

DEAD CERTAINTY

How “Making a Murderer” goes wrong.

BY KATHRYN SCHULZ

A private investigative project, bound by no rules of procedure, is answerable only to ratings and the ethics of its makers.

ILLUSTRATION BY SIMON PRADES

Argosy began in 1882 as a magazine for children and ceased publication ninety-six years later as soft-core porn for men, but for ten years in between it was the home of a true-crime column by Erle Stanley Gardner, the man who gave the world Perry Mason. In eighty-two novels, six films, and nearly three hundred television episodes, Mason, a criminal-defense lawyer, took on seemingly guilty clients and proved their innocence. In the magazine, Gardner, who had practiced law before turning to writing, attempted to do something similar—except that there his “clients” were real people, already convicted and behind bars. All of them met the same criteria: they were impoverished, they insisted that they were blameless, they were serving life sentences for serious crimes, and they had exhausted their legal options. Gardner called his column “The Court of Last Resort.”

To help investigate his cases, Gardner assembled a committee of crime experts, including a private detective, a handwriting analyst, a former prison warden, and a homicide specialist with degrees in both medicine and law. They examined dozens of cases between September of 1948 and October of 1958, ranging from an African-American sentenced to die for killing a Virginia police officer after a car chase—even though he didn’t know how to drive—to a nine-fingered convict serving time for the strangling death of a victim whose neck bore ten finger marks.

The man who didn’t know how to drive was exonerated, at least partly thanks to coverage in “The Court of Last Resort,” as were many others. Meanwhile, the never terribly successful *Argosy* also got a reprieve. “No one in the publishing field had ever considered



the remote possibility that the general reading public could ever be so interested in justice,” Gardner wrote in 1951. “*Argosy’s* circulation began to skyrocket.” Six years later, the column was picked up by NBC and turned into a twenty-six-episode TV series.

Although it subsequently faded from memory, “The Court of Last Resort” stands as the progenitor of one of today’s most popular true-crime subgenres, in which reporters, dissatisfied with the outcome of a criminal case, conduct their own extrajudicial investigations. Until recently, the standout representatives of this form were “The Thin Blue Line,” a 1988 Errol Morris documentary about Randall Dale Adams, who was sentenced to death for the 1976 murder of a police officer; “Paradise Lost,” a series of documentaries by Joe Berlinger and Bruce Sinofsky about three teen-agers found guilty of murdering three second-grade boys in West Memphis in 1993; and “The Staircase,” a television miniseries by Jean-Xavier de Lestrade about the novelist Michael Peterson, found guilty of murdering his wife in 2001. Peterson has been granted a new trial. Randall Dale Adams was exonerated a year after “The Thin Blue Line” was released. Shortly before the final “Paradise Lost” documentary was completed, in 2011, all three of its subjects were freed from prison on the basis of DNA evidence.

In the past fifteen months, this canon has grown considerably in both content and prestige. First came “Serial,” co-created by Sarah Koenig and Julie Snyder, which revisited the case of Adnan Syed, convicted for the 1999 murder of his high-school classmate and former girlfriend, eighteen-year-old Hae Min Lee. That was followed by Andrew Jarecki’s “The Jinx,” a six-part HBO documentary that, uncharacteristically for the genre, sought to implicate rather than exonerate its subject, Robert Durst. A New York real-estate heir, Durst was acquitted in one murder case, is currently awaiting trial in another, and has long been suspected in the 1982 disappearance of his wife, Kathleen Durst.

The latest addition to this canon is Laura Ricciardi and Moira Demos’s “Making a Murderer,” a ten-episode Netflix documentary that examines the 2007 conviction of a Wisconsin man named Steven Avery. Like the prisoners featured in “The Court of Last Resort,” Avery is a poor man serving time for a violent crime that he insists he didn’t commit. The questions his story raises, however, are not just about his own guilt and innocence. Nearly seventy years have passed since Erle Stanley Gardner first tried a criminal case before the jury of the general public. Yet we still have not thought seriously about what it means when a private investigative project—bound by no rules of procedure, answerable to nothing but ratings, shaped only by the ethics and aptitude of its makers—comes to serve as our court of last resort.

If you know anything about “Making a Murderer,” you know that Steven Avery has a particularly troubling and convoluted relationship with the criminal-justice system. In July of 1985, Avery was picked up by the Manitowoc County Sheriff’s Department after a woman named Penny Beerntsen was brutally attacked while out for a run in a

Wisconsin state park. Beerntsen, who had been conscious throughout most of the attack,

deliberately sought to memorize her assailant's features, and subsequently picked Avery out of both a photo array and a live lineup. At trial six months later, Avery was found guilty and sentenced to thirty-two years in prison. He served eighteen of those before being exonerated by DNA testing, a technology not available at the time of the trial. That DNA test also identified Beerntsen's actual assailant: a man named Gregory Allen, who was, by then, imprisoned for another assault.

This was bad news for the Manitowoc County Sheriff's Department. As the public learned soon after the exoneration, local police had gone to the sheriff's department within days after the attack to report that Allen may have been responsible; the department, convinced that it had the right man, declined to investigate. Ten years later, while serving time, Allen confessed to the assault. Again, the sheriff's department was alerted and, again, no one acted; Avery remained in prison for another eight years. In light of this information, he filed a lawsuit against the county for thirty-six million dollars.

In 2005, while the defendants in that civil suit were being deposed, Avery was arrested again—this time for the murder of a twenty-five-year-old photographer named Teresa Halbach. Four months later, his sixteen-year-old nephew, Brendan Dassey, was arrested as well, after he confessed to helping Avery rape and murder Halbach and burn her body. In 2007, after separate trials, both were found guilty and sentenced to life in prison.

Ricciardi and Demos examine those convictions in "Making a Murderer," and the information they present has led viewers to respond with near-universal outrage about the verdicts. Because of the pending civil litigation, the Manitowoc County Sheriff's Department was supposed to have nothing to do with the Halbach investigation beyond lending any necessary equipment to the jurisdiction in charge. Yet members of the department were involved in the case at every critical juncture. One of them was allegedly left alone with Halbach's vehicle for several hours after it was located and before Avery's blood was discovered inside. Another found the key to Halbach's S.U.V. in Avery's home—in plain view, even though the property had previously been searched by other investigators six times. A third found a bullet fragment in Avery's garage, again after the premises had been repeatedly searched. The analyst who identified Halbach's DNA on that bullet had been instructed by a county detective to try to come up with evidence that Halbach had been in Avery's house or garage. Perhaps most damning, the defense discovered that a vial of Avery's blood, on file from the 1985 case, had been tampered with; the outer and inner seal on the box in which it was kept had been broken, and the vial itself had a puncture in the top, as from a hypodermic needle.

That is sobering stuff, but the most egregious misconduct shown in the documentary concerns not Avery but his nephew, Brendan Dassey—a stone-quiet, profoundly naïve, learning-disabled teen-ager with no prior criminal record, who is interrogated four times

claimed to have no knowledge of Halbach, gradually describes an increasingly lurid torture scene that culminates in her murder by gunshot. The gun comes up only after investigators prod Dassey to describe what happened to Halbach's head. Dassey first proposes that Avery cut off her hair, and then adds that his uncle punched her. Finally, one of the investigators, growing impatient, says, "I'm just going to come out and ask you: Who shot her in the head?" After the confession is signed, the prosecutor calls a press conference and turns Dassey's story into the definitive account of what happened—a travesty of justice for Dassey and Avery, given the questionable nature of the interrogation, and a terrible cruelty to the Halbach family.

Dassey repeatedly recanted his confession, including in a letter to the judge and on the witness stand. But it was too late. "Put the tape of his confession in the VCR or DVD player and play it, there's our case right there," Halbach's brother told the press. He was right, but he shouldn't have been. Most people find it impossible to imagine why anyone would confess to a crime he didn't commit, but, watching Dassey's interrogation, it is easy to see how a team of motivated investigators could alternately badger, cajole, and threaten a vulnerable suspect into saying what they wanted to hear. When Dassey's mother asked him how he came up with so many details if he was innocent, he said, "I guessed." "You don't guess with something like this, Brendan," she replied. "Well," he said, "that's what I do with my homework, too."

By chance, I have known many of the details of the Avery case since long before the release of "Making a Murderer," because in 2007 I spoke at length with Penny Beerntsen. At the time, I was working on a book about being wrong—about how we as a culture think about error, and how we as individuals experience it—and Beerntsen, in identifying Avery as her assailant, had been wrong in an unusually tragic and consequential way.

Beerntsen had also been unusual among crime victims involved in wrongful convictions in that she had instantly accepted the DNA evidence—and, with it, her mistake. "It ain't all her fault, you know," Avery had said at the time of his release. "Honest mistake, you know." But Beerntsen had felt horrifically guilty. "This might sound unbelievable," she told me when we first talked, "but I really feel this way: the day I learned I had identified the wrong person was much worse than the day I was assaulted. My first thought was, I don't deserve to live." She wrote Avery a letter, apologizing to him and his family, and, concerned by the missteps and misconduct that led to his incarceration, became involved with the Innocence Project, which seeks to free the wrongfully convicted and to reform legal practices to help prevent miscarriages of justice.

Given her history, Beerntsen does not need any convincing that a criminal prosecution can go catastrophically awry. But when Ricciardi and Demos approached her about participating in "Making a Murderer" she declined, chiefly because, while her own

filmmakers struck her as having already made up their minds. “It was very clear from the outset that they believed Steve was innocent,” she told me. “I didn’t feel they were journalists seeking the truth. I felt like they had a foregone conclusion and were looking for a forum in which to express it.”

Ricciardi and Demos have dismissed that idea, claiming that they simply set out to investigate Avery’s case and didn’t have a position on his guilt or innocence. Yet “Making a Murderer” never provokes



the type of intellectual and psychological oscillation so characteristic of Koenig and Snyder’s “Serial.” Instead, the documentary consistently leads its viewers to the conclusion that Avery was framed by the Manitowoc County Sheriff’s Department, and it contains striking elisions that bolster that theory. The filmmakers minimize or leave out many aspects of Avery’s less than savory past, including multiple alleged incidents of physical and sexual violence. They also omit important evidence against him, including the fact that Brendan Dassey confessed to helping Avery move Halbach’s S.U.V. into his junk yard, where Avery lifted the hood and removed the battery cable. Investigators subsequently found DNA from Avery’s perspiration on the hood latch—evidence that would be nearly impossible to plant.

Perhaps because they are dodging inconvenient facts, Ricciardi and Demos are never able to present a coherent account of Halbach’s death, let alone multiple competing ones. Although “Making a Murderer” is structured chronologically, it fails to provide a clear time line of events, and it never answers such basic questions as when, where, and how Halbach died. Potentially critical issues are raised and summarily dropped; we hear about suspicious calls to and messages on Halbach’s cell phone, but these are never explored or even raised again. In the end, despite ten hours of running time, the story at the heart of “Making a Murderer” remains a muddle. Granted, real life is often a muddle, too, especially where crime is involved—but good reporters delineate the facts rather than contribute to the confusion.

Despite all this, “Making a Murderer” has left many viewers entirely convinced that Avery was framed. After the documentary aired, everyone from high-school students to celebrities jumped on the “Free Avery and Dassey” bandwagon. In the weeks since, people involved in the conviction have been subjected to vicious and in some cases threatening messages from Netflix-watching strangers. (So have people who were not involved, including the Manitowoc Police Department, a separate entity from the county sheriff’s department.)

less like investigative journalism than like highbrow vigilante justice. “My initial reaction was that I shouldn’t be upset with the documentarians, because they can’t help that the public reacted the way that it did,” Penny Beerntsen said. “But the more I thought about it, the more I thought, Well, yeah, they do bear responsibility, because of the way they put together the footage. To me, the fact that the response was almost universally ‘Oh, my God, these two men are innocent’ speaks to the bias of the piece. A jury doesn’t deliberate twenty-some hours over three or four days if the evidence wasn’t more complex.”

“Making a Murderer” raises serious and credible allegations of police and prosecutorial misconduct in the trials of Steven Avery and Brendan Dassey. It also implies that that misconduct was malicious. That could be true; vindictive prosecutions have happened in our justice system before and they will happen again. But the vast majority of misconduct by law enforcement is motivated not by spite but by the belief that the end justifies the means—that it is fine to play fast and loose with the facts if doing so will put a dangerous criminal behind bars.

That same reasoning, with the opposite aims, seems to govern “Making a Murderer.” But while people nearly always think that they are on the side of the angels, what finally matters is that they act that way. The point of being scrupulous about your means is to help insure accurate ends, whether you are trying to convict a man or exonerate him. Ricciardi and Demos instead stack the deck to support their case for Avery, and, as a result, wind up mirroring the entity that they are trying to discredit.

Partway through “Making a Murderer,” we hear a “Dateline NBC” producer discuss the death of Teresa Halbach in disturbingly chipper tones. “This is the perfect ‘Dateline’ story,” she says. “It’s a story with a twist, it grabs people’s attention. . . . Right now murder is hot, that’s what everyone wants, that’s what the competition wants, and we’re trying to beat out the other networks to get that perfect murder story.”

That clip, presented without context, is meant to make the “Dateline” producer look shallow and exploitative, and it does. But it is also meant to inoculate Ricciardi and Demos against the charge that they, too, are pursuing a hot murder case with a dramatic twist in order to grab people’s attention. The implication is that, unlike traditional true-crime shows—“Dateline,” “48 Hours,” “America’s Most Wanted,” “Nancy Grace”—their work is too intellectually serious to be thoughtless, too morally worthy to be cruel.

Yet the most obvious thing to say about true-crime documentaries is something that, surprisingly often, goes unsaid: they turn people’s private tragedies into public entertainment. If you have lost someone to violent crime, you know that, other than the loss itself, few things are as painful and galling as the daily media coverage, and the license it gives to strangers to weigh in on what happened. That experience is difficult enough when the coverage is local, and unimaginable when a major media production

because . . . 'TO ME IT'S REAL LIFE," the younger brother of Hae Min Lee, the murder victim in "Serial," wrote on Reddit in 2014. "To you listeners, its another murder mystery, crime drama, another episode of CSI. You weren't there to see your mom crying every night . . . and going to court almost every day for a year seeing your mom weeping, crying, and fainting. You don't know what we went through."

Like the Lee family, the Halbachs and Penny Beerntsen declined to participate in a journalistic investigation into their personal tragedies. But no one in such a situation has any real way to opt out. "Making a Murderer" takes Halbach's death as its subject (her life is represented by a few photos and video clips, which do not rise above the standard *mise en scène* of murder shows), and footage of her family appears in almost every episode. Beerntsen, for her part, was dismayed to discover that the filmmakers had obtained a photograph of her battered face from the 1985 attack and used it without her knowledge. "I don't mind looking at it, but my children should not have to relive that," she said. "And everything we're dealing with, the Halbachs are dealing with a thousandfold."

This is not to suggest that reporting on violence is always morally abhorrent. Crimes themselves vary widely, as does crime coverage, and it is reasonable to hold that at some point the demands of private grief are outweighed by the public good. But neither "Serial" (which is otherwise notable for its thoroughness) nor "Making a Murderer" ever addresses the question of what rights and considerations should be extended to victims of violent crime, and under what circumstances those might justifiably be suspended. Instead, both creators and viewers tacitly dismiss the pain caused by such shows as collateral damage, unfortunate but unavoidable. Here, too, the end is taken to justify the means; someone else's anguish comes to seem like a trifling price to pay for the greater cause a documentary claims to serve.

But what, exactly, is that cause in "Making a Murderer"? As of January 12th, more than four hundred thousand people had signed a petition to President Obama demanding that "Steven Avery should be exonerated at once by pardon." That outrage could scarcely have been more misdirected. For one thing, it was addressed to the wrong person: Avery was convicted of state crimes, not federal ones, and the President does not have the power to pardon him. For another, it was the wrong demand. "Making a Murderer" may have presented a compelling case that Avery (and, more convincingly, Dassey) deserved a new trial, but it did not get anywhere close to establishing that either one should be exonerated.

The petition points to another weakness of "Making a Murderer": it is far more concerned with vindicating wronged individuals than with fixing the system that wronged them. The series presents Avery's case as a one-off—a preposterous crusade by a grudge-bearing county sheriff's department to discredit and imprison a nemesis. (Hence the ad-hominem attacks the show has inspired.) But you don't need to have filed a

and have evidence planted on your person or property. Among other things, simply being black can suffice. While Avery's story is dramatic, every component of it is sadly common. Seventy-two per cent of wrongful convictions involve a mistaken eyewitness. Twenty-seven per cent involve false confessions. Nearly half involve scientific fraud or junk science. More than a third involve suppression of evidence by police.

Those statistics reflect systemic problems. Eyewitness testimony is dangerously persuasive to juries, yet it remains admissible in courts almost without caveat. Some interrogation methods are more likely than others to produce false confessions, yet there are no national standards; fewer than half of states require interrogations to be videotaped, and all of them allow interrogators to lie to suspects. With the exception of DNA evidence (which emerged from biology, not criminology), forensic tests are laughably unscientific; no independent entity exists to establish that such tests are reliable before their results are admissible as evidence.

It is largely because of these systemic weaknesses in our judicial system that we find ourselves with a court of last resort. While that court cannot directly operate the levers of the law, it has drawn attention to cases that need review, and innocent people have been freed as a result. Yet in the decades since Erle Stanley Gardner launched his column, none of the forces that put those people in prison in the first place have changed for the better. Nor have we evolved a set of standards around extrajudicial investigations of criminal cases. However broken the rules that govern our real courts, the court of last resort is bound by no rules at all.

That does not automatically compromise independent investigations into crime; some remarkable and important work has been done in the tradition of the court of last resort. But it does enable individual journalists to proceed as they choose, and the choices made by Ricciardi and Demos fundamentally undermine "Making a Murderer." Defense attorneys routinely mount biased arguments on behalf of their clients; indeed, it is their job to make the strongest one-sided case they can. But that mandate is predicated on the existence of a prosecution. We make moral allowances for the behavior of lawyers based on the knowledge that the jury will also hear a strong contrary position. No such structural protection exists in our extrajudicial courts of last resort, and Ricciardi and Demos chose not to impose their own.

Toward the end of the series, Dean Strang, Steven Avery's defense lawyer, notes that most of the problems in the criminal-justice system stem from "unwarranted certitude"—what he calls "a tragic lack of humility of everyone who participates." Ultimately, "Making a Murderer" shares that flaw; it does not challenge our yearning for certainty or do the difficult work of helping to foster humility. Instead, it swaps one absolute for

express outrage, comforting to have closure, and satisfying to know all the answers. But, as defense lawyers remind people every day, it is reasonable to doubt. ♦



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