Good TV Makes Bad Justice: How the Rules of Professional Conduct Can Protect Fair Trial Rights

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ABSTRACT: When prosecutors share information related to a criminal investigation with media production companies, and the media companies broadcast that information in the form of true-crime reality shows before the accused has been tried, fair trial rights that serve as a cornerstone to the American judicial system are jeopardized. The history of American jurisprudence regarding balancing the media's First Amendment rights with criminal defendants' Sixth Amendment rights has been shaped in large part by cases concerning requests for restraints upon news agencies. Courts typically view these restraints skeptically, which reflects the high value this nation places on the contributions a free press makes to democracy. The development of true-crime reality shows necessitates a different approach because of risks of hindering fair trial rights, interfering with the administration of justice, and potentially subjecting police and local governments to civil liability. Arguably, the Model Rules of Professional Conduct and their various state counterparts already prohibit attorneys and prosecutors from providing information to these true-crime television companies, but shows that clearly rely on inappropriate disclosures continue to pervade the airwaves. This Note proposes that comments should be added to the Model Rules to make clear that sharing sensitive information that will be broadcast in true-crime reality shows prior to trial will not be tolerated and will lead to attorney sanctions.

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I. INTRODUCTION

In the exciting conclusion of an episode of *Cold Justice*, a reality show about the investigation of cold case murders, the hosts of the show meet with the County Attorney of Jasper County, Iowa to discuss details the hosts and their investigators have discovered through analysis of the crime scene and interviews with witnesses.[1] The focus of the discussion is a woman named Theresa "Terri" Supino, whom the hosts believe murdered her estranged husband Steven and his girlfriend Melisa in 1983.[2] The County Attorney concludes this discussion by declaring that, as a result of the show's investigation, he is ready to indict Supino, who was interviewed by one of the show's hosts and a police officer earlier in the episode.[3] Cameras roll as the hosts, along with the county sheriff, meet with the victims' teary-eyed family members and inform them of the pending prosecution.[4] The show airs footage of police escorting a handcuffed Supino out of a building, and then displays her mugshot.[5]

Cold Justice's cameras were notably absent at the conclusion of her trial one year later, when she was acquitted of all charges.[6] While *Cold Justice* was nowhere to be seen, the local press was there to capture her statement: "[T]hey wouldn't air the show unless they had someone in custody, and that somebody was me."[7] At the end of this interview, Supino forcefully declared, "I'm going to sue somebody."[8] Despite the shortcomings of the *Cold Justice* Supino investigation, the show later returned to Iowa. On July 17, 2015, cameras were again rolling when Steve Klein was arrested in Johnson County, Iowa, following a *Cold Justice* investigation of the 1995 murder of Klein's

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1. *Cold Justice: Copper Dollar Ranch* (TNT television broadcast Mar. 28, 2014). TNT cancelled *Cold Justice* in 2015, but in 2017 the Oxygen Network ordered new episodes as part of its programming shift to solely true-crime content. Cynthia Littleton, *Oxygen Surrenders to Crime Wave in Programming Strategy Revamp*, VARIETY (Feb. 1, 2017, 9:00 AM), http://variety.com/2017/tv/news/oxygen-cold-justice-dick-wolf-crime-revamp.

2. *Cold Justice: Copper Dollar Ranch*, *supra* note 1. The victims were both killed by blunt force trauma at Steven's trailer, which was parked in an area known for high drug activity, on March 3, 1983. *Id.* During the show, the hosts allege that Supino wanted to get back together with her husband and felt betrayed by his involvement with another woman. *Id.* This theory was developed based on statements made by Supino's brother Tim. *Id.* Supino states during an interview that this is not true, and that she never had any intentions other than divorce. *Id.*

3. *Id.* During the interview, the show's primary host Kelly Siegler, a former Texas prosecutor, states during a voiceover, "In my 22 years of all the criminal cases that I have prosecuted, I have never seen a suspect talk so willingly, so much, and say such crazy things." *Id.* Siegler was referring to alleged contradictions between Supino's statements and those of witnesses, as well as Supino's own prior statements to police. *See id.*

4. *Id.*

5. *Id.*

6. *See* Grant Rodgers, *Supino Acquitted, Says: 'Leave Me the Hell Alone'*, DES MOINES REG. (Feb. 20, 2015, 2:28 PM), http://www.desmoinesregister.com/story/news/crime-and-courts/2015/02/20/supino-murder-trial-verdict/23753543 ("Supino's arrest was featured in the final scenes of the episode . . . .").

7. *Id.*

8. *Id.*

girlfriend Susan Kersten.[9] The episode about Klein aired on August 21, 2015.[10] On February 17, 2017, Klein entered an *Alford* plea[11] to charges of "willful injury causing serious injury, second-degree arson, and suborning perjury," and was sentenced to up to fifteen years in prison.[12]

Terri Supino is not the only person to receive an acquittal after having her criminal investigation and eventual indictment recorded and nationally broadcast in a reality show format. Ohio resident Steven Noffsinger was the subject of another *Cold Justice* investigation that resulted in his arrest in 2014.[13] He was eventually acquitted.[14] Joshua Singletary of Tennessee also had his murder investigation broadcast on *Cold Justice* and was eventually acquitted.[15] Both men have lawsuits pending against the show's producers and hosts, as well as the police departments that shared information with the show and ultimately arrested them.[16]

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9. Lee Hermiston, *Newly Disclosed Phone Call Leads to Break in 20-Year-Old Johnson County Murder Case*, GAZETTE (Aug. 21, 2015, 10:17 PM), http://www.thegazette.com/subject/news/public-safety/defense-attorney-demands-more-evidence-in-20-year-old-johnson-county-murder-20150821. In 1995, Kersten's body was discovered in a burning car; a medical examiner subsequently concluded that she had not been killed by the fire, but by blunt force trauma to the head. *Id.* Klein was designated a "person of interest" in the 1995 investigation, but was not arrested at that time. *Id.* The *Cold Justice* episode about Klein, titled "Up in Flames," followed investigators as they examined the important locations involved in the case and spoke to witnesses. *Cold Justice: Up in Flames* (TNT television broadcast Aug. 21, 2015). The supposed break in the case came when a witness described a phone call with Kersten the night of the murder, which ended abruptly. *Id.* Investigators and police initially believed that the murder had occurred at a time when another person of interest, Bob Gump, had no alibi for his whereabouts. *Id.* However, the witness's statements about the phone call led them to the conclusion that the murder occurred around the time of that call, substantially earlier than they initially thought. *Id.* Gump had an alibi for this earlier time, leaving Klein as the only remaining suspect. *Id.*

10. Hermiston, *supra* note 9.

11. An *Alford* plea is a type of guilty plea that allows defendants to maintain their innocence while acknowledging that the state has enough evidence to convict. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970) ("[W]e [cannot] perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when . . . a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.").

12. Lee Hermiston, *Steven Klein Facing Count of First-Degree Murder Pleads to Lesser Charge*, GAZETTE (Feb. 18, 2017, 12:27 AM), http://www.thegazette.com/subject/news/public-safety/steven-klein-facing-count-of-first-degree-murder-pleads-to-lesser-charge-20170217.

13. *See Cold Justice: Second Thoughts* (TNT television broadcast Aug. 8, 2014).

14. Joe Shouse, *Jury Acquits Noffsinger*, PAULDING PROGRESS (May 1, 2015, 3:46 PM), http://www.progressnewspaper.org/Content/News/News/Article/Jury-acquits-Noffsinger/198/1182/189655.

15. *See Cold Justice: Single Working Mom* (TNT television broadcast Feb. 28, 2014); Dessislava Yankova, *Tenn. Man Sues 'Cold Justice' for Defamation*, USA TODAY (Aug. 22, 2014, 6:54 PM), http://www.usatoday.com/story/life/tv/2014/08/22/tennessee-man-sues-cold-justice/14464363.

16. *See* Yankova, *supra* note 15; *see also* Martha Neil, *Acquitted Man Sues 'Cold Justice' Producers and Sheriff over Claimed Malicious Murder Prosecution*, ABA J. (Aug. 11, 2015, 12:35 PM), http://www.abajournal.com/news/article/recently_acquitted_man_sues_cold_justice_producers_and_sheriff_over_claimed. The Noffsinger lawsuit echoes Supino's accusation that the show's producers told the sheriff's department that the episode would not air unless there was an indictment. *See id.*

The issue also spreads far beyond *Cold Justice*. Individuals featured on other true-crime[17] shows have also been acquitted after their "story" was broadcasted to the entire nation. Taiwan Smart found himself the focus of an episode of another true-crime reality show, *The First 48*. This show follows police officers during their investigation of murders and frequently culminates in the arrest of a suspect.[18] Smart was arrested on the show, but the charges were dropped over a year later when new evidence indicating Smart's innocence came to light.[19] After being released, Smart sued the city of Miami and was awarded $860,000 in damages, plus attorney's fees.[20]

These incidents reflect a disturbing trend taking place throughout the country: Prosecutors and police are sharing information about ongoing criminal investigations with entertainment media companies that intend to produce true-crime reality shows with little regard for the rights of the accused. This behavior risks infringing defendants' rights, violates the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules") as adopted by various states, and causes substantial financial damage to state and local governments.

This Note argues that when prosecutors and police departments share information about ongoing criminal investigations with entertainment media production companies, they violate two of the Model Rules: (1) Rule 3.6: "Trial Publicity"; and (2) Rule 3.8: "Special Responsibilities of a Prosecutor."[21]

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17. For purposes of this Note, the phrase "true-crime" generally refers to media that presents a nonfictional narrative based on the facts of a criminal case. For further discussion, see *infra* Part II.B.

18. Jim DeFede, *Wrongly Accused of Double Murder, Freed by Twist of Fate*, CBS MIAMI (Feb. 5, 2014, 11:34 PM), http://miami.cbslocal.com/2014/02/05/wrongly-accused-of-double-murder-freed-by-twist-of-fate. Smart was accused of murdering two teenagers in a drug-related shooting. *Id.* He consistently maintained his innocence, but investigators were highly confident that they had solved the crime. *Id.* The detectives initially told Smart that he would be allowed to take a polygraph test, but subsequently declined to allow him to do so. *Id.* While he was incarcerated awaiting trial, it came to Smart's attention that another man, Arsenio Carter, had admitted to an inmate that he had committed the shooting that Smart was charged with. *Id.* Smart's court-appointed attorney was able to collect statements from inmates indicating Carter's guilt, and Smart eventually took and passed a polygraph test supporting his innocence. *Id.* One week later, the charges against Smart were dropped, and he was released from jail. *Id.* Following his release, a stepfather of one of the victims expressed his outrage at the damage done by the involvement of a television show in the investigation, saying, "No one cared that my boy was killed, and the cops just rushed it for a damn show . . . . Everyone was a victim in this. Them boys killed, [and] that boy who spent two years in prison for it." Terrence McCoy, *The First 48 Makes Millions off Imprisoning Innocents*, MIAMI NEW TIMES (Jan. 16, 2014, 4:00 AM), http://www.miaminewtimes.com/news/the-first-48-makes-millions-off-imprisoning-innocents-6394571. McCoy's article highlights other serious problems that have arisen during investigations filmed by *The First 48*, including the shooting death of seven-year-old Aiyana Jones during a police raid on an incorrect address in Detroit and the misidentification of Cameron Coker in Houston that resulted in his three-year incarceration before charges were dropped. *Id.* A representative for the show disregarded any legal liability for the show by pointing out that, "We simply film the investigations as they unfold . . . . Every episode states clearly that all individuals are innocent until proven guilty." *Id.*

19. DeFede, *supra* note 18.

20. *Fla. Man Wrongly Accused of Murder Awarded Cash*, CBS NEWS: CRIMESIDER (June 17, 2015, 9:40 AM), http://www.cbsnews.com/news/florida-man-wrongly-accused-of-murder-awarded-cash.

21. *See* MODEL RULES OF PROF'L CONDUCT rr. 3.6, 3.8 (AM. BAR ASS'N 2016).

Comments should be added to both rules to make abundantly clear that this behavior is unacceptable and will result in sanctions.

Part II of this Note explores the modern history of the efforts by courts, legislatures, and the ABA to balance First Amendment press and free speech protections with Sixth Amendment trial protections, as well as the rise in popularity of true-crime entertainment media. Part III addresses the harms done by state participation in true-crime reality shows: defendants' fair trial rights are jeopardized, the administration of justice is impaired, and states are subjected to civil liability. Part IV proposes that Model Rules 3.6 and 3.8 should be altered to clearly reflect that prosecutors may be sanctioned when either they or the police departments conducting investigations on their behalf shares information with entertainment production companies for use in true-crime reality shows that air prior to the suspect's trial.

II. TRUE-CRIME ENTERTAINMENT MEDIA THREATENS TO SKEW THE BALANCE BETWEEN THE FIRST AND SIXTH AMENDMENTS

While the United States' struggle to balance First Amendment free press rights against Sixth Amendment fair trial rights has a long and storied history, the fairly recent rise of true-crime entertainment media adds a new wrinkle to that struggle. Both the ABA Standards for Criminal Justice: Fair Trial and Free Press ("Fair Trial and Free Press Standards") and the Model Rules offer attorneys guidance for dealing with this difficult balance. However, problems clearly remain: Fair trial rights are still being jeopardized; and lawsuits are being brought alleging constitutional violations caused by attorney and law enforcement participation in true-crime reality show production. Subpart A discusses the tension between First and Sixth Amendment rights; Subpart B discusses the history of true-crime entertainment media and the modern problem that it presents; and Subpart C discusses the attempts by the ABA to ease that tension.

A. MODERN COURTS STRUGGLE WITH THE TENSION BETWEEN FIRST AMENDMENT AND SIXTH AMENDMENT RIGHTS

Modern media technology makes balancing free press and fair trial rights extremely difficult. This problem reached its boiling point in the 1954 murder trial of Sam Sheppard, which suffered what the Supreme Court referred to as a "carnival atmosphere" at the hands of the press.[22] During the *Sheppard* trial, the media ran roughshod over proceedings—they filled the courthouse to an extent that "made confidential talk among Sheppard and his counsel almost impossible";[23] they published the names and home addresses of all prospective jurors;[24] they published statements by a

22. Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).

23. *Id.* at 344.

24. *Id.* at 342. After the names and addresses were published, "anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors." *Id.* Newspapers also ran photographs of all jurors on multiple

nontestifying police captain intending to discredit Sheppard's testimony about police mistreatment;[25] and they generally "caused Sheppard to be deprived of that 'judicial serenity and calm to which [he] was entitled.'"[26] The trial court repeatedly denied defense motions aimed at protecting the defendant from this environment, asserting "that it lacked power to control the publicity about the trial" due to First Amendment protections afforded to the media.[27]

The Supreme Court disagreed and pointed out that the trial court possessed—and should have exercised—the power to control press presence in the courtroom, regulate the behavior of the press, and make sure that witnesses and jurors alike were protected from press interference.[28] The Court "note[d] that unfair and prejudicial news comment on pending trials has become increasingly prevalent" and noted the risk posed to the defendant's right to a fair trial.[29] Although problems with the trial process may be addressed at the appellate level, the Court pointed out that it makes more sense to prevent the issues at their source, saying that "the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."[30]

In reaction to the *Sheppard* mess, the ABA published the Fair Trial and Free Press Standards.[31] These standards initially weighed heavily in favor of protecting fair trial rights over the freedom of the press.[32] As a result of the Supreme Court's stern rebuke of the *Sheppard* trial court and the first edition's emphasis on protecting fair trial rights, judges began issuing "broad gag orders . . . enjoin[ing] any extrajudicial comment on a pending case."[33]

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occasions. *Id.* at 345 ("During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone.").

25. *Id.* at 349.

26. *Id.* at 355 (alteration in original) (quoting Estes v. Texas, 381 U.S. 532, 536 (1965)). In addition to the issues discussed above, newspapers also regularly published stories with headlines that were damaging to Sheppard, such as a quotation from the victim's cousin alleging that the victim had labeled him "Dr. Jekyll and Mr. Hyde," and another from a police captain who called Sheppard "a bare-faced liar." *Id.* at 348–49, 357. Sheppard filed a motion for change of venue in response to all of the highly prejudicial press coverage, but was denied. *Id.* at 348. Defense attorneys conducted a poll of random citizens, asking whether they thought Sheppard was guilty or innocent, in an effort to gather statistics to support their motion for change of venue. *Id.* at 345–46. In response, a newspaper ran a story that said the technique "smacks of mass jury tampering" and called for intervention by the state bar association. *Id.*

27. *Id.* at 357.

28. Sheppard v. Maxwell, 384 U.S. 333, 357–62 (1966).

29. *Id.* at 362.

30. *Id.* at 363.

31. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS, at ix (3d ed. 1991) ("The first edition of these Fair Trial and Free Press Standards, published in 1968, relied almost entirely on the conceptual framework of *Sheppard*.").

32. *Id.*

33. *Id.*

However, the pendulum swung drastically in the other direction with the second edition, which was "designed to shift the balance radically in the direction of a free press."[34] The second edition once again reacted to a Supreme Court case, *Nebraska Press Association v. Stuart*.[35] *Nebraska Press* dealt with a trial court's order enjoining the press from reporting about specific aspects of the case prior to jury empanelment.[36] Specifically, the press was prohibited from reporting on details such as a possible confession, the identities of victims, the existence of a note written by the accused the day of the murders, and statements made by the accused to third parties.[37] A group of press agencies filed suit, and the case was eventually appealed to the Supreme Court.[38] After a discussion of several cases, including *Sheppard*, the Court held that there was not sufficient risk of deprivation of an impartial jury to warrant a prior restraint on press activity.[39] The Court noted the 1971 decision *New York Times Company v. United States*, which placed a heavy burden on anyone seeking a "presumptively unconstitutional" prior restraint on the press.[40]

In light of the *Nebraska Press* decision, the second edition of the Fair Trial and Free Press Standards attempted to harmonize *Nebraska Press* with *Sheppard* by

> adopt[ing] new or revised standards which placed an absolute ban upon gag orders on the press, severely restricted gag orders on lawyers, precluded judges from using their powers of contempt to enforce any gag order actually issued, and prohibited judges from issuing a courtroom closure order without the consent of the defendant.[41]

The balance did not hold. Like the first edition, the second edition of the Fair Trial and Free Press Standards was "almost immediately outrun by the fast swirl of fair trial-free press developments."[42] The third (and current) edition of the Fair Trial and Free Press Standards attempted to find equilibrium by walking back some of the above-described restrictions on judicial power, while emphasizing that the changes are not intended "to promote a return to the subjugated press approach of the *Sheppard* era."[43] The

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34. *Id.*

35. *Id.* at xi ("The second edition was an equally ambitious attempt to balance *Sheppard* with the then recently announced reaffirmation of a free press in *Nebraska Press Association v. Stuart*.").

36. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 543–45 (1976).

37. *Id.* at 543–44.

38. *Id.*

39. *Id.* at 569.

40. *Id.* at 558; *see* N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (per curiam) (holding that an attempt by the United States government to prevent the publication of details about the Vietnam War did not meet the high burden necessary to justify a prior restraint).

41. ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS, *supra* note 31, at x (footnotes omitted).

42. *Id.* at xi.

43. *Id.* at x.

current edition also appeared to predict the coming storm, astutely pointing out that "the proliferating commercialization of 'real crime' dramas, often broadcast prior to indictment or trial, will . . . add a new dimension to the dilemma of fair trial-free press."[44]

B. TRUE-CRIME ENTERTAINMENT MEDIA: HISTORY, POPULARITY, AND A NEW VERSION OF AN OLD PROBLEM

True-crime entertainment media is a wildly popular genre that encompasses many different formats, such as books (e.g., the groundbreaking nonfiction novel *In Cold Blood* by Truman Capote, which is often credited as creating the modern true-crime genre[45]), internet-based productions (e.g., podcasts like *Serial*[46] and Netflix series like *Making a Murderer*,[47] both of which received widespread national attention), feature films (e.g., *Zodiac*[48] and *Monster*,[49] among many others), and a wide variety of television programs, some displayed as fictionalized portrayals and others as documentary-style reality content. All of these true-crime formats, as well as true-crime reality shows, share common traits: they form details about a nonfictional criminal investigation into an entertaining narrative; they communicate that narrative from a specific perspective; and they reach large audiences. However, true-crime reality shows are uniquely capable of quick production and broadcast, and are therefore the most likely to air prior to a trial and jeopardize a defendant's rights.[50]

Additionally, reality-style content has largely been responsible for the massive popularity of true-crime entertainment media. Once it became

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44. *Id.* at xi–xii.

45. *See* Philip Eil, *"In Cold Blood" Turns 50: Capote's Spellbinding True Crime Novel Gave Us "The Jinx," "Serial" and "Making a Murderer"*, SALON (Jan. 23, 2016, 8:30 PM), http://www.salon.com/2016/01/23/in_cold_blood_turns_50_capotes_spellbinding_true_crime_novel_gave_us_the_jinx_serial_and_making_a_murderer (describing *In Cold Blood*'s place as "a landmark book in the development of American true crime writing" that has gone on to influence various true-crime entertainment media of all types).

46. *Serial*, WBEZ CHI. (2014), https://serialpodcast.org. The first season of *Serial* examined the investigation and conviction of a teenager for the murder of his ex-girlfriend, pointing out the questionable nature of that conviction, and it was immensely popular. *See* David Carr, *'Serial,' Podcasting's First Breakout Hit, Sets Stage for More*, N.Y. TIMES (Nov. 23, 2014), http://www.nytimes.com/2014/11/24/business/media/serial-podcastings-first-breakout-hit-sets-stage-for-more.html.

47. *Making a Murderer* (Netflix Dec. 18, 2015). *Making a Murderer* was a highly popular Netflix documentary that examined the investigation of a murder which resulted in the conviction of a teenager and a man who had previously been freed from prison after 18 years because his conviction for an unrelated crime was proven to have been wrongful. *See* Paul Tassi, *Why 'Making a Murderer' Is Netflix's Most Significant Show Ever*, FORBES (Jan. 3, 2016, 11:48 AM), http://www.forbes.com/sites/insertcoin/2016/01/03/why-making-a-murderer-is-netflixs-most-significant-show-ever (suggesting that the show "is its own form of justice, showing the real heroes and villains of the case for the world to see").

48. *Zodiac* portrayed the occurrence and investigation of a still unsolved string of murders that took place in California in the late 1960s and early 1970s. ZODIAC (Phoenix Pictures 2007).

49. *Monster* was a highly popular and award-winning film portrayal of notorious American serial killer Aileen Wuornos. MONSTER (DEJ Productions & Media 8 Entertainment 2003).

50. *See supra* Part I.

apparent that the American market was highly receptive to content that is presented as unscripted and real, companies exploited those preferences in the true-crime context by creating programs such as *Cops* and *America's Most Wanted*, which provided an archetype that has been adopted ad nauseam throughout the true-crime genre, including in multiple current true-crime reality shows such as *Cold Justice*, *The First 48*, *Dateline*, *Forensic Files*, and *Cold Case Files*, among many others. The genre has proliferated so widely within the entertainment market that there is now an entire television channel, Investigation Discovery, dedicated to true-crime reality content. The channel has been received extremely well and is "the only cable network launched in the last 10 years to land among 20 top-rated channels."[51] In 2017, the Oxygen Network followed suit and announced its intention to adopt a focus on true-crime programming.[52]

Reality programming has so thoroughly saturated the American entertainment market that it is easy to forget that the modern incarnation is a relatively recent phenomenon, albeit one that traces back to the early days of television. The term "reality show" itself is somewhat elusive to define, although the primary common thread is the lack of actors and an "unscripted" portrayal of events.[53] Those elements have been combined with a wide variety of entertainment formats, leading one scholar to remark that "[the reality genre's] prehistory can be traced back through documentary, quiz shows, talent competitions and talk shows – any television format that over the decades has invited 'real people' before the camera."[54]

Perhaps the earliest example of a television show starring "real people" was *Candid Camera*, which was the first show ever broadcast by the then-emerging ABC network in 1948.[55] *Candid Camera* employed hidden surveillance cameras to record individuals caught in unusual situations.[56] Skits built up to an event known as "the reveal," which was the disclosure to the

51. Stephen Battaglio, *Investigation Discovery Becomes Top Cable Channel for Women with True Crime All the Time*, L.A. TIMES (Jan. 5, 2016, 3:00 AM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-investigation-discovery-20160105-story.html.

52. Littleton, *supra* note 1.

53. MISHA KAVKA, REALITY TV 5 (2012) ("If there is a simple definition of reality television then we might say that the term refers to unscripted shows with non-professional actors being observed by cameras in preconfigured environments.").

54. *Id.* at 13.

55. *Id.* at 16. Prior to its television debut, *Candid Camera*'s predecessor, *Candid Microphone*, was broadcast by radio. *Id.* at 15. The *Candid* concept began as a project aimed simply at using covert recording to capture "the beauty of everyday conversation." *Id.* at 16 (quoting ALLEN FUNT WITH PHILIP REED, CANDIDLY, ALLEN FUNT: A MILLION SMILES LATER 26 (1994)). However, when producer Allen Funt realized that normal conversations often are not particularly entertaining, he added a new element: an event intended to stimulate a reaction. *See id.* ("'[E]veryday conversation' was only truly interesting if people were given something to react to, a strange situation or everyday crisis that would test their responses."). Regarding the use of hidden surveillance techniques employed by *Candid Microphone*, one reviewer predicted that "[t]he possibilities are limitless: the prospect is horrifying. Wait till they get the Candid Television Camera. You won't be safe in your own bathtub." *Id.* at 20 (quoting FUNT WITH REED, *supra*, at 30).

56. *Id.* at 17.

subject that they were in fact being filmed, typically signaled by the catchphrase, "Smile, you're on *Candid Camera*!"[57] The reveal presented the novel opportunity for the home viewer to make a connection with the subject of the show because the subject would typically look directly into the camera, as if toward the viewer. "In the reveal, . . . it is not only the duped who become knowing but also the knowing who recognise their affinity with the duped . . . ."[58] This creates an invaluable opportunity for television production companies who are always looking for ways to hook viewers—as one scholar noted about the advertising-funded model of production: "The goal of American TV is to give people programming that they are willing to watch or, at the very least, programming from which they will not turn away."[59]

Later, true-crime reality shows offered another way to keep audiences from turning away: taking advantage of the anticrime political discourse emerging in the 1980s.[60] Two highly popular shows during the late 1980s that utilized the tough-on-crime environment to drive viewer engagement were *Cops* and *America's Most Wanted*, both of which were broadcast by Fox and eventually became longstanding staples of the network's Saturday night lineup.[61] *Cops* featured (and continues to feature) footage gathered by camera crews riding along with police officers, edited in a manner that typically begins by showing the early stages of a criminal investigation and concludes with the apprehension of a suspect.[62] *America's Most Wanted* invited viewers to take an active role in solving crimes.[63] The show typically involved reenactments of criminal behavior committed by an identified but unapprehended suspect, with a call to action from host John Walsh for viewers to "make a difference" by reporting information about the featured suspect.[64]

Since *Cops* and *America's Most Wanted* created the archetype, a huge number of media productions have allowed the viewer to see the criminal justice system in action; some are broadcast only after a conviction has been secured (e.g., HBO's groundbreaking *Paradise Lost: The Child Murders at Robin*

57. *Id.* at 18.

58. *Id.*

59. Ted Magder, *Television 2.0: The Business of American Television in Transition*, *in* REALITY TV: REMAKING TELEVISION CULTURE 141, 146–47 (Susan Murray & Laurie Ouellette eds., 2d ed. 2009).

60. KAVKA, *supra* note 53, at 56. Kavka points out that the elevated focus on crime in the 1980s "had less to do with actual increases in crime than with heightened discourses of criminalisation and the adoption of greater punitive measures." *Id.*

61. *Id.* at 53.

62. *See id.* at 54. Kavka points out that *Cops* is intended to portray the investigation as if the viewer is accompanying the police, an effect accomplished somewhat ironically through the use of "highly selective editing." *Id.* Kavka further describes the techniques employed by *Cops* as "generating reality *effects* rather than framing reality naturalistically [so that] actuality becomes 'reality' and reality becomes the source of viewer engagement." *Id.* The narrative arc is guided by a voice-over provided by the police officer being shadowed, and "the storyline in each case achieves – or, more accurately, ascribes – closure." *Id.* at 59. Regarding the benefit that police get from participating in such a program, Kavka says that "[i]t is of course in the interests of the police that their work be represented as effective and their methods as justified." *Id.* at 55.

63. *Id.* at 53.

64. *Id.* at 53–54.

Hood Hills, which followed the investigation of the grisly murder of three children, culminating in the arrest and conviction of three teenagers),[65] while others cover an investigation and arrest but air before a trial has occurred.[66] It is this latter category that raises the most serious fair trial concerns because of the substantial possibilities of creating juror bias,[67] influencing witness testimony,[68] and interfering with the administration of justice.[69]

True-crime reality shows that air before the underlying case has been resolved present a new variation on the tension between the First and Sixth Amendments. The Supreme Court's jurisprudence has led to restraints on media being met with a high degree of skepticism, but much of that jurisprudence has been developed by challenges to press coverage, rather than entertainment media.[70] This is an important distinction to make because entertainment media is lacking an attribute that the Court frequently mentions when conducting its newscentric analysis: The primary purpose of news coverage is to inform the public of relevant current events, and it is this public awareness that encourages proper behavior by those involved in the criminal justice process.[71] Entertainment media, including true-crime reality shows, is designed not to inform, but to arouse interest that translates to more

65. PARADISE LOST: THE CHILD MURDERS AT ROBIN HOOD HILLS (HBO 1996). At the film's conclusion, three teenagers, who proclaimed their innocence throughout, were convicted of the murders. Following the conviction, a movement developed whose stated intention was to "Free the West Memphis Three," generating books and sequels that focused on the investigation of the crime and possible alternative theories. *See generally* MARA LEVERITT, DEVIL'S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE (2002) (detailing the investigation of the crime and suggesting the possibility that one victim's stepfather was the true culprit); PARADISE LOST 2: REVELATIONS (HBO 2000) (raising questions about the validity of the evidence used to support the conviction). Ultimately the West Memphis Three were freed from prison after making *Alford* pleas. Their release was the subject of yet another sequel. PARADISE LOST 3: PURGATORY (HBO 2011).

66. Such as *Cold Justice, The First 48*, and many other episodic productions that portray their narratives in a documentary-style. *See, e.g.*, *Cold Justice: Copper Dollar Ranch*, *supra* note 1; *Cold Justice: Up in Flames*, *supra* note 9; *The First 48: Straight Menace* (A&E television broadcast Mar. 11, 2010); *see also* Terrence McCoy & Craig Malisow, *The First 48 Makes Millions While the Innocent Have Their Lives Ruined*, HOUS. PRESS (Jan. 29, 2014, 4:00 AM), http://www.houstonpress.com/news/the-first-48-makes-millions-while-the-innocent-have-their-lives-ruined-6600580 ("When the episode, 'Straight Menace,' aired eight months later, Coker wasn't able to watch, since he was in Harris County Jail awaiting trial on the murder charge.").

67. *See infra* Part III.A.1.

68. *See infra* Part III.A.2.

69. *See infra* Part III.B.

70. *See supra* Part II.A.

71. *See* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.'" (alteration in original) (quoting Craig v. Harney, 331 U.S. 367, 374 (1947))).

viewers and ultimately to increased ad revenue.[72] This crucial distinction necessitates an alternate approach when analyzing restrictions on First Amendment media rights that are unrelated to news reporting.

C. THE MODEL RULES OF PROFESSIONAL CONDUCT PROVIDE GUIDANCE REGARDING THE PRESERVATION OF SIXTH AMENDMENT RIGHTS

Similar to the interplay between emerging case law and the Fair Trial and Free Press Standards, the Model Rules have cyclically evolved along with the Fair Trial and Free Press Standards.[73] Iowa is among the many states that has adopted the Model Rules into its statutory framework.[74] Two of the rules have particular applicability to the issue of prosecutor and police participation in true-crime reality shows: Model Rules 3.6 and 3.8.

1. Model Rule of Professional Conduct 3.6: "Trial Publicity"

Model Rule 3.6(a) reads:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.[75]

The first comment to this rule acknowledges that balancing the important interests involved is a delicate process involving consideration of both the need to restrict the flow of potentially prejudicial information to the public and the need of the public to know important details of ongoing legal proceedings.[76] The rule goes on to list a number of exceptions that allow a

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72. *See* Magder, *supra* note 59, at 146 ("To say the least, the U.S. TV market is awash with advertising revenue, which goes a long way to explaining how the system works. It is sometimes said that TV, as a business, does what any business tries to do: give customers what they want or need at an agreeable price, and, over time, develop a stable and trustworthy commercial relationship. But, in the case of television, the customer is really the advertiser, not the viewer." (footnote omitted)).

73. ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS, *supra* note 31, at 2 (stating that "[the third edition of standard 8-1.1] has been modified to conform more closely to Model Rule of Professional Conduct 3.6 (1982), which was itself patterned on this standard").

74. *See generally* IOWA R. OF PROF'L CONDUCT (2015).

75. MODEL RULES OF PROF'L CONDUCT r. 3.6(a) (AM. BAR ASS'N 2016). It is worth noting that Rule 3.6(b) lists several exceptions to subsection (a). *See id.* r. 3.6(b); *infra* note 146 and accompanying text. It is also worth noting that the rule's Iowa counterpart, Rule 32:3.6(e), requires a disclosure statement "explaining that a criminal charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty" when a lawyer releases information that falls under the exceptions of subsection (b). IOWA R. OF PROF'L CONDUCT r. 32:3.6. The episode of *Cold Justice* that focused on Steven Klein displayed this disclosure during the closing credits; the episode that focused on Theresa Supino had no such disclosure. *See Cold Justice: Copper Dollar Ranch*, *supra* note 1 (failing to display a disclosure statement); *Cold Justice: Up in Flames*, *supra* note 9 (displaying a disclosure statement).

76. *See* MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 1 ("It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.

prosecutor to release basic details about ongoing litigation to the public.[77] Despite those exceptions, Comment [3] characterizes the rule as "a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[78] Comment [5] expands on this, listing "subjects that are more likely than not to have a material prejudicial effect," such as "the character, credibility, reputation or criminal record of a party, suspect . . . or the identity . . . or the expected testimony of a party or witness"; "the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement"; "the identity or nature of physical evidence expected to be presented"; and "any opinion as to the guilt or innocence of a defendant or suspect."[79]

2. Model Rule of Professional Conduct 3.8: "Special Responsibilities of a Prosecutor"

Model Rule 3.8(f) reads:

> The prosecutor in a criminal case shall: except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.[80]

This rule adds to Rule 3.6(e) the responsibility of not only avoiding statements likely to result in prejudice at trial, but also avoiding statements with a "substantial likelihood of heightening public condemnation of the accused."[81] Comment [1] following the Rule 3.8 points out that:

Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.").

77. *See id.* r. 3.6(b); *infra* note 146 and accompanying text.

78. MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 3.

79. *Id.* r. 3.6 cmt. 5.

80. *Id.* r. 3.8(f).

81. *Id.*

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.[82]

In addition to this restriction on a prosecutor's speech, the rule notably requires that prosecutors also "exercise reasonable care" to make sure that those associated with the prosecutor's office, including police, do not make statements that would violate Rule 3.6 or 3.8.[83] Every state except California has adopted either identical or modified versions of the Model Rules.[84] One scholar, Sebrina Mason, noted when discussing Illinois' identical rule that "this rule ensures that a prosecutor will not use police officers to disseminate information," closing a loophole that otherwise would have allowed prosecutors to gain an unethical tactical advantage while avoiding disciplinary repercussions.[85]

Mason then discussed the fact that prosecutors around the country have taken issue with this portion of the corresponding rule, particularly with the vagueness of the requirement of "reasonable care."[86] Mason offered some possible precautions that would demonstrate reasonable care on the part of prosecutors, specifically: providing law enforcement officers training about the requirements of Rule 3.8; monitoring law enforcement behavior for compliance; and instructing officers how to appropriately handle media requests.[87]

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82. *Id.* r. 3.8(f) cmt. 1.

83. *Id.* r. 3.8(f).

84. *State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Apr. 16, 2017).

85. Sebrina A. Mason, *Policing the Police: How Far Must a Prosecutor Go to Keep Officers Quiet?*, 26 S. ILL. U. L.J. 317, 321 (2002).

86. *Id.* at 327. Mason mentions that a member of the Illinois Attorney Disciplinary and Regulation Commission stated during an interview that lawyers looking for clarification of the phrase "reasonable care" should look to the preamble of the Illinois Rules. *Id.* at 328. That preamble defines reasonable as "the conduct of a reasonably prudent and competent lawyer." ILL. R. OF PROF'L CONDUCT r. 1.0(h) (2010). The Iowa Rules offer that exact same definition in their terminology section. IOWA R. OF PROF'L CONDUCT r. 32:1.0(h) (2015).

87. Mason, *supra* note 85, at 329–33. With regard to instructing police officers about the requirements of the rule, Mason notes that Model Rule 5.3 requires lawyers to train their nonlawyer employees about the ethical obligations required of an attorney (and by extension their staff) with attention given to the fact that those employees "do not have legal training and are not subject to professional discipline." *Id.* at 329–30 (quoting MODEL RULES OF PROF'L CONDUCT r. 5.3 cmt. 2). Mason also warns that a single training session may not be adequate, and suggests holding regular seminars on the subject of ethical compliance and being available to answer any questions that officers may have. *Id.* at 330. Mason says that regular seminars might also help with monitoring compliance, and suggests having officers promise in writing to comply and take tests to demonstrate their understanding. *Id.* at 332.

III. PROSECUTORS AND POLICE WHO PARTICIPATE IN REALITY ENTERTAINMENT MEDIA ARE JEOPARDIZING DEFENDANTS' FAIR TRIAL RIGHTS, INTERFERING WITH THE ADMINISTRATION OF JUSTICE, AND SUBJECTING STATE AND LOCAL GOVERNMENTS TO POTENTIAL CIVIL LIABILITY

Despite the warnings provided in the Model Rules and their state counterparts against extrajudicial statements that are either prejudicial or heighten public condemnation,[88] prosecutors and police have participated in and shared information with true-crime reality shows. Although the motivations of prosecutors and police are likely noble—e.g., the desire to locate additional witnesses who might contact authorities after viewing the show—there are typically other ways to pursue those ends, such as simply conducting further investigation or setting up a tip line, that would not pose the risks that reality shows introduce. True-crime entertainment media that documents the investigation of a crime and airs prior to the trial of the accused is a potentially serious problem throughout the United States for three primary reasons: (1) it can affect the suspect's fair trial rights; (2) it can interfere with the administration of justice; and (3) it can subject police and local governments to liability in expensive civil suits. This Part takes a more in-depth look at each of these problems and explore why existing protections are inadequate.

A. *TRUE-CRIME ENTERTAINMENT MEDIA AFFECTS SUSPECTS' FAIR TRIAL RIGHTS*

A defendant's right to a fair trial is a concept that is deeply embedded in the American consciousness, as exemplified by protections granted in the U.S. Constitution.[89] The Sixth Amendment specifically mentions that in a criminal prosecution, the defendant has a right to be tried "by an impartial jury."[90] The Due Process Clause of the Fourteenth Amendment forbids the deprivation of liberty, such as imprisonment, "without due process of law."[91] True-crime reality shows jeopardize these rights in two specific ways: they risk prejudicing the jury pool if potential or selected jurors watch the show before or during

88. *See supra* Part II.C.

89. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."); *Id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). While the Constitution certainly provides additional trial protections, the protections above are specifically implicated and placed at risk by the subject of this Note.

90. *Id.* amend. VI.

91. *Id.* amend. XIV, § 1.

their service; and they create the possibility that witnesses will not testify accurately, thereby securing a conviction based on inaccurate evidence.

1. True-Crime Reality Shows Can Generate Jury Prejudice

Trial by a fair and impartial jury is a cornerstone of the American criminal justice system and provides crucial protection against unjust conviction.[92] Courts have the important responsibility of protecting defendants' Sixth Amendment rights, and those rights must be kept in mind when they consider whether a restriction on First Amendment rights is appropriate. Regarding this pressure, the *Sheppard* Court noted that the media "must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.'"[93]

Voir dire is one legal procedure that protects criminal defendants' Sixth Amendment rights. However, the *Sheppard* Court noted that it did not consider voir dire to be an adequate protection in all circumstances. It pointed out that in another case where media concerns were raised, *Marshall v. United States*, the Court overturned a conviction despite the jurors' claims during voir dire "that [they] would not be influenced by the news articles, that [they] could decide the case only on the evidence of record, and that [they] felt no prejudice against petitioner as a result of the articles."[94] There has been a shift since *Sheppard*, however, and modern courts are much more willing to accept voir dire as a safeguard against possible jury prejudice. In one example, *Skilling v. United States*, the Court stated that "[p]rominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*."[95] This point of view demonstrates that courts are aware

92. *See id.* amend. VI.

93. Sheppard v. Maxwell, 384 U.S. 333, 350–51 (1966) (alteration in original) (quoting Cox v. Louisiana, 379 U.S. 536, 583 (1965) (Black, J., dissenting)). The Court pointed out that "[a]mong these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources," raising the concern that the jury would be so influenced by what it had seen in media reports that it would not be able to impartially decide the case. *Id.* at 351.

94. *Id.* (quoting Marshall v. United States, 360 U.S. 310, 312 (1959)). The adequacy of voir dire has been the subject of scholarly criticism. One scholar points out that voir dire rules are not applied consistently, noting that "[a]s a result of the broad discretion granted to trial courts and the restrained review of the Supreme Court and other appellate courts, voir dire practices vary greatly from jurisdiction to jurisdiction and even among judges within the same jurisdiction." Vida B. Johnson, *Presumed Fair?: Voir Dire on the Fundamentals of Our Criminal Justice System*, 45 SETON HALL L. REV. 545, 564 (2015). Johnson also notes that pushes to improve the efficiency of the trial process have led some jurisdictions to impose rules (such as voir dire conducted by judges rather than by attorneys) that render voir dire less effective. These pushes for efficiency continue to occur despite the fact that jury trials occur less frequently today than in years past. *Id.* at 565–66. She also points out that these problems are likely to affect indigent defendants disproportionately, because "[d]efendants with resources (and prosecutors and police) can spend funds investigating prospective jurors, including hiring jury consultants or investigators with expertise in researching the backgrounds of prospective jurors." *Id.* at 567 (footnote omitted).

95. Skilling v. United States, 561 U.S. 358, 381 (2010) (citing Irvin v. Dowd, 366 U.S. 717, 722 (1961)); Reynolds v. United States, 98 U.S. 145, 155–56 (1879)). *Skilling* dealt with the

that jurors are deciding cases where they have some awareness of factual background before the trial even begins, and those same courts are confident that jurors are capable of setting aside any preconceived notions that they may have formed. However, the *Skilling* Court also indicated that there needs to be an evaluation of the specific circumstances of the media involved in each case, including the "depth and extent" of the media in question.[96]

In terms of this "depth and extent," reality entertainment media is an entirely different animal than the news reports that courts have historically assessed. While news reports are primarily focused on informing the public, reality shows are focused on entertaining an audience in order to increase ratings and ultimately increase network revenue from ad sales.[97] Courts that have considered prior restraint issues—where a party requests an injunction against publication—have emphasized the importance of access to information by the public. For example, in *New York Times Company v. United States* the Court said that "[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."[98] The problem addressed by this Note is vastly different from the one addressed by the *New York Times* Court, however. While *New York Times* dealt with a government attempt to prevent the press from reporting news—creating a standoff between First Amendment rights and national security issues[99]—the issue at hand requires balancing entertainment media against the risk posed to defendants' Sixth Amendment right to a trial before an impartial jury. While the First Amendment is still implicated, entertainment media does not provide the crucial public service that news media provides.[100]

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prosecution of a high-ranking Enron executive who claimed that the high amount of publicity involved resulted in his conviction by a prejudiced jury. *Id.* at 385. The Court rejected Skilling's contention, and took note that appellate courts should be hesitant to contradict a trial judge's finding that the media did not create a prejudicial environment because the judge resides in the area where publicity was likely taking place and can therefore evaluate the amount and content of that publicity. *Id.* at 386 (citing Mu'Min v. Virginia, 500 U.S. 415, 427 (1991)). It should be noted that the media in question in *Skilling* were "hundreds of news reports detailing Enron's downfall," rather than nationally broadcast entertainment media. *Id.* at 369.

96. *Id.* at 386 (quoting *Mu'Min*, 500 U.S. at 427).

97. *See* Magder, *supra* note 59, at 145–46 ("The challenge for television's managers and programmers is to grab the attention of viewers and hold on to them for as long as possible" because "[t]hat attention is sold to advertisers" who spent over $60 billion on advertising spots in 2002, an amount in excess of the combined television ad expenditures in "Australia, Canada, France, Germany, Italy, Japan, Mexico, the Netherlands, Spain, Sweden, Switzerland, and the United Kingdom," whose total expenditures were only $52 billion.).

98. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971). *New York Times* addressed an attempt by the United States government to obtain an injunction against the popular newspaper (as well as the *Washington Post*) to prevent them from running a story containing classified details about the government's involvement in the Vietnam War. *Id.* at 714. The government argued that the release of that information would result in national security threats. *Id.* at 718. The Court rejected that argument, stating that "[t]he Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." *Id.* at 717.

99. *Id.* at 718.

100. *See supra* notes 70–72 and accompanying text.

But entertainment media has just as much potential to affect the jury pool. This concern was at the forefront of *Hunt v. National Broadcasting Co.*, which dealt with an attempt by a defendant to obtain an injunction against the NBC broadcast of a docudrama titled "Billionaire Boys Club."[101] Hunt was accused of murdering two people, Ronald Levin and Hedayat Eslaminia, and at the time of his litigation against NBC, he had already been convicted of Levin's murder.[102] While Hunt was awaiting trial for Eslaminia's murder, NBC's docudrama aired.[103] The docudrama depicted a dramatized account of Hunt's life, and portrayed Hunt as the unrepentant murderer of both Levin and Eslaminia.[104] Hunt argued that an injunction against broadcast was crucial to protect his Sixth Amendment right to an impartial jury, both in the trial for Eslaminia's murder as well as in any potential retrial for Levin's murder.[105]

The district court rejected his motion, holding that an injunction against broadcast would be a prior restraint that would violate NBC's First Amendment rights.[106] The Ninth Circuit affirmed that denial, finding that Hunt failed to meet the high burden required to justify a prior restraint on jury prejudice grounds laid out in *Nebraska Press*: that the absence of prior restraint "would prevent securing twelve jurors who could, with proper judicial protection, render a verdict based only on the evidence admitted during trial."[107] Although Hunt failed to meet the very high burden of the *Nebraska Press* test, the possibility remained that jurors had seen the docudrama, and that the show had made an impression in their minds regarding Hunt's guilt. The court acknowledged that "approximately 21.3%" of the population in the county where jury selection occurred had seen the

101. Hunt v. Nat'l Broad. Co., 872 F.2d 289, 290 (9th Cir. 1989).

102. *Id.*

103. *Id.* at 290–92.

104. *See* Lisa Karen Garner, *Billionaire Boys' Club: Billionaires by Crime?*, 10 LOY. ENT. L.J. 573, 579–80 (1990) (noting one viewer's observation "that the docudrama 'ignored—almost entirely—the defense version of what happened,'" and the statement by a Los Angeles District Attorney that "I really think it is irresponsible to have aired this now while the trials are still going on. The story is so inherently entertaining that if they had waited and done it better, it would have been just as interesting two years from now." (quoting Lois Timnick, *What's on the Tube Not Quite the Real Picture*, L.A. TIMES, Nov. 10, 1987, Part VI, at 8)).

105. *Hunt*, 872 F.2d at 290–91. The film had already been broadcast twice at the time of Hunt's appeal. *Id.* at 290. NBC argued that because the film had already been broadcast, Hunt's appeal was rendered moot. *Id.* at 291. The court disagreed, holding that because there would be further proceedings involving details the film includes (Hunt's scheduled upcoming second murder trial, as well as any possible appeals), and because NBC had said that additional court proceedings might heighten public interest and prompt them to broadcast the movie again, the request for injunctive relief was "capable of repetition, yet evading review" and thus was not moot. *Id.* at 291–92 (quoting United States v. Oregon, 718 F.2d 299, 302 (9th Cir. 1983)).

106. *Id.* at 293.

107. Hunt v. Nat'l Broad. Co., 872 F.2d 289, 295 (9th Cir. 1989) (citing Neb. Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976)).

movie.[108] This figure raises the troubling possibility that members of the jury had seen the film.

An analysis of several studies of the effect of negative pretrial publicity on juries indicates "that negative pretrial publicity significantly affects jurors' decisions about the culpability of the defendant. Jurors exposed to publicity which presents negative information about the defendant and crime are more likely to judge the defendant as guilty than are jurors exposed to limited [pretrial publicity]."[109] Another fact noted by researchers is that people tend to downplay the affect that preconceived notions can have on their ability to be impartial. One article mentions that "although potential jurors are cognizant that they have been exposed to damaging pretrial publicity, they still claim impartiality when in fact they have already developed a prejudicial opinion of the defendant."[110] This emphasizes the problems with voir dire as a method of protecting defendants' rights—jurors' tendency to be insincere or inaccurate regarding their biases makes it "unlikely that attorneys will be able to accurately predict and select jurors who will act in an unbiased manner."[111]

These concerns raise crucial questions about the adequacy of voir dire to detect jurors' ability to set aside existing knowledge and suggest that in some circumstances the only possible way to select a fair jury would be to prevent them from encountering the influential information in the first place.

2. True-Crime Reality Shows Create a Risk that Witnesses Will Testify Inaccurately

In addition to jury impartiality issues, true-crime reality shows also affect witness reliability. True-crime reality shows that reveal details about a criminal investigation potentially place witness reliability at risk because they expose the witnesses to information that fills in uncomfortable blanks in their own memories or even replaces existing memories. As an example, psychologist Elizabeth Loftus shared a disturbing anecdote about the peculiar nature of the human memory: 30 years after the death of her mother in a drowning accident, Loftus recalled very little about the event until her uncle told her that she had actually discovered her mother's body.[112] Loftus found herself suddenly flooded with memories of particular details of the day.[113] But then, much to her surprise, she discovered that her uncle was in fact mistaken; it was another family member, not Loftus, who had discovered her mother's

108. *Id.* at 295.

109. Nancy Mehrkens Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 L. & HUM. BEHAV. 219, 229 (1999).

110. Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL., PUB. POL'Y, & L. 677, 679 (2000).

111. *Id.* at 683.

112. Jill Neimark, *It's Magical, It's Malleable, It's . . . Memory*, PSYCHOL. TODAY (Jan. 1, 1995), https://www.psychologytoday.com/articles/199501/its-magical-its-malleable-its-memory.

113. *Id.*

body.[114] Despite being a trained psychologist involved in the study of the human memory, Loftus discovered her own susceptibility to influence from external information.[115]

Witness accounts are similarly at risk of being influenced by external information. One such source of influence is media portrayals. It is possible that information seen in the media will be unintentionally perceived by a witness as their own memory; this problem is known as "source confusion" and occurs when a person has a memory but cannot recall where they first encountered the information.[116] Media programming that depicts a criminal investigation poses a high risk of this sort of influence.[117] Imagine, for example, that a person was an acquaintance of someone who is now suspected of murder and sees a television show where other acquaintances describe the suspect as having a short temper and a tendency for violence. Later, when police ask the acquaintance whether they recall any alarming aspects of the suspect's personality, the acquaintance might understandably confuse the TV witness's description for his or her own memory and go on to describe behavior that never actually occurred.

Of course, other factors might influence witnesses' memories. They might be influenced by the circumstances surrounding the event that they

114. *Id.*

115. *Id.* About the experience, Loftus said, "My own experiment had inadvertently been performed on me! I was left with a sense of wonder at the inherent credulity of even my skeptical mind." *Id.*

116. Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. AIR L. & COM. 1421, 1520 (2001) (noting that source confusion occurs when something observed in the media "becomes *'familiar'* because the witness did see or hear it somewhere (in this case in media reports). This feeling of familiarity is later confused with actual memory of personally witnessing the event or of personally observing the information or evidence in question."). Davis and Follette also point out that the assumption that information portrayed in media is true also plays a part in source confusion because "the media can have direct persuasive effects, giving the witness confidence that the evidence reported is true or that the suspect presented is the actual perpetrator." *Id.* They also note that even if the information portrayed by media is initially viewed with skepticism, the viewer may be affected by "source dissociation," which occurs when the information observed is remembered but the source is forgotten; in such circumstances, "We tend to forget that the source lacked credibility and consequently forget to discount the information." *Id.* (citing Anthony R. Pratkanis et al., *In Search of Reliable Persuasion Effects: III. The Sleeper Effect is Dead. Long Live the Sleeper Effect.*, 54 J. PERSONALITY & SOC. PSYCHOL. 203 (1988)).

117. *See* Davis & Follette, *supra* note 116, at 1519–20 ("Witnesses may confuse the face of a suspect presented on television with that of the real perpetrator. They may become more confident of their memory as a result of hearing their own or others' reports presented on television. They may hear reports of events or depictions of persons that they did not directly witness and later *"remember"* these memories as if they were their own. They may hear that a suspect is in custody and therefore assume (s)he is in a line-up they later inspect.").

saw,[118] or by the traumatic impact of those events.[119] Many influences beyond the scope of this Note might play a part in producing less than perfect testimony, but it is crucial that the justice system does what it can to minimize factors that can negatively impact witness accuracy.

B. True-Crime Entertainment Media Interferes with the Administration of Justice

True-crime reality shows create a very serious risk of interference with the administration of justice because they may brand a wrongfully accused individual as a criminal, a reputation the individual may never be able to live down. Steven Noffsinger makes a startling accusation in the complaint he filed against *Cold Justice* following his acquittal that, if true, goes a long way toward demonstrating the potential for true-crime entertainment media to create serious problems with the administration of justice.[120] Noffsinger alleges that representatives of the show *Cold Justice* told state officials controlling his investigation that unless the investigation resulted in an indictment, the show would not air.[121] Terry Supino made a similar accusation in the press after she was acquitted of murder.[122] Of course, these are only accusations, but they describe a plausible situation—since reality shows are designed to draw audience interest to maximize ad revenue, it makes sense that production companies might hesitate to air an episode that did not culminate in an event that provides a conclusion to the story arc.[123] Such a request could influence the prosecutor's decision to indict, and potentially cloud their duty to ensure that justice is served.[124]

The risk posed to the administration of justice by true-crime entertainment media is brought to light through an examination of its potential influence on a variety of possible factual circumstances related to a criminal investigation and prosecution. Consider the spectrum of possible

118. *See* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 281 (2003) ("A variety of factors affect the ability of an eyewitness to identify the culprit at a later time, including the amount of time the culprit is in view, the lighting conditions, whether the culprit wears a disguise, the distinctiveness of the culprit's appearance, the presence or absence of a weapon, and the timing of knowledge that one is witnessing a crime.").

119. *See* Davis & Follette, *supra* note 116, at 1454–67 (describing the effects of trauma and stress on memory).

120. *See* Neil, *supra* note 16 (describing Noffsinger's allegation that *Cold Justice*'s producers and investigators, as well as employees of the local sheriff's department, "acted with malice and with the intent of getting publicity").

121. Complaint with Jury Demand Endorsed Hereon at 11, Noffsinger v. Landers, No. 3:15-cv-01552-JJH (N.D. Ohio filed Aug. 7, 2015), 2015 WL 4747017.

122. Rodgers, *supra* note 6.

123. *See supra* Part II.B.

124. A comment accompanying Iowa Rule of Professional Conduct 32:3.8 makes it clear that a prosecutor is bound to serve justice, rather than to simply achieve convictions. IOWA R. OF PROF'L CONDUCT r. 32:3.8 cmt. 1 (2015) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

outcomes that might result from a criminal investigation: Generally speaking, there are four combinations of circumstances, ignoring outlier cases where weak evidence produces convictions and strong evidence produces acquittals. First and most desirable, the investigation builds a strong case against a guilty party, and the state gets a conviction. In this circumstance, justice prevailed, and the system has worked as it should. Second, the investigation builds a strong case against an innocent party, who is convicted. This is clearly a terrible outcome that is contrary to the interests of justice. Third, the investigation builds a weak case against an innocent party who is acquitted. In this scenario, justice has not been served because the guilty party is still free, but at least injustice has not occurred because the innocent party was not convicted. And fourth, the investigation builds a weak case against a guilty party, resulting in an acquittal of that party. Here injustice has prevailed; the guilty party was not brought to justice and in fact can never be brought to justice.

True-crime reality shows threaten to impose unnecessary negative consequences in the last two sets of circumstances described above. In circumstance three (in which the state makes a weak case against an innocent party, resulting in an acquittal), if the innocent party was the subject of a widely-viewed media program that portrayed the party as guilty, the party's relief at being acquitted could be tainted by massive damage to the party's reputation caused by a media production that brings national attention to the party's accusation and arrest. It is unlikely that their acquittal will reach even a fraction of the same audience.[125] Innocent parties therefore experience severe reputational damage from which they may never recover.

In circumstance four (in which the state makes a weak case against a guilty party, resulting in an acquittal), the source of the problem is the influence that the show casts over the investigation. If prosecutors or the police are influenced by the terms of an agreement with an entertainment media production company, such as the term alleged by Noffsinger and Supino, they may go forward with charges before they have gathered enough evidence for a strong case. It is true, of course, that a prosecutor needs only probable cause to justify bringing charges. However, evidence to support probable cause may not be enough to support a conviction. For this reason, a prosecutor is wise to hold off on bringing charges, if circumstances permit such a delay, in order to bring the strongest case possible.

Police statements following Supino's arrest indicate that arrests resulting from reality show investigations may be premature, at least in the "strongest case possible" sense. A sheriff who was involved in the Supino investigation said during an interview that "I'm hopeful that (the show) will create some

125. Theresa Supino's experience is a good example of this problem. While her investigation and arrest were the subject of a nationally broadcast television show (*Cold Justice*), her subsequent acquittal does not appear to have been reported outside of Iowa. *See supra* Part I.

additional leads."[126] He said this *after* Supino was in custody, charged with murder. While it is perhaps understandable that police would want to continue to gather evidence even after a suspect is in custody, statements like the sheriff's raise questions about the state's confidence in its case and indicate the possibility that the state went forward with its prosecution before it had adequate evidence to secure a conviction. This is a less-than-optimal—although perhaps not unusual—situation, and steps should be taken to remove any unnecessary pressure that prosecutors might feel to move forward with a less-than-optimal case. To that end, factors such as contractual obligations to an entertainment media production company should be minimized or eliminated wherever feasible. Preventing prosecutors and police from entering into agreements with entertainment media companies will eliminate one potential source of inappropriate pressure and will ensure that the state is free to optimize the administration of justice.

C. True-Crime Entertainment Media Risks Subjecting State and Local Governments to Expensive Civil Liability

In the event that a faulty prosecution leads to the deprivation of constitutional rights, the state could be subjected to civil liability under 42 U.S.C. § 1983. The statute reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[127]

The statute traces its roots back to § 1 of the Civil Rights Act of 1871, which "was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment."[128] Section 1983 is fairly unique in that it provides relief for the violation of *other* protections, rather than for behavior described specifically in the statute itself. Justice Scalia has described § 1983 as "a prism through which many different lights may pass."[129]

Section 1983 is not without controversy. One major issue is the conflict between the law and the Eleventh Amendment of the U.S. Constitution, which provides state governments with sovereign immunity protection.[130]

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126. Grant Rodgers, *Iowa Sheriff Hopes TV Show Helps Crack Cold Case*, USA TODAY (Mar. 27, 2014, 10:48 PM), http://www.usatoday.com/story/news/nation/2014/03/27/iowa-sheriff-hopes-show-helps-solve-cold-case/6988687.

127. 42 U.S.C. § 1983 (2012).

128. Quern v. Jordan, 440 U.S. 332, 354 (1979) (Brennan, J., concurring in the judgment).

129. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 724 (1999) (Scalia, J., concurring in the judgment).

130. *See* U.S. CONST. amend. XI. The Eleventh Amendment was adopted in the wake of the landmark Supreme Court case *Chisholm v. Georgia*, which held a state liable for damages to a citizen; the decision faced immediate widespread scrutiny, and was quickly superseded by

However, the statute has been interpreted to create liability for state actors if their actions violate a federally protected right, and the official who violated that right did so pursuant to a state policy.[131] Prosecutors themselves are immune from liability under § 1983, an extension of common law protections they received out of "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."[132] Although police officers—like many other government officials—enjoy what is known as "qualified immunity" against § 1983 lawsuits, that immunity can be overcome with a showing that the officer violated a "clearly established" constitutional right.[133]

State participation in the production of true-crime reality programs may subject state or local governments, as extensions of the police officers involved in the investigation, to liability under § 1983 under two distinct theories of action: violations of Fourteenth Amendment Due Process rights, such as an allegation of false imprisonment; or violations of Fourth Amendment privacy protections. While both theories require fact-specific analyses—and by no means guarantee a litigant's success—they may provide avenues by which a defendant can successfully recover against a government agency. The agencies at risk, therefore, would be wise to minimize the potential for such liability.

An agreement between prosecutors or police and an entertainment media production company facilitating the production of a true-crime reality show may contain terms that place pressure on state officials—e.g., if the production company requires an indictment before the show will be broadcast, as alleged in the *Noffsinger* complaint.[134] Such pressure introduces the unnecessary risk, however unlikely, that prosecutors or police might cut

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Eleventh Amendment sovereign immunity. *See* Doyle Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 224–28 (1968) (describing various states' hostile reaction to the *Chisholm* decision, which culminated in the ratification of the Eleventh Amendment).

131. *See* Kentucky v. Graham, 473 U.S. 159, 166 (1985) (describing the different proof requirements for "establish[ing] *personal* liability" and "official-capacity action" under § 1983).

132. Imbler v. Pachtman, 424 U.S. 409, 423 (1976). The *Imbler* Court also raised concerns that without immunity, prosecutors would be sued with a frequency that would prevent them from focusing on official duties. *Id.* The Court acknowledged that its decision created a redressability problem, but found that it would have been even more damaging to the public interest to hold otherwise:

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

Id. at 427–28. The Court also noted that even if civil liability is foreclosed, prosecutors may still be subjected to "professional discipline by an association of [their] peers." *Id.* at 429.

133. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

134. Complaint with Jury Demand Endorsed Hereon, *supra* note 121, at 11.

corners when conducting their investigation to meet the terms of their agreement. One very important corner that might be cut is the requirement of probable cause to support an arrest; such an arrest could potentially subject the offending state actors to § 1983 liability under a theory of malicious prosecution or false imprisonment.[135] This may be unlikely, but it is nonetheless possible, and would be easily prevented by simply disallowing state officials from entering into contracts that might cloud their judgment when its unclouded exercise is crucial.

A media production team might also generate liability as a result of simply being present for certain police actions. For example, the presence of a camera crew during the execution of a search warrant will likely always be considered a violation of Fourth Amendment rights because third-party presence must be "related to the justification for police entry" to justify the increased intrusion on the suspect's privacy interest.[136] Producing entertainment media programming is unlikely to ever be related to the justification for police entry, as that justification will either be to make an arrest or to conduct a search.

The Supreme Court created the media entry rule in the 1999 case *Wilson v. Lane*, in which Wilson alleged that police violated his Fourth Amendment rights, and therefore were subject to § 1983 liability, by bringing a news camera crew into his home when officers executed a warrant.[137] The Court reasoned that while some circumstances might justify the presence of a non-officer during the execution of a warrant,[138] filming for a media production, even one related to the dissemination of important information to the community (i.e., the news), did not meet the Court's test because the purpose of the warrant was to arrest Wilson, not to produce entertainment programming.[139]

The Court rejected the argument that the presence of media was justified because it served the purpose of increasing public confidence in police, saying

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135. Generally speaking, false imprisonment requires that, "an actor . . . acts intending to confine the other or a third person within boundaries fixed by the actor . . . his act directly or indirectly results in such a confinement of the other, and . . . the other is conscious of the confinement or is harmed by it." RESTATEMENT (SECOND) OF TORTS § 35(1)(a)–(c) (AM. LAW INST. 1965). Malicious prosecution requires, generally, that "[a prosecutor] initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and . . . the proceedings have terminated in favor of the accused." RESTATEMENT (SECOND) OF TORTS § 653 (AM. LAW INST. 1977).

136. Wilson v. Layne, 526 U.S. 603, 611 (1999).

137. *Id.* at 614. Although the Court found the police behavior constituted a violation of Wilson's Fourth Amendment rights, they declined to impart § 1983 liability on the defendants because this claim was somewhat novel, explaining that "[g]iven such an undeveloped state of the law, the officers in this case cannot have been 'expected to predict the future course of constitutional law.'" *Id.* at 617 (quoting Procunier v. Navarette, 434 U.S. 555, 562 (1978)).

138. The Court gave the example of allowing third parties capable of identifying stolen merchandise to accompany police when search warrants covering the possible location of that merchandise are executed. *Id.* at 611–12.

139. *See id.* at 611 ("[T]he reporters . . . were not present for any reason related to the justification for police entry into the home—the apprehension of [the defendant].").

that "the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home."[140] The Court also notably rejected the argument that filming the events would protect the suspect's rights by creating a record of what transpired, saying that "[w]hile it might be reasonable for police officers to themselves videotape home entries as part of a 'quality control' effort . . . such a situation is significantly different from the media presence in this case."[141]

It is not difficult to imagine a camera crew filming a true-crime entertainment production running afoul of the *Wilson* requirement—these shows frequently have cameras rolling during police investigations and often feature footage of a person being arrested.[142] While it may be speculative to suggest that the sorts of errors described above may occur as a result of police or prosecutor participation in true-crime entertainment media production, they are certainly plausible occurrences. A scenario where a film crew accompanies police during the execution of a warrant seems especially easy to imagine, and a prosecutor becoming overzealous is not as implausible of a scenario as it perhaps should be. There is little reason for states to permit these sorts of risks, and the potential for civil liability provides ample reason to prevent them.

140. *Id.* at 613.

141. *Id.* The Court pointed out that the crew went into the home for their own benefit (to get footage) and not for the benefit of the police department. *Id.* This is notable because some Circuits had previously held that reporter presence during warrant execution was justified because a warrant, as approved by a judge, contained language permitting officers to film and take photographs during execution. *See* Stack v. Killian, 96 F.3d 159, 163 (6th Cir. 1996) (holding that even though media presence was not mentioned in a search warrant "defendants were justified, under the explicit language of the warrant, in permitting the accompaniment of camera personnel" because "the warrant . . . authorized 'videotaping and photographing'").

142. *See supra* notes 5, 9, 18 and accompanying text.

IV. COMMENTS SHOULD BE ADDED TO MODEL RULES OF PROFESSIONAL CONDUCT 3.6 AND 3.8 TO MAKE CLEAR THAT SHARING INFORMATION WITH TRUE-CRIME REALITY SHOW PRODUCTION COMPANIES CONSTITUTES AN ETHICAL VIOLATION

Given the potential risks associated with prosecutor and police participation in true-crime entertainment media[143] and the limitations on direct control over the companies themselves,[144] ethics oversight mechanisms serve a crucial role in preventing behavior that could subject those parties to civil liability. Those mechanisms need to be as clear as possible to prevent confusion about what is and is not permissible behavior. This Note proposes that comments should be added to Model Rules 3.6 and 3.8 to make clear that participation in reality show production falls within the scope of those rules and, if improper, is an offense subject to sanctions.

The ABA can address the problem of state participation in true-crime reality shows by making clear to attorneys that sharing information with entertainment media production companies, particularly for shows that will air prior to a trial, is behavior that will warrant sanctions by an adopting state's disciplinary board. This solution will likely have an easier time passing constitutional muster than requests for injunctive relief against the broadcast of these shows.[145] Sanctions would compel appropriate behavior by attorneys, who have a duty as officers of the court that renders them susceptible to First Amendment limitations which might be considered too restrictive in other circumstances, without stifling the media's ability to produce content. While it is true that limiting the information that attorneys and police can share with the media would reduce the scope of available material, this will not function as an outright bar on production. Companies will remain able to create content based on information that has been appropriately made public—such as information excluded from Rule 3.6[146]—which will likely often be sufficient to mold compelling entertainment programs.

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143. *See supra* Part II.A–B.

144. *See supra* notes 50–52 and accompanying text.

145. Many Supreme Court cases have held that entertainment media deserves First Amendment protections, despite not providing the informational value that makes freedom of the press important. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (finding a statute that prohibited display of pornographic films at drive-in theaters was unconstitutional because "the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502–03 (1952) (holding "that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments" but also noting that "[i]t does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places . . . [n]or does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.").

146. Rule 3.6 allows a lawyer to make statements regarding the following information:

> (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (2) information contained in a public record;

A. *RULE 3.6 COMMENT PROPOSAL*

A comment should be added to Rule 3.6 that makes clear that attorneys, both for the prosecution and the defense, jeopardize the administration of justice by releasing information for broadcast in a true-crime reality show that is not otherwise publicly available. The comment should read as follows:

> The prohibition against making an extrajudicial statement that will be disseminated by means of public communication and that will have a substantial likelihood of materially prejudicing an adjudicative proceeding outlined in paragraph (a) applies to the sharing of information with an entertainment media production company for the purpose of producing entertainment content. To share information that is not otherwise available to the public with a group or company that intends to broadcast that information is tantamount to making a statement that will be disseminated by means of public communication. Such content has a substantial likelihood of materially prejudicing an adjudicative proceeding by the nature of its significant viewing audience and creates an unacceptable risk of tainting the jury pool and of tarnishing witnesses' ability to testify accurately about the matter.

This proposed comment will lend clarity to the phrases "extrajudicial statement," "public communication," and "substantial likelihood of materially prejudicing," so that attorneys are put on notice of exactly what type of behavior can warrant sanctions. The comment also specifically targets entertainment media, leaving prosecutors free to disclose information necessary to keep the public informed of the ongoing investigation or proceeding.

B. *RULE 3.8 COMMENT PROPOSAL*

A similar comment should be added to Rule 3.8. Because of the substantial discretionary power that a prosecutor wields, the rule notably applies a lower standard for evaluating the need for sanctions. Instead of

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(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest;

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

MODEL RULES OF PROF'L CONDUCT r. 3.6(b) (AM. BAR ASS'N 2016).

requiring a substantial likelihood of material prejudice, Rule 3.8 applies when a prosecutor makes "extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[147] Accordingly, a comment should accompany this rule to make clear that providing information to true-crime entertainment media production companies meets this standard:

> The prohibition against making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused outlined in paragraph (f) applies to the sharing of information with an entertainment media production company for the purpose of producing entertainment content. To share information that is not otherwise available to the public with a group or company that intends to broadcast that information to the public is tantamount to making an extrajudicial statement that the prosecutor would be barred from making under rule 3.6, as well as this rule. Such content has a substantial likelihood of heightening public condemnation of the accused because it presents information and images that imply guilt.

This comment will make clear to prosecutors that sharing information with entertainment media production companies creates a major risk of causing public condemnation, a result that Rule 3.8 makes very clear is intolerable. It will also communicate to prosecutors that they are expected to make efforts to prevent police from sharing information beyond the Rule 3.6 exceptions with such companies.

C. LEGAL AND POLICY JUSTIFICATIONS FOR ADDING THE PROPOSED COMMENTS

Together, these comments will help eliminate the various problems associated with true-crime entertainment media while still respecting the need for a balance between First and Sixth Amendment rights. The comments will be much more effective than requests for injunctive relief to prevent the broadcast of programs that pose a risk to fair trial rights, which have been historically unsuccessful.[148] The comments will provide a workable proactive means to prevent companies from generating content that will harm fair trial rights by utilizing the reasoning underlying the Rules' very existence: Attorneys, as officers of the court and as parties with privileged access to

147. *Id.* r. 3.8(f).

148. For example, in *Hunt v. National Broadcasting Co.*, the Ninth Circuit affirmed the district court's denial of injunctive relief against the broadcast of a "docudrama" that portrayed the defendant in a highly negative light because the request did not meet the high requirement set by *Nebraska Press*—a showing that finding an impartial jury will be *impossible* without the injunction. *See* Hunt v. Nat'l Broad. Co., 872 F.2d 289, 295 (9th Cir. 1989) ("The *Nebraska Press* standard is an exacting one, and, as pointed out earlier, allows a prior restraint only if its absence would prevent securing twelve jurors who could, with proper judicial protection, render a verdict based only on the evidence admitted during trial. Hunt has not made this difficult showing." (citation omitted)).

information, should be held to a higher standard of responsibility than the media.

This solution will likely have an easier time passing constitutional muster than requests for injunctive relief against the broadcast of this content.[149] The threat of sanctions would compel appropriate behavior by attorneys without completely stifling production. While it is true that limiting the information that attorneys and police can share with the media would reduce the scope of available material, this will not function as an outright ban on production; companies will remain able to create content based on information that has been appropriately made public, such as information excluded from Rule 3.6.[150]

In practice, states adopting these new additions would make clear that a person—whether a defendant, an attorney, or any other interested party—who suspects that a prosecutor or police are sharing information related to a criminal investigation with a company that intends to use that information to produce true-crime entertainment media can submit an ethics complaint through their states' channels. The availability and use of this option will have a deterrent effect, hopefully serving to eliminate the risk to fair trial rights posed by prosecutor and police participation in true-crime entertainment media production.

V. CONCLUSION

True-crime entertainment media is popular and brings in huge advertisement revenue, but it is not an appropriate medium for keeping the public abreast of current events or for bringing about criminal justice. True-crime entertainment media presents a skewed perspective of a criminal investigation that can tamper with jury pools, create inaccurate witness testimony, interfere with the administration of justice, and subject the state to expensive liability. Restraints on production companies' right to create media or on broadcast companies' right to present media are typically struck down as unconstitutional as a result of the United States' robust First Amendment protections. It is therefore crucial that a new avenue is explored to protect defendants' Sixth Amendment rights while maintaining respect for the media's First Amendment rights.

The Model Rules of Professional Conduct provide this avenue. Their very existence and adoption by individual states demonstrates an acknowledgment that, as a result of their privileged access to information, attorneys can be subjected to First Amendment restraints in order to protect the integrity of the judicial system. By adopting comments that clarify the duty of prosecutors and police to refrain from releasing information that casts a shadow over the administration of justice, the ABA and states that choose to adopt the comments can assure citizens that their rights will not be trampled upon for the sake of selling commercial time and provide other states a model to do

149. *See supra* note 145.
150. *See supra* note 146.

the same. The justice system is imperfect, but any step that a state can take to reduce that imperfection is an opportunity too valuable to pass.