

Un-Making a Murderer: New True Crime Sensationalism and the Criminal Justice System

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I. Introduction

“Humans are fascinated by evil.”¹ Like a car crash from which you cannot turn away, society is oddly ensnared by tales of terror. While some find fear through fiction, others seek thrills closer to home—ones written on the pages of real lives. Indeed, for as long as books have been printed, humanity has sat spellbound by stories of true crimes; real-life horrors more dreadful than fantasy. These stranger-than-fiction stories enthrall the masses with vicarious tremor, allowing their readers to stand “at the shoulder of monsters.”²

From its inception, the true crime genre has sought to elicit an emotional response from its viewer. This emotively provocative approach—formally known as sensationalism—still serves as the genre’s distinctive cornerstone. In contrast, the canon’s purpose has shifted dramatically with time, ranging from religious promotion to penal reform to pure commercialism. And yet, despite the genre’s many motives, historical true crime stories did not aim to meaningfully influence their underlying criminal cases. Instead, the canon’s authors used the accused’s specific circumstance to promote general societal reformation. Nevertheless, recent resuscitations of the genre sit as “impromptu branch[es] of the judiciary,”³ calling into question settled verdicts and affecting the outcomes of their chosen cases. The genre’s resurgence—known as the New True Crime—changes venue from the courts of justice to the courts of public opinion and carries along with it real-life implications. The canon’s newfound influence raises questions: Is the New True Crime different from its predecessors? If so, what affects does it have? And, should steps be taken to mitigate possible negative effects?

This article seeks to answer those questions by examining two of the most prominent examples of the New True Crime phenomenon: Sarah Koenig’s *Serial* and Laura Ricciardi and Moira Demos’s *Making a Murderer*.⁴ The article first reviews the historical traits and motives of the true crime genre. Next, it summarizes each show and explores how they have affected their respective cases. The article then examines how these works apply traditional true crime sensationalism to influence the outcome of a criminal case. Finally, it makes the case for journalistic self-regulation in the true crime context.

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¹ Mark Lawson, *Serial Thrillers: why true crime is popular culture’s most wanted*, THE GUARDIAN (Mar. 21, 2017), <https://www.theguardian.com/culture/2015/dec/12/serial-thrillers-why-true-is-popular-cultures-most-wanted>.

² *Id.*

³ *Id.*

⁴ Though *Serial* is a podcast and *Making a Murderer* is a traditional documentary, this paper will refer to both as documentaries for readability purposes.

II. The History of True Crime Sensationalism

True crime is a non-fiction genre of literature, film, and media involving actual crime stories.⁵ As Joy Wiltenburg notes in her piece *True Crime: The Origins of Modern Sensationalism*, the genre has always “aimed to arouse strong emotional reactions in the public.”⁶ In fact, true crime’s dependence on sensationalism—the act of emphasizing provocative information to elicit an emotional response—dates back to mid-sixteenth century Germany.⁷ From its creation, the canon has been used as a sort of “cultural agent,” shaping community values by linking violent crime with a negative emotional reaction.⁸ Its persuasive force lies largely in its lack of explicit argumentation, which allows authors to influence social and political discourse without garnering the label of propaganda.⁹ Indeed, true crime’s principally emotive focus pushes it outside the typical political realm, which gives true crime authors great latitude to engender social change.¹⁰

To achieve societal reform, true crime authors developed standardized sensationalist techniques to enhance the genre’s emotive influence.¹¹ For example, early true crime often used music or stylistic decoration to encourage feeling¹² and invoked exceptionally graphic descriptions of violence to enflame emotions.¹³ The canon also employed a storytelling style that “direct[ed] and demand[ed] the audience’s imaginative participation,” which encouraged emotional investment in the story’s outcome.¹⁴ In addition, true crime authors established themselves as trustworthy narrators by cementing a personal connection with their audience, typically through shared commiseration for their tragic characters.¹⁵ The genre further cemented an emotional connection between the audience and the story by including direct dialogue from its characters and by detailing the characters’ familial backgrounds.¹⁶ Even more so, true crime has always sought to arouse emotions in as many viewers as possible. Historical true crime would usually include elaborate wood cut images alongside written reports so illiterate audiences could engage with the material through pictures.¹⁷ Authors would also often perform their stories orally so that their work would expand beyond the wealthy, literate classes.¹⁸ Alongside all this, a constant feature of sensational true crime was an implicit emphasis that the story was important *because it was true*. Simply put, the genre demanded an emotional response because its stories were not “recreational like fiction, but rather should be taken seriously.”¹⁹ This emphasis on truth made the stories all the

⁵ See Jordan Foster, *The Truth Is in the Crime*, PUB. WKLY. (Mar. 30, 2012), <http://www.publishersweekly.com/pw/by-topic/new-titles/adult-announcements/article/51298-the-truth-is-in-the-crime.html>.

⁶ Joy Wiltenburg, *True Crime: The Origins of Modern Sensationalism*, 109 AM. HIST. REV. 1377, 1378 (2004).

⁷ See *id.* at 1379.

⁸ *Id.* at 1379–80.

⁹ See *id.* at 1380–81.

¹⁰ See *id.*

¹¹ See *id.* at 1382.

¹² See *id.*

¹³ See *id.* at 1390.

¹⁴ *Id.* at 1387.

¹⁵ See *id.* at 1383. For example, the author of a 1582 pamphlet sympathized along with her audience by commenting, “[m]y dearest reader, this is unfortunately, may God have mercy, one piece of horrifying news after another . . . so that my heart nearly breaks and my eyes fill with tears.” *Id.*

¹⁶ See *id.* at 1389–90.

¹⁷ See *id.* at 1390.

¹⁸ See *id.* at 1382.

¹⁹ *Id.* at 1383.

more horrifying and drew an unrivaled emotional reaction. As this paper will explain, these sensationalist qualities remain a staple of true crime's modern resurgence.

Though true crime sensationalism has remained a historical constant, the genre's motives have widely fluctuated with history. In the late Middle Ages, crime chronicles were solely used by ruling classes to record past events.²⁰ But, by the sixteenth and seventeenth centuries, "[v]irtually all crime accounts . . . [had] connected their stories with an edifying Christian message."²¹ In fact, sixteenth century clergy members considered crime to be "a sign that God was trying to get people's attention" and thought it their duty to shock the masses into repentance and reform.²² These early true crime reports served as cautionary tales about the consequences of sin and preached that the reader could only avoid criminality through strict devotion to the Church.²³

When not used for religious purposes, early true crime was employed to stress the importance of family values and social discipline.²⁴ Indeed, post-Reformation activists would invoke terrifying tales of inter-familial murder to illustrate the consequences of a weak familial structure.²⁵ In a similar vein, early renditions of the genre heavily praised the government's role in maintaining law and order.²⁶ Authors would constantly credit government officials with societal peace and encourage devout respect for their authority.²⁷ This pro-government slant shifted, however, in the nineteenth century when authors like Charles Dickens, William Thackeray, and Oscar Wilde began using tales of punishments to undermine the English government's draconian penal system.²⁸ And, in the early twentieth century, the genre's chief motive changed yet again as Truman Capote's *In Cold Blood* set the standard for sensationalizing true crime stories for primarily commercial gain.²⁹

But despite the genre's oscillating motives, its renditions all hold one trait in common: they take the guilt of the criminal as a given. Their works seek not to prove the specific criminal's innocence, but instead use the criminal's story as a means to achieve abstract, reformative ends. New True Crime marks a distinct and significant break from that tradition.

III. The Rise of the New True Crime

In the latter half of the 20th century, a subgenre of true crime began to emerge: one not focused on exploiting the accused's story, but on using sensationalism to change the story's ending. The progenitor of this canon shift was Stanley Gardner, creator of the famed Perry Mason

²⁰ See *id.* at 1381.

²¹ *Id.* at 1384.

²² *Id.* at 1385.

²³ See *id.* at 1384.

²⁴ See *id.*

²⁵ See *id.* at 1394.

²⁶ See *id.* at 1392.

²⁷ See *id.*

²⁸ Pamela Burger, *The Bloody History of the True Crime Genre*, JSTOR DAILY (Aug. 24, 2016), <https://daily.jstor.org/bloody-history-of-true-crime-genre/>.

²⁹ See Siobhan Lyons, *In Cold Ink: The Celebrity True Crime Author and Ethical Journalism*, 5 THE HUMAN 20, 27 (September 2015) (arguing that Truman Capote wrote *In Cold Blood* to achieve celebrity, fame, and financial success); see also Jessica Ferri, *Capote's Masterpiece 'In Cold Blood' Still Vivid at 50*, THE DAILY BEAST (Dec. 18, 2016), <http://www.thedailybeast.com/articles/2016/12/28/capote-s-masterpiece-in-cold-blood-still-vivid-at-50.html> (noting that some of Truman Capote's contemporaries, including veteran true crime writer Jack Olsen, believed Capote's over-sensationalized *In Cold Blood's* details solely for profit).

series.³⁰ Throughout the 1950s, Gardner published a true crime column investigating cases of impoverished prisoners serving life sentences.³¹ He called his column “The Court of Last Resort.”³² Employing classic sensationalist techniques, Gardner called into question dozens of verdicts, and his coverage, in at least one instance, helped exonerate a wrongly convicted defendant.³³

While still only a subgenre compared to the smashing success of works like *In Cold Blood*, Gardner’s “Court of Last Resort” slowly gained traction among investigative journalists. In 1988, *The Thin Blue Line*, a documentary about Randall Dale Adams, who was sentenced to death for the murder of a police officer, resulted in Adams’s exoneration just a year after its release.³⁴ At the turn of the millennium, the hit television miniseries *The Staircase* chronicled the conviction of Michael Peterson for the murder of his wife and paved the way for his new trial.³⁵ In fact, as early as 1991, scholar Jack Miles concluded that for “[true crime] works to have any social utility, they ought to have it first and foremost for those most directly affected by the crimes in questions.”³⁶

This historical background set the stage for the 21st century’s evolution of the New True Crime; a powerful genre that applies classical true crime sensationalism toward a new motive – influencing the outcome of a specific case. Before engaging in its analysis, however, this paper must first examine how *Serial* and *Making a Murderer* have influenced their respective cases.

IV. The Shows and Their Effects (WARNING: Spoilers Ahead)

A. Serial

Sarah Koenig’s *Serial* is a twelve-part podcast investigating the murder of Baltimore high school senior Hae Min Lee, who was allegedly murdered by her boyfriend, Adnan Syed, in 1999. Hailed the most popular podcast of all time—it was downloaded more than 100 million times and won a Peabody Award for its contribution to the criminal justice system—*Serial* kept listeners riveted each week as Koenig investigated the evidence, or implied lack thereof, in the State’s case against Adnan.³⁷ The podcast raised several important points: that the State lacked DNA evidence or clear motive, that its case relied heavily on the inconsistent testimony of Adnan’s supposed accomplice, Jay Wilds, and that the cell tower records used to corroborate Jay’s story at trial were

³⁰ See Kathryn Schulz, *Dead Certainty: How ‘Making a Murderer’ Goes Wrong*, THE NEW YORKER (Jan. 25, 2016), <http://www.newyorker.com/magazine/2016/01/25/dead-certainty>.

³¹ See *id.*

³² *Id.*

³³ See *id.*

³⁴ See *id.* For more on *The Thin Blue Line*, see Isaac Butler, *What Errol Morris Thinks of Making a Murderer*, SLATE (Jan. 27, 2016), http://www.slate.com/articles/arts/culturebox/2016/01/errol_morris_q_a_on_the_thin_blue_line_and_making_a_murderer.html.

³⁵ See Schulz, *supra* note 30. For more on *The Staircase*, see The Lineup Staff, *The Staircase: A True Crime Documentary That Surprises Even After It Ends*, THE LINEUP (Mar. 9, 2018), <http://www.the-line-up.com/the-staircase-documentary/>.

³⁶ Jack Miles, *Imagining Mayhem: Fictional Violence vs. “True Crime,”* 276 THE NORTH AMERICAN REVIEW 58 (1991), https://www.jstor.org/stable/25125321?mag=bloody-history-of-true-crime-genre&seq=1#page_scan_tab_contents.

³⁷ See Jonah Engel Bromwich, *Adnan Syed, of ‘Serial’ Podcast, Gets a Retrial in Murder Case*, NEW YORK TIMES (Jun. 30, 2016), https://www.nytimes.com/2016/07/01/us/serial-adnan-syed-new-trial.html?_r=0.

inherently unreliable.³⁸ It also questioned the effectiveness of Adnan’s former defense counsel, the late Cristina Gutierrez.³⁹ Nonetheless, Koenig’s most substantial contribution may be finding Asia McClain; a potential alibi witness who would testify that Adnan was with her in the library during the 21 minute period in which Hae was supposedly killed.⁴⁰

Serial’s effects on the case were swift and powerful. Due in large part to Koenig’s investigation of the cell phone tower data, her evidence of Ms. Gutierrez’s ineffectiveness as counsel, and the addition of Asia McClain, Adnan’s conviction *was set aside and he was granted a retrial*.⁴¹ Shortly after the ruling, the pro bono department at powerhouse law firm Hogan Lovells LLP signed on to assist in Adnan’s defense.⁴² Socially, the show became a pop culture phenomenon. The podcast’s so-called “Serial Effect” has “spawned countless follow-up podcasts, blogs, new articles, and online communities [about the case],”⁴³ and its success sealed the deal for Koenig’s second season.⁴⁴ Although Koenig’s next story will not focus on Adnan Syed, his story continues to be covered by podcasts and television shows across the world.⁴⁵

B. Making a Murderer

The brainchild of Columbia film students Laura Ricciardi and Moira Demos, *Making a Murderer* is a ten-episode Netflix documentary about the disturbing, highs-and-lows tale of Wisconsin’s Steven Avery. The series starts simply enough: Avery, a member of an impoverished, socially outcast family, is arrested by the Manitowoc County Sheriff’s Dept. for the alleged sexual assault of local socialite Penny Beerntsen.⁴⁶ He is quickly found guilty and sentenced to thirty-two years in prison.⁴⁷ Fast-forward eighteen years into his sentence, Avery is exonerated by DNA testing and another man, Gregory Allen, is proven to be the assailant.⁴⁸ Evidence soon comes to light that officers in the Manitowoc County Sheriff’s Dept., convinced that they had their man in Avery, declined to investigate Gregory Allen despite knowing that he, not Avery, might be the assailant.⁴⁹

³⁸ Anna Silman, *The Serial Effect: Adnan Syed gets a new hearing – and potential alibi witness Asia McClain will be heard*, SALON (Nov. 9, 2015), http://www.salon.com/2015/11/09/the_serial_effect_adnan_syed_gets_a_new_hearing_and_potential_alibi_witness_asia_mcclain_will_be_heard/.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See* Bromwich, *supra* note 37.

⁴² *See* Blake Edwards, *Serial’s Adnan Syed Now Has Hogan Lovells’ Firepower*, BLOOMBERG LAW (Jul. 6, 2016), <https://bol.bna.com/serials-adnan-syed-now-has-hogan-lovells-firepower/>.

⁴³ *See* Missy Rogers, *The Serial Effect*, THE ODYSSEY (Jul. 20, 2015), <https://www.theodysseyonline.com/podcast-serial>.

⁴⁴ Anna Bradlee and Sara Kolinovsky, *What the ‘Serial’ Podcast Revealed About Ex-Taliban Captive Bowe Bergdahl*, ABC NEWS (Apr. 1, 2016), <http://abcnews.go.com/US/serial-season-episodes-reveal-taliban-captive-bowe-bergdahl/story?id=36149685>.

⁴⁵ *See, e.g.*, Rabia Chadaury, *Season 1*, UNDISCLOSED (last visited on Apr. 27, 2017), <http://undisclosed-podcast.com/episodes/season-1/>; Brittany Britto, *Investigation Discovery to air TV special on Adnan Syed case*, BALTIMORE SUN (Jun. 1, 2016), <http://www.baltimoresun.com/features/baltimore-insider-blog/bal-investigation-discovery-tv-special-adnan-syed-case-20160601-story.html>.

⁴⁶ *See* Schulz, *supra* note 30.

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.*

Avery's release is a public spectacle. He becomes a poster child for the Innocence Project,⁵⁰ wrongful conviction laws are proposed in his name,⁵¹ and the community hangs on his every word, shocked and perturbed by this all-too-close-to-home miscarriage of justice.⁵² Armed with public support and evidence of police misconduct, Avery files a civil lawsuit against Manitowoc County to the tune of \$36 million dollars.⁵³

But, just after the officers accused of misconduct are deposed, Avery is arrested again—this time for the murder of local photographer Teresa Halbach.⁵⁴ A few months later, Avery's nephew, Brendan Dassey, confesses that he helped Avery rape and murder Halbach, burning her body soon after.⁵⁵ Following a lengthy trial, both are found guilty and sentenced to prison for life.⁵⁶

Making a Murderer examines the questionable circumstances that gave rise to those convictions. For instance, because of Avery's pending lawsuit, the Manitowoc County Sheriff's Dept. was supposed to remain removed from the murder investigation, save for lending supplies and equipment.⁵⁷ And yet, Manitowoc County officials appear at nearly every turn. In fact, members of the accused police department found the key evidence used to convict Avery.⁵⁸ The show also suggests that Dassey, who is learning-disabled, was coerced to confess to a crime he did not commit after being interrogated four times without his lawyer present.⁵⁹

The public response to *Making a Murderer* was "extreme and unprecedented."⁶⁰ Before the show aired, Avery could no longer afford a legal defense and was representing himself on a long-shot second appeal.⁶¹ Dassey had recently filed a writ of habeas corpus—i.e. "a legal Hail Mary that could take the court years to address."⁶² Yet, less than a year after *Making a Murderer*'s release, a federal district court *overturned Brendan Dassey's conviction*, ruling that his confession had been coerced in violation of his Fifth Amendment rights.⁶³ Indeed, within 72 hours of the documentary's release, a petition garnering over 500,000 signatures was sent to the White House pleading that President Obama pardon Steven Avery.⁶⁴ The outcry was so powerful that the White

⁵⁰ See *Avery Profile*, INNOCENCE PROJECT (last visited on Apr. 27, 2017), <https://www.innocenceproject.org/cases/steven-avery/#menu-nav>.

⁵¹ See Alison Dirr, *What happened to the Steven Avery bill*, POST-CRESCENT (Jan. 18, 2016), <http://www.postcrescent.com/story/news/local/steven-avery/2016/01/18/what-happened-avery-bill/78847486/>

⁵² See *Making a Murderer: Episode 1* (Netflix broadcast in 2015) (showing the amount of publicity Avery received post release at the 48:00 mark).

⁵³ See Schulz, *supra* note 30.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See Chitra Ramaswamy, *Guilty pleasure: how Making a Murderer tapped our weakness for true crime*, GUARDIAN (Jan. 11, 2016), <https://www.theguardian.com/tv-and-radio/2016/jan/11/how-making-murderer-tapped-our-weakness-true-crime-steven-avery>.

⁶¹ See Amelia McDonnell-Parry, *'Making a Murderer' One Year Later: Everything You Need to Know*, ROLLING STONE (Dec. 16, 2016), <http://www.rollingstone.com/culture/news/making-a-murderer-one-year-later-everything-to-know-w455262>.

⁶² *Id.*

⁶³ See Steve Almasy, *'Making a Murderer': Brendan Dassey conviction overturned*, CNN (Mar. 25, 2017), <http://www.cnn.com/2016/08/12/us/making-a-murderer-brendan-dassey-conviction-overturned/>.

⁶⁴ See Michael Seyedian, *Free Steven Avery*, CHANGE (Aug. 12, 2016), <https://www.change.org/p/president-of-the-united-states-free-steven-avery>.

House was forced to respond, noting that President Obama does not have the power to pardon Avery since he was convicted under state law.⁶⁵ Rallies for the pair have been held across the world—from London to New York and all the way to Australia.⁶⁶ What is more, the widespread publicity has resulted in thousands of dollars being donated to the duo’s legal defense,⁶⁷ has attracted high-powered defense counsel specializing in wrongful convictions,⁶⁸ and even caused a juror to admit that he thought Avery was innocent, but voted guilty out of “fear for [his] personal safety.”⁶⁹ With each passing day, new forensic testing is being considered to prove Avery’s innocence,⁷⁰ new tips are coming in about the case,⁷¹ and new allies, such as the infamous Internet hacker group “Anonymous,” are answering the show’s implied call for help.⁷²

But the documentary also produced darker consequences. While the show’s clear heroes reaped the benefits of their newfound fame, its villains paid the cost. Angry protests have plagued the Manitowoc County courthouse following the documentary’s release,⁷³ Freedom of Information Act requests by armchair investigators became so large that Manitowoc had to hire a separate “Steven Avery” law clerk,⁷⁴ and a bomb threat was even alleged against the local courthouse in Steven Avery’s name.⁷⁵ Perhaps most sobering for the legal profession, Ken Kratz, the case’s special prosecutor, has been demonized like a real-life Disney villain. Angry viewers flooded his

⁶⁵ See Lesley Messer, *White House Responds to Petition For Steven Avery of ‘Making a Murderer,’* ABC (Jan. 7, 2016), <http://abcnews.go.com/Entertainment/white-house-responds-petition-steven-avery-making-murderer/story?id=36153350>. A similar petition garnering over 340,000 signatures was sent to Wisconsin Governor Scott Walker. A spokesperson for Governor Walker responded that Governor Walker does not issue pardons and that “[t]hose who feel they have been wrongly convicted can seek to have their convictions overturned by a higher court.” *White House Responds to ‘Making a Murderer’ Petition*, NBC CHICAGO (Jan. 7, 2016), <http://www.nbcchicago.com/news/local/Making-a-Murderer-White-House-364593811.html>.

⁶⁶ See Caroline Graham, *Justice by Netflix?*, DAILY MAIL (Aug. 13, 2016), <http://www.dailymail.co.uk/news/article-3739395/Justice-Netflix-Fears-TV-hit-year-Making-Murderer-lead-freeing-man-killer.html>.

⁶⁷ See Beatrice Verhoeven, *‘Making a Murderer’: 28 Updates Since The Series Debut*, THE WRAP (Dec. 12, 2016), <http://www.thewrap.com/making-a-murderer-updates-since-series-premiere-photos/7/>.

⁶⁸ See Chris Tognotti, *Steven Avery Hires Defense Attorney Kathleen Zellner, And She’s A Specialist In Wrongful Convictions*, BUSTLE (Jan. 9, 2016), <https://www.bustle.com/articles/134537-steven-avery-hires-defense-attorney-kathleen-zellner-and-shes-a-specialist-in-wrongful-convictions>.

⁶⁹ See Nicole Puglise, *‘Making a Murderer’ Creators: We Were Contacted By Juror*, NBC CHICAGO (last visited on Apr. 27, 2017), <http://www.nbcchicago.com/entertainment/entertainment-news/making-a-murderer-juror-says-avery-not-guilty-364234661.html>. The author notes that the juror’s gender is in fact unknown. This paper only chooses a pronoun for readability purposes.

⁷⁰ See Lauren Pearle and Emily Shapiro, *Steven Avery of ‘Making a Murderer’ Requests Advanced Forensic Testing Amid Claims Officers Planted Evidence*, ABC (Aug. 26, 2016), <http://abcnews.go.com/US/steven-avery-making-murderer-requests-advanced-forensic-testing/story?id=41667641>.

⁷¹ See Peter Wade, *There Is a New Suspect in the Making a Murderer Case*, ESQUIRE (Aug. 20, 2016), <http://www.esquire.com/news-politics/news/a47853/new-suspect-making-a-murderer/>.

⁷² See Andrew Griffin, *Making a Murderer: Anonymous Claims To Have Evidence That Netflix Documentary’s Subject, Steven Avery, Is Innocent*, INDEPENDENT (Dec. 30, 2015), <http://www.independent.co.uk/arts-entertainment/tv/making-a-murderer-anonymous-claims-to-have-evidence-that-netflix-documentary-s-subject-steven-avery-a6790546.html>.

⁷³ See Chris Tognotti, *7 Striking Photos From The Manitowoc County Protests That Are Seeking Justice After ‘Making a Murderer,’* BUSTLE (Jan. 29, 2016), <https://www.bustle.com/articles/138557-7-striking-photos-from-the-manitowoc-county-protests-that-are-seeking-justice-after-making-a-murderer>; see also Verhoeven, *supra* note 67.

⁷⁴ See *‘Making a Murderer’ Popularity Overwhelms Manitowoc County Clerk*, NBC CHICAGO (Jan. 7, 2016), <http://www.nbcchicago.com/news/local/Making-a-Murderer-Popularity-Overwhelms-Manitowoc-County-Clerk-364493191.html>.

⁷⁵ See Verhoeven, *supra* note 67.

law firm's Yelp review page with aggressive, even violent comments.⁷⁶ A homemade “glitter bomb” was sent to his office, causing significant damage to his equipment and personal affects.⁷⁷ The embattled prosecutor has received numerous death threats⁷⁸ and even considered suicide in light of the show's fallout.⁷⁹

Like *Serial*, *Making a Murderer* was also signed for a second season, which will be released in 2017.⁸⁰

V. Forensic Analysis of the New True Crime

It is undeniable that these documentaries have affected their cases in profound and unprecedented ways. But why does the New True Crime hold so much sway? First, the modern canon actively seeks to influence the outcome of the defendant's case.⁸¹ Second, the genre employs classical true crime sensationalism to evoke a powerful emotional response—usually one of outrage—in as many viewers as possible. Third, the New True Crime encourages participation by focusing on contemporary criminal cases that its impassioned audience can change.

A. Outcome-Focused Purpose

From their introductory sequences, the producers of the New True Crime make clear they intend to influence the outcome of the case in question. To start, most crime narratives traditionally follow a tale-as-old-as-time blueprint; they begin by discovering the victim, continue by investigating the crime, and end with the bad guy being put away.⁸² New True Crime employs a different tactic. Indeed, if it followed its predecessors' approach, *Making a Murderer* “would not begin with Steven Avery . . . [i]t would begin, instead, with the disappearance of twenty-five-year-old Teresa Halbach.”⁸³ *Serial*'s first line would not be “[f]or the last year, I've spent every working day trying to figure out where a high school kid was for an hour after school one day in 1999,” but

⁷⁶ See Greg Gilman, *'Making a Murderer' Viewers Target Prosecutor Ken Kratz – On His Yelp Page*, THE WRAP (Jan. 28, 2015), <http://www.thewrap.com/making-a-murderer-viewers-trashing-prosecutor-ken-kratz-in-terrible-yelp-reviews/> (“When you think of garbage think of Mr. Kratz, he is the living representation of immorality and indecency. . .”).

⁷⁷ See Tom Huddleston, Jr., *The Unexpected Fallout from Netflix's 'Making a Murderer'*, FORTUNE (Jan. 9, 2016), <http://fortune.com/2016/01/09/making-a-murderer-netflix/>.

⁷⁸ See Ryan Parker, *'Making a Murderer' Prosecutor Says He Has Been Inundated With Death Threats*, THE HOLLYWOOD REPORTER (Jan. 6, 2016), <http://www.hollywoodreporter.com/news/making-a-murderer-prosecutor-says-852684>.

⁷⁹ See Gilman, *supra* note 76.

⁸⁰ See Jack Shepherd, *Making a Murderer season 2 release date*, INDEPENDENT (Jan. 29, 2017), <http://www.independent.co.uk/arts-entertainment/tv/news/making-a-murderer-season-2-release-date-netflix-steven-avery-brendan-dassey-new-episodes-a7552081.html>.

⁸¹ This is not to say that the producers' do not wish to change the criminal justice system more broadly. To the contrary, Ricciardi and Demos have stated that their goal was to start a dialogue about the criminal justice system. See Scott Stump, *'Making a Murderer' filmmakers: Original juror believes Steven Avery was framed*, TODAY (Jan. 5, 2015), <http://www.today.com/popculture/making-murderer-filmmakers-our-goal-was-question-us-justice-system-t65161>. This paper only argues that altering the outcome of a specific case is a primary goal, possibly set in tandem with other goals, of the New True Crime, which is unique when compared with the broad goals of its predecessors.

⁸² See Sarah Marshall, *Making a Murderer and the New True Crime*, NEW REPUBLIC (Jan. 6, 2016), <https://newrepublic.com/article/127083/making-murderer-new-true-crime>.

⁸³ *Id.*

would instead be “[f]or the last year, I’ve spent every working day trying to figure out *who killed a high school senior* after school one day in 1999.”⁸⁴ These unique introductions indicate a purpose shift; one not principally focused on the victim or the crime, but on the plight of the accused.

The shows’ unequal presentation of the evidence also evinces a pro-defendant motive. The majority of *Serial*, for instance, is spent undercutting the State’s case against Adnan, with only one episode focused solely on the bad evidence in Adnan’s case.⁸⁵ This has caused commenters to notice that Koenig “does not believe Adnan Syed is guilty.”⁸⁶ On the other hand, *Making a Murderer*’s bias is so pronounced that it has been widely accused of manipulation for leaving out key evidence that incriminates Avery.⁸⁷ The show also subtly shades its presentation of the evidence in Avery’s favor. For example, the show’s final chapter is sympathetically titled “Fighting for Their Lives,” and its chapter descriptions are almost entirely prejudicial to the State’s case.⁸⁸ This pick-and-choose narrative style suggests that New True Crime producers have a pro-defendant motive.

What is more, the producers’ partnership choices also hint at a defendant-driven focus. While investigating *Serial*, Sarah Koenig began working with the University of Virginia’s Innocence Project, an organization that aims to overturn wrongful convictions through DNA evidence.⁸⁹ In large part thanks to Koenig’s cooperation and research, the Innocence Project ended up taking Adnan’s case.⁹⁰ In the same vein, *Making a Murderer* worked exclusively with Steven Avery’s family and defense counsel, developing intimate relationships with each and providing them ample airtime to make their case to an invested audience. Of course, these partnerships, in and of themselves, are insufficient to evince a wholly partisan intent, especially since the defendants’ opposing parties refused the opportunity to speak in either documentary.⁹¹ And yet, the case of Penny Beerntsen suggests that the opposing parties may have refused because the producer’s intentions were clearly one-sided. Ricciardi and Demos reached out to Beerntsen—the woman who mistakenly identified Avery as her attacker in his first trial—to participate in the documentary, but Beerntsen declined because the “filmmakers struck her as having already made up their minds.⁹² In fact, Beerntsen felt it was clear “from the outset that they believed Steve was innocent . . . [that] they were[n’t] journalists seeking the truth . . . [but instead] had a foregone conclusion and were looking for a forum in which to express it.”⁹³ To be sure, this anecdote

⁸⁴ *This American Life: Serial Episode 1*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes).

⁸⁵ See generally *This American Life: Serial*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes).

⁸⁶ Patrick Sproull, *The Serial effect: making true crime hot TV property*, DEN OF GEEK (Feb. 4, 2016), <http://www.denofgeek.com/other/serial/38769/the-serial-effect-making-true-crime-hot-tv-property#ixzz4ZQx0aQ56>.

⁸⁷ See Anna Leszkiewicz, *From Serial to Making a Murderer: can true crime as entertainment ever be ethical?*, NEW STATESMAN (Jan. 15, 2016), <http://www.newstatesman.com/culture/tv-radio/2016/01/serial-making-murderer-can-true-crime-entertainment-ever-be-ethical>.

⁸⁸ One example is the description for Episode 3: Plight of the Accused, which states “Steven is back in jail, charged with murder, but there are troubling questions about how he was arrested and why.” See *Making a Murderer: Episode 3* (broadcast by Netflix 2015).

⁸⁹ See Eric Williamson and Mary Wood, *SERIAL Brings to Light Work of Innocence Project*, UVA LAW (last visited Apr. 27, 2017), <http://www.law.virginia.edu/html/alumni/uvalawyer/spr15/serial.htm>.

⁹⁰ See *id.*

⁹¹ See generally *Making a Murderer* (broadcast by Netflix 2015). Producers maintain, however, that Ken Kratz denied requests for an interview. See Daniel Holloway, ‘*Making a Murderer*’ Filmmakers Fire Back At Prosecutor, THE WRAP (Dec. 31, 2015), <http://www.thewrap.com/making-a-murderer-filmmakers-fire-back-at-prosecutor-hes-not-entitled-to-his-own-facts/>.

⁹² See Schulz, *supra* note 30.

⁹³ *Id.*

provides only one example. But it does raise questions about the producers' impartiality throughout the development process. These questions, when combined with the producers' decision to work heavily with defendant-favorable parties, provide further evidence of a partiality toward the accused.

Perhaps most telling, the producers have proffered their personal beliefs to their audience point blank. After building up extensive credibility with her listeners, Sarah Koenig closes her audio argument with a personal plea; "as a juror, I vote to acquit Adnan Syed."⁹⁴ And while Ricciardi and Demos do not speak in *Making a Murderer*, they have each gone on record saying that they personally believe Steven Avery is not guilty.⁹⁵ Of course, a producer's personal beliefs do not necessarily drive a production's purpose. But by choosing to reveal their personal beliefs, rather than letting the work speak for itself, the producers imply that their shows are not primarily focused on creating art, or providing entertainment, or making a statement, but are instead aimed at driving home a more immediate point: the innocence of the accused.

Finally, by creating a documentary that calls into question a case's evidence, the producers indicate to the viewer that they disagree with the current narrative's result. Because when a person believes that a narrative is correct, that person does not dig into a case's cold evidence and skewer it, piece by piece, in front of a 100,000+ audience. As one commentator put it, "for better or worse, these [programs] do begin with a presumption before they read the evidence, and the presumption is that the dominant narrative is wrong."⁹⁶ This presumption, when combined with the producers' statements, actions, and presentation makes the New True Crime's purpose clear: to incite public outrage about a case's outcome and, ultimately, change its result.

B. Sensationalist Techniques

Like the true crime genre of old, the New True Crime uses sensationalist methods to maximize its emotive effect. First, the genre seeks to establish a trustworthy narrator by creating an emotional connection between the viewer and the storyteller. This trust ultimately makes the armchair jury more receptive to the narrator's story and the producers' intended message. Koenig does this by constantly reminding the audience that she too is conflicted about Adnan's guilt.⁹⁷ By admitting that she, like her viewer, is still undecided, Koenig places herself in the jury box alongside her audience and develops a sense of camaraderie and connection. Her approach also implies that she is not invested in the outcome, even though deeper analysis suggests that she has a biased purpose. Like a wolf in sheep's clothing, Koenig's camaraderie and feigned disinterest makes her appear inherently trustworthy. If this is hard to envision, consider the following example: a lawyer stands up, makes a compelling argument, and sits back down. A juror watching might be inclined to think, "Of course the lawyer is going to say those things; she's the *defendant's* lawyer." And yet, when that same juror watches a New True Crime piece and trusts that the narrator is disinterested, the juror is more likely to believe that narrator's story as true. In other words, by creating the impression that its storyteller is conflicted about her beliefs, the New True Crime creates the appearance of impartiality and is therefore afforded unrivaled credibility.

⁹⁴ *This American Life: Serial Episode 12*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes).

⁹⁵ See Marcus Riley, 'Making a Murderer' filmmakers divulge whether they believe Steven Avery is guilty, WTMJ-Milwaukee (Jan. 17, 2016), <http://www.tmj4.com/news/local-news/making-a-murder-filmmakers-divulge-whether-they-believe-steven-avery-is-guilty>.

⁹⁶ Leszkiewicz, *supra* note 87.

⁹⁷ See generally *This American Life: Serial*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes).

Though *Making a Murderer* approaches credibility differently, it achieves the same result. Rather than introduce an outside narrator, the show allows Steven Avery to tell his tale through a series of recorded telephone calls. What this approach lacks in impartiality, it makes up for with the appearance of pure, unprompted truth. This straight-from-the-horse's-mouth style gives the impression that Avery is being entirely truthful, is coming clean about his missteps, and is willing to answer the virtual jury's the questions as they arise. In doing so, it accomplishes the same feat achieved by Koenig: the show establishes trust. While *Serial* creates credibility through the appearance of disinterested journalism, *Making a Murderer* uses sunshine as disinfectant and suggests that Avery has nothing left to hide. Both approaches prime the audience for a powerful emotive response and make them more amenable to the story the narrators tell next.

After establishing trust, the New True Crime goes on to inflame the viewer's emotions by creating a villain. There is no doubt that *Making a Murderer* owes its success, in large part, to its real-life super-villain, Special Prosecutor Ken Kratz. The producers' paint Kratz as an opportunistic bureaucrat whose questionable trial ethics are largely to blame for Steven Avery's ostensibly wrongful conviction. And indeed, the impression seems to have stuck. Like a modern-day Maleficent,⁹⁸ Kratz has been tarred and feathered in the court of public opinion, garnering labels like "creepy mustache prosecutor,"⁹⁹ "slimeball,"¹⁰⁰ and that he "deserves to be locked away."¹⁰¹ And while *Serial* does not explicitly paint the prosecution's key witness, Jay Wilds, as a villain, Koenig certainly gives the viewer's ammunition to make him a villain based on his constantly shifting statements and untruthful demeanor.¹⁰²

The canon's use of real-life villains is important for many reasons. First, a villain allows the audience to direct its newfound anger toward a concrete person, rather than an abstract system. It also provides the audience with a living, breathing reason to act so that the newly despised villain does not win. But perhaps most paramount, the villainization of a real person effectively turns that person into a storybook character, and "when people become characters, objectivity is sidelined and subjectivity rules."¹⁰³ Put differently, these shows rewrite a multi-faceted person into a one-dimensional archetype, which encourages the viewer to develop a passionate, subjective bias against the villain, even when the villain might be objectively and morally right. With the naysayers now demonized, the audience is left with only the producers' version of the facts as true, allowing the New True Crime to arouse a powerful and unmitigated emotional response.

In addition, the shows create metaphorical villains for the audience to rally against. In *Making a Murderer*, for example, Steven Avery makes a sobering statement about the reality of the criminal justice system when he says, "Poor people always lose."¹⁰⁴ *Serial*, on the other hand, suggests that racial profiling may have impacted Adnan's trial.¹⁰⁵ These metaphorical villains –

⁹⁸ See *Maleficent*, FANDOM (last visited Mar. 26, 2017), <http://disney.wikia.com/wiki/Maleficent>.

⁹⁹ Paul Tassi, *Why 'Making a Murderer' Is Netflix's Most Significant Show Ever*, FORBES (last visited Mar. 26, 2017), <https://www.forbes.com/sites/insertcoin/2016/01/03/why-making-a-murderer-is-netflixs-most-significant-show-ever/#78d154e5326a>.

¹⁰⁰ Blair Nicole, *Ken Kratz Proves Once Again Why He's The Real Villain On Making a Murderer*, INQUISTR (Jan. 28, 2016), <http://www.inquisitr.com/2747330/ken-kratz-proves-once-again-why-hes-the-real-villain-on-making-a-murderer/>.

¹⁰¹ *Kratz Law Firm*, YELP (last visited Mar. 26, 2017), <https://www.yelp.com/biz/kratz-law-firm-west-bend>.

¹⁰² See generally *This American Life: Serial*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes).

¹⁰³ Leszkiewicz, *supra* note 87.

¹⁰⁴ *Making a Murderer: Episode 2* (broadcast on Netflix Dec. 28, 2015).

¹⁰⁵ See *This American Life: Serial Episode 7*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes) (noting that Adnan's Pakistani roots could have led to racial profiling).

unequal justice and systemic racial bias – agitate passions and unite the viewers against common enemy. By linking the stories to broader social issues, the producers’ make their specific cases emotionally significant to the viewer and increase the odds that the audience will contest their unjust results.

New True Crime also takes cue from classical sensationalism by creating an emotional connection through direct dialogue and deep focus on the characters’ familial background. Both *Serial* and *Making a Murderer* are almost entirely comprised of direct dialogue, whether it be through interviews, trial recordings, or phone calls with the accused.¹⁰⁶ Indeed, Sarah Koenig establishes a direct connection between Adnan Syed and the listener through recorded jailhouse conversations,¹⁰⁷ and *Making a Murderer* does the same by including Steven Avery’s numerous interviews with media and law enforcement.¹⁰⁸ As a result, these documentaries make abstract names into tangible people. The documentaries couple this direct connection with heavy detail of the accused’s family history. Each show explores the characters’ personal relationship with their families, often showing family photos or drawing out humanizing anecdotes of happier times.¹⁰⁹ These stories are essentially pathos plays—tales that cause the audience to think, “the accused is a good person and could not have committed such a heinous crime.” Like true crime of old, the New True Crime uses dialogue and familial background to make the audience *feel* for the accused, which ultimately drives home the genre’s pro-defendant message.

The New True Crime also mirrors its predecessor by using music and cinematic presentation to maximize its sensational effect. One example is *Serial*’s tendency to cue the music and cutaway after it presents important facts, like when it played its telltale theme song after introduction of the integral 21-minute period in which Hae Min Lee was supposedly murdered. *Making a Murderer* echoes this technique by cuing dramatic music just after a Manitowoc County police officer admits that he knew the location of Teresa Halbach’s car a full two days before it was reported,¹¹⁰ suggesting he had ample opportunity to plant Avery’s DNA in the vehicle. In addition, the documentaries use visual aids and recreations to make their arguments more comprehensible. In the second episode of *Making a Murderer*, for instance, the producer’s recreate a visual timeline that explains why the Manitowoc County Sheriff’s Dept. had motive to frame Steven Avery.¹¹¹ Koenig parallels this technique by posting visual timelines on the show’s website¹¹² and by recreating, step by step, the events that Jay Wilds said occurred during the key 21 minutes.¹¹³ In fact, she concludes from her recreation that it would have been virtually impossible for Adnan to commit the murder and make it back to track practice (his alibi) on time.¹¹⁴

¹⁰⁶ See generally *This American Life: Serial*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes); *Making a Murderer* (broadcast on Netflix Dec. 28, 2015).

¹⁰⁷ See generally *This American Life: Serial*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes).

¹⁰⁸ See, e.g., *Making a Murderer: Episode 1* (broadcast on Netflix Dec. 28, 2015) (in which the producers include Steven’s interview after he was released from prison).

¹⁰⁹ See, e.g., *This American Life: Serial Episode 1*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes) (in which Koenig recounts Adnan buying his friend a stuffed animal for her birthday); *Making a Murderer: Episode 1* (broadcast on Netflix Dec. 28, 2015) (show a number of family photos and pictures of Steven as a happy child).

¹¹⁰ See *Making a Murderer: Episode 5* (broadcast on Netflix Dec. 28, 2015).

¹¹¹ See *Making a Murderer: Episode 2* (broadcast on Netflix Dec. 28, 2015).

¹¹² See *Who, What, When*, SERIAL PODCAST (last visited Mar. 26, 2017), <https://serialpodcast.org/maps/who-what-when>.

¹¹³ See *This American Life: Serial Episode 5*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes)

¹¹⁴ See *This American Life: Serial Episode 5*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes)

At their core, these visual effects make complex fact patterns easier for the audience to understand. And by using these methods, the New True Crime mimics the techniques historical true crime authors created to ensure that their works were comprehensible and accessible to a wide-ranging audience.

To further maximize its emotional effect, the New True Crime leaves out evidence that undermines the defendant's case. The most notorious examples of this practice have been found in *Making a Murderer*. The laundry list of the show's alleged missteps is long, including: downplaying that "Avery was charged with cruelty to animals for dousing a cat with gasoline and oil, throwing it in a bonfire, and watching it die";¹¹⁵ omitting that Avery had purchased leg irons and shackles like the ones Dassey said he used to restrain Halbach only months before her murder;¹¹⁶ and curiously leaving out that Halbach had complained to her boss that Avery had been inappropriate in prior meetings, that Avery had called Halbach using a disguised number on the day she died, and that Avery specifically requested for Halbach's photography services on three separate occasions.¹¹⁷

And while *Making a Murderer* has been the most publicly criticized, *Serial* also shares blame. The show stands accused of leaving out key evidence, like entries from Hae's diary that suggest Adnan was an abusive boyfriend,¹¹⁸ that Asia McClain gave inconsistent testimony about the day of the murder,¹¹⁹ and that Hae once hid from Adnan and asked a teacher to cover for her when he came looking for her.¹²⁰ These omissions suggest that the New True Crime tells not a complete story, but a curated one. More like advocates than the journalists they hold themselves out to be, the New True Crime manipulates the viewer by downplaying (or omitting entirely) evidence that would detract from the shock value of their arguments.

Lastly, like the classical true crime canon, the modern rendition seeks to draw in as many viewers as possible. By premiering on platforms like Netflix, Apple, and HBO, the shows are able to reach record numbers of viewer via an accessible and intuitive streaming service. *Making a Murderer*, for example, reached over 19 million viewers just one month after its release.¹²¹ Incredibly, nearly 20% of *all television viewers* were watching the show within a week of its premiere.¹²² *Serial*, a mere podcast, was downloaded over 40 million times in just two months¹²³ and continues to hold title as the most popular podcast of all time.¹²⁴ Unlike cable broadcasts,

¹¹⁵ Ester Bloom, *What Was Left Out Of Making a Murderer Episode One*, VULTURE (Dec. 21, 2015), <http://www.vulture.com/2015/12/making-a-murderer-episode-one.html>.

¹¹⁶ See Dustin Rowles, *Evidence 'Making a Murderer' Didn't Present In Steven Avery's Murder Case*, PAJIBA (Sep. 3, 2016), http://www.pajiba.com/netflix_movies_and_tv/is-steven-avery-guilty-evidence-making-a-murderer-didnt-present.php.

¹¹⁷ See *id.*

¹¹⁸ See Sarah Stone, *Why Is Nobody Talking About What Serial Left Out*, AWARDS DAILY (May. 27, 2015), <http://www.awardsdaily.com/2015/05/27/why-is-nobody-talking-about-what-serial-left-out/>.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See Jethro Nededog, *Here's How Popular Netflix's 'Making a Murderer' Really Was According To A Research Company*, BUSINESS INSIDER (Feb. 12, 2016), <http://www.businessinsider.com/netflix-making-a-murderer-ratings-2016-2>.

¹²² See Brady Dale, *The Week Netflix's 'Making a Murderer' Crushed All of Television*, OBSERVER (Mar. 25, 2016), <http://observer.com/2016/03/the-week-netflixs-making-a-murderer-crushed-all-of-television/>.

¹²³ See Amy Roberts, *The 'Serial' podcast: By the numbers*, CNN (Dec. 23, 2014), <http://www.cnn.com/2014/12/18/showbiz/feat-serial-podcast-btn/>.

¹²⁴ See Bromwitch, *supra* note 37.

streaming services are not bound by any geographic region, do not have commercials, and are always accessible at the click of a button. In addition, streaming services offer unlimited views per show. Viewers can stop, start, watch, and re-watch their favorite shows at their convenience, in any order, no DVR necessary. These features make streaming services incredibly popular.

Streaming services also promote increased viewing because the shows are conglomerated in one easy to access location. The viewer is therefore enabled to “binge watch”—i.e. watch all the series’ episodes in succession—and become caught up on the show at a remarkable rate.¹²⁵ What is more, the easy access of streaming services has created a spoiler phenomenon, in which viewers who have not yet finished a series find themselves stalked by the cold terror of having a show’s ending ruined before they have finished watching.¹²⁶ This newfound spoiler risk adds additional incentive for viewers to catch up on the newest streaming service show. And, since many of the major streaming services have recommendation programs that notify users of popular new programs, each show’s success creates a domino effect that makes it more likely to appear on another user’s screen.¹²⁷ As more and more viewers watch the recommended true crime shows on their home screens, an “in-culture” is established that everyone wants to be part of—A-list celebrities included.¹²⁸ Bolstered by easy-access streaming mediums, the programs expand far beyond the typical cable show, to the point that the common question is “not *if* you’ve seen [the documentary]. It’s how long did it take you to watch it?”¹²⁹

C. Participatory Experience

The New True Crime also encourages participation by focusing on relevant cases that the viewer can still change. The producers of the modern genre understand that, in 2017, societal distrust of the criminal justice system is at an all-time high. Released on the heels of the tragic killings of Freddie Gray,¹³⁰ Eric Garner,¹³¹ and Michael Brown,¹³² these documentaries give viewers the opportunity to strike back at an ostensibly unfair system. Unlike the defendants in

¹²⁵ See Lucas Shaw, *Netflix Wants the World to Binge-Watch*, BLOOMBERG BUSINESSWEEK (Jan. 12, 2017) <https://www.bloomberg.com/news/features/2017-01-12/netflix-wants-the-world-to-binge-watch>.

¹²⁶ See *IMDb, What are ‘spoilers,’* IMDB (last visited April 27, 2017), https://help.imdb.com/article/imdb/discover-watch/what-are-spoilers/GPQ3YAE3ZPWBVR3V?ref_=helpsrall# (“A spoiler is usually defined as a remark or piece of information which reveals important plot elements (for example the ending or a major plot twist), thus ‘spoiling’ a surprise and robbing the viewer of the suspense and enjoyment of the film.”).

¹²⁷ See Ben Popper, *How Netflix Completely Revamped Recommendations For Its New Global Audience*, THE VERGE (Feb. 27, 2016), <http://www.theverge.com/2016/2/17/11030200/netflix-new-recommendation-system-global-regional>.

¹²⁸ See Allison Piwowarksi, *16 Celebrities Who Watched ‘Making a Murderer’ & Can’t Stop Talking About It*, BUSTLE (Dec. 18, 2015), <https://www.bustle.com/articles/132211-16-celebrities-who-watched-making-a-murderer-cant-stop-talking-about-it>.

¹²⁹ See Tassi, *supra* note 99.

¹³⁰ See Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes With Zero Convictions Against Officers*, THE BALTIMORE SUN (Jul. 27, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html>.

¹³¹ See Al Baker, J. David Goodman, and Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, NY TIMES (Jun. 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

¹³² See Larry Buchanan, et. al, *What Happened in Ferguson?*, NY TIMES (last visited Mar. 27, 2017), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

other true crime tales,¹³³ *Serial* and *Making a Murderer* focus on cases in which the characters are alive and can benefit from public outcry. By focusing on contemporary, rather than historical cases, the New True Crime gives its viewers an opportunity to make a difference. They can protest.¹³⁴ They can donate.¹³⁵ They can come forward with new evidence.¹³⁶ They can even try to solve the case themselves. One woman was so invested in saving Steven Avery that she spent over \$6,000 to purchase copies of his trial transcripts.¹³⁷ At bottom, these shows make viewers feel outraged, and then empower them with the information to change the status quo. “Viewers in turn become more than just viewers; they see themselves as constituents in the process, and in the case itself.”¹³⁸ Due to the relevance of its subject matter, the New True Crime encourages people to participate in the system that has frustrated them for so long. By first provoking public emotion and then providing an actual person to rally behind, the genre transcends conventional entertainment and becomes a different beast entirely: a catalyst of real social change.

VI. The Case For Journalistic Self-Regulation

To be sure, the New True Crime has great potential to benefit wrongly convicted defendants. Still, some argue that it may democratize—bring into public control—a system that is designedly detached from fickle public opinion.¹³⁹ At minimum, the success of *Serial* and *Making a Murderer* makes clear that New True Crime journalists hold tremendous influence in modern society. And yet, these journalists operate largely without law. Indeed, “true crime writers and producers operate in a perfectly unregulated world.”¹⁴⁰ And while journalism is not without its ethical principles—to the contrary, many journalistic organizations have published on the topic¹⁴¹—its maxims are unconnected to a central governing body and seem to be promulgated on a newsroom-by-newsroom basis.¹⁴² Even more so, journalistic ethical guidelines are often broad, and most are untailored to mitigate the unique consequences that arise from contemporary true crime reporting.¹⁴³ Because of true crime’s unique ability to affect ongoing criminal cases,

¹³³ See Truman Capote, *In Cold Blood* (Random House 1966) (the defendants in Capote’s tale had been hanged before the book’s publication).

¹³⁴ See Graham, *supra* note 66.

¹³⁵ See Verhoeven, *supra* note 67.

¹³⁶ See Wade, *supra* note 71.

¹³⁷ See ‘*Making a Murderer*’ Popularity Overwhelms Manitowoc County Clerk, NBC CHICAGO (last visited Mar. 27, 2017), <http://www.nbcchicago.com/news/local/Making-a-Murderer-Popularity-Overwhelms-Manitowoc-County-Clerk-364493191.html>.

¹³⁸ See Elisha Fieldstadt, *New Crop of True Crime Shows Seduces Audiences, Compels Them to Dig*, NBC NEWS (Apr. 16, 2016), <http://www.nbcnews.com/news/us-news/new-crop-true-crime-shows-seduces-audiences-compels-them-dig-n546821>.

¹³⁹ See Leszkiewicz, *supra* note 87.

¹⁴⁰ Nick Foster, *The problem with true crime stories – by a true crime writer*, THE TELEGRAPH (Feb. 7, 2017), <http://www.telegraph.co.uk/men/thinking-man/problem-true-crime-stories-true-crime-writer/>.

¹⁴¹ See, e.g., Society of Professional Journalists, *SPJ Code of Ethics*, SPJ (2014), <https://www.spj.org/ethicscode.asp>; The Ethical Journalism Network, *The Five Principles of Ethical Journalism*, EJN (last visited Apr. 20, 2017), <http://ethicaljournalismnetwork.org/who-we-are/5-principles-of-journalism>.

¹⁴² See generally American Society of News Editors, *Ethics*, ASNE (last visited April 20, 2017) <http://asne.org/content.asp?contentid=236> (which outlines over fifty distinct newsroom ethical guidelines, each beholden to their own enforcement structure).

¹⁴³ See *id.*; see also Foster, *supra* note 140 (noting that true crime editors are bound by no specific jurisdiction or rules).

journalists should enact ethical regulations specific to New True Crime reporting to combat the risk that their pieces might negatively influence the criminal process.

First, self-regulation would mitigate the danger that a journalist may fudge the facts to tell a more compelling narrative. Journalists differ from lawyers because their interests do not lie solely in exonerating the accused; they also seek to tell an entertaining story. To do so, the true crime writer must often sensationalize to “make the biographical subject into an appealing criminal protagonist.”¹⁴⁴ But, in the author’s quest to make the topic more interesting, facts may become lost or may be fabricated entirely. Even Truman Capote, father of the modern true crime genre, was heavily criticized for skewing facts and fabricating events while recounting the murder story at the heart of *In Cold Blood*.¹⁴⁵ This propensity for sensationalism is especially concerning in the true crime context since the stakes are so high. Indeed, fictional melodrama fundamentally clashes with even-keeled journalism, and the latter is sacrosanct when real lives are on the line. True crime scholar Anita Biressi has noted that true crime’s tendency to exaggerate factual narratives into compelling stories presents “a literary challenge which also becomes ethical jeopardy with real consequences for the people involved in the case.”¹⁴⁶ Since public opinion seems to have a sizable influence on the way the New True Crime’s cases unfold, genre-specific self-regulation should be enacted to protect the court of public opinion from inaccurate representations.

True crime regulation would also protect criminal defendants from predatory journalism. Though *Serial* and *Making a Murderer* present examples of journalists developing relationships to help criminal defendants, Truman Capote was widely critiqued for befriending criminal defendants with the sole purpose of damning them for notoriety and financial gain.¹⁴⁷ Unlike most interviewees, criminal defendants are precariously vulnerable and may confide in a journalist because they believe the author will vindicate their claims. But this belief sits in stark contrast with a journalist’s “first and over-riding loyalty,” which is not to the defendant, but to the readers.¹⁴⁸ In fact, the accused’s desperate view of the journalist as merciful redemption effects an even crueler punishment when that same journalist manipulates the accused’s own words to make him a monster. Take, for example, the case of *Macdonald v. McGinnis*.¹⁴⁹ In 1983, Dr. Jeff MacDonald, a man accused of murdering his wife and children, allowed journalist Joe McGinniss to document his struggle to prove his innocence.¹⁵⁰ Though the journalist befriended MacDonald during the proceedings, he “damned [MacDonald] unequivocally as a psychopath” in his subsequent book, *Fatal Vision*.¹⁵¹ Blindsided by the betrayal, MacDonald “sued the journalist for breach of contract because he had deliberately feigned a sympathetic friendship while writing a work of character assassination.”¹⁵² Though McGinniss settled the suit out of court,¹⁵³ the case exemplifies how true crime journalists, when left unchecked by regulation, have the ability to inflict unwarranted

¹⁴⁴ ANITA BIRESSI, CRIME, FEAR AND THE LAW IN TRUE CRIME STORIES 26 (Palgrave ed. 2001).

¹⁴⁵ See *id.*; see also Lyons, *supra* note 29, at 27.

¹⁴⁶ Biressi, *supra* note 144.

¹⁴⁷ See Lyons, *supra* note 29, at 27.

¹⁴⁸ The News Manual, *Chapter 38: Ethics of Reporting Crime*, THE NEWS MANUAL (last visited Apr. 20, 2017), https://www.thenewsmanual.net/Manuals%20Volume%202/volume2_38.htm.

¹⁴⁹ See Biressi, *supra* note 144; see also *Jeffrey MacDonald v. Joe McGinnis*, The Jeffrey MacDonald Information Site (last visited Apr. 20, 2017), http://www.thejeffreymacdonaldcase.com/html/1-mcginniss_1984-08-20.html (trial documents were unavailable on Westlaw, but copies are available here).

¹⁵⁰ See Biressi, *supra* note 144.

¹⁵¹ *Id.* For more on the trial, see generally Joe McGinniss, *FATAL VISION* (Signet 1983).

¹⁵² Biressi, *supra* note 144.

¹⁵³ See *id.*

emotional distress upon desperate defendants. Well-fashioned journalistic regulations would mitigate this potential for voracious exploitation.

In addition, journalistic boundaries would minimize the narrator's ability to improperly influence the audience. Both journalists and lawyers understand the power of persona and its ability to sway public opinion despite adverse factual evidence. This understanding forms the foundation of the American Bar Association's Model Rule of Professional Conduct 3.4(e), which forbids an attorney from proffering a personal opinion to the jury.¹⁵⁴ Even more so than attorneys, journalists should remain personally neutral since "the only thing that separates journalists from partisan communicators is impartiality."¹⁵⁵ And yet, Sarah Koenig and the producers of *Making a Murderer* breach this time-honored maxim by volunteering their personal opinions on their subject's innocence or guilt.¹⁵⁶ Considering the popularity of these productions, the producers' personal opinions have the potential to carry great weight and could sway public opinion toward a conclusion unsupported by the facts. And, since public opinion seems to be having a sizable influence on modern court proceedings, true crime journalists should hold themselves to stricter neutrality standards to avoid inducing an improperly reached result.

Self-regulation would also mitigate the danger of juror pollution. Before *Serial*, for example, Adnan Syed had become a relatively forgotten name after seventeen years in jail. But, after the documentary aired, public support for Syed soared in his case's venue. A short scroll through the *Baltimore Sun*'s coverage of the case yields titles like "Don't Appeal Syed's New Trial," "Drop Charges Against Adnan Syed, Too," and "Serial Star Syed Adds Momentum. . . ."¹⁵⁷ A poll conducted by the *Baltimore Sun* shortly after *Serial*'s release found that 74.8% of the local publication's voters believe that Adnan Syed should be granted a retrial.¹⁵⁸ A similar poll showed that 66.5% of voters feel he should be released on bail.¹⁵⁹ And most importantly, 61.6% of 3,880 *Baltimore Sun* voters believe that a jury should acquit Syed altogether.¹⁶⁰

Professional jury consultants now believe that "someone plucked fresh from devouring [these documentaries] might not even make it past their first day of civic duty."¹⁶¹ In fact, due to the fear that these documentaries may "transmit a vague distrust of the legal system in their viewers," people who subscribe to the shows may immediately become suspect at *voir dire*.¹⁶²

¹⁵⁴ See Prof. Cond. R. 3.4(e); see *This American Life: Serial Episode 12*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes).

¹⁵⁵ Eliana Dockterman, *How The Jinx and Serial Strain the Blurry Ethical Lines of Crime Reporting*, TIME (Mar. 20, 2015), <http://time.com/3746792/jinx-serial-ethics/>.

¹⁵⁶ See *This American Life: Serial Episode 12*, CHICAGO PUBLIC RADIO (Oct. 3, 2014) (downloaded using iTunes); Riley, *supra* note 95.

¹⁵⁷ See BALTIMORE SUN, http://www.baltimoresun.com/topic/crime-law-justice/crime/adnan-syed-PEOCVC000378-topic.html?page=1&#trb_topicGallery_search (last visited on Mar. 27, 2017).

¹⁵⁸ See *Adnan Syed retrial?*, BALTIMORE SUN (last visited Mar. 27, 2017), <http://www.baltimoresun.com/news/opinion/bal-adnan-syed-retrial-poll-20150107-htmistory.html>.

¹⁵⁹ See *Release Adnan Syed?*, BALTIMORE SUN (last visited Mar. 27, 2017), <http://www.baltimoresun.com/news/opinion/bal-release-adnan-syed-poll-20161024-htmistory.html>.

¹⁶⁰ See *Adnan Syed: innocent or guilty?*, BALTIMORE SUN (last visited Mar. 27, 2017), [http://www.baltimoresun.com/news/opinion/bal-adnan-syed-innocent-or-guilty-poll-20160204-htmistory.html?="](http://www.baltimoresun.com/news/opinion/bal-adnan-syed-innocent-or-guilty-poll-20160204-htmistory.html?=).

¹⁶¹ Kenny Herzog, *From the CSI Effect to Making a Murderer: Will True-Crime Docuseries Change How Jurors Think?*, VULTURE (Jan. 15, 2016), <http://www.vulture.com/2016/01/making-a-murderer-jurors-csi-effect.html>.

¹⁶² Lucy Tiven, *The Bizarre Way True Crime TV Is Shaping Jury Selection*, ATTN: (Jan. 20, 2016), <http://www.attn.com/stories/5274/serial-making-a-murderer-jury-selection>.

And, even if the *voir dire* process worked perfectly every time (which it does not),¹⁶³ it is now more likely that less sophisticated jurors—who might not have the means to pay for streaming services—will be deciding complex cold cases. This injures the truth-finding process because jurors render more accurate results when they are better equipped to juggle intricate details and fully appreciate the legal standards at issue.¹⁶⁴ To avoid these issues, New True Crime journalists should adhere to firmer standards of impartiality. Rules promoting even-handed presentation would decrease the risk that potential jurors would prematurely reach a decision due to a documentary’s biased presentation; moreover, documentaries bound by such procedures would educate jurors and increase their capacity to handle complex fact patterns.

Lastly, journalistic boundaries would abate the risk that the New True Crime will lead to advocacy wars. The success of *Serial* and *Making A Murderer* provide a blueprint for how advocacy journalism can influence the adversary process itself. In a world increasingly affected by and accustomed to media, it is not difficult to imagine a system where litigants must seriously consider the ability of journalists to meaningfully influence their cases.¹⁶⁵ Indeed, defendants have already begun soliciting journalists to publicize their defense campaigns.¹⁶⁶ Commentators recognize that these partnerships present “an intriguing prospect: a kind of vertical integration between advocacy groups—with their considerable resources and arsenal of information—and editorial teams equipped to turn that raw data into fascinating stories.”¹⁶⁷ And, while society may benefit from these tandems when their works bring about justice, what happens when they don’t? What if Adnan Syed really did murder Hae Min Lee? What if Steven Avery actually murdered, raped, tortured, and burned the body of Teresa Halbach? The point is that these pieces have tremendous potential to accomplish moral good, but they also carry a tremendous risk of being horribly wrong. Compensation for journalists exacerbates this risk because money has the potential to draw journalistic attention away from deserving, yet impoverished litigants and toward wealthy, potentially dubious ones. Even payment for reporting on an innocent defendant hurts the criminal process because it creates an appearance of impropriety, which intensifies public distrust toward the justice system. Ethical boundaries would offset these risks and discourage journalists from accepting compensation in exchange for favorable coverage.

These concerns provoke a final question: how should these regulations be enacted? This paper contends that they be promulgated in a treatise similar to Justice Solution’s *Guide for Journalists Who Report On Crime And Crime Victims*.¹⁶⁸ The treatise, which was developed under a grant from the Department of Justice’s Office for Victims of Crime, outlines tips, techniques,

¹⁶³ See Molly McDonough, *Rogue Jurors*, ABA JOURNAL (Oct. 24, 2006), http://www.abajournal.com/magazine/article/rogue_jurors.

¹⁶⁴ See Alison K. Bennett, *Do We Need Einstein’s In The Jury Box? The Role and Impact of Juror IQ*, THE JURY EXPERT (Nov. 1, 2010), <http://www.thejuryexpert.com/2010/11/do-we-need-einsteins-in-the-jury-box-the-role-and-impact-of-juror-iq/>.

¹⁶⁵ See Daniel Victor, ‘*Making a Murderer*’ Left Out Crucial Facts, Prosecutor Says, NY TIMES (Jan 5, 2016), <https://www.nytimes.com/2016/01/05/arts/television/ken-kratz-making-a-murderer.html> (in which Ken Kratz calls *Making a Murderer* an advocacy piece); see also Elisabeth Donnelly, *HBO’s True Crime Series ‘The Jinx’ May Solve a Murder Case*, FLAVORWIRE (Mar 9, 2015), <http://flavorwire.com/508380/how-hbos-true-crime-series-the-jinx-may-solve-a-case> (calling *Serial* “justice via entertainment”).

¹⁶⁶ See Biressi, *supra* note 143.

¹⁶⁷ Lenika Cruz, *The New True Crime*, THE ATLANTIC (Jun 11, 2015), <https://www.theatlantic.com/entertainment/archive/2015/06/true-detectives-serial-the-jinx/393575/>.

¹⁶⁸ See Bonnie Bucqueroux and Anne Seymour, *A Guide for Journalists Who Report On Crime and Crime Victims*, JUSTICE SOLUTIONS (2009), <http://www.mediacrimevictimguide.com/journalistguide.pdf>.

guidelines, concerns, and best practices for crime journalists. While it covers a broad survey, most of the treatise focuses on assisting journalists in developing a story and dealing with victims, not on outlining procedures to mitigate true crime's negative effects on the justice system. I propose that a similar true crime treatise be drafted to provide clarity to the murky ethics of true crime reporting. Such a treatise, if followed by true crime journalists, would adequately mitigate the New True Crime's risks, while preserving its ability to spark progressive social change.

VII. Conclusion

“The human heart being what it is, murder [is] a theme not likely to darken and yellow with time.”¹⁶⁹ True crime's allure has endured for centuries and, just as Truman Capote predicted, continues to enthrall the viewer of today. The canon's newest rendition employs time-tested sensationalist techniques to influence the results of contemporary cases and has done so with extraordinary success. But with great power comes great risk. Though the genre seeks to un-make murderers, it does so without rules, regulations, or oversight. Because of the genre's distinct ability to influence ongoing criminal proceedings, New True Crime journalists should enact self-regulations to minimize the canon's potentially negative effects. These regulations would protect the system from the genre's risks, while allowing it to benefit from the genre's rewards.

¹⁶⁹ Foster, *supra* note 5 (quote by Truman Capote).

Further Reading

1. BILL JAMES, *POPULAR CRIME: REFLECTIONS ON THE CELEBRATION OF VIOLENCE* (Scribner ed., 2011) (cultural analysis of sensational crime in America, including famous cases like the Lindbergh baby kidnapping, the Black Dahlia murder, and the O.J. Simpson trial).
2. STEVE HASTE, *CRIMINAL SENTENCES: TRUE CRIME IN FICTION AND DRAMA* (Cygnus Arts ed., 1997) (a study of how authors adapt criminal facts to fit their needs and an A to Z rundown of historically popular true crime sagas).
3. SIMON STERN, *LAW & LITERATURE (AS AN APPROACH TO CRIMINAL LAW)* (November 13, 2013). *THE OXFORD HANDBOOK OF CRIMINAL LAW* 111-130 (Markus Dubber & Tatjana Hörnle eds., 2014) (study of how literary material can be used to examine and influence the criminal system).
4. Joy Wiltenburg, *Crime and Culture In Early Modern Germany*, 119 *Am. Hist. Rev.* 1374 (2014) (analysis of sixteenth and seventeenth century sensationalist crime literature as a steward of appropriate social feeling toward crime in early modern Germany).
5. ANNE-MARIE KILDAY & DAVID NASH, *LAW, CRIME & DEVIANCE SINCE 1700: MICRO STUDIES IN THE HISTORY OF CRIME* (Bloomsbury Academic ed., 2016) (collection of studies detailing how various true crime pieces have shaped the historical narrative surrounding crime and society).
6. MARK SELTZER, *TRUE CRIME: OBSERVATIONS ON VIOLENCE AND MODERNITY* (Routledge ed., 2006) (analysis of true crime as an integral part of American wound culture – where a culture in which commiseration is essential to shared sociality and beliefs).
7. CASSANDRA SHARP & MARETT LEIBOFF, *CULTURAL LEGAL STUDIES: LAW’S POPULAR CULTURE AND THE METAMORPHOSIS OF LAW* (Routledge eds., 2015) (collection of studies that relate to how law’s popular culture can actually change the law itself).
8. Melissa Rutman, *Intersection of Art and Criminal Law: The Ethics of True Crime*, *CARDOZO ART. & ENT. L. J.* (December 1, 2014), <http://www.cardozoelj.com/2014/12/01/intersection-of-art-and-criminal-law-the-ethics-of-true-crime/> (analyzing the ethical problems that arise when law and reporting mix, and exploring the potential consequences of modern true crime journalism).