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# NOTES

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## THE WHOLE TRUTH: THE IMPLICATIONS OF AMERICA’S TRUE CRIME OBSESSION

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MEGAN BOORSMA \*

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### INTRODUCTION

If you find yourself rooting for Adnan Syed<sup>1</sup> or Steven Avery,<sup>2</sup> you may also find yourself questioning the criminal justice system as a

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\* J.D., Elon University School of Law ‘16; B.A. Political Science, North Carolina State University ‘13. My sincere thanks to Eric Maddox for his support and encouragement of my personal true crime obsession.

<sup>1</sup> See *Serial* (Oct. 3, 2014), <https://serialpodcast.org/season-one>.

<sup>2</sup> See Netflix, *Making a Murderer*, NETFLIX (2015), <https://www.netflix.com/search/making%20a%20murder?jbr=80000770&jbp=0&jbr=0>.

whole. You may even be craving more, impatiently waiting for the next hit true crime<sup>3</sup> series or anthology to debate with friends and family. A “majority of people in the United States receive much of their impressions and knowledge of the criminal justice system through the media,” and in particular, through “entertainment television.”<sup>4</sup> While fictional crime shows, such as *CSI*, generally portray criminals in a negative light,<sup>5</sup> the genre of true crime has typically sought to understand the monster and purpose behind real criminal acts,<sup>6</sup> or, in a modern trend, focus on cases with questionable endings.<sup>7</sup> As a result, the line between fact and fiction is often blurred for entertainment value or simply to prove a point.<sup>8</sup>

With the rise of modern crime documentaries, series, and podcasts,<sup>9</sup> growing doubt is being cast on the criminal justice system through the portrayal of injustice.<sup>10</sup> On the surface, this may be a noble means of identifying flaws in the system,<sup>11</sup> yet the big picture may not always be the actual focus.<sup>12</sup> The “explosive growth of varied platforms” has

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<sup>3</sup> References to “true crime” throughout this note are generally referring to the genre of true crime as a whole.

<sup>4</sup> Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. CRIM. JUST. & POPULAR CULTURE 1, 3 (1995).

<sup>5</sup> *Id.* at 9.

<sup>6</sup> See Susan Weiner, *True Crime: Fact, Fiction, and the Law*, 17 LEGAL STUD. F. 275, 278 (1993).

<sup>7</sup> Elisha Fieldstadt, *New Crop of True Crime Shows Seduces Audiences, Compels Them to Dig*, NBC NEWS (Apr. 16, 2016, 5:33 AM), <http://www.nbcnews.com/news/us-news/new-crop-true-crime-shows-seduces-audiences-compels-them-dig-n546821>.

<sup>8</sup> Weiner, *supra* note 6, at 280.

<sup>9</sup> See Evelyn Wang, *Every Grisly '90s Murder Case Will Get a True Crime Anthology Series By the End of 2016*, ESQUIRE (Apr. 8, 2016), <http://www.esquire.com/entertainment/tv/news/a43780/everyone-is-jumping-on-the-true-crime-bandwagon/>.

<sup>10</sup> Tom Huddleston, Jr., *How True Crime Series Are Exposing America's Criminal Justice System*, FORTUNE (Feb. 11, 2016, 11:21 AM), <http://fortune.com/2016/02/11/true-crime-series-oj-murderer>.

<sup>11</sup> See Keith A. Findley, *'Making a Murderer' Shows that our Justice System Needs a Healthy Dose of Humility*, THE WASH. POST (Jan. 15, 2016), [https://www.washingtonpost.com/opinions/the-lessons-from-making-a-murderer/2016/01/15/93d9698c-baf0-11e5-829c-26ffb874a18d\\_story.html](https://www.washingtonpost.com/opinions/the-lessons-from-making-a-murderer/2016/01/15/93d9698c-baf0-11e5-829c-26ffb874a18d_story.html).

<sup>12</sup> Viewers “see themselves as constituents in the process, and in the case itself.” Fieldstadt, *supra* note 7. As a result, “nearly 130,000 people were inspired to sign a White House Petition requesting a pardon” for Making a Murderer’s Steven Avery and Brendan Dassey, while a “Free Steven Avery” petition on Change.org “garnered more than half a million signatures.”

allowed “[deviation] from the norm by telling stories that don’t necessarily have a neat conclusion,” which inspires the idea that the viewer can solve the crime at hand.<sup>13</sup> Considering the fact that layperson knowledge of the justice system stems from these platforms themselves, this sense of empowerment is problematic. Without being informed, outside of the narrative or dramatization, true crime may be harming America’s perception of the criminal justice system to an unmerited extent. Perhaps the real flaw exposed by America’s true crime obsession is that the public is misinformed in regards to the process and laws that shape the criminal justice system.

This note will examine the rise in popularity of true crime before addressing the implications of dramatizing the criminal justice system, including how the genre is altering America’s perception of the system. In doing so, areas of criminal law that are misrepresented in true crime storytelling will be highlighted along with concerns that arise from a misinformed public.

## I. TRUE CRIME: A RISING OBSESSION TURNED MODERN SENSATION

“Imagination, of course, can open any door  
– turn the key and let terror walk right in.”<sup>14</sup>

Truman Capote’s *In Cold Blood* is universally accepted to be one of the flagships of true crime literature,<sup>15</sup> originally published in 1965.<sup>16</sup> The New York Review of Books described it as “the best documentary account of an American crime ever written” and further exclaimed that it “chills the blood and exercises the intelligence.”<sup>17</sup> Yet, *In Cold Blood* has also been boiled down to a “‘fictionalized’ account” with the

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*Id.* See also Jareen Imam, *Judge Reopens Case of ‘Serial’ Podcast Subject Adnan Syed*, CNN (Nov. 7, 2015, 7:46 PM), <http://www.cnn.com/2015/11/07/us/serial-adnan-syed-new-hearing/>.

<sup>13</sup> Fieldstadt, *supra* note 7.

<sup>14</sup> TRUMAN CAPOTE, *IN COLD BLOOD: A TRUE ACCOUNT OF A MULTIPLE MURDER AND ITS CONSEQUENCES* 88 (Random House, First Vintage Int’l ed., 1994) (1965).

<sup>15</sup> Rosemary Herbert, *Publishers Agree: True Crime Does Pay*, 237 PUBLISHERS WKLY. 33 (1990).

<sup>16</sup> CAPOTE, *supra* note 14.

<sup>17</sup> F. W. Dupee, *Truman Capote’s Score*, N.Y. REV. OF BOOKS (Feb. 3, 1966), <http://www.nybooks.com/articles/1966/02/03/truman-capotes-score/>.

“traditional appeal of the novel.”<sup>18</sup> That appeal is, in fact, the “hallmark” of the most successful true crime nonfiction.<sup>19</sup> More recently, publishers have described the genre as “hot,” recognizing that media coverage on crime piques interest, while “the rise of tabloid television” has a “symbiotic relationship with the rise of books.”<sup>20</sup> At its core, crime “impinge[s] on our consciousness” and makes us want “to know how and why” it happens.<sup>21</sup> Psychologists have studied why every person, to some degree, has some sort of morbid curiosity.<sup>22</sup> Findings have suggested that humans are inclined to scrutinize threats to their own survival and that they generally possess a desire to empathize with other human beings.<sup>23</sup>

With the passing of time and advancements in technology, the instruments of true crime storytelling have evolved as well as the actual manner of telling the story.<sup>24</sup> Now, there are books documenting nearly every significant high profile crime.<sup>25</sup> There are also dramatized shows, documentaries, and podcasts available through streaming services that recount high-profile crimes as well as crimes that did not even garner national recognition when they occurred.<sup>26</sup> The influence of these modern mediums exemplifies the growing success of the true crime genre as a whole. The 2014 crime podcast *Serial* broke iTunes records

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<sup>18</sup> Herbert, *supra* note 15. See also Kevin Helliker, *Capote Classic ‘In Cold Blood’ Tainted by Long-Lost Files*, WALL ST. J. (Feb. 8, 2013), <http://www.wsj.com/articles/SB10001424127887323951904578290341604113984>.

<sup>19</sup> Herbert, *supra* note 15.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Oliver Burkeman, *This Column Will Change Your Life: Morbid Curiosity*, THE GUARDIAN (July 27, 2012, 5:59 PM), <http://www.theguardian.com/lifestyle/2012/jul/27/morbid-curiosity-change-life-burkeman>.

<sup>23</sup> *Id.*

<sup>24</sup> See Fieldstadt, *supra* note 7 (noting that online platforms allow storytellers to deviate from the norm by telling stories without neat conclusions).

<sup>25</sup> See, e.g., VINCENT BUGLIOSI & CURT GENTRY, *HELTER SKELTER: THE TRUE STORY OF THE MANSON MURDERS* (1974); DAVE CULLEN, *COLUMBINE 3* (1st ed. 2009); MATTHEW LYSIAK, *NEWTOWN: AN AMERICAN TRAGEDY* (First Gallery hardcover ed., Simon & Schuster 2013).

<sup>26</sup> See, e.g., *Serial*, *supra* note 1; *Making a Murderer*, *supra* note 2; *The Jinx: The Life and Deaths of Robert Durst* (HBO television broadcast 2015); *The People v. O.J. Simpson: American Crime Story: The Race Card* (FX television broadcast Mar. 1, 2016).

by being the “fastest podcast ever to reach 5 million downloads.”<sup>27</sup> *Making a Murderer* has been deemed Netflix’s “most significant show ever,” comparing it to the likes of HBO’s *Game of Thrones*.<sup>28</sup> In fact, “nearly one in five” adults were watching *Making a Murderer* during the week of December 28, 2015.<sup>29</sup> While the finale of *Jinx* alone “drew more than 800,000 viewers,”<sup>30</sup> *The People v. O.J.* averaged 12.6 million total viewers throughout the first eight episodes, ranking it second behind AMC’s *The Walking Dead* among all cable series in total viewers as of April 2016.<sup>31</sup>

True crime is indeed “hot” according to the numbers and is even approaching levels of success competitive with regular and premium programming.<sup>32</sup> The genre has grown from the origins of paperback novels to the modern sensation of critically acclaimed crime anthologies. As a result, the public is being exposed to the justice system in ways it never has before, especially those who have never had any firsthand experience with crime.<sup>33</sup> True crime is a new force to be reckoned with, which will undeniably require more research in what that means for the law and criminal justice system.

## II. THE IMPLICATIONS OF DRAMATIZING THE CRIMINAL JUSTICE SYSTEM

Considering the fact that “a majority of people in the United States receive much of their impressions and knowledge of the criminal justice

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<sup>27</sup> Fieldstadt, *supra* note 7. See also Ellen Gamenman, ‘Serial’ Podcast Catches Fire, WALL ST. J. (Nov. 13, 2014, 6:37 PM), <http://www.wsj.com/articles/serial-podcast-catches-fire-1415921853>.

<sup>28</sup> Paul Tassi, *Why ‘Making a Murderer’ is Netflix’s Most Significant Show Ever*, FORBES (Jan. 3, 2016, 11:48 AM), <http://www.forbes.com/sites/insertcoin/2016/01/03/why-making-a-murderer-is-netflixs-most-significant-show-ever/#4e28c32a5c00>.

<sup>29</sup> Brady Dale, *The Week Netflix’s ‘Making a Murderer’ Crushed All of Television*, OBSERVER (Mar. 25, 2016, 12:39 PM), <http://observer.com/2016/03/the-week-netflixs-making-a-murderer-crushed-all-of-television/>.

<sup>30</sup> Fieldstadt, *supra* note 7.

<sup>31</sup> Michael Malone, *‘The People v. O.J.’ Averaging 12.6 Million Total Viewers*, BROAD. & CABLE (Apr. 12, 2016, 3:11 PM), <http://www.broadcastingcable.com/news/programming/peo-ple-v-oj-averaging-126-million-total-viewers/155462>.

<sup>32</sup> See *supra* notes 29–31 and accompanying text.

<sup>33</sup> See McNeely, *supra* note 4, at 1, 3.

system through the media” and entertainment television in particular,<sup>34</sup> the recent booming popularity of true crime makes the genre a pervasive force in shaping the public’s perception of the criminal justice system. While there is little written about how true crime specifically alters perception,<sup>35</sup> there is an abundance of literature on the effect of the media in general.<sup>36</sup> A major issue with the media is that “coverage of crime and punishment is notoriously inaccurate and . . . biased toward sensationalized accounts.”<sup>37</sup> It often “depicts crime rates as escalating regardless of actual trends.”<sup>38</sup> Even the American Bar Association has recognized that “the play of imagination, exaggeration, effusion, distortion, deduction, conjecture, and all the secondary mental processes are often exercised upon . . . by ingenious reporters.”<sup>39</sup>

Taking into account the fact that true crime seeks to either dramatize or utilize narrative prose to evoke emotion, the effect is even more powerful by essentially taking news reporting to another level.<sup>40</sup> Just as the media distorts crime trends, a study on whether true crime homicide cases resemble the typical homicide committed in the United States found that “homicides account for almost eighty percent of the total crimes recounted in true crime books,” while “official data reveal[s]

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<sup>34</sup> *Id.* at 3.

<sup>35</sup> Alexis M. Durham et al., *Images of Crime and Justice: Murder and the “True Crime” Genre*, 23 J. CRIM. JUST. 143, 145 (1995) (stating that while there has been “considerable research on the character and consequences of media representations of crime, there has been little attention devoted to the true crime genre.”).

<sup>36</sup> See *McNeely*, *supra* note 4, at 7–9 (discussing crime dramas and law enforcement television programs). See also Kenneth Dowler, *Media Consumption and Public Attitudes Toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, and Perceived Police Effectiveness*, 10 J. CRIM. JUST. & POPULAR CULTURE 109, 109–10 (2003) (discussing news media effect on perception of system); Lisa A. Kort-Butler & Kelley Sittner Hartshorn, *Watching the Detectives: Crime Programming, Fear of Crime, and Attitudes About the Criminal Justice System*, 52 SOC. Q. 36, 36 (2011) (discussing attention given to television news, network crime dramas, and reality shows like “COPS,” but not to nonfictional documentary style programming).

<sup>37</sup> Justin T. Pickett et al., *Public (Mis)Understanding of Crime Policy: The Effects of Criminal Justice Experience and Media Reliance*, 26 CRIM. JUST. POL’Y REV. 500, 501 (2015).

<sup>38</sup> *Id.*

<sup>39</sup> Hon. Leon R. Yankwich, *Sensationalism in Crime News: Newspapers and the Administration of Justice*, 19 ABA J. 51, 51 (1993).

<sup>40</sup> See Joy Wiltenburg, *True Crime: The Origins of Modern Sensationalism*, 109 AM. HIST. REV. 1377, 1378–79 (2004) (discussing the true crime genre and adopting the term “sensationalism” due to its appeal to the emotions).

that homicides are quite rare.”<sup>41</sup> The result is a niche area of crime that is affecting America’s perception of the criminal justice system through dramatization. Generally speaking, forty-one percent of Americans reported only having “some” confidence in the criminal justice system in 2012, while twenty-nine percent had either “a great deal” or “quite a lot,” and twenty-six percent had “very little.”<sup>42</sup> Since there is a lack of direct research on the link between true crime and perceptions of the criminal justice system, the genre’s use of narrative will be discussed in relation to the portrayal of the justice system, followed by an analysis of legal principles that are omitted or misrepresented as a result.

### *A. Fact or Fiction: Stories About Justice*

In the modern world, where technology permeates everyday life, people yearn to be entertained. The Pew Research Center asked what people liked most about reading and found that it is “diverting, entertaining and educational.”<sup>43</sup> As stated earlier, the most successful true crime nonfiction includes elements of fictionalization to gain the “traditional appeal of the novel.”<sup>44</sup> In order to be diverting and entertaining, both print and broadcast true crime stories incorporate dramatic techniques to describe real events, including “reenactments, narration and music, emotional hooks, and cliffhangers . . . .”<sup>45</sup> They may even “intertwine factual reports with ‘rumor and speculation,’” which effectively blurs the “distinction between news and entertainment” and, ultimately, blurs the line between fact and fiction.<sup>46</sup> There are two major consequences of this dramatization: (1) the shaping of perception and (2) the enticing of emotional reactions.

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<sup>41</sup> Durham et al., *supra* note 35, at 146–47.

<sup>42</sup> *Reported Confidence in the Criminal Justice System, by Demographic Characteristics*, SOURCEBOOK CRIM. JUST. STATS. ONLINE, UNIV. ALB. (2012), <http://www.albany.edu/sourcebook/pdf/t2112012.pdf>.

<sup>43</sup> *Why People Like to Read*, PEW RES. CTR. (Apr. 5, 2012), <http://www.pewinternet.org/2012/04/05/why-people-like-to-read/>.

<sup>44</sup> Herbert, *supra* note 15.

<sup>45</sup> Kort-Butler & Hartshorn, *supra* note 36, at 39.

<sup>46</sup> *Id.*; Weiner, *supra* note 6, at 280.

## 1. Shaping Perception

It has been suggested “that the extent to which televised crime news has the potential for shaping social reality is related to the credibility of the news content.”<sup>47</sup> “The greater the realism *perceived* in crime dramas the more likely . . . audience members [are] to be fearful, to perceive crime rates as higher, [and] to hold negative attitudes towards police and the courts . . . .”<sup>48</sup> This means that a story can present fiction under the guise of fact while affecting social reality, so long as the content is believable. True crime does have a history of inspiring the “public’s demand that lawmakers get tough on crime,”<sup>49</sup> despite the reality that crime is actually trending downward.<sup>50</sup> Even homicides, the crime most covered by the genre,<sup>51</sup> have decreased by nearly half from 1992 to 2011.<sup>52</sup>

On that note, true crime has certainly inspired a critical look at the criminal justice system on a whole, including recent stories signifying the prevalence of wrongful convictions. For example, *Making a Murderer* frames the entire series in the first episode with the story of how Steven Avery was wrongfully convicted of sexual assault and imprisoned for eighteen years before being exonerated by DNA evidence in 2003.<sup>53</sup> With the tone set, the series progresses and hints at Avery, and his nephew Brendan Dassey, possibly being framed for the murder of Teresa Halbach in 2005.<sup>54</sup> Along the way, viewers witness Dassey, a

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<sup>47</sup> Weiner, *supra* note 6, at 281.

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> *Id.* at 287.

<sup>50</sup> See e.g., Pickett et al., *supra* note 37, at 501 (“The media typically depict[s] crime rates as escalating regardless of actual trends . . .”).

<sup>51</sup> See Durham et al., *supra* note 35, at 146 (“[H]omicides account for almost eighty percent of the total crimes recounted in . . . true crime books . . .”).

<sup>52</sup> Erica L. Smith & Alexia Cooper, *Homicide in the U.S. Known to Law Enforcement, 2011*, BUREAU JUST. STAT., U.S. DEP’T JUST. (Dec. 2013), <http://www.bjs.gov/content/pub/pdf/hus11.pdf>.

<sup>53</sup> See Netflix, *Making a Murderer: Eighteen Years Lost*, NETFLIX (2015), <https://www.netflix.com/title/80000770>; see also Jethro Nededog, *Everything You Need to Know from ‘Making a Murderer’ If You Don’t Want to Spend 10 Hours Watching*, BUS. INSIDER (Jan. 14, 2016, 3:01 PM), <http://www.businessinsider.com/netflix-making-a-murderer-recap-2016-1>.

<sup>54</sup> See *Making a Murderer*, *supra* note 2; see also Kathryn Shattuck, *‘Making a Murderer’: Watched It All? Share Your Theories*, N.Y. TIMES (Dec. 31, 2015), <http://www.nytimes.com/2015/12/31/arts/television/netflix-making-a-murderer-spoilers-discussion.html>.



minor at the time, being interrogated and apparently coerced by police without an attorney or parent present.<sup>55</sup> It is evident in the progression of the story and the manner in which the events are depicted that the viewer should empathize with Avery and Dassey. It accomplishes this while raising questions about the effectiveness of the justice system—which it does so successfully.<sup>56</sup> At the same time, the result of an emotional reaction to true crime can also be troublesome.

## 2. Enticing Emotion

Another issue related to the narration of a perceived or actual injustice is the ability for the genre to take advantage of the social and political climate in the portrayal of crime. Stories of true crime often highlight a hot button issue, such as police brutality or misconduct, gun control, or mental health.<sup>57</sup> These rare tragedies do shed light on extremely important issues, but the stories that stem from them feed on human nature—our desire to empathize and our emotions—through narration and dramatization. “Emotions are systemic responses” that “reflect central activation and preparation for action.”<sup>58</sup> The fact that

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<sup>55</sup> See *Understanding Brendan Dassey’s Sentence: ‘Making a Murderer’ and the Strickland Standard*, WASH. U. ST. LOUIS: @WASHULAW (Apr. 6, 2016), <https://onlinelaw.wustl.edu/blog/making-a-murderer-strickland/> (“The documentary shows how the 16-year-old high school student [Dassey] was yanked out of class, interrogated four times over a period of 48 hours, questioned by police officers without his parents or an attorney present, and ultimately coerced into confessing.”); see also Netflix, *Making a Murderer: Indefensible*, NETFLIX (2015), <https://www.netflix.com/title/80000770>.

<sup>56</sup> See e.g., Fieldstadt, *supra* note 7 (“[N]early 130,000 people were inspired to sign a White House petition requesting a pardon” for *Making a Murderer*’s Steven Avery and Brendan Dassey, while a “Free Steven Avery” petition on Change.org garnered more than half a million signatures.”).

<sup>57</sup> See CULLEN, *supra* note 25, at 298–301, 318–19 (discussing police misconduct in handling case and gun control legislation, eerily stating that “[n]o significant national gun-control legislation was enacted in response to Columbine.”); BUGLIOSI, *supra* note 25, at 293–94 (discussing Charles Manson’s motive, “Helter Skelter,” which was intended to start a race war through the murders); *Id.* at 297 (discussing how Manson became a sort of counterculture hero with people protesting “Free Manson,” even in the wake of multiple murders); LYSIAK, *supra* note 25, at 234–41, 260 (discussing gun control and mental health reform in wake of tragedy as well as the issue of stigmas relating to mental health); *The People v. O.J. Simpson: American Crime Story: The Race Card* (FX television broadcast Mar. 1, 2016) (explaining how the defense developed a defense theory, “the race card,” to claim that the LAPD framed and acquitted Simpson, despite an abundance of DNA evidence).

<sup>58</sup> Peter J. Lang, *The Emotion Probe: Studies of Motivation and Attention*, 50 AM. PSYCHOLOGIST 372, 373 (1995).

“media representations . . . are widely held to be powerful emotion generators and significant determinants of societal manners”<sup>59</sup> demonstrates the power true crime stories have. Further, emotions “play an important modulatory role on other behaviors,” such as perception and action, “often in contexts that are physically and semantically remote from the apparent source of the controlling affect.”<sup>60</sup> The likes of the “Free Steven Avery” petition<sup>61</sup> are akin to the “Free Manson” sentiments surrounding the Manson murders<sup>62</sup> and the racial divide surrounding the O.J. Simpson not-guilty verdict.<sup>63</sup> All three are examples of emotional responses to crime and justice.

Since feelings alter perceptions and actions in unpredictable ways, the perception of our criminal justice system is under unprecedented scrutiny.<sup>64</sup> Emotionally motivated perceptions of the system are in stark contrast to the intended objective nature of the law, which is another indication that the system is being misperceived.<sup>65</sup> The next section will examine some relevant areas of law that are either omitted from true crime stories or are misinterpreted as a result of the dramatization. First, the portrayal and interpretation of wrongful convictions will be considered, followed by commonly oversimplified concepts in criminal

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<sup>59</sup> *Id.* at 374.

<sup>60</sup> *Id.* at 377.

<sup>61</sup> See Michael Seyedian, *Free Steven Avery*, CHANGE.ORG (December 29, 2015), <https://www.change.org/p/president-of-the-united-states-free-steven-avery> (containing the following statements from commenters: “I believe in the Constitution . . . and this could happen to any one of us if we don’t stand up & voice our concerns,” and “[*Making a Murderer*] clearly shows . . . instances of incompetence . . . and manipulation of the law . . . .”); Fieldstadt, *supra* note 7.

<sup>62</sup> See also BUGLIOSI, *supra* note 25, at 296–97.

<sup>63</sup> In a 1995 poll, sixty-two percent of whites believed Simpson was guilty, while sixty-six percent of African Americans believed he was not guilty. Sixty-five percent of African Americans also believed that Simpson was framed. *Races Disagree on Impact of Simpson Trial*, CNN (Oct. 6, 1995, 1:00 AM), [http://www.cnn.com/US/OJ/daily/9510/10-06/poll\\_race/oj\\_poll\\_txt.html](http://www.cnn.com/US/OJ/daily/9510/10-06/poll_race/oj_poll_txt.html).

<sup>64</sup> *American Bar Association Symposium II: Public Understanding and Perceptions of the American Justice System*, 62 ALB. L. REV. 1307, 1315–16 (1999) (discussing how changes in attitudes toward the public as a whole will change people’s perception and confidence in the justice system).

<sup>65</sup> Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CAL. L. REV. 319, 320–21 (2007) (examining whether emotions should, could or do play a role in the law and why this could be a negative or positive consideration that may alter the objective of the law).

law, procedure, and punishment. This will expose some of the concerns that arise from a misinformed public.

### B. *The True Crime: Public Misunderstanding*

#### 1. Wrongful Convictions

*Making a Murderer* is one of the recent true crime series that deals with the issue of wrongful conviction,<sup>66</sup> which has become an increasing concern since 1989.<sup>67</sup> That was the first year “post-conviction DNA testing was used to establish innocence,”<sup>68</sup> as it was used in 2003 when Steven Avery was exonerated for a 1985 sexual assault.<sup>69</sup> A drop in public confidence in the criminal justice system is closely related with the introduction of post-conviction DNA testing.<sup>70</sup> Wrongful convictions can range “from persons who are falsely accused . . . to those who are wrongfully convicted and imprisoned, to death row inmates who are erroneously executed.”<sup>71</sup> However, there is a difference between “wrong-person” convictions and “procedural errors” that result in conviction, which further speaks to whether the person is “factually (not merely legally) innocent.”<sup>72</sup> This is perhaps one distinction that is misunderstood by layperson viewers or readers of true crime. In fact, “‘not guilty’ and ‘innocent’ are not synonymous.”<sup>73</sup>

For example, Avery was factually innocent as demonstrated by DNA evidence in the 1985 sexual assault case, classifying that particular conviction as wrongful.<sup>74</sup> On the other hand, the evidence seems to suggest that Avery is, at the very least, not factually innocent in the 2005 Halbach murder regardless of the suspicious circumstances presented in the documentary.<sup>75</sup> Ironically, DNA evidence seems to be what proves

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<sup>66</sup> *Making a Murderer*, *supra* note 2.

<sup>67</sup> Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning From Social Science*, 7 OHIO ST. J. CRIM. L. 7, 8 (2009).

<sup>68</sup> *Id.*

<sup>69</sup> *Making a Murderer: Eighteen Years Lost*, *supra* note 53.

<sup>70</sup> Leo & Gould, *supra* note 67, at 8.

<sup>71</sup> Tony G. Poveda, *Estimating Wrongful Convictions*, 18 JUST. Q. 689, 690 (2001).

<sup>72</sup> *Id.* at 690–91.

<sup>73</sup> *Id.* at 691.

<sup>74</sup> *Making a Murderer: Eighteen Years Lost*, *supra* note 53.

<sup>75</sup> Search of the Avery salvage yard yielded Halbach’s vehicle, “burned bone fragments, including skull fragments . . . with DNA consistent with that of Halbach; blood in the front

he is not factually innocent.<sup>76</sup> However, there may be procedural error in that case, which is a different type of justice system error.<sup>77</sup> Nevertheless, procedural error itself does not necessarily establish his innocence—the conclusion to which most viewers seem to be jumping.<sup>78</sup>

Further tied to the classification of guilt is the standard of proof required to actually establish guilt.<sup>79</sup> The varying standards of proof, which will be discussed further in the next section, are sometimes difficult for lawyers to grasp, making it apparent that an average true crime enthusiast likely lacks an understanding of the legality of establishing guilt.<sup>80</sup> Either way, it is extremely hard to quantify the *actual* extent or prevalence of wrongful convictions,<sup>81</sup> despite what the genre may depict. True crime stories that depict issues like wrongful conviction ultimately oversimplify complex legal principles.<sup>82</sup> In particular, the “narrative method” of telling “stories about wrongful conviction [tends] to oversimplify causation.”<sup>83</sup> Without delving deeper into these concepts, we “rob” ourselves of analysis of unique “causes, characteristics, and consequences.”<sup>84</sup> As a result, the emotional responses to true crime narratives ignore the more fundamental concepts and issues at hand, all at the expense of confidence in the justice system.

## 2. Criminal Law, Procedure, and Punishment

A 2015 study concluded that “reliance on the mass media for crime-related information is associated with lower levels of knowledge

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area of Halbach’s vehicle that was later determined to have come from Avery; blood in the cargo area of the vehicle that was later determined to have come from Halbach” and “a nearly intact bullet and bullet fragments from Avery’s garage that came from a rifle found in Avery’s trailer and contained DNA belonging to Halbach.” *State v. Avery*, 804 N.W.2d 216, 221 (Wis. Ct. App. 2011).

<sup>76</sup> *See id.*

<sup>77</sup> *See id.* at 222, 230 (discussing Steven Avery’s argument that an unreasonable search and seizure took place on his property and that the court erred by prohibiting his introduction of third-party liability evidence); Poveda, *supra* note 71, at 690–91 (stating that procedural errors occur when an individual’s due process rights have been violated).

<sup>78</sup> *See, e.g., supra* text accompanying note 60.

<sup>79</sup> Poveda, *supra* note 71, at 691.

<sup>80</sup> *Id.* at 691–92.

<sup>81</sup> *Id.* at 692.

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

<sup>83</sup> Leo & Gould, *supra* note 67, at 16.

<sup>84</sup> *See id.* at 17.

about criminal punishment.”<sup>85</sup> Further, “knowledge about criminal punishment [was] extremely low among both media-reliant and non-media-reliant respondents.”<sup>86</sup> As a result, “large swaths of the public hold inaccurate perceptions about the correctional system along a range of dimensions.”<sup>87</sup> Another study found that courts may have some control over “perceptions of procedural fairness,” but most of the influences on confidence in the system are out of their control, including the selection system for judges, the individual’s experience with the system, and crime rates in the area.<sup>88</sup> These findings highlight the importance of raising public knowledge about criminal procedure and punishment,<sup>89</sup> including the burden of proof in establishing guilt. The 2015 study suggests using “narratives or exemplars” that are “emotionally charged” to increase engagement.<sup>90</sup> While true crime narratives have proven to be popular and engaging,<sup>91</sup> the medium needs reforming if it is actually going to impart knowledge rather than oversimplified legal concepts that are biased towards a certain issue.<sup>92</sup>

Understanding the burden of proof in establishing guilt is an excellent example, especially considering the role of juries in certain trials.<sup>93</sup> Jurors have been found to be correct about “questions of law less

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<sup>85</sup> Pickett et al., *supra* note 37, at 514–15.

<sup>86</sup> *Id.* at 515.

<sup>87</sup> *Id.* at 516.

<sup>88</sup> Sarah C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 704 (2006).

<sup>89</sup> See Pickett et al., *supra* note 37, at 516–17 (explaining the efforts that need to be made to “facilitate retention of criminal justice facts”).

<sup>90</sup> *Id.* at 517.

<sup>91</sup> See *supra* text accompanying notes 27–31.

<sup>92</sup> See *supra* text accompanying notes 59–60, 82, 84.

<sup>93</sup> See Hon. Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 358–61, n.41 (2006) (“[W]atching CSI and related programs may marginally increase the expectation of scientific evidence in certain types of cases . . . . [CSI watchers] were . . . likely to expect DNA evidence in cases charging . . . criminal sexual conduct . . . fingerprint evidence in cases charging breaking and entering, theft, or cases involving a gun . . . ballistics evidence in gun[] cases . . . .”; “This may be simply a reflection of the well-documented misplaced reliance on the reliability of eyewitness identification.”; “Numerous studies have found that jurors often ignore the evidence in rape cases and make their decisions on the basis of extraneous factors [such as the “victim on trial” phenomenon].”).

than half of the time.”<sup>94</sup> While “[j]udges’ instructions significantly improved performance on questions about the procedural law,” they still “failed to raise it to a level desirable for fair and meaningful deliberation.”<sup>95</sup> FX’s *The People v. O.J.* never fully discusses the details of the differing burdens of proof but still indicates that Simpson was held liable in a subsequent civil case brought against him by the Goldman’s.<sup>96</sup> This illustrates how true crime fuels the public’s lack of knowledge and misunderstanding of legal concepts. The distinction between burdens of proof is undoubtedly confusing when considering a combined ignorance of (1) the different standards themselves and (2) why the differing burdens exist.

First, Simpson’s *guilt* needed to be proven “beyond a reasonable doubt” at the criminal level,<sup>97</sup> while the burden in finding Simpson *liable* in the civil action for wrongful death was by “preponderance of the evidence.”<sup>98</sup> Beyond a reasonable doubt requires “a juror’s mind be in a ‘subjective state of near certitude’ of guilt.”<sup>99</sup> Preponderance of the evidence essentially requires that the “fact or causation” is “more likely [to have occurred] than not.”<sup>100</sup> Second, this distinction exists because criminal prosecution requires a higher burden of proof since the consequences are greater (i.e. deprivation of liberty by imprisonment or even death), while civil punishment is typically comprised of monetary damages.<sup>101</sup> Supreme Court precedent also tells us that “it is far worse to

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<sup>94</sup> Alan Reifman et al., *Real Jurors’ Understanding of the Law in Real Cases*, 16 L. & HUM. BEHAV. 539, 550 (1992).

<sup>95</sup> *Id.* at 550–51.

<sup>96</sup> *The People v. O.J.*, *supra* note 26.

<sup>97</sup> See JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 9 (5th ed. 2009) (“The Due Process Clause of the United States Constitution requires the prosecutor to persuade the fact finder ‘beyond a reasonable doubt of every fact necessary to constitute the crime charged.’” This standard is the “prime instrument for reducing the risk of convictions resting on factual error.”) (quoting *In re Winship*, 397 U.S. 358, 363 (1970)).

<sup>98</sup> See ARTHUR BEST & DAVID W. BARNES, *BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS* 21 (1st ed. 2003). *Guilt* and *liable* are italicized for emphasis due to the different terminology used in criminal law and tort law, which further highlights that each area of law is distinct from the other.

<sup>99</sup> DRESSLER & GARVEY, *supra* note 97, at 11 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979) (explaining that reasonable doubt may be difficult to actually quantify, but courts are free to define it further so long as it still meets the constitutional standard)).

<sup>100</sup> BEST & BARNES, *supra* note 98, at 175.

<sup>101</sup> *Id.* at 21.

convict an innocent man than to let a guilty man go free,”<sup>102</sup> which justifies the heavier burden at the criminal level.

The public’s lack of knowledge in regards to legal concepts and why they exist, though understandable, is troubling. One principle of criminal law is that ignorance (or mistake) of the law is not a defense because it “encourage[s] the societal benefit of . . . knowledge and respect for the law.”<sup>103</sup> This principle speaks to the problems associated with public misunderstanding of the justice system, which this note has argued is only worsened by the media and true crime storytelling in most cases. Society is harmed when the public lacks knowledge and respect for the law.

Another legal principle from criminal procedure that relates to this issue is Rule 403 of the Federal Rules of Evidence, which contains a “prejudice-versus-probativeness standard.”<sup>104</sup> Basically, the court can exclude relevant evidence if it is outweighed by certain dangers, such as unfair prejudice, confusing the issues, or misleading the jury.<sup>105</sup> One of the purposes behind this rule is to prevent decisions from being made on an improper basis.<sup>106</sup> The rule also helps filter out inflammatory evidence that a party might try to introduce in court.<sup>107</sup> True crime dramatizations seem to do the opposite—they exclude relevant evidence or highlight inflammatory evidence in order to appeal to the emotions.<sup>108</sup> It can therefore be argued that true crime is promoting an improper perception of criminal justice.

Though journalists and creators of true crime stories are obviously not subject to the Federal Rules of Evidence or other principles of criminal law and procedure, it is important to recognize how the genre is structured in a way that does not necessarily represent what the criminal justice system stands for. It may even go so far as to explicitly contradict certain legal principles. Despite this, true crime sets out to portray the

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<sup>102</sup> DRESSLER & GARVEY, *supra* note 97, at 9 (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). This principle also proves that the system does not intend to make wrongful convictions, though true crime stories may illustrate otherwise.

<sup>103</sup> *Id.* at 205.

<sup>104</sup> FED. R. EVID. 403; GEORGE FISHER, *EVIDENCE* 22 (3d ed. 2013).

<sup>105</sup> FED. R. EVID. 403.

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

<sup>107</sup> FISHER, *supra* note 104, at 44–58.

<sup>108</sup> *See supra* text accompanying notes 53–63.

system and its flaws without being held to its standards. True crime's rising popularity should be an area of concern and further research to fully understand what the implications are in regards to perceptions of the criminal justice system and public misunderstanding.

### CONCLUSION

While true crime does expose flaws that exist in the criminal justice system—such as wrongful convictions, issues with police discretion, and prejudice—one of the biggest concerns is how the genre can misinform the public by enticing emotional responses to these issues. It is true that the criminal justice system needs to adapt as society and technology progresses, as it notably did when DNA evidence was introduced to prove post-conviction innocence.<sup>109</sup> On that note, the system is limited by society itself. This is evident when considering the role of juries in our criminal justice system.<sup>110</sup> A misinformed public does not just mean lack of knowledge and respect for the law—it means a misinformed jury.

True crime has proven to be a great avenue for reaching out to the public on important issues that shape the criminal justice system, but there is a need for some reform in how the genre presents information. Perhaps, if standards are raised, true crime can actually become a tool for educating the public. It is unacceptable for Americans to be ignorant of the intricacies of the law and of their rights. In truth, the criminal justice system is a reflection of society—when we improve, our system will improve too.

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<sup>109</sup> Leo & Gould, *supra* note 67, at 8.

<sup>110</sup> See Hon. Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 358–361, 361 n.41 (2006) (noting a study found that “watching *CSI* and related programs may marginally increase the expectation of scientific evidence in certain types of cases” including DNA evidence, fingerprint evidence, and ballistics evidence; there is “well-documented misplaced reliance on the reliability of eyewitness identification”; numerous studies have also found that “jurors often ignore the evidence in rape cases and make their decisions on the basis of extraneous factors” such as the “victim on trial” phenomenon).