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Ryan D. Suniga

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## **FILMING POLICE & LEGAL DRAMAS: EXAMINING THE INFLUENCE OF TELEVISION PROGRAMS ON THE LEGAL PROFESSION AND LAW ENFORCEMENT**

RYAN D. SUNIGA \*

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### INTRODUCTION

In response to the Netflix original documentary *Making a Murderer*, a petition on We the People, a section of the [whitehouse.gov](http://www.whitehouse.gov) website dedicated to petitioning the current presidential administration's policy experts, collected nearly 130,000 petition signatures in an attempt to obtain a pardon for Brendan Dassey and Steven Avery.<sup>1</sup> Such a movement, which is not advocated for by the

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\* J.D. candidate, May 2017, Chicago-Kent College of Law, Illinois Institute of Technology; Member of CHICAGO-KENT LAW REVIEW; Member of Chicago-Kent Moot Court Honor Society; Occidental College, B.A, Mathematics & Economics, 2009.

<sup>1</sup> We the People, <https://petitions.whitehouse.gov/response/response-your-petition-teresa-halbach-murder-case> (last visited April 24, 2016); *Making a Murderer* is a TV mini-series appearing on Netflix which documents arrest, prosecution and conviction of Stephen Avery and Brendan Dassey, who are both charged for the murder of Teresa Halbach. The show suggests that the Manitowoc County sheriff's department had a conflict of interest when participating in the murder proceedings. *Making a Murderer*, IMDB, <http://imdb.com> (search in search bar for "Making a Murderer") (last visited April 24, 2016).

show, illustrates the power of mass media and its ability to influence the public. Programs like *Making a Murder*, *Serial*<sup>2</sup> and others reflect the public obsession with law enforcement and judicial proceedings.<sup>3</sup> While disclosure of information pertaining to law enforcement and judicial proceedings is generally in society's best interest, projects like these can also threaten the integrity of these proceedings. The potential for prosecutors and law enforcement officials to over-exaggerate or overstate the details of a case poses a real threat to the integrity of these public institutions. Accordingly, courts and other authority figures should allow media into law enforcement and judicial proceedings cautiously.

This Article uses the Seventh Circuit's decision in *Hart v. Mannina* as its vehicle to explore the role of media in the justice system, and determine what, if any, boundaries should be placed on the media's involvement in the judicial system. Part I will explain the evolution of the public's attitude toward the criminal justice system. Part II will discuss the impact of mass media on law enforcement and judicial proceedings. Part III will focus on *Hart v. Mannina*, highlighting the troublesome conduct that occurred in that case and discussing the Seventh Circuit's resolution of the claims presented. Part IV will suggest limitations and guidelines that courts and law enforcement department should consider placing on the media's presence in these settings.

#### DEPICTION OF THE LAW IN POPULAR CULTURE

The attitude toward law enforcement and lawyers in American culture has varied over time. In colonial times, authoritarian figures, like the police, were seen as instruments of the crown and as the embodiment of oppression and injustice.<sup>4</sup> In fact, at one time the

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<sup>2</sup> *Serial*, WBEZ Chicago (Oct. 3, 2014) (downloaded using iTunes).

<sup>3</sup> See e.g. THE STAIRCASE (Maha Productions broadcast October 2004).

<sup>4</sup> Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L REV. 229, 236 (1987).

colonies of Pennsylvania and Massachusetts banned lawyers.<sup>5</sup> Colonial Americans maintained a strong anti-authoritarian impulse, which reverberated throughout popular culture.<sup>6</sup> Initial depictions of police and lawyers were contained in “pulp novels” and detective magazines, and these depictions were not flattering.<sup>7</sup> Early stories depicted detectives, cowboys and private eyes as protagonists.<sup>8</sup> These stories romanticized figures that acted outside the formal justice system, and idealized a notion of vigilante justice.<sup>9</sup>

As time progressed, societal attitude toward law enforcement and lawyers gradually improved. Once radio became the popular form of media, police and lawyers began being depicted in a positive light.<sup>10</sup> While programs based on private-eye detectives continued to display a disdain for the police, a new batch of police-friendly, crime-fighting heroes became popular with the general public. This change reflected society’s improving attitude towards public institutions.<sup>11</sup> During the advent of television as the predominant form of entertainment, the public perception of law enforcement changed again. Although numerous television programs have utilized the police drama format, this paper focuses exclusively on two television programs that were instrumental in shaping the public perception of police and lawyers: *Dragnet* and *Perry Mason*.

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<sup>5</sup> *Id.*; DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 230 (Little, Brown and Co. 1963) (One common complaint was that lawyers tended to monopolize positions in all branches of the government, especially the judiciary).

<sup>6</sup> Stark, *supra* at note 3, at 236.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 237.

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., *Mr. District Attorney* (ZIV Television Programs broadcast 1954); *The Crime Club* (CBS radio broadcast 1946-1947).

<sup>11</sup> Stark, *supra* at note 3, at 242 (“[I]n the 1920’s many police agencies had lost the public’s confidence due to the scandals involving inefficiency, bribery, and collusion with criminals. . . . [B]eginning in the 1930’s, by means of the most popular entertainment medium, the mass of American citizens began hearing of the heroic undertakings of private and public investigative agencies.”)

### A. *Prime Time Television*

From the outset, crime dramas were a perfect match for television. Crime shows come prepackaged with dramatic tension because they nearly always involve serious crimes and serious consequences. That prepackaged tension is extremely important given that most television shows last only thirty or sixty minutes, which significantly hampers the opportunity to develop genuine dramatic complexity. Aside from the natural drama associated with crime, crime shows and westerns offered prime time television guaranteed methods of success with low costs. As television relied more and more on the weekly series as its dominant form of entertainment, television needed proven formulas to attract audiences. Crime shows and westerns were able to supply their audiences with “an abundance of action without requiring much in the way of expensive special effects.”<sup>12</sup> Because of that, they were the perfect option for television executives looking to maximize viewership and minimize costs.

Yet even these early crime shows depicted legal professionals and law enforcement in a manner similar to their earlier depictions in radio and print.<sup>13</sup> Early portrayals of lawyers and police reinforced the anti-establishment mentality contained in early radio programs and detective magazines.<sup>14</sup> The private detectives and amateur sleuths in these television programs, portrayed as protagonists, displayed the same sense of contempt for police officials as in early radio programming. Programs like *Gunsmoke*, which was actually adapted from radio for television, used the same western-style mentality to tell stories about characters who acted outside the letter of the law on occasion.<sup>15</sup> In fact, *Gunsmoke*'s main character was designed to be a “Philip Marlowe of the West,” a tribute to the infamous noir character created by Raymond Chandler.<sup>16</sup> However, these anti-establishment

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 243.

programs, as with many popular trends, began to turn stale. The changing public palate presented an opening for programs that depicted the law and law enforcement in a more positive light. None of these law or police-friendly programs ever experience more than moderate success in the 1940s-50s.<sup>17</sup> Then, with the popularity of *Dragnet*, the attitude toward law enforcement and lawyers in television shifted drastically.<sup>18</sup>

### B. *Dragnet*

*Dragnet* changed the perception of law enforcement in popular culture. Joe Friday played the hero, a police officer with a gritty mentality. With few outside relationships, Friday dedicated his life to his job. One of the most important changes about the hero's depiction in *Dragnet* was that, unlike the traditional private eye, Friday worked as one cog within a larger police unit.

The show's success was massive. Friday even appeared on the cover of Time magazine in 1954.<sup>19</sup> The program's popularity helped to shift the public image of law enforcement.<sup>20</sup> Police-friendly programming became more popular at this time. The rise of police-friendly programming likely resulted from a combination of changing social values, the alignment between these programs' conservative-friendly message with conservative executive producer's own ideologies, and the positive effect these programs had on audiences by encouraging positivity rather than propagating distrust of public institutions amongst their viewers.<sup>21</sup> The changing characterization of law enforcement, along with major reforms of police institutions, helped to improve the public image of law enforcement.<sup>22</sup> In much the same way that *Dragnet* changed the attitude toward law enforcement,

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 244.

<sup>19</sup> *Jack, Be Nimble!*, TIME, Mar. 15, 1954, at 47.

<sup>20</sup> See Stark, *supra* at note 3, at 245.

<sup>21</sup> See *Id.* at 246.

<sup>22</sup> See *Id.* at 247.

the television show *Perry Mason* would elevate the public image of lawyers.

### C. *Perry Mason*

*Perry Mason* followed the adventures of a master defense attorney as he solved difficult criminal cases for his accused clients.<sup>23</sup> The series ran from 1957 to 1966, and wound up being an important show that shaped the media's portrayal of lawyers. The *Perry Mason* program signaled a change from the police as a show's central hero to a lawyer being depicted as the protagonist.<sup>24</sup>

*Perry Mason* ushered in a new era in entertainment based on the criminal defense lawyer. The show helped to revitalize the public image of lawyers. Shows like *Perry Mason* paved the way for other lawyer-centric shows like *Mr. District Attorney* and *The Defenders*.<sup>25</sup> Not only did these defense lawyers operate within the bounds of the law, but they also displayed other altruistic characteristics. They often acted as father-figures, solving not only their clients' cases, but also helping their clients with the "existential travails of modern living, including unhappy marriages, ungrateful children, or terrible jobs."<sup>27</sup> In some respects, these new heroes became "society's counselor," presenting a positive view of the legal profession to which audiences could attach themselves.<sup>28</sup> Some scholars even speculate that *Perry Mason* may have impacted the surge in law school enrollment that occurred during the 1960s and 70s.<sup>29</sup> However, because television is often reflective of

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<sup>23</sup> *Perry Mason*, IMDB, <http://www.imdb.com/title/tt0050051/> (search in search bar for "Perry Mason") (last visited April 24, 2016).

<sup>24</sup> Stark, *supra* at note 3, at 253.

<sup>25</sup> *Mr. District Attorney* (ZIV Television Programs broadcast 1954).

<sup>26</sup> *The Defenders* (CBS television broadcast Sept. 16, 1961).

<sup>27</sup> Stark, *supra* at note 3, at 255.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 256; A.B.A., SEC. OF LEGAL EDUC. AND ADMISSIONS, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES: FALL 1984, at 66 (1985).

societal trends, this lawyer-hero would also fade from popularity by the late 1960s.

Today, the field of police and legal dramas varies widely, with some heroes displaying a traditional respect for the law, some playing the role of private-eye with a comedic disrespect for the law,<sup>30</sup> some displaying a cynical view toward authority,<sup>31</sup> and others acting wholly outside the law in a vigilante capacity.<sup>32</sup> Aside from fictional legal/police programming, modern perceptions of law enforcement and judicial proceedings are often molded by the media's coverage of real cases involving some area of great public interest. Divisive issues such as race, abortion, gay marriage and consumer fraud are a few among many areas where public interest can be extremely high.<sup>33</sup> For instance, cases or instances involving minorities and altercations with the police have been of great interest to the public.<sup>34</sup> These highly controversial and politicized issues are prime targets for television executives to broadcast.

#### HOW CAN TELEVISION BE HARMFUL?

The influence of television is so pervasive that its depictions of certain subject matters can actually affect how people act. For example, within six weeks of the home video release of the movie *Gone in Sixty Seconds* auto thefts spiked twenty-three percent in

<sup>30</sup> *E.g.* *Psych* (USA Network broadcast July 7, 2006).

<sup>31</sup> *E.g.* *The Wire* (HBO broadcast June 2, 2002).

<sup>32</sup> *E.g.* *Arrow* (CW Network broadcast Oct. 10, 2012).

<sup>33</sup> *See e.g.* *Hollingsworth v. Perry*, 558 U.S. 183 (2010); *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 587 (S.D.N.Y. 1996).

<sup>34</sup> *See e.g.* Wayne Drash, *The Killing of Laquan McDonald: The dashcam video vs. police accounts*, CNN, Dec. 19, 2015, <http://www.cnn.com/2015/12/17/us/laquan-mcdonald-video-records-comparison/>; Seth Mydans, *THE POLICE VERDICT; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (April 30, 1992), <http://www.nytimes.com/1992/04/30/us/the-police-verdict-los-angeles-policemen-acquitted-in-taped-beating.html>.

Philadelphia.<sup>35</sup> One gang, comprised of about twenty youths, responsible for a host of stolen vehicles, even went so far as to label themselves the “Gone in 60 Seconds Gang.”<sup>36</sup>

In all fairness, televising courtroom proceedings has beneficial qualities. The public has an interest in understanding how judicial and law enforcement proceedings operate.<sup>37</sup> Few people ever attend court, and so they must obtain their understanding of its operation from elsewhere.<sup>38</sup> Television fills that education gap. By exposing larger groups of individuals to courtroom and law enforcement proceedings, the public obtains a better understanding and ability to monitor these institutions. In addition, newspaper and broadcast reporter’s accounts of what occurs in these proceedings are far more accurate when a camera is present.<sup>39</sup> One New York study even suggested that cameras ensure greater partiality by judges towards parties.<sup>40</sup> Because televising these events can be beneficial, the courts and other authorities permitting audio-video coverage must be sensitive to both the benefits and potential harms. These authorities must balance the public interest in monitoring and understanding the justice system with the defendant’s right to a fair and uninterrupted trial.

### A. *Harm to Judges, Lawyers and Police*

Apart from an impact on impressionable youths, the media can also influence how professionals perform their jobs. In *Estes v. Texas*, the Supreme Court commented on the effect the presence of television

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<sup>35</sup> Barbra Boyer, *Big drop in car thefts ‘Gone in Sixty Seconds’*, PHILLY.COM, (Jan. 7, 2002), [http://articles.philly.com/2002-01-07/news/25343831\\_1\\_owner-give-ups-auto-thefts-car-theft](http://articles.philly.com/2002-01-07/news/25343831_1_owner-give-ups-auto-thefts-car-theft).

<sup>36</sup> *Id.*

<sup>37</sup> See *Hollingsworth*, 558 U.S. at 207 (Breyer, J., dissenting) (“The competing equities consist of not only respondents’ interest in obtaining the courthouse-to-courthouse transmission they desire, but also the public’s interest in observing trial proceedings to learn about this case and about how courts work”).

<sup>38</sup> *Katzman*, 923 F. Supp. at 586.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

has on judges.<sup>41</sup> A judge's job is to make sure the defendant receives a fair trial.<sup>42</sup> However, when cameras become involved the judge is required to make more difficult judgment calls about whether the media is impeding on the ability to ensure a fair trial. In *Estes*, the trial judge had to, on several occasions, enter an order or have a hearing "made necessary *solely* because of the presence of television."<sup>43</sup> In addition to physical disruptions, television can become a political weapon as well. Television displays judges to the public, and can reveal their personally held beliefs or how they operate their courtroom. Generally, this is beneficial because it keeps the judges accountable for their actions. But problems can arise when television editing mischaracterizes what a judge says or does. This is particularly worrisome where judges are elected and thus dependent upon their public image in order to continue being elected.<sup>44</sup> These factors combine to divert the attention of the judge from his primary objective: a fair trial of the accused.

But, judges are not the sole victims of television's effect. Television can also become harmful when it affects the behavior of the individuals trusted with enforcing and upholding the law. One study found that half the methods employed by police officers—lineups, fingerprinting, etc.—were used because the public expected them from television, despite their lack of utility in the case.<sup>45</sup> A lawyer may seek to introduce similar types of forensic evidence on the belief that jurors will be more convinced of the defendant's guilt or innocence, despite the evidence being wholly irrelevant. A lawyer may also make other decisions or tactical choices which are influenced by the media's presence that results in less effective counsel for their client.<sup>46</sup> A less innocuous effect, some have suggested that television programs

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<sup>41</sup> *Estes v. Texas*, 381 U.S. 532, 548 (1965).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (emphasis added).

<sup>44</sup> *Id.*

<sup>45</sup> Stark, *supra* at note 3, at 267.

<sup>46</sup> *Estes*, 381 U.S. at 549 ("[T]elecasting may also deprive an accused of effective counsel").

promoting a “do-whatever-it-takes-mentality” have resulted in more violent encounters with police.<sup>47</sup> Many of the law enforcement officers in television programs display a willingness to disregard wrongdoer’s constitutional rights in pursuit of “justice.”<sup>48</sup> This pressure placed on police may be similar to what others have deemed the “YouTube Effect,” which describes the effect cellphones have on police interactions.<sup>49</sup> This theory suggests that civilians who record police interactions with their cellphones make police feel as if they are under attack.<sup>50</sup> In turn, some officers may hesitate in performing their job out of fear that their actions will end up on social media as a calling card for social reform.

### B. Harm to Witnesses and Jurors

Perhaps the more harmful effect wrought by mass media on the law enforcement and legal systems is its potential impact on witnesses and jurors. Popular culture is one of the few avenues the general public has to educate themselves about the judicial process.<sup>51</sup> Because it acts as an important supplier of information, the media has the ability to shape public perception with regard to the integrity of and how public institutions operate. Public perception is significant in a society, such as ours, where the laws and practices evolve around public perception. Much in the same way other government institutions do, judicial and law enforcement institutions develop their policies and rules based on, or in reaction to, public perception. This correlation becomes a problem when television’s depictions of the

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<sup>47</sup> See Stark, *supra* at note 3, at 264-269.

<sup>48</sup> *Id.* at 264-65.

<sup>49</sup> Andrea Noble, *Police fear ‘YouTube effect’ affecting work, contributing to rise in violent crime*, THE WASHINGTON TIMES, (Oct. 25, 2015), <http://www.washingtontimes.com/news/2015/oct/25/police-fear-youtube-effect-affecting-work-contribu/?page=all>

<sup>50</sup> *Id.*

<sup>51</sup> David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 796 (1993).

justice system create public expectations of law enforcement, prosecutors and courts that are unrealistic.<sup>52</sup> Jurors are becoming conditioned by television's depiction of law and police work to expect forensic evidence or witty cross examinations in nearly every case.<sup>53</sup> For example, in Dallas, Texas an attorney had produced two eyewitnesses to a robbery, however, a hung jury found the defendant innocent.<sup>54</sup> Afterwards, the attorney spoke with a juror who said that they weren't convinced of the defendant's guilt because on every robbery case they "had ever seen on TV, the thief had left fingerprints."<sup>55</sup> This kind of phenomenon has come to be known as the "CSI Effect."<sup>56</sup> The CSI effect is a term used to describe when jurors hold unrealistic expectations about the use and availability of forensic evidence and investigative techniques, and become interested in the discipline of forensic evidence.<sup>57</sup>

On the other hand, there is some dispute as to the actual effect on jurors and witnesses. Lower courts have suggested that cameras in the courtroom do not impede the fair administration of justice.<sup>58</sup> Because cameras placed inside the courtroom tend to be small and silent, and therefore unobtrusive to the judicial process, these courts have been reluctant to limit the televising of courtroom proceedings. In fact, one court has gone so far as to find a First Amendment right of the press to televise court proceedings<sup>59</sup>, in spite of the Supreme Court holding in

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<sup>52</sup> *Id.* at 813.

<sup>53</sup> *Id.*

<sup>54</sup> *The Case of the Unhappy DA*, TV GUIDE, Apr. 26, 1958, at 6-7.

<sup>55</sup> *Id.*

<sup>56</sup> Tom R. Tyler, *Viewing CSI and the Threshold of Guild: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1052 (2006).

<sup>57</sup> *Id.*; *The "CSI effect"*, THE ECONOMIST, April 22, 2010, <http://www.economist.com/node/15949089>.

<sup>58</sup> *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 585 (S.D.N.Y. 1996).

<sup>59</sup> *Id.* at 589 ("Twelve years after the *Westmoreland* decision and twenty-two years after the *Estes* holding, the advances in technology and the above-described experiments have demonstrated that the stated objections can readily be addressed

1965 that no such right exists.<sup>60</sup> But there is a difference between an unobtrusive camera which disrupts no part of a proceeding and a potential psychological effect that cameras can have on witnesses and jurors. The Judicial Conference of the United States, a conference of supreme, appellate and district court judges dedicated to framing policy guidelines for the administration of justice in federal courts, stated in a 1994 report that cameras can have an intimidating effect on some witnesses and jurors.<sup>61</sup> By intimidating witnesses or jurors, the quality of deliberation and testimony is lessened which can have serious consequences in a criminal trial.

Aside from actual or psychological effects, phenomenon such as the CSI effect can be viewed as now requiring authority figures to utilize every possible tool in the administration of justice, which is potentially beneficial. The problem with that position is that it is not always as easy as television makes it appear. Forensic evidence such as fingerprints, DNA and gunshot residue are often unavailable in a criminal trial.<sup>62</sup> It is rare indeed that a “smoking gun” will exist that will make the prosecutor’s case impervious to attack.<sup>63</sup> And even if such evidence is available, jurors may not understand when it would be appropriate to present such evidence to the jury. But because they are expecting that evidence to be presented, they may believe that its omission is a sign of innocence, or guilt in some circumstances, when the truth is that the evidence sheds no light on the guilt or innocence of a defendant.<sup>64</sup> Shows that create these unrealistic expectations undermine the administration of justice based on a misunderstanding of how the criminal justice system works.

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and should no longer stand as a bar to a presumptive First Amendment right of the press to televise as well as publish court proceedings”).

<sup>60</sup> *Estes v. Texas*, 381 U.S. 532, 539 (1965).

<sup>61</sup> REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 47 (Sept. 20 1994).

<sup>62</sup> Tyler, *supra* note 56, at 1053.

<sup>63</sup> *Id.*

<sup>64</sup> *The “CSI effect”*, THE ECONOMIST, April 22, 2010, <http://www.economist.com/node/15949089>.

Additionally, cases involving famous individuals or divisive issues can be affected in a slightly different way when those proceedings are televised. Studies show that pretrial publicity shapes verdicts from jurors.<sup>65</sup> These studies show that participants are significantly more likely to find a guilty verdict when exposed to negative pretrial publicity rather than positive pretrial publicity.<sup>66</sup> The results indicate that prior exposure to media coverage alters the types of evidence that jurors find persuasive in evaluating a defendant's guilt or innocence.<sup>67</sup> While few cases may obtain such national attention, those few cases can be affected which can be problematic because those cases often involve important and highly controversial issues.<sup>68</sup> The integrity of the justice system is paramount if the defendant's rights are to be protected in such highly politicized cases garnering pretrial publicity.

Witness testimony is also compromised by the presence of television.<sup>69</sup> The range of reactions by a witness to being televised spreads from cocky and overconfident to frightened and petrified. The Supreme Court acknowledged this possibility in *Estes*, stating, "The quality of the testimony in criminal trials will often be impaired."<sup>70</sup> When this kind of pressure is placed on a witness, the court opens the door for the trial process, and discovery of the truth, being impeded on or frozen when a witness is reluctant to take the stand for fear of publicity.<sup>71</sup> Even expert witnesses can experience this chilling effect.

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<sup>65</sup> See e.g. Nancy Mehrkins Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 LAW & HUM. BEHAV. 219, 228 (1999).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See e.g. Wayne Drash, *The Killing of Laquan McDonald: The dashcam video vs. police accounts*, CNN, Dec. 19, 2015, <http://www.cnn.com/2015/12/17/us/laquan-mcdonald-video-records-comparison/>; Seth Mydans, *THE POLICE VERDICT; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, April 30, 1992, <http://www.nytimes.com/1992/04/30/us/the-police-verdict-los-angeles-policemen-acquitted-in-taped-beating.html>.

<sup>69</sup> *Estes v. Texas*, 381 U.S. 532, 547 (1965).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 547.

There is a fundamental difference between bearing testimony in open court and having that testimony broadcast throughout the country.<sup>72</sup> Witnesses may be less willing to have their testimony, or their thoughts and views, broadcast on television. They may feel that their testimony or viewpoints will subject them to threats or ridicule from others. The Supreme Court recognized as much in *Hollingsworth v. Perry*.<sup>73</sup> Interestingly, that decision was accompanied by a dissenting opinion authored by Justice Breyer and signed onto by three other justices.<sup>74</sup> With the recent Supreme Court vacancy, the attitude toward cameras in the courtroom may change depending on who fills that vacancy.

However, acceptance of potentially harmful effects on witnesses and jurors is not universal. Some academics doubt the actual effect on jurors or programs like CSI.<sup>75</sup> They argue that no actual prejudice is present in case proceedings due to an effect like CSI, and instead offer explanations like sympathy for the defendant or a lack of confidence in legal authorities to explain odd criminal verdicts.<sup>76</sup> Yet even if empirical evidence does not support the existence of phenomena like the CSI effect, courts must protect against even hypothetical risks to ensure faith in the justice system. Our system of justice endeavors to prevent “even the *probability* of unfairness.”<sup>77</sup> “Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.”<sup>78</sup> It is the

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<sup>72</sup> *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 199.

<sup>75</sup> Tyler, *supra* note 56, at 1054.

<sup>76</sup> Tyler, *supra* note 56, at 1077-1083.

<sup>77</sup> *Offutt v. United States*, 348 U.S. 11, 14 (1954).

<sup>78</sup> *Tumey v. Ohio*, 273 U.S. 510, 532; *see also Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963).

appearance of justice which the courts must uphold to ensure the integrity of the judicial system.<sup>79</sup>

### *C. Harm to the Defendant*

Besides judges, attorneys, law enforcement, witnesses and jurors, there is another individual likely to feel the pressure accompanied by the presence of television: the defendant.<sup>80</sup> A courtroom swarming with press and cameras will inevitably create a sense of prejudice against the accused.<sup>81</sup> “The inevitable close-ups of [the defendant’s] gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely and without the distraction of wide public surveillance.”<sup>82</sup> By focusing a camera on a particular witness, the court risks animating the behavior of that witness, disrupting the fact-finding process, and ultimately harming the defendant’s right to a fair trial. Even a courtroom, devoid of media coverage, packed with spectators will affect the defendant as well as the trial process. By adding cameras into the mix, the court risks creating a spectacle out of a judicial or law enforcement proceeding. “A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena.”<sup>83</sup> By involving the media in the justice process, we risk opening a Pandora’s box inside the justice system.

Again, there is merit to allowing the media to film law enforcement and legal proceedings. The more the public is aware of how these institutions operate, the more accountable the institutions will be and the better informed the public is.<sup>84</sup> Nevertheless, there are

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<sup>79</sup> See *Offutt*, 348 U.S. at 14.

<sup>80</sup> *Estes v. Texas*, 381 U.S. 532, 549 (1965).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 539-40.

some practical limits associated with television that limit its potential benefit. In order to make sure these programs receive airtime, they have to appeal to sponsors.<sup>85</sup> This is likely why only notorious cases are the subject of television programs. The run-of-the-mill case is not likely to generate the kinds of viewership ratings that will induce a sponsor to spend the funds necessary to produce a television program. This practical limitation creates a built-in screening mechanism in television programs that gives viewers only a partial understanding of how courts and law enforcement operate.<sup>86</sup> These shows are only going to follow events that can appeal to larger numbers of viewers. The types of cases television programs are attracted to are those with novel features.<sup>87</sup> Yet, those kinds of cases are not indicative of how the justice system operates. “By focusing on the sensational or aberrational, the media implant within the public psyche a potential for undue cynicism and the basis for rejecting judicial authority.”<sup>88</sup> Television teaches its viewers that every case is solved because of some kind of forensic evidence<sup>89</sup> or a crafty attorney during cross examination.<sup>90</sup> Unfortunately, that is not how the system works practically since most cases are settled well before the trial stage.

#### EXPLORING THE HARM OF MEDIA IN *HART V. MANNINA*

In *Hart v. Mannina*, the Seventh Circuit held that Carlton Hart’s § 1983 lawsuit alleging Fourth and Sixth Amendment violations failed because a reasonable jury could not find that the police lacked probable cause to arrest him when he was identified by four separate

<sup>85</sup> *Id.* at 549-50.

<sup>86</sup> See Cynthia D. Bond, “*We the Judges*”: *The Legalized Subject and Narratives of Adjudication in Reality Television*, 81 UMKC L. REV. 1, 13-16 (2012).

<sup>87</sup> See, e.g., *Chandler v. Florida*, 449 U.S. 560 (1981).

<sup>88</sup> Bruce M. Seyla, *The Confidence Game: Public Perceptions of the Judiciary*, 30 New Eng. L. Rev. 909, 914 (1996).

<sup>89</sup> Bond, *supra* note 86, at 14.

<sup>90</sup> *Id.*

witnesses and no evidence showed these witnesses were coached.<sup>91</sup> The Seventh Circuit considered three claims in the case: a Fourth Amendment claim for making false or misleading statements in support of a probable cause affidavit, a Fourth Amendment claim for false arrest and false imprisonment, and a Sixth Amendment claim for denial of the right to a speedy trial. Only the first two claims involve the media. Understanding these claims requires a description of how events unfolded and what the media's involvement in the investigation entailed.

### A. *The Investigation*

On November 3, 2008 a deadly home invasion occurred which resulted in the death of one individual: Richard Miller.<sup>92</sup> Duane Miller, Ricky Bluiett, Tamela Daniels and Kourtney Glassock were also victims of the attack.<sup>93</sup> The principal detective involved in the case was Detective Christine Mannina of the Indianapolis Metropolitan Police Department (IMPD).<sup>94</sup> The four surviving witnesses told Mannina and other detectives that the invasion was conducted by black men wearing hooded sweatshirts, however, none of the witnesses were able to identify the perpetrators.<sup>95</sup> After little initial success, the investigators were able to identify a suspect after one of the witness's contacted Detective Mannina claiming to have recognized Carlton Hart as one of the culprits from his MySpace.com webpage.<sup>96</sup> Detective Mannina then singlehandedly conducted private interviews with all the remaining witnesses on November 22, 2008.<sup>97</sup> After each witness identified Hart, Mannina drafted a probable cause

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<sup>91</sup> Hart v. Mannina, 798 F.3d 578, 583 (7th Cir. 2015).

<sup>92</sup> *Id.* at 584.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

affidavit in which she swore that all the witnesses identified Hart.<sup>98</sup> After consulting with prosecutor Denise Robinson, Mannina arrested Hart on December 3, 2008.<sup>99</sup>

Nearly a year after Hart's arrest, Bluiett reached out to the prosecutor's office and expressed concerns about his identification of Hart.<sup>100</sup> Bluiett told the prosecutor's office that he was "pretty sure but not completely" sure that Hart participated in the home invasion.<sup>101</sup> Two additional detectives, Jeff Breedlove and Kevin Kelly, re-interviewed Bluiett on December 11, 2009.<sup>102</sup> Bluiett told the detectives that, "I was reluctant. I kind of signed, but I signed because I guess that's what I was supposed to do, you know?"<sup>103</sup> In response to questions about whether Bluiett had ever expressed these reservations to Mannina, Bluiett told the detectives that he had talked to Mannina about his uncertainty, but this event occurred after Hart was arrested.<sup>104</sup> Bluiett described this encounter with Mannina, telling the detectives: "[W]e talked about something and I told her I wasn't completely sure that these were the people" and that Detective Mannina "was just trying to convince me."<sup>105</sup> The conversation between Bluiett and Mannina lasted about two and half hours, during which time Mannina tried to reassure Bluiett telling him, "These are the guys . . . if they don't go to jail, they're just gonna have a chip on their shoulder and be out here and think they're invincible."<sup>106</sup> After spending nearly two years in jail pending trial, Hart was released after the State moved to dismiss the case due to "an 'insufficient nexus' between Hart and the crime."<sup>107</sup>

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<sup>98</sup> *Id.* at 585.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 586.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

Detective Mannina also conducted an interview, along with Officer Lesia Moore, of Adrian Rockett in March 2009.<sup>108</sup> Rockett was a suspect in another case who claimed to have information about the Miller home invasion.<sup>109</sup> Detective Breedlove, originally schedule to participate in person but having been called away by something else, also participated in the interview via a direct feed to his computer.<sup>110</sup> After the interview, Breedlove expressed some objections to the way Mannina conducted the interview.<sup>111</sup> Breedlove stated “that it looked as if Mannina had encouraged Rockett to sign the photo array after [Rockett] initially hesitated.”<sup>112</sup> While Breedlove did not think Mannina had communicated with Rockett whom to pick out of the photo array, he believed that Mannina “crossed a line.”<sup>113</sup>

In support of his Fourth Amendment claims, Hart attempted to show that probable cause did not exist for his arrest by establishing three theories on which to rely: (1) Detective Mannina failed to record the beginning of each interview conducted on November 22, 2008; (2) the IMPD destroyed evidence in violation of a duty to preserve it; and (3) a reasonable trier of fact could have inferred that Mannina coached the witnesses into providing false identifications.<sup>114</sup>

### B. *The “Shift”*

Lucky Shift, Inc. (“Lucky Shift”) created a six-episode reality police drama about homicide detectives that worked between 2:00 and 10:30pm (known as IMPD’s middle-shift).<sup>115</sup> The season finale of the program, titled “The Shift”, focused on the home invasion and

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<sup>108</sup> *Id.* at 590.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 587-90.

<sup>115</sup> *Id.* at 586.

culminated in Hart's arrest.<sup>116</sup> For their participation in the show, Detective Mannina was paid \$14,500, Detective Breedlove was paid \$2,750, Detective Kelly was paid \$3,000, and officer Moore was paid \$2,500.<sup>117</sup> The City received a \$1,000 contribution for access to detectives and its facilities, window tinting for the homicide detectives' squad cars paid for by the television company, and new badges for the detectives also paid for by the television company.<sup>118</sup>

### C. *The November 22, 2008 Interviews*

Detective Mannina's interview with the surviving witnesses, minus Miller, were recorded and included in the television episode titled "Brother's Keeper."<sup>119</sup> Before recording the interview, Mannina showed each witness the photo array of suspects and asked if they could identify anyone.<sup>120</sup> Only after each witness confirmed that they recognized one of the suspects did Mannina turn on the tape recorder.<sup>121</sup> While the Seventh Circuit acknowledged that this procedure was flawed, they held that it did not meet Hart's burden of showing evidence of coercion or manipulation.<sup>122</sup>

Unlike Detective Mannina, Lucky Shift videotaped the entirety of the interviews.<sup>123</sup> However, they destroyed these videos in compliance with company policy nearly one month after the episode aired.<sup>124</sup> The court held that IMPD did not have a duty to preserve this evidence because the record established that the raw video footage would not

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 586-87.

<sup>119</sup> *Id.* at 586.

<sup>120</sup> *Id.* at 588.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 589.

<sup>124</sup> *Id.* (Lucky Shift's president testified that the company typically sent raw footage to an independent shredding company approximately 30 days after the episode aired).

have provided exculpatory evidence.<sup>125</sup> Similarly, the court found that Lucky Shift did not destroy the evidence in bad faith, despite the fact that the footages was destroyed three days after Hart's co-defendant's attorney filed a discovery motion seeking "all contracts and/or agreements between the [IMPD] and/or the City of Indianapolis and Investigation Discovery/Discovery Channel/Discovery Communications, Inc. relating to . . . the television program 'The Shift.'"<sup>126</sup> The court found that because there was no evidence that Lucky Shift knew about the request, their destruction of the footage was not done illegally.<sup>127</sup>

#### *D. The Probable Cause Affidavit*

Hart also alleged that Mannina made false or misleading statements with regard to her probable cause affidavit.<sup>128</sup> Warrant requests violate the Fourth Amendment "if the requesting officer knowingly, intentionally or with reckless disregard for the truth, [make] false statements in requesting the warrant and the false statements were necessary to the determination that a warrant should issue."<sup>129</sup> An officer recklessly disregards the truth when it is shown that "the officer entertained serious doubts as to the truth of statements, had obvious reasons to doubt [the statements'] accuracy, or failed to disclose facts that he or she knew would negate probable cause."<sup>130</sup> In her probable cause affidavit, Mannina omitted that Bluiett told her that he was only "pretty sure" that Hart was involved in the home invasion.<sup>131</sup> The Seventh Circuit held that this omission was not material, despite the fact that the court "believe[d] she should

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 590.

<sup>129</sup> *Knox v. Smith*, 342 F.3d 651, 658 (7th Cir. 2003).

<sup>130</sup> *Betker v. Gomez* 692 F.3d 854, 860 (7th Cir. 2012).

<sup>131</sup> *Hart*, 798 F.3d at 593.

have included this qualification.”<sup>132</sup> Seemingly the court included its belief for the sake of posterity, suggesting that in similar circumstances in the future detectives should include such information in their probable cause affidavits. Ultimately however, all of Hart’s claims were dismissed on summary judgment by the district court, and affirmed by the Seventh Circuit. While the outcome in the case may have ultimately been correct, the troubling conduct that occurred during the course of the investigation demonstrates how the media’s presence in law enforcement and judicial proceedings can potentially have a negative effect.

*Hart v. Mannina* is a perfect illustration of the media’s effect on law enforcement. Detective Mannina tried to convince Bluiett that he had identified the correct perpetrator.<sup>133</sup> Mannina also engaged in interview techniques that at least one of his colleagues found disconcerting.<sup>134</sup> One explanation for Mannina’s overly aggressive tactics could be that Mannina was acting in this manner in order to secure an arrest and conviction because she knew her case would be the seminal piece for the show’s series finale. Mannina’s conduct arguably reflected the “do-whatever-it-takes” mentality promoted by crime dramas. The Seventh Circuit itself acknowledged that such a circumstance could arise when it said, “It is easy to imagine a detective with a looming television deadline cutting a corner to ensure that a suspect is arrested in time for the final episode.”<sup>135</sup> When the “whatever-it-takes” mentality migrates from television programs into real police work, the system is threatened by police officers willing to violate due process and other constitutional rights in order to achieve the result they seek.

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 585.

<sup>134</sup> *Id.* at 590.

<sup>135</sup> *Id.* at 583.

## HOW COURTS SHOULD HANDLE MASS MEDIA IN THE JUSTICE SYSTEM

The primary purpose of establishing trial procedures is to ensure fairness in the justice system. Criminal trials are mechanisms for determining guilt.<sup>136</sup> In order to facilitate that purpose, the rules of criminal procedure, which dictate how courtroom proceedings unfold, must be designed to provide for the fair and reliable determination of guilt.<sup>137</sup> When the colonists began establishing laws to govern their new nation, they sought to put in place safeguards protecting the right to a fair trial.<sup>138</sup> The enactment of the Sixth Amendment was one such attempt to protect this fundamental right.<sup>139</sup> The Sixth Amendment guarantees a defendant the right to a “public trial.”<sup>140</sup> This guarantee was established because of the fear of secret tribunals.<sup>141</sup> In both federal and state criminal trials, courts are required to “comport with the fundamental conception of a fair trial.”<sup>142</sup>

There is no constitutional right mandating the entry of electronic media into judicial proceedings.<sup>143</sup> Rather, the media’s “right” to access courtroom proceedings and law enforcement efforts acts more like a privilege. Attempts have been made to read such a right from the First Amendment, Sixth Amendment, or some combination of the two; however the Supreme Court has been unequivocal that such a right does not exist.<sup>144</sup> That is not to say that the media may not have a valid

<sup>136</sup> *Estes v. Texas*, 381 U.S. 532, 557 (1965).

<sup>137</sup> *Id.*

<sup>138</sup> *See Stark, supra* at note 3, at 236.

<sup>139</sup> *Estes*, 381 U.S. at 559.

<sup>140</sup> U.S. CONST. amend. VI.

<sup>141</sup> *Estes*, 381 U.S. at 538 (“History [has] proven that secret tribunals were effective instruments of oppression”).

<sup>142</sup> *Id.* at 560 (quotations omitted).

<sup>143</sup> *See In Re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 774 (1979).

<sup>144</sup> *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978) (“[T]here is no constitutional right to have [live witness] testimony recorded or broadcast...[n]or does the Sixth Amendment require that the trial – or any part of it – be broadcast live or on tape to the public”).

reason to access courtroom proceedings. In fact, the Supreme Court opposes a *per se* rule prohibiting the presence of the media inside the courtroom.<sup>145</sup> The presence of the media in the courtroom provides several beneficial functions. The media is often the best source for awaking the public interest in governmental affairs. By stimulating public interest in the government, the press helps keep the system and officials accountable by exposing corruption and informing the citizenry of important public events. Thus, a certain degree of freedom must be allotted to the media if they are to effectively carry out this important function. By allowing access to criminal proceedings, both prior to and during trial, the media adds another level of accountability to the system. Media accountability affect strengthens the integrity of the justice system. However, as discussed above, there are other countervailing factors that make this strengthening of public confidence less effective that it probably could be.

Because of the significant effect of courts on citizen's day-to-day lives, and the ability of mass media to reach mass groups of people, access to courtrooms and police proceedings should not be completely cut-off from the media. Instead, courts should focus on establishing clear-cut rules, designed to keep up with the evolution of the media, which will encourage public confidence in the justice process as well as protect defendants' constitutional guarantees to fair and expedient trials. The next sections lay out guidelines courts should consider when addressing the presence of medial in the courtroom or in law enforcement proceedings. The following suggestions are meant to help courts navigate the potential problems that might arise when the media wants to access judicial or law enforcement proceedings. They are not intended to be rules and remove the discretion of judges and other individuals charged with making these decisions. Ultimately, courts should make decisions about whether to allow the media to access certain events on a case-by-case basis. The guidelines specifically address the following: objections by the accused, protection of certain witnesses, and media coverage taken out of context.

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<sup>145</sup> Chandler v. Florida, 449 U.S. 560, 574-575 (1981).

### A. *Objections by the Accused*

Many states experiment with allowing the media to televise their public institutions.<sup>146</sup> While states have taken great liberties to ensure that the media will not disrupt the trial process, some defendants are sure to object to the media's presence. For example, in *Chandler v. Florida*, the defendant made repeated attempts to ban or limit the media's access to the courtroom proceedings.<sup>147</sup> Despite the defendant's efforts, the media was eventually allowed to cover the trial.<sup>148</sup> The only protection put in place for the defendant was a court instruction to the jury that they should not "watch or read anything about the case in the media."<sup>149</sup> It is hard to imagine this instruction provided the defendant with any great relief. In upholding the state conviction, the Court held that the defendant did not show any evidence which would have suggested an adverse impact on the trial process.<sup>150</sup> Similarly, in *Hart v. Mannina*, the Seventh Circuit upheld the district court's decision because Hart could not provide sufficient evidence that Detective Mannina pressured an eyewitness into making a false identification or that Lucky Shift destroyed the video footage in bad faith.<sup>151</sup>

Requiring the defendant to prove that the media's presence will be disruptive to the trial is a backward proposition considering it is the prosecution burdened with proving most other elements in a criminal trial. It is not that startling that the defendant was required to prove that the media's presence would be disruptive in *Chandler* because in that case the defendant lost at the trial level, and therefore the defendant had the burden at the appellate level. What is alarming about *Chandler*, is that the Court said the the appropriate safeguard against juror prejudice "is the *defendant's right to demonstrate* that the

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<sup>146</sup> *Id.* at 576.

<sup>147</sup> *Id.* at 567.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 581.

<sup>151</sup> *Hart v. Mannina*, 798 F.3d 578, 589-90 (7th Cir. 2015).

media's coverage of his case . . . compromised the ability of the particular jury that heard the case to adjudicate fairly."<sup>152</sup>

The burden should be on the opposite party. The media enjoys no special right to televise courtrooms. *Estes* unequivocally stated that the First Amendment does not extend so far as to provide the press with a right to televise courtroom proceedings.<sup>153</sup> Therefore, if a defendant objects at the trial level or during law enforcement proceedings to the media's presence, the burden should be on the prosecution, or perhaps the media itself, to show that the media's presence will not disturb the process or disrupt the defendant's ability to receive a fair trial. Such a rule has two beneficial side effects. First, it protects the defendant by removing the burden of showing that the media will be an unwanted nuisance to the trial court or law enforcement proceedings. Burdening the defendant to show why the media shouldn't be allowed in the proceeding distracts the defendant from their primary focus: establishing a solid defense to their accused crime. Our system favors the defendant (e.g. rule of lenity) and so it makes sense that the rules should favor them in this area as well. The other beneficial effect of such a rule is that it requires the media, prosecution or whomever wants access, to take the necessary steps to ensure that media presence will not be disruptive. This will help to develop the necessary policies and technology to ensure that media coverage will not cause the kind of disruptive behavior that implicates due process concerns.

That is not to say the the media should have to prove their presence will not be disruptive beyond a reasonable doubt. A more practical solution is to simply require that the media show by a preponderance of the evidence that their presence will not have a negative effect. After all, the court or police department should take into account the positive aspects of media coverage, and balance those benefits with the potential for disruption. Proof by a preponderance of

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<sup>152</sup> *Chandler*, 449 U.S. at 574 (emphasis added).

<sup>153</sup> *Estes v. Texas*, 381 U.S. 532, 547 (1965) ("It is said, however, that the freedoms granted in the First Amendment extend a right to the news media to televise the courtroom....[t]his is a misconception of the rights of the press").

the evidence would appropriately balance the benefits of media's presence with its potentially disruptive effects.

### *B. Protection for Certain Witnesses*

Another area that courts and law enforcement should be concerned about is protection for certain types of witnesses, for example children, victims of sex crimes, some informants, and extremely timid witnesses. Given the effect media tends to have on witnesses and their importance to the fact-finding process, it is imperative that they receive protection when the media's presence threatens to undermine the fact-finding process. An overly aggressive law enforcement officer or prosecutor may be able to intimidate and sway the opinion of a particularly vulnerable witness. A perfect example of this is on display in *Mannina*. Detective Mannina conducted an interview of Adrian Rockett where it was noted by another office that "Rockett seemed a little wishy-washy in his identification and that it looked as if Mannina had encouraged Rockett to sign the photo array after he initially hesitated."<sup>154</sup> An extreme reaction to this kind of conduct would be to require the police to question witnesses only in the presence of an attorney. In fact, Regent University law professor James Duane advises his law students to never talk to the police without the presence of an attorney, even in circumstances where the media is not a factor.<sup>155</sup> Undoubtedly, this would be an untenable rule. Still, media coverage can create added pressure for witnesses to recall details with 100% accuracy, and if they do not they will be impeached not just in front of the judge and jury, but in front of the camera—potentially damaging their public credibility. Some states have addressed this concern by promulgating special rules to address such circumstances.<sup>156</sup> While courts and police departments may have policies to address these kinds of situations,

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<sup>154</sup> *Hart*, 798 F.3d at 590.

<sup>155</sup> Russr, *Don't Talk to Police*, YOUTUBE (June 21, 2008), <https://www.youtube.com/watch?v=6wXkI4t7nuc>

<sup>156</sup> *Chandler*, 449 U.S. at 577.

these institutions should be especially sensitive to these individuals because they tend to be especially vulnerable to intimidation and influence.

### *C. Media Coverage Taken Out of Context*

The last guiding principle that police departments, courts, and other governmental institutions should consider is how to deal with the media taking their coverage out of context. As already discussed, the media is attracted to particularly bizarre or drama-filled cases.<sup>157</sup> Media presence becomes even more problematic when the coverage consists of only select portions of the proceeding. For instance, in *Estes* the Court noted that the “cameras operated only intermittently.”<sup>158</sup> By only recording various portions of the trial and airing those select pieces, the media was creating a distorted image of how the trial process occurred. That does not mean that the media had a nefarious purpose by only airing select segments. News programs are constrained by practical limits, like their timing schedules and the need to play commercials, which pay the bills at the end of the day. Additionally, these programs are constrained by what the judge permits them to record. The district court in *Estes* only permitted the taping of the opening and closing arguments of the State, the return of the jury’s verdict and its receipt by the judge.<sup>159</sup> These rules and practicalities create a dangerous situation where the public is not seeing the entire picture, and thus are constructing their opinions about the case and the judicial process based on incomplete information.

Courts and law enforcement departments should be wary about letting coverage of these processes be taken out of context. The danger is not necessarily tied to the administration of justice in the trial or police investigation because the individuals who participate in that process, attorneys, judges and law enforcement, will by privy to all the relevant information. The danger arises from the media’s ability to

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<sup>157</sup> *Id.* at 580.

<sup>158</sup> *Estes*, 381 U.S. at 537.

<sup>159</sup> *Id.*

shape the appearance of justice through these programs. As we've discussed, the media is a great source of knowledge about public institutions like courtrooms or police departments.<sup>160</sup> These institutions are not always readily accessible to the public, and so the media can play an important function by making the general public aware of how these institutions operate. Coverage of high profile cases can even incite reform and the passage of laws. Matthew Shepard stands as an example of this. Matthew Shepard was a twenty-one-year-old male who was brutally murdered because of his sexual orientation. In the wake of his death, then-President Bill Clinton renewed attempts to extend federal hate crime legislation to include violent acts because of homosexuality.<sup>161</sup> While initial attempts were unfruitful, Congress eventually passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.<sup>162</sup> This Act was signed into law by President Barack Obama in October 2009.<sup>163</sup> The passage of this law was direct result of the national attention paid to Matthew Shepard's murder. Media coverage was instrumental in creating this reform.

Certain events in *Hart v. Mannina* demonstrate the danger of incomplete coverage of legal or law enforcement proceedings. Portions of the the November 22, 2008 interviews were not recorded.<sup>164</sup> Before she turned on the tape recording, Mannina presented the photo array to each witness and asked if the witness recognized anyone.<sup>165</sup> Mannina failed to observe the proper protocol, and therefore captured an incomplete picture of the event in the tape recording.<sup>166</sup> Given that Mannina was the only detective present

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<sup>160</sup> *Id.* at 539

<sup>161</sup> Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, WIKIPEDIA, [https://en.wikipedia.org/wiki/Matthew\\_Shepard\\_and\\_James\\_Byrd\\_Jr.\\_Hate\\_Crimes\\_Prevention\\_Act](https://en.wikipedia.org/wiki/Matthew_Shepard_and_James_Byrd_Jr._Hate_Crimes_Prevention_Act) (last visited April 24, 2016).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Hart v. Mannina*, 798 F.3d 578, 588 (7th Cir. 2015).

<sup>165</sup> *Id.*

<sup>166</sup> See U.S. DEPARTMENT OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* 23-24 (October 1999); INTERNATIONAL ASS'N FOR CHIEFS OF POLICE, *MODEL POLICY ON EYEWITNESS IDENTIFICATION 2* (September 2010).

during those interviews,<sup>167</sup> it becomes difficult to know what transpired when the cameras were off. Lucky Shift did record the entire interaction, but destroyed the tapes per company policy.<sup>168</sup> Although the Seventh Circuit found the tapes were not destroyed in bad faith, they were destroyed three days after Swavely's attorney filed a motion to obtain "all contracts and/or agreements between the Indianapolis Metropolitan Police Department and/or the City of Indianapolis . . . relating to the recording and production of . . . 'The Shift.'"<sup>169</sup> The timing of the request begs the question, what was actually contained on the videotapes. But even if we accept that the tapes contained no incriminating evidence against Mannina, there is another issue with the way Mannina conducted the interviews. Had a witness been presented with a photo array and asked to identify the suspect, and could not do so, the defendant would be entitled to know about the non-identification.<sup>170</sup> This kind of information has come to be known as *Brady* material.<sup>171</sup> Mannina's technique failed to account for this possibility.<sup>172</sup> The interviews were also conducted in such a way as to avoid the preferred "double-blind" method of administering identification procedures, where the administering officer does not know who is and is not a suspect.<sup>173</sup> By avoiding the double-blind procedure, the officer introduces a risk of inadvertently cueing the witness before, during or after the viewing as to who they believe the suspect to be.<sup>174</sup> These kinds of mistakes are made possible with the introduction of cameras into judicial and law enforcement proceedings. In order to avoid such oversights, the courts and police should be vigilant of the media's presence and take steps to ensure that the process is fortified to deal with any potential disruptions.

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<sup>167</sup> *Hart*, 798 F.3d at 584.

<sup>168</sup> *Id.* at 589.

<sup>169</sup> *Id.*

<sup>170</sup> *Brady v. Maryland*, 373 U.S. 83, 83 (1963).

<sup>171</sup> *Id.*

<sup>172</sup> *Hart*, 798 F.3d at 588 n.1.

<sup>173</sup> *Id.*

<sup>174</sup> *State v. Lawson*, 291 P.3d 673, 686 (Or. 2012).