

Letters to the Journal

Beginning with this issue, we invite readers of the OHIO STATE JOURNAL OF CRIMINAL LAW to send us your responses to articles from previous issues of the journal. Although, of course, we welcome replies in the form of Commentaries, we also hope to publish brief letters, such as the following one.

To The Journal:

Susan Bandes navigates well-traveled terrain with her article *Fear Factor: The Role of the Media in Covering and Shaping the Death Penalty* [1 Ohio St. J. Crim. L. 585 (2004)]. Few would be surprised by or would disagree with her rendition of media shortcomings—the tendency to sensationalize, to pander to public fear, and to avoid more complicated issues in favor of simple and superficial coverage. For the most part, her perceptive analysis is on target.

But ironically, the chief media sin she keenly and accurately describes, namely the failure to explore “root causes, context, complex causal chains, or multi-faceted explanations,” is also illustrated in *Fear Factor*.

Who or what is responsible for media shallowness? Are all media equally culpable? We never find out.

I’m a general assignment reporter. I’ve covered all kinds of stories, including quite a number about the criminal justice system. Most of my work deals with public policy issues. Call me defensive, but I don’t see myself reflected in *Fear Factor*, and quite frankly, it’s unreasonable to tar all media with the same brush.

To be fair, this failing is one Professor Bandes acknowledges from the outset. “[T]he folk knowledge that we construct from ‘the media’ does not tend to distinguish among particular media, or even in many cases between news and entertainment,” she writes. “For that reason, I will generally refer to ‘the media’ in this paper”

But acknowledgement of this serious weakness doesn’t excuse it.

If I were to write about the legal profession based on “folk knowledge” derived say from interviewing mob lawyers and watching *The Practice* on TV, I daresay I might legitimately be called to task.

The medium that best fits her critique is local TV news, which, sadly, is the source of information for most Americans, according to surveys. That’s where the coverage is most fragmented, given to breathless bursts of information, and most likely to stir and pander to public outrage. But it’s a mistake to lump all media together, even if she apologizes for doing so.

Notably, public broadcasting (where I work), as well as many newspapers and magazines defy the “folk knowledge” that Professor Bandes uses to impugn “the media.”

If she were to confine her analysis to most local TV stations, I would line up behind her. Although, in my opinion, it’s a mistake to suggest that shallow, local

TV reporting is somehow confined only to criminal justice issues. Professor Bandes' analysis can serve as a template to describe a hit-and-run approach of TV newsrooms to all manner of subjects. It's a culture well-suited for coverage of fires, floods and other disasters, but, as she points out, sorely deficient when it comes to reporting on any number of pressing issues, such as housing, healthcare, and education—in addition to criminal justice.

Professor Bandes correctly criticizes “the media” for not assigning a “prison beat.” But, again referring to local TV news, she will find few beats other than sports and weather.

In the coverage of criminal justice issues, Professor Bandes seems to see a focus on human emotion as a failing. I don't completely disagree, but news coverage of criminal cases shouldn't have to follow rules of evidence. Community response to crime, fear, the effects of crime on families, can be an important part of the coverage of the criminal justice system. Put in the proper context, issues and facts inadmissible in a courtroom can be an important part of the larger story.

It's worthwhile noting that the landscape of reporting and news delivery is changing. And here's where if she keeps her vow to take “a more particularized look at various media for another day,” Professor Bandes can do a real service.

According to the Project for Excellence in Journalism, audiences are dropping off for over-the-air television. Newspaper readership has declined precipitously. Cable viewership is flat. At the same time, there's a growth in ethnic and alternative media, as well as Internet use. Magazine audiences are steady, but magazines have less news content. Overall, it appears that fewer people are getting less information from more fragmented sources. How do those trends affect public knowledge about complex issues?

Some voices seem especially loud, particularly those which inhabit right-wing talk shows. How do they influence public opinion and the media?

Corporate consolidation has put control of the news media into fewer hands. How do media plutocrats affect the flow of news and information?

And finally, it seems appropriate for a legal publication to delve into the role of the legal profession. Are the media solely to blame for all the problems Professor Bandes describes?

What about their co-conspirators—armies of bar-card touting media-hungry legal beavers eager to get their mugs in front of cameras to offer whatever kind of mindless speculation they're asked to? I remember one prominent L.A. law professor asked to comment on a radio program about testimony in the O.J. Simpson case, who prefaced his analysis with: “I wasn't there, and didn't hear it, but”

Professor Bandes pities judges running for election who “are placed in the position of needing to create . . . sound bites . . . [to] prove that one is not soft on crime.” In her universe it's not the judges' fault. They're hapless victims, forced to take simplistic positions that go against their principles. Again, I'm not defending the way the media, particularly television, cover elections, but

campaigners, judges included, do need to take responsibility for the way they craft campaigns.

As for the appellate process, there's no question that TV gives it short shrift. But here, too, if one is pointing fingers, the obvious question arises: What about the lawyers? Might there be more TV coverage of the process if cameras were allowed to record it? Would allowing cameras in federal courts (they're currently banned) be a good thing? I'm not sure myself that would solve the problems Professor Bandes outlines, because as they do now, the cameras are likely to seek out only the most sensational and celebrity-driven cases, but at least the more conscientious TV producers and reporters could have a tool they could use.

Solutions? Conclusions? Bandes doesn't really have any. Not sure I do either. Certainly, there's plenty of room for reform by the news media. But I would also love to see well-organized pressure put on news executives by community groups and advocates pointing out flaws and problems with coverage. Lawyers could help remind corporate TV decision-makers that the airwaves are a public trust. And I think the bar could be more active in trying to influence star-struck lawyers to show more restraint.

Jeffrey Kaye

Jeffrey Kaye is a correspondent, based in Los Angeles, for the "NewsHour with Jim Lehrer," the week-nightly PBS news program. He has held the position since 1984.

Professor Bandes replies:

In *Fear Factor*, I set out to explore the feedback loop between media and the death penalty. I argued that media coverage of the death penalty has a role in shaping the implementation of the penalty itself. This argument examines and critiques both media portrayals of capital punishment and the system of capital punishment itself. It illustrates that implementation of the death penalty is highly susceptible to media influence at a number of crucial junctures. This susceptibility, as I argued, raises serious questions about the viability of a legal system that claims the ability to sort those who deserve to die from those who will be allowed to live. The problem I sought to address is the deeply flawed American system of capital punishment. The media play a part in that problem, but they have plenty of company.

Jeffrey Kaye would like to hear more about the role of the legal profession, about the particular role played by various media, about the reasons for media shallowness, and about solutions. I agree that all these issues are essential to explore. As to the first issue, there is of course a rich body of literature examining the role of the legal profession *vis-a-vis* the death penalty (and even as to the particular issue Mr. Kaye singles out for mention, the media's need for talking

heads and various lawyers' willingness to feed it, I am aware of several articles published in the wake of the O.J. Simpson case). In my own work, I have examined the legal system's role in the system of capital punishment on many occasions and from many vantage points (and some of these articles were footnoted in *Fear Factor*). Most recently, my colleague Andrea Lyon and I organized a two day conference on race and the death penalty (since published in the *DePaul Law Review*) which explored the myriad ways in which race infects the death penalty. The media's role was properly treated as one of many factors.

When the media's role is considered alongside the roles of judges, juries, attorneys, legislators, the lay public and all the other actors in the tragedy of the modern death penalty, the scope of the problem becomes increasingly obvious. The media are not solely to blame, but neither are they unwitting stooges. The same can be said for the elected judges Mr. Kaye mentions: they are subject to powerful influences, but, like all of us, they ultimately make their own choices. One salient characteristic of the American death penalty is that it allows and even encourages buck passing. In this complex causal chain, there are many systemic forces acting in concert, but at the same time, the systems are comprised of people, who sometimes accept responsibility for the ultimate consequences of their actions but more often do not.

Although Mr. Kaye and I agree on the importance of exploring all the strands in the complex chain, he seems to argue that all these issues should have been explored in this particular essay (for which I was given a 5000 word limit), and that the failure to do so renders the article guilty of failing to place matters in adequate context, the very sin of which I accuse the media. This analogy is weak. My critique of news coverage focused on the cumulative effect of media choices over the long term, for example the insistent focus on black on white violent crime day in and day out, despite the relative rareness of such crime. To demand that each particular work of reportage or scholarship must consider every aspect of a problem and, moreover, provide solutions, is to raise an insuperable obstacle to serious investigations of complex issues. A better solution, I think, is to collaborate, to build on the work of others, to aim for fairness and balance, and to keep focused on the problem over the long term—especially a problem as difficult and seemingly intractable as capital punishment.

Susan Bandes