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'Serial' should release Bergdahl interviews: Column

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Courts need to ensure access to evidence as the media trend toward true-crime shows builds.



(Photo: Andrew Craft, AP)

A high-stakes showdown unfolding in the courts pits military prosecutors against the American media. Prosecutors recently subpoenaed uncut interviews Army Sgt. Bowe Bergdahl gave to a filmmaker that form the basis for the second season of the *Serial* podcast. Bergdahl could be sentenced to life for allegedly deserting his Afghanistan post.

A media “dream team (https://www.washingtonpost.com/lifestyle/style/why-bowe-bergdahls-serial-interviews-should-be-off-limits-in-his-court-martial/2016/08/14/c042c47a-5e45-11e6-af8e-54aa2e849447_story.html)” — including organizations from Fox to NPR — has intervened. These organizations want a court to rule that reporter’s privilege blocks disclosure of the unused interview material, even though the source (Bergdahl) is

no secret. While it is nice to see NPR and Fox getting along, the public loses if the dream team gets its way. The special protection the media seek is incompatible with the new breed of true-crime entertainment it would shield.

Producers recently discovered that the justice system is the ultimate reality show. As of 2013, there are more than 14,000 killings (https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls) each year in the United States. These largely untold tragedies involve proven ratings boosters: violence and loss, heroes and villains, surprise and mystery. And they are all true. Drama does not need to be contrived around a fleeting romance, novice chefs, or who gets voted off an island. In courtrooms across the country, people are wrongly convicted, let off for heinous crimes, and everything in between. Tune in, pick your side, and root for justice.

The most prominent example of this new media phenomenon is the first season of *Serial*. Millions downloaded the 12-episode podcast (<https://serialpodcast.org/season-one>). The show made reporter Sarah Koenig famous and led to a court ruling tossing out the murder conviction of its protagonist, Adnan Syed.

Other shows followed suit. A judge recently threw out a conviction (<http://www.vanityfair.com/hollywood/2016/08/making-a-murderer-brendan-dassey-conviction-overturned>) profiled in the Netflix hit *Making a Murderer*. California is prosecuting Robert Durst of HBO’s *The Jinx* in a 16-year-old killing (<http://www.nytimes.com/2015/03/16/nyregion/robert-durst-subject-of-hbo-documentary-on-unsolved-killings-is-arrested.html>). The shows concluded to great popular acclaim. The underlying real-life dramas continue.

Part of the first *Serial*’s appeal was that the facts were murky. Is Syed really innocent? *Serial* doesn’t know or won’t tell. One week, it planned to test new evidence for DNA; subsequent episodes never mention any results. In another episode, Koenig discussed (<http://www.vocativ.com/culture/media/serial-podcast-finale/>) rumors, including a “story so incriminating that we thought, if this one is true, we’re done. Our story is over, and we can go home.” No further details emerge except that Koenig says she couldn’t corroborate the story so she crossed it off her list.

Popular media’s interest in criminal justice is welcome. The system needs all the help it can get. But the new strain of reporters who mine the criminal justice system for stories should be accountable to the public, just like the prosecutors and courts they profile. When reporters uncover information in a serious criminal case, the public’s right to know — including access to information the show did not broadcast — trumps a show’s desire to control the narrative.

The general legal principle (http://ilj.law.indiana.edu/articles/82/82_2_Porter.pdf), famously deployed during Watergate against President Nixon, is that “the public ... has a right to every man’s evidence.” To block disclosure in the Bergdahl case, the media dream team argues to the contrary (<https://pmcdeadline2.files.wordpress.com/2016/07/amici-curiae-brief.pdf>): that the public is only entitled to the information producers choose to give them. The media must “select among all of the material gathered through their reporting and make choices regarding what portions of that material will be disseminated and what portions will remain unpublished.”

POLICING THE USA: A look at race, justice, media (<http://preview.usatoday.com/policing/>)

Further, they contend, compelling a journalist to disclose unpublished material “will negatively affect his or her ability to report future news stories, and the public’s corresponding ability to receive information.” That’s hard to swallow because people talk to reporters for the very purpose of communicating information to the public. If sources are counting on only selective disclosure of what they say, the public may be better off not hearing from them at all.

That doesn’t mean a broad reporter’s privilege wouldn’t be a neat tool for reporters — or any other group. Nixon thought his monopoly on evidence was in the public’s interest. Prosecutors sometimes think the same thing. It is a natural inclination to ask everyone else to trust you, and it is almost always wrong. As the dream-team’s position reveals, the media are not immune from the “trust me” delusion. One hopes they reconsider. If not, viewers should keep the media’s non-disclosure position in mind as they watch future shows.

Nobody tunes in to 12 episodes to learn how the system got it right. These shows generate buzz when the convicted defendant might be innocent, the unprosecuted millionaire guilty. It’s a great mix of journalism and entertainment. But that mix is incompatible with a “reporter’s privilege” that blocks public access to the material that gets left on the cutting room floor.

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