



2011

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Recommended Citation

Hot Crimes: A Study in Excess, 45 Creighton L. Rev. 33 (2011)

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HOT CRIMES: A STUDY IN EXCESS

STEVEN GROSSMAN†

Societies appear to be subject, every now and then, to periods of moral panic. . . . [I]ts nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) restored to; . . . sometimes the panic passes over and is forgotten . . . at other times it has more serious and long-lasting repercussions and might produce such as those in legal and social policy or even in the way society conceives itself.¹

I. INTRODUCTION

In the fall of 1984, after a jury acquitted two parents she had accused of sexually molesting their children and before she was forced to drop charges against the twenty-one remaining defendants she had accused of child sex abuse related charges, the chief prosecutor in Jordan, Minnesota said that she was “sick to death of things like the presumption of innocence.”² After the tragic mass murders at Columbine High School in 1999, Mothers Against Drunk Driving (“MADD”) issued a press release classifying the “murders as ‘insignificant’ compared to those killed in alcohol-related traffic accidents.”³

What do these two announcements have in common? This Article suggests that each is but one manifestation of the pathology that exists regarding certain crimes and the reaction to them on the part of the public, the media, legislative bodies, law enforcement authorities, and ultimately members of the judicial system. For a long time, crimes such as these were either not treated with the seriousness they deserve (i.e. drunk driving) or the extent of their prevalence in society was significantly underestimated (i.e. child sex abuse). Fortunately, in ways this Article discusses, the previous undervaluation or under ap-

† The author, a former New York City prosecutor, is the Dean Julius Isaacson Professor of Law at the University of Baltimore School of Law. He wishes to thank Chris Trumppower and especially Justin Fine and Ashley Marucci for their thoroughness and dedication to this project.

1. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF MODS AND ROCKERS* 9 (MacGibbon & Kee eds. 1972).

2. Civia Tamarkin, *Kathleen Morris*, PEOPLE, Dec. 24, 1984, <http://www.people.com/people/article/0,,20089593,00.html>.

3. David J. Hanson, *Mothers Against Drunk Driving: A Crash Course in MADD*, ALCOHOL ABUSE PREVENTION, <http://alcoholfacts.org/CrashCourseOnMADD.html> (last visited Oct. 2, 2011).

preciation of these crimes was brought to the attention of different elements of American society, and people were educated about the nature of these crimes and the degree of harm they cause. As a result of this heightened attention, the public and particularly victims' rights groups began to call for more action in preventing and punishing these crimes. Legislatures on both the state and federal levels responded to these calls with new laws designed to accomplish both goals. Prosecutors investigated these crimes with more urgency and charged and prosecuted them more strictly. Judges began to sentence individuals convicted of these offenses more harshly. In other words, each affected group in society took action in an appropriate way to deal with the dangers that child sex abusers and drunk drivers posed.

There came a point, however, when reaction turned into over-reaction and remedial measures became excessive. This Article examines some of that over-reaction, seeks to explain why it occurs with certain crimes, fleshes out the lessons to be learned from the over-reactions, and offers suggestions on how to avoid recurrences of this type of social pathology. For the most part, this Article uses those crimes related to the serious problems that child sex abusers and drunk drivers pose as illustrations of how crimes become hot crimes and then how such crimes are treated.

Section II of this Article discusses the genesis of a hot crime, what factors appear to be needed for a crime to become hot, and how each factor contributes to the way in which such crimes are ultimately treated. Section III looks at the types of excesses that hot crimes breed. Section IV examines the kind of flaws in society's responses to hot crimes that breed these excesses. Section V discusses how the concept that has been referred to as moral panic explains the hot crimes phenomenon. Lastly, Section VI explores ways in which society, particularly law enforcement and legal institutions, can respond to serious crimes without the need to react with excessive and arguably unconstitutional measures.

II. THE GENESIS OF HOT CRIMES

On October 23, 1976, a man who was thrown out of a Bronx, New York social club after having an argument with his girlfriend returned to the club and threw a firebomb into the club. The result was an arson fire that killed twenty-five people.⁴ One year later on October 12, 1977, during the television broadcast of the second game of the World

4. Joe Conason & Jack Newfield, *Arson for Hire: The Men Who are Burning New York*, VILLAGE VOICE, June 2, 1980, at 15-19; *Gulliver's Discotheque Fire*, New York, HAVOC BUILDING CONTROL FIRE SAFETY, <http://www.iklimnet.com/hotelfires/clubfire/case7.html> (last visited Sept. 21, 2011).

Series from Yankee Stadium, a fire started in an abandoned public school building a few blocks away from the stadium. The fire obviously made for dramatic television, as the camera from an ABC helicopter lingered on the view of the school burning. Legendary sports broadcaster Howard Cosell, who was announcing the game for ABC Sports, looked at the fire and said, "There it is, ladies and gentlemen, the Bronx is burning."⁵

Prior to the game and Cosell's words, the Bronx had been suffering from a rash of arson fires, especially in decaying areas of this New York City borough.⁶ While some were acts of deliberate violence like the social club fire, the vast majority were believed to be either randomly set or the product of attempts by landlords to get damage awards from insurance companies for what were becoming worthless properties.⁷ Cosell's comment was an example of the growing attention that the media was paying to the arsons and the reactions to them.

The legal community was reacting to the escalating arson fires as well. State legislatures in the region passed laws making the arson fires far more serious crimes.⁸ Perhaps more significantly, politicians, prosecutors, and judges, especially those in the Bronx, handled arson fires, even ones in which no one was hurt, far differently than they had in the past.⁹ Crimes such as rape, armed robbery, and even some homicides, long viewed as among the most serious of crimes, became secondary to arson. Arson quickly received the most attention and the heaviest sentences. In other words, arson had become a hot crime.¹⁰

Although in 1970's New York the number of arson fires seemed to increase, there was nothing new about fires being set for deliberate reasons. The amount of attention arson fires received during this time period had to do with more than just an increase in the frequency of such crimes. Where no injuries resulted from fires, arson had always

5. 1977 World Series, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/bullpen/1977_World_Series (last visited Sept. 21, 2011).

6. Leslie Maitland, *Arson Destroying New York Housing at a Record Rate*, N.Y. TIMES, Nov. 10, 1980, at A1.

7. Conason & Newfield, *supra* note 4, at 15-19.

8. See Robert E. Tomasson, *Drive to Combat Arson in State Reported Gaining*, N.Y. TIMES, May 10, 1981, at 11.

9. See Maitland, *supra* note 6, at A1 (quoting then-New York City Mayor Edward Koch as saying, "Those who commit arson are the most despicable people in the world, and if apprehended should be sent away for forever."); see also Howard Blum, *Arson in New York: The Landlords and Their "Torches"*, N.Y. TIMES, Nov. 11, 1980, at A1; Conason & Newfield, *supra* note 4; Leslie Maitland, *Suspicious Fires Found to Have Patterns in City*, N.Y. TIMES, Nov. 12, 1980, at A1.

10. For instance, the *New York Times* did a three-part exposé on the rash of New York City fires. See Maitland, *supra* note 6, at A1; Blum, *supra* note 9, at A1; Maitland, *supra* note 9, at A1.

been viewed, prosecuted, and punished as a property crime. In the 1970s, the media, the public, legislators, prosecutors, and judges began to understand that arson fires, even where no injuries resulted, should be viewed as much more than just crimes against property.¹¹ The crime of arson, until the late 1970s, was not treated with the seriousness it deserved. The 1980's equivalent of arson, in this regard, was the crime of drunk driving.

A. DRUNK DRIVING

"[B]ooze had to go when . . . the motor car came in."

— Henry Ford.¹²

America has always been fascinated with the automobile.¹³ Cars provide a relatively fast way to get from place to place and give us the freedom of movement on which we have come to depend. When Europe was relying on vast rail systems and other means of public transportation after World War II, America was constructing the Eisenhower Interstate System. Many believe that modern America has inadequate means of public transportation to satisfy our needs, but our system of roads and highways is considered extensive and relatively complete. The primary problem with our roadways is that over-reliance on automobiles in the United States creates congestion.¹⁴

In the 1960s and 70s, the United States experienced an alarming increase in the rate of driving-related fatalities, and understandably people became concerned about the dangerous driving that caused these accidents.¹⁵ While it was no secret at that time that a significant number of these accidents were caused by drivers who had been drinking alcohol, the drunk driving laws were enforced in a manner that was lax, inconsistent, and unresponsive.¹⁶

Several reasons for this lack of effective enforcement of the drunk driving laws existed. First, it was difficult to fully understand the problem because both effective field research is difficult to conduct and research into drunk driving did not begin in earnest until after the drunk driving problem was "federalized."¹⁷ Second, the law enforcement community did not consider drunk driving a "real crime." For example, until the 1990s, the FBI did not even include drunk driving related crimes in the national crime database.¹⁸ Lastly, drunk

11. See Conason & Newfield, *supra* note 4.

12. JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA xiv (1989).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at xv, xvi.

17. *Id.* at xix, xx.

18. *Id.* at xx.

driving may simply not conform to social, historical, or political expectations of a crime in the way murder, theft, or terrorism might.¹⁹

In 1910, New York became the first jurisdiction in the United States to adopt laws against drunk driving.²⁰ Early laws prohibited driving while intoxicated, but the necessary proof of intoxication was hard to come by because chemical tests for blood alcohol content ("BAC") were not yet invented.²¹ Once BAC tests were created, and law enforcement was required to use them, the American Medical Association recommended, and early laws adopted a BAC standard: The law presumed that drivers with a .15% BAC or higher were under the influence, drivers with less than .05% were not, and drivers with a BAC in between could be found to be under the influence if corroborating circumstances were present.²²

In many ways, the BAC²³ standard is arbitrary²⁴: a BAC of .10% is the level where "approximately half of the population will show signs of intoxication."²⁵ While a .04% BAC is "not inconsistent with safe driving," the likelihood of a vehicle accident increases dramatically at .08%.²⁶ Although arbitrary, the BAC standard is objective, and anti-drunk-driving advocacy groups soon began pressuring lawmakers to set a lower BAC standard for intoxicated driving.²⁷

In the 1960s, fueled by several court decisions and the writings of doctors and other experts, alcoholism came to be regarded as more of a disease than a crime.²⁸ Alcoholics are people who either physically or psychologically cannot resist drinking liquor. To imprison such people

19. *Id.* at xxi.

20. *Id.* at xiv.

21. H. LAURENCE ROSS, *CONFRONTING DRUNK DRIVERS: SOCIAL POLICY FOR SAVING LIVES* 42-43 (1992).

22. *Id.* at 43.

23. JACOBS, *supra* note 12, at 70 ("BAC, measured in terms of the weight of the quantity of alcohol in a given volume of blood, expresses the ratio of weight to volume (or breath), in terms of a percentage.").

24. *Id.* at 70-71.

25. *Id.* at 71 (referencing a 1970 American Medical Association Committee on Medicolegal Problems study).

26. *Id.* at 71 (referencing Professor Borkenstein's classic Grand Rapids Study).

27. See Craig Reinerman, *The Social Construction of an Alcohol Problem: The Case Against Mothers Against Drunk Drivers and Social Control in the 1980s*, 17 *THEORY & SOC'Y* 91, 98-99, 105-06 (1988).

28. See Public Health Service Amendments of 1968, Pub. L. No. 90-574, 82 Stat. 105; *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966); *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966); see also ELVIN JELLINEK, *THE DISEASE CONCEPT OF ALCOHOLISM* (1960). In his book, Jellinek

described alcoholics as individuals with tolerance, withdrawal symptoms, and either "loss of control" or "inability to abstain" from alcohol. He asserted that these individuals could not drink in moderation, and, with continued drinking, the disease was progressive and life-threatening. Jellinek also recognized that some features of the disease (e.g., inability to abstain and loss of control) were shaped by cultural factors.

was regarded as cruel and unhelpful. During the five years from 1969 to 1974, the number of arrests for public drunkenness in the United States fell from two million to one million.²⁹ This huge decrease was both a cause of and a reaction to the lenient treatment alcohol-related crimes received in the courts. In many states, drunk driving was only a hybrid crime. That is, the crime was viewed as a combination of being drunk and driving recklessly.³⁰

Furthermore, judges were not trained in how to deal with drunk drivers. There was no line to guide them with respect to when mere carelessness became harmful behavior. Judges, therefore, were left largely to their own devices in deciding how to treat alcohol related driving crimes.³¹ It was inevitable then that the subjective views that judges had towards drunk drivers would play a significant, even determinative role, in how driving related alcohol crimes were sentenced. Such subjective views were, no doubt, formed in large part by each sentencing judge's unique experiences and values.

Given the socioeconomic group from which they come, most state judges are considerably more likely to sympathize and even empathize with a drunk driver than they are with most other types of criminals.³² This was especially true before the 1980s and 90s when drunk driving became a hot crime. A judge might know a burglar, an armed robber, or a rapist outside his or her professional life, but the chances are not great. It is even less likely that the judge ever committed the crime himself. It is very likely, however, that the judge knew people who perhaps had a drink or two too many during a dinner meeting or a holiday celebration and then drove home.³³ It would not stretch the imagination too far to believe that perhaps the judge had done so him or herself.³⁴ Judges are more likely to empathize with

Thomas R. Hobbs, Ph.D., *Managing Alcoholism as a Disease*, PHYSICIAN'S NEWS DIGEST, Feb. 1998, <http://www.physiciansnews.com/commentary/298wp.html>; see also Robinson v. California, 370 U.S. 660 (1962) (referring to drug addiction, often compared to alcoholism, as an illness).

29. JACOBS, *supra* note 12, at 12; see also David Robertson Jr., *Powell v. Texas: The Case of the Intoxicated Shoeshine Man Some Reflections a Generation Later by a Participant*, 26 AM. J. CRIM. L. 401, 441 (1999) (quoting the 1967 President's Crime Commission Report as stating, "[In] 1965 there were two million public drunkenness arrests in America, for the year 1996, the number of reported arrests had fallen to less than 465,000 for people over eighteen.").

30. See, e.g., *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (discussing how in Wisconsin, the first offense for driving while intoxicated was a non-criminal civil forfeiture violation).

31. Eric J. Gouvin, Note & Comment, *Drunk Driving and the Alcoholic Offender: A New Approach to an Old Problem*, 12 AM. J. L. & MED. 99, 119 (1986).

32. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 281 (1983).

33. *Id.*

34. *Id.* at 282.

those whose situations are similar to their own. How many judges, when sentencing a drunk driver back before drunk driving came to be regarded as seriously as it is now, thought that there but for fortune go I? It is hardly surprising, therefore, that sentences meted out to drunk drivers were for the most part lenient, especially where no physical injury to others was involved.

For these reasons, drunk driving was a crime that through the 1970s was not viewed or treated as the serious crime that most have come to regard it as today. It is time now to look into what changed the way drunk driving is regarded in the United States. How did drunk driving become a hot crime?

In 1980, Candi Lightner, a California real estate agent, suffered a life-altering personal loss when a drunken hit-and-run driver killed her thirteen-year-old daughter, Cari, as she walked down a suburban street.³⁵ Lightner later wrote that, "I promised myself on the day of Cari's death that I would fight to make this needless homicide count for something positive in the years ahead."³⁶ And so she did. Later that year, Candi Lightner became the organizer and founding president of Mothers Against Drunk Driving ("MADD") whose mission was "to aid the victims of crimes performed by individuals driving under the influence of alcohol or drugs, to aid the families of such victims and to increase public awareness of the problem of drinking and drugged driving."³⁷ Over the years the mission of MADD has come to include the elimination of drunk driving and the prevention of underage drinking.³⁸

As MADD and other citizen-based anti-drunk driving organizations insinuated their way more and more into the public consciousness, lawmakers began to respond to the growing call to do something about drunk driving accidents. For example, Senator Frank Lautenberg became concerned that although the minimum drinking age in his state of New Jersey was twenty-one, many under that age were crossing the Hudson River and purchasing liquor in New York where the minimum age was eighteen.³⁹ With the avid support of

35. Laurie Davies, *25 Years of Saving Lives*, MADD (Fall 2005), <http://www.madd.org/aboutus/history/madd25thhistory.pdf>.

36. *Candy Lightner*, WIKIPEDIA, http://en.wikipedia.org/wiki/Candy_Lightner (last visited Mar. 12, 2011).

37. *History of the Mission Statement*, MADD (2011), <http://www.madd.org/aboutus/mission/>.

38. *Id.* Other organizations with missions similar to MADD were forming as well. For example, Students Against Destructive Decisions, originally Students Against Driving Drunk, was formed in 1981 in Massachusetts. *History of SADD*, SADD (2011), <http://www.sadd.org/history.htm>.

39. See Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 303, 310 n.34 (2006).

MADD, Senator Lautenberg proposed an amendment that later became law requiring all states within two years to raise the minimum age for a person to purchase or possess alcoholic beverages to twenty-one.⁴⁰ A state failing to do this would lose 10% of its federal highway funds.⁴¹

The state of South Dakota challenged the new law, citing concerns related to federalism and the overuse of Congressional authority under the Taxing and Spending Clause of the Constitution.⁴² The U.S. Supreme Court rejected this challenge in *South Dakota v. Dole*,⁴³ and within a short time, every state whose drinking age was lower than twenty-one capitulated and complied with the new law.

B. CHILD ABUSE

Unlike drunk driving, in modern America there has never been any question about the seriousness of the sexual abuse of children. What there was, however, was a misperception about its breadth and prevalence.⁴⁴ We know now that child abuse is not that rare and occurs in all socio-economic groups.⁴⁵ In part because this was such an uncomfortable and almost unthinkable realization, people refused to think about it. Law enforcement officers, relatives, friends, neighbors, teachers, medical personnel, and social workers were rarely educated about the signs that existed indicating that a child was the victim of sexual abuse.⁴⁶ In turn, they did not actively look for such signs except in those extremely rare cases when something was directly reported to them.⁴⁷ While children are sometimes taken and abused by strangers, we now know that the vast majority of child sex abusers are either members of the child's family or family friends and acquaint-

40. *Author of 21 Drinking Age Law Sen. Frank Lautenberg Celebrates the 21st Anniversary of that Important Measure*, FRANK R. LAUTENBERG (Apr. 13, 2005), <http://lautenberg.senate.gov/newsroom/record.cfm?id=254503>. States also took dramatic steps to turn the law against drunk drivers. Reinerman, *supra* note 27, at 105-08. President Reagan initially opposed the law but later changed his mind because his advisors recognized the issue as a "sleeping giant." *Id.* at 100.

41. *Id.* at 99-100.

42. *South Dakota v. Dole*, 483 U.S. 203 (1987).

43. 483 U.S. 203 (1987).

44. NAT'L RES. COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT (1993) (documenting belief that child abuse in the United States was rare).

45. *Id.*

46. See generally Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 650 (2009).

47. See generally Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 186-87 (1983).

ances.⁴⁸ This was a major contributing factor to why the crime often went unnoticed and why it was not reported.⁴⁹

Another factor contributing to the underreporting of child abuse cases was the very nature of child abuse itself.⁵⁰ How much and what forms of discipline was a parent permitted to undertake with a child before it could be regarded as abusive behavior? On the other end of the spectrum, how much affection was permitted before the conduct became sexual in nature? By adding to this uncertainty the fact that until relatively recently children in western nations were considered the property of their parents,⁵¹ it becomes clearer still why so many instances of child abuse never were exposed.

In the 1970s, awareness of the child abuse problem increased because of a number of factors. With the civil rights and feminist movements becoming prominent in America, and due to a number of economic factors, far greater numbers of women began entering the workforce during this period.⁵² The last time such a phenomenon occurred was during WWII due to the absence of men needed to fill jobs in the American economy.⁵³ Back then, in the midst of the wartime spirit of help, families and friends pitched in to care for the children while the women worked and the men fought in the war. In the 1970s and beyond, this role was undertaken to a great degree by day care centers.⁵⁴ The result of this was that young children were cared for in large numbers by adults who were largely unknown to the parents.

After combining the increasing societal awareness of and sensitivity to child sex abuse, the horror with which almost everyone regarded such crimes, and the fact that more and more children were being cared for by relative strangers, it is clear that all that was needed for an explosion in how child sex abuse was regarded was a match to light the fuse of reaction. A series of multi-victim, multi-offender child abuse prosecutions that began in the early 1980s in Bakersfield and

48. See Bela August Walker, *Essay: Deciphering Risks: Sex Offender Statutes and Moral Panic in a Risk Society*, 40 U. BALT. L. REV. 183, 185 (2010).

49. See Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 195 (2005).

50. CYNTHIA CROSSON-TOWER, UNDERSTANDING CHILD ABUSE AND NEGLECT (1993).

51. *Id.*

52. See FRANCINE D. BLAU, MARIANNE A. FERBER & ANNE E. WINKLER, THE ECONOMICS OF WOMEN, MEN, AND WORK 69 (1986).

53. See MARY P. RYAN, WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 267 (1975); Thomas H. Barnard & Adrienne L. Rapp, *Pregnant Employees, Working Mothers and the Workplace – Legislation, Social Change and Where We Are Today*, 22 J.L. & HEALTH 197, 201-03 (2009).

54. See Donald E. Messer & Bonnie J. Messer, *Day Care: A Need Crying to Be Heard*, RELIGION-ONLINE (Nov. 6, 1974), <http://www.religion-online.org/showarticle.asp?title=1599>.

Kern County, California⁵⁵ and continued through the McMartin Pre-school case in 1983⁵⁶ lit that match. The explosion resulting from these prosecutions was not completely extinguished until 1996 when the convictions of the Kern County defendants were overturned.⁵⁷

In these and other such cases, the nature of the hot crimes phenomenon can be seen quite clearly. Overly eager police with the help of overly eager “child therapy professionals” feed the results of their efforts to crusading prosecutors who charge criminal defendants based on evidence obtained in a highly suggestive manner⁵⁸ and often not supported by physical or other evidence.⁵⁹ Evidence that points to any conclusion short of child abuse is either ignored or covered up.⁶⁰ The media plays up the cases in ever more horrifying ways, inciting the public and leading to even more questionable prosecutions.⁶¹ From such things, societal excess is born and nurtured.

III. EXCESS

Societal over-reaction to a hot crime can be shown in a variety of ways depending largely on what group or institution is the source of the over-reaction. Citizens groups call for extreme responses, the media describes the crimes in progressively more strident language, the police and prosecutors rely on techniques for prevention or apprehension that do not pass the usual tests for reliability, and courts abandon well-established principles in determining the legality of procedures designed to combat hot crimes. In examining the approaches taken to combat drunk driving and child sexual abuse as they became hot crimes, one can see several of these types of over-reaction.

A. DRUNK DRIVING

Faced with pressure from groups like Mothers Against Drunk Driving (“MADD”) and Remove Intoxicated Drivers (“RID”), law en-

55. See, e.g., *People v. Stoll*, 783 P.2d 698 (Cal. 1989); *People v. Pitts*, 273 Cal. Rptr. 757 (Cal. Ct. App. 1990).

56. John Earl, *The Dark Truth About the “Dark Tunnels of McMartin,”* 7 INST. FOR PSYCHOL. THERAPIES, 1995, available at http://www.ipt-forensics.com/journal/volume7/j7_2_1.htm.

57. Maggie Jones, *Who Was Abused?*, N.Y. TIMES, Sept. 19, 2004, <http://www.nytimes.com/2004/09/19/magazine/19KIDSL.html?pagewanted=all&position=>

58. Dana D. Anderson, Note, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2144-49 (1996).

59. See PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 171-72 (1998).

60. See Thomas L. Feher, *The Alleged Molestation Victim, the Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 237-38 (1987).

61. See VALERIE J. CALLANAN, FEEDING THE FEAR OF CRIME: CRIME-RELATED MEDIA AND SUPPORT FOR THREE STRIKES 53-56 (2005).

forcement authorities felt a greater need to apprehend drunk drivers and to be seen doing so.⁶² Traditionally, police officers arrested drunk drivers most often by observing the manner in which the driver is operating the car. Officers would notice both the obvious signs of the drunk driver, such as erratic driving, as well as those less obvious ones they had been trained to observe, such as a car being driven in cold weather with the windows wide open.⁶³ Usually these officers looked for the telltale signs of drunk driving from their patrol cars while they were either driving or parked on the sides of the road. At times, officers positioned themselves outside certain bars and made arrests as they saw intoxicated persons exiting the bar and starting their cars.⁶⁴

Arrests made in all of these situations generally complied with the requirements of the Fourth Amendment as interpreted by the U.S. Supreme Court. In 1979, the Court held in *Delaware v. Prouse*⁶⁵ that in non-exceptional circumstances, before the police could pull over a vehicle in transit, the officer must have an articulable suspicion that the driver of the vehicle or the vehicle itself was in violation of some law or regulation.⁶⁶ Ten years before *Prouse*, the Court held in the landmark case of *Terry v. Ohio*⁶⁷ that persons on the street could not be subjected to investigative seizures unless there was articulable suspicion that criminal activity was afoot.⁶⁸ In the traditional police investigative stop of a suspected drunk driver, the officer could point to the specific reasons (those signs exhibited by the manner in which the car was being operated) that led the officer to become suspicious. It was the presence of these specific, suspicious signs that satisfied the Fourth Amendment seizure requirements set forth in *Terry* and *Prouse*.⁶⁹

Faced with the increasing awareness of the public and government officials to the danger posed by drunk drivers and the demand to do something about the problem, some police departments began experimenting with an entirely different kind of investigative tech-

62. Police DUI arrests increased by more than 50%, reaching 20 million arrests in 1982. *A History of the Science and Law Behind DUI*, 1 TRAFFIC SAFETY CENTER, no. 3, Summer 2003, available at <http://safetrec.berkeley.edu/newsletter/Summer03/DUIHistory.html>; see, e.g., JENKINS, *supra* note 59, at 218; see also Reinerman, *supra* note 27, at 105–08.

63. H. Laurence Ross, *Law, Science and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1, 11 (1973).

64. JACOBS, *supra* note 12, at 110.

65. 440 U.S. 648, 662 (1979).

66. *Delaware v. Prouse*, 440 U.S. 648, 662 (1979).

67. 392 U.S. 1 (1968).

68. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

69. *Prouse*, 440 U.S. at 648.

nique.⁷⁰ This new enforcement technique allowed the police to detain the driver for investigation without any requirement that the police suspected the driver of drunk driving or any other violation of the law.⁷¹ It required stopping every car or stopping cars in some systematic, non-discriminatory manner (i.e. every third car) that passed through a checkpoint set up by the police. Often these checkpoints were established on roadways strategically selected because they either led away from areas that contained bars or were the scene of many accidents.⁷² Known as sobriety checkpoints, these detentions were designed to be fairly brief but allowed the officer enough time to talk to the driver to observe certain signs of intoxication, such as difficulty in taking out a driver's license, slurred speech, bloodshot eyes, or the odor of alcohol on the breath. The public was told that because many drunk drivers do not give off signs that police could detect merely by observing driving patterns, these checkpoints would be far more successful at apprehending drunk drivers than the traditional means of doing so discussed above. Many of these roadblocks were set up on weekend nights, the time that the highest number of drunk drivers was on the roads.⁷³ In looking closely at the attention they received, their lack of success in combating drunk driving, and the manner in which courts assessed their constitutionality, sobriety checkpoints serve as instructive analytic tools in examining what happens when a crime becomes hot.

Proposed originally as a means of apprehending drunk drivers who posed a great danger to the walking and driving public, sobriety checkpoints soon proved rather conclusively to be ineffective at catching drunk drivers.⁷⁴ While the statistics varied somewhat, sobriety checkpoints fairly consistently reported that 1% or less of the drivers passing through them were arrested for alcohol or drug related driving offenses.⁷⁵ When taking into consideration that most of these checkpoints were set up at night and often on weekends, the time

70. See Richard A. Ifft, Note, *Curbing the Drunk Driver under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1457 (1983).

71. *Id.*

72. *Id.* at 1461-63; JACOBS, *supra* note 12, at 111.

73. Steven P. Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protections*, 12 AM. J. CRIM. L. 123, 157 (1984).

74. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 460 n.2, 461 n.3 (1990) (Stevens, J., dissenting); Grossman, *supra* note 73, at 158-59, 163-64.

75. See, e.g., Commonwealth v. Beaman, 880 A.2d 578, 590 (Pa. 2005) (Nigro, J., dissenting) ("The empirical data before our Court establishes that during the years 1999-2001, only .71 percent of all drivers stopped at suspicionless checkpoints were charged with DUI . . ."); Jack Gillum, *DUI Checkpoints Costly, Catch Few*, ARIZ. DAILY STAR, Aug. 27, 2007 (stating that of the fewer than 1% of drivers stopped at sobriety checkpoints and arrested on suspicion of DUI, half of that number were ever convicted); *Police Term Drunken-Driver Crackdown a Success*, N.Y. TIMES, June 27, 1983, at B1.

when the highest percentage of drivers was intoxicated, their failure to apprehend such drivers becomes even clearer.⁷⁶ Experts believe that roughly 7-8% of nighttime drivers are legally intoxicated.⁷⁷ This would mean that sobriety checkpoints are arresting about one out of every seven or eight drunk drivers who pass through them.⁷⁸

One of the largest sobriety checkpoints programs established in the 1980s took place in New York City from May 27 through June 26, 1983.⁷⁹ These checkpoints were typical of most checkpoint operations in that they were set up at night, mostly on weekends, when the highest percentage of drivers were believed to be drunk, and the locations were changed daily so that drivers would not be expecting them.⁸⁰ During the month in which the checkpoints operated, 100 police officers stopped 184,828 drivers at the checkpoints.⁸¹ Of that number, 210 were arrested for driving under the influence of alcohol or drugs.⁸² So 100 officers spent a month arresting one-eighth of the 1% of drivers they stopped at these sobriety checkpoints, likely less than one out of twenty of the intoxicated drivers who drove through them.

It was hardly surprising that the New York City program, like virtually all other such sobriety checkpoint programs, failed at apprehending drunk drivers.⁸³ Officers had a very limited time, generally only ten to fifteen seconds, to observe drivers at these checkpoints. This is because in order to comply with Fourth Amendment holdings regarding suspicionless seizures, the detentions have to be brief and relatively unintrusive.⁸⁴ Thus more comprehensive and reliable ways of determining if one was intoxicated, such as blood or breath tests

76. *Sitz*, 496 U.S. at 465 (Stevens, J., dissenting).

77. RICHARD COMPTON & AMY BERNING, RESULTS OF THE 2007 NATIONAL ROADSIDE SURVEY OF ALCOHOL AND DRUG USE BY DRIVERS (2009), available at <http://www.ondcp.gov/publications/pdf/07roadsidesurvey.pdf>. This report also notes that for the first time in 2007, the report took into account other drugs in nighttime drivers' systems and found that 14.4% of nighttime drivers were drug-positive. *Id.*

78. *Id.*; see also *Post Details: Sobriety Checkpoint Statistics Speak for Themselves*, ROADBLOCK REVELATIONS (Feb. 23, 2007), <https://www.checkpointusa.org/blog/index.php/2007/02/23/p25> (reporting that a Pima County, Arizona sobriety checkpoint program that occurred during Labor Day Weekend 2006 had a DUI arrest rate of approximately .6%).

79. *Police Term Drunken-Driver Crackdown a Success*, N.Y. TIMES, June 27, 1983, at B1.

80. *Id.*

81. *Id.*

82. *Id.*

83. See *Sitz*, 496 U.S. at 460 n.2, 461 n.3 (Stevens, J., dissenting). Justice Stevens reviewed the success rate of various states' sobriety checkpoint records. He noted that Maryland's program achieved a .3% arrest rate, Arizona had a .2% arrest rate, California had a 0% arrest rate, Indiana had a 7% arrest rate, Indiana had a 2.6% arrest rate, Kansas had an approximate arrest rate of .6%, Massachusetts had a 1.6% arrest rate, and New Hampshire had a .9% arrest rate. *Id.*

84. Grossman, *supra* note 73, at 159 n.197.

were not permitted at the initial stop. Upon approaching such a checkpoint, any but the most intoxicated of drivers would surely have hid any bottle of alcohol, perhaps popped a breath mint, and collected himself sufficiently to pass a brief visual inspection through a car window by flashlight at night. That same driver would make it his business to drive especially carefully as he came to the checkpoint. He would not give off the signals that trained officers could observe while watching driving patterns from off a road or highway. When approaching such a checkpoint, it was unlikely that a driver would drive erratically or violate traffic laws such as going through red lights, speeding, and not driving within the traffic lane. At that time, there would be more subtle signs that officers at checkpoints were unlikely to observe but that trained police officers observing a driver in the flow of traffic knew to be clues that one might be driving impaired. Examples of such signs would be a driver who kept his window open in cold weather or applied his directional signal well before needing to.

Faced with the failure of sobriety checkpoints to apprehend the vast majority of drunk drivers who passed through them, the proponents of the checkpoints shifted their attention to another claimed benefit that would derive from such inspections.⁸⁵ It was claimed that even if relatively few drunk drivers were arrested at the checkpoints, they would serve as effective deterrents to those people thinking of getting in their car after imbibing too much alcohol.⁸⁶ The significance of this deterrent effect would be to reduce the large number of serious traffic accidents caused by drunk drivers and would be demonstrated by reductions in accident rates in places utilizing checkpoints. Deterrence is of course difficult to prove and therefore even more difficult to disprove. However, as with the apprehension rate discussed above, the available data at the time and the knowledge that existed about accidents caused by drunk driving again showed that sobriety checkpoints were ineffective.⁸⁷

Even though the claims regarding the effectiveness of sobriety checkpoints as a deterrent to drunk driving were not borne out, proponents of the checkpoints continued making their claims anyway. For example, the Governor of Massachusetts boasted that the sobriety checkpoints established in his state over the Fourth of July weekend

85. See, e.g., John Feinstein, *Sobriety Checkpoints*, WASH. POST, Dec. 3, 1982, at B1; Doug Jewett, *State Should Adopt Swedish System of Deterrence*, SEATTLE TIMES, Feb. 9, 1983, at A11; *Police Term Drunken-Driver Crackdown a Success*, N.Y. TIMES, June 27, 1983, at B1; *Sobriety Checkpoint Drunk-Driving Roadblock Set for Harford*, BALT. SUN, Dec. 14, 1982, at D1.

86. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., SATURATION PATROLS & SOBRIETY CHECKPOINTS 3 (2002), available at <http://www.nhtsa.gov/people/injury/alcohol/saturationpatrols/SatPats2002.pdf>.

87. See *supra* notes 74-82 and accompanying text.

in 1983 reduced the traffic fatalities in his state to the lowest level in a decade.⁸⁸ What then accounted for the fact that during that same weekend traffic fatalities diminished nationwide to their lowest total in twenty-three years? Certainly it was not the few isolated checkpoints that existed around the nation at that time. It is far more likely that the reduction could be attributed to increased awareness of the seriousness of the drunk driving problem resulting from the efforts of MADD and other groups, the deployment of more and better trained police officers in patrol cars looking for signs emitted by drunk drivers, and changes in the law, such as raising the drinking age and stiffening the penalties for drunk driving.⁸⁹

The Maryland State Police also claimed that sobriety checkpoints prevented accidents and based this conclusion on data collected over a period of time longer than just one holiday weekend. From December 1982 to February 1983, the total number of accidents (both alcohol and non-alcohol related) in one county using sobriety checkpoints was reported to be 125 less than the previous year when checkpoints were not used.⁹⁰ In a control county, the accident rates were unchanged from the year before.⁹¹

Although the figures for *alcohol-related* accidents in both counties in fact diminished by the same 10% from the previous year, the police maintained that these numbers showed the effectiveness of checkpoints in preventing accidents.⁹² Of course, had the police looked at the same statistics for the same period of time from another nearby county of approximately the same size as the counties they reported on, their opinion might have been different. That county reported that both the number of fatal accidents *and* alcohol-related fatal accidents were halved from the year before without using checkpoints. This reduction was achieved through the deployment of carefully trained and strategically located police patrols looking for drivers evidencing signs of impairment.⁹³ Additionally, the data coming from other counties offered no support for the deterrence benefit of sobriety checkpoints.⁹⁴

88. BOSTON GLOBE, July 4, 1983, at 23 col. 3 (statement of Mass. Governor).

89. In fact, traffic fatalities nationally during that 1983 Fourth of July weekend were the lowest for any weekend in the previous twenty-three years. *Id.* at 23 cols. 3, 4, 5, & 6.

90. Karen Hosler, *State Likely to Widen Sobriety Checkpoints*, BALT. SUN, May 24, 1983, at D1.

91. *Id.*

92. *Id.*

93. *Id.*

94. See *Beaman*, 880 A.2d at 590 (Nigro, J., dissenting) (discussing statistics during 1999-2001, 7.69% of arrests made by roving patrols resulted in DUI arrests, as compared with the .71% of arrests made at sobriety checkpoints); H. LAURENCE ROSS, *DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL* 66 (1984); Karina Ioffe, *Statistics Spark Debate on Whether DUI Checkpoints Work*, RECORDNET.COM

In addition to being less effective in terms of arresting impaired drivers, sobriety checkpoints also consume more man hours than roving patrols. One judge took note of the fact that a DUI arrest at some checkpoints required 28.77 man-hours, whereas a patrol required only 18.82 man-hours before a DUI arrest.⁹⁵

As with the failure of sobriety checkpoints to apprehend drunk drivers, so too is the data showing no deterrent benefit from them hardly surprising. Clearly, drunk drivers cause many serious accidents, and the benefit of deterring drunk driving is said to be that doing so would significantly reduce the number of such accidents. An examination of who these drunk drivers are and an understanding of how deterrence works, however, makes clear why sobriety checkpoints were not effective in reducing accidents or deterring those drivers most likely to cause them.

The National Highway Traffic Safety Administration ("NHTSA") has concluded that two-thirds of those who drive intoxicated are either alcoholics or problem drinkers.⁹⁶ This is particularly significant because NHTSA and other commentators consider problem drinkers and alcoholics to be virtually incapable of being deterred from driving intoxicated.⁹⁷ As one commentator noted, "[T]he problem drinker whose very life is subjected to his most often uncontrollable desires—perhaps compulsion—to drink to excess will not be prevented from driving on the roadways in an intoxicated condition by a fine . . . or a jail term."⁹⁸ This makes sense because the theory of crime prevention known as deterrence requires that an individual thinking about committing a crime weighs the advantages (the benefits either pecuniary or otherwise) against the likelihood of being apprehended and the punishment he or she will receive if convicted.⁹⁹ The more the potential criminal intends and plans a crime and then weighs the potential consequences of doing so, the more deterrence is said to work as a crime preventer.

(Sept. 18, 2005), <http://www.recordnet.com/apps/pbcs.dll/article?AID=/20050918/NEWS01/509180321> (reporting that states that use roving patrols rather than sobriety checkpoints saw a steeper decline in alcohol-related traffic deaths).

95. *Beaman*, 880 A.2d at 590 (Nigro, J., dissenting).

96. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., SUMMARY OF NATIONAL ALCOHOL SAFETY ACTION PROJECTS 2 (1979).

97. Roger C. Cramton, *The Problem of the Drinking Driver*, 54 A.B.A. J. 995, 998 (1968); Joseph W. Little, *Control of the Drinking Driver: Science Challenges Legal Creativity*, 54 A.B.A. J. 555, 557 (1968); Comment, *Deterring the Drinking Driver: Treatment v. Punishment*, 7 UCLA ALASKA L. REV. 244, 253 (1978); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 96, at 2.

98. Marvin Wagner, *Problem Drinking v. Public Safety*, 7 TRIAL, no. 3, May-June 1971, at 26, 28.

99. See Roger C. Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 438 (1969); see also Johannes Andenaes, *The Effects of Scandinavia's Drinking-and-Driving Laws: Facts and Hypotheses*, 6 SCANDINAVIAN STUD. CRIMINOLOGY 35, 46 (1978).

Obviously, alcoholics and problem drinkers are usually less capable as well as less inclined to weigh carefully their chances of being apprehended and the consequences of such apprehension before they get into their cars while drunk.¹⁰⁰ They are, therefore, most unlikely to fall into the category of those likely to be deterred by potential arrest and punishment. This is not to say that drunk drivers do not deserve the punishments they receive (corresponding to the theory of punishment known as retribution), but only that they are unlikely to be deterred by them.

So the one-third of drunk drivers who are considered social drinkers and who cause a lower number of traffic accidents is the only group that has any realistic potential of being deterred from driving drunk by knowing about sobriety checkpoints. For these drivers to be meaningfully deterred, they must believe there is a significant chance they will be apprehended. In 1979, shortly before sobriety checkpoints begin to appear with some frequency, it was estimated that for every 2,000 trips taken by drunk drivers, only one resulted in arrest.¹⁰¹ Given their low rates of apprehension and the fact that they take traffic patrol personnel away from watching for and arresting those actually observed driving drunk, sobriety checkpoints were unlikely to change those numbers. Therefore, unless drivers have a misconception about their realistic chances of being arrested for driving drunk, even social drinkers who may think about the consequences of what they are doing are not especially likely to be deterred by sobriety checkpoints.

Given their ineffectiveness in both arresting and deterring drunk drivers,¹⁰² why then were sobriety checkpoints championed so vigorously by anti-drunk driving interest groups and certain members of the law enforcement community? One thing about sobriety checkpoints was undisputed. They made news. Newspapers and local television news programs frequently wrote about or showed them, being careful not to reveal their locations. Politicians, like the Governor of Massachusetts, could point to them as proof that they recognized the problem and were serious about dealing with it. Interest groups had tangible evidence that the pressure they were putting on law enforcement agencies and politicians was paying off. So what if the check-

100. Michael F. Lotito, Note, *Unsteady on its Feet: Sobriety Checkpoint Reasonableness*, 67 WASH. & LEE L. REV. 735, 761-62 (2010) (stating that pre-problem and problem drinkers cannot be considered rational in terms of their drinking and therefore sobriety checkpoints have little deterrent value to these types of drinkers).

101. See Tracy Cameron, *The Impact of Drinking-Driving Countermeasures: A Review and Evaluation*, 8 CONTEMP. DRUG PROBS. 495, 511 (1979); see also NAT'L HIGHWAY SAFETY TRAFFIC SAFETY ADMIN., *supra* note 96, at 2; ROSS, *supra* note 94, at 87.

102. Even police officers doubt the effectiveness of DUI checkpoints. See *Sitz*, 496 U.S. at 470 (Stevens, J., dissenting); Grossman, *supra* note 70.

points did not help deal with the actual problem of drunk driving? They satisfied many other needs that were particularly relevant to the phenomena of hot crimes. In the words of U.S. Supreme Court Justice Stevens, "[S]obriety checkpoints are elaborate, and disquieting, publicity stunts."¹⁰³

Sometimes satisfying these needs resulted merely in a waste of time or money. Sometimes they drained resources from being used for other efforts to deal with the drunk driving problem that were more effective but less flashy. Additionally, sometimes they led to stretching or crossing the boundaries of the law to accommodate the enforcement program.

In 1990, the U.S. Supreme Court tackled the issue of the constitutionality of sobriety checkpoints. In *Michigan Department of State Police v. Sitz*,¹⁰⁴ the Court held that although stopping a car at a checkpoint was indeed a seizure under the Fourth Amendment, it was a "reasonable" seizure despite the absence of the articulable suspicion traditionally required for such seizures.¹⁰⁵ The Court's opinion in *Sitz* is most notable for the surprising way it abandoned its previous approach to suspicionless automobile seizures¹⁰⁶ and its cavalier treatment of a record that, in assessing the effectiveness of sobriety checkpoints, demonstrated that even the most charitable reading of the record showed little indication that such checkpoints were successful.¹⁰⁷

The majority in *Sitz* determined that the method for analyzing the constitutionality of these checkpoint seizures involved a test derived from its holding in *Brown v. Texas*,¹⁰⁸ which required a "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."¹⁰⁹ All parties agreed the danger posed by drunk drivers was indeed a grave one, so attention turned to the next factor: the degree to which sobriety checkpoints contribute to dealing with this danger. In a detailed analysis of the data available from the record compiled by both parties to the law-

103. See *Sitz*, 496 U.S. at 475 (1990) (Stevens, J., dissenting) ("[S]obriety checkpoints are elaborate, and disquieting, publicity stunts.")

104. 496 U.S. 444 (1990).

105. *Sitz*, 496 U.S. at 449-50 (citing *Treasury Employees v. Van Raab*, 489 U.S. 656 (1989)).

106. *Id.* at 456-57 (Brennan, J., dissenting) (citing *Dunaway v. New York*, 442 U.S. 200, 209, 210 (1979)) (stating that in most cases, the police must possess probable cause for a seizure to be judged reasonable).

107. See *id.* at 454-55 (admitting that "approximately 1.6 percent of the drivers passing through the checkpoint [at issue] were arrested for alcohol impairment.").

108. 443 U.S. 47 (1979).

109. *Sitz*, 496 U.S. at 448-50 (quoting *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)).

suit challenging the Michigan checkpoints, the trial judge found that sobriety checkpoints were not an effective means of combating drunk driving.¹¹⁰ The Michigan Court of Appeals affirmed this finding.¹¹¹ The U.S. Supreme Court appeared at first to reject even the need to examine the effectiveness of the seizure and then seemed to defend the effectiveness of the checkpoints, albeit in a cursory manner.¹¹²

The Court rejected the seemingly obvious conclusion of the Michigan courts that in order for a suspicionless and therefore extraordinary seizure to “advance the public interest,” it must be at least somewhat effective in achieving its purpose.¹¹³ Instead, the Court held that the determination of effectiveness is largely for the law enforcement agency itself to make and not for the courts.¹¹⁴ In defending this position, the Court referred to the language in *Brown* as a “general[ized] reference,” and then went on to refute the Michigan court’s analysis of how this test was applied in the Court’s *Delaware v. Prouse* and *United States v. Martinez-Fuerte*¹¹⁵ holdings.¹¹⁶

In *Prouse*, the Court determined that, in order to rid the roads of unlicensed drivers and unsafe vehicles, random stops of automobiles without any individualized suspicion of criminal activity violated the Fourth Amendment.¹¹⁷ The *Sitz* majority acknowledged that in *Prouse*, “we observed that no empirical evidence indicated that such stops would be an effective means of promoting roadway safety.”¹¹⁸ The *Sitz* Court then quoted from *Prouse* that “it seems common sense that the percentage of all drivers on the road who are driving without a license is very small and the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed.”¹¹⁹ The *Sitz* Court did not mention that the *Prouse* opinion referred to the question at issue in the case as to whether there was a “sufficiently productive mechanism” to justify the seizure of an automobile.¹²⁰ Nor did it mention that in deciding this issue, the *Prouse* Court considered “the alternative methods available” in reaching its conclusion that “the incremental contribution to highway safety” of

110. See *Sitz*, 496 U.S. at 448 (reporting that the Michigan trial court found the checkpoint violated the Fourth Amendment).

111. *Id.*

112. See *id.* at 449 (discussing the magnitude of the drunk driving problem and the level of intrusion on seized motorists at checkpoints before discussing the effectiveness of sobriety checkpoints).

113. *Id.* at 453.

114. *Id.*

115. 428 U.S. 543 (1976).

116. *Sitz*, 496 U.S. at 453-54.

117. *Prouse*, 440 U.S. at 657.

118. *Sitz*, 496 U.S. at 454.

119. *Id.*

120. *Prouse*, 440 U.S. at 659.

the automobile stops in that case did not justify seizures without any individualized suspicion.¹²¹ Thus, the *Prouse* Court did see clear constitutional relevance in assessing the effectiveness of the law enforcement procedure at issue.

The *Sitz* Court responded to this discussion of effectiveness in *Prouse* by attempting to distinguish the sobriety checkpoints in *Sitz* from the stops to check for unlicensed drivers in *Prouse*. First, it noted that *Prouse* involved a random stop rather than a checkpoint.¹²² While this is true and, as the Court had held previously, has a bearing on the degree of the intrusion, it in no way detracts from the language in *Prouse* requiring a judicial analysis of the effectiveness of the law enforcement method involved in a suspicionless seizure. Second, the *Sitz* Court said that unlike *Prouse*, it did not involve "a complete absence of empirical data" supporting the law enforcement program.¹²³ An examination of that data, however, is wholly unresponsive of the notion that checkpoints achieve either of their goals.

In *Martinez-Fuerte*, the Court found that a fixed checkpoint close to the United States-Mexico border that was established to apprehend and deter smugglers of undocumented aliens did not violate the Fourth Amendment.¹²⁴ The *Sitz* Court pointed to the fact that border area checkpoints netted a smaller arrest to detention ratio than the sobriety checkpoints at issue in *Sitz*. To the Court, this apparently demonstrated that the low apprehension level at sobriety checkpoints did not prove their ineffectiveness.¹²⁵ What is notable about the *Sitz* Court's references to the *Martinez-Fuerte* opinion, however, is what the Court then said and what it did not say.

The *Sitz* Court quoted from *Martinez-Fuerte* that the record in that case "provides a rather complete picture of the effectiveness of the San Clemente checkpoint."¹²⁶ Thus the Court in *Martinez-Fuerte* looked directly at effectiveness as a factor in determining the constitutionality of the checkpoint. In fact, the Court in *Martinez-Fuerte* went on to assess the effectiveness of that checkpoint in ways that would be most instructive in evaluating sobriety checkpoints.¹²⁷ The *Martinez-Fuerte* Court noted that the checkpoints were an integral part of a comprehensive method of apprehending and preventing the smug-

121. *Id.*

122. *Sitz*, 496 U.S. at 454.

123. *Id.*

124. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-67 (1976).

125. *Sitz*, 496 U.S. at 455.

126. *Id.* (emphasis added).

127. *Martinez-Fuerte*, 428 U.S. at 553-54.

gling of illegal aliens across the border with Mexico.¹²³ Set up in strategic locations on high-speed highways leading away from the border, the checkpoints were designed to deny the smugglers access to highways that made for easy escape and access to large cities. As the *Martinez-Fuerte* Court declared, referring to cars used to smuggle undocumented aliens across the border, “[T]he prospect of such inquiries forces others onto less efficient roads that are less heavily traveled, slowing their movement and making them more vulnerable to detection by roving patrols.”¹²⁹ Thus, despite the fact that such checkpoints uncovered comparatively few undocumented aliens, the *Martinez-Fuerte* Court regarded them as integral parts of a comprehensive scheme to protect the areas around the Mexican border from those who smuggle undocumented aliens across it. There was no evidence in *Sitz*, nor does it seem likely, that sobriety checkpoints have any comparable benefit.¹³⁰

In its opinion in *Martinez-Fuerte*, the Court observed that without checkpoints stopping cars for “particularized study,” there was no way of identifying the cars carrying undocumented aliens driving on high-speed roads.¹³¹ In contrast, the *Prouse* Court noted that traffic laws were best enforced through police reaction to observed violations.¹³² As to the deterrent impact of checking for unlicensed drivers before developing individualized suspicion, the Court asserted that such drivers, who are undeterred by the possibility of being discovered after suspicious activity or at post-accident investigations, are unlikely to be deterred by random inspections.¹³³ Such reasoning applies with more force to drunk drivers who, for reasons noted earlier, are even less susceptible to deterrence and who are far more likely to exhibit

128. See *id.* at 556-57 (noting that checkpoints apprehend smugglers and illegal aliens who use major highways and increases detections of such persons by forcing them onto less traveled roads).

129. *Id.* at 557 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 883-85 (1975)).

130. See James H. Newhouse, Comment, *Interference with the Right to Free Movement: Stopping and Search of Vehicles*, 51 CAL. L. REV 907, 915 (1963) (stating that checkpoint roadblocks set up to check drivers licenses is a “safety measure which applies to all roads within the state, and violation is as likely in one place as another”) (emphasis added). In *State v. Olgaard*, the court noted that motorists could not have been aware of the sobriety checkpoint roadblock in question and all motorists unexpectedly encountered the checkpoint on that road. 248 N.W.2d 392, 394 (S.D. 1976). Because sobriety checkpoints interdict motorists by surprise and take officers away from patrolling side roads, they are unlikely to be part of any similar comprehensive scheme to force motorists onto smaller roads where detection of criminal activity might be easier, as discussed in *Martinez-Fuerte*.

131. *Martinez-Fuerte*, 428 U.S. at 557.

132. *Prouse*, 440 U.S. at 659.

133. *Id.* at 660.

signs of their condition to police officers observing their driving pattern.¹³⁴

In examining the level of the intrusion generated by the seizure at sobriety checkpoints (the third part of the *Brown* test), the *Sitz* Court analogized sobriety checkpoints to border area checkpoints.¹³⁵ The Court here dismissed the distinction between checkpoints whose locations are known and those that catch the driver by surprise.¹³⁶ Previous cases had held that the unpredictability or frightening nature of a seizure significantly raises the level of the intrusion.¹³⁷

The holding in *Sitz* was deeply flawed both as to its interpretation of previous Supreme Court holdings and its treatment or non-treatment of the empirical data contained in the record of the case.¹³⁸ Worse still it gave the ultimate judicial sanction to a law enforcement technique born of the media's and public's understandable but misdirected concern about the serious problem posed by drunk drivers.

The use of sobriety checkpoints to combat drunk driving serves as a notable example of a flawed response to hot crimes. Law enforcement chose a crime prevention mechanism that at best had a highly dubious record of success and at worst proved to be a clear failure for dealing with the crime problem. What the mechanism does have working for it, however, is that it is highly visible. Politicians leap to support the mechanism because it is a concrete sign that they are sensitive to the problem and innovative in their approach to dealing with it. They use the media to help spread their message. Courts rely on deeply flawed empirical support or find excuses to discount the need for empirical support in upholding the program. Worse still, they stretch their reasoning and the use of precedent in finding no constitutional violation exists. As Justice Brennan noted in his dissent in *Sitz*, "[C]onsensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis."¹³⁹

Another manifestation of hot crimes is the rise of one-issue interest groups formed exclusively to combat the problem crime. The ubiquitous advocacy group, Mothers Against Drunk Driving ("MADD"), played a significant role in piping up public angst about drunk driv-

134. See *supra* notes 93-98 and accompanying text.

135. See *Sitz*, 496 U.S. at 453.

136. *Id.* at 451-52.

137. See, e.g., *Martinez-Fuerte*, 428 U.S. at 558-59; *United States v. Ortiz*, 422 U.S. 891, 895 (1975); see generally *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

138. See *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004) ("*Sitz* was a radical departure from how a *Terry*-style balancing test had previously been applied and how the state and individual interests should have been weighed in the context of such roadblocks.>").

139. *Sitz*, 496 U.S. at 459 (Brennan, J., dissenting).

ing. MADD drew attention to such things as the seriousness of the problem created by the drunk driver,¹⁴⁰ the overly lenient sentences that many drunk drivers received at that time, and the need for new legislation.¹⁴¹ All of these actions were good to a point.

While MADD has forever changed the way the public perceives drunk driving, the organization has undergone a paradigm shift in recent years. One journalist grouped MADD with other “charities gone bad” because it has taken advantage of its past success to inoculate it from its fundamental change in focus and tactics.¹⁴² For instance, MADD has shifted from “Don’t drive drunk” to “Don’t drink and drive” and seeks to put breathalyzers in every new car in America.¹⁴³ Even Candy Lightner, MADD’s founder, believes the organization she began has succumbed to social hysteria regarding drunk driving.¹⁴⁴ Lightner abandoned the organization¹⁴⁵ in part because she believed MADD’s missionary zeal for punishment caused the organization to lose its direction thereby doing the victims of drunk drivers a disservice.¹⁴⁶ She also leveled accusations against MADD that it manipulated data, so called “Chicken Little” tactics, in order to justify “neo-Prohibitionist” public policies.¹⁴⁷ For instance, MADD “defines down” drunk driving by arguing that even low blood alcohol content (“BAC”) while driving equate to dangerous driving under the influence. MADD does this despite the fact that evidence suggests that driver fatality rates do not increase appreciably until a BAC reaches .1%.¹⁴⁸ Furthermore, even if social hysteria is not to blame for MADD’s excesses,

140. MADD created a high recognition rate with its brand in part by using rhetorical devices such as drunk *driver* instead of *driving*, holding itself out to be the “voice of the victim,” and successful use of the media. See Reinerman, *supra* note 27, at 98-99, 105-06.

141. *Id.* at 100-01, 107-08. This included mandatory jail sentences, sharply increased fines, reduced plea bargaining for drunk-driving offenses, lowering the BAC level for intoxicated from .10% to .08% or lower, and per se standards where certain BAC levels were in of themselves criminal.

142. Richard Berman, *Charities Behaving Badly; Dollars from Naïve Donors are Sometime Misused*, WASH. TIMES, Mar. 22, 2010, at B-1.

143. *Id.* MADD has also become a bad investment for philanthropists. The American Institute of Philanthropy gave MADD poor marks for its fundraising practices, noting that while charities should spend \$35 or less to raise \$100, MADD regularly doubles that amount. *Id.*

144. Katherine Griffin, *No Longer MADD*, THIS WORLD, Aug. 7, 1994, at 8.

145. In subsequent years after MADD, Lightner worked for the Beverage Institute, a lobbyist organization that lobbies on behalf of restaurateurs who have liquor licenses—a position at odds with her former role as the head of MADD. Walt Wiley, *Candy Lightner’s New Cause: MADD Founder Now Heads Group Fighting Bias Against Arabs*, SACRAMENTO BEE, Oct. 18, 1994.

146. *Id.* (“MADD helps you deal with anger . . . but I really think it prolongs denial.”).

147. See Radley Balko, *Targeting the Social Drinker Is Just MADD*, L.A. TIMES, Dec. 9, 2002, <http://www.cato.org/research/articles/balko-021209.html>.

148. *Id.*

such defining down helps MADD reiterate its relevance and raise money.¹⁴⁹ MADD's missionary zeal to punish drunk drivers has caused it to ignore equally or more dangerous drivers such as speeders, cell phone users, and excessive drinkers.¹⁵⁰ Lightner stated, "If we really want to save lives, let's go after the most dangerous drivers on the road."¹⁵¹

Another manifestation of the hot crime syndrome is the passage and application of laws that are either of questionable value or are excessively intrusive. In Pennsylvania, for example, drivers can have their licenses removed on drunk driving grounds for honestly reporting to their doctor that they enjoy a daily six-pack of beer.¹⁵² In one instance, Keith Emerich, who sought medical help regarding an irregular heartbeat,¹⁵³ told his doctor that he imbibed a six-pack of Budweisers a day. For this, his license was taken away.¹⁵⁴ This occurred without any showing that Emerich drove in violation of the drunk driving laws.¹⁵⁵

In addition, police are taking expansive steps to collect and preserve evidence of drunk driving. Under a federal program, select Idaho police officers are carrying needles and being trained to withdraw blood from suspected drunk drivers.¹⁵⁶ This is in an effort to curtail the number of drunk driving trials and to see if blood drawing is an effective strategy against drunk driving.¹⁵⁷ One Idaho deputy prosecutor noted that while the police cannot "hold down a suspect and force them to breathe into a tube," her understanding of Idaho law was that the police could forcefully take blood.¹⁵⁸ If the Idaho program is successful, the National Highway Traffic Safety Administration will encourage police nationwide to undergo similar training.¹⁵⁹

149. *Id.*

150. *Id.*

151. *Id.*

152. Patrick Kerkstra, *Fessing Up to Doctor Costs Drinker His License*, PHILA. INQUIRER, Aug. 6, 2004, <http://www.doctordeluca.com/Library/PublicHealth/FessingUpToDocCostsLicense04.pdf>.

153. Martha Raffaele, *Court Upholds Suspension of Beer Drinker's License*, ASSOCIATED PRESS, Aug. 17, 2004.

154. *Id.* Though Emerich refused alcohol counseling or to have an interlock device placed in his vehicle, he did admit at his hearing to having had "a few beers" on occasion before driving. *Id.*

155. *Id.* The court did note, however, that Emerich had a previous conviction for drunk driving. *Id.*

156. Lawrence Taylor, *DUI Cops Now Armed with Guns, Batons . . . and Needles*, LAWRENCE TAYLOR'S DUI BLOG (Sept. 16, 2009), <http://www.duiblog.com/2009/09/16/dui-cops-now-armed-with-guns-batonsand-needles/>.

157. *See id.*

158. *Id.*

159. *Id.*

In a similar vein, an Indiana man who was suspected of drunk driving was subdued and force-catheterized.¹⁶⁰ The man registered a .07% BAC on a breathalyzer test and a search warrant was issued for blood and urine samples.¹⁶¹ Blood was drawn at a nearby hospital, however, the man was unable to provide a urine sample.¹⁶² The man was then shackled to his hospital bed and forcefully catheterized against his will.¹⁶³ The blood test revealed that the man's BAC did not exceed the Indiana limit for driving.¹⁶⁴ It is fair to question whether this procedure and the others noted above are warranted for suspected drunk driving.

A recent policy to release certain offenders in Illinois further demonstrates the societal over-reaction to drunk driving. In order to save five million dollars, low-level, non-violent offenders were released from a Chicago prison during the 2009 winter holiday season.¹⁶⁵ The offenders included drunk drivers, burglars, financial criminals, and drug criminals.¹⁶⁶ Upon learning of the early release of the drunk drivers, MADD intervened and pressured the State Corrections Department to reclassify them as violent offenders.¹⁶⁷ The Corrections Department succumbed to the pressure, agreed with MADD, and put eighteen drunk drivers back in prison while the burglars, drug criminals, and financial criminals remained released.¹⁶⁸

In addition to the sometimes disproportionately harsh treatment drunk drivers receive, they are at times subject to penalties that apply only to them. For example, an Arizona law allows judges to fine DUI offenders for the cost of their stay in jail.¹⁶⁹ This fine is unique to drunk drivers.¹⁷⁰ Though law enforcement officials are encouraging

160. *Forced Catheterization Used in DUI Case*, WPBF.COM (Sept. 3, 2009), <http://www.wpbf.com/health/20703731/detail.html>.

161. Jennifer Nelson, *Man Sues After Forced Catheterization*, IND. LAW. (Sept. 1, 2009), <http://www.theindianalawyer.com/article/print?articleId=21195>.

162. *Id.*

163. *Forced Catheterization Used in DUI Case*, *supra* note 160; Nelson, *supra* note 161.

164. *Forced Catheterization Used in DUI Case*, *supra* note 160. To boot, the DUI suspect was also charged with obstructing justice for his inability to provide a urine sample. *See id.*

165. Frank Main & Chris Fusco, *Early Release Ends for DUI Offenders: 18 Sent Back to Prison to Serve Out Terms*, CHI. SUN-TIMES, Dec. 25, 2009, at 2.

166. Frank Main & Chris Fusco, *Inmates Home for Holidays: Drunken Drivers, Rip-Off Artists Stretch Definition of 'Non-Violent, Low-Lever Offenders'*, CHI. SUN-TIMES, Dec. 22, 2009.

167. Main & Fusco, *supra* note 166, at 2.

168. *Id.*

169. *More Ariz. Drunk Drivers Could Pay for Jail Stays*, AZCENTRAL.COM (Sept. 7, 2009), <http://www.azcentral.com/news/articles/2009/09/07/20090907pimacounty-dui07-ON.html>; Lawrence Taylor, *The DUI Double Standard*, LAWRENCE TAYLOR'S DUI BLOG (Sept. 7, 2009), <http://www.duiblog.com/2009/09/07/the-dui-double-standard-4/>.

170. *See* ARIZ. REV. STAT. § 28-1444 (2011).

judges to mete out this fine, judges are reluctant to do so because of the huge financial costs already associated with drunk driving under Arizona law.¹⁷¹

Perhaps because they believe the drunk driving laws are not enforced adequately, some private citizens have taken justice into their own hands with regard to drunk drivers. Citizens in Milwaukee formed a group on Craigslist whose supposed purpose is to report drunk drivers to the authorities.¹⁷² The group stakes out a bar, waits for a seemingly overly intoxicated patron to enter his vehicle, and then reports the vehicle to the police.¹⁷³ More controversial is the online statement by some members that they lie or exaggerate to ensure the police respond, regardless of whether a driver is operating his or her car dangerously.¹⁷⁴

As of late, with the advent of portable communication and entertainment devices, some skeptics question whether drunk driving is the most pressing danger on the road. A Los Angeles Times article entitled "Targeting the Social Drinker is Just MADD" reported a British study that found that "cell phone use while driving caused significantly more impairment than a .08 blood-alcohol level."¹⁷⁵ That study's conclusion is supported by a Car and Driver study, which found that text message usage can be even more dangerous than alcohol impaired driving, especially at slower speeds.¹⁷⁶ States have now responded to the dangers posed by drivers who use cell phones or send text messages, but such individuals are not treated with anywhere near the same harshness as those who drive while impaired by alcohol. These studies do not suggest that drunk driving is not a significant danger, but they do raise questions about whether it is being treated with disproportionate harshness.

B. CHILD SEX ABUSE

In the early 1980s in Kern County, California, a string of child abuse cases arose in which many young children in the area voiced allegations of horrific and prolonged sexual abuse by family members, neighbors, and friends. These cases were fueled by suggestive inter-

171. Taylor, *supra* note 169.

172. Brad Hicks, *Fox 6 Exclusive: Craigslist DUI Busters*, FOX6NOW.COM (Jan. 20, 2010), <http://www.fox6now.com/news/witi-100120-craigslist-narcs-dui,0,7859851.story>.

173. *Id.*

174. *Id.*

175. Balko, *supra* note 147.

176. See Michael Austin, *Texting While Driving: How Dangerous Is It?*, CAR & DRIVER, June 2009, http://www.caranddriver.com/features/09q2/texting_while_driving_how_dangerous_is_it_-feature.

views and prosecutorial misconduct, which ultimately led the California appellate courts to overturn the convictions.

In the 1985 case *People v. Pitts*,¹⁷⁷ several adults in Kern County were accused of performing sexual acts on children and forcing the children to perform sexual acts on each other. As investigators and child services workers interviewed the children, their stories evolved and more child victims and adult abusers emerged.¹⁷⁸ Eventually the children's allegations came to include tales of group sexual orgies.¹⁷⁹

Initially, when several additional children were questioned regarding their presence at these orgies, they vehemently denied it.¹⁸⁰ However, after being questioned by interviewers several times in a short period, the children changed their stories and claimed that they and others had been sexually abused.¹⁸¹ Based on this information alone, arrest warrants were issued and charges were brought against seven adults for conspiracy, forcible lewd and lascivious acts on children under the age of fourteen, use of children for purposes of pornography, child endangerment, and assault.¹⁸²

The children's allegations included being taped and photographed while being molested by the adults and being forced to perform various sexual acts on each other.¹⁸³ The children claimed they were forced to drink beer and whiskey and to consume drugs, including marijuana, cocaine, and heroin.¹⁸⁴ The children stated that they were strapped down to a board and injected with drugs if they failed to behave.¹⁸⁵ They claimed that they were threatened with knives and guns if they told anyone of the abuse.¹⁸⁶

However, the children's stories were rampant with inconsistencies about the time and location of the alleged abuse. The allegations regarding alcohol and drug use were also different in each child's testimony. In addition, almost all of the children picked different individuals as their abusers from lineups conducted during the investigation.¹⁸⁷ Some of the individuals chosen from the lineups had no relation to the case.¹⁸⁸ Lastly, during searches of the defendants'

177. 273 Cal. Rptr. 757 (1990).

178. *People v. Pitts*, 273 Cal. Rptr. 757, 775 (Cal. Ct. App. 1990).

179. *Pitts*, 223 Cal. Rptr. at 775.

180. *Id.*

181. *Id.* at 775-77. In fact, one child only conceded she had been abused several months into the investigation after meeting with investigators and social services workers 20-25 times to discuss the allegations. *Id.*

182. *Id.* at 771.

183. *Id.* at 778.

184. *Id.* at 778-81.

185. *Id.* at 774-90.

186. *Id.* at 778-81.

187. *Id.* at 776.

188. *Id.*

homes, no pornography, drug paraphernalia, cameras, or video equipment was ever found.¹⁸⁹

Nonetheless, each defendant was convicted of the charged crimes in 1985.¹⁹⁰ The defendants were sentenced to varying terms of 285, 373, and 405 years in prison.¹⁹¹ In 1990, however, the Court of Appeals for the Fifth District of California overturned the convictions on appeal.

On appeal, the court noted many forms of gross prosecutorial misconduct in the way the investigation and prosecution were handled.¹⁹² The court documented several improper and argumentative remarks made by the prosecution during closing arguments.¹⁹³ The questioning techniques of the prosecution during direct and cross examination of witnesses involved "inadmissible evidence and improper innuendo."¹⁹⁴ Similarly, throughout the trial, the prosecutor attempted to prove his case using innuendos rather than relevant, material evidence. Lastly, the appellate court found that the jury was improperly influenced by the trial judge's lack of impartiality. The appellate court noted several comments made by the trial judge in the presence of the jury, which implied that the prosecution's case was more credible and that the judge and prosecution were on the same side.¹⁹⁵ These various forms of gross misconduct during the investigation and subsequent trial compelled the appellate court to reverse the convictions and sentences of the defendants.

In *People v. Stoll*,¹⁹⁶ a case that occurred in the same county and the same year as *Pitts*, four adults were charged with thirty-six counts of lewd and lascivious acts against seven young boys in the area. The defendants were convicted on all counts in a case involving essentially the same investigators and prosecutors as the *Pitts* case.

Similar stories of a sex ring emerged after considerable prompting by local investigators and child services workers. The children all testified that adults performed sexual acts on them and that these acts were photographed.¹⁹⁷ However, the children did not agree on exactly what was done or who took the photographs.¹⁹⁸ As two lead investigators, one from the Sheriff's Department and the other from Child Protective Services, met with the children several times over a ten-day

189. *Id.* at 775.

190. *Id.* at 772.

191. *Id.*

192. *Id.* at 806-07.

193. *Id.* at 809-18.

194. *Id.* at 829-30.

195. *Id.* at 860-61.

196. 783 P.2d 698 (Cal. 1989).

197. *People v. Stoll*, 783 P.2d 698, 701-02 (Cal. 1989).

198. *Stoll*, 783 P.2d at 701-02.

period, allegations and depictions of events began to change.¹⁹⁹ During these interviews the children were first informed that other children had made allegations of abuse, and then they were asked to describe their own abuse.²⁰⁰ Such leading and suggestive interview techniques were used throughout the entire investigation.

Similar to the investigation in the *Pitts* case, no photographs of the alleged sexual acts were found. In addition, no medical examinations were performed on the child accusers and the interviews with the children were not recorded.²⁰¹ As one article noted, “[E]ven if you believe[d] that someone did molest one or more of the boys, much of the kids’ testimony pushed the bounds of plausibility—and of anatomy.”²⁰² Still, all four defendants were convicted on the respective counts and received varying sentences of 40, 31, 16, and 14 years in prison depending on their alleged involvement in the crimes.²⁰³

In 1989, the Supreme Court of California overturned two of the four convictions after reviewing the investigation and prosecution of the case. The conviction of one of the defendants, John Stoll, was not overturned until years later, after he had spent fifteen years in prison.²⁰⁴ The remaining defendant completed his sentence and was moved to a state mental hospital after the court determined that he was a sexually violent predator.²⁰⁵

Many of the child accusers, now adults, say the abuse they so vividly described years ago never happened.²⁰⁶ The accusers claim they “felt pressured by the investigators to describe sex acts.”²⁰⁷ One of the accusers, Ed Sampley, said that when he was initially confronted with questions about sex acts and molestation that Stoll allegedly committed, he vehemently denied it.²⁰⁸ But after repeated interviews with suggestive questioning, “at some point—Sampley doesn’t remember when or exactly why—he changed his story.”²⁰⁹ When the boys attempted to recant their accusations soon after the trial, their parents were told that they were “in denial” or “too embarrassed to tell . . . the truth.”²¹⁰

199. *Id.* at 702-03.

200. *Id.*

201. *Id.* at 703.

202. Jones, *supra* note 57.

203. *Stoll*, 783 P.2d at 707 n.15.

204. Jones, *supra* note 57.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

Years later, in 2004, many of the accusers came from miles away to officially recant their stories at Stoll's hearing.²¹¹ The judge ultimately overturned Stoll's conviction, finding that "the children had been improperly interviewed, making their testimony unreliable."²¹²

In 1983 in Manhattan Beach, California, accusations of child abuse arose against the owners and aides of the McMartin Preschool.²¹³ Peggy McMartin Buckley and her mother, Virginia McMartin owned the preschool.²¹⁴ Ray Buckey, Peggy's son, worked as a school aide at McMartin Preschool.²¹⁵ In August of 1983, Judy Johnson called the Manhattan Beach police to report that Ray Buckey abused her two-and-a-half-year-old son.²¹⁶ Although there was no physical evidence of abuse, police proceeded to investigate the accusations.²¹⁷

In early September of 1983, the Chief of Police sent a letter to 200 parents of children who were attending or had attended McMartin Preschool at some point in the past.²¹⁸ The letter indicated that Ray Buckey was under investigation for criminal acts of child molestation.²¹⁹ The letter requested that parents ask their children whether they had been a witness to or a victim of any relevant crime. Specifically, the letter directed the parents to ask whether their children had ever witnessed Ray Buckey leave the room with a child during naptime or if they had ever seen him tie up a child.²²⁰ The Chief of Police indicated in his letter that "possible criminal acts include: oral sex, fondling of genitals, buttocks or chest area, and sodomy, possibly committed under the pretense of 'taking the child's temperature.'"²²¹ This

211. *Id.*

Perhaps more attention should have been paid to how the children became victims of the tactics employed by over-zealous investigators. This victimization was so severe in some cases that it lasted well into their adulthood. The adult Ed Sampley, for example, reported how the pressure tactics used by the investigators still distorted his sense of trust. Then 28, Sampley told how he is afraid to be around his stepdaughter's friends or to give his own 3-year-old daughter a bath lest someone accuse him of molesting them.

Id.

212. *Id.*

213. Earl, *supra* note 56.

214. *McMartin' Ritual Abuse Cases in Manhattan Beach, CA*, RELIGIOUS TOLERANCE.ORG, http://www.religioustolerance.org/ra_mcmar.htm (last updated Oct. 29, 2005).

215. *Id.*

216. Earl, *supra* note 56.

217. *McMartin' Ritual Abuse Cases in Manhattan Beach, CA*, *supra* note 214.

218. *Id.*

219. Letter from Police Chief Kulhmeyer, Jr. to McMartin Preschool Parents (Sept. 8, 1983), available at <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/lettertoparents.html>.

220. *Id.*

221. *Id.*

letter “set off a panic and, some lawyers have said, tainted the case from the outset.”²²² A local television station soon picked up on the story and reported that the McMartin Preschool may be linked to pornography rings and sex industries.²²³

Hundreds of parents came forward to have their children interviewed by representatives of the Children’s Institute International.²²⁴ Many of the children initially denied being molested, but ultimately 360 interviewed children claimed they had been abused.²²⁵ Taped interviews of the children later indicated that they were fed suggestive questions, urged to admit to the abuse, and rewarded for saying they had been sexually abused.²²⁶ One hundred and fifty children underwent medical examinations. Although there were no physical signs of abuse that typically accompany sexually abused children, the doctor claimed to have performed new tests which indicated that approximately 120 children had been abused.²²⁷ These tests were later found to be an inaccurate indicator of abuse.²²⁸

Tales of abuse by the children included satanic conspiracy, animal sacrifice, ritualistic murder of infants, acting in pornographic movies, flying witches, and secret underground tunnels.²²⁹ Despite the incredulity of these stories, Ray Buckey, Peggy McMartin Buckey, Virginia McMartin, and several other individuals associated with the school were indicted on 115 counts of child abuse in 1984.²³⁰ The charges were later increased to 321 counts involving forty-eight children.²³¹ Ultimately, the prosecution charged only Ray Buckey and Peggy McMartin Buckey and dismissed charges against the other indicted individuals.²³²

In 1990, after years of investigation and trial, the jury handed down its verdict.²³³ Peggy McMartin Buckey was found not guilty on all counts and Ray Buckey was found not guilty on thirty-nine of fifty-two counts, with a hung jury on the remaining thirteen counts against

222. Robert Reinhold, *The Longest Trial—A Post-Mortem; Collapse of Child-Abuse Case: So Much Agony for So Little*, N.Y. TIMES, Jan. 24, 1990, <http://www.nytimes.com/1990/01/24/us/longest-trial-post-mortem-collapse-child-abuse-case-so-much-agony-for-so-little.html?scp=1&sq=&st=nyt>.

223. *McMartin’ Ritual Abuse Cases in Manhattan Beach, CA*, *supra* note 214.

224. *Id.*

225. Reinhold, *supra* note 222.

226. Earl, *supra* note 56; Reinhold, *supra* note 222.

227. Earl, *supra* note 56; *McMartin’ Ritual Abuse Cases in Manhattan Beach, CA*, *supra* note 214.

228. *McMartin’ Ritual Abuse Cases in Manhattan Beach, CA*, *supra* note 214.

229. *Id.*

230. Reinhold, *supra* note 222.

231. *Id.*

232. *McMartin’ Ritual Abuse Cases in Manhattan Beach, CA*, *supra* note 214.

233. Earl, *supra* note 56.

him.²³⁴ By this time, Ray Buckey had spent five years in jail.²³⁵ Later that same year, after a re-trial on the remaining thirteen counts, a different jury also remained hung.²³⁶

Similar to the aftermath of the other child abuse cases discussed above, some of the child accusers in this case later recanted their stories. Kyle Zirpolo, a child who attended McMartin Preschool from 1979-1980 when he was eight years old, had told stories of sex games, animal sacrifice, and child pornography in interviews with investigators and in his testimony in front of the Grand Jury.²³⁷ Zirpolo later recanted, claiming no one at McMartin Preschool “did anything to me, and I never saw them do anything.”²³⁸ Zirpolo stated that interviewers would ask the same questions until they got the answer they wanted.²³⁹ He claimed that “there were so many kids saying all these things happened that you didn’t want to be the one who said nothing. You wouldn’t be believed if you said that.”²⁴⁰

In 1984 in Jordan, Minnesota, James Rud was arrested on allegations of child abuse.²⁴¹ During the police investigation of the alleged abuse, additional allegations of abuse and murder arose within the small community.²⁴² Eventually the State charged twenty-four adults with molesting thirty-seven children.²⁴³ Of these twenty-four adults, one pled guilty, two were acquitted at trial, and charges were dropped against the remaining twenty-one defendants.²⁴⁴ The Scott County Attorney claimed that “the charges were dismissed in order to shield the children from the trauma of trial and to prevent the disclosure of evidence relating to an ongoing murder investigation.”²⁴⁵

Following dismissal of the charges by the Scott County Attorney against twenty-one of the defendants, the Attorney General, the Federal Bureau of Investigation, and the State Bureau of Criminal Appre-

234. *Id.*

235. Reinhold, *supra* note 222.

236. Earl, *supra* note 56.

237. Debbie Nathan, *I’m Sorry: A Long-Delayed Apology from One of the Accusers in the Notorious McMartin Preschool Molestation Case 1*, L.A. TIMES, Oct. 30, 2005, <http://articles.latimes.com/2005/oct/30/magazine/tm-mcmartin44>.

238. *Id.* at 3.

239. *Id.* at 1.

240. *Id.* at 2.

241. Lawrence D. Spiegel, *The Phenomenon of Child Abuse Hysteria as a Social Syndrome: The Case for a New Kind of Expert Testimony*, 2 INST. FOR PSYCHOL. THERAPIES, no. 1, 1990, available at http://www.ipt-forensics.com/journal/volume2/j2_1_4.htm#en0. James Rud was, in fact, a confessed child abuser and pled guilty to several counts of abuse. Hubert H. Humphrey, III, *The Scott County Investigation*, THE A-TEAM, Feb. 12, 1985, http://www.a-team.org/scott_county.html.

242. *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting).

243. *Craig*, 497 U.S. at 868.

244. *Id.*

245. Feher, *supra* note 60, at 239.

hension performed an investigation into the allegations of murder and abuse.²⁴⁶ The Attorney General's Report ultimately concluded that there was "no credible evidence to support allegations of murder, which arose during the sexual abuse investigation" and there was "insufficient evidence to justify the filing of any new sex abuse charges."²⁴⁷ It went on to detail the inherent flaws in the investigation and prosecution that tainted the proceedings from the start. Ultimately, "any evidence, or testimony, that may have existed was ruined by the investigation."²⁴⁸

The Report indicated that "allegations of child abuse ranging from gross sexual abuse to murder arose in Jordan, Minnesota."²⁴⁹ When the allegations arose, many of the "children were removed from their homes and isolated from" their families for long periods of time, even if they denied being sexually abused.²⁵⁰ When children were told that they could return home if they revealed that they had been abused, many confessed to being abused.²⁵¹ However, their stories were incredible and inconsistent. In his initial interview, a child described three murders in graphic detail.²⁵² In a subsequent interview, the same child described "seven children being stabbed, mutilated, and/or shot."²⁵³ Later, he claimed that five bodies had been dumped in a Minnesota River.²⁵⁴ Ultimately, the child admitted that he had lied about the murders.²⁵⁵

Other children similarly admitted to fabricating stories. One child claimed that he made up detailed stories of sexual abuse because he told the interviewers what they wanted to hear.²⁵⁶ Another child admitted that "he got the idea of ritualistic torture from a television" show and that "he lied about the murders because he wanted to please the investigators."²⁵⁷ Yet another child stated that she made up stories about people being killed because her friend asked her to do so.²⁵⁸

246. Humphrey, *supra* note 241.

247. *Id.*

248. Feher, *supra* note 60, at 239.

249. Brian L. Schwalb, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining 'Confrontation' to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185, 217 n.3 (1991).

250. Humphrey, *supra* note 241.

251. Spiegel, *supra* note 241.

252. Humphrey, *supra* note 241.

253. *Id.*

254. *Id.*

255. *Id.*

256. Diana Younts, Note, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691, 731 (1991).

257. Humphrey, *supra* note 241.

258. *Id.*

Many of the children were questioned multiple times at length, but records of the interviews were rarely made. For example, the police interviewed one nine-year-old girl approximately twenty times during the investigation, but only four written reports of the interviews were found.²⁵⁹ Some of the children were interviewed together, and others were told what other child accusers had recounted.²⁶⁰ In one interview, "a child was told that his sibling had made allegations against a parent. He was then asked to describe what had happened to him."²⁶¹

The investigation was also characterized by the lack of corroborating physical and demonstrative evidence recovered. Despite allegations of child pornography, police never recovered any photographs.²⁶² There were also no physical signs of abuse on any of the children.²⁶³ Investigators nonetheless proceeded to arrest suspects on little more than the children's bare allegations.²⁶⁴ To compensate for a lack of evidence, the County Attorney sought to induce the various defendants to provide information in exchange for plea bargains.²⁶⁵ When defendant James Rud was first arrested, he described an elaborate child sex ring in exchange for a reduced sentence.²⁶⁶ He later admitted that he had completely fabricated this information to please investigators and receive a lighter sentence.²⁶⁷

While Attorney General Hubert Humphrey expressed his concern over the problem of child abuse in Minnesota, he made the point that "[i]n the Scott County cases . . . something clearly went awry."²⁶⁸ As Justice Scalia aptly noted in his dissent in *Maryland v. Craig*,²⁶⁹ "There is no doubt that some sexual abuse took place in Jordan; but there is no reason to believe that it was as widespread as charged."²⁷⁰

IV. FLAWS IN SOCIETY'S TREATMENT OF CHILD SEX ABUSE

By examining the flaws that existed in the way child sex abuse was handled by police, prosecutors, legislators, and the media, the societal impact that results from a crime becoming hot can be seen quite

259. Lucy S. McGough, *For the Record: Videotaping Investigative Interviews*, 1 PSYCHOL. PUB. POL'Y & L. 370, 372 (1995).

260. Humphrey, *supra* note 241.

261. *Id.*

262. *Id.*

263. Spiegel, *supra* note 241.

264. Humphrey, *supra* note 241.

265. *Id.*

266. Spiegel, *supra* note 241.

267. *Id.*; Humphrey, *supra* note 241.

268. Humphrey, *supra* note 241.

269. 497 U.S. 836 (1990).

270. *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting).

clearly. Additionally, such an examination can point the way to avoiding similar problems in the future as crimes become hot.

The child abuse hysteria of the 1980s was compounded by various flaws throughout the investigation and prosecution of child sexual abuse cases. These flaws included investigators' disregard of unbelievable and inconsistent allegations from child accusers, interviewers' use of junk science or good science in a questionable manner, courts' submission to undue pressure from the public and the media, and over-prosecution. The combination of these flaws in varying degrees produced tragic results for both the child accusers and the wrongfully accused defendants.

The problems with investigating child abuse allegations in the 1980s began with the child accusers' tales of abuse. Prior to the 1980s, prosecutors were hesitant to take on cases involving allegations by young children because of a widespread belief that children would tell fantastical stories rather than relate factual accounts.²⁷¹ However, the overwhelming response to allegations of child abuse during the height of the daycare scandals was best characterized as a "refusal to disbelieve," even in the face of the most outrageous stories.²⁷² Many of the stories that the children told were either inherently unbelievable or at least inconsistent enough to raise doubts in the investigation.

In the McMartin Preschool case discussed above, panic ensued when parents received a letter from the police informing them of allegations of child sexual abuse and urging them to discover whether their children had also been abused.²⁷³ Soon, stories emerged of satanic rituals, live animals being slaughtered, and infant child sacrifices.²⁷⁴ The alleged victims of the child abuse asserted that in addition to being molested at the preschool, they had also been molested at various public places, "including a market, a car wash, and a church."²⁷⁵ Some children claimed that they had been taken on planes and others insisted they had been forced to drink blood.²⁷⁶ Another child stated that Ray Buckey, one of the alleged abusers, had

271. JENKINS, *supra* note 59, at 171.

272. *Id.*; see also Andrew M. Luther, Comment, *The Deadly Consequences of Unreliable Evidence: Why Child Capital Rape Statutes Threaten to Condemn the Innocent Defendant to Death*, 43 TULSA L. REV. 199, 214 (2007) ("[D]espite the far-fetched stories the children often told, the majority of people . . . in America, were willing to believe the children.").

273. See JENKINS, *supra* note 59, at 166.

274. Luther, *supra* note 272, at 213, 214.

275. Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, 65 LAW & CONTEMP. PROBS. 149, 149 (2002).

276. *Id.*

taken him to a cemetery and forced him to dig up bodies.²⁷⁷ The same child also told stories of trap doors in the preschool with elaborate underground tunnels where lions were housed.²⁷⁸ In a similar case in New Jersey, Kelly Michaels, a kindergarten teacher, was accused of

licking peanut butter off [children's] genitals, playing a piano while naked, forc[ing] the children to drink urine and eat feces; assaulting them with silverware, a sword and Lego blocks; forcing them to play the "cat game" where they all got naked and licked each other; amputating children's penises; [and] putting a real car and tree on top of one of them.²⁷⁹

Despite the outrageous nature of these allegations and a lack of supporting medical evidence, Kelly Michaels was convicted of 115 counts of child abuse and sentenced to forty-seven years in prison.²⁸⁰

Although there was no corroborating evidence for the children's fantastical tales, interviewers were determined not to question the truth of their allegations, even though the stories were inherently unbelievable and inconsistent.²⁸¹ Investigators began with the premise that children never lied about being sexually abused, and that if a child claimed to have been sexually abused, the job of the investigators was to verify that fact.²⁸² At that point, investigators often encouraged children to make sexual descriptions.²⁸³ Rather than seeking to clarify inconsistent and outrageous descriptions of sexual abuse through rational questioning, investigators specifically sought to confirm the allegations of abuse.²⁸⁴ In fact, investigators often ignored statements that did not conform to their theory of abuse and instead focused on unsupported and often contradictory tales of abuse given by the children.²⁸⁵

During the extensive interviewing process leading up to trial, many interviewers tainted children's stories and memories through the use of junk science, or alternatively, the use of good science in a questionable manner. The interviewers often employed leading and suggestive questions, were improperly trained, misinterpreted supposed evidence of abuse, used anatomically correct dolls in suggestive manners, repeatedly interviewed child accusers, and questioned mul-

277. Luther, *supra* note 272, at 213.

278. *Id.*

279. JENKINS, *supra* note 59, at 177.

280. *Id.*

281. See JENKINS, *supra* note 59, at 177 ("[W]hat were obviously fantasies were not considered sufficient to discredit the cases reflected a new determination to believe victim testimony at all costs.").

282. *Id.* at 172.

283. Anderson, *supra* note 58, at 2144.

284. *Id.* at 2149.

285. See Feher, *supra* note 60, at 237-38.

multiple accusers at the same time. These flaws in the investigation process led hundreds of children to raise allegations of abuse where none had in fact occurred.

Research has shown that the specific techniques used by interviewers when questioning children about sexual abuse can have a direct impact on the child accuser's answers.²⁸⁶ When these techniques are flawed in some material way, the integrity of an interviewee's response is compromised.²⁸⁷ The use of suggestive questioning, such as by coaching, bribes, and threats, makes it more likely that child interviewees will recount tales of abuse, even if they were never actually abused.²⁸⁸ Thus, the flawed techniques of the interviewers coupled with the high suggestibility of children in general caused many false allegations of child sexual abuse.²⁸⁹

The suggestive techniques used by interviewers involved leading questions to the children that suggested a particular answer.²⁹⁰ Children, therefore, answered the questions based on their perception of the answer the interviewer wanted.²⁹¹ The children were ultimately seeking approval from their adult interviewers in the answers they gave.²⁹² At times, interviewers may not have been aware that their questions, simply by the way or how many times they were asked, suggested the answer they sought.²⁹³ Even if unintended at times, these suggestive interview techniques led children to give responses that were then incorporated into the children's memories as truthful accounts of sexual abuse.²⁹⁴

The use of suggestive questions and other flawed techniques stemmed, at least in part, from a lack of skill on the part of the interviewer in child abuse investigations. As subsequent research has shown, "[T]he skill of the interviewer directly influences whether a child relates a true memory, discusses a false belief, affirms details suggested by others, embellishes fantasies, or provides no information at all."²⁹⁵ Although many interviewers may have believed that their extensive educational and research backgrounds qualified them for investigating allegations of child sexual abuse, most investigators had a

286. Walker, *supra* note 275, at 150.

287. *See id.* at 151.

288. Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 85 (2000).

289. *See generally* Walker, *supra* note 275, at 161-62.

290. *See id.* at 161.

291. *See id.* at 160.

292. *See* JENKINS, *supra* note 59, at 167; *see also* Terese L. Fitzpatrick, Note, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175, 200-01 (1991).

293. Feher, *supra* note 60, at 231.

294. *Id.* at 231-32; *see also* Fitzpatrick, *supra* note 292, at 201.

295. Walker, *supra* note 275, at 150.

limited understanding of both their objective and the criteria they should have been using to determine if sexual abuse occurred.²⁹⁶ Even with the use of proper techniques, it is difficult to evaluate the reliability of a child's statements and to put those statements into a cohesive structure.²⁹⁷

In addition to the difficulties presented in gathering statements and other evidence, another flaw in the investigation process occurred in the interpretation of that evidence. In determining the meaning of certain statements and behaviors, interviewers failed to be cognizant of the fact that there is no particular type of behavior or action that specifically indicates child sexual abuse.²⁹⁸ For example, in medical examinations conducted following allegations of sexual abuse, doctors have found many of the supposed indicators of abuse in not abused as well as abused children.²⁹⁹ Psychological evaluations similarly resulted in the assessment of symptoms that were once thought to be indicative of anal and genital rape but which were later found to have interpretations wholly separate from sexual abuse.³⁰⁰

The anatomically correct doll was yet another flawed investigative tool widely used in interviewing suspected child abuse victims. Many investigators used anatomically correct dolls in the beginning stages of an interview with the expectation that children who were uncomfortable talking about sexual abuse would exhibit signs of abuse by playing with certain areas, such as the sexual organs or orifices, of the doll.³⁰¹

However, this suggestive interviewing technique may lead to false allegations of sexual abuse.³⁰² Many interviewers are not trained in how to properly use the dolls in an interview setting.³⁰³ Therefore, like the problems associated with interpreting medical evidence related to uncovering child sexual abuse, it is difficult to interpret the meaning of a child's behavior in playing with an anatomically correct doll. In addition to the fact that many children who were not abused may play with the dolls' sexual organs, interviewers ultimately tend to find indicators of sexual abuse in many circumstances.³⁰⁴ Lastly,

296. Bruce M. Giffen, *Child Sexual Abuse: Problems in Evidence*, 3 NEV. LAW. 13, 14 (1995).

297. *Id.*; see also Walker, *supra* note 275, at 156 ("One crucial task in conducting forensic assessments of children is to determine which factors, if any, impinge upon their ability to comprehend, recall accurately, and report past events.").

298. Giffen, *supra* note 296, at 13.

299. *Id.*

300. JENKINS, *supra* note 59, at 167.

301. Luther, *supra* note 272, at 220.

302. *Id.*

303. *Id.* at 221.

304. Giffen, *supra* note 296.

there is no uniform standard available for interviewers to determine what kind of sexualized play may indicate abuse.³⁰⁵ Thus, even those interviewers who have received some training in the correct usage of anatomically correct dolls may nevertheless come to different conclusions about the meaning of a child's interaction with a doll.³⁰⁶

Another flaw in the investigation process occurred when interviewers questioned children on multiple, separate occasions and when interviewers introduced information from other child accusers during these interviews. Throughout the investigation process and continuing until the time of trial, interviewers repeatedly questioned children on multiple occasions.³⁰⁷ In addition, many interviewers often repeated the same questions during an interview.³⁰⁸ This repetition becomes its own learning process and can change or create a memory.³⁰⁹ The phenomena of creating a memory through repetitive questions is often irreversible, as the altered perceptions are reinforced with each subsequent interview.³¹⁰ As interviewers conducted investigations of more and more children supposedly involved in the same incident, the interviewers became aware of common threads between the stories.³¹¹ The interviewers may have focused their suggestive questions around these accounts so that "repeated reinforcement of these ideas created in the child a 'subjective reality' that an event did happen even if it never did."³¹²

Similar dangers are present when an interviewer conducts an interview of multiple potential child accusers at the same time. Interviewers in these circumstances tend to assure the child interviewees during questioning that the abuser is a bad person and deserves to be punished.³¹³ This suggestive technique often results in children altering their answers to be consistent with those of their peers.³¹⁴ Other times in multi-victim cases, an interviewer will interview one child at a time but will tell the child that they have received allegations of abuse from other children.³¹⁵ As in the situation where multiple children are interviewed together, a child is more likely to say that he or

305. Luther, *supra* note 272, at 221.

306. *Id.*

307. *Id.* at 221-22; *see also* Walker, *supra* note 275, at 158.

308. Luther, *supra* note 272, at 222.

309. Feher, *supra* note 60, at 231-32.

310. *Id.* at 232-33.

311. *See* JENKINS, *supra* note 59, at 167.

312. Feher, *supra* note 60, at 233; *see also* Norbert Ebisike, *The Evidence of Children*, 44 CRIM. L. BULL., no. 5, 2008 (discussing "when an interviewer selectively reinforces certain elements of a child's report").

313. Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1031 (1999).

314. *See* Anderson, *supra* note 58, at 2151.

315. *See id.*; *see also* Luther, *supra* note 272, at 224.

she has been abused after receiving information that another child already admitted to being abused, regardless of the accuracy of the statement.³¹⁶

Media coverage of child abuse allegations and public pressure to prosecute the cases constituted yet another category of flaws in the investigation process. Because the media provides an important source of information to the public regarding crime and criminals not generally available elsewhere, it has a great deal of influence over the public's beliefs and attitudes about these subjects.³¹⁷ When the media puts such great emphasis on a crime, it creates a sense of anxiety about the crime and about being the victim of the crime.³¹⁸ The media focuses on the most atypical crimes and offenders, thus "rais[ing] the specter of the predatory criminal from a minor character to a common, ever present image."³¹⁹ This image often leads to an outcry for justice by the public, which then forces prosecutors to act, regardless of the sufficiency of the evidence.³²⁰

As was the case during the child abuse hysteria of the 1980s, when the media inundates news stories with senseless acts of violence, society's instinctual reaction for dealing with the violence is to punish those who pose a threat.³²¹ This perception was so strong during the investigations and trials of suspected child sexual abuse in the 1980s that it became impossible to believe that the defendants were innocent.³²² Thus, those accused of child sexual abuse had been convicted by the media and the public before they ever stepped foot in a courtroom.

Lastly, the concept of over-prosecution arose both during the trials of those facing child abuse charges and later in statutes enacted by the legislature in response to infamous child sexual abuse tragedies that received media attention throughout the country. Prosecutorial misconduct was rampant in many of the child sexual abuse cases in the 1980s.³²³ Although faced with unbelievable and inconsistent accounts of alleged abuse, prosecutors characterized the evidence as correct accounts in part because they were elicited by "skilled behavioral-science investigators." These investigations were then used to obtain often "florid" indictments.³²⁴

316. Luther, *supra* note 272, at 225.

317. See CALLANAN, *supra* note 61, at 55.

318. *Id.* at 53.

319. See *id.* at 55-56.

320. See Fitzpatrick, *supra* note 292, at 200.

321. CALLANAN, *supra* note 61, at 56.

322. JENKINS, *supra* note 59, at 167.

323. See Randall Grometstein, *Prosecutorial Misconduct and Noble-Cause Corruption*, 43 CRIM. L. BULL., no. 1, 2007.

324. JENKINS, *supra* note 59, at 167.

Prosecutors were later criticized for failing to disclose to the defense some of the most bizarre accusations of satanic rituals. A mistrial was declared in one case from St. Louis, Missouri, and a conviction was overturned in another case from Roseburg, Oregon for just this reason.³²⁵ When the California appellate court overturned the convictions of the falsely accused defendants in *People v. Pitts*,³²⁶ the court scolded the prosecution for making improper assertions in closing argument, appealing to the emotions of the jury, personally attacking the defense counsel, and referring to facts that had not been admitted into evidence during closing arguments, on motions, or during objections.³²⁷

In addition to the prosecutors' unfair and unethical practices in the courtroom, state legislatures enacted harsh legislation around this time in response to actual and alleged child sexual abuse. During the height of child sexual abuse hysteria in the 1980s, state and federal legislatures drafted new laws designed to protect missing or abused children, create guidelines for registration of sex offenders, and guide investigations of day care centers.

Today, all states require some form of sex offender registration.³²⁸ This requirement stems in part from the federal government's threat to withdraw federal funding in states that do not require sex offenders to register and provide information.³²⁹ While such registration laws can be effective tools in combating re-offending by sexual predators, they can also overreach. Additionally, because each state can define the requirements for registration, there is divergence in the definition of what constitutes a dangerous sex offender.³³⁰

While some states require only the most serious offenders to register, other states require that all sex offenders, defined in various ways by state statute, register and provide information.³³¹ Many of these states' registration laws have become over-inclusive in the offenses for which they require registration. As a result, the laws conflict with the states' originally intended goal of protecting children from sexual abuse. For example, Alabama requires registration for those convicted of second-degree prostitution, even between con-

325. See Grometstein, *supra* note 323.

326. 273 Cal. Rptr. 757 (Cal. Ct. App. 1990).

327. *People v. Pitts*, 273 Cal. Rptr. 757, 818 (Cal Ct. App. 1990), *see also* Grometstein, *supra* note 323.

328. See Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172 (1999).

329. See *id.* at 1172-73.

330. JENKINS, *supra* note 59, at 202.

331. Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law*, 89 IOWA L. REV. 1535, 1548 (2004).

senting adults.³³² Many states, including Washington, California, Indiana, and Colorado, require registration for crimes committed for the purpose of “sexual gratification.”³³³ Lastly, some state courts have required registration for individuals charged with, but not convicted of, one of the many “sexual offenses” as defined in that state’s statute.³³⁴ These examples provide insight into how states have strayed from the originally intended purpose of the registration statutes in response to the media’s portrayal of sensationalized and horrific crimes committed by repeat offenders.

Community notification laws provide another related example of legislation that began in response to child sexual abuse crimes. Despite the intended purpose of these statutes, they have at times incited vigilante attacks, making it difficult for offenders to live in the community.³³⁵ These notification laws require distribution of highly personal information about offenders to various groups and individuals in the community.³³⁶ States can use any method of prescribed communication to notify community members of the presence of a convicted sex offender, such as posting the information online or in a public place in the community.³³⁷ Perhaps most disturbing is the fact that many states fail to provide registrants with a right to appeal their placement on the registry, the means of notification, and the length of registration.³³⁸ While this type of legislation was drafted and passed in response to tragic crimes that occurred in the 1980s and 1990s, the statutes in their current form no longer satisfy the original legislative intent to protect communities from truly dangerous criminals.

332. *See id.*

333. *See* Logan, *supra* note 328, at 1208.

334. *See id.*

335. *See* Karen Franklin, *Vigilantes: Coming Soon to a Community Near You*, IN THE NEWS (Oct. 18, 2007), <http://forensicpsychologist.blogspot.com/2007/10/vigilantism-coming-soon-to-community.html> (referring to a vigilante in Maine and one in Bellingham, Washington, each of whom killed two sex offenders after getting their addresses from a sex offender registry; a father and son in New Jersey mistakenly beating a man they thought was a paroled sex offender, whose name they had found pursuant to a community notification law; and a vigilante, later shot and killed by the police, trying to break down the door of a sex offender whose name, photograph, and address had been distributed to the neighborhood by the police); *see also* JENKINS, *supra* note 59, at 201; Logan, *supra* note 328, at 1207 (“[A]lthough notification is justified to protect the public from registered [sex] offenders, it is clear that the broad scope of predicate offenses triggering registration and notification, including mere attempts to commit specified crimes, can overshoot this mark.”).

336. Logan, *supra* note 328, at 1179.

337. *Id.* at 1203.

338. *See id.* at 1209.

V. SUGGESTIONS FOR A NEW WAY TO APPROACH HOT CRIMES

With an understanding both of what causes crimes to become hot and how this social phenomenon impacts the manner in which such crimes are handled or mishandled, we can now turn to suggestions for preventing crimes from becoming hot and coping with the excesses that result from them if they do.

A. LEARN TO RECOGNIZE THE SYMPTOMS GIVEN OFF AS CRIMES ARE BECOMING HOT

First, as a society, we need to recognize the existence of a hot crime consistent with how this Article has defined one.³³⁹ If society begins to look with an informed eye at such crimes, we can identify those which are likely to result in excesses in the way they are perceived, prosecuted, and legislated. Specifically, the following can all be signs that a crime is being hot: how these crimes have been misunderstood and treated historically, the presence of an especially heinous or disastrous triggering criminal act or series of acts, the existence of calls for extreme and unusual reactions from the public and the media, and responses from the courts and legislatures that are different in kind or degree from how other crimes are treated. The ability to recognize that a particular crime possesses elements that may lead to excessive reactions will allow all aspects of society to act preemptively at the early signs that such excesses are taking place.

As this Article has discussed, crimes related to driving while intoxicated had been traditionally regarded as minor by the public and treated with undue leniency by the courts.³⁴⁰ In part this was due to the “there but for fortune go I” attitude about driving intoxicated. When the public, with the assistance of groups such as Mothers Against Drunk Driving (“MADD”), began to understand the dangers that drunk drivers created and began to see the leniency with which the courts punished such drivers, the reaction was a strong one.³⁴¹ In time, what was an appropriately strong reaction became an inappropriately excessive one.³⁴²

Crimes related to the sexual abuse of children were never taken lightly, however, most people had little understanding of how often they happened and even less understanding of how most child molesters were not the proverbial stranger in the long coat but instead a

339. *See supra* Part II.

340. *See supra* notes 16-34 and accompanying text.

341. *See supra* notes 35-43 and accompanying text.

342. *See supra* Part III.A.

friend, acquaintance, or member of the family.³⁴³ Due to these misunderstandings and the inclination of many people to regard even discussing such things as taboo, child molestation crimes were dramatically underreported.³⁴⁴ In this historical under appreciation of the seriousness or prevalence of a crime, we can see the seeds for potential over-reaction once the various elements of society come to recognize the problem in its full form.

Be it a spectacular arson fire at a Bronx social club, a series of intensely reported and hyped up child sex abuse cases at daycare centers, or the calamitous events of 9/11, there is a real danger that such tragic events could lead to societal over-reactions. The angrier people are at criminal behavior, the more likely they will respond to it.³⁴⁵ This is a good thing when it results in correcting the misunderstandings that led to such crimes being ignored or treated too leniently, but not such a good thing when it casts suspicions on people merely because of who they are or what job they perform.³⁴⁶ It is also not such a good thing when it results in unnecessary and improperly suggestive law enforcement procedures or draconian sentences that previously were reserved for more serious crimes.³⁴⁷

Burning down an empty warehouse is a serious crime. Should it suddenly be treated more seriously than forcible rape or manslaughter? Has not society crossed the line in protecting children from abusers when day care providers are afraid to hug children in their care for fear that someone will see them and claim they touched the children improperly? Is even the most heinous act ever an excuse for the stereotyping of people based on their religion or appearance?

Major crimes need to be treated with the harshness warranted by the deed, and where needed, laws should be drafted to make such crimes more difficult to commit or to punish the lawbreaker proportionally to the seriousness of the crime. Yet we need to take special care in such circumstances not to allow the crime of the moment to rise to such a level that it silences the debate that normally accompanies the search to discover the best means of responding to crimes in an effective yet measured way.

We need next to look at how the public is reacting to these crimes. Is the media fueling public anger?³⁴⁸ Are organizations becoming more and more strident and uncompromising in their attempts to

343. See *supra* notes 44-49 and accompanying text.

344. See *supra* notes 50-52 and accompanying text.

345. See *generally supra* Parts I, II.

346. See *supra* Part III.B.

347. See *supra* Part III.A.

348. See *supra* notes 106, 226, 321-27 and accompanying text.

shed light on and combat the crimes?³⁴⁹ We must react to serious crimes in meaningful and substantive ways, but there is no crime that warrants the destruction of prized values such as fairness or constitutional principles involving the presumption of innocence, due process, and the notion that a punishment should fit the crime.

Are draconian laws being passed, which not only cause unfair sentences but which ironically make law enforcement less effective?³⁵⁰ When the seriousness of the drug problem and its relationship to other crimes was fully appreciated, tough laws were passed to address drug related crimes. Some went too far, such as a New York law that permitted the court to sentence a first offender who passed a marijuana cigarette to another person to life imprisonment.³⁵¹ This not only created a grossly unfair sentence scheme but also led the police, courts, and prosecutors to take steps to avoid enforcing the law as written.³⁵² When courts are treating teenage boys past the age of majority who had sex with teenage girls like forcible rapists by sentencing them to substantial terms of imprisonment,³⁵³ it is clear that courts have disregarded the important and sensible line drawing that is designed to treat crimes proportionally to the extent of the moral wrong and the degree of harm caused. Additionally, punishing someone convicted only of statutory rape like a forcible rapist devalues the seriousness of a crime such as forcible rape.³⁵⁴

349. See *supra* notes 143-54 and accompanying text.

350. See *supra* Part III.

351. See Judy Mann, *Getting Wise to Stupid Drug Laws*, WASH. POST, at C-9 (Mar. 30, 2001) (discussing the flaws in "New York's draconian Rockefeller drug laws, which mandate[d] a 15-year-to-life sentence" for possessing or selling small amounts of narcotics, even for first time offenders).

352. See Austin Fenner, *Prosecutors RIP Plan to Ease Drug Laws: Stiff Terms Necessary, They Say*, N.Y. DAILY NEWS (Feb. 11, 2001). See generally Nancy S. Marder, *Juries, Drug Laws & Sentencing*, 6 J. GENDER, RACE & JUST. 337, 360-62 (2002).

353. See, e.g., Meredith Cohen, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment State Statutory Rape Laws*, 16 J. L. & POL'Y 717, 717 (2008). Genarlow Wilson, a seventeen-year old with no prior criminal record, was convicted of aggravated child molestation and sentenced to a mandatory term of ten years in prison without the possibility of parole when a fifteen-year-old girl consensually performed oral sex on him during a party. *Id.* at 717-18.

354. See Jessie K. Liu, *Victimhood*, 71 MO. L. REV. 115, 127-28 (2006) (arguing that sentences should be proportional to the seriousness of the crime committed). The Supreme Court recognized the importance of not sentencing even especially heinous criminals such as child rapists to a sentence that is disproportional to the crime committed. See *Kennedy v. Louisiana*, 554 U.S. 407 (2008). While *Kennedy* was a death-penalty case and the Court's approach to just how disproportional a non-capital sentence has to be to violate the cruel and unusual punishment clause of the Eighth Amendment is somewhat murky, see, e.g., *Ewing v. California*, 538 U.S. 11 (2003); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Solem v. Helm*, 463 U.S. 277 (1983); *Rummel v. Estelle*, 445 U.S. 263 (1980), there should be no doubt that a sentence grossly disproportional to the crime committed is unfair whether or not that unfairness rises to the level of a constitutional violation.

B. CHALLENGE THE MEDIA AND OTHERS TO AVOID OVER-SENSATIONALIZING THE PROBLEM

It is no secret that numerous elements of the media thrive on sensationalizing crimes.³⁵⁵ In a country that values freedom of the press, that cannot be prevented. If not challenged, newspaper stories, Internet communications, and television segments serve to feed the fires of over-reaction. Mechanisms must be put into place that quickly respond to these stories and that acknowledge the seriousness of the crimes, but that also warn of the dangers of over-reaction and call into question some of the outrageous claims that tend to accompany hot crimes. Allegations, especially ones that seem too wild to be true, often are untrue or at least highly exaggerated.³⁵⁶ Common sense should have told people immediately that some of the wild claims of children abetted by therapists and law enforcement personnel in the 1980s³⁵⁷ were absurd, but the hysteria over child abuse drowned out common sense.

There should be people writing op-ed pieces in newspapers, offering themselves as guests on television shows, responding in blogs and on websites to some of the more outrageous claims made or at the least insisting upon some verification for these claims. The message sent should be that warning about excessive reactions to crimes does not make the one who issues the warning weak or insensitive to the damage done by the crime.

C. CRAFT LAWS RESPONSIVE TO THE CRIMES BUT THAT DO NOT OVERREACH

There are times when, because the seriousness or prevalence of certain crimes is underappreciated, laws need to be changed to respond to new information learned about such crimes. Science showed that people posed a danger to other drivers and pedestrians when the alcohol content of their blood was lower than had previously been believed.³⁵⁸ Therefore lowering the blood alcohol level required to be guilty of alcohol-related driving crimes to a level consistent with these scientific findings made sense. Some states allow for punishing those convicted of drunk driving by requiring ignition locks on their cars—meaning that before the drivers can start their cars, they must blow

355. Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 Nw. U. L. REV. 1317, 1384 (1998).

356. See *supra* Part III.B.

357. See generally Parts III.B, IV.

358. See *supra* notes 17-27 and accompanying text.

into a machine that tests the alcohol content of their blood.³⁵⁹ A reading above a certain amount will make the car impossible to start.³⁶⁰

While laws such as these have their critics and can be excessive, they do have one important feature that is important in avoiding certain over-reactions to hot crimes. Laws such as these target only individuals who have been found guilty of a crime or those whose conduct is reasonably believed to be in violation of the law. Such a feature also can contribute to the reasonableness and effectiveness of law enforcement approaches. For example, the practice employed by law enforcement personnel trained to observe the signs of drunk driving from their cars while parked on the sides of roads has proven to be both an effective and reasonable method of apprehending drunk drivers.³⁶¹

Sobriety checkpoints, on the other hand, have no such limitation as they stop everyone, making no distinction for who may or may not be violating the law.³⁶² These stops, which are seizures and fall within the protection of the Fourth Amendment, are made without any suspicion that the person stopped may be intoxicated.³⁶³ There are certain Fourth Amendment searches and seizures that are acceptable without individualized suspicion because the appropriate governmental objectives can be achieved in no other reasonable way.³⁶⁴ This Article has argued that drunk driving laws can be enforced in other equally, if not more, effective ways.³⁶⁵ The normal ways of analyzing the effectiveness of a governmental search or seizure done without the existence of individualized suspicion (a necessary analysis in determining the constitutionality of such Fourth Amendment implicated activity) were largely abandoned by many courts, including the U.S. Supreme Court, in assessing the constitutionality of these checkpoints.³⁶⁶ There is good reason to believe this abandonment occurred because drunk driving had become a hot crime.

359. See Press Release, Centers for Disease Control and Prevention, Ignition Interlocks Reduce Alcohol-Impaired Driving (Feb. 22, 2011), available at http://www.cdc.gov/media/releases/2011/p0222_ignitioninterlocks.html.

360. *Id.*

361. See *supra* notes 63-66 and accompanying text.

362. See *supra* notes 73-76 and accompanying text.

363. See *supra* notes 74-76 and accompanying text.

364. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 647-48 (1995) (drug testing of school athletes); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667-68 (1989) (drug testing of customs service employees); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 624, 631 (1989) (drug and alcohol testing of railroad employees); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-62 (1976) (border area inspections); *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 534 (1967) (municipal housing inspections).

365. See Press Release, Centers for Disease Control and Prevention, *supra* note 359 (study demonstrating effectiveness of interlock device); *supra* notes 107-42 and accompanying text.

366. See *supra* notes 107-42 and accompanying text.

As new laws are proposed, care should be taken not to create severely longer sentences or criminalize behavior that was not previously considered criminal unless the existing laws contain significant omissions or undervalue the seriousness of crime. The approach taken by the New York State Legislature to the drug problem in the 1970s, often referred to as the Rockefeller drug laws and discussed above,³⁶⁷ offers a concrete example of sentences made far too severe in reaction to hot crimes.

Additionally, the laws or at least the application of them should maintain meaningful distinctions between those offenders who deserve serious penalties and those who do not. While statutory rape can be a crime deserving of substantial jail time in certain situations, the push for tougher sentences for child sex abusers should not lead to ten-year prison sentences for consensual sex between teenagers³⁶⁸ or provide a justification for placing such teens on a sex offender registry list for the rest of their lives.³⁶⁹

As new laws are created and existing laws are updated to reflect the prevalence or seriousness of crimes that previously did not receive the attention they deserved, we must be cognizant of the possible collateral consequences of such changes in laws. In crafting the laws, lawmakers must be vigilant in guarding against allowing these laws to apply to innocent people or allowing innocent activity to be criminalized. Similarly, in their zeal to apprehend and prosecute those who commit hot crimes, police and prosecutors must not abandon the checks and balances they normally apply before bringing charges against criminal offenders. Of special concern is allowing public pressure to coax police into using investigation and enforcement techniques that may not be scientifically or empirically defensible.³⁷⁰ For prosecutors, the dangers lie in overlooking evidence that may raise doubts about the guilt of an accused offender and in not sufficiently assessing the credibility of both lay and expert witnesses.³⁷¹

367. See *supra* notes 355-56 and accompanying text.

368. See, e.g., *Wilson v. State*, 631 S.E.2d 391 (Ga. Ct. App. 2006) (affirming the appellant's conviction for aggravated child molestation and mandatory 10-year imprisonment sentence).

369. See, e.g., *People ex rel. Birkett v. Konetski*, 909 N.E.2d 783 (Ill. 2009); *In re J.W.*, 787 N.E.2d 747 (Ill. 2003); *In re T.C.*, 894 N.E.2d 876 (Ill. App. Ct. 2008); *In re Welfare of J.R.Z.*, 648 N.W.2d 241 (Minn. Ct. App. 2002); *In re D.P.*, No. 2008-L-186, 2009 WL 4021187 (Ohio Ct. App. Nov. 20, 2009); *In re Marcio A.*, No. 2007 CA 00149, 2008 WL 4118249 (Ohio Ct. App. Sept. 4, 2008).

370. See *supra* notes 285-320 and accompanying text.

371. See *supra* notes 275-77, 325-31 and accompanying text.

The existing data demonstrates that although sobriety checkpoints are ineffective in dealing with drunk driving,³⁷² states continue to use them. The seizures at these checkpoints, which are permitted despite the absence of individualized suspicion, raise serious constitutional concerns and clearly should not pass the U.S. Supreme Court's own tests for Fourth Amendment legality.³⁷³ The investigations that led to the prosecutions of day care facility workers for child sex abuse relied on stories of children, which were often so bizarre that they should have raised immediate red flags with police and prosecutors.³⁷⁴ These stories were supported by the testimony of child therapists whose suggestive methods in getting the stories from the children were highly questionable and have now been largely discredited.³⁷⁵

D. USE LIMITING RETRIBUTIVISM TO MODERATE EXCESSES OF UTILITARIAN THEORIES OF PUNISHMENT

There are primarily four justifications for punishment, and sentences in criminal cases invariably are based on one or more of these justifications. The four justifications are retribution, deterrence, incapacitation, and rehabilitation. Retribution is a morality based concept which focuses on justice based principles.³⁷⁶ The other three justifications are utilitarian in nature, each seeking to reduce the likelihood that crimes will be committed in the future.³⁷⁷ Through understanding these justifications for punishment and applying them wisely, society can structure criminal penalties to avoid the excessive sentences associated with hot crimes. To understand how this may be accomplished, it is necessary to first understand the nature and purpose of each of the justifications for punishment.

Retribution seeks to salve the wound caused to society by the commission of a crime.³⁷⁸ The way to salve this wound according to retributionists is to provide a punishment commensurate with the

372. See *supra* notes 77-86 and accompanying text.

373. See *supra* notes 107-42 and accompanying text.

374. See *supra* Part III.B.

375. See *supra* notes 285-320 and accompanying text.

376. See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 236 (1968); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 9-10 (1968).

377. JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE AND THERAPY 151 (1979); PACKER, *supra* note 376, at 10-11 (1968); LEON RADZINOWICZ, IDEOLOGY AND CRIME - A STUDY OF CRIME IN ITS SOCIAL AND HISTORICAL CONTEXT 115 (1966).

378. The goal of punishment to the retributionist must be some form of righting the wrong and not "the serpent wings of utilitarianism." C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 159 (1987); NIGEL P. WALKER, WHY PUNISH? 7 (1991).

seriousness of the crime committed.³⁷⁹ Retributionists normally measure the seriousness of the crime by assessing the blameworthiness of the wrongdoer and the degree of harm the crime caused.³⁸⁰ The focus of a retributionist sentence is the creation of a reasonably proportional relationship between the seriousness of the crime and the harshness of the sentence. The goals of most retributionists are limited to fairness and justice, without a strong concern for whether the sentence will reduce crime in the future.³⁸¹ To many retributionists, it is wrong to use a person, even one guilty of a crime, to achieve societal goals, especially if those goals compromise fairness.³⁸²

There are two forms of deterrence: general deterrence and special or specific deterrence.³⁸³ Deterrence based sentences are designed to make the punishment harsh enough that those contemplating committing a similar crime in the future will get the message that the benefit the potential wrongdoer hopes to gain through the crime is outweighed by the punishment he will suffer if caught and convicted.³⁸⁴ General deterrence is designed to use the sentence in a given case to send the message to the public at large,³⁸⁵ while specific or special deterrence aims the message at the defendant.³⁸⁶ In each case, the focus is not on creating a sentence that is fair because it is proportional to the crime committed but the focus is on reducing future crime.³⁸⁷ The justification is utilitarian in nature.³⁸⁸

The purpose of sentences with the primary justification of incapacitation is to insure that the individual who committed the crime is

379. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 31 (1985).

380. *Id.* at 64; Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 69 (1985).

381. See, e.g., C.S. LEWIS, THE HUMANITARIAN THEORY OF PUNISHMENT, reprinted in CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 194 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) ("[T]he concept of desert is the only connecting link between punishment and justice.").

382. Immanuel Kant believed that "one man ought never to be dealt with as a means subservient to the purpose of another." IMMANUEL KANT, JUSTICE AND Punishment, reprinted in PHILOSOPHICAL PERSPECTIVES OF PUNISHMENT 103, 104 (Gertrude Ezorsky ed., 1972); see also LEWIS, *supra* note 381, at 195.

383. NICHOLAS N. KITTRIE & ELYCE H. ZENOFF, SANCTIONS, SENTENCING, AND CORRECTIONS: LAW, POLICY, AND PRACTICE 12 (1981); PACKER, *supra* note 376, at 39.

384. PACKER, *supra* note 376, at 140; RADZINOWICZ, *supra* note 377, at 10-11; VON HIRSCH, *supra* note 379, at 32.

385. KITTRIE & ZENOFF, *supra* note 383, at 12; PACKER, *supra* note 376, at 39; see also *United States v. Blarek*, 7 F. Supp. 2d 192, 202 (E.D.N.Y. 1998) (discussing Jeremy Bentham's espousal of general deterrence).

386. PACKER, *supra* note 376, at 45.

387. *Id.* at 11.

388. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 45 (1976); see TEN, *supra* note 378, at 7-8.

separated from the public so he will no longer pose a danger.³⁸⁹ Incapacitation based sentences are generally reserved for the most heinous of criminals like serial murderers or child rapists. The goal of such a sentence is to separate the dangerous individual from his potential victims.³⁹⁰ While this often means that the most serious crimes are punished most severely, as in a retribution based sentence, this is not the goal of the incapacitator. Therefore, a defendant can be punished more harshly than the crime he committed might call for because he is deemed to pose a danger to society due to the perceived likelihood that he will commit similar acts in the future.³⁹¹ With its eye on preventing the criminal from endangering others in the future, incapacitation is also a utilitarian sentence justification.

Rehabilitation as a sentencing justification is not to be confused with the programs both within and outside penal institutions that are designed to help an offender overcome whatever problem led him to criminal behavior. Programs that provide counseling, education, or vocational training designed to aid the offender in leading a crime-free life in the future may be the tools employed for a rehabilitation based sentence. As a sentencing justification, however, rehabilitation refers to crafting a sentence, including the length of any incarceration, conditioned on how long it will take the offender to free himself from whatever led him to commit crimes.³⁹² In crafting such a sentence, the importance of the seriousness of the crime is minimal in comparison to an assessment of what and how much time the offender will need to change sufficiently so that he will not re-offend.³⁹³ Rehabilitation, with its focus on changing the offender rather than making the sentence proportional to the crime, is another utilitarian sentencing justification.

Understandably, judges often wish to accomplish something they regard as meaningful when sentencing criminals. At times, the primary purpose of a sentence is to help the offender deal with the perceived problem that led him to commit the criminal act. Sometimes, the sentencing judge wishes to separate the dangerous offender from the rest of society. At other times, it is clear that the judge's goal is use the sentence to send a message either to the defendant or poten-

389. TEN, *supra* note 378, at 8.

390. KITTRIE & ZENOFF, *supra* note 383, at 13.

391. VON HIRSCH, *supra* note 379, at 24; *see also* KITTRIE & ZENOFF, *supra* note 383, at 24.

392. KITTRIE & ZENOFF, *supra* note 383, at 11, 23.

393. *See* Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problems of Hate Crimes*, 39 S.D. L. REV. 1, 42 & n.239 (1994).

tial future offenders about the price they will pay for committing a similar crime. All of these utilitarian goals are laudable.

The more a sentence reflects utilitarian principles, however, the more likely it is to skew the proportionality of the relationship between the seriousness of the crime and the harshness of the punishment.³⁹⁴ Retributionists believe that sentencing defendants to more or less time than they "deserve" (meaning the seriousness of the crime they committed) is unjust.³⁹⁵ Due to the attention hot crimes get from the public and politicians, it would be naïve to expect judges to ignore the pressure that builds on them in sentencing defendants who have been convicted of hot crimes. The press and watchdog groups often make the public aware of sentences in such cases. In most instances, the pressure in such cases is to sentence those convicted of hot crimes to heavy sentences. Therefore, with hot crimes the temptation to base a sentence primarily on utilitarian principles and impose a heavier sentence than one that fits the particular crime committed is likely to be especially intense. As a result, harsh sentences may be meted out for such crimes to first offenders or in situations where the facts or circumstances mitigate the seriousness of the offense.

As judges will often use utilitarian principles in sentencing defendants for hot crimes and, as the use of such principles may be appropriate, it would be unwise as well as ineffective to attempt to eliminate such sentencing. On the other hand, because the use of these principles can result in sentences that may be totally disproportionate to the seriousness of the crime committed, they can result in gross unfairness. The solution to this problem is to employ the principles of limiting retributivism.

Limiting retributivism allows judges to include whatever utilitarian goal they deem appropriate in determining the proper sentence

394. In the acerbic words of C.S. Lewis,

Only the expert penologist . . . in the light of previous experiment, can tell us what is likely to deter: only the psychotherapist can tell us what is likely to cure. It will be in vain for the rest of us, speaking simply as men, to say, "but this punishment is hideously unjust, hideously disproportionate to the criminal's deserts." The experts with perfect logic will reply "but nobody was talking about deserts." No one was talking about punishment in your archaic vindictive sense of the word. Here are the statistics proving the treatment deters. Here are the statistics proving that this other treatment cures. What is your trouble?

C.S. LEWIS, *supra* note 381, at 196. SEE ALSO WALKER, *supra* note 275, at 67.

395. Herbert Morris suggests that the wrongfulness of basing punishment on achieving utilitarian ends is apparent when looking at a person who would be sentenced despite being innocent of any crime. Even if deterrence or some other utilitarian goal were achieved through the sentence, it would still be unjust. HERBERT MORRIS, *PERSONS AND PUNISHMENT*, reprinted in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT*, *supra* note 382, at 121. See generally NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 75 (1972); MURPHY, *supra* note 377, at 234.

for a criminal offender. At the end of the day, though, the judge must review the sentence to decide if the use of utilitarian factors has so skewed the relationship between the crime and the punishment that the resulting sentence is grossly unfair.³⁹⁶ Norval Morris, a strong believer in making sentences proportional to crimes, wrote that just desert is not a defining principle but a limiting one.³⁹⁷ Another commentator described the benefit of limiting retributivism stating, “[C]onsiderations of justice function as checks on social utility, weighing against promoting happiness if in so doing people are treated unfairly.”³⁹⁸

When dealing with hot crimes, the primary dangers of which are excesses in many forms, use of the principle of limiting retributivism would be especially valuable. Limiting retributivism would allow a judge to consider the importance of rehabilitation, incapacitation, and/or deterrence in his or her sentence while protecting against the kind of unjust sentences that lose sight of the relationship between the seriousness of the crime itself and the harshness of the punishment.³⁹⁹

VI. CONCLUSION

This Article explored the phenomenon of the hot crime. Primarily using child sex abuse and alcohol related driving offenses as examples, this Article traced the path and trajectory of such crimes. Only by understanding what causes certain crimes to become hot, the kinds of excessive responses that hot crimes provoke, and the resulting societal impact from these responses, can we hope to avoid these types of over-reaction. As societal responses to hot crimes reflect somewhat natural human behavior, there is no foolproof way to prevent the harmful excesses that hot crimes can produce. There are, however, steps that can be taken to reduce the possibility of a crime becoming hot and to diminish the harmful effects should the crime take on such characteristics.

First, we need to recognize the symptoms that are indicative of a crime becoming hot. There needs to be effective mechanisms in existence for challenging the media and the public who exaggerate the dangers or prevalence of certain crimes or call for extreme responses

396. WALKER, *supra* note 275, at 127. While H.L. Packer believes that prevention or deterrence is the chief goal of the criminal law, he recognizes that blameworthiness (retribution) must act as a limiting principle. PACKER, *supra* note 376, at 66.

397. NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 199 (1982).

398. MURPHY, *supra* note 377, at 150.

399. In this regard, the United States Supreme Court wrote in a recent case, “Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered.” *Graham v. Florida*, 130 S. Ct. 2011, 2029 (2010).

to them. Public officials may need to change old laws or craft new ones to respond adequately to what is newly learned about certain crimes, but those laws should not overreach or have deleterious collateral consequences. Courts should not abandon traditional approaches to the interpretation of constitutional rights when dealing with such crimes. Finally, when sentencing persons convicted of crimes, especially hot crimes, judges should employ the principles of limiting retributivism to insure that the relationship between crime and punishment is not grossly disproportional.