

RACHEL FRANKS

State Library of New South Wales; The University of Sydney

KIM D. WEINERT

Bond University

Habeas Corpus: the wrongful imprisonment of Steven Avery

ABSTRACT

The politics of the body have been debated at length; ideas of moral and natural rights to protect individual autonomy have been presented in the context of class, gender and race for centuries. Such sovereignty has been entrenched in law through the recourse of habeas corpus: the right of redress for unlawful detention or imprisonment before a court. This paper looks at habeas corpus through the lens of the recent ten-part documentary, Making a Murderer (2015), created by Laura Ricciardi and Moira Demos, and streamed on Netflix. This web-television series unpacks the wrongful imprisonment of Steven A. Avery (who served eighteen years for rape), and posits the recent imprisonments of Avery and his nephew Brendan Dassey, both serving life sentences for murder, are also wrongful. This paper also provides a brief overview of the history of the writ of habeas corpus and offers an outline for the continuing importance – within the justice system and within popular culture – of this legal right.

KEYWORDS

Steven Avery
Habeas
Corpus
Imprisonment
Making a
Murderer
Social media
Television

INTRODUCTION

The politics of the body have been debated at great length; lawyers, philosophers, politicians and sociologists often jostling for position around ideas of moral and natural rights to protect individual autonomy. These arguments have been presented in the context of class, gender and race for centuries and remain relevant today. To facilitate a structure that provides minimum protection for individuals, the notion of the sanctity of life and the human body has been entrenched in law through the recourse of habeas corpus: the right of redress, for

unlawful detention or imprisonment, before a court (Halliday 2012: 9-95). This paper looks at habeas corpus (a writ traditionally discussed in legal texts rather than within popular publishing) through the lens of the recent ten-part documentary series, *Making a Murderer* (2015), created by Laura Ricciardi and Moira Demos, and streamed on Netflix. This web-television docu-series unpacks the wrongful imprisonment of Steven A. Avery (who served eighteen years for rape), and posits the recent imprisonments of Avery, and his nephew Brendan Dassey (both currently serving life for murder¹), are also wrongful. This paper explores issues of the body, focusing on the removal of the body from the home for the purposes of detention. In addition, this paper looks briefly at the virtual community created after *Making a Murderer* became available. A community of diverse individuals who appreciate and understand a popular conception of habeas corpus, that have come together on a variety of social media platforms to support the incarcerated and to demand legal reform.

STEVEN AVERY: A WRONGFUL IMPRISONMENT

The 10-part web-television series, *Making A Murderer* (of which all episodes were available for streaming, in the United States, on 18 December 2015), follows the story of Steven A. Avery, of Manitowoc County, Wisconsin. The first episode relates the circumstances around Avery's wrongful conviction of rape and attempted murder in the mid-1980s. The conviction, of these crimes against Penny Beernsten, was handed down in 1985. Despite Avery's continued claims of innocence, the bringing forward of sixteen alibi witnesses ('What Happened to Steven Avery'), and significant flaws in the case brought against him, Avery served "18 years in prison before being exonerated in 2003 by new DNA evidence" (Carrejo 2015). This freedom was the result of work undertaken by the Wisconsin Innocence Project, a non-profit organisation which "seeks to exonerate the innocent, educate students, and reform the criminal justice system by identifying and remedying the causes of wrongful convictions" ('About the Wisconsin Innocence Project' 2016).

The documentary details a series of comparatively minor criminal offences committed by Avery (to which Avery readily admits his guilt) and how these offences generated conflict between Avery and local law enforcement agencies. The case brought against Avery in 1985 was tenuous and complicated by claims that the victim was led by those constructing the charges, as outlined in Michael Griesbach's work *The Innocent Killer: A True Story of*

¹ At the time of writing both the case against Steven Avery and the case against Brendan Dassey were subject to significant, ongoing, developments (Keating 2016).

Wrongful Conviction and its Astonishing Aftermath (2014).

Reinforcing the idea that the Manitowoc Sheriff's Department was fixated on convicting Avery of this crime, instead of bringing the actual offender to account, is evidence that while Avery languished in prison another man confessed to the crime in question. In 1995, Gregory Allen, the man who did assault Beersten, provided a confession to law enforcers. This confession was reported to Officer Coburn, of Manitowoc Sheriff's Department, by telephone: a formal report of this call was not made by Coburn until the day *after* Avery was released from prison, *eight years later*, in September 2003.

Just two years after Avery's release, Avery and his 16-year-old nephew Brendan Dassey were arrested and charged with the murder of 25-year-old Teresa Halbach (Carrejo 2015). These charges were brought forward in the midst of Avery's "\$36 million lawsuit against Manitowoc County officials over his false conviction" (Shattuck 2015). *Making a Murderer* explores the various, significant, flaws in the way the Avery and Dassey had their properties searched and were interviewed, respectively, issues with evidence brought against both men and the way in which the two men were tried. Avery would subsequently settle his claim against the County for \$400,000 in an effort to raise funds for his defence against the criminal charges associated with Halbach's murder (Shattuck 2015). Allegations against law enforcement agencies of incompetence, as well as various conspiracy theories asserting these agencies were pursuing a vendetta against Avery, surround the case.

HABEAS CORPUS: AN OVERVIEW

Holding a person, incarcerating them, for a crime which they are known not to have perpetrated highlights the grossly unlawful detention of Avery in the 1980s. Through a blatant failure to acknowledge, and appropriately report, a confession received, Avery – having spent a decade in prison – would spend another eight years behind bars being punished for a crime he did not commit. In reflecting here, on the removal of the body from the home for the purposes of detention, the legal notion of habeas corpus is a critical consideration. The term habeas corpus comes from habeas corpus ad subjiciendum, literally "you may have the body subject to examination" ('Safeguarding Civil Liberties' n.d.), it is essentially a writ that facilitates the petition of unlawful incarceration. Summarised briefly (in the context of Steven Avery):

Habeas corpus is a kind of petition that you can file in federal court to claim that your imprisonment violates federal law. Whether you are a state or federal prisoner, a federal habeas petition claims that your imprisonment is illegal

because your arrest, trial, or sentence violated federal law. This would be true if any aspect of your arrest, trial, or actual sentence violated a federal statute, treaty, or the US Constitution. (Columbia Human Rights Law Review 2011: 220)

The writ of habeas corpus has its origins in British common law, and predates the Magna Carta (1215), the modern form of the writ enacted into law with the Habeas Corpus Act 1679. Paul D. Halliday, in his extensive history of the writ, *Habeas Corpus: From England to Empire* (2012), notes its accessibility and its reliability. “More than 11,000 prisoners or detainees of other kinds used habeas corpus between 1500 and 1800. Across three centuries, 53% of all those who used the writ were released” (322). Halliday goes on to note that the actual success rate of those presenting habeas corpus would have been much higher as a result of variable standards of record keeping and that “sailors were simply dismissed from service without contest” (322).

These rights are, today, assured in numerous legal systems, including the jurisdictions that cover Steven Avery and Brendan Dassey as habeas rights are enshrined within the US Constitution (‘Magna Carta’ 2014-15). Additionally, it is important to note that the traditional purpose of habeas corpus is elemental but powerful: to allow a judge to review the legality of a prisoner’s detention (Garrett 2012: 57-8). Avery has had his liberty of “unimpeded movement, or corporeal freedom” (Kristjánsson 2007: 17) denied by, at best, incompetence and, at worst, by a conspiracy to obtain a conviction.

The notion of habeas corpus, unlike many laws which evolve in line with changing societies, is quite stable. US Justice William J. Brennan observing that the “standards of due process have evolved over the centuries. But the nature and purpose of habeas corpus have remained remarkably constant” (in Garrett 2012: 48). Such consistency in application and understanding of habeas corpus, it is argued here, reinforces the fundamental right that all citizens have in not being subjected to unfair, and unlawful, imprisonment.

HABEAS CORPUS: IN POPULAR CULTURE

In the wake of the release of *Making a Murderer* a virtual community has been created: bodies that have come together on a variety of social media platforms to support the incarcerated and to demand legal reform. Though the term habeas corpus was not in regular use upon these platforms, the essence of the writ and a popular appreciation of the illegal and immoral nature of holding an innocent man was clear. “With its twists and turns, the 10-part Netflix series has become an obsession for many” (Cable News Network [CNN] 2015),

including celebrities Alec Baldwin (Cobb 2015), Mia Farrow, Ricky Gervais, Emmy Rossum and Wil Wheaton (Jacobsen 2015). This, the authors suggest here, is a reflection of a popular conception of habeas corpus. That is people, even without any formal legal training or even any structured knowledge of the law, have an instinct for this writ and understand the unlawfulness of wrongful imprisonment.

In addition to people discussing, and attempting to solve, the case on sites such as reddit.com, one of the most visible outcomes of this virtual community is the development, posting and participation in three online petitions in support of Avery and Dassey. Cate Carrejo has noted how quickly the case, via the Netflix documentary, has “captured the attention of the nation and enraged social justice advocates who blame a corrupt criminal justice system” (2015) who believe in the wrongful incarceration of both Avery and Dassey. Within three weeks of the *Making a Murderer* series being available to stream, these online petitions calling for action – for Avery, for Dassey and another for Avery and Dassey – garnered hundreds of thousands of signatures (Donnelly 2016) (at the time of writing, there were over 750,000 signatures across the three petitions; when Donnelly first wrote about these petitions there were almost 90,000 signatures over the three).

Generating particular excitement, for some, in the online space are the announcements from the “multiple people on Twitter, claiming to be a part of Anonymous, [who] have made it their mission to prove the innocence of Avery and Dassey” (Cable News Network 2015). The genuine nature of these claims, and the impact of any additional evidence released, is yet to be proven. In connection to the idea of additional evidence, one of Avery’s attorney’s (representing Avery throughout the series), Dean Strang, has said, in an interview, that he believes Avery now relies upon “new evidence” that would require “someone coming forward, someone admitting something, someone revealing a secret they’ve been carrying that would point in another direction or an advance in scientific testing” (in Harris 2015). In direct comment on the social media storm Strang has said:

For example, during the Avery trial — the run-up and the seven weeks of the trial — we got all kinds of hate mail, threats. If you read the comments posted on newspaper websites, it was all vitriol, overwhelmingly directed at us, our client and his family. Now, for the last six days, it’s been exactly the opposite, sort of an onslaught of encomiums, warm wishes. A lot of it is literate and thoughtful and all that, but both of those experiences are artificial and distorting. Neither of them represent any particular reality other than what’s going on in fevered social media at the moment among a self-selected portion of the population. You really can’t set your bearings to that at any time. (in Joyce 2015)

Jerry Buting, another of Avery's lawyers (representing Avery, alongside Strang, throughout the series), is, perhaps, more encouraged by the development of an online community of support, for both Avery and Dassey, than Strang. This is reflected in activity on Buting's own Twitter account, @JButing. Having not Tweeted, since July 2014, he has offered regular Tweets since *Making a Murderer* was made available. These brief messages thank the community for engaging in a dialogue about the case and for suggesting ideas that might contribute to a different outcome for the two men incarcerated for the murder of Teresa Halbach. Buting is also maintaining pressure on "disgraced prosecutor Kratz" (2 Jan. 2016, 2:46 AM) asserting "Kratz wasn't even honest in his own Supreme Court discipline case" (2 Jan. 2016, 3:05 AM), offering references to support these claims through the microblogging site.

There is also an official *Making a Murderer* Twitter account, @MakingAMurderer, promoting the series, re-Tweeting endorsements and highlighting important aspects of the cases such as "Chief Deputy Kusche's sketch looked like Steven Avery – not Beersten's description of her attacker" (21 Dec. 2015, 8:30 AM) and key quotes from the narrative such as Stephen Glynn, Avery's civil rights lawyer saying "this is as close to a conspiracy of silence as I think you could find in a case" (30 Dec. 2015, 8:00 AM) and Ressa Evans, Avery's public defender's assertion that "this was one of the biggest miscarriages of justice I ever saw in 20 years" (31 Dec. 2015, 12:25 PM).

Attracting considerable attention on Twitter – amidst complaints of sleep deprivation due to 'binge' watching all episodes in one or two sessions, are threats to never set foot in the state of Wisconsin and a vast array of insults directed at those responsible for Avery's and Dassey's incarceration – is the content of a telephone call, in relation to Dassey's various confessions, made by Dassey to his mother while in gaol. Dassey, with an IQ of only 73, tells his mother his statements to police were described as "inconsistent", he asks her what inconsistent means. She is unable to answer the question (Episode 4).

Reactions to this episode were quickly revealed on Twitter:

"How can a 16 yr old be questioned like this with no parent/lawyer present? He doesn't even know what "inconsistent" means. #MakingAMurderer" (@MandasaurusRexx 30 Dec. 2015, 9:53 AM).

"Listening to Brendan talk to his mom from jail is heartbreaking. 'What does inconsistent mean?' #MakingAMurderer" (@joeyohern 29 Dec. 2015, 4:13 PM).

"A kid who doesn't understand the word 'inconsistent' is sophisticated enough to pull off a murder w/o blood or DNA? Right. #MakingAMurderer" (@justlikeliz 3 Jan. 2016, 2.49 AM).

This outrage – a popular culture expression for a foundation stone of our contemporary justice system – reinforces the argument for the continued relevancy of habeas corpus.

CONCLUSION

This paper has highlighted the politics of the body and how protection of the individual body has entrenched in law through the recourse of habeas corpus: the right of redress for unlawful detention or imprisonment before a court. This paper viewed habeas corpus through a brief case study of the recent ten-part documentary, *Making a Murderer* (2015), created by Laura Ricciardi and Moira Demos, and streamed on Netflix (for which a follow-up series was announced in mid-2016). In looking at both legal and popular reactions to the wrongful imprisonment of Steven A. Avery and the questionable imprisonments of Steven Avery and his nephew Brendan Dassey (both currently serving life for murder) which have been posited as also being unlawful, this paper has demonstrated the continuing relevance of the writ of habeas corpus.

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CONTRIBUTOR DETAILS

Rachel Franks is the Coordinator, Education & Scholarship, at the State Library of New South Wales, a Conjoint Fellow at the University of Newcastle, Australia and is at The University of Sydney researching true crime. Rachel holds a PhD in Australian crime fiction and her research in the fields of crime fiction, true crime, food studies and information science has been presented at numerous conferences. An award-winning writer, her work can be found in a wide variety of books, journals and magazines.

Contact: rachel.franks@sl.nsw.gov.au

Kim Weinert BComm (Griffith), JD (Bond), DipLegalPrac (Bond), LLM (Research) (Bond) is a Senior Teaching Fellow with the Faculty of Law at Bond University. Kim's research is primarily concerned with the governance of not-for-profit organizations and how the law deals with individuals that are responsible for mismanaging not-for-profit organizations.

Contact: kweinert@bond.edu.au

SUGGESTED CITATION

Franks, R. and K.D. Weinert (2016) 'Habeas Corpus: The Wrongful Imprisonment of Steven Avery', *Peer Reviewed Proceedings of the 7th Annual Conference Popular Culture Association of Australia and New Zealand (PopCAANZ)*, Sydney, Australia, 29 June–1 July, 2016, P. Mountfort (ed), Sydney: PopCAANZ, pp. 11-20. Available from <http://popcaanz.com/conference-proceedings-2016/>.