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Kat Albrecht

Kaitlyn Filip

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THE SERIAL EFFECT

Kat Albrecht & Kaitlyn Filip*

ABSTRACT

*The “CSI Effect” theorizes that criminal juries can be unduly influenced by fictional crime dramas such that they demand a higher standard of forensic evidence than is available, or even possible to provide, in most criminal cases. The CSI Effect has a strong presence in the courtroom despite its narrow focus on forensic evidence and basis in fiction. This article explores a new media-induced effect that may prove to affect American juries even more insidiously: The Serial Effect. This article explores the rise of true crime podcasts and the legal cases featured within them through focus on *Syed v. Maryland* and *Flowers v. Mississippi*, cases that were featured on true crime podcasts and both later made it all the way to the Supreme Court. By engaging directly with the podcasts that featured these cases, this article draws distinctions between the CSI Effect and the newly conceptualized Serial Effect by considering how different forms of true crime storytelling can influence cultural perceptions of criminal cases. We begin by considering what it means that the Serial Effect’s impact is due to media that casts itself as truth, not fiction, and is heralded as true. We then carefully analyze the language of these podcasts and how each podcast’s narrative construction focuses on guilt versus innocence, considers evidence, understands and explains criminal procedure, and deals with the verdict or resolution of the case. We find that true crime podcasts can vary substantially in how they construct criminal cases for the lay audience, particularly in their focus (or lack thereof) on guilt and innocence. We argue that this understudied narrative construction could have substantial impacts on jury expectations for forensic evidence and, more broadly, perhaps eclipse the previously studied CSI Effect. We conclude by calling for rigorous empirical research on this newly defined Serial Effect.*

* Kat Albrecht is an Assistant Professor of Criminal Justice and Criminology in the Andrew Young School of Policy Studies at Georgia State University. She received her PhD and MA in sociology from Northwestern University. She received her JD from the Northwestern University Pritzker School of Law. Kaitlyn Filip is a Law & Humanities Fellow at Northwestern University Pritzker School of Law and a JD-PhD Student in Communication Studies: Rhetoric and Public Culture at Northwestern University. The authors are grateful for the assistance of Brittain Spurka in the editing and reference checking of this article. The authors are also appreciative of the insightful comments made by Dr. Shari Diamond and the attendees of the Northwestern Pritzker School of Law JD/PhD Colloquium.

INTRODUCTION

CSI: Crime Scene Investigation is one of the most watched television shows in the world. Airing from 2000 to 2015, the original series recorded viewership numbers as high as 44 million global viewers per episode.¹ The franchise expanded from there, spawning spin-offs like *CSI: Miami*, *CSI: New York*, *CSI: Cyber*, and *CSI: Vegas*.² Along with its success on the small screen, *CSI* made its way into the courtroom and the annals of legal and criminological scholarship via the “*CSI* Effect.” The *CSI* Effect hypothesizes that crime dramas like *CSI* have changed jurors’ expectations of the certainty and availability of forensic evidence, raising them to unrealistic standards.³ In response to this theory, both legal practitioners and scholars have attempted to investigate the veracity of the *CSI* Effect and guard against its potentially detrimental effects on the criminal justice system.

While the *CSI* Effect has been studied considerably,⁴ the effects of other, newer forms of crime media on criminal proceedings have received substantially less scholarly attention, even as these new forms of media become cultural juggernauts in ways that are more nuanced, and potentially more impactful, than fictional forensic TV dramas. In 2014, the true crime podcast *Serial* captivated the nation through its investigation of a single murder case for twelve episodes. Unlike its fictional television predecessors and contemporaries, *Serial* strove to be factual and was presented and received as such.⁵ *Serial* was a massive success, ushering in a host

1. Brandon Shoaff, *CSI: Crime Scene Investigation Is Way More Popular Than You Think*, LOOPER (Dec. 7, 2021, 7:54 PM), <https://www.looper.com/680624/csi-crime-scene-investigation-is-way-more-popular-than-you-think/> [https://perma.cc/T2GV-UJXM].

2. Nate Millado, *The DNA Of CSI: Every Crime Scene Investigation Spinoff Revisited*, CBS WATCH! MAG., <https://cbswatchmagazine.com/shows/dna-all-csi-spinoffs-revisited/csi-crime-scene-investigation> [https://perma.cc/4NMM-NHX4].

3. Steven M. Smith, Veronica Stinson & Marc W. Patry, *Fact of Fiction: The Myth and Reality of the CSI Effect*, 47 CT. REV. 4, 4 (2011).

4. See generally *id.*; Kimberlianne Podlas, *The “CSI Effect” and Other Forensic Fictions*, 27 LOY. L.A. ENT. L. REV. 87 (2006); Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 NEW ENG. L. REV. 435 (2007); Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L. J. POCKET PART 70 (2006), <https://www.yalelawjournal.org/forum/the-csi-effect-fact-or-fiction> [https://perma.cc/8968-M2UU]; Kit R. Roane & Dan Morrison, *The CSI Effect*, 138 U.S. NEWS & WORLD REP. 48 (2005); N.J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction About Forensic Science Affects the Public’s Expectations About Real Forensic Science*, 47 JURIMETRICS 357 (2007); Donald E. Shelton, *The ‘CSI Effect’: Does It Really Exist?*, 259 NAT’L INST. JUST. J. 1 (2008); Young S. Kim, Gregg Barak & Donald E. Shelton, *Examining the “CSI-effect” in the Cases of Circumstantial Evidence and Eyewitness Testimony: Multivariate and Path Analyses*, 37 J. CRIM. JUST. 452 (2009); MARICOPA CNTY. ATT’Y’S OFF., *CSI: MARICOPA COUNTY: THE CSI EFFECT AND ITS REAL-LIFE IMPACT ON JUSTICE* (June 30, 2005) (on file with the NEW MEXICO LAW REVIEW); Elisa Bergslien, *Teaching to Avoid the “CSI Effect”: Keeping the Science in Forensic Science*, 83 J. CHEM. EDUC. 690 (2006); Rebecca M. Hayes & Lora M. Levett, *Community Members’ Perceptions of the CSI Effect*, 38 AM. J. CRIM. JUST. 216 (2012).

5. For example, as a means of underscoring the veracity of the information therein, *Serial* begins each episode of Season 1 with the Maryland Correctional Facility phone recording, “This is a Global Tel Link prepaid call from Adnan Syed, an inmate at a Maryland Correctional Facility . . .” See, e.g., *Episode 1: The Alibi*, *Season 1*, SERIAL, at 00:02–00:12 (Oct. 3, 2014) [hereinafter *Episode 1: The Alibi*], <https://serialpodcast.org/season-one/1/the-alibi>.

of true crime podcasts that have broadly influenced society.⁶ ACLU Capital Punishment Project Director Cassandra Stubbs described *Serial* as more than a podcast, writing:

Serial, the pop culture podcast phenomenon, isn't just a well-produced and addictive listening experience (though it is both of those things). By questioning the validity of some criminal justice procedures and educating its listeners to ask questions, especially when someone's life is on the line, the podcast has done a great service: Because the case of Adnan Syed is not particularly unique.⁷

By the end of 2014, only months after the podcast's release, over 40 million Americans were listening and learning.⁸

This article seeks to understand the influence of true crime podcasts on criminal proceedings and individual courtroom actors. In Part I, we begin by considering the role of the jury in the American criminal justice system to create a bridge between our study of true crime podcasts and the function of the jury as a collective of individuals who are influenced and shaped by society. In Part II, we turn to the *CSI* Effect, which postulates that jury expectations may be so influenced by fictional crime media that there are tangible effects on criminal legal outcomes.

Then, in Part III, we introduce new problems presented by true crime podcasts and a potential *Serial* Effect, whereby true crime podcasts may have more of an impact on criminal legal proceedings than television crime dramas do because of the unique ways in which they influence understandings of justice. We specifically argue that true crime podcasts differ meaningfully from the *CSI* Effect in that they are cast not as fiction but as infallible accounts of criminal cases. In Part IV, we describe two cases that were discussed in popular true crime podcasts, *Syed v. Maryland* and *Flowers v. Mississippi*, and saw renewed legal interest after their respective features.

In Part V, we analyze how the respective podcasts construct different narratives about criminal cases with substantially different levels of focus on the question of a defendant's guilt or innocence. We then consider broad themes that result from these different narrative constructions, including considerations of guilt and innocence, engagement with evidence and criminal procedure, and conceptualizations of case resolutions. Ultimately, we argue that the way these stories are told can help us understand ever-changing societal and cultural expectations about criminal cases. Finally, in Part VI, we concisely define our new

6. Kelli S. Boling & Kevin Hull, *Undisclosed Information—Serial Is My Favorite Murder: Examining Motivations in the True Crime Podcast Audience*, 25 J. RADIO & AUDIO MEDIA 92, 92–93 (2018).

7. Cassandra Stubbs, *Serial and What It Says About America's Criminal Justice System*, AM. CIV. LIBERTIES UNION (Dec. 22, 2014, 3:57 PM) (emphasis added), <https://www.aclu.org/blog/national-security/serial-and-what-it-says-about-americas-criminal-justice-system> [https://perma.cc/D7QB-5BMS].

8. Amy Roberts, *The 'Serial' podcast: By the numbers*, CNN (Dec. 23, 2014, 11:30 AM), <https://www.cnn.com/2014/12/18/showbiz/feat-serial-podcast-btn/index.html> [https://perma.cc/L3UW-SW32].

theoretical advancement of the *Serial Effect* and consider what future research should be conducted on its potential impacts on the criminal justice system.

I. THE ROLE OF JURIES

Juries are one of the defining features of the American criminal justice system, both in their unique function and the ideals they represent. While many legal systems have juries, scholars argue that the United States' legal system uniquely elevates the importance of juries, and the ordinary Americans who serve on them, as significant legal decisionmakers.⁹ Compared to other legal systems, like those in Canada and the United Kingdom, American juries have substantially more power to make important constitutional and criminal law decisions that undergird precedents.¹⁰ In this way, juries serve as bridges between the American people and the American justice system, making the decisions and perceptions of juries vital for the functioning of the system itself.

In its most ideal form, “the jury injects a democratic component into the criminal justice system to ensure that justice, rather than vengeance or an invidious legislative agenda, is served.”¹¹ The jury occupies a protective and humanizing role, grounding decisions of law in the beliefs of society and the “true” goals of the law. Of course, as with most things in law, the reality is far more complex. There are a variety of arguments that contend that the elevated role of the ordinary citizen via their place on a jury is damaging to the project of legal justice, including allegations of juries' pro-state bias, the lack of jury predictability, the inability of juries to understand legal issues and jury instructions, and logistical arguments about juries as a source of delay.¹²

In this article, we are less interested in arguments for or against the actions of juries in any particular case and are more interested in what juries represent broadly. Rather than serving as rote defenders of impartial law, American juries bring elements of culture and society into the courtroom. Some scholars tout this as a way to prevent the legal system from operating in a vacuum divorced from societal standards.¹³ However, such a statement is overly simplistic and does not account for the reality that juries are not simply bastions of social progress and democratic ideals, they also bring their values, beliefs, and personal biases—“juries too often act based on racism and sexism [that are] endemic in our society.”¹⁴ This relationship between members of a jury and society contextualizes societal standards and trends as a force of law that may not always be for the better.

Recognition of the potential impact of jury biases has roots in the common law. William Blackstone distinguished the differences between “manifest prejudice” and “bias on the favor,” entering both potential conflicts of interest and personal

9. See Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 850 (2014); Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 226 (2008).

10. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 31–32 (1986).

11. Ryan, *supra* note 9, at 852.

12. See Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-building*, 52 L. & CONTEMP. PROBS. 269, 269 (1989).

13. See, e.g., Ryan, *supra* note 9, at 854.

14. Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1863 (2014).

biases of jury members into legal discourse.¹⁵ Today, jury selection processes and questions intended to evaluate potential juror bias vary widely by state, creating inconsistent practices for deciding who does and who does not get to sit on juries.¹⁶ This variation makes it difficult to provide a single targeted explanation for the persistence of jury bias. We do not endeavor to trace the entire history of juror bias here but instead employ categorizations of jury errors to illustrate the link between society, juries, and legal decisions.¹⁷ Juries may make extrinsic errors, which stem from the way information and instructions are communicated to the jury from the court, or intrinsic errors, which are related to the makeup, attitudes, and beliefs of jury members and the impacts those individualized factors have on jury decision-making.¹⁸

Courts and scholars have spent a substantial amount of time attempting to lessen the impact of extrinsic errors on court proceedings. The bulk of social scientific literature agrees that juries take their jobs seriously and can capably handle complex issues.¹⁹ However, this same literature agrees that jurors struggle to comprehend and apply legal instructions; in fact, an average juror may understand only about half of the legal instructions given by the judge.²⁰ It would be a mistake to assume that this lack of comprehension is the fault of the jury or even a limitation on their level of availability:

[L]egal standards are not always obvious, and jurors do not always succeed in applying the legal instructions they are given, not because they actively resist but because the legal education provided at trial is remarkably awkward, frequently incomplete, and in some respects almost obstinately opaque.²¹

Here we see an indictment, not of the intrinsic characteristics of the jury but rather of the extrinsic factors, which are the responsibility of the court, and their effect on judicial outcomes. Courts have attempted to mitigate the negative effects of extrinsic factors by improving jury instructions by making changes to language,

15. See generally WILLIAM BLACKSTONE, *THE SOVEREIGNTY OF THE LAW: SELECTIONS FROM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND* (Gareth Jones ed. 1973); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 34 (2007).

16. VIDMAR & HANS, *supra* note 15, at 34.

17. See generally Bennett L. Gershman, *How Juries Get It Wrong—Anatomy of the Detroit Terror Case*, 44 WASHBURN L. J. 327 (2005).

18. *Id.* at 327–28.

19. See Editorial, *The Perfect Juror?*, NAT'L L. J., May 2, 1994, at A18 (“As shown in last year’s National Law Journal poll of nearly 1,000 jurors, most of them take their jobs seriously and try to follow the law as best they can.”); Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181, 234 (Robert E. Litan ed., 1993).

20. Amiram Elwork, James J. Alfani & Bruce D. Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 436 (1982). It is worth noting that studies find a wide range of jury comprehension of legal instructions, making it difficult, if not impossible, to apply empirical understandings of jury comprehension broadly. Studies find juror comprehension of legal instruction ranges from 12.85%–73%. Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 90 (1988); Raymond W. Buchanan, Bert Pryor, K. Phillip Taylor & David U. Strawn, *Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions*, 26 COMM’N Q. 31, 34 (1978).

21. Shari Seidman Diamond & Mary R. Rose, *Real Juries*, 1 ANN. REV. L. SOC. SCI. 255, 272 (2005).

offering pattern instructions, using novel formats, and offering distinctions.²² Despite these efforts, these extrinsic errors remain difficult to fix. For one, simple jury instructions are very difficult to write in ways that maintain the nuance of the law.²³ Additionally, some scholars find that judges might intentionally not explain instructions clearly for fear of being overturned on appeal.²⁴ Other studies show that juries do not ask for clarification where there are misunderstandings.²⁵ Finally, even when they are made, efforts to clarify legal instructions can create more confusion and uncertainty and are thus struck down by the court.²⁶

Intrinsic jury errors are in some ways more difficult to quantify and rectify than extrinsic errors, in part because of their dueling individual and collective factors. Here we discuss three factors that reveal the inherent complexity of intrinsic jury bias and its relationship to society. First, we introduce the problem of changing societal context. Second, we describe the problem of insufficient and misdirected legal protections designed to alleviate recognized bias. Third, we consider the problem of unpredictable or powerful juries.

22. See generally Laurence J. Severance, Edith Green & Elizabeth F. Loftus, *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198 (1984) (for a test of simplified pattern instructions); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCH. PUB. POL'Y & L. 589 (1997) (reviewing specific problems with different types of jury instructions and a number of potential solutions, especially via re-writing instructions based on psycholinguistic principles); AMIRAM ELWORK, BRUCE D. SALES & JAMES J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982) (offering a guide for the iterative testing and improvement of jury instructions); Richard L. Wiener, Melanie Rogers, Ryan Winter, Linda Hurt, Amy Hackney, Karen Kadela, Hope Seib, Shannon Rauch, Laura Warren & Ben Morasco, *Guided Jury Discretion In Capital Murder Cases*, 10 PSYCH. PUB. POL'Y & L. 516 (2004) (conducting a simulation with 80 deliberating juries to show that current instructions do not convey the necessary ideas and processes to juries, followed by a 20-jury simulation to demonstrate that deliberation alone does not correct comprehension errors); Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy*, 6 PSYCH. PUB. POL'Y & L. 788, 798–99 (2000) (providing a review of proposed jury reforms and the citations from which they derive, with the goal of reviewing problems and solutions with jury reform from a social scientific perspective); Amy E. Smith & Craig Haney, *Getting to the Point: Attempting to Improve Juror Comprehension of Capital Penalty Phase Instructions*, 35 L. & HUM. BEHAV. 339 (2011) (conducting a study that compares plain language jury instructions to pinpoint jury instructions that use case-related facts to illustrate key terms); Charles W. Otto, Brandon K. Applegate & Robin King Davis, *Improving Comprehension of Capital Sentencing Instructions*, 53 CRIME & DELINQ. 502 (2007) (who approach reforming jury instructions through a process of debunking or disputing misconceptions to improve jury comprehension). In sum, these studies comprise a universe of detailed field experiments designed to test and improve jury instructions. These studies generally consist of interventions to improve language choice, test pattern instruction, changing the formatting, and trying to offer distinguishing examples.

23. Severance et al., *supra* note 22.

24. ELWORK ET AL., *supra* note 22; Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC'Y REV. 153, 154 (1982) (“Since seemingly minor changes in wording have been the basis for successful appeals, trial judges tend to adopt a conservative approach and are reluctant to deviate from language approved by higher courts, however difficult it might be for the untrained layperson to understand.”).

25. Diamond & Rose, *supra* note 21.

26. Severance et al., *supra* note 22, at 199–200; Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1307–08 (1979).

First, shifting societal values and the benefits of hindsight impact the trajectory of intrinsic jury errors over time. Societal values are not static; rather, they are ever-changing, and these changing values are reflected in the law. For example, some legal decisions made in the past would not be societally acceptable today. A clear example is the issue of whether women can sit on criminal juries. Legally contested since 1961, it was not until 1975 in *Taylor v. Louisiana* that the Supreme Court ruled that systematic exclusion of women from juries was unconstitutional.²⁷ At the time of this writing, in 2022, it would seem absurd to argue that women could not sit on juries, but legally speaking, this is a recent change. It would be negligent to consider this structural change in composition as separate from the changing position of women in society. Notably, in the period leading up to women's inclusion on juries and the advancement of other legal protections for women, the women's right movement, a wide-reaching social movement specifically calling for legal evolution of women's status, was at its peak. In this way, society and law remain inextricably linked.

Second, currently enshrined legal protections are insufficient to deal with recognized sources of intrinsic bias that affect legal outcomes. Contemporary scholars of jury bias point to the existing tension between aspirations of bias-free verdicts and the practical rules of the courtroom that make bias-free verdicts less likely.²⁸ These rules often limit the ability to strike jurors for their expressed biases. Legal scholar Jessica West opines that, despite "social science, anecdotal, and experimental data indicat[ing] that bias is pervasive, the justice system in the United States does relatively little to address bias preemptively."²⁹ For example, rules of courtroom procedure do not directly address biases held by jurors. Instead, the rules prohibit lawyers from exercising their own biases in removing jurors based on race or gender via a so-called "Batson Challenge."³⁰ Named after the originating case, *Batson v. Kentucky*,³¹ scholars and activists have been outspoken about how the Batson Challenge has failed to address bias in the courtroom by not excluding biased jurors but by trying to prevent lawyers from removing jurors for reasons founded in their own biases.³² In fact, research on the effectiveness of the Batson Challenge

27. *Taylor v. Louisiana*, 419 U.S. 522 (1975); see also *Women Serving on Juries*, in *Drawing Justice, Exhibitions*, LIB. CONG., <https://www.loc.gov/exhibitions/drawing-justice-courtroom-illustrations/about-this-exhibition/race-based-crimes/women-serving-on-juries/> [<https://perma.cc/SSF4-769Y>].

28. See generally Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 168 (2011); See also *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

29. West, *supra* note 28.

30. Tetlow, *supra* note 14, at 1865–66.

31. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race).

32. See generally Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1818–19 (1993); *Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J., concurring); See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462–64 (1996); See Tetlow, *supra* note 14, at 1859, 1860; See Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. 1713, 1714 (2012) [hereinafter *Batson Misses the Point*]; See Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 503 (1999).

indicates that it is insufficient and wrongly shifts the focus of the court away from protecting the defendant's rights.³³ In this example, we see the problem of societally derivative biases not being successfully mitigated by the court.

Finally, a jury's power to disregard its oath and certain instructions based on intrinsic factors can impact the outcomes of cases, demonstrating that juries can exercise their power outside the desired boundaries of the law. Sometimes jurors simply ignore jury instructions, even though they understand those instructions. For example, jurors often violate the instruction to only discuss the case when all members of the jury are in the room.³⁴ This frequent violation exemplifies not only that juries sometimes do not follow instructions, but it also provides an example of a potential bias source: discussions of the case where some members of the jury are not present.

Scholars debate how aware juries should be of their own power. For example, juries are usually not told of their right to reach any verdict they choose.³⁵ As a result, juries are unaware of their right of nullification—a not guilty verdict even though the jury believes beyond a reasonable doubt that the defendant has broken the law.³⁶ Arguments against disclosure of this right find that jury nullification might lead to “anarchy” and inconsistent application of the law, contending that treatment under the law simply cannot be equal if juries have the power to acquit a defendant whose guilt was proved beyond a reasonable doubt.³⁷ On the other hand, scholars argue that juries should be informed that they can nullify because no evidence shows juries to be worse than any other legal actors at making decisions.³⁸ Further, scholars argue that jury nullification should be considered a jury *decision*—an explicit decision to nullify based on disagreements with law—rather than an outcome derivative of confusion about jury instructions as nullification is intrinsically linked to the beliefs and values of individual jurors.³⁹ In cases where the jury and the judge decided differently, much of the discrepancy can be attributed to the values of the jurors.⁴⁰ Therefore, jury nullification is precisely the type of substantial legal issue that is clearly impacted by intrinsic jury errors or, more broadly, the values and beliefs of jurors.

33. See *Batson Misses the Point*, *supra* note 32, at 1731.

34. See Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 28 (2003); See Natasha K. Lakamp, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. REV. 845, 853 (1998) (discussing estimation that up to 44% of jurors ignore the instruction to not discuss the case).

35. See generally James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, 22 LITIG. 6 (1996).

36. See 6 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 22.1(g) (4th ed. 2015).

37. See Lawrence W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 3 (1997) (describing jury nullification as a tension between law and anarchy and defining anarchy as the process and consequence of laws changing from day to day).

38. See CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 202–03 (CATO Inst. 2014) (1998).

39. See Lieberman & Sales, *supra* note 22, at 589–90.

40. See generally HARRY KALVEN, JR., & HANS ZEISEL, THE AMERICAN JURY (1966) (conducting a survey of over 7,000 jury trials designed to test how often judges and juries made the same decision).

In sum, we argue that juries are important in the unique way that they represent the context of the society in which they originate. While the jury plays a democratic role in the courtroom, there is a substantial universe of potential jury errors, both extrinsic and intrinsic. These intrinsic errors include the beliefs and biases of juries, including shifting social values, insufficient in-court protections against bias, and the question of jury power. This understanding of intrinsic errors creates a foundation for understanding the importance of the jury-society nexus—a relationship we explore specifically using juror expectations and crime entertainment media. Next, we turn our focus to a particular form of intrinsic jury bias: the *CSI* Effect. Following that, we spend the bulk of the paper confronting the *CSI* Effect’s potentially more insidious contemporary to examine how true crime podcasts have already changed the terrain of criminal justice.

II. THE *CSI* EFFECT

The *CSI* Effect is a quintessential, though controversial, example of how media-induced beliefs are strong and pervasive enough to tangibly affect jury proceedings. Named for the eponymous television program, *CSI: Crime Scene Investigation*, the theory considers what happens when jurors watch procedural crime shows on television and develop unrealistic expectations about the quality and reliability of forensic science evidence applied to criminal cases.⁴¹ The theory posits that when the jury is not presented with forensic evidence of a quality and quantity portrayed in crime dramas like *CSI*, it is more likely to find in favor of the defendant.⁴² However, evidence portrayed in fictionalized TV shows is impossibly divorced from reality—grainy photographs can be enhanced to high-definition quality, DNA can be found and sequenced from the least likely of sources, and fiber analysis can be used to pinpoint individual items of clothing or the upholstery of specific cars.⁴³ In reality, forensic evidence is substantially less conclusive and has been resoundingly critiqued by scientists with specific concerns about “reliability, accuracy, error, and . . . contextual bias.”⁴⁴

Importantly, the *CSI* Effect does not only affect the jury, but also the prosecutors, who must work to counter jury perceptions, further extending the potential power of the *CSI* Effect in the courtroom.⁴⁵ Notably, in a case in Delaware, the State argued that it ought to be allowed to introduce inconclusive or exculpatory evidence in part to combat the *CSI* Effect.⁴⁶ The State opined that “[i]f not confronted by prosecutors, this so called ‘C.S.I. Effect’ can lead to a misapprehension of the evidence actually introduced or encourage improper speculation by jurors during their deliberations.”⁴⁷ Ultimately, the court

41. See Steven M. Smith, Veronica Stinson & Marc W. Patry, *Fact or Fiction: The Myth and Reality of the CSI Effect*, 47 CT. REV. 4, 4 (2011).

42. *Id.*

43. See Podlas, *supra* note 4, at 90, 105–06.

44. Saul M. Kassin, Itiel E. Dror & Jeff Kukucka, *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J. OF APPLIED RSCH. IN MEMORY AND COGNITION 42, 42–43 (2013).

45. Cole & Dioso-Villa, *supra* note 4, at 448.

46. *State v. Cooke*, 914 A.2d 1078, 1082 (Del. 2007).

47. *Id.* at 1083.

concluded that the State's argument had enough merit to introduce the evidence, but it declined to determine if a *CSI* Effect is actually present in the courtroom.⁴⁸

Similarly, in a case out of Arizona, the head juror declared that he watched *CSI* and therefore knew that the prosecutor had not collected sufficient forensic evidence to convict the defendant, convincing the entire jury the police officers had not done a good job collecting evidence during the investigation because "on television they do so much more."⁴⁹ In another case, an attorney specifically instructed the jury that "this was [their] *CSI* moment" and blamed the loss of the case on heightened expectations from *CSI* viewership.⁵⁰ In further comments on that case, the State's Attorney lamented the *CSI* Effect, saying that "the burden it places on [the state] is overwhelming."⁵¹ *CSI* viewership has also been used as selection criteria for jurors, notably in the case of Robert Durst, who was acquitted of murder by a jury selected partially based on *CSI* viewership.⁵² There is some scientific evidence that viewers of television crime dramas make different decisions about evidence and criminal convictions than non-viewers. For example, studies have found that consumers of fictional forensic science programming are more critical of forensic evidence and are less likely to convict than their non-viewer counterparts, though this difference was not statistically significant.⁵³

Some scholars doubt that the *CSI* Effect exists in a form that would affect juries' legal decision-making.⁵⁴ Recent work has attempted to use more complex modeling techniques to study the *CSI* Effect. A study of 1,027 jurors in Michigan concluded that *CSI* viewership did not have independent or direct effects on verdicts, but that it did have indirect effects on conviction when cases involved only circumstantial evidence as juries had higher expectations of the reliability of the available evidence.⁵⁵ This suggests that the *CSI* Effect applies only in a small group of cases in particular situations. Other studies have similar results, finding evidence of a more general "technology effect" rather than behavior attributable to one specific television program.⁵⁶ Other scholars take a more absolute stance against the

48. *Id.* at 1088.

49. Thomas, *supra* note 4 (quoting from the article, not the head juror).

50. Roane & Morrison, *supra* note 4, at 50.

51. *Id.*

52. See Matthew Ormseth & James Queally, *Robert Durst Convicted of Murdering His Friend Susan Berman*, L.A. TIMES (Sept. 17, 2021), <https://www.latimes.com/california/story/2021-09-17/robert-durst-murder-trial-verdict> [<https://perma.cc/JM7M-ZUS8>]; see also Smith et al., *supra* note 3, at 5 (stating that the defense jury consultant included questions about watching *CSI* in his jury selection strategy); *The Jinx: The Life and Deaths of Robert Durst*, (HBO 2015) (an award winning mini-series docudrama that told the story of Robert Durst, who was arrested the day before the airing of the finale episode).

53. See Schweitzer et al., *supra* note 4, at 357.

54. See Shelton, *supra* note 4, at 5 (writing that "although *CSI* viewers had higher expectations for scientific evidence than non-*CSI* viewers, these expectations had little, if any, bearing on the respondents' propensity to convict. This is an important finding and seemingly very good news for our Nation's criminal justice system.")

55. See Kim et al., *supra* note 4, at 454–56.

56. See Shelton, *supra* note 4, at 5 (describing a potential "tech effect" as the result of gains made in science and technology over the past 30 years that may explain why jurors have higher demands for forensic evidence. That is, that advancements in science and technology have made such advances possible).

existence of the *CSI* Effect altogether, with one declaring, “contrary to the hype, the empirical data does not support the existence of a *CSI* Effect.”⁵⁷

However, whether or not the *CSI* Effect exists, it can still substantially impact legal proceedings if some actors alter their strategies because they believe in its existence.⁵⁸ In 2005, the Maricopa County Prosecuting Attorney’s Office surveyed over 100 prosecutors in the jurisdiction and found that 38% of attorneys believed they lost a case because of the *CSI* Effect and 72% indicated that *CSI* fans overly influenced other jurors.⁵⁹ This reportedly led prosecutors to include questions about television viewing habits in *voir dire*.⁶⁰ Efforts to correct the *CSI* Effect, real or not, have also extended beyond the courtroom. Science educators have made tangible suggestions for ways to teach forensic science specifically to combat the *CSI* Effect from infiltrating the scientific field more generally.⁶¹ A study by Rebecca Hayes and Lora Levett found that community members also believe the *CSI* Effect exists, finding that people who watch crime shows are more likely than non-viewers to think that crime shows are educational and accurate.⁶²

Having considered the potential power of the *CSI* Effect, which exists in the explicitly fictional world of crime dramas, we now turn to the rise of true crime podcast media that positions itself as explicitly true in order to consider the possibilities of this new type of media effect.

III. TRUE CRIME PODCASTS AND THE MEANING OF TRUTH

Though true crime *podcasts* are a relatively recent player in the universe of crime entertainment, true crime as a genre is nothing new. Here, we briefly describe the trajectory and current state of true crime media broadly so as not to deviate from the central concern of this article. The literature presented on podcasts is similarly limited, but this is instead a function of a very limited pool of scholarly work on the recent phenomenon.

America has eagerly devoured true crime in many forms, beginning with its first appearance in magazines in the 1920s.⁶³ Scholars argue that more than simple morbid fascination has led to the rise of the genre in the twentieth century:

True crime is a way of making sense of the senseless, but it has also become a worldview, an outlook, and a perspective on contemporary American life, one that is suspicious and cynical, narrowly focused on the worst kinds of crimes, and preoccupied with safety, order, and justice.⁶⁴

57. Podlas, *supra* note 4, at 88.

58. Smith et al., *supra* note 3, at 5.

59. MARICOPA CNTY. ATT’Y’S OFF., *CSI: MARICOPA COUNTY: THE CSI EFFECT AND ITS REAL-LIFE IMPACT ON JUSTICE* 4, 5–6 (June 30, 2005) (PDF on file with the NEW MEXICO LAW REVIEW).

60. *Id.* at 5–6.

61. Bergslien, *supra* note 4, at 690–91.

62. Hayes & Levett, *supra* note 4, at 233.

63. See JEAN MURLEY, *THE RISE OF TRUE CRIME: TWENTIETH CENTURY MURDER AND AMERICAN POPULAR CULTURE* 2, 15 (2008).

64. *Id.* at 2.

Research on true crime media often focuses on the distorted reality it constructs for its consumers. Murder cases considered in true crime media, for example, differ significantly from the population of actual murders in the United States by overrepresenting female perpetrators and young, white victims, which are statistically less common than they are portrayed in true crime.⁶⁵ True crime is also preoccupied with female victims, portraying their stories with more frequency than the stories of male victims.⁶⁶ Studies also find that women are drawn to true crime entertainment as they are more fearful of their own victimization.⁶⁷ These findings lend further credence to theories that find the popularity of true crime is due to more than mere morbid fascination. The appeal of true crime, particularly for women, involves understanding the mindset of a criminal, picking up survival techniques, and willingness to endure fear and discomfort.⁶⁸ Regardless of the reasons, true crime has seen an undeniable resurgence in popularity due to television shows and literature, even spawning dedicated television channels that play true crime media 24 hours a day.⁶⁹

True crime media has its fair share of critics, including both fans and individuals close to the crimes that are portrayed. Loved ones and families of individuals featured in popular true crime entertainment have reported great distress about features in media, even begging authors and filmmakers not to report on their family members.⁷⁰ Defenders of true crime admit that it might not be possible to create or consume true crime totally ethically⁷¹ but argue that true crime media can make the world a better place by centering victims and their stories.⁷² Debates about the consumption of true crime media and the genre's overall rising popularity have important implications for a potential media effect, which we term the *Serial Effect*, as a larger audience means that the impacts of the effect may become more widespread than the impacts of the *CSI Effect*.

65. Alexis M. Durham, III, H. Preston Elrod & Patrick T. Kinkade, *Images of Crime and Justice: Murder and the "True Crime" Genre*, 23 J. CRIM. JUST. 143, 150 (1995).

66. See Amanda M. Vicary & R. Chris Fraley, *Captured by True Crime: Why are Women Drawn to Tales of Rape, Murder, and Serial Killers?*, 1 SOC. PSYCH. & PERSONALITY SCI. 81, 85 (2010); see generally Joy Wiltenburg, *True Crime: The Origins of Modern Sensationalism*, 109 AM. HIST. REV. 1377 (2004).

67. Vicary & Fraley, *supra* note 66.

68. Megha Sharma, *This Might Be the Reason That Women Are Obsessed with True Crime Stories*, VOGUE (INDIA) (Feb. 20, 2020), <https://www.vogue.in/culture-and-living/content/why-are-women-obsessed-with-true-crime-stories> [https://perma.cc/WR7H-FLCD].

69. See Kelli S. Boling, *True Crime Podcasting: Journalism, Justice or Entertainment?*, 17 RADIO J.: INT'L STUD. BROAD. & AUDIO MEDIA 161, 162 (2019); see also Kelly-Leigh Cooper, *Is Our Growing Obsession with True Crime a Problem?*, BBC NEWS (Apr. 1, 2019), <https://www.bbc.com/news/world-us-canada-47474996> [https://perma.cc/REP5-HFPS].

70. Melissa Chan, *'Real People Keep Getting Re-traumatized.'* *The Human Cost of Binge-Watching True Crime Series*, TIME, (Apr. 24, 2020, 8:17 AM), <https://time.com/5825475/true-crime-victim-families/> [https://perma.cc/P2SP-7HLP].

71. Ethical considerations include consuming media that is being put out against a family's will or that has allowed third parties to profit off of someone else's misfortune.

72. Sarah Weinman, *True Crime Always Risks Exploitation. But It Can Still Make the World a Better Place*, *Opinion*, WASH. POST (Sept. 6, 2019, 1:13 PM), https://www.washingtonpost.com/opinions/true-crime-always-risks-exploitation-but-it-can-still-make-the-world-a-better-place/2019/09/05/5bfa1b5a-d00a-11e9-87fa-8501a456c003_story.html [https://perma.cc/C5EU-JA94].

A. Contemporary True Crime Podcasts

While true crime podcasts certainly share some elements of other popular true crime media, they also diverge significantly from their predecessors. Podcast scholars Martin Spinelli and Lance Dann suggest eleven major features of podcasts that cast them as a revolutionary form of media:

1. Personal consumption via personal headsets
2. Podcasting as a mobile medium
3. Listener control (replaying, fast forwarding, etc.).
4. Increased engagement via user self-selection
5. Ability to thrive in niche audiences
6. Interrelationships between podcasts and social media
7. Ability to launch a podcast without an editor or controlling institution
8. Free listening for the base product
9. Indefinite availability
10. No permanent text, open to corrections and improvements
11. Lack of timing and scheduling constraints compared to traditional broadcast media⁷³

While many of these features are found in other types of media, finding all of them within one source constitutes a novel media vehicle.⁷⁴ In this way, podcasts occupy a different space in cultural life than other forms of media, which we argue constitutes a significant expansion of the media universe that has the potential to influence cultural expectations and understandings of law. Specifically, the true crime genre of podcast is a more recently conceptualized form of popular crime media, with some scholarship suggesting that the first true crime podcast emerged as recently as 2005.⁷⁵ The recent advent of this kind of podcast has not precluded its mainstream popularity, with over 200 true crime podcasts emerging since 2014 and the genre regularly performing at the top of the podcast charts.⁷⁶

Academics have yet to fully study and make meaning of true crime podcasts, even as podcasts broadly grow in success. A small number of studies have begun conducting exploratory work on how true crime podcasts interface with law. These scholars propose that true crime podcasts have already had some effect on the criminal justice system, though the intricate relationship between the narrative worlds of these podcasts and the legal system has not yet been thoroughly analyzed.⁷⁷ Rhetorical analyses of these podcasts focus on the interactive relationship between the audience and the podcaster, framing this relationship as an invitation to the

73. MARTIN SPINELLI & LANCE DANN, *PODCASTING: THE AUDIO MEDIA REVOLUTION* 7–8 (2019).

74. *See id.* at 8.

75. *See* Lindsey A. Sherrill, *The “Serial Effect” and the True Crime Podcast Ecosystem*, 16 *JOURNALISM PRAC.* 1473, 1486 (2022).

76. Kelli S. Boling, *Fundamentally Different Stories that Matter: True Crime Podcasts and the Domestic Violence Survivors in Their Audiences* 6 (Spring 2020) (Ph.D. Dissertation, University of South Carolina), <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=6644&context=etd> [<https://perma.cc/AWH8-NGUU>].

77. *See id.* at 4–5.

audience to act as an alternate jury.⁷⁸ Similarly, other scholarly work considers the complexity of rhetorical space in true crime podcast narratives, focusing primarily on forensic evidence.⁷⁹ In our analysis of true crime podcasts, we move beyond a singular focus on forensic evidence, allowing us to more broadly consider the potential impacts of true crime podcasts both socially and legally.

B. True Crime Podcasts as “Truth”

In this work, we extend preliminary scholarship on true crime podcasts while simultaneously expanding the universe of inquiry to consider the potential effects of true crime podcasts on cultural consumption and legal expectations. We begin by conceptualizing the “true” in true crime podcasts. That is, we juxtapose the seemingly similar “*CSI* Effect” and a true crime podcast effect that we call the “*Serial* Effect,” using truth as a conceptual heuristic to differentiate between them. The *CSI* Effect comes from a universe of fictional media, whereas true crime podcasts intentionally orient themselves as a project of uncovering the truth and align themselves with real-life events. It is important to distinguish here that not only do true crime podcasts seek to deliver the truth, but they are also readily consumed as being true. This is a substantial difference from the *CSI* Effect, which as a theory is rooted in fictional entertainment. Additionally, the role of the podcast host impacts how true crime podcasts are consumed as the truth. Some scholarly consideration of true crime podcasts concludes that podcast hosts are not objective, ascribing such objectivity to journalists.⁸⁰ However, journalists are not rote transcribers of facts either—rather, the creation of news and the project of journalism are the outcome of sociological work.⁸¹ In this way, the news is a process of interactive creation—a type of iterative process between the creators and consumers of the news.⁸² Considering this, the line between true crime podcasts and other forms of news becomes increasingly blurred, lending further credence to the project of more seriously considering how true crime podcasts have the potential to affect court proceedings and jury expectations.

IV. CASE STUDIES: *SYED V. MARYLAND* AND *FLOWERS V. MISSISSIPPI*

If a fictional crime drama can change features of the jury or criminal courtroom, then what are the possible effects of a form of media that is true? Recognizing the substantial difference between the *CSI* Effect and this new *Serial* Effect, we ground our analysis in two legal cases. In the sections that follow, we

78. See Lili Pâquet, *Seeking Justice Elsewhere: Informal and Formal Justice in the True Crime Podcasts Trace and The Teacher’s Pet*, 17 *CRIME MEDIA CULTURE* 421, 421–22, 425 (2021).

79. See Lili Pâquet, *Literary Forensic Rhetoric: Maps, Emotional Assent, and Rhetorical Space in Serial and Making a Murder*, 12 *L. & HUMANS* 71 (2018).

80. See *id.* at 426–27.

81. See Michael Schudson, *The Sociology of News Production*, 11 *MEDIA CULTURE & SOC’Y* 263, 263 (1989).

82. See Zhongdang Pan & Gerald M. Kosicki, *Framing Analysis: An Approach to News Discourse*, 10 *POL. COMM’N* 55, 55 (1993).

introduce these cases, their respective podcasts, and draw thematic conclusions about the rhetorical world these podcasts create.

To investigate these proposed nexuses of variation more thoroughly, we conduct a close examination of two cases that were featured on popular true crime podcasts before important steps in the legal process were completed. We do this not only by analyzing the reach and social interest of each case, but also by looking into the rhetorical world of the true crime podcasts themselves and conducting close content analysis of the themes expressed therein. First, we consider *Syed v. Maryland*, featured in *Serial*, as the archetypal true crime podcast case.⁸³ We then contrast *Syed* with another true crime podcast case, *Flowers v. Mississippi*, to analyze how a different narrative approach has the potential to influence cultural understandings of law and criminal procedures in different ways.⁸⁴

We first briefly introduce the facts of each case along with an accompanying analysis of societal interest in each before, during, and after they were featured on true crime podcasts. We visualize these results for ease of interpretation. Having contextualized the two cases of inquiry, we then conduct an analysis of over 40 hours of podcast audio footage to systematically investigate the rhetorical world of each podcast, ultimately drawing conclusions about the relationship between true crime podcast and criminal law.⁸⁵

A. *Syed v. Maryland*

On January 13, 1999, Woodlawn High School student Hae Min Lee was murdered in Baltimore, Maryland, and her body was found less than a month later.⁸⁶ Lee's ex-boyfriend, Adnan Syed, was convicted of the murder on February 25, 2000.⁸⁷ The prosecution relied heavily on location data from Syed's cellphone records and the testimony of Jay Wilds, who told police that he helped Syed bury Lee's body.⁸⁸ Syed was sentenced to life imprisonment for murder plus thirty years for kidnapping and an additional ten years for robbery, but maintained his innocence throughout his time in prison.⁸⁹ His first appeal was denied in early 2003.⁹⁰

Ten years after his conviction, Syed filed a second petition for post-conviction relief, claiming counsel at his first trial was inadequate. Most significantly, the petition asserted that Syed's lawyer failed to investigate a potential alibi witness, Asia McClain, who claimed she saw Syed at the school at the exact

83. See generally *Syed v. State*, 181 A.3d 860 (Md. App. 2018).

84. See generally *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

85. Other scholarly experts who study podcasts advocate for textual analysis of podcasts that specifically allow for granular detail. See SPINELLI & DANN, *supra* note 73, at 4.

86. *Syed*, 181 A.3d at 865. Although the case was later heard by the Maryland Court of Appeals (Maryland's highest court), Justice Greene's opinion in that case references the lower court here as "thorough, carefully-written and well-organized," with "a more exhaustive review of the underlying facts, evidence presented at trial, and subsequent procedural events" involved in Syed's case, so we turn to Justice Woodward's Court of Special Appeals opinion as our primary source. *State v. Syed*, 204 A.3d 139, 143 (Md. 2019).

87. *Syed*, 181 A.3d at 865.

88. *Id.* at 926.

89. *Id.* at 865.

90. *Id.*

time Lee was allegedly killed.⁹¹ However, Syed's petition for relief was denied.⁹² Syed appealed this decision, citing new information about the reliability of the cellphone tower evidence used in his initial trial to determine his location on the day of Lee's disappearance.⁹³ The circuit court granted Syed a new post-conviction relief hearing on McClain's testimony, the cell tower evidence, the allegations of ineffective assistance of counsel, and the possibility of prosecutorial misconduct during the original trial.⁹⁴ After this hearing, Syed's conviction was vacated, and a new trial was ordered.⁹⁵ Both Syed and the State appealed.⁹⁶ While the Court of Special Appeals upheld the decision to grant Syed a new trial,⁹⁷ the Maryland Court of Appeals reversed, denying Syed another trial and reinstating his murder conviction.⁹⁸ The Supreme Court of the United States denied Syed's petition for certiorari on November 25, 2019.⁹⁹ Shortly before the publication of this piece, it was announced by Baltimore State's Attorney Marilyn Mosby that "recently tested DNA evidence completely exculpated Syed from the crime" and that the state was dropping the charges against Syed.¹⁰⁰ This may not be the final chapter of the Syed case, however, as Hae Min Lee's family has filed an appeal set to be heard in February of 2023.¹⁰¹

Syed's case was featured on the first season of what would become one of the most widely heard podcasts of all time: *Serial*, hosted by Sarah Koenig.¹⁰² The first season of *Serial*, which focused exclusively on Syed's case, set a record for podcast downloads with over 300 million downloads.¹⁰³ Notably, *Serial* was also received by critics differently than other forms of crime entertainment. Some critical reviews conceptualized *Serial* as a piece of journalism rather than a piece of entertainment: *Slate* called it "a master class in investigative journalism"¹⁰⁴ and the

91. *Syed*, 204 A.3d at 144.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 145.

96. *Id.* at 146.

97. *Id.* at 139.

98. *See* *State v. Syed*, 204 A.3d 139 (Md. 2019).

99. *Syed v. Maryland*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/syed-v-maryland/> [<https://perma.cc/6FY5-NXTA>].

100. Anastasia Tsioulcas, *Prosecutors Drop Charges Against Adnan Syed, the Subject of 'Serial' Podcast*, Nat'l Pub. Radio (Oct. 11, 2022, 1:52 PM ET), <https://www.npr.org/2022/10/11/1127986399/prosecutors-drop-charges-against-adnan-syed-the-subject-of-serial-podcast> [<https://perma.cc/FB3S-ULFZ>].

101. Emily Davis & Omari Daniels, *Appeal of Order Vacating Adnan Syed Conviction Can Continue, Court Rules*, WASH. POST (Nov. 4, 2022, 7:03 PM ET), <https://www.washingtonpost.com/dc-md-va/2022/11/04/adnan-syed-appeal-continue/> [<https://perma.cc/G77D-FR88>].

102. Koenig also recorded a short follow-up podcast reflecting on the case after it was announced that the charges were dropped against Adnan Syed. We do not analyze that recording here as it is not contemporaneous with the rest of the analysis.

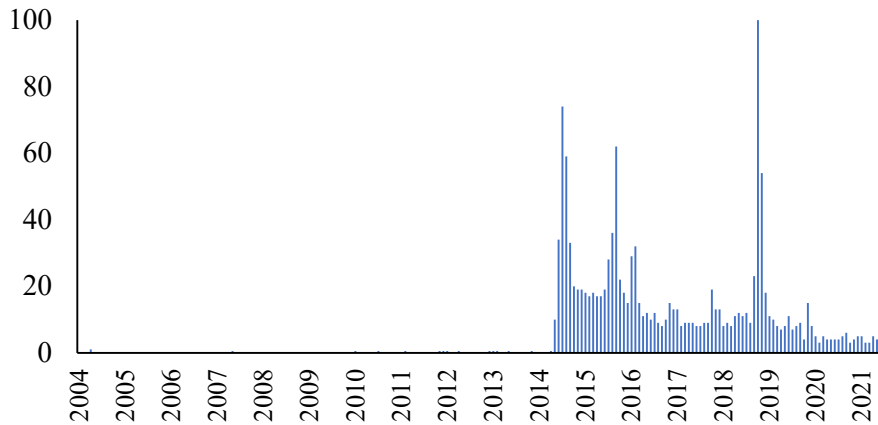
103. *See Our Other Shows*, THIS AMERICAN LIFE, <https://www.thisamericanlife.org/about/our-other-shows> [<https://perma.cc/L7AC-8NEM>].

104. Josh Levin, *Serial Wasn't a Satisfying Story. It Was a Master Class in Investigative Journalism*, SLATE (Dec. 18, 2014, 6:25 PM), <https://slate.com/culture/2014/12/serial-as-investigative-journalism-the-hit-podcast-was-a-master-class-in-reporting.html> [<https://perma.cc/Y7ZD-NQQE>].

Atlantic put forth an extended defense of the season, even justifying errors in *Serial* through the lens of journalism, writing, “all journalists risk getting any subculture other than their own wrong.”¹⁰⁵ This understanding of *Serial* as something beyond just entertainment makes it inherently different from fictional crime programs like *CSI*. Beyond *Serial*’s reception as a piece of journalism, reviewers felt *Serial* mattered to society beyond the textual world of the podcast: *The New Yorker* described this phenomenon, saying that “*Serial* gave millions of people what felt like a personal connection to the realities of criminal prosecution.”¹⁰⁶

It is plausible that the case of Adnan Syed would have captured societal attention and outrage without *Serial*, but a look at the data demonstrates that this is likely not the case. Figure 1 (below) depicts search results for Adnan Syed from 2004 through 2021, quantifying interest on a scale of 0 – 100.¹⁰⁷

Figure 1: Search Behavior for 'Adnan Syed,' 2004 to 2021



Syed was first convicted of the murder of Hae Min Lee on February 25, 2000. Figure 1 clearly demonstrates that Syed’s case was not part of the cultural consciousness in the ten years before it was featured on *Serial* in late 2014. Figure 2 (below) zooms in on the latter half of the distribution to further visualize the clear

105. Conor Friedersdorf, *The Backlash Against Serial—and Why It’s Wrong*, ATLANTIC (Dec. 3, 2014), <https://www.theatlantic.com/politics/archive/2014/12/unpacking-the-social-justice-critique-of-serial/383071/> [<https://perma.cc/Y8TW-X77W>]; *Our Other Shows*, *supra* note 103 (both considering misinterpretations about culture and community).

106. Sarah Larson, *What “Serial” Really Taught Us*, THE NEW YORKER (Dec. 18, 2014), <https://www.newyorker.com/culture/sarah-larson/serial-really-taught-us> [<https://perma.cc/3V4L-F7K7>].

107. This data was generated using Google Trends. See *FAQ About Google Trends Data*, GOOGLE, <https://support.google.com/trends/answer/4365533?hl=en> (“Search results are normalized to the time and location of a query by the following process: Each data point is divided by the total searches of the geography and time range it represents to compare relative popularity. Otherwise, places with the most search volume would always be ranked highest. The resulting numbers are then scaled on a range of 0 to 100 based on a topic’s proportion to all searches on all topics.”). Data to generate these tables are on file with the authors. The data series as collected by Google Trends begins in 2004, so the authors are unable to go back any further.

and enduring relationship between public interest in Syed's case and the *Serial* podcast.

Figure 2: Search Behavior for 'Adnan Syed,' 2004 to 2021

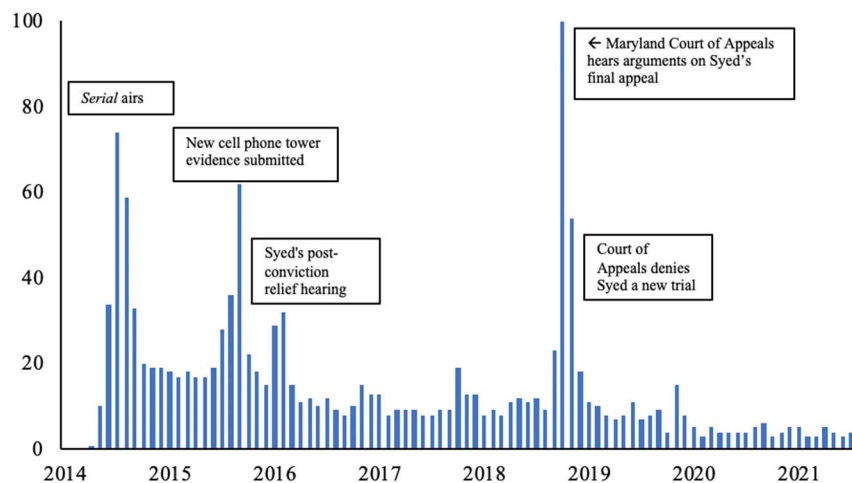


Figure 2 demonstrates the increased interest in Syed's case during the original airing of *Serial*'s first season, October 3, 2014, through December 18, 2014. Again, this demonstrates that the jump in the distribution of interest falls in perfect alignment with the emergence of the podcast itself. Equally interesting is what happened after *Serial* moved on from Syed's case. According to this data, the public remained interested. Rather than an abatement of interest in Syed's case, searches continued to spike with key dates in his case.¹⁰⁸ Importantly, the interest generated by *Serial* surpassed the run time of the podcast—in fact, nearly five years later, the public continued to be interested in Syed's case and its outcome. This implies a longevity of *Serial*, lending credence to the argument that *Serial* (and other forms of media like it) have the potential to make lasting impacts on perceptions of criminal cases.

B. *Flowers v. Mississippi*

The second case we feature in this analysis is *Flowers v. Mississippi*.¹⁰⁹ In his majority opinion in the Supreme Court case, Justice Kavanaugh opens by describing the facts of *Flowers v. Mississippi* as follows: “In 1996, Curtis Flowers

108. This interest outlived the update episodes *Serial* did on the case. *Serial* released three update episodes in February 2016. See *FAQ About Google Trends Data*, GOOGLE, <https://support.google.com/trends/answer/4365533?hl=en> [https://perma.cc/ET7Q-33EN]; see also *Update, Adnan Syed's Hearing, Season 1*, SERIAL, (Feb. 2016), <https://serialpodcast.org/season-one/adnan-syeds-hearing> [https://perma.cc/B6NC-JJ5V].

109. While race and religion are also important considerations in Adnan Syed's case, we specifically consider the factor of race in Curtis Flowers' case as race undergirds the legal issues he has come up against. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019).

allegedly murdered four people in Winona, Mississippi. Flowers is black. He has been tried six separate times before a jury for murder. The same lead prosecutor represented the State in all six trials.”¹¹⁰ The four people who were murdered at Tardy Furniture in 1996—Bertha Tardy, Robert Golden, Derrick Stewart, and Carmen Rigby—were all employees of that store and three of the four were white.¹¹¹ The prosecutor, Doug Evans, is also white.¹¹² The town of Winona, Mississippi, where the murders occurred, is “about 53 percent black and about 46 percent white.”¹¹³

Before reaching the Supreme Court, Flowers’s death penalty case was tried before a jury six times.¹¹⁴ In the first three trials, Flowers was convicted,¹¹⁵ but the Mississippi Supreme Court reversed each conviction—the first two because of prosecutorial misconduct and the third because the court found that the prosecutor had discriminated against Black prospective jurors in the jury selection process.¹¹⁶ The fourth and fifth trials ended in hung juries.¹¹⁷ In the sixth trial, Flowers was again convicted of the murders, but this time the Mississippi Supreme Court affirmed the conviction.¹¹⁸ However, on *cert*, the U.S. Supreme Court remanded the sixth trial back to the Mississippi Supreme Court for review of racial discrimination in the jury selection process.¹¹⁹ The Mississippi Supreme Court affirmed its original decision.¹²⁰ Finally, in 2019, the U.S. Supreme Court reversed Flowers’ sixth conviction, holding that “the trial court committed clear error in concluding that the State’s peremptory strike of [a] black prospective juror . . . was not motivated in substantial part by discriminatory intent.”¹²¹ In 2020, all charges were dropped against Flowers.¹²²

Curtis Flowers’ case was featured on season two of the true crime podcast *In the Dark*, hosted by Madeleine Bran.¹²³ Like *Serial*, *In the Dark* was conceptualized as investigative journalism rather than pure entertainment media. Further, the podcast was credited by some as helping Flowers win his case.¹²⁴ The

110. *Id.* at 2234.

111. *Id.* at 2236.

112. *Id.*; Complaint at 1, *Flowers v. Evans*, No. 4:21cv110-MPM-JMV (N.D. Miss. Sept. 3, 2021).

113. *Flowers*, 139 S. Ct. at 2236.

114. *Id.* at 2236–37.

115. In the first and second trials, he was convicted and charged with only one count of murder. *See id.* at 2235–36. In the third trial, he was charged with and convicted of all four murders. *See id.*

116. *Id.* at 2236–37.

117. *Id.* at 2237.

118. *Id.*

119. *Id.*

120. *Id.* at 2238.

121. *Id.* at 2251.

122. *See* Nicholas Bogel-Burroughs & Rick Rojas, *After 6 Murder Trials and 24 Years, Charges Dropped Against Curtis Flowers*, N.Y. TIMES (Sep. 4, 2020), <https://www.nytimes.com/2020/09/04/us/after-6-murder-trials-and-nearly-24-years-charges-dropped-against-curtis-flowers.html> [<https://perma.cc/WVG4-UZP8>].

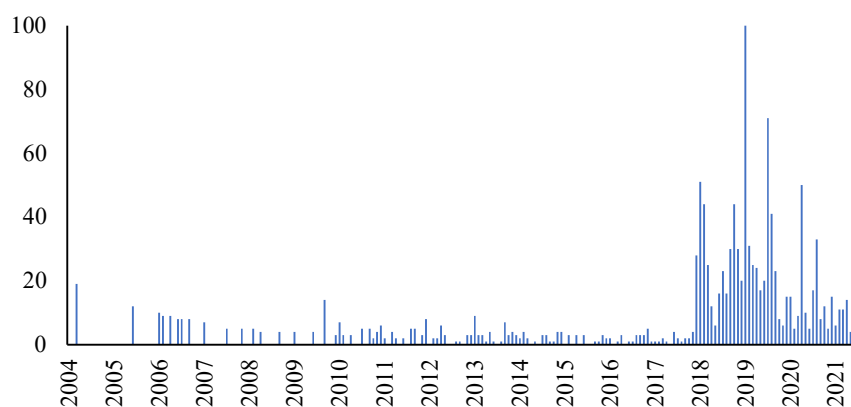
123. *See* *July 16, 1996, In the Dark*, APM REPORTS (May 1, 2018), <https://www.apmreports.org/episode/2018/05/01/in-the-dark-s2e1> [<https://perma.cc/4E3U-M39P>].

124. *See* Alissa Zhu, *How an Investigative Podcast Helped Free Curtis Flowers*, CLARION LEDGER (Sept. 10, 2020), <https://www.clarionledger.com/story/news/2020/09/10/how-investigative-podcast-in->

podcast was critically acclaimed, and Flowers' season garnered around 42 million downloads.¹²⁵

Replicating the analysis from Figures 1–2 in Syed's case, we extracted the search data pertaining to Curtis Flowers over the available data range. This data has a somewhat different distribution than the Syed case. Notably, there are small spikes of interest in the case pre-dating the first episode of *In the Dark* that featured Flowers' case, but none of these spikes reach the peaks of interest during and following the podcast.¹²⁶ This data distribution is likely due to the excessive number of trials (6) in the Flowers case that both differentiated the case from others and provided more media opportunity to report on the case.

Figure 3: Search Behavior for 'Curtis Flowers,' 2004 to 2021



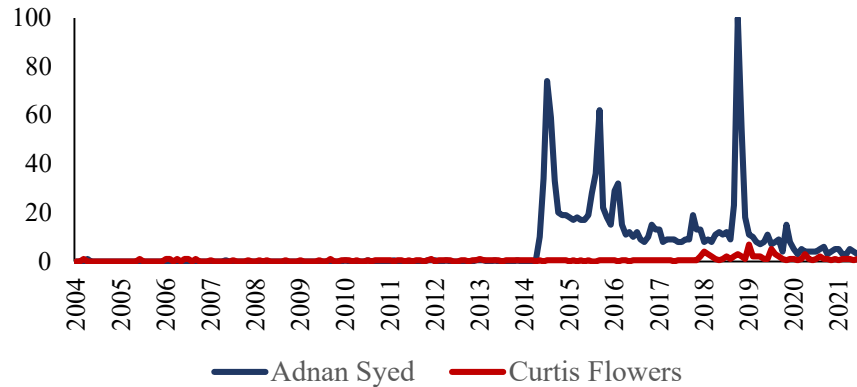
We propose that by comparing *Syed v. Maryland* and *Flowers v. Mississippi*, we can analyze how different true crime podcasts create different narratives, highlight different potential legal (or non-legal) issues, and ultimately affect legal outcomes and undergird societal perceptions. To make the most of such a comparison, it was necessary to select cases that likely vary across those conditions. Figure 4 provides some useful context for comparing public interest in *Syed v. Maryland* to *Flowers v. Mississippi*.

dark-helped-free-curtis-flowers/5747054002/ [https://perma.cc/78QZ-HBR3] (“Through the course of the podcast’s investigation, reporters interviewed prosecutors’ witnesses who recanted their statements, debunked forensic science and discovered an alternative suspect whose alibi fell apart under questioning. They also found that Evans’ office had a history of disproportionately keeping Black people off juries . . . Flowers’ attorney . . . said the podcast’s work was ‘instrumental in turning this case around and alerting the public to the injustice that occurred.’”).

125. See Sharyn Alfonsi, *How Curtis Flowers, Tried Six Times for the Same Crime, Was Saved from Death Row*, CBS NEWS (Jan. 3, 2021), <https://www.cbsnews.com/news/curtis-flowers-in-the-dark-60-minutes-2021-01-03/> [https://perma.cc/7P8E-DLMK].

126. The first episode of season two, titled *July 16, 1996*, *supra* note 123, aired on April 30, 2018.

Figure 4: Interest in Adnan Syed v. Curtis Flowers Over Time, 2004 - 2021



From this data, it is evident that public interest in Syed far surpasses interest in Flowers along every single point of the distribution after the launch of the *Serial* podcast. Rather than simply speculate on why this might be, we instead turn to the textual world of the podcasts, generating several reasons for this disparity in social interest.

V. ARGUMENT AND ANALYSIS

Serial and *In the Dark* operate on opposite ends of a spectrum of the kinds of narratives that true crime podcasts can craft. The central distinction between these narratives is the extent to which the podcasts conceptualize the case as a question of “did he actually do it?” *Serial* and *In the Dark* differ fundamentally on how much each story is concerned with answering that guiding question or conceptualizing the case as a variation on a classic “whodunit.”¹²⁷ At one end of the spectrum, this question is the absolute driving force of *Serial*, where the listener is frequently invited to wonder alongside host Sarah Koenig if it is possible to definitively—beyond a legal standard and into a personal one—understand Adnan Syed’s guilt or innocence. The show asks: can we know, not just beyond a reasonable doubt, but with absolute personal, moral certainty, if Syed is guilty? On the other hand, there is a profound lack of interest in this question in *In the Dark* and for host Madeleine Baran where, at the end of the day, the question being pursued is not actually about Curtis Flowers’ guilt or innocence but about the legal legitimacy of the case against Flowers, including claims of witness perjury, prosecutorial misconduct, and loss of evidence. More abstractly, the show asks how Flowers came to be tried six times for the same crime as a matter of criminal procedure. Knowing who is behind the murders—or if it could have been Flowers at all—is largely irrelevant to the world of *In the Dark*.

127. TZVETAN TODOROV, THE POETICS OF PROSE 44–48 (Richard Howard, trans., 1977) (1971) (defining the whodunit in terms of the story of the crime and the story of the investigation; we focus here on the merge of the two).

Further, each host employs different strategies for assuring the listener of the legitimacy and veracity of the show. *Serial*'s Sarah Koenig establishes intimacy with the audience, speaking colloquially and almost confessionally. She assures listeners that a phone call is incredibly important and that she will talk about it in another episode, "I swear," orienting herself in an authentic yet parasocial relationship with the audience.¹²⁸ Here, she is speaking to the audience much like a friend, promising that something she has mentioned in brief will become important. In doing so, she asks the audience to trust her that the narrative arc will be concluded and breaks the proverbial fourth wall to interact with the audience more directly. She plays portions of her interviews with Syed that seem primarily aimed at displaying her own difficulty in framing Syed's account of events, thereby guiding the listener through her thought process and bringing them to a similar level of understanding.¹²⁹ By contrast, *In the Dark*'s Madeleine Baran maintains a more traditional reporter persona. Throughout the show, she gives listeners insight into the logistics of her investigative process, such as noting her difficulty in making contact with Doug Evans, the prosecutor in all of Flowers' cases, and what, precisely, she did to eventually obtain an on-the-record interview with him.¹³⁰ This is all underscored when she explicitly gives insight into her process and philosophy of reporting in a season two update.¹³¹ Both processes work to introduce authenticity and veracity to the podcasts, even though they function differently. In both cases, the way the host chooses to build rapport with the audience echoes the narrative themes and helps clarify the essential story of each podcast.

This polarity in framing has multiple narrative and discursive consequences that we explore here. First, we consider the role of evidence in the podcasts, a central tenet of the *CSI* Effect. This is the core of the argument. While literature concerning the *CSI* Effect focuses on the potential pitfalls of narrative depictions of forensic science and its effect on juries, we expand that focus to consider a wider universe of evidence and to look at how narrative tropes and techniques influence the depiction of evidence.¹³² Second, we consider the podcasts' respective articulations of criminal procedure, an implicit but ultimately unexplored tenet of the *CSI* Effect. Again, we move beyond discussion exclusive to forensic evidence from the *CSI* Effect to consider representations of criminal procedure: formally, functionally, and effectively. Finally, we consider the sense of finality that the shows provide—and are able to provide—and grapple with providing for the cases. We consider verdicts in terms of narrative endings and consider how criminal courts and their media depictions grapple with closure, resolution, and satisfaction.

128. See, *Episode 5: Route Talk, Season 1, SERIAL*, at 17:01–17:15 (Oct. 23, 2014) [hereinafter *Episode 5: Route Talk*], <https://serialpodcast.org/season-one/5/route-talk> [<https://perma.cc/3GKC-TWT4>].

129. See *Episode 6: The Case Against Adnan Syed, Season 1, SERIAL* (Oct. 30, 2014) [hereinafter *Episode 6: The Case Against Adnan Syed*], <https://serialpodcast.org/season-one/6/the-case-against-adnan-syed> [<https://perma.cc/ZV2Y-FXUW>].

130. See *The D.A., In the Dark*, APM REPORTS (June 12, 2018), <https://www.apmreports.org/episode/2018/06/12/in-the-dark-s2e8> [<https://perma.cc/E3RZ-VY8S>].

131. See *S2 Update: Q&A + A Fire in Winona, In the Dark*, APM REPORTS (Nov. 27, 2018), <https://www.apmreports.org/episode/2018/11/27/s2-update-questions-fire-in-winona> [<https://perma.cc/C498-HW7Z>].

132. See Smith et al., *supra* note 3, at 4; Cole & Dioso-Villa, *supra* note 4, at 447.

Although here we discuss the dichotomous, polarized nature of these two narrative types, we do not intentionally do so to suggest that one is correct or better. Here, we merely emphasize that they work toward two separate goals that are not, in fact, opposite beyond their approach to the idea of guilt. This has potential stakes, both for representation of legal issues and for public interest.

A. Did He Do It?

Whether each respective podcast is framed around a detective inquiry into whether the “right” person was prosecuted for the murders at issue ultimately informs how each podcast deals with their relationship to narrative and story, to the truth, to journalism, and to representations of the criminal legal system. We argue that both *Serial* and *In the Dark* present a narrativized account of a set of true facts that allows the listener to create new sets of meanings out of a rearrangement of the facts through investigative journalism—in other words, they are positioning a set of facts as a story. However, while *Serial* posits that Syed’s guilt or innocence *is* the story, *In the Dark* posits that Flowers’s guilt or innocence is largely immaterial and the story actually lies in whether he has been treated fairly by the justice system. Sarah Koenig opens *Serial* immediately with the intrigue of Syed’s guilt or innocence:

For 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. . . . And I’m not a detective or a private investigator. I’m not even a crime reporter. But, yes, every day this year, I’ve tried to figure out the alibi of a 17-year-old boy.¹³³

She ends the final episode of the season with a more explicit rendering of the problem she has presented: “If you ask me to swear that Adnan Syed is innocent, I couldn’t do it. I nurse doubt. I don’t like that I do, but I do. I mean most of the time I think he didn’t do it.”¹³⁴ This question of guilt and innocence permeates the entire first season of *Serial*. Each time a new piece of evidence is examined, each time a point of criminal procedure is explained, Koenig returns to and grapples with this central question.¹³⁵ She measures each newly presented element for its materiality to

133. *Episode 1: The Alibi*, *supra* note 5, at 00:57–01:34.

134. *Episode 12: What We Know*, SERIAL, at 51:08–51:20 (Dec. 8, 2014) [hereinafter *Episode 12: What We Know*], <https://serialpodcast.org/season-one/12/what-we-know> [<https://perma.cc/E2J4-B27Z>].

135. This is a non-exhaustive list of times where the show relates a piece of evidence directly to whether it points to Syed’s guilt or innocence and is meant only to serve as an example of the scope of the pattern. See, e.g., *Episode 1: The Alibi*, *supra* note 5, at 48:43–48:48 (wondering about the implications of Asia McClain’s alibi, Koenig notes, “I talk to Adnan regularly, and he just doesn’t seem like a murderer”); *Episode 2: The Breakup, Season 1*, Serial, at 10:31–10:36, 34:38–35:04 (Oct. 3, 2014) [hereinafter *Episode 2: The Breakup*], <https://serialpodcast.org/season-one/2/the-breakup> [<https://perma.cc/F5YZ-JCZG>]. (introducing a detail in terms of not “look[ing] good for Adnan” and concluding that Syed’s statement about asking Lee for a ride is a “red flag”); *Episode 5: Route Talk*, *supra* note 128, at 34:28–34:50 (introducing two calls on the cell phone record as “incriminating” against Syed); *Episode 6: The Case*

Syed's case but does so to an exacting, exhausting standard: does this information have any tendency whatsoever to suggest that Syed could be guilty?

In stark contrast, *In the Dark* presents no such dichotomy of guilt and innocence. Madeleine Baran notes only that Flowers maintains his innocence and that his parents believe he is innocent.¹³⁶ The former notation is exclusively used to underscore the procedural elements of Flowers' extended legal battles rather than as a moral assertion. It is, for the show, a fact which colors his parents' acquisition of lawyers and Flowers' own patience through his endless appeals.¹³⁷ Importantly, we argue, Flowers maintaining his innocence is not particularly *interesting* in the world of the podcast. Baran does not use that as an emotional appeal, nor does she question the veracity of Flowers' assertion of innocence. Ultimately, what matters in *In the Dark* is not who committed the crime but how one man could be tried *six* times for the same crime.

These central questions set the stage for how each podcast considers evidence, procedure, and verdicts. As we will argue in the remainder of this section, *Serial* relies on expectations that evidence should be able to definitively prove *something*, that procedure is "boring," and that a verdict is of utmost importance to obtaining justice. *In the Dark*, we argue, takes a different tack, affirming that evidence exists to tell a story, that procedure is central, and that a verdict can, in fact, be very far removed from justice. We discuss each of those issues in turn.

B. The Role of Evidence

In the following section, we argue that the single most profound implication of the narrative framing within the world of the text is how each podcast handles conceptualizations of and standards of evidence in a criminal legal proceeding. Certainly, both pieces of investigative journalism build their own arguments about what is important for their listeners to take away, but evidence plays a role within the world of the text as well: it is explicitly talked about, turned over, and given various levels of credence depending on what it is meant to prove. This section is ultimately a question of persuasion: what facts, arranged in what way, make a particular outcome seem more or less likely or viable—both in and outside the courtroom? Further, we argue that the precise mechanisms of this persuasion are unique in considering the construction of a "*Serial* effect."

Against Adnan Syed, *supra* note 129, at 01:20–01:40 (introducing a palm print on a map in Lee's car as "[t]he most incriminating piece of physical evidence against Adnan"); *Episode 9: To Be Suspected, Season 1*, SERIAL, at 15:20 (Nov. 20, 2014) [hereinafter *Episode 9: To Be Suspected*], <https://serialpodcast.org/season-one/9/to-be-suspected> [<https://perma.cc/3C9Y-WNKR>] (framing Syed's call to the police as puzzling: "Is that something a distraught teenager would do? Or is that something a killer would do?"); *Episode 11: Rumors, Season 1*, SERIAL, (Dec. 11, 2014) [hereinafter *Episode 11: Rumors*], <https://serialpodcast.org/season-one/11/rumors> [<https://perma.cc/UPT4-Z9ZX>] (discussing rumors about Syed that Koenig has heard since the podcast began airing, noting that although the rumors have nothing to do with the case, they still gave her "pause").

136. See *July 16, 1996*, *supra* note 123.

137. *Id.*

i. *Serial*

In *Serial*, Koenig interestingly builds a world of two types of evidence, the schema of which is apparent from something she says in the final episode: “As a juror I vote to acquit Adnan Syed. I have to acquit. . . . That’s what the law requires of jurors. But I’m not a juror, so just as a human being walking down the street next week, what do I think?”¹³⁸ This distinction between the evidence needed to convince a juror and the evidence needed to convince a human is a question of burden of proof and the nature of evidence required to meet each person’s threshold for convincing. To be admissible in court, evidence must be more or less likely to establish *something*, but whether evidence must also prove that something definitively is an open question. Legally, it does not. For Koenig, “the human being,” it must.

Before engaging too deeply in the way Koenig considers evidence in *Serial*, it must be noted that she does not consistently frame this distinction throughout the show, nor does she foreground it in the first episodes. We note that evidence that did and did not make it into trial—and evidence that could or could not make it into trial—are woven interchangeably throughout the show. Things that could have mattered to a juror, and things that may not have mattered, are all part of the same evidentiary narrative, despite this fracturing. The distinction between juror and human being is not held as a central tension throughout the show. This is noteworthy, we argue, because her hypothetical acquittal as a juror at the end of the final episode is made only after hearing evidence and digging into evidence that she might not have encountered as an actual juror. We do not purport to know how Koenig would have voted had she sat on the initial jury that convicted Syed. However, she would have had access to a fundamentally distinct set of information and that is important to keep in mind in light of her rhetorical, hypothetical vote to acquit in the text of the podcast.

Koenig engaged with a broad spectrum of evidence over the course of the season in her investigation of Syed’s guilt or innocence. She investigated and spoke to various potential witnesses who could provide an alibi for Syed, as well as others who could potentially discredit this alibi.¹³⁹ She conducted a range of investigations, including looking into the weather on the day of the murder.¹⁴⁰ She read diary entries and personal notes to characterize Hae Min Lee’s relationships both with Syed and with her new boyfriend, Don.¹⁴¹ She spoke to people who could speak to Syed’s

138. *Episode 12: What We Know*, *supra* note 134, at 50:48–51:08.

139. See *Episode 1: The Alibi*, *supra* note 5; *Episode 5: Route Talk*, *supra* note 128; *Episode 6: The Case Against Adnan Syed*, *supra* note 129; *Episode 12: What We Know*, *supra* note 134; *Update Day 01: Adnan Syed’s Hearing*, SERIAL, (Feb. 4, 2016) [hereinafter *Update Day 01*], <https://serialpodcast.org/season-one/adnan-syeds-hearing/day-01>; *Update Day 02: Adnan Syed’s Hearing*, SERIAL, (Feb. 5, 2016) [hereinafter *Update Day 02*], <https://serialpodcast.org/season-one/adnan-syeds-hearing/day-02>; *Update Day 03: Adnan Syed’s Hearing*, SERIAL, at 05:23–07:39 (Feb. 6, 2016) [hereinafter *Update Day 03*], <https://serialpodcast.org/season-one/adnan-syeds-hearing/day-03>.

140. See *Episode 1: The Alibi*, *supra* note 5, at 46:34–46:38; *Update Day 02*, *supra* note 139, at 01:20–02:10. This element pertains to McClain’s alibi as she attested that it snowed the day of Lee’s disappearance and murder.

141. See generally *Episode 2: The Breakup*, *supra* note 135; *Episode 6: The Case Against Adnan Syed*, *supra* note 129, at 07:18–08:58.

character and the role of his Islamic faith.¹⁴² She looked into alternative suspects.¹⁴³ She investigated the reputation of Jay, Syed's friend, and his confession to police that he helped Syed bury Lee's body.¹⁴⁴ She looked at Syed's and others' cell phone records, confirming who called whom when and tracking cell phone tower records (and investigating the reliability of location pinpointing).¹⁴⁵ She looked into the timeline of the murder to determine if it would have been physically possible for Syed to commit the crime.¹⁴⁶ In order to verify Jay's story, she looked into the existence of a phone booth at the Best Buy where the murder was purportedly committed.¹⁴⁷ She dug into the police notes, records, files, and recordings.¹⁴⁸ She spoke to lawyers and legal experts to better understand what Syed's lawyers and detectives on the case were doing to understand where the police and Syed's legal team may have failed in their investigation.¹⁴⁹ She considered physical evidence the police did not ever consider.¹⁵⁰ She considered analogous cases and crimes.¹⁵¹ She spoke to Don, Lee's boyfriend at the time of the murder.¹⁵² She considered Syed's

142. *Episode 2: The Breakup*, *supra* note 135, at 09:44–11:07; *Episode 10: The Best Defense is a Good Defense, Season 1*, SERIAL, at 03:00–17:30 (Dec. 4, 2014) [hereinafter *Episode 10: The Best Defense is a Good Defense*], <https://serialpodcast.org/season-one/10/the-best-defense-is-a-good-defense>; *Episode 11: Rumors*, *supra* note 135.

143. *See Episode 3: Leakin Park, Season 1*, SERIAL, at 03:39–03:44, 21:02–21:35 (Oct. 9, 2014) [hereinafter *Episode 3: Leakin Park*], <https://serialpodcast.org/season-one/3/leakin-park>; *Episode 10: The Best Defense is a Good Defense*, *supra* note 142, at 25:25.

144. *Compare Episode 1: The Alibi*, *supra* note 5, at 17:42–18:45, with *Episode 4: Inconsistencies, Season 1*, SERIAL, at 07:18–08:13 (Oct. 16, 2014) [hereinafter *Episode 4: Inconsistencies*], <https://serialpodcast.org/season-one/4/inconsistencies>; *Episode 8: The Deal with Jay, Season 1*, SERIAL (Nov. 14, 2014) [hereinafter *Episode 8: The Deal with Jay*], <https://serialpodcast.org/season-one/8/the-deal-with-jay>; *Episode 10: The Best Defense is a Good Defense*, *supra* note 142, at 25:25–37:47; *Episode 12: What We Know*, *supra* note 134, at 11:00–20:28.

145. *See Episode 4: Inconsistencies*, *supra* note 144, at 03:35–04:30; *Episode 5: Route Talk*, *supra* note 128, at 28:04–31:20; *Episode 6: The Case Against Adnan Syed*, *supra* note 129, at 04:55, 16:55, 20:40; *Episode 7: The Opposite of the Prosecution, Season 1*, SERIAL, at 05:42–09:09 (Nov. 6, 2014) [hereinafter *Episode 7: The Opposite of the Prosecution*], <https://serialpodcast.org/season-one/7/the-opposite-of-the-prosecution>; *Episode 9: To Be Suspected*, *supra* note 135, at 10:13–11:00; *Episode 12: What We Know*, *supra* note 134, at 21:00–33:27; *Update Day 02*, *supra* note 139; *Update Day 03*, *supra* note 139, at 01:00–05:22.

146. *See Episode 5: Route Talk*, *supra* note 128, at 01:09–03:40, 10:14–11:18; *Episode 9: To Be Suspected*, *supra* note 135, at 04:00–04:30.

147. Although this is, technically, possible to include under the category of "phone records" generally, Koenig makes a particular deal out of this pay phone's existence (or lack thereof). This ends up being a major point of contention for listeners as well. *See Episode 5: Route Talk*, *supra* note 128, at 08:04–09:27; *Episode 9: To Be Suspected*, *supra* note 135, at 01:14–04:00; *Episode 12: What We Know*, *supra* note 134, at 30:22–30:59.

148. *See Episode 6: The Case Against Adnan Syed*, *supra* note 129, at 00:50, 27:00; *Episode 8: The Deal with Jay*, *supra* note 144, at 10:45, 11:07, 12:59.

149. *See Episode 7: The Opposite of the Prosecution*, *supra* note 145, at 02:48; *Episode 8: The Deal with Jay*, *supra* note 144, at 06:32, 11:07; *Episode 9: To Be Suspected*, *supra* note 135; *Episode 10: The Best Defense is a Good Defense*, *supra* note 142, at 44:00; *Episode 11: Rumors*, *supra* note 135; *Episode 12: What We Know*, *supra* note 134.

150. *See Episode 7: The Opposite of the Prosecution*, *supra* note 145, at 23:50.

151. *See id.* at 01:09; *Episode 10: The Best Defense is a Good Defense*, *supra* note 142, at 08:40.

152. *See Episode 12: What We Know*, *supra* note 134, at 02:50–11:35.

potential motives.¹⁵³ She considered her own conversations with Syed and her own impressions of his innocence.¹⁵⁴

None of these pieces of evidence are cataloged in any meaningful way. Koenig does not mark for the listener whether something could have appeared before the court at any point in a proceeding. She does not note *when* certain evidence might matter in the criminal legal process or how a different audience might matter to determinations of the weight of the evidence. For example, the difference in consideration of the issue of ineffective defense counsel at Syed's jury trials or during appeal. She does not weigh any evidence discursively, beyond implicitly giving more weight to certain pieces of evidence through the frequency of mentions (for example, we're led to believe that the Best Buy pay phone is important because of how frequently it is considered, not because it may have actual bearing on the outcome of Syed's case). She seems only to note when a piece of evidence looks good or bad for Syed, not what role or function it plays in his conviction or possible acquittal (if any), or what role it *could* play within the constraints of the rules of evidence and criminal procedure.

In the interest of better selecting particular pieces of evidence to focus on, and in order to underscore the wide universe of evidence considered by the series (compared to the narrower realm of forensic evidence undergirding the *CSI* Effect), we have categorized the evidence discussed in *Serial* into the following categories, as illustrated in the below table (Figure 5). We have broken down the evidence by its source, whether from an individual witness (directly or indirectly); a piece of physical evidence from the day of the murder or the crime scenes; procedural evidence concerning the murder investigation or the first trial (ultimately, points that would be noteworthy in the appeal process); or speculative evidence, which is a category without particular value attached but that comes from outside the universe of the crime itself or requires inferences and logical reasoning to understand its significance. Further, we have noted whether or not particular evidence, regardless of origin, speaks to someone's character or propensity for violence or criminality (an important evidentiary consideration¹⁵⁵) and whether or not it deals in forensic evidence (an important consideration in building on the *CSI* Effect's theories about the effect of forensic evidence on juries).

153. *See id.* at 35:20–37:10.

154. *See generally Serial, Season 1, SERIAL*, <https://serialpodcast.org/season-one>. This is separated from other analyses of Syed's character because it consistently comes up in every episode.

155. *See* FED. R. EVID. 404 (character evidence is excluded and evidence of other criminal acts or wrongdoings designed to prove that a person acted in accordance with a trait on one specific occasion). However, character evidence may be admissible in some cases if offered by the defendant and then rebutted via evidence by the prosecution, if explaining victim peacefulness in a homicide case, or if used for another purpose like proving motive, opportunity, or knowledge.

Figure 5: Typology of Evidence in Serial

	Physical	Procedural	Witness	Speculation
Character or propensity		Ineffective assistance of counsel at initial trial	Lee's Diary; classmates/teachers about Syed; Gossip about Jay	Motives; Koenig's personal conversations with Syed
Forensic	Fibers, DNA			
General	Weather, cell phone records, timeline/route, Best Buy phone booth	Police investigation notes; analogous cases; alternative suspects; Gutierrez's ineffectiveness	Asia McClain letter; Jay's confession	Analogous crimes/alternative suspects

Serial as a project is predominantly interested in putting pieces of information on a scale: on one side, Syed's innocence in absolute terms, and on the other, his guilt with equal absolute certainty. Therefore, every piece of evidence Koenig examines on the podcast is for the purposes of being added to that scale. To understand the consequences of weighing evidence in terms of black-and-white determinations of guilt or innocence, we will focus on discussions of the physical, procedural, and witness-based evidence presented in *Serial*. We look particularly at five pieces of evidence: the phone records (including the Best Buy pay phone), the physical evidence at the crime scenes (including fibers and fingerprints—some classic hallmarks of the *CSI* Effect literature), the character evidence for and against Syed and Jay, the reliability of witnesses, including Asia McClain and the fragility of her recollection of the weather, and Syed's trial lawyer, Christina Gutierrez, as ineffective counsel. These pieces of evidence are selected as examples of the types of evidence to which Koenig gives the most weight.

While the legal significance of evidence changes across different points in criminal procedure (and Koenig hypothesizes that some of that happens between jury trials, even in Syed's cases)—for example, Gutierrez's effectiveness as counsel only becomes important post-conviction and the importance of McClain's testimony varies wildly throughout the procedural posture¹⁵⁶—it is important to keep in mind

156. See *Episode 10: The Best Defense is a Good Defense*, *supra* note 142, at 17:59–49:00 (discussing how Syed's first trial ended in a mistrial and speculating on what could have changed between trials one and two).

the distinction between evidence with legal significance and evidence that is significant for its ability to persuade a person of a defendant's absolute guilt or innocence, which is the evidence Koenig focuses on in *Serial*.

a. The Role of Forensic Evidence in *Serial*

First, we consider the physical and forensic evidence presented in *Serial*, including DNA found on Lee's body, fingerprints found in Lee's car, and items found near Lee's body. Unlike the *CSI* Effect, which emphasizes almost exclusively the effect of crime drama on jurors' expectations of forensic evidence, there is little attention paid to physical and forensic evidence within *Serial*—possibly because the available forensic evidence in Syed's case is unable to convince Koenig definitively of Syed's guilt or innocence. In the area of forensic evidence, Koenig only highlights a few pieces of evidence: first, there was untested DNA collected from Lee's body that, over the course of recording the podcast, Syed's lawyers had filed a motion to have DNA tested.¹⁵⁷ Koenig emphasizes that it is a “longshot” that there is anything in the sample remaining to test or, if it could be tested, that the DNA matches someone else and would exonerate Syed.¹⁵⁸ This is the full extent of what we hear about DNA within the world of *Serial*. Second, Koenig mentions a brandy bottle and rope found near Lee's body, a partial palm print matching Syed's on a map in Lee's car, and thirteen other prints in Lee's car from unidentified individuals.¹⁵⁹ None of these pieces of evidence is, for Koenig, either dispositive or worth discussing extensively—all could plausibly point to or against Syed, and none allow for the drawing of satisfying narrative conclusions.¹⁶⁰

This minimal consideration of forensic evidence, in the *CSI* Effect universe, is an astonishingly even-handed approach to physical and forensic evidence. Arguably, Koenig spends proportionately less time with these pieces of evidence than a court might—and certainly spends less time with these pieces of evidence than an episode of *CSI* would. Rather than over-signifying their importance, she contextualizes them, and, in the case of the untested DNA, explicitly articulates the limits of the types of conclusions that can be drawn from this kind of evidence. In other words, *Serial* situates physical and forensic evidence in this case as relatively mundane and not particularly persuasive in any direction. It is described but never shifts the narrative and is never a point of unrealistic expectation-setting for the listener.

157. See *Episode 12: What We Know*, *supra* note 134, at 41:50–42:30. Syed's lawyers cited improvements in DNA evidence and called for testing of Lee's shoes, clothes, hair and other evidence. See Debra Cassens Weiss, *Judge Orders New DNA Tests in Adnan Syed Murder Case*, ABA JOURNAL (Mar. 14, 2022, 8:33 AM), <https://www.abajournal.com/news/article/prosecutors-back-new-dna-tests-in-adnan-syed-murder-case-featured-on-serial-podcast> [<https://perma.cc/6PLZ-54LJ>]. The judge granted this motion, ordering new DNA analysis in the case. *Id.*

158. See *Episode 12: What We Know*, *supra* note 134, at 45:50–46:10.

159. See *Episode 3: Leakin Park*, *supra* note 143, at 17:09–17:55; *Episode 6: The Case Against Adnan Syed*, *supra* note 129, at 00:50; *Episode 7: The Opposite of the Prosecution*, *supra* note 145, at 23:50.

160. See *Episode 3: Leakin Park*, *supra* note 143; *Episode 6: The Case Against Adnan Syed*, *supra* note 129. While each of these pieces of evidence are discussed in turn, none of them accomplish the satisfying narrative task of definitively proving Syed guilty or innocent.

We argue two things: first, this specific narrative undoing of the *CSI* Effect is a particular and necessary function of true crime both as a genre and the long-form version as a sub-genre; and second, that this relatively empty category of evidence in *Serial* necessitates a substantially broader understanding of how true crime in general, and *Serial* in particular, could conceivably set audience expectations about evidence; what can be uncovered; and how an audience or jury could come to an understanding of truth or knowledge in a criminal proceeding.

Necessarily, we argue, true crime must handle forensic evidence differently than the inaccurate and overblown simplified expectations set in a fictional television procedural. This analysis seems tautological—of course true crime as a genre needs to be more closely intertwined with reality; this is evident from the name of the genre. Certainly, some aspects of true crime are more speculative in this area than others. Some crime narratives additionally lend themselves to more speculation on forensic evidence—for example, casual podcast discussions of older, unsolved cases lend themselves to suggestions about the power of forensic evidence were it to exist.¹⁶¹ *Serial*, structurally, offers fewer opportunities for speculating on what forensic evidence *could* do and engages more with what it has done. Which is, ultimately, not much.

Finally, it is also worth explicitly noting that none of this forensic evidence is explored in depth *because* it does not offer a definitive direction to look. As we have discussed, *Serial* is particularly preoccupied with the question of determining if Syed is guilty or innocent. From the perspective of building an argument, none of these pieces of forensic evidence direct the investigator definitively in any one direction, and none of them are likely to *ever* direct the investigator in any direction. They only introduce ambiguity and do not further the story being told. We argue that it makes sense, then, that they have lesser narrative weight.

Ultimately, we argue that the *CSI* Effect literature *itself* over-emphasizes the importance of forensic evidence. By conducting a close reading of other crime media, with true crime itself a very popular genre of crime media, we can begin to form a better perspective on the broader situatedness of forensic evidence in contemporary crime media. Forensic evidence is not, in fact, always situated as a magic bullet in the quest for truth. Even as culture influences personal understandings of the justice system, and that can theoretically influence jury behavior, there is both a bigger world of cultural artifacts and a world of evidence other than that which is forensic. For the rest of this section, we investigate what *Serial* and *In the Dark* do deem to be important in order to better understand a piece of the media puzzle.

b. Beyond Forensic Evidence

Here, we look beyond the forensic to consider how *Serial* articulates understandings of other types of evidence—specifically, phone records, character evidence, alibi evidence, effective assistance of counsel, and evidence about the

161. See, e.g., MY FAVORITE MURDER, <https://www.myfavoritemurder.com> [<https://perma.cc/L78U-WAXC>]. This is beyond the scope of this project but many true crime podcasts, such as, for example, *My Favorite Murder*, feature *ad hoc* conversation about the cases being covered. The influence of broader cultural expectations about the power of forensic evidence can be more prevalent there.

route Syed would have taken the night of Lee's murder. These other kinds of evidence are important because they set narrative expectations about the role of evidence that is aberrant or uniquely interesting for the story in this case. In other words, we turn now to the evidence that has substantial narrative weight and functions within *Serial*'s narrative emphasis on guilt and innocence to set audience expectations.

First, we consider records of incoming calls to Syed's cell phone and their use to map Syed's location on the day of Lee's murder. In Syed's trial, the State relied on this evidence to place Syed on the day of Lee's disappearance near the park where Lee's body was later found.¹⁶² However, it was later discovered that incoming calls cannot be used to reliably pinpoint location. The phone records, and specifically, this cell phone tower evidence, are incredibly important in the legal story of Syed's case. This is evident from the discussion of this evidence in the podcast's later update episodes. Upon appeal of Syed's case, both appellate courts in Maryland discuss the cell phone records. In fact, the circuit court granted Syed a new trial based on his defense attorney's failure to challenge the State's use of this cell phone evidence at Syed's initial trial.¹⁶³ Further, Jay, who later confessed to police that he helped Syed bury Lee's body, claimed he saw Syed use a payphone at a Best Buy to call him for a ride after Syed allegedly murdered Lee in the parking lot. However, it is contested whether there even *was* a payphone for Syed to use at the Best Buy in question, thus discrediting Jay's story. Both appellate courts mention the elusive Best Buy payphone and Jay's story; however, its existence is not instrumental, nor is it ever called into question.¹⁶⁴

Ultimately, the court's engagement with phone records fades away and the question becomes one of whether Gutierrez's failure to challenge the use of incoming call logs to place Syed at the crime scene rose to the level of ineffective assistance of counsel, and whether Syed had waived his claim to her ineffectiveness by the time his case got to the appellate courts years later. However, these cell phone records are the most enduring puzzle, discussed in nearly every episode of *Serial* and turned into an evocative consideration for the audience.¹⁶⁵ In a way that seems to fully encapsulate the show's general disposition to the records, Koenig describes them as "screwy right from the beginning."¹⁶⁶ The phone record evidence seems like it should definitively determine Syed's guilt or innocence, but its recurrence throughout the show speaks to how it is a problem on the quest for definitive truth. Even as Koenig turns over old details, they are continually considering new angles and, importantly, ways of interpreting the existing details.¹⁶⁷

162. See *State v. Syed*, 463 Md. 60, 88 (2019).

163. See *Syed v. State*, 236 Md. App. 183, 194 (2018).

164. See *id.* at 199, 284; *State v. Syed*, 463 Md. 60, 96 (2019).

165. See *Episode 4: Inconsistencies*, *supra* note 144; *Episode 5: Route Talk*, *supra* note 128; *Episode 6: The Case Against Adnan Syed*, *supra* note 129, at 04:55, 16:55, 20:40; *Episode 7: The Opposite of the Prosecution*, *supra* note 145, at 05:34; *Episode 9: To Be Suspected*, *supra* note 135; *Episode 12: What We Know*, *supra* note 134, at 21:00–28:00; *Update Day 03*, *supra* note 139, at 01:00–05:22.

166. *Episode 12: What We Know*, *supra* note 134, at 28:10–28:13.

167. See *id.*

Second, we consider relevant character evidence of Syed. Characterizations of Syed are recurrent in nearly every episode of the main series.¹⁶⁸ While evidence that is admissible at trial is generally limited to character evidence used for defendants and witness impeachment, Koenig's consideration of Syed's character establishes just how potentially persuasive such evidence is, no matter its potential admissibility.¹⁶⁹ Further, it establishes how difficult it is to build guiderails around such evidence to prevent its abuse. Much of the evidence that Koenig considers about Syed's character is self-generated because she personally interacts with him. For example, she says early on in the season, "I talk to Adnan regularly and he just doesn't seem like a murderer."¹⁷⁰ Her faith in Syed contradicts the volume of communications that the show received over the course of its run that complicate Koenig's belief about Syed's character, even with some of Koenig's own deductions from interviews.¹⁷¹ She devotes time in the first episode describing her own physical impressions of him from when she first saw him in person—he was larger than she expected and had "giant brown eyes like a dairy cow."¹⁷² She continues: "That's what prompts my most idiotic lines of inquiry. Could someone who looks like that really strangle his girlfriend? Idiotic, I know."¹⁷³ Certainly, drawing conclusions about a defendant's guilt based on their appearance is troubling at best, but Koenig's candor about doing so is elucidating: the defendant's very appearance is potentially communicative to a juror, particularly one seeking out opportunities to draw conclusions about their character.

More broadly, *Serial* reveals the importance of character evidence and how insidious and pervasive it is: despite its relative restriction in the courtroom, it can remain persuasive. In fact, because this is what Koenig keeps returning to again and again throughout the series, character evidence is constructed as one of the most definitive ways of establishing guilt, even though it is arguably the most subjective way of doing so.

Third, we consider Asia McClain as an alibi witness and the fragility of her recollection. McClain claims that she saw Syed in the library at the time of Lee's murder, which, if true, would exonerate Syed. McClain is procedurally instrumental

168. See *Episodes 1, 2, 3, 4, 6, 8, 9, 10, 11, and 12*. *Episode 5* extensively discusses the route and timeline and *Episode 7* focuses on Syed's attorney (arguably also an episode about character). We use the phrase "main series" here to differentiate from the "update" episodes.

169. See generally FED. R. EVID. 404 (admissibility of character evidence); FED. R. EVID. 608 (admissibility of evidence regarding a witness's reputation for having a character for truthfulness or untruthfulness).

170. *Episode 1: The Alibi*, *supra* note 5, at 48:43–48:48.

171. *Episode 11: Rumors*, *supra* note 135, at 01:01–02:09 (Koenig explains that "for two months now I've been grappling with rumors about Adnan. People telling me, 'there's stuff you don't know about Adnan, stuff you need to know to understand who you're dealing with.' These communications came in the form of phone calls, many phone calls, sometimes one on one, sometimes conference calls . . . The rumors themselves are nothing too dastardly. Nobody is saying, 'I saw him do it' or 'I have proof.' None of it is directly connected to the crime. But likely there are a great many things I don't know about Adnan and some of the things I was hearing were giving me pause"); *Episode 2: The Breakup*, *supra* note 135, at 17:41–18:09, 23:50–24:27 (noting that all teenagers write brooding prose, that breakups are mundane, and that Syed was "yeah, a player").

172. *Episode 1: The Alibi*, *supra* note 5, at 19:52–20:13.

173. *Id.* at 20:13–20:19

because the exclusion of her testimony from the original trials speaks directly to whether Syed's lawyer provided effective counsel. *Serial* positions her alibi testimony as potentially dispositive or, at least, holds that an alibi witness' testimony could be dispositive if it was both consistent and grounded in fact.¹⁷⁴ *Serial*'s consideration of McClain as a witness underscores three things: first, that witness testimony is compelling; second, it is unreliable; and third, that its exclusion is potentially problematic even if it is ultimately, in Koenig's words, "legally worthless."¹⁷⁵

The theme of episode one, "The Alibi," is that memory is unreliable.¹⁷⁶ The first thing Koenig discusses in the episode is the idea that it is difficult to account for one's time: if something significant happens, she argues, a person remembers their entire day much better.¹⁷⁷ But Koenig admits to being unsure about why McClain's memory is so clear—her "best guess" is that she wrote it down at the time.¹⁷⁸ Still, despite structuring the episode around the idea that memory is unreliable, Koenig does a great deal of work to push the idea that McClain could be the difference that makes the difference. She even tells McClain that she could be "the technicality" that changes the outcome of Syed's case.¹⁷⁹ Ultimately, *Serial* is unconcerned with Syed's original defense counsel's failure to interview McClain and considerations of whether this ineffective defense should grant Syed a new trial. Instead, the show is concerned with whether McClain's claims of Syed's innocence are true at all. Unfortunately, this consideration is entirely irrelevant at the point the podcast is recorded, but it stokes a curiosity in listeners that is potentially utterly misguided.

Fourth, we consider Gutierrez's effectiveness as trial counsel. Narratively, the trouble the show has in considering Gutierrez's performance as defense counsel is that it fundamentally does not fit. The discussion of Gutierrez makes the most sense within the context of the show as an evaluation of other pieces of evidence. Taking McClain as an example, the show begins to seed Gutierrez's failures immediately. Syed told Koenig that he told Gutierrez about McClain, but it does not appear that Gutierrez ever followed up on this.¹⁸⁰ Koenig notes that there are conceivable strategic reasons to choose not to put McClain on the stand but no reason to never contact her: "that is not a strategy, that is a screw-up."¹⁸¹ So, the listener hears that the lawyering is potentially bad, but the stakes are ontological, not procedural. Koenig tells us that Gutierrez's notes simply say that the library may have cameras, per McClain—but that we do not know anything else.¹⁸² In fact, it is not until the appeals update episodes post-season that the listener is given an understanding of the procedural stakes at all—that Gutierrez's performance was potentially so deficient that Syed could be awarded a new trial.¹⁸³ Again, the

174. *See id.* at 33:48–34:51, 47:59–48:33.

175. *Id.* at 51:05–51:15.

176. *See generally id.*

177. *Id.*

178. *Id.* at 44:52–45:02.

179. *Id.* at 47:58–48:15.

180. *Id.* at 33:11–34:01.

181. *Id.* at 34:25–34:41.

182. *See id.* at 33:39–33:47.

183. *See Episode 1: The Alibi, supra* note 5 at 05:38–05:46; *Episode 2: The Breakup, supra* note 135.

discussion of evidence is in service of answering a question that has nothing to do with the realities of the criminal legal system: is Adnan Syed guilty? Because evidence of Gutierrez's effectiveness does not sufficiently address that question, it is thinly presented.

Overall, the story of evidence in *Serial* is about considering facts and opinions based on their persuasive value. The show spends the most time with evidence that could conceivably lead to greater certainty about Syed's guilt or innocence. This is ultimately a weighting of evidence that does not necessarily match the realities of the courtroom. However, the discrepancy happens outside of the realm of forensic evidence: expectations are *best* managed in the case of DNA evidence, as we have argued. Although *Serial* need not operate with narrative fidelity to the realities of the courtroom—and arguably, tells a more broadly compelling, or at least more popular, story because it does not—shifting the burden of persuasion toward the genre of the whodunit ultimately does muddle the story about the courts, opening a broader array of mismatched expectations about those courts. That is, the danger of misunderstood evidentiary importance is potentially more diffuse than the *CSI* Effect would suggest.

ii. *In the Dark*

In the Dark takes a different approach to analyzing and interpreting evidence in its narrative arc. *In the Dark* works systematically through three fundamental pieces of evidence important in the State's case against Curtis Flowers: the route to the crime scene, the gun, and the confessions.¹⁸⁴ However, the show takes on an explicitly procedural view of evidence because, after consideration of relevant evidence, host Madeleine Baran turns to an investigation of the process and the facts under investigation, concerning not Curtis Flowers's guilt or innocence but that of the District Attorney who tried Flowers in all six trials, Doug Evans. She turns then to the validity of witnesses, Evans' use of peremptory strikes in jury selection, and the methods of Evans' chief investigator. Three types of evidence in the question of Flowers's guilt are examined: a prior shooting, forensic evidence (a shoe print and gunshot residue), and alternative suspects. However, all three of those pieces of evidence are considered in service of the broader story about Evans, not Flowers.

The route, the gun, and the confessions are worth considering, particularly in relation to *Serial*. Each of these pieces of evidence are considered in turn in their own episode. Each episode ends in the same place: an articulation of how Evans used the evidence at issue in Flowers' trials. The show explicitly draws on that presentation in order to evaluate it.

Episode Two, "The Route," examines the witness testimony that Evans used to establish that Flowers could have gotten (and, allegedly, did get) from his house to Tardy Furniture to commit the murders.¹⁸⁵ This includes an examination of the credibility of witnesses who stated they saw Flowers along the alleged route.¹⁸⁶

184. *In The Dark, The Route*, AM. PUB. MEDIA, at 10:05 (May 1, 2018), <https://www.apmreports.org/episode/2018/05/01/in-the-dark-s2e2> [<https://perma.cc/74SL-6SK3>]. This is Baran's own rhetorical framing from *In the Dark*, season 2, episode 2 that she repeats in episodes 3 and 4.

185. *Id.*

186. *Id.*

This, Baran argues, is some of the State's strongest evidence against Flowers—most of the witnesses knew him, were also Black, and had grown up in his neighborhood.¹⁸⁷ However, Baran begins to chip away at the credibility of this evidence quickly, pointing out that the witnesses' original statements were not given until at least a month after the murders (and some statements were not given until nine months later); what the witnesses described seemed wholly unremarkable and it was unclear why anyone would remember it; and one witness claimed that the police approached her, when in reality she went to the police herself.¹⁸⁸ The punchline, though, is that Baran notes that as she talked to witnesses, she “became more and more suspicious, not of the witnesses but of *the investigation*.”¹⁸⁹ Baran's goal is not to return to evaluating Flowers after casting doubt on evidence but instead to turn to Evans and his investigator: “I see evidence of a different kind, evidence that law enforcement was willing to rely on testimony from people who couldn't plausibly remember what they saw in any kind of detail[], evidence that law enforcement was willing to pressure people and evidence that so many of these people were just plain scared.”¹⁹⁰ The indictment, here, is very clearly about Evans in particular and the process in general.

Baran considers the gun and the confessions similarly. Episode Three, “The Gun,” looks at the murder weapon and how it is potentially traceable to Flowers.¹⁹¹ Here, the punchline again is the process: Baran spends a great deal of time discussing the use of expert ballistics testimony at Flowers' various trials.¹⁹² The ballistics issues in Flowers' case were immediately complicated by the fact that gun was not recovered but was allegedly stolen by Flowers from his step-uncle and used to commit the murders.¹⁹³ At trial, the ballistics expert erroneously and impossibly asserted that he was “100% certain” that the bullet at the crime scene came from a gun traceable to Flowers.¹⁹⁴ Other experts were critical of this level of confidence, saying that even if bullets were recovered in ideal conditions and the expert endorsed the controversial belief that every gun has a unique “fingerprint,” forensic experts could still not make such exclusionary claims with certainty.¹⁹⁵ Here, we actually see

187. *Id.* at 13:25. These factors indicate that the witnesses and Flowers shared a cultural/community context, and their implication of Flowers in the murders is less obviously attributable to racism.

188. *Id.* at 14:50.

189. *Id.* at 24:55 (emphasis added).

190. *Id.* at 51:55. See also Emily Wagster Pettus, *Freed from Prison, Mississippi Man Sues District Attorney*, BLOOMBERG: POLITICS AND EQUALITY (Sep. 3, 2021, 2:50 PM), <https://www.bloomberg.com/news/articles/2021-09-03/freed-from-prison-mississippi-man-sues-district-attorney> [<https://perma.cc/B88G-L223>] (Flowers eventually sued Evans, alleging “Evans and the investigators engaged in misconduct, including ‘pressuring witnesses to fabricate claims about seeing Mr. Flowers in particular locations on the day of the murders’”).

191. See *In the Dark, The Gun*, APM REPORTS, at 02:05 (May 8, 2018), <https://www.apmreports.org/episode/2018/05/08/in-the-dark-s2e3> [<https://perma.cc/4L5Y-AZJW>].

192. See *id.*

193. See Rehman Tungekar, *Could they really match those bullets in the Tardy Furniture case?*, APM REPORTS: POLICING & CRIM. JUST., (May 8, 2018), <https://www.apmreports.org/story/2018/05/08/ballistics-match-bullets-tardy-furniture> [<https://perma.cc/P8FZ-JKUN>].

194. *Id.*

195. See *id.*

a media representation of forensic evidence that is *more moderate* than that presented in the courtroom. And, again, *In the Dark* presents evidence to discuss the process, *not* Flowers' guilt.

Finally, the State presented evidence in the trials that Flowers had confessed to cell mates that he had committed the murders.¹⁹⁶ Baran casts doubt on the chief witness here, investigating just how much undisclosed benefit he received, presumably in exchange for his possibly unreliable testimony.¹⁹⁷

The work for the podcast from there becomes an investigation into just how poorly the criminal legal actions against Flowers were handled. Baran investigates Evans' use of peremptory strikes in jury selection, not just in Flowers' cases, but in his tenure as prosecutor to establish a pattern of discrimination against Black jurors.¹⁹⁸ She investigates Evans' personal history and speaks with him about his continued confidence in Flowers' guilt.¹⁹⁹ She investigates how Evans' investigator tied Flowers to the murders.²⁰⁰ Finally, she investigates the alternate suspect who was never disclosed to the defense—a potential *Brady* violation.²⁰¹

Every single aspect of Baran's investigation is focused on criminal procedure. It would be inaccurate to say that the show is disinterested in guilt and innocence because it is ultimately very interested in *Evans'* guilt in the form of prosecutorial misconduct. Ultimately, the stakes of that, narratively, is to present a meta-analysis of the use of evidence. *In the Dark* does not evaluate evidence for its ability to persuade listeners now, or even for the juries at the time of each of Evans' trials, but instead investigates whether or not it was used properly and accurately. This, we argue, could perform a different pedagogical function from other types of crime media that is, again, quite removed from the determinism of the *CSI* Effect.

In summary, the way that these two shows discuss and present an understanding of evidence is distinct. They are informed by the central question behind each show and the narrative that each show presents. *Serial* presents an articulation of evidence that is fundamentally removed from a court-based understanding as it concerns itself with evidence in search of a more objective or certain truth, asking what type of evidence is persuasive in determining Syed's

196. See *In the Dark, The Confessions*, APM REPORTS, at 04:18 (May 15, 2018), <https://www.apmreports.org/episode/2018/05/15/in-the-dark-s2e4> [<https://perma.cc/QZ8J-ZPTS>].

197. See *id.* at 50:35; see also *In the Dark, Privilege*, APM REPORTS, at 17:40, 27:06, 44:16 (May 22, 2018), <https://www.apmreports.org/episode/2018/05/22/in-the-dark-s2e5> [<https://perma.cc/9STU-CLSF>] (discussing in-depth the investigation of Odell Hallmon).

198. See *In the Dark, The Trials of Curtis Flowers*, APM REPORTS, at 05:26 (June 5, 2018), <https://www.apmreports.org/episode/2018/06/05/in-the-dark-s2e7> [<https://perma.cc/E54T-5MW5>] (exploring the jury in this case); see also *The D.A.*, *supra* note 130 (exploring the pattern in Evans' juries).

199. See *The D.A.*, *supra* note 130.

200. See *In the Dark, Why Curtis?*, APM REPORTS, at 02:32, 14:09, 17:46 (June 19, 2018), <https://www.apmreports.org/episode/2018/06/19/in-the-dark-s2e9> [<https://perma.cc/CP42-339L>].

201. See *In the Dark, Discovery*, APM REPORTS, at 04:00 (June 26, 2018), <https://www.apmreports.org/episode/2018/06/26/in-the-dark-s2e10> [<https://perma.cc/ETA2-URB5>] (explaining that a *Brady* violation, so named for *Brady v. Maryland*, 373 U.S. 83 (1963), occurs when prosecutors do not disclose exculpatory evidence to the defense, specifically any evidence that would be favorable to the accused). In the Flower's case, this potential violation concerns an alternate suspect that was not disclosed to the defense. *Id.*

actual, objective guilt. By contrast, *In the Dark* ultimately remains closer to a court-based understanding of evidence because the central concern is the workings of the court and how a different character, the district attorney Doug Evans, operated within that space. Looking at how the shows present evidence in relation to their respective narrative frameworks allows for a better understanding of the universe of expectations potentially set for societal understandings of the criminal legal system.

C. Understanding Criminal Procedure

We argue that the *CSI Effect* literature fails to consider how media can represent the legal *process*. This is a major part of a juror's interaction with the legal system. Considering not just the *accuracy* of how it's depicted, but the *interest* with which it's depicted could conceivably have an influence on how jurors conceptualize their roles and the system broadly. That is, in this section, we consider how each podcast interacts with a broader cultural understanding that legal procedure is "boring."

In *Serial*, the podcast's positioning of the court process is two-pronged: first, it exists in the background of the story that the show wants to tell and, second, it is framed as "always boring."²⁰² The show is, again, fundamentally a morality tale about whether Syed is guilty and can be found to be guilty through the show's additional investigatory process.

In the Dark, comparatively, tells a story about the process of trial and appeals. Consider the introduction to the podcast where, at the top of each episode in the first half of season two (before Flowers' case was taken up before the Supreme Court), Baran introduced the show as a story about "a Black man [who] has spent twenty-one years fighting for his life and a white prosecutor who has spent that same time trying just as hard to execute him."²⁰³ By framing the story as a contest between Flowers and Evans, we argue that Baran situates the story as one that is fundamentally about the adversarial nature of the courtroom, the process itself, and how that process can create disparate, race-based outcomes.

Episode One of *In the Dark* notes that the number of Flowers' trials is the point of interest. Baran states that what got her attention in Flowers' case was that he had been tried "not once, not twice, but six times" over twenty-one years for the same crime.²⁰⁴ This is a procedural story that is presented with the same interest as the whodunit of *Serial*. *In the Dark* considers the rules—from *Brady* and *Batson* in particular—that determine the interpersonal drama surrounding the story of Evans and Flowers.²⁰⁵ Ultimately, we argue that this affect-based positioning further contributes to societal understandings of the criminal legal system. Therefore, it ought to be considered in theorizing about the potential influence of crime media on the legal process in general and juries in particular.

202. *Episode 8: The Deal with Jay*, *supra* note 143, at 05:50–06:28.

203. *In the Dark, Season Two*, APM REPORTS <https://features.apmreports.org/in-the-dark/season-two/> [<https://perma.cc/5X3R-QA9Z>].

204. *July 16, 1996*, *supra* note 123.

205. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (ruling prosecutors violate the Due Process Clause when withholding evidence favorable to the accused); *Batson v. Kentucky*, 476 U.S. 79, 84, 88 (1986) (determining that the striking of jurors purely on account of race violates the Equal Protection Clause).

D. The End (or Verdict)

The *CSI* Effect literature does not consider the role of narrative in potentially creating audience expectations of the courts. However, crime-based media *as* media employs genre-specific conventions that necessarily differ from a specific, factual, personal experience in a real courtroom. We argue that this matters because an audience expects a story to be a defined, discrete thing unto itself with clear narrative arcs and a resolution. Certainly, some stories break generic conventions. Moreover, as Baran herself points out, investigative journalism is not strictly storytelling in the same way that fictional storytelling is.²⁰⁶ We have argued throughout this paper that both podcasts still rely upon storytelling techniques and tropes—both podcasts are forced to deal with the idea of an ending or resolution that, as in the case of *Serial*, is utterly unavailable to the show. We argue, ultimately, that this dissonance sets up expectations that are uniquely difficult to resolve within the legal process.

Unlike *Serial*, *In the Dark* has an “ending.” The first attempt at an ending occurred as Flowers’ case was anticipating oral argument before the Supreme Court.²⁰⁷ In many ways, this is not particularly satisfying: when the team first concludes their reporting, we do not yet know what happens to Flowers, and thus there is no resolution for our central “character.”²⁰⁸ However, this ambiguity does not leave the narrative argument unfinished or unresolved. As we return to the central point of interest in *In the Dark*—the six trials of Curtis Flowers—we do not ultimately need to know what happens to Flowers in order to understand the central problem being unraveled in the show. Curtis Flowers is a case study of a very particular, very egregious instance of injustice, and that story is satisfyingly told, even as the injustice is ongoing.

Baran is able to populate “The End,” the would-be-final episode of *In the Dark* season two, with a laundry list of how the prosecutor Doug Evans failed—“a prosecutor who violated the U.S. Constitution when he struck Black people from the jury”—and a fulsome story about the consequences of that failure for Curtis Flowers and his parents.²⁰⁹ This temporary finale of *In the Dark* re-emphasizes the interpersonal stakes of the interaction between Evans and Flowers but also situates them in a system and a bigger racial history.

Baran reminds the listener of the specific harms and misfires of Evans’ prosecution: he failed to mention another plausible suspect to the defense, he struck Black people from the juries discriminatorily, he put clearly uncredible witnesses on the stand, he relied on the work of an investigator who did not take detailed notes, he relied on a ballistics expert whose testimony was unsupported by science, and he relied on the testimony of jailhouse informants who have all since said they lied or got undisclosed deals.²¹⁰ Further, she notes that he did all of this in plain sight, in a

206. *S2 Update: Q&A + A Fire in Winona*, *supra* note 131.

207. See *The End, In the Dark*, AM. PUB. MEDIA (July 3, 2018), <https://www.apmreports.org/episode/2018/07/03/in-the-dark-s2e11> [<https://perma.cc/E79H-DR9K>].

208. Given the ongoing litigation in Flowers’s civil suits, his legal matters are arguably still not fully resolved.

209. *The End*, *supra* note 207, at 19:40.

210. *Id.* at 19:40.

death penalty case, “and he’s never gotten in trouble for any of it.”²¹¹ Despite not yet being able to speak to Flowers, this episode also accentuates the impact of the prosecution on the Flowers family: he hasn’t touched his family since his last trial, his mother died and the judge never responded to his request to attend her funeral, and, in the context of unpacking the Flowers’ visits to prison, Baran describes their hypothetical last visit at his execution.²¹² Finally, Baran underscores that the prison where Flowers was incarcerated, Parchman Prison, was explicitly built to house slaves, gesturing toward a historical context of racism in the criminal legal system.²¹³

By contrast, *Serial* struggles substantially with the sense of an ending. In fact, this is the entire plot of the final episode of the first season. Koenig opens the episode with an explicit meta-discussion on whether any satisfying conclusions can be drawn from the information presented throughout the podcast.²¹⁴ To answer that question, Koenig works through the evidence for and against Syed to again determine if there is a definitive answer to Syed’s guilt or innocence. That is not available, and it remains unavailable throughout later updates. The struggle with resolution is particularly troublesome in *Serial* because it breaks expectations both for storytelling and for what the courts can do. While *In the Dark* also breaks expectations for what the courts can do, Baran spends the entirety of the season making the systemic failures the point. When we end with this place of systemic failure in *Serial*, it is not immediately clear what can be done or why it matters.

Ultimately, this sense of an ending, or lack thereof, speaks to the audience’s expectations about storytelling and about their own potential satisfaction. This effect is, we argue, theoretically important for understanding how media can shape expectations. The resolution and narrative satisfaction speak to the ultimate message of the piece and should be considered when evaluating the influence of media on trials.

E. Summary

Both *Serial* and *In the Dark* have a fundamental underlying argument and attendant narrative structure. *Serial* tells a story that is exclusively focused on interrogating the guilt or innocence of the central figure, Adnan Syed. *In the Dark* tells a story that is focused on prosecutorial misconduct and how the system worked against Curtis Flowers as a Black defendant. Interrogating how each story works as a story has allowed us to garner insight into how the shows present evidence, procedure, and resolution (or, as a legal analogy, verdicts).

As we argue, the function of each of these factors is not currently considered in the *CSI* Effect literature. However, understanding the representation of those factors paints a fuller picture of possible cultural expectations about the legal system. This close textual analysis points out how the realities of the legal system can butt up against genre conventions and expectations for storytelling. The storytelling choices made in each of the podcasts, including what they foregrounded as the driving message of each piece, further influence how accurate and inaccurate

211. *Id.* at 20:43.

212. *Id.* at 31:14.

213. *See id.* at 28:43.

214. *Episode 12: What We Know*, *supra* note 134, at 01:43–02:50.

expectations can function. That is, we look beyond whether evidence is presented accurately and interrogate its functioning within the story and how that functioning can influence expectations.

VI. THE SERIAL EFFECT

The outcome of the careful analysis conducted in this article is to consider and conceptualize a new domain of media and its potential impacts on cultural expectations, and in turn, criminal juries. In this section, we briefly describe other usages of the term *Serial Effect* before succinctly re-defining the effect and its importance. We follow this with a call for empirical research to test the impacts of the *Serial Effect* on criminal proceedings and layperson expectations.

A. Previous Uses of the Term “Serial Effect”

This article is not the first to use the term “*Serial Effect*.” In 2016, Nancy Vogt coined the term to describe the expansion in true crime podcasts, arguing that such an effect may have encouraged the creation and expansion of podcasts broadly.²¹⁵ Vogt’s use of the term was later cited in some recent academic articles, again referring structural elements of the true crime podcast ecosystem and the increased popularity of podcasting, and true crime podcasting specifically.²¹⁶ We certainly see the usefulness of using the term “*Serial Effect*” to describe the popularity-driving force of the *Serial* podcast, but here we advocate for a different use of the terminology to complement the existing *CSI Effect* instead. The term *Serial Effect* has substantial analytic leverage when conceptualized as a variation and extension of the *CSI Effect*, giving us leverage to name and investigate a new potentially impactful phenomenon for American culture and American juries. Therefore, we advocate for the use of this terminology to spur research into this area in a way that is compatible with terminology already used in this field of legal and criminological scholarship and also in public consciousness.

B. Defining the Serial Effect

The *Serial Effect* is a new media-induced effect that stems from the unique features of the true crime podcast and the unique social positioning of those podcasts as true. In this way, the novel features of podcast media combine with a search for truth not found in other media types.²¹⁷ The *Serial Effect* hinges on narrative construction and storytelling found in true crime podcasts. Because of this, true crime podcasts should not be reduced to a monolith. Instead, we find that they can operate on a spectrum, with very different concerns at their core. This difference is made abundantly clear by comparing *Serial* itself to *In the Dark*.

We further define the *Serial Effect* as having four key domains: focusing on guilt versus innocence, engaging with various types of evidence, understanding criminal procedure, and dealing with the resolutions of cases. In its treatment of these domains, the *Serial Effect* adds new dimensions to expectations of law and criminal

215. NANCY VOGT, *Podcasting Fact Sheet*, in STATE OF THE NEWS MEDIA 2016 61, 66 (2016).

216. Sherrill, *supra* note 75, at 1473.

217. See SPINELLI & DANN, *supra* note 73, at 7–8.

proceedings beyond what the *CSI* Effect is capable of. True crime podcasts prove variable in their emphasis on guilt versus innocence, sometimes focusing on it disproportionately (e.g., *Serial*) and sometimes hardly focusing on it at all (e.g., *In the Dark*). True crime podcasts are not restricted only to forensic evidence, nor do they exist in a fictional world devoid of the realities of criminal procedure, nor can they resolve themselves in the same way as long-form fiction at the end of the hour. While these factors significantly complicate analysis of these podcasts, they also significantly expand the potential impact of true crime podcasts. Consistent with this assertion, our data shows that interest in the criminal cases featured on true crime podcasts persists after the podcast version of the story is finished.²¹⁸ Therefore, we contend that the *Serial* Effect is a dynamic new type of media effect that is more far reaching than the *CSI* Effect.

C. Future Work on the Serial Effect

The only way to know with certainty how the popularity of true crime podcasts may affect court proceedings is to do further research. There are a variety of ways of accomplishing such an analysis, and we suggest that research be undertaken both inside and outside of the courtroom. Previous work on the *CSI* Effect provides a ready template for some of these analyses, but we encourage scholars to take additional creative approaches to this research. This article and its contemporaries demonstrate the value of content analysis within the world of the podcasts, which should be expanded to further distinguish types of true crime podcasts and their positioning on the spectrum of guilt and innocence and the three dimensions described here. Considerable efforts should also be made to conduct analysis of potential changes in cultural perception both inside and outside the courtroom, leveraging innovative survey and simulation techniques. Finally, attention should also be paid to strategies undertaken by court actors in combatting the *Serial* Effect, which, as the *CSI* Effect indicates, may be unrelated to the nature of the effect itself.

CONCLUSION

This article analyzes a new type of media-derived effect that may have substantial impacts on cultural expectations of the criminal legal system. Beginning with a look at the role of American juries and the impact of the *CSI* Effect, we engage with the known field of work connecting crime media consumption to expectations in criminal law. We extend this work by joining a small number of scholars in investigating the yet unexplored terrain of new true crime podcast media, differentiating it from its predecessors in ways that have the potential to affect criminal proceedings and legal expectations or jurors and other courtroom actors. We then define the *Serial* Effect and its dimensions by employing a detailed content analysis of two of legal cases featured in popular true crime podcasts—cases that ascended all the way to the Supreme Court. We conclude that these podcasts operate differently than other forms of true crime media but also differently from each other in their respective focus on guilt versus innocence and general narrative structure.

218. See *supra* Figures 1–4.

We then explicate three tenants of the *Serial* Effect, including dealing with different types of evidence, understandings of criminal procedure, and how they deal with case resolutions. We conclude by calling for increased research into this uncharted terrain.

As the popularity of true crime podcasts grows, and the number of available podcasts increases, consumption of this media genre may have effects on the criminal justice system—effects that demand our attention. Just as *Serial* and *In the Dark* provided opportunities for listeners to learn about the cases at issue, the podcasts broadly provide an opportunity for society to learn about the effects of media on their own expectations of the criminal justice system.