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INFORMATION OVERLOAD, MULTI-TASKING, AND THE SOCIALLY NETWORKED JURY: WHY PROSECUTORS SHOULD APPROACH THE MEDIA GINGERLY

By Andrew E. Taslitz

Abstract

The rise of computer technology, the internet, rapid news dissemination, multi-tasking, and social networking have wrought changes in human psychology that alter how we process news media. More specifically, news coverage of high-profile trials necessarily focuses on emotionally-overwrought, attention-grabbing information disseminated to a public having little ability to process that information critically. The public's capacity for empathy is likewise reduced, making it harder for trial processes to overcome the unfair prejudice created by the high-profile trial. Market forces magnify these changes. Free speech concerns limit the ability of the law to alter media coverage directly, and the tools available to trial judges to minimize harm to trial fairness are toothless. The usual solution has been lawyers' ethics rules designed to channel their communications with the press, particularly rules focusing on prosecutors.

This piece addresses these concerns, using a recent proposed revision to the American Bar Association Criminal Justice Standards for the Prosecution Function as a jumping off point for the discussion. Those Standards, like most state ethics rules, prohibit prosecutors from making "public statements that the prosecutor reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding." Drawing on cognitive science, behavioral economics, rumor-transmission studies, and jury research, this article argues that a substantial likelihood of material prejudice to criminal proceedings from prosecutor statements to the press will *always* be present in high profile cases. Accordingly, the rules generally governing prosecutor dealings with the press, including the latest version of those rules embodied in the proposed Standards, are unrealistic. Better rules are theoretically possible. Nevertheless, this article concludes, such rules are not politically realistic. Accordingly, this piece recommends modest changes to the proposed standards' commentary to alert prosecutors to the true nature of the risks arising from their contact with the media and recommending prosecutor training and internal and external accountability mechanisms to improve prosecutor performance in this area.

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Information Overload, Multi-tasking, and the Socially Networked Jury: Why Prosecutors Should Approach the Media Gingerly

Andrew E. Taslitz*

I. Introduction

This article will argue that changes in technology and American culture create reasons for all prosecutors to be even more cautious than was true in the past in interacting with the media. Many of my comments could apply to defense counsel as well, but my focus here is on prosecutors, both because of my limited space and my belief that they are the actors whose word is likely to have the greatest impact on the public. More specifically, this article will raise doubts about the effectiveness of the proposed American Bar Association Criminal Justice Standards for the Prosecution Function, Standard 3-1.7, entitled, “Relationship with the Media.” The core provision of that standard reads as follows:

(c) A prosecutor should not make or authorize the making of a public statement that the prosecutor reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or unnecessarily heightening public condemnation of the accused, except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s or law enforcement actions and which serves a legitimate law enforcement purpose (and subject to any exceptions in an applicable judicial rule or rule of professional conduct).¹

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This provision alters the current standard in two ways: first, by adding the word “material” before the word “prejudice” (a standard that would seem to make it easier to talk to the media because it is harder to prove “material” prejudice than any prejudice whatsoever); second, by adding to the prohibition against unreasonably creating a substantial likelihood of materially prejudicing a criminal proceeding a second prohibition, namely on “unnecessarily heightening public condemnation of the accused.”² In most cases, these new standards would present no problem because media coverage of most criminal cases is non-existent or minimal.³

But in high-profile cases, these standards are unduly optimistic because media coverage will almost invariably create a substantial likelihood of “materially prejudicing a criminal proceeding” and of unnecessarily heightening condemnation of the accused. That does not necessarily mean that the standard should be changed because there are free speech concerns that are largely beyond the scope of this paper (though I will address them briefly in this article’s conclusion). Instead, this paper’s focus is solely on the risk to a fair trial.⁴ That risk is unavoidable. Prosecutors should not add to it and should therefore be cautious. At a minimum, therefore, comments to the proposed standard should urge such caution and explain the reasons justifying it. The standard is, after all, an aspirational one, offering guidance rather than punishable dictates on prosecutor behavior.

¹ ABA STANDARDS FOR CRIMINAL JUSTICE, PROPOSED REVISIONS TO STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-1.7(c) (Draft as of June 2010).

² *See id.* at 16 (separately reciting the language of the current standard, drafted in 1993, and the proposed new standard). It should be noted that current Rule 3.8(f), AM BAR ASS’N MODEL RULES OF PROF. CONDUCT, also contains a general prohibition on “making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused,” but that language does not appear in the current Standards for the Prosecution Function, which, along with the proposed revisions to those standards, are the subject of this symposium.

³ *See* Andrew E. Taslitz, *The Duke Lacrosse Players and the Media: Why the Fair Trial/Free Press Paradigm Doesn’t Cut It Anymore*, in RACE TO INJUSTICE: LESSONS LEARNED FROM THE DUKE LACROSSE RAPE CASE 175, 182-83 (Michael Seigel ed. 2009) [hereinafter *Free Press*].

⁴ Although the standards extend to impacts on a “criminal proceeding,” I focus solely on the impact on a fair trial here. If unacceptable prejudice would occur at trial, it is likely also to infect trial alternatives, such as a guilty plea, and many pretrial activities. Even where this is not necessarily so, however, the analysis for a fair trial can readily be applied to other stages of a criminal proceeding, such as suppression motion hearings.

After this Introduction, Part II of this article explains that our fast-paced, high-technology, multi-tasking, information overloading world makes it far more likely that audiences will evaluate news media emotionally rather than critically and will be drawn to extreme versions of the news. This observation is based on research concerning the impact of information overload on cognitive functioning. Part II will further explain why and how the news media caters to these tendencies in ways that lead to error, error likely to be slanted against criminal defendants.

Part III examines why these same technological and cultural changes reduce the likelihood of sustained, deep, critical thought generally, particularly in the case of crime news stories. Such reduced ability to fairly evaluate the credibility and weight of media reports makes it more unlikely that false or misleading statements will be challenged, truthful ones placed in proper context, or counterarguments and counter-interpretations fairly considered. Somewhat more speculatively, there is also reason to worry that technological and cultural changes are impairing Americans' on-average capacity for empathy – for fully understanding another's thoughts, feelings, and situation – a prerequisite for judging them fairly.⁵ Much news also spreads by, and is interpreted through the process of, rumor-transmission. Yet the rise of the internet amplifies the speed and scope of rumor, while increasing its capacity for fostering error.⁶ A less-critical, less empathetic audience is even less likely to spot these errors, as Part III further explains. Finally, Part III reviews psychological research on pretrial publicity's impact on juries, research that further supports the risks to critical thinking and feeling already reviewed. Yet that research likely undervalues the likely risks as rising generations raised on the internet and the quickening pace of technology make the dangers to trial fairness all the greater.

⁵ See Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEXAS TECH. L. REV. 419, 431-41 (2009) [hereinafter *Tinkerbell*].

⁶ See Taslitz, *Free Press*, *supra* note 3, at 182; *infra* text accompanying notes 247 - 253.

Part IV, the conclusion, briefly reviews, however, countervailing concerns, such as free speech, promoting sound democratic governance, responding to defense media coverage, correcting inaccurate media reports, and overcoming pre-existing public biases that favor prosecutor access to the press. Though this section is necessarily short given what can be accomplished in a brief article, this section offers support for retaining the unavoidably flawed core standard protecting the right to a fair trial but expanding the commentary to reflect the concerns noted here and endorsing changes beyond those recited in the standards that are necessary to improve prosecutor use of the press. Those changes include better prosecutorial training and enhanced methods for maintaining prosecutorial transparency and accountability. The conclusion also addresses some more minor drafting concerns.

I want to emphasize that I am no Luddite. Technology and the complexities of the modern world have many benefits, including for criminal justice. But in the area of media coverage, the risks to a fair trial are greater than ever before. Offering a fuller appreciation of those risks is my primary goal here.

II. *Information Overload and its Companions*

A. *A Day Spent in Overdrive*

Consider the typical day of a middle-aged married male lawyer with two kids.⁷ He awakes to music, perhaps from the ipod plugged into his wireless clock. He immediately checks his email on his home computer, then rushes downstairs to help to feed the kids and get them ready for school while a television set playing cartoons blares in the background. Once the kids are off, he drives to the train, again listening to music on his ipod while talking on his hands-free cell phone

⁷ The example is my own but is inspired by the more detailed example offered in JACK FULLER, *WHAT IS HAPPENING TO NEWS: THE INFORMATION EXPLOSION AND THE CRISIS IN JOURNALISM* 58-59 (2010). Fuller's book is the first work to explore the cognitive implications of information overload for the implosion of traditional news media and thus more generally inspired Part II of this article.

to young associates and early-rising clients. On the train, he uses his ipad to review background materials helpful for an upcoming deposition. At work, he edits a draft brief while listening to music but with periodic interruptions from calls or text messages on his cell phone and from emails and instant messages from clients who expect instant responses. He may also have programmed his laptop to interrupt him if there is pressing news about the world, and he may periodically glance at it to check out professional news feeds to keep him abreast of the latest developments in his areas of practice. His day is punctuated with meetings where he and others will check messages on their Blackberrys and conference calls that permit him to web surf or even edit a draft direct examination during each call. After a full day, on the ride home he relaxes by reading book excerpts on his ipad and again listening to music. Madness ensues when he returns home: multiple television sets playing, one kid needing a ride to a recital, another to a friend's house, a brief moment of "peace" with his equally exhausted spouse until the kids return home, a peace likely used to get ready for the next day's professional challenges by working on a laptop but perhaps at a more measured pace as a favorite television show plays in the background, though interruptions recur, much like those during the working day.

His children in some ways lead still more frantic lives. They have grown up in this multi-tasking, multi-media, fast-paced world of limited attention spans and information overload.⁸ They crave it. Unlike their middle-aged parents, these kids obsess about social networking sites, spending far more time on Facebook and MySpace interacting with scores or hundreds of "friends" than with in-person connection.⁹ If they want to relate to one individual or a small group, they text one another rather than using the cell phone.¹⁰ They may indeed rarely even

⁸ See LARRY D. ROSEN, *REWired: UNDERSTANDING THE iGENERATION AND THE WAY THEY LEARN*, 28-29 (2010).

⁹ See *id.* at 28-32.

¹⁰ See *id.* at 14-15, 35-37.

answer their cellphones, unless the call is from mom or dad.¹¹ They text as obsessively as they network. Uni-tasking bores them.¹² They do their homework while posting to their network sites, texting friends, listening to music, watching television, and googling interesting topics, much of this simultaneously or with quick task-switching.¹³ Parents must fight with the kids to get them to complete their homework faster and to get them to read books from start to finish, with full engagement and no distractions.¹⁴ Parents lose these fights, as do teachers.¹⁵ Older teens today spend about twenty-one hours daily using technology.¹⁶ Obviously, they are not sleeping only three hours per night and ditching school every day. This extraordinary number reflects the remarkable degree of their multi-tasking.

B. *Consequences of Overdrive: A First Look*

1. *Affective Consequences*

Information overload, time pressure, and frequent interruptions create problems for our limited brains.¹⁷ Our working memory can generally handle no more than about seven units of information at a time.¹⁸ Lengthy and difficult training can perhaps expand that limit by a

¹¹ See *id.* 36-37.

¹² See *id.* at 2-3.

¹³ See *id.* at 28; Larry D. Rosen, *Adolescents in MySpace: The State of Our Nation's Youth: 2008-09* (Horatio Alger Ass'n 2008); Larry D. Rosen, et al., *The Association of Parenting Style and Child Age with Parental Limit Setting and Adolescent MySpace Behavior*, 29 J. APPLIED DEV. PSYCH. 459, 459-71 (2008); D. TAPSCOTT, GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD 9 (2009).

¹⁴ See ROSEN, *supra* note 8, at 30-32, 33-35.

¹⁵ See *id.* at 75-76.

¹⁶ See *id.* at 28-30; E.A. Vandewater, et al., *Digital Childhood: Electronic Media and Technology Use Among Infants, Toddlers, and Pre-Schoolers*, 119 (5) PEDIATRICS 1006-15 (2007). For analyses of media usage by other age groups as well, see NPDI Group, *Kids Ages 12-14 Consume Digital Content on a Device between Three and Seven Times Per Month*, http://www.npd.com/press/releases/press_080115.html (January 15, 2009); A Mindlin, *Preferring the Web Over Watching TV*, N.Y. TIMES, August 25, 2008, <http://www.nytimes.com/2008/08/25/technology/25drill.html>; HORATIO ALGER ASS'N OF DISTINGUISHED AMERICANS, *THE STATE OF OUR NATION'S YOUTH 2008-09*, <http://www.horatioalger.org/pdfs/0708SONY.pdf> (2008).

¹⁷ See FULLER, *supra* note 7, at 60-61.

¹⁸ See *id.* at 63; see generally TORTEL KLINGBERG, *THE OVERFLOWING BRAIN: INFORMATION OVERLOAD AND THE LIMITS OF WORKING MEMORY* (2009)(detailing the largely negative impact of modern-day information overload and multi-tasking on working memory and the implications for cognitive performance and emotional state).

maximum of two data bits in some individuals.¹⁹ In a complex world, many things scream for our attention. But our attention is a scarce resource, requiring some means for us to economize on it.²⁰ This economy of attention operates more at an often subconscious emotional level than a conscious intellectual one, particularly under circumstances of cognitive overload.²¹

Thus multi-tasking and information overload encourage greater reliance on stereotyping and emotional cues in judging and deciding how to react to other persons.²² Severe time pressure leads its victims to experience negative emotions, in turn focusing primarily on negative rather than positive information.²³ Interruption alone can cause emotional arousal,²⁴ but the combination of all these factors leads to still greater arousal.²⁵ “Arousal” is a type of attention that focuses on nothing in particular but rather is “a general heightening of perception and the feeling of awareness.”²⁶ Intense arousal constitutes stress.²⁷ The greater the degree of cognitive demands, the greater the intensity of emotional arousal.²⁸ The aroused brain is more prone to certain kinds of judgment errors.²⁹ It is also more prone to focus on specific environmental stimuli -- to select what aspects of the world merit greater attention – based upon their emotional intensity.³⁰

¹⁹ See KLINBERG, *supra* note 18, at 121-24.

²⁰ See FULLER, *supra* note 7, at 63-64.

²¹ See *id.*; RICHARD LANHAM, *THE ECONOMICS OF ATTENTION: STYLE AND SUBSTANCE IN THE AGE OF INFORMATION* (2007); THOMAS H. DAVENPORT & JOHN C. BECK, *THE ATTENTION ECONOMY* (2002).

²² See FULLER, *supra* note 7, at 61; Gordon H. Bower & Jordan P. Forgas, *Affect Memory and Social Cognition*, in, *COGNITION AND EMOTION* 141 (Eric Eich, et al. ed.s 2000).

²³ See FULLER, *supra* note 7, at 61; Anne Edland & Ola Svenson, *Judgment and Decision Making under Time Pressure: Studies and Findings*, in *TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING* 27, 28 (Anne Edland & Ola Svenson ed.s.); John A. Maule & G. Robert J. Hockey, *State, Stress, and Time Pressure*, in *TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING* 86 (Anne Edland & Ola Svenson ed.s).

²⁴ See GEORGE MANDLER, *MIND AND BODY: PSYCHOLOGY OF EMOTION AND STRESS* 171 (1984).

²⁵ See FULLER, *supra* note 7, at 61-62.

²⁶ *Id.* at 60; see KLINBERG, *supra* note 18, at 20-22.

²⁷ See FULLER, *supra* note 7, at 60.

²⁸ See *id.*; KLINBERG, *supra* note 18, at 20-22.

²⁹ See FULLER, *supra* note 7, at 60-61.

³⁰ See *id.* at 60-62; JOHN J. RATEY, *A USER'S GUIDE TO THE BRAIN: PERCEPTION, ATTENTION, AND THE FOUR THEATRES OF THE BRAIN* 121 (2002) (noting that by the time the brain is conscious of a sensation, “the amygdala

The problem is complicated by the phenomenon of habituation.³¹ Much like some drug addicts, the appeal of continued exposure to the same emotionally intense information fades over time. The emotion addict needs a stronger fix.³² Only the ever-more emotionally intense aspects of the environment are able to grab the addict's attention.³³ Information failing to meet this criterion is ignored, leaving us attention-blind, as if the information never existed.³⁴ Those who want our attention must try ever-harder. In a world where distraction, sensory inundation, and task-switching are almost ever-present, emotional arousal will run especially high.³⁵ That in turn means that competition for our attention will become increasingly fierce via the low-road tools of appealing to the amygdala, a critical brain structure for marking information based upon its emotional appeal.³⁶ If not all Americans so react, the average reaction of the average American to our high-technology world is surely tipping toward the world of arousal. Market competition in the economy of attention is thus affective, rather than intellectual, warfare.

2. *Media Structure*

In days gone by, audiences had few technological sources for news. There were three national television stations, maybe one or two additional local ones in major cities. But cable and the rise of the internet have led to a vast multiplication of potential news sources.³⁷ Round-the-clock cable news stations compete with network news, both in turn competing with on-line publications, blogs, social networking sites, electronic bulletin boards, news “apps,” and a host

has already branded it with a raw emotional valence somewhere along the continuum from mildly interesting to ‘oh my God!’”).

³¹ See FULLER, *supra* note 7, at 71 (summarily defining habituation); MARK JOHNSON, *THE MEANING OF THE BODY: AESTHETICS OF HUMAN UNDERSTANDING* 34-35 (2007) (defining habituation and its underlying processes in more depth).

³² See FULLER, *supra* note 7, at 71.

³³ See *id.* at 71-72.

³⁴ See *id.*

³⁵ See *id.* at 60-62, 71-73.

³⁶ See *id.* at 40, 47, 49-55 (analyzing the amygdala's role and the role of emotions more generally in governing the economy of attention); JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 157-69 (1996) (explaining the cognitive and emotional “low” and “high” roads).

³⁷ See FULLER, *supra* note 7, at 65-67.

of other options.³⁸ Increased competition means that producers must give the consumers more of what the latter want.³⁹ But wants, including for news, are diverse. One way to compete, therefore, is to alter programming to appeal to market segments.⁴⁰ This market fragmentation means news specialization. Thus Fox News offers a conservative slant, MSNBC a moderately liberal one, the Huffington Post a progressive one. Audience fragmentation in which we each watch primarily the news with which we already are likely to agree leads to group polarization.

Group polarization is a phenomenon in which like-minded members of groups, hearing only from persons already agreeing with them, become increasingly extreme in their views.⁴¹ There are several likely causes of this growing polarization. First, the argument pool becomes limited. Group members are simply never exposed to contrary views.⁴² Second, individuals tend to like those who are most similar to them.⁴³ Moreover, we are a “groupish” species, looking for ways to distinguish “us” from “them,” with “us” being somehow superior.⁴⁴ To be more accepted by the group as a whole requires increasingly energetic efforts to craft reasons for agreeing with the group’s views and ways more sharply to distinguish the group from outsiders.⁴⁵ Views thus

³⁸ *See id.*

³⁹ *See id.* at 69-70.

⁴⁰ *See id.*; Sendhil Mullainathan & Andrei Shleifer, *The Market for News*, <http://www.ssrn.com> (2004) (two economists’ predicting that increased competition for news readers leads to market fragmentation if audience beliefs are diverse).

⁴¹ *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 11-14 (2003) [hereinafter DISSENT]. There are ways to overcome the ill effects of group polarization, but they require careful design and implementation of decision making procedures in a way unlikely to arise from ordinary market competition. *See* Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO J. PUB. L., POL’Y, & ETHICS 271 (2006) [hereinafter *Democratic Deliberation*].

⁴² *See* SUNSTEIN, DISSENT, *supra* note 41, at 120-21.

⁴³ *See id.* at (“If individual [group] members perceive one another as friendly, likable, and similar to themselves, the size and likelihood of the [polarization] shift will increase.”); Taslitz, *Tinkerbelle*, *supra* note 5, at 433 (analyzing the general psychology of liking similar persons).

⁴⁴ *See* DAVID BERREBY, US & THEM 67, 129-332, 206-09, 232 (2005).

⁴⁵ *See* SUNSTEIN, *supra* note 41, at 122-24, 129-31.

tend to become more extreme. Media outlets, to appeal to their relevant markets, must, therefore, also become more extreme.⁴⁶

When this tendency toward market segmentation and group polarization is combined with an audience selling its attention only for an ever-increasingly-intense emotional appeal, media are forced into “an emotional arms race.”⁴⁷ As Pulitzer prize-winning former Chicago Tribune publisher Jack Fuller puts it, “[t]he aroused brain might be drawn to a neo-populist commentator ranting about illegal immigration, a film clip of an explosion ripping, or – turning to humor to regulate a surfeit of emotion – a comedian delivering a satire on the day’s news.”⁴⁸

Concludes Fuller:

Emotional presentation succeeds across all class lines and has attained wide legitimacy. The curve has shifted toward emotional presentation. As bandwidth increases and the cost of computing drops, message immersion will continue to increase, and with it a further shift of the curve. We may only be at the beginning of the process.⁴⁹

3. *Sources of Judgment Error*

If the news that we receive is increasingly slanted, often portraying only one side of the picture fully, and if it relies on emotional intensity more than cognitive content to grab our attention, it would seem at first blush sound to assume that audiences would eventually catch on. Our high-tech world does not, despite some of its ill consequences, render us all stupid.⁵⁰ Indeed, it makes more views available in total if only we would spend the time to examine them fairly.⁵¹ Unfortunately, a variety of human reasoning processes, many of them unconscious, suggest that

⁴⁶ See FULLER, *supra* note 7, at 69.

⁴⁷ See *id.* at 71.

⁴⁸ See *id.*

⁴⁹ *Id.* at 73.

⁵⁰ For arguments, a subset of which are refuted here, that the net does much cognitive good, see STEVEN JOHNSON, *EVERYTHING BAD IS GOOD FOR YOU* (2006).

⁵¹ See REPUBLIC.COM 2.0 (2009).

most of us either will not see the problem, will not care about it, and will not put in the energy to correct it.

Notably, the confirmation bias – the tendency to seek and retain evidence and arguments that confirm our pre-existing beliefs – means that we often filter out contradicting evidence.⁵² Furthermore, our powers of self-deception are enormous.⁵³ If we reach a decision on purely irrational grounds, that creates a sense of “cognitive dissonance” with our understanding of ourselves as rational beings.⁵⁴ Accordingly, we confabulate a rationalization, a seemingly rational explanation for the arguably irrational.⁵⁵ For example, many of us have a tendency to favor items on the right over those on the left.⁵⁶ Accordingly, a chooser might favor the cup of coffee on the right over that on the left. But the chooser will never admit to himself that he just likes things on the right better, so he comes up with a detailed explanation of why the right-placed coffee is richer tasting, sweeter-smelling than the left-placed coffee.⁵⁷ Similarly, individuals will insist that emotional appeals have nothing to do with their choice of news and that the media has little impact on them, crafting alternative explanations for their behavior.⁵⁸ They may also display “third party effects,” agreeing that media manipulation may work on others but not on themselves.⁵⁹ That denial, of course, makes it harder for them to overcome the

⁵² See Peter Goldie, *Emotion, Feeling, and Knowledge of the World*, in THINKING ABOUT FEELING: CONTEMPORARY PHILOSOPHERS ON EMOTION 99-100 (Robert C. Solomon ed. 2004) (defining and explaining the confirmation bias); FULLER, *supra* note 7, at 183 (applying confirmation bias to the media context).

⁵³ See Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. L. & GENDER 381 (2005).

⁵⁴ See KAREN A. DILL, HOW FANTASY BECOMES REALITY: SEEING THROUGH MEDIA INFLUENCE 21-23 (2009) (defining and explaining cognitive dissonance).

⁵⁵ See FULLER, *supra* note 7, at 76 (explaining application of a similar process to media news reports).

⁵⁶ See DILL, *supra* note 54, at 29.

⁵⁷ See *id.* (offering a similar example but involving choosing panty hose); see generally SHEENA IYENGAR, THE ART OF CHOOSING (2010) (exploring the psychology of choosing).

⁵⁸ See DILL, *supra* note 54, at 21-25. This observation follows from the broader point that we rationalize our emotions as well as our choices. See FULLER, *supra* note 7, at 76 (“[B]ecause the pattern-making, contradiction-avoiding brain has a gift for rationalizing, it will usually make up a reason for any feeling it has and believe it, at least consciously.”).

⁵⁹ See DILL, *supra* note 54, at 10.

very manipulation to which the media subjects them.⁶⁰ Cognitive dissonance could be resolved by means other than rationalization but that “would require real strength – strength of character, strength of intellect, and the strength to make real social change.”⁶¹ It would also require serious education and training in how to overcome these biases.

The “fundamental attribution error” also plays a role.⁶² This error is our tendency to attribute outcomes more to an individual’s character than to his situation.⁶³ This error makes it more likely that observers will attribute a theft to the purported thief’s tainted character than to his starving because the Great Recession drove his firm out of business.⁶⁴ As Walter Lippmann put it long before the research had given the phenomenon a name, “To many simple and frightened minds there was no political reverse, no strike, no obstruction, no mysterious death or mysterious conflagration anywhere in the world of which the causes did not wind back to...personal sources of evil.”⁶⁵

This error can be particularly egregious because of our tendency to make holistic judgments about character based upon one trait and to form impressions concerning that trait based upon only the flimsiest of evidence.⁶⁶ Hearing a rumor that a neighbor has engaged in a single act of unkindness might thus result in perceiving that neighbor as irredeemably cruel. The error is also magnified by high states of arousal, including fear.⁶⁷ Subconscious fear based upon race, such as black skin color, thus results in a particularly extreme phenomenon, the “ultimate

⁶⁰ See *id.* at 22-23.

⁶¹ *Id.* at 23.

⁶² See FULLER, *supra* note 7, at 76 (applying the fundamental attribution error to media content and audience reception).

⁶³ See RICHARD NISBETT & ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF HUMAN JUDGMENT 31 (1980).

⁶⁴ See Andrew E. Taslitz, *Racial Blindsight: the Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 6 - 7 (2007) [hereinafter *Racial Blindsight*].

⁶⁵ WALTER LIPPMAN, PUBLIC OPINION 7 (1965)

⁶⁶ See Andrew E. Taslitz, *Myself Alone: Individualizing Justice through Psychological Character Evidence*, 52 MD. L. REV. 1, 6 -9 (1991) [hereinafter *Myself Alone*].

⁶⁷ See Taslitz, *Racial Blindsight*, *supra* note 64, at 8 - 9.

fundamental attribution error” in which an actor’s race becomes the basis for attributing to him an evil character.⁶⁸

A related error is “misguided parsimony,” reducing the causes of complex events to a single cause.⁶⁹ It is easier to blame either Alan Greenspan or foolish mortgage purchasers for the Great Recession than to blame multiple, complex, and ambiguous causes.⁷⁰ Time-pressured journalists thus often favor this oversimplification, knowing that their audience will buy into it, especially if the simplification is consistent with the audience’s pre-existing views.⁷¹

Novelty is a better attention-grabber than the familiar.⁷² Additionally, harmful events are more memorable than helpful ones.⁷³ Our greater attention to the negative over the positive likely has evolutionary roots.⁷⁴ Not seeing the poisonous snake may kill us instantly while not seeing the juicy piece of fruit at worst leaves us (perhaps temporarily) hungry.⁷⁵ Media thus push novel, negative stories over positive ones, slanting story content and painting an inaccurate, usually more frightening than is justified, picture of the world.⁷⁶ No matter how much audiences may bemoan the dearth of positive news stories, they are more readily drawn to the negative. As one ex-reporter admitted, “when the nine o’clock news comes on television and a live report showing the dome lights of the hook and ladders flashing and the flames licking out an upstairs window, I do not turn the channel.”⁷⁷

⁶⁸ See *id.* at 7 - 8.

⁶⁹ See FULLER, *supra* note 7, at 76.

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.* at 77-78.

⁷³ See *id.* at 78-79.

⁷⁴ See *id.* at 79; TIMOTHY WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS 63-64 (2002).

⁷⁵ See Andrew E. Taslitz, *Forgetting Freud: The Courts’ Fear of the Subconscious in Date Rape (and Other) Cases*, 17 B.U. PUB. INT. L. REV. 145, 171-72 (2007) [hereinafter *Forgetting Freud*].

⁷⁶ See FULLER, *supra* note 7, at 78-79.

⁷⁷ *Id.* at 79.

In highly emotional situations, our ability to reason probabilistically is also compromised.⁷⁸ Vivid, concrete descriptions of suffering trigger such emotional states.⁷⁹ Thus, law students evaluating the risk of developing cancer from small amounts of arsenic in water were willing to pay vastly more to eliminate that risk when given descriptions of the cancer as “very gruesome and intensely painful” and “eat[ing] away at the internal organs of the body” than were law students not given such descriptions.⁸⁰ Yet both groups of students were given identical data on the low probabilities of developing the cancer.⁸¹ Emotionally vivid information is simply more readily available for cognitive processing than is less vivid information, and it is thus the more vivid, though not necessarily the more useful, information on which we prefer to rely.⁸²

“Framing effects,” using emotionally powerful language or images that trigger a certain perspective on a problem, also alter perceptions.⁸³ Describing someone protesting the use of racial epithets as a “censor” rather than a loving egalitarian triggers images of jack-booted thugs crushing freedoms rather than of freedom fighters exercising rights to counter-speech.⁸⁴ Framing effects can lead to decisions based on shallow, “peripheral” routes to persuasion rather than the “central” routes relying on message content and the quality of argument.⁸⁵

⁷⁸ See CASS SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 77-79 (2005) [hereinafter *FEAR*].

⁷⁹ See *id.*; REID HASTIE & ROBYN M. DAWES, *RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 92 (2nd ed. 2010) (noting that more salient and vivid events are more readily accessible to memory).

⁸⁰ SUNSTEIN, *FEAR*, *supra* note 78, at 77-79.

⁸¹ See *id.*

⁸² See FULLER, *supra* note 7, at 80 (using this observation to explain trends in newspaper content and audience review); HASTIE & DAWES, *supra* note 79, at 92-93 (reviewing social science revealing that “people’s estimates of frequency of causes of death...are correlated with the frequency with which causes are reported in newspapers irrespective of their actual frequency of occurrence,” and reaching similar conclusions about crime reporting); BARRY GLASNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* (1999) (documenting the “If it bleeds, it leads” strategy of news reporting and the ways in which special interest groups use their knowledge of this strategy to further their political agendas).

⁸³ See DILL, *supra* note 54, at 48-49.

⁸⁴ See *id.*

⁸⁵ See *id.* at 48.

The “representativeness” heuristic leads us to make judgments based upon our beliefs about the qualities of what we have been taught are representative members of the group, even if our judgments are irrational.⁸⁶ A perceiver may thus be asked whether a woman who is a liberal, a fan of the Grateful Dead, and an advocate for legalizing marijuana is more likely a political reporter than a local one. Many perceivers are likely to choose “political reporter” because the woman *sounds like* their notion of someone representative of at least progressive reporters.⁸⁷ Yet there are likely far more local reporters than political ones, so the probabilities are just the opposite.⁸⁸

Memory affects attention too. We are less likely to remember pallid positive information than vivid negative information, thus making it easier to retrieve the latter to guide impression-formation and decision making.⁸⁹ We are, however, not only bad at accurately remembering the past but equally bad at predicting the future.⁹⁰ Therefore, we may overestimate the future effect of certain events on our future happiness, particularly negative ones that arguably involve giving up that which we already have.⁹¹ Media play to these fears as well.⁹²

Logical forms of argument are also less gripping than arguments framed as stories.⁹³ We are story-telling creatures.⁹⁴ Stories define our personal identities, our conceptions of whom we

⁸⁶ See HASTIE & DAWES, *supra* note 79, at 101-06.

⁸⁷ This example is my variation of one offered by FULLER, *supra* note 7, at 83.

⁸⁸ *Cf. id.* (noting that representativeness heuristic errors occur because subjects ignore base rates – the background frequency of events in the broader population).

⁸⁹ *See id.* at 84.

⁹⁰ *See id.* at 85; George Lowenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, in HANDBOOK OF AFFECTIVE SCIENCES 619, 620-21, 625-26 (Richard J. Davidson et al., eds 2003); DANIEL GILBERT, STUMBLING ON HAPPINESS (2007).

⁹¹ *See* GILBERT, *supra* note 90 (explaining why we mis-predict what makes us happy); HASTIE & DAWES, *supra* note 79, at 288-91 (explaining the “endowment effect” in which possessing something makes it more valuable to us than it would have been before we possessed it).

⁹² *See* FULLER, *supra* note 7, at 84-85.

⁹³ *See* MICHAEL SCHUDSON, A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 89-90 (1978) (comparing the New York Times’ “information model” with the New York Daily News’ more emotional, human-interest “story” model and linking the latter model of the time to the middle and lower classes, the former model to the educated ones); FULLER, *supra* note 7, at 73 (arguing that today the “emotional presentation” of the story model crosses all class lines; indeed, “[p]eople of all educational attainment levels watch (and admit to watching) cable news shows that follow the story model with a vengeance.”).

can trust, our understandings of how the world works.⁹⁵ But stories necessarily require selectivity about reporting observed experiences and conformity with the dictates of dramatization.⁹⁶ There must be heroes and villains, winners and losers. Stories require characters that come alive, emotional tension, and clear plot lines.⁹⁷ Stories also turn on intentions, something hard to judge from limited information.⁹⁸ Stories can trigger powerful emotions in the audience and teach moral lessons. They require use of the imagination.⁹⁹ Stories are not false because they involve narrative. One story can be more or less true than another.¹⁰⁰ But where information is lacking, reporters may readily turn to, and listeners respond to, stock stories (typical ones) rather than individualized ones.¹⁰¹ Stories about real people are thus reduced to stereotypes.¹⁰² Moreover, if the stories are about crime, as so many are (remember our obsession with the negative), the audience will expect and receive information about the “bad guys,” usually meaning the suspect.¹⁰³ Where there is a dearth of information about character and intentions, the media will

⁹⁴ See *id.* at 118 (“[T]he telling of stories is as deeply rooted in humans as language.”); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 434 - 435 (1996) [hereinafter *Patriarchal Stories*] (analyzing the psychological processes involved in storytelling).

⁹⁵ See FULLER, *supra* note 7, at 119 (noting storytelling-personal identity link); Andrew E. Taslitz, A *Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & LAW 1, 34 - 36 (1998) [hereinafter *Feminist Approach*] (analyzing in greater detail the nature of personal identity and its roots in story).

⁹⁶ See Taslitz, *Myself Alone*, *supra* note 66, at 43 - 44.

⁹⁷ See *id.* at 94 - 96; FULLER, *supra* note 7, at 119-22, 133-36 (making analogous point about the role of narrative in journalism).

⁹⁸ See Taslitz, *Myself Alone*, *supra* note 66, at 94 - 96.

⁹⁹ See DILL, *supra* note 54, at 52 (explaining and illustrating how the emotional impact of media stories can teach values, social expectations, and the consequences of behavior).

¹⁰⁰ See Taslitz, *Patriarchal Stories*, *supra* note 94, at 435 - 438 (explaining the interpretive nature of narrative). This does not mean, however, that stories of purported “real world” events can fairly be based on fiction; the indisputable “out there” physical facts of who did and said what exist, though we may have trouble proving them, but their meaning can be contested even when the physical facts are not. See Taslitz, *Feminist Approach*, *supra* note 95, at 36 - 39 & n. 51.

¹⁰¹ See Taslitz, *Patriarchal Stories*, *supra* note 94, at 425 - 426 (explaining the cognitive processes involved in relying on stock stories); *cf.* FULLER, *supra* note 7, at 118 (discussing “archetypal” stories).

¹⁰² See Taslitz, *Patriarchal Stories*, *supra* note 94, at 466 - 471 (discussing and illustrating this point in the context of rape stories).

¹⁰³ See RAY SURETTE, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES, REALITIES, AND POLICIES* (2010).

suggest some, or audiences will assume some.¹⁰⁴ Much of this information can be conveyed subconsciously and indirectly, through language choice (“perpetrator”), relative exposure to minority races as supposed evildoers, and selectivity in what evidence is reported, what not.¹⁰⁵

Stories partly have their appeal because of “mirror neurons.”¹⁰⁶ If we see or hear another suffering, neurons fire that simulate the victim’s suffering as our own.¹⁰⁷ The two experiences are, of course, not identical, but they are sufficiently similar that watching suffering can cause many of us pain and anger at pain seen as undeserved.¹⁰⁸ The power of our imagination allows us to empathize with real and imagined persons alike (we cry at the mother’s pain at her child’s loss in a movie scene).¹⁰⁹ Coverage that stresses crime victims’ pain thus encourages empathy for the victim at anger at his or her presumed assailant.¹¹⁰

A variety of social forces also seem to be eroding trust in experts, including expert opinion reported in the news.¹¹¹ Many debate the reasons for this declining trust.¹¹² Some of it may involve the media’s own reporting of the supposed frequent failures of many of our social and political institutions.¹¹³ Some of it may be due to a postmodern skepticism that there are any value-free “right” answers to most questions.¹¹⁴ Perhaps we are simply in an anti-elitist cyclical

¹⁰⁴ See FULLER, *supra* note 7, at 120-26 (discussing how the news media, while striking a pose of objectivity, often suggest knowledge of that which they cannot know, such as a suspect’s mental state, in the name of telling a good story); Taslitz, *Myself Alone*, *supra* note 66, at 84, 94 - 96 (discussing the process by which jurors fill in missing information to make stories seem coherent).

¹⁰⁵ See FULLER, *supra* note 7, at 83, 85-86 (discussing language choice and racial imagery); SURETTE, *supra* note 103 (discussing selectivity in reporting).

¹⁰⁶ See Taslitz, *Tinkerbelle*, *supra* note 5, at 446.

¹⁰⁷ See *id.* at 446-51.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*; FULLER, *supra* note 7, at 117-18, 129 (discussing how news stories promote empathy with particular characters).

¹¹¹ See *id.* at 87-88, 96-98.

¹¹² See *id.* at 88.

¹¹³ See *id.*

¹¹⁴ See *id.* at 91 (“Perception is reality. Everything is spin. As one journalism scholar described it, “We’re all post-modern now.”); Andrew E. Taslitz, *The Jury and the Common Good: Fusing the Insights of Modernism and Postmodernism*, in FOR THE COMMON GOOD: A CRITICAL EXAMINATION OF LAW AND SOCIAL NORMS 312,

phase of American democracy, as some historians claim.¹¹⁵ Whatever the explanation, audiences give decreasing credibility to true, “expert” journalists and increasing credibility to those, like Glenn Beck, who lack formal training in journalistic standards.¹¹⁶ On the other hand, perceptions of source credibility rise with those whom we know personally or with sources that we use routinely, so reports from social networking sites and familiar blogs get much credence.¹¹⁷ The overall tendency is to turn previously professional reporting into showmanship.¹¹⁸ As infotainment rises and the audience for serious reporting declines, resources shift as well away from investigative and critical journalism toward high-tech fluff.¹¹⁹ We live on the artificial pabulum called news while our critical senses become dulled.

III. *The Decline of Deep Thought and of Empathy*

A. *The Basic Argument*

Indeed, our capacity for sustained critical thought might itself be at risk.¹²⁰ What tasks we use our brains to accomplish affects the structure of our brains.¹²¹ Certain oft-used neuronal connections become easier, faster, increasing in number and complexity, while others infrequently used wither.¹²² These changes in connections make some tasks easier and more

314, 327-38 (Carolina Academic Press, ed. Robin Miller 2004) (defining “postmodernism” and comparing it to its alternatives).

¹¹⁵ See FULLER, *supra* note 7, at 95-98.

¹¹⁶ See *id.* at 5, 14, 87-88, 96-98.

¹¹⁷ See *infra* text accompanying notes 177 - 182 (discussing sources of credibility and trust in the generations raised on the internet); FULLER, *supra* note 7, at 99 (“[T]he very interactivity of the new [on-line] environment can stimulate trust – perhaps greater than traditional media ever can – even between people who don’t know one another’s name.”); RUSSELL HARDIN, TRUST AND TRUSTWORTHINESS 1, 152 (2002) (arguing that we *ordinarily* have greater trust in those with whom we have ongoing relationships than in distant others).

¹¹⁸ See FULLER, *supra* note 7, at 92-93.

¹¹⁹ See *id.* 70-73, 92-93 (discussing shifting resources); SURETTE, *supra* note 103 (discussing “infotainment”).

¹²⁰ See generally NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS (2010) (articulating a book-length argument of this point); MAGGIE JACKSON, DISTRACTED: THE EROSION OF ATTENTION AND THE COMING DARK AGE (2008) (similar).

¹²¹ See CARR, *supra* note 120, at 48-57, 63.

¹²² See *id.*

probable, others harder, less likely.¹²³ The human brain's natural state is probably one of distractedness¹²⁴, "rapidly and involuntarily shifting attention to salient visual features of potential importance."¹²⁵ In particular, we became acutely sensitive to environmental changes so that predators could not surprise us or food sources escape us.¹²⁶ Environmental and cultural changes required acts of will to overcome these tendencies and develop the capacity for sustained thought.¹²⁷ British research psychologist *Vaughn* Bell thus declares that "[t]he ability to focus on a single task, relatively uninterrupted ... [is] a strange anomaly in the history of our psychological development."¹²⁸ Close reading of books especially required intense concentration, getting lost in a book meaning that readers "made their own associations, drew their own inferences and analogies, fostered their own ideas. They thought deeply as they read deeply."¹²⁹

Net reading returns us to the practiced distractedness of an earlier evolutionary era.¹³⁰ Hyperlinks break information into chunks, permitting a multi-sensory experience.¹³¹ The content displayed on the computer screen fragments our attention as we shift from video to word, to audio, often using all simultaneously.¹³² Links permit jumping from one bit of information to another bit without the necessity for careful synthesis.¹³³ Searchability decreases our incentives to take a work in as a whole as the scraps of information we seek for instrumental reasons

¹²³ See *id.* at 48-57; ROSEN, *supra* note 8 (detailing the biological processes by which this happens).

¹²⁴ See CARR, *supra* note 120, at 63-64.

¹²⁵ See Charles E. Connor, et al., *Visual Attention: Bottom-Up versus Top-Down*, 14 COGNITIVE BIOLOGY 850-52 (2004).

¹²⁶ See *id.*; CARR, *supra* note 120, at 64.

¹²⁷ See CARR, *supra* note 120, at 64-67.

¹²⁸ Vaughn Bell, *The Myth of the Concentration Oasis*, *Mind Hacks Blog*, www.mindhacks.com/blog/2009/02/the_myth_of_the_conc.html (February 11, 2009).

¹²⁹ CARR, *supra* note 120, at 64-65.

¹³⁰ See *id.* at 108.

¹³¹ See *id.* at 90-92.

¹³² See *id.*

¹³³ See *id.*

become easy to find rapidly.¹³⁴ Skimming replaces close reading, a phenomenon observed even among academics.¹³⁵ Indeed, the rise of e-readers like the Kindle, the Nook, and the iPad, which allow net surfing during reading and heighten book searchability, are likely to accelerate these trends. Even author Steven Johnson, a staunch defender of the advantages of the brain changes wrought by modern technology,¹³⁶ worries that “one of the great joys of book reading – the total immersion in another world, or in the world of the author’s ideas – will be compromised. We all may read books the way we increasingly read magazines and newspapers: a little bit here, a little bit there.”¹³⁷

Researchers have found that the “repetitive, intensive, interactive, addictive” use of the internet promotes particularly rapid brain changes.¹³⁸ The net seizes but scatters our attention rapidly and repeatedly.¹³⁹ Unlike interruptions of periods of sustained thought, which permit rest and renewal, constant distractedness harms more than hurts our sustained critical thinking skills.¹⁴⁰ In one study, it took just five hours of novices learning to use the internet for their brains to rewire in ways making them virtually indistinguishable from those of experienced users.¹⁴¹

¹³⁴ See *id.* at 90-91.

¹³⁵ See *id.* at 136-37; University College London, Information Behaviour of the Researcher of the Future, www.ucl.ac.uk/slais/research/ciber/downloads/ggexecutive.pdf (January 11, 2008) (“[T]here are signs that new forms of ‘reading’ are emerging as users ‘power browse’ horizontally through titles, contents pages and abstracts going for quick wins. It almost seems that they go on line to avoid reading in the traditional sense.”)

¹³⁶ See JOHNSON, *supra* note 50.

¹³⁷ See Steven Johnson, *How the E-Book Will Change the Way We Read and Write*, WALL STREET JOURNAL, April 20, 2009.

¹³⁸ CARR, *supra* note 120, at 116.

¹³⁹ See *id.* at 118, 121.

¹⁴⁰ See *id.*

¹⁴¹ See GARY SMALL & GIGI VORGAN, *iBRAIN: SURVIVING THE TECHNOLOGICAL ALTERATION OF THE MODERN MIND* 1, 16-17 (2008).

More areas of the brain are active when we use the net than when we engage in deep reading.¹⁴² But this occurs precisely because multi-tasking requires use of many brain areas but in a shallow way.¹⁴³ Long-term memory is not merely the brain's filing system but also the home of "complex concepts, or schemas," the "seat of understanding."¹⁴⁴ "We are able to understand concepts in our areas of expertise because we have schemas associated with those concepts," explains educational psychologist John Sweller.¹⁴⁵ The deep concentration involved in uni-tasking allows the small amount of data stored in short-term memory to make its way into long-term memory, enhancing schema formation.¹⁴⁶ But high cognitive load interferes with schema formation, leaving our understanding shallow. Likewise, high cognitive load makes it harder for us to distinguish relevant from irrelevant information.¹⁴⁷

Indeed, though the results of the research are not uniform, the preponderance of the research evidence is that hypertext readers understand less than linear readers.¹⁴⁸ The high cognitive load involved in the former weakens "establishing relationships between concepts, drawing inferences, activating prior knowledge, and synthesizing main ideas."¹⁴⁹

Importantly, multi-media presentations can be organized to aid understanding. But they must be carefully designed to be effective, as educational psychologists have shown.¹⁵⁰ For example, auditory and visual memory are sufficiently distinct that using both simultaneously can under the

¹⁴² See Gary W. Small, et al., *Your Brain on Google: Patterns of Cerebral Activation during Internet Searching*, 17 AM. J. GERIATRIC PSYCHIATRY 116 (2009).

¹⁴³ See CARR, *supra* note 120, at 121-22.

¹⁴⁴ See *id.* at 124.

¹⁴⁵ John Sweller, *Instructional Design in Technical Areas* 11 (Australian Council for Educational Research 1999).

¹⁴⁶ See CARR, *supra* note 120, at 124-25.

¹⁴⁷ See *id.* at 125; KLINGBERG, *supra* note 18, at 339, 72-75 (explaining why cognitive overload "makes distractions more distracting.").

¹⁴⁸ See CARR, *supra* note 120, at 129-31.

¹⁴⁹ Erping Zhu, *Hypermedia Interface Design: The Effects of Number of Links and Granularity of Nodes*, 8 J. EDUCATIONAL MULTIMEDIA AND HYPERMEDIA 331 (1999).

¹⁵⁰ See CARR, *supra* note 120, at 131.

right circumstances actually increase effective working memory.¹⁵¹ On the other hand, multiple demands making use of the same memory system, such as multiple visual stimuli, interfere with working memory.¹⁵² But the common internet user is not an educational psychologist. Moreover, effective multimedia presentations minimize interruptions, precisely the opposite of what happens in the networked life.¹⁵³ Cognitive switching between just two tasks, much less three or four, short-circuits real understanding, the evidence reveals.¹⁵⁴

Browsing and scanning can be effective ways to identify information for further, deeper study. Too often, however, the browsing and scanning becomes an excuse for broad but superficial reasoning.¹⁵⁵ Concludes Jordan Grafman, the head of the National Institute of Neurological Disorders' cognitive neuroscience unit, "The more you multitask, the less deliberative you become; the less able to think and reason out a problem."¹⁵⁶ Conformity rises too as you "rely on conventional ideas and solutions rather than challenging them with original lines of thought."¹⁵⁷ In sum,

The mental functions that are losing the "survival of the busiest" brain cell battle are those that support calm, linear thought -- the ones we use in traversing a lengthy narrative or an involved argument, the ones we draw on when we reflect on our experiences or contemplate an outward or inward phenomenon. The winners are those functions that help us speedily locate, categorize, and assess disparate bits of information in a variety of forms, that let us maintain our mental bearings while being bombarded by stimuli. These functions are, not coincidentally, very similar to the ones performed by computers, which are programmed for the high-speed transfer of information. Once again, we seem to be taking on the characteristics of a popular new intellectual technology.¹⁵⁸

¹⁵¹ See Sweller, *supra* note 145, at 137-47.

¹⁵² See CARR, *supra* note 120, at 131.

¹⁵³ See *id.* at 131-32.

¹⁵⁴ See *id.* at 133.

¹⁵⁵ See *id.* at 137-38.

¹⁵⁶ DON TAPSCOTT, GROWING UP DIGITAL 108-09 (2009) (quoting Grafman).

¹⁵⁷ CARR, *supra* note 120, at 140.

¹⁵⁸ *Id.* at 142.

If it is true that our capacity for *critical* thought is, on average, being compromised by our technology while that same technology makes us respond to media more with heart than head, it becomes increasingly hard to see how the bulk of our population can effectively spot the flaws in media news coverage, particularly of such an emotionally radioactive topic like crime.

B. *Criticisms and Caveats*

There are three major criticisms that can be made of the argument that there is a decline in critical thought. None of these three undercuts my argument.

First, brain changes come from practice, so we can simply require people to practice deep thought.¹⁵⁹ Indeed, one leading cognitive psychologist has argued that teaching that capacity is the whole point of a university education.¹⁶⁰ There is thus no reason for despair. As an academic, I certainly am not going to challenge the value of a university education. Nevertheless, there is an elitism here that is worrisome. The majority of our population still does not receive a university education.¹⁶¹ Many who study beyond high school may attend two-year community colleges or hone very specific job skills not particularly requiring mastery of deep analytical thinking.¹⁶² If this critic is right, there is a new kind of digital divide arising: that between

¹⁵⁹ See Steven Pinker, *Mind Over Mass Media*, http://www.nytimes.com/2010/06/11/opinion/11Pinker.html?_r=1&emc=etal&pagewanted=all (last visited July 16, 2010).

¹⁶⁰ See *id.*

¹⁶¹ According to the U.S. Census Bureau, in 2008 only 29.4% of Americans had obtained a college degree. See U.S. CENSUS BUREAU, USA Statistics in Brief—Education, <http://www.census.gov/compendia/statab/2010/files/edu.html> (last visited November 15, 2010).

¹⁶² “[O]nly about a quarter of high school graduates are college-ready in the four main subject areas of English, reading, math and science.” MAGGIE JACKSON, *DISTRACTED: THE EROSION OF ATTENTION AND THE COMING DARK AGE* 228 (2008). About half of college freshmen need remedial help. *Id.* Still worse, “many exit still needing remedial help, while making mediocre gains in the one skill that, as Harvard president Derek Bok notes, almost all educators agree is the main purpose of an undergraduate education: critical thinking.” *Id.* Educational psychologist Patricia King, who has devoted decades to studying higher-order thinking, concludes that even “four years of college only brings traditional-age college students to a very-low level of critical thinking and judgment,” leaving them “making what we call quasi-reflective judgments.” *Id.* Critical thinking is defined in different ways, some emphasizing reason, problem-solving, judgment, and good research skills, others logic. *Id.* But, “however defined, students seem to be making at most lukewarm and perhaps declining progress,” one study finding only half the gains in this area in the 1990s relative to a decade earlier. *Id.* I am emphatically not arguing that technical skills, like repairing or programming computers, are not cognitively difficult. Furthermore, I do not see any necessary

citizens most capable of serious critical thought and those far less capable.¹⁶³ For deep reading and sharp critical skills to become the “province of a small and dwindling elite”¹⁶⁴ cannot be a good thing for democracy.

Furthermore, if children are raised in a multitasking, multimedia world, it is not so clear that simply insisting on deep reading, even at the university level, will work. Students must first be engaged, and long lectures, class discussion of assigned materials, even Power Point slides, are no longer enough to do the job.¹⁶⁵ Frustrated professors indeed increasingly experiment with multimedia books to replace the linear ones of yesteryear as one effort to re-engage their young audiences – and this occurs even at the graduate level.¹⁶⁶ Grade inflation, the absence of many long papers, and the ability to paste together ideas found from combing the net may mean that most university students get along just fine without intensive, uni-tasking studying.¹⁶⁷ Most law professors can attest that the bulk of first-year students do not arrive with a mastery of analytical thinking.¹⁶⁸ In any event, the bulk of jurors in most areas of the country – our ultimate concern here -- will not be the product of four-year, high-quality university educations.¹⁶⁹

connection between higher education and higher raw intelligence, broadly defined. *See generally* KEITH STANOVICH, *WHAT INTELLIGENCE TESTS MISS: THE PSYCHOLOGY OF RATIONAL THOUGHT* (2009); RICHARD NISBETT, *INTELLIGENCE AND HOW TO GET IT: WHY SCHOOLS AND CULTURE COUNT* (2010). But I am arguing that the skepticism and deep sustained thought involved in reading challenging works of literature, politics, social science, or religion; crafting critical arguments dissecting another’s opinion; or contesting the credibility of information received are of a different nature from the technical skills often taught in community colleges or job training programs. Our four-year colleges arguably do try to teach more critical skills but are apparently failing most students in this endeavor.

¹⁶³ *See* Wendy Griswold, et al., *Reading and the Reading Class in the Twenty-First Century*, 31 ANNUAL REV. OF SOCIOLOGY 127 (2005) (“We are now seeing such reading return to its former social base: a self-perpetuating minority that we shall call the reading class.”).

¹⁶⁴ CARR, *supra* note 120, at 108.

¹⁶⁵ *See* ROSEN, *supra* note 8.

¹⁶⁶ The new lines of law-school electronic casebooks are one example. [cite]

¹⁶⁷ [insert cites]

¹⁶⁸ *See* Andrew E. Taslitz, *Exorcising Langdell’s Ghost: Structuring a Criminal Procedure Casebook For How Lawyers Really Think*, 43 HASTINGS L. J. 143-75 (1991).

¹⁶⁹ *See* Alan Feigenbaum, *Special Juries: Deterring Spurious Medical Malpractice Litigation In State Courts*, 24 CARDOZO L. REV. 1361, 1392 (2003) (“Generally speaking, ‘[t]he typical juror has, at best, a high school education.’”).

Indeed, the second criticism has two parts: (a) the cognitive losses are not so bad; and (b) we simply cannot effectively teach this and upcoming generations without buying into their lifelong habits of scattered thinking.¹⁷⁰ We must join them rather than fight them. The first part of this argument relies on research showing that certain kinds of multitasking may slow learning but do not make it less effective.¹⁷¹ However, time is finite in and outside the classroom, and slower learning is a high cost to pay. Furthermore, much of this research [correct?] focuses on memorization, the raw retention of information, rather than the higher-level critical skills that I focus upon here.¹⁷² Additionally, these critics concede that properly-designed multitasking is important, such as trying to avoid simultaneous tugs on similar types of processing, such as visual processing.¹⁷³

The second portion of this argument has more force. It probably is necessary to use social networking; properly structured multimedia presentations; more active learning; and greater multisensory, more realistic simulations as ways to engage students and improve their learning.¹⁷⁴ Indeed, such changes in teaching style may make it easier to prod students toward deeper learning. But most teachers at most levels have not made such changes, indeed are not yet aware of the need for such changes.¹⁷⁵ It may be many years before such changes occur, resistance by those wedded to old ways is likely, and experimentation in the field will be needed for some time to come to improve these ways of teaching. To make the case for change, however, the critics point out how untutored net users – the vast bulk of the net population – currently are so poor at analytical reasoning, even in using the net.¹⁷⁶

¹⁷⁰ See ROSEN, *supra* note 8 at 16-77.

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.* at 87-90.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

For example, researchers have discovered that elementary schoolchildren lack the ability to assess the credibility, relevance, and weight of numerous sources identified via websites.¹⁷⁷ But the same has proven to be true with college students. In one study nearly half of college students used only the first five links on an internet research project.¹⁷⁸ Only fifteen percent used the first ten links, twelve percent all the links on the first page, three percent links beyond the first three pages.¹⁷⁹ Yet educators agreed that looking further was “necessary to find the best and most reliable information.”¹⁸⁰ Other experimenters found that college students most trusted the first links appearing in a search even when less relevant than later ones.¹⁸¹ College students generally tend not to distinguish among the credibility of sources and uncritically to accept what appears on a website, though much of it is “unverified, unsubstantiated thoughts and opinions....”¹⁸² Blogs are especially troublesome because, unlike traditional journalists’ work product, they do not pass through several editors’ hands, nor are they required to meet journalistic evidentiary standards.¹⁸³

Indeed, the more young people use the internet, the more credible they believe it to be. They find particularly credible sites containing information that interests them or in which they are invested.¹⁸⁴ Moreover, website users generally, regardless of age, are insufficiently skeptical of information that they find on the web.¹⁸⁵ Very few in one study were “extremely concerned,”

¹⁷⁷ See *id.* at 155; M.S. Eastin, M.S. Yang, & A.I. Nathanson, *Children of the Net: An Empirical Exploration of Internet Content*, 50 J. BROADCASTING & ELECTRONIC MEDIA 211, 213-15 (2006).

¹⁷⁸ See N. Cheever, L. Rosen, & L.M. Carrier, *Assessing the Credibility of Wikipedia and Bloggers: Trust and Use of Unedited Online Material*, Presented at the 2008 Western Psychological Association Conference, April 12, 2008 (unpublished).

¹⁷⁹ See *id.*

¹⁸⁰ See ROSEN, *supra* note 8, at 155.

¹⁸¹ See B. Pan, et al., *In Google We Trust: Users’ Decisions on Rank, Position, and Relevance*, 12 J. COMPUTER-MEDIATED COMMUNICATION 801, 816 (2007).

¹⁸² See ROSEN, *supra* note 8, at 156.

¹⁸³ See *id.* at 159.

¹⁸⁴ See *id.* at 168-69.

¹⁸⁵ See *id.* at 169.

willing to look outside the website specifically to explore the credibility of its authors or the accuracy of its information.¹⁸⁶

Net users make heaviest use of those sources that they trust most,¹⁸⁷ that is, that seemingly display honesty (keeping one's word), benevolence (not trying to mislead), and competence (accuracy).¹⁸⁸ But, in descending order, users place the greatest trust in peer recommendations (by far the highest), on-line consumer opinions, editorial content, brand websites and sponsorships, and television – more trust than in traditional, edited newspaper reporting, though being quite distrustful of most forms of advertising.¹⁸⁹

Individual differences matter, with those generally more trusting of people also being more trusting of websites.¹⁹⁰ But people seem indiscriminately to trust expert and non-expert sources alike.¹⁹¹ Yet, “[s]ources that look professional, contain a wide variety of material, and are used by many have source credibility but may lack real credibility.”¹⁹² In one study of perceived website trustworthiness, almost half the respondents preferred and trusted Wikipedia over other sources of information when asked where they would go to research a specific topic.¹⁹³

Commentators urging educators to embrace net learning styles thus simultaneously stress the importance of training net users from a young age in such simple concepts as that media images have points of view, are not always accurate, may reflect differing *opinions*, are targeted to different populations of people, and often exist to make money or serve some other specific

¹⁸⁶ See Cheever, et al, *supra* note 178.

¹⁸⁷ See D. Li, et al., *An Empirical Investigation of Web Site Use Using a Commitment-Based Model*, 37 DECISION SCIENCE 427, 432-33 (2006); L. Casalo, *The Influence of Satisfaction, Perceived Reputation and Trust on a Consumer's Commitment to a Website*, 13 J. MARKETING COMMUNICATIONS 1 (2007).

¹⁸⁸ See ROSEN, *supra* note 8, at 169.

¹⁸⁹ See *id.* at 170; The Nielsen Company, *Nielsen Global Online Consumer Survey 2009*, www.nielsen.com.

¹⁹⁰ See ROSEN, *supra* note 8, at 171.

¹⁹¹ See Cheever et al., *supra* note 178.

¹⁹² See ROSEN, *supra* note 8, at 171.

¹⁹³ See Cheever, et al., *supra* note 178.

agenda.¹⁹⁴ Furthermore, users must be trained to explore net authors' credentials and credibility; to search for peer-reviewed sources to back up on-line claims; to use print sources where on-line ones are incomplete, unavailable, or potentially inaccurate; to distinguish observations from opinion; and to uncover sources of bias.¹⁹⁵ These skills must be taught at higher educational levels too because college students similarly lack adequate net literacy.¹⁹⁶

Third, IQ scores have risen steadily, so, to the extent that they are an accurate measure of intelligence – a questionable claim – intelligence arguably does not seem to have suffered from the rise of the internet.¹⁹⁷ But there has in fact been little, if any, improvement in the portions of the test involving memory, math, general knowledge, or vocabulary. The improvement has come primarily in tests involving mentally rotating objects, finding similarities among them, and arranging them into logical sequences.¹⁹⁸ Moreover, verbal scores on other measures of intellectual skill, such as the PSAT and the SAT have declined.¹⁹⁹ Even IQ scores have started falling in many Western nations since the 1990s.²⁰⁰ Overall intelligence is a hard concept to measure, perhaps not a valid one at all.²⁰¹ Consequently, these measures may reveal nothing more than a changing of our brains, a switching from deeper thinking skills to more shallow ones in a way that does not overall dramatically affect IQ measures.²⁰² But the new net-brain is neither better nor worse than its predecessors, no what IQ and other scores say. The new brain is simply different, with its own strengths and weaknesses.²⁰³ Among those weaknesses, unfortunately, is a

¹⁹⁴ See ROSEN, *supra* note 8, at 172-73.

¹⁹⁵ See *id.* at 2522-78.

¹⁹⁶ See *id.* at 2573-92.

¹⁹⁷ See CARR, *supra* note 120, at 144-45 (discussing rising IQ scores); NISBETT, *supra* note 162, at 44 (challenging IQ measures); STANOVICH, *supra* note 162, at 1-7 (similar).

¹⁹⁸ See CARR, *supra* note 120, at 145.

¹⁹⁹ See *id.* at 145-46.

²⁰⁰ See *id.* at 146.

²⁰¹ See STANOVICH, *supra* note 162, at 45.

²⁰² See CARR, *supra* note 120, at 145-48.

²⁰³ See *id.* at 148.

greater difficulty with the deeper, analytical thinking necessary to viewing news reports and images skeptically and with an open mind.

C. *Declining Empathy*

Up until now, I have spoken as if there is a sharp, unbridgeable difference between emotions and cognitions. In fact, there are generally differences in degrees, differences substantial enough in relevant ways here to justify my writing *as if* the two processes were dichotomous. They are not.²⁰⁴ For example, to fear spiders, you must first conclude that they are dangerous – a conclusion that I personally had rejected until being hospitalized after receiving a brown recluse spider bite.²⁰⁵ The thought triggers and is in some sense part of the emotion.²⁰⁶

Empathy is often thought of as an emotion and a positive one at that. But it need not be so viewed. Empathy, properly understood, is the ability to stand in another person's shoes, to see and feel the world through their eyes.²⁰⁷ Empathy requires the exercise of imagination, and the accuracy of empathy also requires information about another's life experiences and current situation.²⁰⁸ Empathy is a form of speculative mind reading.²⁰⁹ Once we have read the other's mind, however, that may trigger both thoughts and feelings. We may be horrified by what we find, or at least judge the other's thoughts, emotions, and thus resulting actions worthy of censure.²¹⁰ Alternatively, we may resonate with the other's heart and mind, feeling sympathy for his plight, wanting to reduce his suffering, even if he deserves some of it.²¹¹ Accuracy in judging others therefore requires accuracy in empathy.

²⁰⁴ See Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOM.'S L.J. 3-76, 9 (2000) [hereinafter *Two Concepts*].

²⁰⁵ See *id.* at 9 - 12.

²⁰⁶ See *id.* at 9- 12.

²⁰⁷ See Taslitz, *Tinkerbelle*, *supra* note 5, at 431-41.

²⁰⁸ See *id.* at 432-333.

²⁰⁹ See *id.* at 432.

²¹⁰ See *id.* at 441-42.

²¹¹ See *id.* at 442-50.

Yet there is at least some reason to worry that empathy is becoming more scarce. One recent major study found this year's college graduates the least empathetic in decades based upon standard psychological measures.²¹² If that conclusion is accurate, there could be many reasons for that decline. But the net and modern media likely have much to do with it.²¹³ Media increasingly portray violence as "cool, gratifying, fun, and without consequences."²¹⁴ Various studies have concluded that exposure to media violence reduces empathy.²¹⁵ Even worse, consumers are unaware of this effect.²¹⁶ One study found that those who just finished playing a violent video game were less likely to help a person being hurt in their presence.²¹⁷ Other studies found the brain activity of violent video game users consistent with reduced sensitivity to the

²¹² See University of Michigan News Service, *Empathy: College Students Don't Have As Much as They Used To*, www.ns.umich.edu/htdocs/releases/story.php?id=7724 (May 27, 2010) [hereinafter *Empathy Low*] (summarizing a study by lead researcher for the University of Michigan Institute for Social Research, Sara Konrath, who is also associated with the University of Rochester Department of Psychiatry and who presented the results in Boston at the 2010 Annual Meeting of the Association for Psychological Science). The study was a meta-analysis combining 72 different studies of college student empathy between 1979 and 2000. The study found " 'the biggest drop in empathy after the year 2000,' " with today's college kids being " 'about 40 percent lower in empathy than their counterparts of 20 or 30 years ago, as measured by standard tests of this personality trait.' " *Id.* (quoting Konrath).

²¹³ Konrath and one of her graduate student co-authors, Edward O'Brien, are worth quoting here. Explains Konrath:

The increase in exposure to the media could be one factor. Compared to 30 years ago, the average American now is exposed to three times as much nonwork-related information. In term of media content, this generation of college students grew up with video games, and a growing body of research, including work done by my colleagues at Michigan, is establishing that exposure to violent media numbs people to the pain of others.

Id. O'Brien adds that "the ease of having 'friends' online might make people more willing to tune out when they don't feel like responding to others' problems, a behavior that could carry over offline...." *Id.* Moreover, add "in the hypercompetitive atmosphere and inflated expectations of success, borne of 'reality shows,' and you have a social environment that works against slowing down and listening to someone who needs a bit of sympathy...." *Id.* Concludes O'Brien, "College students may be so busy worrying about themselves and their own issues that they don't have time to spend empathizing with others, or at least perceive such time to be limited." *Id.* Both Konrath and O'Brien hope to do further research concerning these hypotheses. *Id.*

²¹⁴ DILL, *supra* note 54, at 67.

²¹⁵ See *id.* at 68.

²¹⁶ See *id.*

²¹⁷ See Brad J. Bushman & Craig A. Anderson, *Comfortably Numb: Desensitizing Effects of Violent Media on Helping Others*, 20 PSYCHOLOGICAL SCIENCE 273, 273-76 (2009) (finding both short and long-term reductions in helping behavior and sensitivity to others' suffering from violence).

suffering of others.²¹⁸ Still other brain studies reveal the release of dopamine in violent video game users, linking violence therefore with pleasure of an addictive nature.²¹⁹ The Mind Science Foundation,²²⁰ in studying television violence, reported that watching such violence

recruits a network of brain regions involved in the regulation of emotion, arousal and attention, episodic memory encoding and retrieval, and motor programming. This pattern of brain activations may explain the behavioral effects observed in many studies, especially the finding that children who are frequent viewers of TV violence are more likely to behave aggressively. Such extensive viewing may result in a large number of aggressive scripts stored in long-term memory in the posterior singulate, which facilitates rapid recall of aggressive scenes that serve as a guide for overt social behavior.²²¹

Moreover, noted these researchers, although the game players were aware that the violence was not real, their brains reacted as if it were real.²²²

Mirror neurons, discussed earlier, are essential to empathy.²²³ Those neurons are more likely to fire, however, when we are interacting with someone whom we perceive as similar to us.²²⁴ Despite improvements, media stereotyping of racial minorities continues.²²⁵ Even if equal numbers of Blacks and Whites are shown engaging in violence on television, most Whites have little close contact with Blacks, certainly few Black friends.²²⁶ Whites will thus know other Whites who are nonviolent, but most Whites' image of Blacks will come primarily from the

²¹⁸ See Bruce D. Bartholomew, et al., *Chronic Violent Offender Video Game Exposure and Desensitization to Violence: Behavioral and Event-Related Brain Potential Data*, 42 J. EXPERIMENTAL SOCIAL PSYCH. 532, 535-36 (2006) (also supporting the conclusion that it is not less helpful people who choose to use violent video games but rather the reverse: violent video games make people less helpful).

²¹⁹ See M.J. Koepp, et al., *Evidence for Striatal Dopamine Release during a Video Game*, 393 NATURE 266, 266-67 (1998).

²²⁰ See generally Mind Science Foundation, <http://www.mindscience.org/> (last visited Oct. 25, 2010).

²²¹ See Murray, et al., *Children's Brain Activations While Viewing Televised Violence Revealed by Fmri*, 8 MEDIA PSYCH. 25, 26 (2006).

²²² See *id.*

²²³ See Taslitz, *Tinkerbelle*, *supra* note 5, at 436-37.

²²⁴ See *id.* at 433.

²²⁵ See DILL, *supra* note 54, at 94-95.

²²⁶ See FULLER, *supra* note 7, at 85-86.

media.²²⁷ Exposure to images of Black violence takes its toll.²²⁸ In video game studies, “the presence of an African American male video game character *primed* (brought to mind) the concept of violence.”²²⁹ Fear of the other and perceived difference from him make empathy hard, in turn making sympathy hard, even where it is deserved.²³⁰

Storytelling, as also noted earlier, has special power. Yet both fictional media and news media necessarily engage in narrative.²³¹ But, “[w]hen you get lost in a story, you become uncritical of the persuasive messages embedded in the story, accepting them involuntarily.”²³² Mere descriptions of someone as dangerous therefore have far less impact than story-embedded images, “such as when an African American man in a video game is portrayed as a street criminal.”²³³ Concludes social psychologist Karen Dill, “Since we don’t differentiate between stereotypes we’ve just imagined and those we’ve seen confirmed in real life, then surely we don’t differentiate between real people who confirm a stereotype and fictional characters who do.”²³⁴ Media tales thus particularly create obstacles to empathy.

Self-control, patience, and deferred gratification are also central to empathy. In repeated experiments over decades, children displaying the least self-control were more likely than other children to become bullies, get poor teacher evaluations, and abuse drugs.²³⁵ Self-control was related to attentional control. Children who could shift their attention away from the desired object to other thoughts for extended periods were better able to control their behavior.²³⁶ Self-

²²⁷ *See id.*

²²⁸ *See id.*; DILL, *supra* note 54, at 94-95.

²²⁹ DILL, *supra* note 54, at 95.

²³⁰ *See* Taslitz, *Tinkerbelle*, *supra* note 5, at 433-36.

²³¹ *See* FULLER, *supra* note 7, at 117-36.

²³² DILL, *supra* note 54, at 97.

²³³ *Id.*

²³⁴ *Id.* at 97-98.

²³⁵ *See* JACKSON, *supra* note 120, at 226-27; Walter Mischel & Ozlem Ayduk, *Self-Regulation in a Cognitive-Affective Personality System: Attentional Control in the Service of the Self*, 1 SELF AND IDENTITY 113, 116-19 (2002); Walter Mischel, et al, *Delay of Gratification in Children*, 244 SCIENCE 933, 935-36 (1989).

²³⁶ *See* JACKSON, *supra* note 120, at 231.

control thus seems linked to the ability to focus on others than one's self. Self-control is enabled by sustained, focused attention, thus permitting long-term planning, information-gathering, engagement with others in ways that enable connection.²³⁷ Social learning and caring thus turn on uni-focusing. Science journalist Maggie Jackson makes the point eloquently:

Attention ... tames our inner beast. Primates that receive training in attention become less aggressive. One of attention's highest forms is "effortful control," ... the ability to shift focus deliberately, engage in planning, and regulate one's impulses. Six-and-seven-year-olds who score high in tests of this skill are more empathetic, better able to feel guilt and shame, and less aggressive. Moreover, effortful control is integral to developing a conscience, researchers are discovering. In order to put back the stolen cookie, you must attend to your uneasy feelings, the action itself, and the abstract moral principles – then make the right response. All in all, attention is key to both our free will as individuals and our ability to subordinate ourselves to a greater good.²³⁸

The multi-tasking, distracting, interruption-filled life of modernity does not keep citizens practiced in this form of focused social attention. Perhaps that is why so many Americans, even the young, may report many weak social ties but few strong ones.²³⁹ Yet without skill at focused, particularly face-to-face, social attention, empathy suffers.²⁴⁰ There are surely many other forces affecting whether we can empathize with another in a particular case,²⁴¹ and the immersion in concrete evidence at a criminal trial may arguably force jurors to pay closer attention to the person they are judging.²⁴² But most suspects will be racial minorities, class minorities,²⁴³ portrayed as "them," not "us" in the media,²⁴⁴ already creating obstacles to

²³⁷ See *id.* at 232-33.

²³⁸ *Id.* at 23-24.

²³⁹ See *id.* at 59-60.

²⁴⁰ See *id.* at 60 ("[F]ace to face contact remains ... the 'gold standard' of human relations.").

²⁴¹ See Taslitz, *Tinkerbelle*, *supra* note 5, at 432-55.

²⁴² See ROBERT BURNS, *A THEORY OF THE TRIAL* 212-13 (2001).

²⁴³ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

²⁴⁴ See *supra* text accompanying notes 225 - 30.

empathy and fear of the purported offender.²⁴⁵ Scattered attention spans may amplify the problem. There is thus at least good reason to worry that news audiences for crime stories will have every motivation to absorb those stories uncritically, to favor the negative ones portraying the suspect in a bad light, and to avoid the effort to understand his life circumstances or to see the other side. Those risks may not fully abate when some of those audiences members sit in his judgment as jurors.²⁴⁶

D. *Gossip, Rumors, and the Net*

1. *False Net Rumors and How They Spread*

Remember that net users consider two sources of information extremely credible: people they already know or sites that they frequently use with some emotional investment in them.²⁴⁷ This observation matters greatly when we recognize that most news and opinion about it is spread by rumor, defined here roughly as the spread of unverified information.²⁴⁸ In the pre-internet world, friends, neighbors, and colleagues gossiped about much, including local crime stories. That, of course, still happens. But the internet magnifies the speed and impact with which those rumors can spread.²⁴⁹

Because rumors are unverified, it can be hard to separate the true wheat from the false chaff.²⁵⁰ Rumor propagators have many motives, however, to spread false, misleading, or incomplete information, consciously or not. Such motives include narrow self-interest (making

²⁴⁵ See Taslitz, *Tinkerbelle*, *supra* note 5, at 432-36.

²⁴⁶ See *infra* Part IV.

²⁴⁷ See *supra* text accompanying notes 184- 93.

²⁴⁸ See Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants' Example*, 37 S.W.L.REV. 1091, 1132 (2009) [hereinafter *Redux*] (defining “rumor” and “gossip,” a distinction not worth exploring here); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 122-23 (2007) (reminding readers that it is not only media content but also gossip and “the formation of community solidarity against a trial participant” that contributes to anti-defense public perceptions in high-profile cases).

²⁴⁹ See CASS SUNSTEIN, *ON RUMORS: HOW FALSEHOODS SPREAD, WHY WE BELIEVE THEM, WHAT CAN BE DONE ABOUT THEM* 4 (2009) [hereinafter *RUMORS*].

²⁵⁰ See Taslitz, *Redux*, *supra* note 248, at 1135-36.

money, beating the competition), general self-interest in the sense of attracting eyeballs to websites, altruism (promoting a social cause), and malice (injuring another for the sheer joy of it.)²⁵¹ On the net, a rumor posted on a blog with even a small readership gets picked up by one blog, then another, then another, until finally even making it to the local news.²⁵² Rumors can spread in similar fashion through social networking sites.²⁵³

Three effects in particular aid the spread of rumor. First, informational cascades.²⁵⁴ The idea here is simply that you hear a rumor, have no personal knowledge of its accuracy, but you see many other people propagating it. Accordingly, you assume that so many people cannot be wrong, so you accept the rumor's truth and spread it further.²⁵⁵ Even if you have some counter-information, the sheer number of people accepting the rumor may cause you to lack confidence in your initial judgments. You defer to the will of the group.²⁵⁶

Second, and relatedly, conformity cascades may arise.²⁵⁷ These are similar to informational cascades but the primary motive is not doubt in the accuracy of one's own knowledge base but rather the desire to conform to a group.²⁵⁸ Experiments reveal that people will even express belief in information whose accuracy they doubt to avoid feared social sanctions.²⁵⁹ Explains law professor Cass Sunstein:

²⁵¹ See SUNSTEIN, RUMORS, *supra* note 249, at 12-15.

²⁵² See *id.* at 15-16.

²⁵³ See *id.*; NICHOLAS DIFONZO, THE WATER COOLER EFFECT: A PSYCHOLOGIST EXPLORES THE EXTRAORDINARY POWER OF RUMORS 102-08, 111-16, 114-19, 194, 198-99 (2008) (exploring the role of social networks in rumor propagation in greater detail).

²⁵⁴ See SUNSTEIN, RUMORS, *supra* note 249, at 21-23.

²⁵⁵ See *id.*; cf. DIFONZO, *supra* note 253, at 139-40 (noting that one reason repeated hearing of a rumor increases belief in its truth is the perception that it cannot be wrong if it has survived scrutiny by so many people).

²⁵⁶ See SUNSTEIN, RUMORS, *supra* note 249, at 21-23.

²⁵⁷ See *id.* at 29-30.

²⁵⁸ See *id.*

²⁵⁹ See *id.* at 29, 31 (briefly summarizing these experiments); Solomon Asch, *Opinions in Social Pressure*, in READINGS ABOUT THE SOCIAL ANIMAL 13, 16, 23-24 (Elliot Aronson ed. 1995) (offering an overview of much of the literature); ROBERT BARON & NORBERT KERR, GROUP PROCESS, GROUP DECISION, GROUP ACTION 66 (1992); TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES 26-28 (1998).

Rumors often spread as a result of conformity cascades, which are especially important in social networks made up of tightly knit groups or in which there is a strong stake in a certain set of beliefs. In a conformity cascade, people go along with the group in order to maintain the good opinion of others – no matter their private views or doubts.²⁶⁰

Thus if A and B are far-left liberals and A tells B that a well-known Republican Senator is taking graft, B may profess belief in that rumor. She may do so even if she privately doubts its truth because she wants to avoid A’s hostility or lessened esteem of her or that of her other far-left friends.²⁶¹

Third, group polarization, discussed above, plays a role.²⁶² Widespread discussion within a group leads to more extreme versions of the originally-held beliefs. Social networks, including via networking sites, magnify the effect because they increase corroboration by the like-minded and heighten concerns about maintaining a strong reputation among other community members.²⁶³ Polarization intensifies not only the cognitive strength of beliefs but also their emotional importance to us, often leading to anger.²⁶⁴ Consequently, deliberation often prompts aggressive protest action, even including supporting marches and sit-ins.²⁶⁵ Such action itself enhances polarization while gaining still more attention for the initiating rumor.²⁶⁶

Different groups have different likelihoods of initially believing a rumor, primarily based upon whether it is consistent or inconsistent with the group’s prior beliefs.²⁶⁷ Consistency with

²⁶⁰ See SUNSTEIN, RUMORS, *supra* note 249, at 30.

²⁶¹ Cf. *id.* at 30-31 (inspiring this example).

²⁶² See *supra* text accompanying notes 41-46 (defining “group polarization”).

²⁶³ See SUNSTEIN, RUMORS, *supra* note 249, at 40-41.

²⁶⁴ See *id.* at 37.

²⁶⁵ See *id.* 36-37; Norris Johnson, et al., *Crowd Behavior as “Risky Shift”: A Laboratory Experiment*, 40 SOCIOLOGY 183, 183, 185-86 (1977); TERRY ANN KNOPF, RUMOR, RACE, AND RIOTS 8-14 (2006).

²⁶⁶ See SUNSTEIN, RUMORS, *supra* note 249, at 36-37.

²⁶⁷ See *id.* at 24-26; cf. DIFONZO, *supra* note 253, at 129 (“Perhaps the main reason that people believe rumors, then, is because they accord with the hearer’s feelings, thoughts, attitudes, stereotypes, prejudices, opinions, and behaviors.”).

prior convictions promotes belief, inconsistency its opposite.²⁶⁸ One group thus has a low threshold for believing a rumor, another a higher threshold.²⁶⁹ Yet if the low-threshold group is big enough, and if other low-threshold groups catch on, eventually the total group may be large enough for even higher threshold groups to accept the rumor's truth and propagate it further.²⁷⁰

2. Raced Effects

Rumors that are consistent with pre-existing attitudes, including toward racial group members, are more likely to be believed.²⁷¹ For example, rumors about black criminality, stupidity, and sexual aggression are more readily accepted by white audiences than the converse.²⁷² In the mid 1960s, a rumor circulated in Detroit, Michigan, falsely alleging that a child was castrated by a gang of teenage boys in a shopping mall restroom. "When repeated in the White community, the gang was said to be Black and the victim White. When told in the Black community, the gang was said to be White and the victim Black."²⁷³

Rumor-repetition also increases its acceptance. The mere re-telling of a similar story can thus encourage its spread, particularly if not rebutted by equally credible sources.²⁷⁴ Likewise, the various other biases recounted above that degrade rumor accuracy in the telling--information-filters, confirmation biases, in-group aggrandizement, among others--probably promote acceptance and repetition of stereotype-consistent rumors.²⁷⁵

In any given instance, of course, a variety of forces can be at work, some promoting rumor

²⁶⁸ See SUNSTEIN, RUMORS, *supra* note 249, at 24-26.

²⁶⁹ See *id.*

²⁷⁰ See *id.*

²⁷¹ See NICHOLAS DIFONZO & PRASHANT BORDIA, RUMOR PSYCHOLOGY: SOCIAL AND ORGANIZATIONAL APPROACHES 92-93 (2007).

²⁷² See *id.* at 94. But see GARY ALAN FINE & PATRICIA A. TURNER, WHISPERS ON THE COLOR LINE: RUMOR AND RACE IN AMERICA 126-27 (2001) (analyzing the credibility among the African-American community of rumors, often about white anti-black conspiracies).

²⁷³ DIFONZO & BORDIA, *supra* note 271, at 96; see Marilyn Rosenthal, *Where Rumor Raged*, *Trans-Action*, Feb. 1971, at 34, 36.

²⁷⁴ See DIFONZO & BORDIA, *supra* note 271, at 101-03, 111.

²⁷⁵ See *id.* at 111; *supra* text accompanying notes 254 - 66.

accuracy, others undermining it. But what this review of illustrative factors encouraging the latter does is to point out how racial stereotyping can raise the risk of inaccurate rumors being believed, particularly under certain conditions.²⁷⁶

3. *Difficulties of Responding*

More speech will not necessarily correct false net rumors. The joint presence of three factors makes it particularly unlikely that counter-speech will change false beliefs: (1) strong prior beliefs, (2) skewed trust toward the rumor source, and (3) weak prior knowledge.²⁷⁷ Many audience members will have strong prior beliefs about crime, mostly ones that work against the accused, as has been extensively demonstrated elsewhere.²⁷⁸ The media exaggeration of crime frequency and severity to catch audience attention, explained earlier, creates a perception of our society as a dangerous one populated by human-appearing predators.²⁷⁹ Racial stereotypes trigger fears of offenders.²⁸⁰ Despite the presumption of innocence, too many people assume that someone arrested must be guilty or dangerous, even if the innocence movement has made some inroads into these attitudes.²⁸¹ Crimes stories also help to create social solidarity in a rapidly-changing, oft-frightening world.²⁸² The stories promote shared values and a common perceived enemy.²⁸³

On the other hand, most of us have little prior knowledge about specific criminal cases. We glean our knowledge from rumor, friends, websites, social networking sites, and media outlets.²⁸⁴

²⁷⁶ See *supra* text accompanying notes 247 - 75; Rosenthal, *supra* note 273, at 34.

²⁷⁷ See SUNSTEIN, RUMORS, *supra* note 249, at 51-54.

²⁷⁸ See SURETTE, *supra* note 103, at 4-5, 119-25.

²⁷⁹ See *supra* text accompanying notes 213 - 22.

²⁸⁰ See Taslitz, *Redux*, *supra* note 248, at 1146 - 147.

²⁸¹ See Mschultz, Guest post: Stop publishing the Police Blotter, newsobserver.com (Aug. 6, 2010 14:24), <http://blogs.newsobserver.com/orangechat/guest-post-stop-publishing-the-police-blotter> (discussing the presumption of guilt associated with the knowledge of an individual's arrest).

²⁸² See Joseph Kennedy, *Monstrous Offenders and the Search For Solidarity Through Modern Punishment*, 51 HASTINGS L. J. 829, 834-48 (2000).

²⁸³ See *id.*

²⁸⁴ See SURETTE, *supra* note 103, at 1-24.

We are unlikely to do independent investigation in most cases, and only the rare person had eyewitness knowledge of the events in a specific case.²⁸⁵ Our ignorance makes it likely that we will rely on trusted others.²⁸⁶

Rumors from friends or frequently-visited sites are treated as coming from trusted others.²⁸⁷ Website reports are too-readily accepted uncritically.²⁸⁸ Beliefs in rumor truth, including about crime stories, will form early.²⁸⁹ Moreover, because law enforcement has access to most of the information early in a case, even the true information available will tend to favor conviction.²⁹⁰ Beliefs once formed mightily resist change, even in the face of starkly contradicting evidence. Indeed, audiences suspect that merely trying to rebut a story shows that you have something to hide and that the prior-belief-inconsistent source is likely not credible.²⁹¹ Self-deception, rationalization, and filtering processes lead to judging the new evidence as implausible or confused.²⁹² Moreover, trying to rebut a prior belief simply re-focuses attention on that belief, often perversely *increasing* the strength with which it is held.²⁹³ Only if special sets of circumstances are present, such as the belief-inconsistent information itself coming from trusted sources that first defended the initial belief, will counter-speech likely be effective.²⁹⁴

²⁸⁵ See Micheal A. Millerman & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Investigation into the First Year*, 12 CLINICAL L. REV. 441, n.153 (2006) (applying the premise to law students who rarely inquire into facts or conduct their own investigations prior to engaging in legal analysis); see generally Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCH. PUB. POL'Y & L. 315 (2009) (discussing confirmation bias and the role of prosecutors and investigators in false convictions as well as the inability of defense counsel to engage in independent investigations).

²⁸⁶ See *supra* text accompanying notes 184 - 93.

²⁸⁷ See *supra* text accompanying notes 184 - 93.

²⁸⁸ See *supra* text accompanying notes 184- 93.

²⁸⁹ See Taslitz, *Free Press*, *supra* note 3, at 183-85, 188.

²⁹⁰ See *id.* at 183-85.

²⁹¹ See SUNSTEIN, RUMORS, *supra* note 249, at 53.

²⁹² See *id.* at 51.

²⁹³ See *id.* at 54.

²⁹⁴ See *id.* at 52-53.

Negative, vivid rumors are also more likely to spread and stay – to be “sticky” -- than are positive, more abstract ones.²⁹⁵ Rumors triggering strong emotions, such as disgust, anger, or outrage, spread more rapidly and resist counter-information more effectively than more pallid, positive information.²⁹⁶ This too can contribute to selective perception of the disgusting and evil, selective inattention to the opposite.²⁹⁷ The media is aware of this phenomenon, thus more likely to spread the negative in the first place.²⁹⁸ But horribly vivid crime stories will mean that positive messages will face selective *inattention*.²⁹⁹

Rumors need not be false to inflict grave harm. If the state truthfully summarizes information it will present via the story as *it sees it* and the defense does the same, the state’s story under the circumstances just noted will be stickier than the defense’s. An incomplete tale can be a misleading one. Moreover, so much of what happens at trial is not about the evidence but about its interpretation.³⁰⁰ It can be hard to label one interpretation “false,” another true.³⁰¹ Yet the same forces can skew average public perception of a reported criminal case in favor of one interpretation over another well before a jury has been empanelled.³⁰²

4. *Jurors and the Media*

²⁹⁵ See *id.* at 58-59; CHIP HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* 15 (2007).

²⁹⁶ See Chip Heath, et al., *Emotional Selection in Memes: The Case of Urban Legends*, 81 J. PERSONALITY AND SOCIAL PSYCH. 1028, 1032, 1038-39 (2001)

²⁹⁷ See Heath, *supra* note 296, at 1028, 1032, 1038-39.

²⁹⁸ See FULLER, *supra* note 7, at 78-79 (“[T]he increasing competition for attention and the increasing emotional arousal levels in the audience push purveyors of news more strongly than ever before in the direction of satisfying people’s curiosity about bad news.”).

²⁹⁹ Cf. *id.* (noting that “[n]egative events are more emotionally powerful than positive events” and “[n]egative emotions narrow a person’s focus,” offering this evolutionary explanation: “Usually animals have more than one chance at finding food or a mate. But fail to spot a stalking lion and it’s the end of the line.”); see generally CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: AND OTHER WAYS OUR INTUITIONS DECEIVE US* (2010) (explaining at length how focused attention on some objects in the environment renders others effectively invisible).

³⁰⁰ See Taslitz, *Feminist Approach*, *supra* note 95, at 25 - 26.

³⁰¹ See *id.*

³⁰² See Taslitz, *Free Press*, *supra* note 3, at 188.

The dominant view among research psychologists is that pretrial publicity has negative effects, generally ones working against defendants.³⁰³ Persons exposed to media crime stories tend toward pro-prosecution bias.³⁰⁴ Publicity conveying factually probative, incriminating information, such as whether a defendant confessed, plays into this bias in a particular case.³⁰⁵ Emotional publicity casting the defendant in a bad light, though relevant to some issue other than the wrongdoer's identity, also favors conviction.³⁰⁶ Reports of a defendant's bad character can do much damage to audience fairness, especially revelations of a prior record, which foster perceptions of the suspect as a "typical criminal."³⁰⁷ Pretrial publicity has its greatest effect on individuals lacking strong prejudgments about guilt in the individual case or strong case-relevant attitudes (for example, about the likelihood of "real rape") and when the prosecution's case is weak.³⁰⁸

Once negative reactions set in, new evidence tends to be viewed through a pro-prosecution lens.³⁰⁹ Field and laboratory research converge on similar results.³¹⁰ However, a "combination of prejudicial information – such as the seriousness of the offense, the race of the accused, unfavorable statements by a prosecutor, a confession, and retention in custody – is more

³⁰³ See *id.* at 186.

³⁰⁴ See Joel D. Lieberman, et al., *Inadmissible Evidence and Pretrial Publicity: The Effects (and Ineffectiveness) of Admonitions to Disregard*, in *JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES* 67, 70 (Joel D. Lieberman & Daniel A. Krauss ed.s 2009).

³⁰⁵ See *id.*

³⁰⁶ See *id.*

³⁰⁷ See *id.*; Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity and Its Influence on Juror Decisionmaking*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 254, 254-55 (Neil Brewer & Kipling D. Williams ed.s 2005) (focusing on "typical criminal" images).

³⁰⁸ See Lieberman, *supra* note 304, at 71; [weak prosecution case cite].

³⁰⁹ See Lieberman, *supra* note 304, at 71; L. Hope, et al., *Understanding Pretrial Publicity: Predecisional Distortion of Evidence by Mock Jurors*, 10 *J. EXPERIMENTAL PSYCH.* 111, 115-17 (2004) (supporting conclusion that participants exposed to negative pretrial publicity interpret new evidence as pro-prosecution).

³¹⁰ See Lieberman, *supra* note 304, at 71; Nancy M. Steblay, et al., *The Effects of Pretrial Publicity on Jury Verdicts: A Meta-Analytic Review*, 23 *LAW AND HUMAN BEHAVIOR* 219, 229-30 (1999) (meta-analysis concluding that pretrial publicity effect sizes were greater with real rather than simulated publicity and trials).

likely to result in a guilty verdict than any one item presented in isolation.”³¹¹ Pretrial publicity increases juror recall of anti-defendant information, biases its interpretation against the defendant still further, and enhances pre-existing negative attitudes, “for example, that fraternities promote licentiousness.”³¹² The heinous nature of the crime, media focus on an individual defendant rather than a class of defendants, and high credibility of the source – and on crime reports in individual cases, the media may be given much credibility – are also factors favoring conviction.³¹³

The current Model Rules of Professional Conduct (“MRPC”), of course, prohibit prosecutors from conveying to the media several of the most damaging categories of pre-trial information.³¹⁴ Yet prosecutor compliance is erratic. Thus one content analysis of fourteen newspapers revealed that twenty-seven percent of media-identified criminal suspects in news stories revealed information violative of the MRPC prohibitions.³¹⁵ This study concluded that the “most common types of publicly revealed information were negative statements about the suspect, prior arrest information, opinions of guilt, confessions, and prior conviction information.”³¹⁶ Although the media may obtain this information through many sources, the

³¹¹ Taslitz, *Free Press*, *supra* note 3, at 186.

³¹² *See id.* at 187.

³¹³ *See id.* (heinous nature).

³¹⁴ *See* AM. BAR ASS’N, MODEL RULES PROF. CONDUCT, Rules 3.6, 3.8. Rule 3.6 allows any attorney to convey to the media certain categories of information, including information in a public record; the claim, offense, or defense involved; the existence of an investigation in progress; the scheduling or result of any step in litigation; a request for assistance in obtaining information or evidence; and a warning of danger when there is reason to believe there is a likelihood of substantial harm to an individual or the public interest. *See* Rule 3.6(b). In a criminal case, the lawyer may also reveal the identity, residence, occupation, and family status of the accused; information necessary to aid in his apprehension; the fact, time, and place of arrest; and the identities of the investigating or arresting officers or agencies and the length of the investigation. *See* A lawyer may also make statements that a reasonable lawyer would believe to be necessary to protect her client from the substantial unduly prejudicial effects of recent publicity initiated by neither the client nor the lawyer. *See* Rule 3.6(c). Rule 3.8 addresses the special responsibilities of a prosecutor but, as to pretrial publicity, largely contains merely a general prohibition on extrajudicial statements creating a substantial likelihood of heightening public condemnation of the accused, though recognizing exceptions to that prohibition.

³¹⁵ Imrich, et al., *Measuring the Extent of Prejudicial Pretrial Publicity in Major American Newspapers: A Content Analysis*, 45 J. COMMUNICATIONS 94 (1995).

³¹⁶ Lieberman, *supra* note 304, at 70 (summarizing the study).

study revealed that “[I]aw enforcement officers and prosecutors were often the sources of prejudicial information to the newspapers.”³¹⁷ Another, more recent content analysis reached similar conclusions but also explored racial bias.³¹⁸ That study found that “African-Americans and Latinos were twice as likely as Whites to be described in prejudicial ways that violated the ABA standards.”³¹⁹

There is a dispute about the size of the pretrial publicity effects. Pessimists find a great effect size. Optimists see a much smaller effect size.³²⁰ Yet even the optimists’ reports of small effect sizes can make a big difference in close cases. In such cases, juries that are just below the beyond-a-reasonable-doubt threshold need their confidence in conviction raised only a bit to cross over into the zone of conviction.³²¹ Presumably very strong cases would result in conviction even without bad publicity and very weak ones will not be revived from the dead by publicity alone.³²² If that presumption is correct, most such cases should result in guilty pleas rather than trials. Pretrial publicity thus matters most in those cases worthy of debate and likely to go to trial, even under the (contested) conclusions of the minority pessimists.

Pessimists and optimists also disagree over the likely success of remedies for pretrial publicity. Pessimists, again in the majority, find most available remedies ineffective.³²³ Voir dire does not work, partly because potential jurors may honestly but erroneously declare that they can be fair.³²⁴ Persons are also often unaware of the effect of various factors on their tendency to

³¹⁷ *Id.*

³¹⁸ See T.L. Dixon & D. Linz, *Television News, Prejudicial Pretrial Publicity, and the Depiction of Race*, 46 J. BROADCASTING AND ELECTRONIC MEDIA 112, 114-15, 117-18 (2002).

³¹⁹ Lieberman, *supra* note 304, at 71.

³²⁰ See Taslitz, *Free Press*, *supra* note 3, at 186-90.

³²¹ *See id.* at 190.

³²² *See id.*

³²³ *See id.* at 187-89.

³²⁴ *See* Lieberman, *supra* note 304, at 69.

convict. They do not know themselves.³²⁵ There is even some evidence that merely asking potential jurors about pretrial biasing information can in fact heighten its biasing effects.³²⁶ Peremptory challenges run out quickly, leaving either side little effective remedy in voir dire.³²⁷

Jury instructions to disregard pretrial publicity are similarly generally ineffective.³²⁸ The ineffectiveness can, however, perhaps be moderated by contextual factors, such as strong prosecution evidence or giving jurors a persuasive, logical reason to believe the previously-revealed information to be unreliable.³²⁹ Some researchers believe that deliberation can reduce the effects of inadmissible evidence within a juror's awareness.³³⁰ Yet the more prevalent view is that "deliberations actually tend to increase the effect of publicity on jurors,"³³¹ probably again because of group polarization.³³² Moreover, the overwhelming consensus is one of general distrust of admonitions as a means for combating pretrial publicity effects.³³³ Admonitions likely fail because of belief perseverance (processing future information consistently with the original belief), the backfire effect (paying *more* attention to what you are told to ignore), hindsight bias (the inability, once being told of information, to alter one's beliefs to what they were before you were exposed to the information), and reactance (giving more weight to what you are told to ignore because of resentment at an effort to limit your autonomy).³³⁴

³²⁵ *See id.*

³²⁶ *See id.* at 72.

³²⁷ *See* HARRY I. SUBIN, ET AL., THE PRACTICE OF FEDERAL CRIMINAL LAW: PROSECUTION AND DEFENSE 416-20 (2006) (discussing voir dire tactics).

³²⁸ *See* Lieberman, *supra* note 304, at 73; Taslitz, *Free Press*, *supra* note 3, at 187-88.

³²⁹ *See* Lieberman, *supra* note 304, at 77-79. Thus some research suggests that jurors with a high need for "cognition" (for analyzing information) may disregard inadmissible evidence nevertheless brought to their attention if told that there is reason to doubt its reliability, for example, because a tape was of poor quality, but would not disregard the evidence if told to ignore it because it was illegally obtained. *See id.* at 78.

³³⁰ *See id.* at 75 n.3.

³³¹ *See id.*

³³² *See id.*

³³³ *See* Taslitz, *Free Press*, *supra* note 3, at 187.

³³⁴ *See* Lieberman, *supra* note 304, at 79-86.

Researchers disagree on the effects of long continuances. There is some reason to believe that the press moderates its reports over a long time period.³³⁵ There is also research suggesting that the impact on the public diminishes over time.³³⁶ But there is contrary evidence that the impact *increases* with time.³³⁷

Change of venue can be difficult and works only if press coverage did not reach the new venue.³³⁸ That seems increasingly less likely in a world where internet communication can spread stories rapidly around the globe.³³⁹

Optimists disagree concerning remedy effectiveness in one way. The optimists point out that most studies examined the impact of remedies one at a time.³⁴⁰ Optimists instead embrace the “cumulative remedies hypothesis,” that is, that “careful voir dire, effective defense counsel, cautionary instructions, jury deliberation, and presentation of trial-evidence under real-world conditions should cumulatively minimize or even entirely erase media coverage’s negative effects.”³⁴¹ Yet pessimists concede that their argument rests partly on improvements in how each of these remedies are currently administered, improvements that would seem unlikely to be rapidly adopted.³⁴² In any event, the combination of all these remedies in the real world seems a lot to ask for (guaranteeing effective defense counsel in an under-resourced criminal justice system is alone a challenge).³⁴³ Moreover, the wisdom of the optimists’ assertion awaits further research.³⁴⁴

³³⁵ See Taslitz, *Free Press*, *supra* note 3, at 188-89.

³³⁶ See *id.* at 189; Lieberman, *supra* note 304, at 72.

³³⁷ See Taslitz, *Free Press*, *supra* note 3, at 188-89.

³³⁸ See Lieberman, *supra* note 304, at 72.

³³⁹ See *id.* at 73-74 (summarizing evidence that modern media and the internet may nullify efforts of countries other than the United States, who far more severely limit pretrial press coverage of criminal trials.)

³⁴⁰ See Taslitz, *Free Press*, *supra* note 3, at 190.

³⁴¹ *Id.*

³⁴² See *id.*

³⁴³ See The Constitution Project, Right to Counsel Initiative, *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel* (2009).

³⁴⁴ See *id.*

The bottom line is that jury research is consistent with the likely ill impacts of pretrial publicity discussed throughout this piece. The net-related-effects described in earlier sections of this article suggest that pretrial publicity effects will worsen, not improve, as younger generations age and technology advances. The only sure-fire way to protect against the ill effects of pretrial publicity on criminal trials is to bar it entirely, a non-starter in our constitutional culture.³⁴⁵

IV. Conclusion

There is much to like in the new standard on prosecutors' dealing with the media. I have written elsewhere on the need for current standards to address the risks of harm to reputation, not only to a fair trial.³⁴⁶ The new standard does just that.³⁴⁷ Prosecutors must therefore be cautious with the press even for cases that are ultimately dismissed or result in guilty pleas, and even where a fair trial seems possible but certain information-dissemination creates risks of *unnecessarily* harming reputation, including harming it more than would (and before) the simple fact of conviction itself. Although both the old and the new core standard protect not only the fairness of trials but of "criminal proceedings,"³⁴⁸ thus also arguably extending to guilty pleas, the new standard more properly and more broadly adds a focus not only on prejudice to such

³⁴⁵ See *id.* at 197-210 (summarizing the relevant constitutional law).

³⁴⁶ See *id.* at 178-210.

³⁴⁷ On the other hand, I have argued that it is not only reputational injury *to the accused* but also to associated salient *social groups and institutions* that matters. See *id.* For example, racially-tinged messages can harm the accused's racial group as much as the accused himself. See *id.*; J.D. Johnson, et al., *Justice Is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY AND SOCIAL PSYCH. BULL. 893 (1995) (finding Whites more willing to consider inadmissible evidence to be incriminating for Black relative to White defendants). As another example, the prosecutors' comments in the Duke rape case caused grievous racial group injury as well as injury to Lacrosse as a sport and to Duke University as an institution. See Taslitz, *Free Press*, *supra* note 3, at 178-210. I do not believe that ethics rules punishable by bar discipline can be useful in addressing these concerns. But aspirational rules like the Standards can be just the place to address such concerns. Yet the proposed revision focuses only on reputational harm to the accused. Adding language to address associated social groups and institutions is therefore a matter worth further discussion.

³⁴⁸ See ABA STANDARDS FOR CRIMINAL JUSTICE, PROPOSED REVISIONS TO STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-1.7(c) (Draft as of June 2010).

proceedings but to undue (“unnecessary”) harm to reputation (or, in the standard’s words, to heightened “public condemnation”) and is thus to be applauded.³⁴⁹

The new standard also has other provisions that discourage continuation of prosecution contact with the media “off the record” or even where the prosecutor is not involved in the particular high-profile case on which she comments if that improperly risks an unfair trial or otherwise risks materially prejudicing a criminal proceeding.³⁵⁰ That discourages end-runs around the core provision guarding the right to a fair trial.³⁵¹ Similarly, there are new provisions generally barring prosecutors from emotion-heightening demonstrations or re-creations for the media of any pending case, including ones in which the prosecutor is not directly involved.³⁵² Nor may the prosecutor allow her judgment to be influenced by the personal or career benefits of involving the media.³⁵³ These provisions offer details that improve upon the current standard’s textual silence on these matters.

But the standard’s core provision protecting the right to a fair trial (and other stages of a criminal proceeding), on which I have focused here, is troubling. One minor point is that it does not define “prejudice” to a criminal proceeding. In the sixth amendment effective assistance of counsel area, prejudice means either likely to alter the case outcome or to undermine confidence in the outcome.³⁵⁴ That seems like a sensible standard and, if applied here, would negate any

³⁴⁹ As noted earlier, the current Model Rules of Professional Conduct seem already to do this as well. *See supra* note 314.

³⁵⁰ *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PROPOSED REVISIONS TO STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-1.7 (Draft as of June 2010).

³⁵¹ *See supra* text accompanying notes 316-19 (summarizing studies suggesting a high rate of prosecutorial non-compliance with the Model Rules of Professional Conduct provisions governing pretrial publicity). It is hard to know how these studies how prosecutors disseminated information that they should not have, but one plausible explanation is that the information-disseminating prosecutors either were not involved personally in the cases on which they commented or gave the information anonymously, preventing disciplinary sanctions.

³⁵² *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PROPOSED REVISIONS TO STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-1.7 (Draft as of June 2010).

³⁵³ *See id.*

³⁵⁴ *See* *Strickland v. Washington*, 466 U.S. 668 (1984); *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Nix v. Whiteside*, 475 U.S. 157 (1986).

need to talk of “material” prejudice. Although commentary may clear up the matter, I cannot see what point the addition of the materiality language to the existing rule serves other than as a signal that it should be harder to find prejudice than is the case under the current rule.

The more important problem, however, is not with the materiality or prejudice language but with the retention of the core standard barring prosecutor statements raising a “substantial likelihood” of materially prejudicing a criminal proceeding. What I have argued here is that there is strong reason to worry that *any* press coverage of a high-profile case raises a substantial risk of such prejudice. Furthermore, I have insisted that this risk is likely to rise in the future because of quickening technological and resulting cultural change. Specifically, our high-information-overload, multi-tasking lifestyle encourages decision making by the general public based more on emotion than reason. Moreover, computer technology, with all its many advantages, discourages deep, sustained, critical thinking unless there is a strong motivation to do so or the audience receives special training in doing so, both unlikely to occur with the audience in most high-profile cases.

That same technology, though this point is more speculative, may be reducing the ease with which most people are able to experience empathy, yet empathy is a cognitive prerequisite to accurately and fairly judging another. You must in particular understand another person’s nature and situation before you can make such value-laden, interpretive judgments as defining what his mental state was at the time of the crime.³⁵⁵ Additionally, the web’s speed and breadth exacerbate the many dangers that rumor-mongering poses to trial fairness. Yet news always spreads, and faces reinterpretation by, the rumor-dissemination process. Finally, research on the impact of pretrial publicity on trial fairness seems consistent with the dangers noted here.

Granted, some forms of publicity are more dangerous than others. But even such facts as the race

³⁵⁵ See Taslitz, *Feminist Approach*, *supra* note 95, at 33- 46.

of the suspects, the neighborhoods from which they hail, and other matters not specifically prohibited by the standards, new or proposed, or even prohibited by current ABA ethics disciplinary rules, can pose substantial risks to trial fairness.³⁵⁶

Yet, despite these concerns, this flawed standard may, as a practical matter, be as good as it can get. Notably, the United States offers capacious free speech protection far beyond that of most other nations, even when the right to a fair trial is involved.³⁵⁷ Even if the Court sometimes writes as if it is finding no substantial danger to trial fairness from pre-trial publicity in particular cases, its cases are more sensibly understood as implicitly (or sometimes explicitly) balancing free speech rights against trial rights.³⁵⁸ Such balancing is more of a normative question than a factual one, though “facts” like the risk posed to a fair trial certainly should enter the balance. But the ultimately normative nature of the inquiry means that the risks posed by technology cannot justify a flat bar on prosecutors contributing to the risk posed by the press to fair trial rights. Words like “substantial” in the standard might indeed best be understood as meaning “substantial next to the need for protecting free speech and press rights,” in short, as implying a balancing.³⁵⁹

Additionally, it is not only the constitution but sound policy that favors protecting press coverage of the criminal justice system, despite some risk posed to trial fairness. The public in a democracy has a right to know how the system works, and the purposes of the criminal law (for example, retribution, public education) cannot fully be served if the public is not aware of system

³⁵⁶ I say “can” pose a danger, not *will* pose a danger, because it is impossible to tell with confidence in any given trial resulting in a guilty verdict whether the jury has indeed given the defendant a fair shake, unprejudiced by pretrial publicity. The most that we can do is assess the *risks* of unfairness in general, perhaps in a particular case. The rules must, therefore, address risks, not certainties, and that the proposed standard does. In a companion piece, I have addressed the risks to free speech values where ethical standards unduly silence prosecutor speech. See Andrew E. Taslitz, *The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press*, 62 HASTINGS L.J. 1285 (2011) [hereinafter *Incautious Media*].

³⁵⁷ See Lieberman, *supra* note 304, at 73-75.

³⁵⁸ See Taslitz, *Fair Press*, *supra* note 3, at 197-204.

³⁵⁹ See *id.*

processes and outcomes.³⁶⁰ The media may itself distort the message, but it is far too dangerous to let the state decide that matter on its own. Although prosecutors are far from the only available information sources, they are important information sources. Cutting off media access to them entirely seems extreme.

Furthermore, it is plausible that prosecutors need media access to promote trial fairness to the state or to justice. There may be a need to respond to defense use of the media.³⁶¹ Alternatively, the press may on its own be painting an unfair picture of events, or the public may harbor biases that prosecutor statements may at least arguably be capable of softening.³⁶²

Do not misunderstand me. In an ideal world, when the analysis above is weighed against free speech rights, even better approaches than those recited in the proposed standards are defensible, as I have argued elsewhere.³⁶³ Such alternatives would, for example, adopt a principle of non-aggravation – that a prosecutor should make no statement that aggravates the unfair prejudice inherent in any media coverage.³⁶⁴ Likewise, each prosecutor would avoid certain categories of particularly damaging revelations to the press – likely damage determined by social science -- and would even work affirmatively to counter unfair prejudices created by the media alone.³⁶⁵ But my experience in participating in roundtables on the proposed standards at various locations around the country and in various criminal justice law reform efforts in other areas suggests that the current proposed standards may be the best that the politics of our time will allow.

The best solution *available* beyond the text of these standards, therefore, seems to be improved prosecutor training, heightening prosecutor aspirations, and building systems of

³⁶⁰ See Taslitz, *Incautious Media*, *supra* note 356, at 23-29.

³⁶¹ See *id.* at 42-43.

³⁶² See *id.*

³⁶³ See *id.* at 1-43.

³⁶⁴ See *id.* at 42-43.

³⁶⁵ See *id.*

transparency and accountability for prosecutors' use of the media that fall short of the chilling effects of harsh bar discipline, which experience has shown is unlikely to be forthcoming anyway.³⁶⁶ The prosecution standards can further these goals by expanding at least the commentary, if not the text itself, to caution against the dangers noted here, to further caution prosecutors to be conservative in deciding what to tell the press, to offer some useful hypotheticals, and to emphasize the importance of training and accountability procedures, both internal and external.³⁶⁷ The ABA is also currently working on revising the Fair Press/Free Trial standards, and that may be the appropriate place to take the more ambitious step of recommending procedural changes in how prosecutors' offices can improve training, transparency, and accountability in this area. This brief piece is not the place to suggest specifics, though numerous writers have been addressing prosecutor best practices in internal management and external review in other areas that may serve as inspiration.³⁶⁸

Ultimately, therefore, I conclude that the proposed prosecution media standards do nearly as fine a job as can be expected, but they cannot alone be expected to do enough. At a minimum, however, later forthcoming commentary to the proposed standards should take into the account the matters analyzed here and should try to get the ball rolling for other-needed mechanisms for reform. The prosecutors' duty to "do justice"³⁶⁹ demands no less.

³⁶⁶ See generally Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. Rev. 275 (2007) (discussing the legal profession's failure to hold prosecutor's accountable for misconduct and ethical violations).

³⁶⁷ For a guide to general principles for designing a sound procedure for prosecutorial deliberation, training, and accountability, see Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO J. PUB. L., POL'Y, & ETHICS 271 (2006).

³⁶⁸ See *id.*

³⁶⁹ See *id.*