribune*, the *Birmingham News*, the *New York Times*, and others demonstrated that newspapers could serve to initiate and ignite public debate about this country’s criminal justice system. As the editors of the *Birmingham News* noted at the very beginning of their series, “[w]e are not telling you how to think; we are just challenging you to think.”⁴³

This type of comprehensive, engaged reporting on matters of criminal justice cannot continue much longer. This is not because American newspapers have purposefully abandoned their conscience, their “moral imperative,” or even their mythologized role as keepers of the public trust. It is because, in the past few years alone, the financial fragility of America’s newspapers has worsened to the point where they simply cannot afford to choose “rational tempered stories that might help explain the vexing crime problem”⁴⁴ over simplistic and salacious crime reporting.

41. Bill Rankin, Heather Vogell, Sonji Jacobs & Megan Clarke, *Death Still Arbitrary*, ATLANTA J.-CONST., Sept. 23, 2007, at A1; Sonji Jacobs, *Where Cases Diverge*, ATLANTA J.-CONST., Sept. 24, 2007, at A9; Heather Vogell & Bill Rankin, *A Death Case Derailed*, ATLANTA J.-CONST., Sept. 24, 2007, at A1; Heather Vogell, *I Still Saw This Man as a Human Being*, ATLANTA J.-CONST., Sept. 25, 2007, at A5; Heather Vogell & Bill Rankin, *Pendulum Swings Toward Life in Prison*, ATLANTA J.-CONST., Sept. 25, 2007, at A4; Bill Rankin, Heather Vogell & Alice Wertheim, *High Court Botched Death Reviews*, ATLANTA J.-CONST., Sept. 26, 2007, at A1; Bill Rankin, *Is Review Process Too Narrow?*, ATLANTA J.-CONST., Sept. 26, 2007, at A5.

42. For example, in October 2006, the *Austin American-Statesman* published a two-day series on the failures of appellate counsel appointed to represent indigent capital defendants in Texas. Chuck Lindell, *Sloppy Lawyers Failing Clients on Death Row*, AUSTIN AM.-STATESMAN, Oct. 29, 2006, at A01; Chuck Lindell, *Lawyer’s Writs Come Up Short*, AUSTIN AM.-STATESMAN, Oct. 30, 2006, at A11; Chuck Lindell, *When \$25,000 Is the Limit on a Life*, AUSTIN AM.-STATESMAN, Oct. 30, 2006, at A01; In July 2008, the *East Valley Tribune* (AZ) published a five-part, online multimedia series, entitled “Reasonable Doubt,” revealing highly questionable and controversial arrest and immigration policies carried out by the Maricopa County Sheriff’s Office and its limelight-seeking Sheriff, Joe Arpaio. Ryan Gabrielson, *MCSO Evolves into an Immigration Agency*, E. VALLEY TRIB., July 10, 2008, <http://www.eastvalleytribune.com/story/120461>; Ryan Gabrielson, *Overtime Led to MCSO Budget Crisis, Records Show*, E. VALLEY TRIB., July 10, 2008, <http://www.eastvalleytribune.com/story/120468>; Paul Giblin, *Sweeps and Saturation Patrols Violate Federal Civil Rights Regulations*, E. VALLEY TRIB., July 11, 2008, <http://www.eastvalleytribune.com/story/120562>; Ryan Gabrielson, *Public Safety Shortchanged Throughout County*, E. VALLEY TRIB., July 12, 2008, <http://www.eastvalleytribune.com/story/120637>; Paul Giblin, *Why No One Is Willing to Hold Sheriff Arpaio Accountable*, E. VALLEY TRIB., July 13, 2008, <http://www.eastvalleytribune.com/story/120706>. In addition, newspapers such as the *Los Angeles Times* have published lengthy, individual articles on critically important matters of criminal justice. See, e.g., Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, July 15, 2000, at A1.

43. Scarritt, *supra* note 39.

44. KRAJICEK, *supra* note 9, at 4.

What is different now—from ten years ago, from only a few years ago—is that newspapers today have *very little choice* in deciding whether to conduct criminal justice reporting or succumb to tabloid-style crime reporting. America's newspapers are in dire financial straits.⁴⁵ The explosive availability of information from alternative sources,⁴⁶ declining circulation,⁴⁷ and diminishing advertising revenue⁴⁸ have all contributed to extreme cost-cutting tactics undertaken by publishers. The result of cost-cutting tactics is a lesser paper—fewer reporters and less reporting.⁴⁹ In the words of Steve Smith, editor of the (Spokane, Wash.) *Spokesman-Review*:

None of us should hold any illusions here. A smaller staff means a lesser paper. There is no 'working harder' or 'working smarter' rhetoric that can hide the impact of staff reductions. Doing more with less is corporate-speak BS and you won't hear it from me. There is no way to make this pig look like anything other than a pig.⁵⁰

45. "Daily newspapers are going out of business at an unprecedented rate, and the survivors are slashing their budgets. . . . 2008 was the worst year in history for newspaper publishers, with shares dropping a stunning 83 percent on average. Newspapers lost \$64.5 billion in market value in 12 months." Gary Kamiya, *The Death of the News*, SALON.COM, Feb. 17, 2009, <http://www.salon.com/opinion/kamiya/2009/02/17/newspapers/print.html>. Still, it seems unlikely that the tide will turn in 2009. "[S]ome economists and newspaper executives say it is only a matter of time—and probably not much time at that—before some major American city is left with no prominent local newspaper at all. 'In 2009 and 2010, all the two-newspaper markets will become one-newspaper markets, and you will start to see one-newspaper markets become no-newspaper markets,' said Mike Simonton, a senior director at Fitch Ratings, who analyzes the industry." Richard Perez-Pena, *As Cities Go From Two Papers to One, Some Talk of Zero*, N.Y. TIMES, Mar. 12, 2009, at A1.

46. See *infra* Part III.

47. When it came to audience and circulation, 2007 was simply another verse in the same old song for the newspaper industry. Paid circulation continued to fall and at just about the same rate as in the two previous years. For the six months ending September 30, 2007, the Audit Bureau of Circulations (ABC) reported that circulation was down 2.5% daily and 3.3% Sunday compared to the same period a year earlier. Cumulatively, newspapers end 2007 with 8.4% less circulation daily and 11.4% less Sunday than in 2001.

PROJECT FOR EXCELLENCE IN JOURNALISM & RICK EDMONDS, *Newspapers: Audience, in THE STATE OF THE NEWS MEDIA 2008: AN ANNUAL REPORT ON AMERICAN JOURNALISM* (2008), available at http://www.stateofthenewsmedia.com/2008/printable_newspapers_audience.htm (footnotes omitted).

48. "The revenue base for newspapers was built around ads that provided detail—this product on sale for this price—and this included classifieds. Discount retailers and then nonjournalism competitors on the Internet have eroded that kind of advertising, and the print industry has not found a replacement." PROJECT FOR EXCELLENCE IN JOURNALISM, *Overview: Economics, in THE STATE OF THE NEWS MEDIA 2008*, *supra* note 47.

49. A 2008 report by the Project for Excellence in Journalism found that more than two thirds of professional journalists—national, local and Internet—said that "increased bottom-line pressure is seriously hurting the quality of news coverage." PROJECT FOR EXCELLENCE IN JOURNALISM, *THE WEB: ALARMING, APPEALING, AND A CHALLENGE TO JOURNALISTIC VALUES: FINANCIAL WOES NOW OVERSHADOW ALL OTHER CONCERNS FOR JOURNALISTS 5* (2008), available at <http://www.stateofthenewsmedia.org/2008/Journalist%20report%202008.pdf>; see *infra* note 52.

50. News is a Conversation, <http://www.spokesmanreview.com/blogs/conversation/>

The financial constraints currently faced by American newspapers make nearly impossible the type of reporting conducted by the *Chicago Tribune* only nine years ago. “[D]eep reporting is imperiled by the shaky state of journalism’s financial underpinnings.”⁵¹

The financial crisis facing American newspapers is not limited to small-town and mid-size dailies—papers of all sizes and stature are struggling.⁵² Even the *New York Times* reported in early 2008 that it would cut approximately 100 jobs as the company came “under increased pressure from shareholders—notably two hedge funds that recently bought almost 10 percent of the common stock—to do something significant to improve its bottom line.”⁵³ In the same article, the *Times*’ editor-in-chief “suggested that the cuts

archive.asp?postID=16687 (Aug. 3, 2007, 15:13 PST).

51. Rex Smith, *Pro Publica a Boost to Watchdogs*, ALB. TIMES UNION, July 26, 2008, at A7.

52. The year 2008 saw massive cuts in newspaper staff nationwide. *See, e.g.*, Ken Foskett & Scott Thurston, *AJC Will Cut Staff, Tighten Operations*, ATLANTA J.-CONST., July 17, 2008, at B1 (“The Atlanta Journal-Constitution will cut its work force by about 8 percent, or 189 jobs, and eliminate all of its geographically targeted news sections as part of a cost-cutting plan announced Wednesday. . . . Job cuts, which will occur between August and October, will include 85 newsroom positions—58 of them currently filled—and 104 positions in advertising, which is undergoing a departmental reorganization. The news staff will drop to 350 after the cuts. The cuts will be accomplished through voluntary buyouts, layoffs and job eliminations.”); Kyle Kennedy, *Ledger to Lay Off 36 Employees*, LEDGER (Lakeland, Fla.), Aug. 7, 2008, available at http://www.theledger.com/article/20080807/NEWS/135876980/1410&title=Ledger_to_Lay_Off_36_Employees (“The Ledger will lay off 36 employees in response to ongoing revenue declines and a deteriorating Florida economy, Publisher Jerome Ferson announced Thursday. The positions that were eliminated affect virtually every department of The Ledger, Ferson said, with 11 jobs being cut from the newsroom. It marks the second round of layoffs in less than two months and the fourth within the past year. . . . In addition to the layoffs, some open positions will remain unfilled, Ferson said. With the latest cuts effective Sept. 21, The Ledger will have a total 284 employees, nearly a third off its high of 415 in 1999. The newsroom will have 62 employees compared to a high of 99 that same year.”); Thomas S. Mulligan & James Rainey, *Job Cuts at Papers Shrink Coverage*, L.A. TIMES, Feb. 29, 2008, at C1 (“Today, the Los Angeles Daily News will say goodbye to 22 more editors and reporters, paring its newsroom to 100 people from nearly twice that many a few years ago. Editor Ron Kaye gave the news in a tearful address to his staff Wednesday.”); Christopher Tritto & Rob Hurtt, *Bleak Year Culminates with More Layoffs at Post-Dispatch*, ST. LOUIS BUS. J., Oct. 3, 2008, available at <http://www.bizjournals.com/stlouis/stories/2008/10/06/story2.html> (“At least 69 [St. Louis] Post-Dispatch employees have lost their jobs this year. The most recent layoffs came Sept. 26 when 20 people in production, marketing and the newsroom were let go. The Suburban Journals of Greater St. Louis, also owned by Lee, axed more than 30 jobs Sept. 26 following 14 staff position cuts in August. ‘Morale at the newspaper is awful,’ said Mary Casey, a former Post-Dispatch employee and representative of the St. Louis Newspaper Guild, which represents the majority of the paper’s workers. ‘Everyone is waiting for the other shoe to drop.’”); *USA Today to Cut About 20 Newsroom Jobs*, TIMESRECORDNEWS: WICHITA FALLS ONLINE, Nov. 24, 2008, <http://www.timesrecordnews.com/news/2008/nov/24/usa-today-cut-about-20-newsroom-jobs/> (“On Monday, The Virginian-Pilot in Norfolk said it will cut at least 125 positions, about 10 percent of its work force, including about 15 newsroom jobs and may sell or close papers it owns.”).

53. Richard Perez-Pena, *The Times To Cut 100 News Jobs*, N.Y. TIMES, Feb. 15, 2008,

could not help but affect the newspaper's journalism."⁵⁴ The *Chicago Tribune* is currently suffering a worse fate. On December 9, 2008, the *Los Angeles Times* reported that its parent company, which also owns the *Chicago Tribune*, filed for bankruptcy protection:

In perhaps the starkest sign yet of trouble in the news business, media giant Tribune Co.—owner of the Los Angeles Times, KTLA-TV Channel 5 and other newspapers and TV stations—filed Monday for bankruptcy protection from creditors.

Tribune's woes stem from a combination of plunging advertising revenue and a heavy debt load of \$12.9 billion, much of it incurred a year ago when it was taken private by Chicago real estate entrepreneur Sam Zell.

Tribune is far from being the only troubled media company. In the last week alone, the New York Times said it would mortgage its Manhattan headquarters for as much as \$225 million to help cover operating costs, industry leader Gannett Co. pushed ahead with the layoff of 2,000 employees, and Denver's Rocky Mountain News and the Miami Herald were put up for sale.

“Everywhere you go, it's the same story,” said Alan Mutter, a veteran newspaper editor and investor who writes the Newsosaur blog. “It's all kind of appalling.”⁵⁵

Whether the lionized and popularized version of the American newspaper as the critical “Fourth Estate”⁵⁶—uniquely capable by force of will, resources, and mission to uncover the misconduct, malfeasance, and hidden shame of the state—was more myth than reality is a debate best left to students of journalism. But as consumers of newspapers, and as capital defense attorneys, we took solace and consolation that at least, on occasion, newspapers would print thoughtful, comprehensive, and critical evaluations of the criminal justice system. However infrequently that reporting occurred, we knew that, at times, the public was afforded the opportunity to evaluate and judge the inequalities and iniquities of a system otherwise portrayed as flawless. Unfortunately, the

at C1.

54. *Id.*

55. James Rainey & Michael A. Hiltzik, *Owner of L.A. Times Files for Bankruptcy*, L.A. TIMES, Dec. 9, 2008, at A1.

56. As R.D. Rosen once observed with regard to the post-Woodward and Bernstein era of American journalism:

After Watergate, everyone wanted to be a journalist . . . Journalism schools were clogged with investigative aspirants, and résumés flowed like lava into editors' offices—résumés that listed the authors' ‘career objective’ as something along the lines of ‘I wish to use the power of the press to bring a United States president to his knees.’ Journalists became the new cowboys, riding their video display terminals into the sunset in pursuit of unindicted coconspirators and other defacers of the American Way.

Flashbacks: November 24, 2006, BOSTON PHOENIX, Nov. 21, 2006 (quoting Rosen in 1981), available at <http://thephoenix.com/Boston/News/28024-Flashbacks-November-24-2006/?page=2>.

current incarnation of the American newspaper is increasingly incapable of undertaking extensive investigative reporting and thus serving as the impetus for critical change in the area of criminal justice.⁵⁷

Newspapers will continue to report on crime. Crime sells, as do scandal, sex, and celebrity. But it will continue in a form and manner devastating to the development of an intelligent and rational discourse on the failings of this country's criminal justice system. The tragedy lies not only in the absence of extensive reporting in the manner once conducted by the *Chicago Tribune*, but also in the continuing rise and dominance of a form of crime reporting that discourages any nuanced public discussion.

II. THE VICES OF CRIME REPORTING

There have been many critiques of American crime reporting as superficial, sensationalist, and catering to the worst instincts of its readers. In 1998, long-time *New York Daily News* crime reporter David J. Krajicek critiqued the practice of crime reporting as then practiced by newspapers as “drive-by journalism—a ton of anecdote and graphic detail about individual cases drawn from the police blotter but not an ounce of leavening context to help frame and explain crime.”⁵⁸ According to Krajicek, too much reporting on crime in the United States was nothing more than blazing, inflammatory headlines, graphic pictures of violence, and interviews with neighbors of the accused who—even if they had never actually met the suspect—offered pop-psychological evaluations based on the trash the defendant left on the curb.

As financially troubled newspapers cut costs to stave off extinction—eliminating reporters, editors and staff members⁵⁹—this type of crime reporting is not only a possible option; it is increasingly the only financially feasible option. As crime reporting becomes more and more prevalent in the daily press, newspapers are turned into tabloids. But so severe are the financial constraints facing newspapers that the ability of newspapers to engage even in crime reporting has also been compromised. Papers have increasingly become

57. As Henry Weinstein said in a speech in 2006: “What is at stake here is not simply a matter of job preservation. This is a matter of information development and preservation. To the extent that newspapers reduce their capacity to report on these events, we are creating a dangerous news vacuum. We are failing to bear witness.” Henry Weinstein, *Newspaper Cuts Threaten Journalists’ Abilities to “Bear Witness,”* Acceptance Speech at the 2006 John Chancellor Award for Excellence in Journalism Ceremony at Columbia University (Dec. 4, 2006), available at <http://www.concernedjournalists.org/newspaper-cuts-threaten-journalists-abilities-bear-witness>. The dangerous news vacuum to which Weinstein referred has consequences. In the words of Tom Rosenstiel, the director of the Project for Excellence in Journalism, “‘If a newspaper reduces staff by 20%, some portion of that community is going to be operating in the shadows in a way it was not before’” Mulligan & Rainey, *supra* note 52.

58. KRAJICEK, *supra* note 9, at 7.

59. See *supra* note 52.

passive recipients and distributors of “facts” rather than active gatherers of information. Increasingly unable to conduct their own independent fact-finding investigations, newspapers rely more and more on subjective sources such as law enforcement agencies, which provide packaged “stories” readily convertible to newsprint, or on news services such as the Associated Press, which produces a generic product suitable for inoffensive publication. The local crime reporter does not even need to wallow in dirty police stations to procure his stories; the stories now come to him as an attachment to an email sent from the local district attorney’s office. Crime reporting was never very probing or analytical in the first place, but the forms of crime reporting currently being practiced simply do not permit a perspective that is not superficial or prosecution-biased.

Nearly every police department, district attorney’s office, or attorney general’s office regularly produces press releases that praise the professionalism and thoroughness of the investigation, assert the certainty of the defendant’s guilt, and proclaim the need for harsh punishment. These releases are produced by experts in media relations, and are consumed and republished, more or less verbatim, as stories by newspapers. The ability of local law enforcement to generate prepackaged stories in this form is a relatively recent development. But it is one that has proven of great benefit to the newspaper executives. The repackaging of law enforcement press releases relieves the newspaper of enormous financial costs that would be borne if the newspaper itself actively investigated the facts and wrote the story. “Investigative reporting is expensive. . . . Rehashing press releases is cheap.”⁶⁰ But the releases, and consequently the repackaged versions of the releases as they appear in the newspapers, uniformly fail to offer any reason to doubt the guilt of the accused and rarely present any mitigating information about the defendant that might warrant anything less than society’s ultimate approbation. The press releases, and the newspaper stories they become, fail to suggest that there might be any explanation for the crime other than the monstrosity of the defendant. The releases rarely provide information that the accused suffers from a severe mental illness, or is cognitively impaired, or was the victim of horrific physical or sexual abuse. By stressing individual culpability, the press releases produced by law enforcement, and therefore the news stories, neglect the greater factors present in the lives of many criminal defendants: abject poverty, institutional failure, crumbling social structures, or widespread drug infestation throughout whole neighborhoods. Of course, the criminal justice system is adversarial, and it is unreasonable to expect that partisan advocates will publicly sow seeds of doubt as to their own positions. But as newspapers become more and more dependent for their crime stories on press releases

60. *Slant*, EUGENE WKLY., Dec. 27, 2007, available at <http://www.eugeneweekly.com/2007/12/27/news.html#slant>.

generated by law enforcement, crime reporting becomes more and more a simple matter of prosecution propaganda.

It is becoming increasingly difficult to determine whether what is printed in the newspaper is the work of a journalist or the media specialist at the local law enforcement agency. Conversely, law enforcement agencies have designed their press releases to appear as articles contained in newspapers. For example, the former Johnson County (Kansas) District Attorney maintained a web site that appeared indistinguishable from a site that might be maintained by the local newspaper, the *Kansas City Star*.⁶¹ One such story involved the arrest and prosecution of Edwin Hall for the murder of Kelsey Smith. Below is the story as viewed on the district attorney's website:

Kline files new and amended charges against Edwin Hall

Hall faces capital murder, rape, aggravated sodomy, kidnapping, and two unrelated counts of aggravated indecent liberties with a 14-year old girl

July 12, 2007 – Olathe, KS – Johnson County District Attorney Phill Kline today filed a Capital Murder charge and added charges of rape and aggravated sodomy against Edwin R. Hall for the death of 18 year old Kelsey Smith after she was abducted on June 2, 2007.

Capital Murder carries one of two possible sentences, death by lethal injection or life in prison without parole. Rape, Aggravated Kidnapping and Aggravated Sodomy each carry a possible sentence of 653 to 147 months in prison depending on the person's criminal history.

District Attorney Kline has not yet decided whether he will file notice of intent to seek the death penalty. That decision must be made within 5 days of the arraignment which generally occurs after the preliminary hearing.

Judge Peter Ruddick revoked the bond set and ordered Hall held without bond pending the capital murder charge in accordance with the State of Kansas constitution.

Hall Charged with two Counts of Aggravated Indecent Liberties

In addition to the amended charges filed Tuesday, Kline also filed unrelated charges of aggravated indecent liberties against Hall involving a 14-year old girl in 2004.

Hall's preliminary hearing is set for August 15, 2007 and a motion hearing is scheduled for July 13, 2007 at 11:00 am.

Hall is presumed innocent under the law and the charges are mere allegations.

61. Johnson County Kansas, District Attorney's Office—Phill Kline, Home Page, <http://web.archive.org/web/20080207013412/http://da.jocogov.org/> (cached Feb. 7, 2008) (also on file with author).

Click [HERE](#) for additional coverage from the Kansas City Star⁶²

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Linking to the “additional coverage from the Kansas City Star” provides an article that adds little to the story already promulgated and released by the Johnson County District Attorney’s Office. Indeed, it appears that the news story from the *Kansas City Star*⁶³ is no different from the press release:

Edwin Hall charged with capital murder

Charges against Edwin R. “Jack” Hall, the man accused of kidnapping and killing Kelsey Smith, were amended this morning to capital murder and now include rape and aggravated criminal sodomy charges.

The new charges make Hall eligible for the death penalty, but Johnson County District Attorney Phill Kline said he was not making a decision on whether to pursue the death penalty yet. Capital murder carries a possible sentence of death by lethal injection or life in prison without parole.

District court judge Peter Ruddick ordered Hall held without bond.

Hall, 26, is scheduled to appear in court on an unrelated charge this afternoon.

In Kansas, one of several aggravating factors need [sic] to be present for the capital murder charge. In this case, it’s rape. Hall also faces an aggravated kidnapping charge that was filed earlier.

The amended complaint says Hall committed the aggravated sodomy when Smith “was overcome by force or fear or when she was unconscious or physically powerless.”

Hall was arrested June 6 after Smith’s body was found in a wooded area near Longview Lake in southern Jackson County. She had disappeared June 2 from a Target store parking lot in Overland Park.

The 18-year-old’s disappearance drew nationwide attention and hundreds searched for her.

In the other, unrelated case, Hall was charged Monday in a 2004 case involving a 14-year-old girl. He was charged with two counts of aggravated indecent liberties for his alleged involvement in a sexual relationship in July 2004 with a girl who was 14 at the time, Kline said.

62. *Id.*

63. Since the publication of the 2007 story on Edwin Hall, the *Kansas City Star* has followed the national trend and made severe job cuts. In June 2008, it cut 120 positions; in September 2008, it laid off or accepted buyouts from 65 employees; and in November 2008, it cut 50 more jobs. *Kansas City Star Announces 50 Job Cuts*, COLUMBIA MISSOURIAN, Nov. 10, 2008, available at <http://www.columbiamissourian.com/stories/2008/11/10/kansas-city-star-announces-50-more-cuts/>.

Kline declined to offer any information about how the new case came to light or to provide any other details. However, he said the 14-year-old in question was not Smith.⁶⁴

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Before the state of Texas executed Larry Donnell Davis, Denard Manns, and Derrick Sonnier—the “stories” of whose executions by the Associated Press are reprinted above—the Texas Attorney General issued comprehensive press releases concerning the “facts of the crime” and the “procedural history” of each case.⁶⁵ The packages prepared by the Texas Attorney General provide enough information for newspapers which cannot afford to investigate to create an article. Detailed in the Attorney General’s press release on Larry Davis are not only the facts of the crime, but summations of the state’s case at the penalty phase of the trial. The reporter can learn that the state presented “evidence of Davis’ abusive treatment of women[,]” that Davis’s wife “finally left him when Davis became abusive toward their children[,]” and that while awaiting trial, Davis had an altercation with jail officials where Davis “was holding an uncapped Bic pen (considered a weapon in this context) in his fist in a ‘stabbing’ manner.”⁶⁶ Also contained in the press release is an exhaustive history of Davis’s prior contact with the criminal justice system.⁶⁷ Not surprisingly, there is nothing in the press release about what, if anything, was presented by the defense at any stage of Davis’s capital murder trial. If the defense presented mitigating evidence, there is no mention of it in the press package. It is not the responsibility of the district attorney or the attorney general to present the position of the defense. But there is no countervailing press package from the defense. The vast disparities between the resources available to the government for purposes of prosecution and the resources available to defense counsel for the representation of indigent defendants⁶⁸ so

64. Diane Carroll, *Edwin Hall Charged with Capital Murder*, KAN. CITY STAR, July 10, 2007, at B1.

65. Press Release, Tex. Attorney Gen., Sonnier Scheduled for Execution (May 27, 2008); Press Release, Tex. Attorney Gen., Larry Davis Scheduled for Execution (July 28, 2008); Press Release, Tex. Attorney Gen., Denard Sha Manns Scheduled for Execution (Nov. 6, 2008).

66. Press Release, Tex. Attorney Gen., Larry Davis Scheduled for Execution (July 28, 2008).

67. *Id.*

68. See, e.g., Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 305 (2008) (“Consider, for example, the results of an exhaustive study of Virginia’s system for indigent defense representation commissioned by the American Bar Association. On every funding-related matter surveyed, Virginia prosecutors came out far ahead of public defenders. These include attorney salaries and caseloads, attorney and support staff, and office resources.” (footnotes omitted)); see also THE SPANGENBERG GROUP, RESOURCES OF THE PROSECUTION AND INDIGENT DEFENSE FUNCTIONS IN TENNESSEE 17 (2007), available at <http://www.thejusticeproject.org/wp-content/uploads/spangenberg-study.pdf> (stating that in Tennessee, “indigent prosecution funding is between two and two-and-a-half times greater than indigent defense funding”).

often mean that defense attorneys cannot afford the services of professionals to “package the facts.” If a reporter wanted to include perspectives from the defense, the reporter would have to actively seek out the defense lawyer; however, that would entail switching from a passive recipient of “facts” to an active gatherer of information. That costs money. Therefore, it likely will not occur.

Even with sufficient resources, our cases are rarely amenable to packaging. The life of an individual, the reasons why that individual may have committed a crime, or the reasons why a conviction may be the product of systemic race and class biases are not reducible to two-paragraph, press-worthy snippets. In every courtroom across the United States, prosecutors are urging jurors to believe that “This case is simple,” while lawyers for the accused inevitably respond that “No case is ever simple and no life is ever simple.” But only the former fits, above the fold, in today’s newspaper.

The cases are rare where DNA evidence both exists and exonerates a capital defendant; where another individual, already fortuitously convicted and incarcerated for a series of sexual assaults and murders that eerily resemble the acts for which the defendant was convicted, matches the newly tested DNA evidence, and there exists no further evidence against the defendant. Those cases can be summarized in two paragraphs and presented to the press. But far more common, a demonstration of innocence requires presentation of the fruits of years of investigative and legal work: documents, affidavits, witness testimony. That cannot be accomplished in a “press package.”

The alternative to accepting prepackaged news from interested parties is increased reliance on news-gathering agencies such as the Associated Press. The Associated Press is not new; what is new is American newspapers turning to Associated Press stories and stories from wire services for issues that they once covered with staff reporting.⁶⁹ Throughout the entire United States of

69. The Project for Excellence in Journalism, which surveys newsroom executives and journalists throughout the nation, noted the following in its 2008 *State of the News Media* report: “Newsroom executives who say they have eliminated jobs . . . said they had in many cases replaced newsroom-written contributions with syndicated or news agency content—content they get at a fraction of the cost of producing it with staff.” PROJECT FOR EXCELLENCE IN JOURNALISM, *Special Reports: The Changing Newspaper Newsroom*, in THE STATE OF THE NEWS MEDIA 2008, *supra* note 47. In short, “You can buy a lot of wires for what one reporter costs[.]” *Journalist Suggests Positive Approach to News Coverage*, BANGOR DAILY NEWS, Nov. 11, 1993. Interestingly, the Associated Press, which operates as a not-for-profit cooperative owned by 1500 daily newspapers in the United States, Associated Press, Facts & Figures, <http://www.ap.org/pages/about/about.html> (Apr. 16, 2007), has not felt the budget crunch which has devastated newspapers. As the *New York Times* reported in October 2008: “Newspapers are going through their most wrenching time since the Depression, with advertising revenue falling about 25 percent over the last two years. But the balance sheet of The A.P., a nonprofit company, is healthy; last year its profit rose 81 percent, to \$24 million, on revenue of \$710 million, according to a financial statement issued to its members.” Richard Perez-Pena, *Some Papers in Financial Trouble Are Leaving the A.P. to Cut Costs*, N.Y. TIMES, Oct. 20, 2008, at B1. And though the

America, the *only* source of “news” on the Texas executions of Davis and Manns was the Associated Press,⁷⁰ and just one other outlet reported on the execution of Sonnier.⁷¹ And every story reads the same. Consider the opening paragraphs of the executions of Davis, Manns, and Sonnier, as reported by the Associated Press:

HUNTSVILLE, Texas—Texas executed a condemned inmate on Thursday for orchestrating and taking part in the robbery and killing of a man in Amarillo 13 years ago.

“Blessed are they that mourn, for they shall be comforted,” Larry Donnell Davis said in his final statement, quoting from the Bible. “It is finished.”

The parents of Davis’ victim watched through a window a few feet from him but he never looked at them. He was pronounced dead at 6:19 p.m. CDT, eight minutes after the lethal drugs began to flow.⁷²

* * *

HUNTSVILLE, Texas—Texas executed a former New York City hair stylist with a long criminal record Thursday for the robbery, rape and murder of an Army medic at her apartment near Fort Hood.

“From Allah he came and from Allah he shall return,” Denard Manns said from the death chamber gurney.

Manns, 42, criticized or thanked various attorneys who had represented him, expressed love to friends and said, “I’m ready for the transition.” He uttered what appeared to be a brief prayer three times and was pronounced dead 10 minutes after the lethal drugs began to flow.⁷³

* * *

Associated Press is currently receiving some heat from its financially struggling members—a few have filed the required two-year advance notice that they plan to leave the cooperative—the only real alternative for the members would be to buy more stories from corporate wire services such as Reuters since they clearly lack the resources to abandon the Associated Press and fill in the gaps with staff coverage. A newspaper’s decision to switch from the Associated Press to Reuters while continuing to cut staff reporters would not solve the problem addressed in this Article.

70. The fact that no non-Associated Press outlets in the United States covered the executions—as determined by Westlaw searches for the name of each inmate and the day of and day after his execution—signals a dangerous shrinkage of “the marketplace of ideas and interpretations.” PROJECT FOR EXCELLENCE IN JOURNALISM, *Special Reports: The Changing Newspaper Newsroom*, in THE STATE OF THE NEWS MEDIA 2008, *supra* note 47.

71. The lone non-Associated Press article on Sonnier’s execution was written by the staff of the *Houston Chronicle*. Rosanna Ruiz, *Execution Has Little Solace for Relatives; Killer Silent as He’s Put to Death for 1991 Murders*, HOUS. CHRON., Aug. 24, 2008, at B1. However, the *Chronicle* article looks quite similar to the Associated Press template. *See id.*

72. *See supra* note 5.

73. *See supra* note 6.

HUNTSVILLE, Texas—Texas executed a man Wednesday who was convicted of killing a woman and her child, while Mississippi put to death a man who took part in the fatal beating of another man.

Derrick Sonnier shook his head “no” when asked if he had any final statements. He was pronounced dead at 6:18 p.m. CDT, eight minutes after the lethal dose was administered.⁷⁴

Names are changed, the inmate’s last words are different, the minutes in which it took the condemned man to die “after the lethal drugs began to flow” are renumbered. But the formula is always the same. And nowhere in the formula is there space to explain in any serious detail that the defendant may have had a trial attorney who is now disbarred, or that the defendant’s attorney was ineffective, or that outstanding issues of real merit remain in the case, but those issues will never be heard because the courts dismissed all such claims on procedural grounds.

This is the future of crime reporting in newspapers. As capital defense attorneys, we are concerned. We note that newspapers rarely engage in criminal justice reporting as opposed to crime reporting. We believe criminal justice reporting is endangered in this country’s newspapers, and we see no reason to believe in its resurrection. We note that crime reporting is not, and never has been, an adequate substitute for criminal justice reporting. But while the quantity of crime reporting in this country is on the ascent, the quality of crime reporting manages to get worse. Crime reporting has little place for the defense’s side of the story. In the vast majority of cases, we cannot package our client and our client’s story into convenient two-paragraph snippets. We acknowledge that newspapers of old were far from perfect, but we drew some solace from the fact that series like that published by the *Chicago Tribune* in 2000 were possible. We no longer draw such solace. We emphasize that our concern is not for the vitality of newspapers for their own sake. Our concern is where stories of criminal justice—stories of unfairness, stories of outrageous conduct undertaken by the state in the public’s name, stories of people, not monsters, who are being killed by the state—are going to appear. They are not going to appear in newspapers. And we fail to see where they will appear instead.

III. THE LIMITATIONS OF NEW MEDIA

The reality that our clients and people like them have lost the watchdog of the “Fourth Estate” on account of the traditional newspaper’s decline would not be as frightening if new media were capable of filling the void. Unfortunately, while we acknowledge that new media such as blogs have democratized the journalistic endeavor and drawn previously unconnected people into the public

74. *See supra* note 7.

discourse, we fail to see how they can engage in serious criminal justice reporting.

Nationwide, people are increasingly turning to the web for news,⁷⁵ and naturally traditional newspapers have attempted to evolve with the times by focusing heavily on their more flexible web-based companions.⁷⁶ But in the past two years, one fact has become crystal clear: American newspapers have not yet devised a business strategy that sufficiently capitalizes on new media to cover the expenses of the traditional newsroom.⁷⁷ In short, when newspapers began experimenting with the wonders of the web, their readers followed,⁷⁸ and many advertisers did too.⁷⁹ But the advertisers have since hit the brakes.

75. “Nearly half of the 1,979 people who responded to [a We Media/Zogby Interactive Poll] said their primary source of news and information is the Internet, up from 40 percent just a year ago.” *More Americans Turning to Web for News*, Reuters, Feb. 29, 2008, available at <http://www.reuters.com/article/internetNews/idUSN2824760420080229>. Ten percent said their primary source of news is newspapers. Perhaps even more importantly, the age breakdown leaves nothing unclear about the direction in which news consumption is moving. “More than half of those who grew up with the Internet, those 18 to 29, get most of their news and information online, compared to 35 percent of people 65 and older. Older adults are the only group that favors a primary news source other than the Internet . . .” *Id.*

76. Newspapers were more reactive than proactive with their moves to the web. In its 2006 *State of the News Media* report, the Project for Excellence in Journalism stated:

In earlier [State of the News Media] reports, the real investment and creativity in new technology appeared to be coming mostly from non-news organizations like Google. Traditional news outfits, in practice if not in rhetoric, treated the Internet as a platform to repurpose old material. While the evidence is sketchy and the efforts are frustrated by newsroom cutbacks, in 2005 we saw signs that the pattern was beginning to change.

PROJECT FOR EXCELLENCE IN JOURNALISM, *Overview: Major Trends, in THE STATE OF THE NEWS MEDIA 2006: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2006)*, available at http://www.stateofthenewsmedia.org/2006/narrative_overview_eight.asp?cat=2&media=1.

A year later, the *American Journalism Review* observed this pattern as well: “Newspapers have not exactly been leaders in this tech-driven landscape. In the late 1990s, they were tentatively dipping their toes into the chilly rapids of cyberspace; years later, they still can’t quite figure out what to do with the Web or how to make money off the thing. But, finally, newspapers are starting to see the Internet as central to their future.” Rachel Smolkin, *Adapt or Die*, AM. JOURNALISM REV., June-July 2006, at 17, 17 (citations omitted). Unfortunately, the new problem for many newspapers is not whether the Internet will be central to their future, but whether the newspapers will have a future at all. See *infra* notes 78-80 and accompanying text.

77. “Currently there is no business model that makes online reporting financially viable. From a business perspective, reporting is a loser.” Kamiya, *supra* note 45.

78. See *More Americans Turning to Web for News*, *supra* note 75 (reporting that the fraction of survey respondents who use the Internet as their primary source of news rose 40% from 2007 to 2008). However, observing that readers “followed” newspapers online when newspapers made the leap is simply to say that they began spending more and more time with the online versions than the print versions, not they had never spent time on the web before. In reality, many newspapers were slow to capitalize on the Web.

79. In its 2005 *State of the News Media* report, the Project for Excellence in Journalism reported: “The biggest question for 2005 involves the economics of the Internet. Ad revenue there continued to explode, with growth projections for 2004 around 30%, to roughly \$10 billion.” That report—published just a few short years ago—concluded that “[t]he economics of journalism continues to be robust.” PROJECT FOR EXCELLENCE IN JOURNALISM, *Overview*:

As the *American Journalism Review* noted in its January 2008 issue, “[m]ost ominous of all is that online ad growth is beginning to slow. Remember those confidence-building double-digit increases in online advertising revenue? They’re fading, fast.”⁸⁰

Thus, the print model of the traditional newspaper is failing, and the web-focused model is failing too in that it cannot compensate for the decline of the print model. Any hope that online advertising revenues might stave off the budget cuts caused by declining newspaper revenues—or build and sustain new web-based institutions with the newsroom model of the traditional paper⁸¹—have vanished. The traditional newspaper is not simply in dire straits with regard to its paper product; it is in dire straits all around.

Of course, traditional newspaper institutions are not—and never have been—the leading proprietors of new media.⁸² Since the explosion of the Internet, ordinary people with access to computers have played the most important role in the generation and transmission of information across the

Economics, in THE STATE OF THE NEWS MEDIA 2005: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2005), available at http://www.stateofthenewsmedia.org/2005/narrative_overview_economics.asp?cat=4&media=1.

80. Paul Farhi, *Online Salvation*, AM. JOURNALISM REV., Dec.-Jan. 2008. The same year, the publication stated that:

Newspapers that were hoping to be rescued by their online ad businesses woke up to a sobering reality in mid-2007. By then, it was becoming clear that online advertising wasn’t growing fast enough to make up for the rapid disappearance of print ads. In fact, at the moment, online ads aren’t growing at all. Sales at newspaper Web sites fell 2.4 percent in the second quarter of 2008. This may be as ominous a development as the meltdown of print. Online newspaper revenues had grown smartly in every quarter since the Newspaper Association of America began tracking them in 2003. No longer.

Paul Farhi, *Don’t Blame the Journalism*, AM. JOURNALISM REV., Oct.-Nov. 2008, at 14 (citations omitted). “[M]ore and more it appears the biggest problem facing traditional media . . . [is] the emerging reality that advertising isn’t migrating online with the consumer.” PROJECT FOR EXCELLENCE IN JOURNALISM, *Overview: Intro*, in THE STATE OF THE NEWS MEDIA 2008, *supra* note 47.

Online advertising growth slowed throughout the industry and, in some markets, newspaper sites experienced declines (mainly because sales related to print classifieds were way down). For the year, the industry’s online advertising grew a little less than 20%, compared to more than 30% for several years before.

It is evident that much online reading is done in quick bursts, leaving not much time to browse the ads, which may not be nearly as reader-friendly as their print counterparts. Much traffic now comes through search rather than the “front door” of a home page. A substantial share of those readers live out of market and thus is not of use to local advertisers.

PROJECT FOR EXCELLENCE IN JOURNALISM & RICK EDMONDS, *Newspapers: Economics*, in THE STATE OF THE NEWS MEDIA 2008, *supra* note 47.

81. Even the proprietors of web-based media institutions recognize the financial limitations of their reporting as compared to that of traditional newspapers. In the words of Joel Kramer, the editor and chief executive of an online news organization in Minneapolis, “We can tweak the papers and compete with them, but we can’t replace them.” Richard Perez-Pena, *supra* note 45.

82. Although virtually all traditional newspapers have online companions now—complete with blogs and other new features—most were well behind the curve when new media began emerging as a dominant force. See *supra* note 76.

web. Those ordinary people note their observations on blogs,⁸³ and they post comments and photos on social networking sites.⁸⁴ They develop web-based communities devoted to public discourse,⁸⁵ and they participate in collaborative projects.⁸⁶ As the Project for Excellence in Journalism observed in its State of the News Media 2008 report: “Citizen media [are] . . . growing in ways unmistakable and engaging. Web sites run by citizen journalists are multiplying”⁸⁷ Media institutions have opened their doors to the public as well, creating interactive features on the web and turning to ordinary citizens for content.⁸⁸ However, as noted above, institutions have struggled to generate revenues through such innovations.

83. Web logs, or “blogs,” are web sites to which individuals post regular entries. The entries include text and sometimes photos or video, and they are generally displayed in reverse chronological order. Sites such as www.blogger.com enable people to create their own blogs for free. In its 2008 *State of the Blogosphere* report, Technorati, a blog-tracking service, reported that it had indexed 133 million blogs on the web between 2002 and 2008. TECHNORATI, STATE OF THE BLOGOSPHERE 2008, <http://technorati.com/blogging/state-of-the-blogosphere>. In the report, Technorati also noted various studies suggesting that more than 60 million people in the United States read blogs (one study stated 60.3, another stated 94.1) and that more than 20 million people in the United States have started blogs (one study stated 22.6, another stated 26.4). Although the different studies reveal different numbers, there is no disagreement over the fact that tens of millions of people throughout the nation are active in the world of blogs.

84. Networking sites such as Facebook and MySpace enable users to create and update personal profiles, join networks, and communicate with other users. The Internet information provider comScore released a study in August 2008 stating that Facebook attracted 132 million unique visitors worldwide in June 2008 alone, while MySpace attracted 117 million unique visitors in that same month. Press Release, comScore, Social Networking Explodes Worldwide as Sites Increase Their Focus on Cultural Relevance (Aug. 12, 2008), *available at* <http://www.comscore.com/press/release.asp?press=2396>. In addition, Twitter, the micro-blogging service which enables users to send 140-character updates by text message, e-mail, or web posting, has at least six million registered users. Posting of Clair Cain Miller to New York Times Bits, Why Twitter Turned Down Facebook, <http://bits.blogs.nytimes.com/2008/12/03/why-twitter-turned-down-facebook/?scp=4&sq=twitter%20&%20million&st=cse> (Dec. 3, 2008, 09:41 EST).

85. *See, e.g.*, US Democrat-National, Yahoo! Groups, <http://dir.groups.yahoo.com/group/USDemocrat-National/messages?o=1> (last visited Apr. 3, 2009) (devoted to the “discussion of national issues that affect Democrats”).

86. One such project, Wikipedia, functions as an online encyclopedia which volunteers edit. Press Release, The Nielsen Company, Wikipedia U.S. Web Traffic Grows 8,000 Percent in Five Years, Driven by Search, According to Nielson Online (May 14, 2008), *available at* http://www.nielsen-online.com/pr/pr_080514.pdf (noting that “[i]n the past five years, Web traffic to Wikipedia has skyrocketed, increasing nearly 8,000 percent from April 2003 to April 2008”).

87. PROJECT FOR EXCELLENCE IN JOURNALISM, *Online: Intro*, in THE STATE OF THE NEWS MEDIA 2008 *supra* note 47.

88. In its 2008 *State of the Blogosphere* report, Technorati reported that “95% of the top 100 U.S. newspapers have reporter blogs.” TECHNORATI, STATE OF THE BLOGOSPHERE 2008, <http://technorati.com/blogging/state-of-the-blogosphere/>. Such sites “are incorporating styles and formats from the Blogosphere” even though they are mainstream newspaper sites. *Id.* Nonetheless, advertising revenues have failed to compensate for the fall of the newspapers themselves. *See supra* note 80.

Limited financial capabilities aside, the revolutionary advantage of new media is that they expand the news-collecting universe by inviting ordinary citizens into the process.⁸⁹ As Kenneth Lerer, one of the founders of the *Huffington Post* blog,⁹⁰ told *The New Yorker* in 2008: “Early on, we saw that the key to this enterprise was . . . taking advantage of our community. And the key was to think of what we were doing through the community’s eyes.”⁹¹ Indeed, community participation—whether through personal blogs or larger, high-traffic sites—provides two unique strengths for new media. First, ordinary people conduct their own independent research through the ever-expanding Internet, at times working to scoop the traditional news media on important stories.⁹² Second, subjects of the news provide firsthand accounts by sharing their experiences on the web, thus communicating unfiltered perspectives unavailable in traditional newspapers.⁹³

The national analysis of the developments in and advantages of new media is an ongoing process, and much of it centers on a single question: whether the new, democratized media have the ability to fill the gaps created by the fall of the institutional newspaper—a fall to which new media have obviously contributed.⁹⁴ Stalwarts of traditional newspapers contend that bloggers and other nontraditional journalists merely repack news rather than discover it, and as such they are dangerous parasites who reap the reporting benefits of the traditional newspaper while simultaneously destroying it.⁹⁵ Of course, defenders of new media have a response. From their standpoint, the stalwarts’ claim that new media lack the very essence of reporting—reporters—is a

89. “The Roman Empire that was mass media is breaking up, and we are entering an almost-feudal period where there will be many more centers of power and influence.” *The Future of the New York Times*, BUS. WK, Jan. 17, 2005, cover (quoting Orville Schell, dean of the University of California at Berkeley’s journalism school).

90. The Huffington Post, <http://www.huffingtonpost.com/>.

91. Alterman, *supra* note 16, at 48 (quoting Kenneth Lerer).

92. More people than ever before have an eye on the subjects once covered by a limited number of full-time professional reporters. Gone are the days when only major media outlets could deliver a high-profile scoop. Now, if the press corps misses a red flag or talks itself out of a story through group-think, bloggers can take it upon themselves to investigate. See Paul McLeary, *How TalkingPointsMemo Beat the Big Boys on the U.S. Attorney Story*, COLUM. JOURNALISM REV., Mar. 15, 2007, http://www.cjr.org/behind_the_news/how_talkingpointsmemo_beat_the.php (explaining how a relatively small blog capitalized on its readers’ input to beat major media outlets to the story of U.S. Attorneys being fired across the country).

93. See *infra* text accompanying notes 101-03.

94. See *supra* note 75.

95. See, e.g., Alterman, *supra* note 16, at 48 (exploring the relationship between new media and newspapers and commenting on “the parasitical relationship that virtually all Internet news sites and blog commentators enjoy with newspapers”); Ted Vaden, *Blogs Challenge Newspaper Standards*, NEWS & OBSERVER, Oct. 16, 2005, at A31 (quoting *New York Times* executive editor Biller Keller saying, “Most of what you know, you know because of the mainstream media . . . Bloggers recycle and chew on the news. That’s not bad. But it’s not enough”).

fallacy. The web has millions of reporters: ordinary people conducting their own investigations and sharing their own experiences.

Unfortunately, criminal justice reporting presents unique problems which the new, democratized media appear ill-suited to handle. The first is that effective criminal justice reporting takes serious money up front, not only to investigate but also to engage in the litigation that is often a necessary component of such investigation. The second issue is that the very strength of new media trumpeted by their adherents—the citizen as journalist—ends at the prison walls. New media rooted in citizen participation have yet to showcase a sustainable strategy for confronting either of those challenges, let alone the two challenges operating in concert.

The financial costs of effective criminal justice reporting are enormous. “Investigative reporting is expensive, not only because you have to write a lot of paychecks before good work gets [published] but also because you sometimes have to hire lawyers to pry documents out of government files or to defend yourself from harassing lawsuits filed by the annoyed investigative targets.”⁹⁶ The fact that launching and conducting journalistic investigations into the criminal justice system is so expensive poses a problem for the basic concept underlying the democratization of the media. It is true that many people can take some time out of their lives to contribute to blogs. But for the most part such people do not have the resources to spend days upon days observing court proceedings, more days sifting through legal documents, more days interviewing witnesses, and more days doing it all again. “Investigative reporting often requires an enormous commitment of time and money, with no guarantee that the effort will produce any news at all. Bloggers don’t have the resources . . . for that kind of work.”⁹⁷

In addition, investigating criminal justice is a minefield for litigation—both litigation concerning information access⁹⁸ and litigation concerning the final product.⁹⁹ Lawsuits over access to information are especially likely in the context of criminal justice reporting, as prisons and law enforcement agencies

96. Rex Smith, *supra* note 51 at A7. Although writing paychecks to place reporters in the field constitutes a large portion of the financial burden, “[t]here is no substitute for field reporting, in which a real live human being observes an event while it is happening and talks to other real, live human beings.” Kamiya, *supra* note 45.

97. Cokie Roberts & Steven V. Roberts, *Pulitzers Answered the ‘Dead Tree’ Question*, SUN HERALD (Biloxi, Miss.), Apr. 23, 2006, at B10.

98. *See infra* note 100.

99. *See* Demian Bulwa, *Cabbie Sues Chronicle over Photo Mistake*, S.F. CHRON., May 10, 2006, at B5 (“A San Francisco taxi driver sued The Chronicle on Tuesday, saying he had suffered emotional distress and embarrassment and had to cut his work hours after the newspaper mistakenly identified him in a photograph as a police officer with a record of using excessive force The article was part of a series on problems with the use of force by San Francisco police.”).

often stonewall prying outsiders until the officials are literally hauled into court.¹⁰⁰

Defenders of new, democratized media contend that what they lack in resources, they gain through citizen participation. Whereas traditional newspapers can only report on events where they have reporters on the scene, new media can capitalize on the insight of ordinary people—regardless of whether those people have a day’s worth of journalism experience. As one media veteran observed, “Traditional journalism provides the view from the outside looking in, and citizen journalism provides the view from the inside looking out.”¹⁰¹

The benefit of the “inside looking out” view is that it enables ordinary people to share real experiences—and the citizenry to absorb those experiences—without the impediments or dilution of a gatekeeper. For example, news consumers could rely on traditional reporters to tell them that Virginia Tech students were terrified as their college campus became immersed in violence on April 16, 2007. But by simply logging on to their computers, those same consumers could read the students’ firsthand accounts.¹⁰² The end result is either the proliferation of information independently presented or the supplementation of the institutional media’s reporting—either way, a democratizing force delivering previously unavailable perspectives.

Writing in 2005, journalism professor Jay Rosen observed, “[f]reedom of the press belongs to those who own one, and blogging means practically anyone can own one.”¹⁰³ Indeed, new media have drastically expanded the

100. See, e.g., Gordon Russell, *Police Sued over Public Records TP Says Reports Are Delayed, Unreleased*, TIMES-PICAYUNE (New Orleans), Apr. 19, 2008, at A1 (“The Times-Picayune filed a lawsuit Friday against the New Orleans Police Department, alleging that the department has failed to provide a long list of public records requested by the newspaper and routinely delays the release of initial incident reports intended to promptly inform the public about crime in the city. The suit, filed in Civil District Court, outlines six written requests for records made between Dec. 18 and March 4 by two reporters and an editor at the paper in accordance with the Louisiana Public Records Act.”); *Newspaper Sues Wis. Police for Denying Access to Records*, Associated Press, June 22, 2007 (“A newspaper is accusing the Madison Police Department of violating the state’s open records law by refusing to release disciplinary records involving a former officer who resigned. The Wisconsin State Journal . . . the second largest [newspaper] in Wisconsin, is seeking access to employment and disciplinary records involving former officer Meredyth Thompson. The department, in response to an open records request filed by Hall, refused to release copies of complaints filed against Thompson by citizens and her colleagues on the force in 2002, 2003, and 2004 . . .”).

101. Chris Gaither & Matea Gold, *Katrina Spotlights Internet’s Increasingly Crucial Role*, L.A. TIMES, Sept. 10, 2005, available at 2005 WLNR 14243092 (Westlaw) (quoting Mitch Gelman, senior vice president and executive producer of CNN.com).

102. K.C. Jones, *Cell Phones, Blogs Enable Live Reporting of Virginia Tech Shooting*, INFO. WK., Apr. 16, 2007, <http://www.informationweek.com/news/mobility/showArticle.jhtml?articleID=199001329> (explaining that students used blogs and Facebook on the day of the violence).

103. PressThink, <http://journalism.nyu.edu/pubzone/weblogs/pressthink/2005/01/21/>

world of journalism. But Professor Rosen chose his words carefully when he explained who owns the press—“practically everyone.”

There are more than 2.2 million people in jails and prisons across the United States.¹⁰⁴ They include people recently arrested for the first time and people wondering when, if ever, they will see an attorney. They include people serving nine-year prison terms and ninety-nine year prison terms, people with mental illness and mental retardation, people abused as children at home and abused as adults in prison. They include people languishing on death row and people nearing execution by lethal injection. None of those people can own a computer, and none have access to the Internet. None can capitalize on the freedom Professor Rosen heralds for “practically everyone.”

The reality is that the “inside looking out” view does not exist in the context of criminal justice news. People entangled in the criminal justice system cannot share their real experiences with the citizenry without a gatekeeper, and the citizenry cannot absorb those experiences. This is a problem not because people in jails and prisons have some legal right to unimpeded access to the Internet,¹⁰⁵ but because society’s increasing reliance on ordinary people to contribute to news coverage means that the perspectives of those in jails and prisons are featured even less by new media than by the traditional newspaper.

In short, the fall of the traditional newspaper has left people entangled in the criminal justice system to rely on participatory media to play the watchdog role of the “Fourth Estate.” Alas, those people are not participants in the new participatory media.

If engaged citizens cannot conduct their own criminal justice reporting because it is too expensive and the participatory new media exclude people in jails and prisons, our fear is that new media—however valuable in other areas—cannot ride to the rescue as the traditional American newspaper abandons serious reporting of criminal justice.

CONCLUSION

The collapse of criminal justice reporting as an endeavor that newspapers today can undertake is more than a crisis of information. It is a moral crisis. Americans are not apathetic about the great issues of the day. The presidential election of 2008 demonstrated the opposite: Americans want to know what is being done in their name and what is happening in their own backyard. To a large extent, media—both traditional and new—met this demand for

berk_essay.html (Jan. 21, 2005, 17:43 EST). After that comment, Professor Rosen states, “[t]hat is the Number One reason why weblogs matter.” *Id.*

104. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (explaining that at the end of 2007, “2,293,157 prisoners were held in federal or state prisons or in local jails”).

105. We do not claim that such a right exists.

knowledge. If a citizen wanted to understand the candidates' differing positions on health care reform, he could read newspapers, and he could also wade through dozens of new media sources providing detailed analysis of the candidates' proposals¹⁰⁶ and the perspectives of people without access to doctors.¹⁰⁷

We do not see such availability of information in matters of criminal justice. What is happening to our children when they are placed in delinquent institutions in faraway states? Why are poor people spending months in jail because they cannot afford the fees of private probation companies while rich people literally escape because they could afford the initial traffic fine? Why do courts tolerate such abysmal attorneys for poor people accused of criminal offenses? If such information is not available, the American public cannot be expected to react and demand change or reform. What is happening to our children, to poor people charged with crimes, and to the condemned and institutionalized in this country are critical questions that define who we are as a nation. But where do Americans get the information to answer these questions? In the past, newspapers could and at times did provide this information, but we do not see newspapers being able to perform this critical function moving forward. And we do not see new media filling the vacuum. "[W]hat will become of those people . . . who depend on . . . journalistic enterprises to keep them safe from various forms of torture, oppression and injustice"?¹⁰⁸ They will be tortured; they will be oppressed; they will be victims of injustice. And Americans will not know.

106. See, e.g., Posting of Susan Blumenthal to Huffington Post, http://www.huffingtonpost.com/susan-blumenthal/us-presidential-candida_b_55460.html (July 9, 2007, 15:18 EST); Curing Healthcare, http://curinghealthcare.blogspot.com/2007/12/presidential-candidates-healthcare_26.html (Dec. 26, 2007) (examining the Democratic candidates' proposals on how to achieve universal health care in a post by a psychologist and practitioner to his personal blog); Health08.org, <http://www.health08.org/sidebyside.cfm> (analysis by the Kaiser Family Foundation).

107. See, e.g., Posting of mightbeanangel18 to Yahoo! Answers, <http://answers.yahoo.com/question/index?qid=20081022090108AAWEjZ4> (Oct. 22, 2008, 09:01 EST) ("Thyroid issues run in my family. I am 24 and have been putting on weight and can not lose it . . . I am also always tired and have no energy. Sometimes I wake up and it is hard for me to swallow. I have no health care so I can not go to a doctor, although I'd like to. Does this have to be diagnosed by a doctor? If it does, and I obviously can't afford one, how will not having it treated affect me?").

108. See Alterman, *supra* note 16, at 48.

