

# IMPACT OF TELEVISION ON CROSS-EXAMINATION AND JUROR “TRUTH”

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## INTRODUCTION

Research demonstrates that jurors assess evidence and determine verdicts on the basis of stories, i.e., they assess truth in terms of the basic stories with which they are familiar.<sup>1</sup> Consequently, cross-examination’s parameters and abilities must be considered within this context. In contemporary society, television is our primary storyteller: its stories, along with their component plots and stock characters, tell us how things work, define our culture’s morals, and provide a framework for interpreting events. This power also extends to the legal realm, for though few people have ever entered a courtroom, millions have seen one on TV.<sup>2</sup> Consequently, television’s legal narratives can cultivate assumptions and expectations about law.

Referencing original empirical research regarding the influence of television representations of law—such as those of *Judge Judy*, *CSI*, and *Law & Order*—this paper explores the way in which television contributes to the stories that jurors use in structuring their determinations of “truth,” as reflected in their verdicts. With this as a base, the paper discusses how televisual media will increasingly influence trials and, as a result, cross-examination. Consequently, in conducting cross-examination, attorneys will be obliged to acknowledge certain proven influences that television has on viewers while eschewing unsubstantiated mythologies about television’s influences.

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1. Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 J. EXPERIMENTAL PSYCHOL. 521 (1988). See *infra* part II.

2. Kimberlianne Podlas, *Please Adjust Your Signal: How Television’s Syndicated Courtrooms Bias Our Juror Citizenry*, 39 AM. BUS. L.J. 1, 5-6 (2001) [hereinafter Podlas, *Please Adjust*]; Michael Asimov, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 531, 552 (2000).

## I. THE POTENTIAL OF CROSS-EXAMINATION

Although this symposium questions whether cross-examination remains “the greatest legal engine ever invented for the discovery of truth,”<sup>3</sup> the symposium’s participants address this issue in different ways. This paper does not interpret the question literally and, in fact, cautions that cross-examination’s potential for discovering truth should not be confused with a burden to do so. Such an interpretation romanticizes cross-examination as able to correct any mistakes at trial<sup>4</sup> and evokes images of righteous advocates using superb cross-examination skills to uncover the truth.<sup>5</sup> In any event, truth is an impossibility.<sup>6</sup> Actual truth cannot be the point of trial,<sup>7</sup> let alone of cross-examination, for the collision of adversarial interests prevents a trier of fact from ever knowing the truth in the literal sense.<sup>8</sup> At best, truth is nothing more than what the trier of fact thinks happened,<sup>9</sup> and findings of fact are educated guesses about the competing stories and the underlying facts that seem reasonably proven.<sup>10</sup>

Consequently, this paper does not contemplate cross-examination in terms of a truth-seeking function. Rather, it likens a verdict to the jury’s version of truth, and recognizes cross-examination’s contribution to that verdict. Indeed, when combined with the “free narrative” of an opening statement, cross-

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3. 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 1367 (3d ed. 1940).

4. ROBERT E. GOLDMAN, THE MODERN ART OF CROSS-EXAMINATION xix (1993) (cross examination considered magic bullet).

5. Keith D. Kilback & Michael D. Tochor, *Searching for Truth But Missing the Point*, 40 ALBERTA L. REV. 333, 334 (2002).

6. *Id.*; see also RALPH ADAM FINE, THE “HOW-TO-WIN” TRIAL MANUAL 3 (1998) (no verifiable truth).

7. Kilback & Tochor, *supra* note 5, at 337 (concept of truth is unfounded); *id.* at 335 (trial determines whether an allegation has been proven according to a particular standard); *id.* at 334; but see *Estes v. Texas*, 381 U.S. 532, 551 (1965) (trial is a “sober search for the truth”).

If truth of actual innocence or non-responsibility were known, the case would have no basis to proceed to trial; if actual guilt or responsibility were known, a settlement, plea, or some other alternate disposition would be entered—again, avoiding trial. FINE, *supra* note 6, at 3.

8. Kilback & Tochor, *supra* note 5, at 334.

9. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 15 (1950).

10. *Id.* at 16.

Any correlation between testimony and truth is merely a convenient accident. Kilback & Tochor, *supra* note 5, at 341; THOMAS A. MAUET, TRIAL TECHNIQUES 23 (5th ed. 2000).

examination can make the case.<sup>11</sup> Hence, cross-examination is a prophylactic that can secure "the correctness and completeness" of testimony.<sup>12</sup> As a defensive mechanism, cross-examination can reveal the biases,<sup>13</sup> distortions,<sup>14</sup> and "falsehoods of mendacious witnesses,"<sup>15</sup> as well as mistakes and failures of perception: "In every trial, some of the witnesses forget, make mistakes about, reinterpret, shade, and prevaricate the truth. If they didn't, there would be no trials."<sup>16</sup> It can also minimize unfavorable direct testimony.<sup>17</sup> As an offensive mechanism, cross-examination can elicit evidence favorable to one's case<sup>18</sup> and facts supporting one's version of events.<sup>19</sup> Consequently, cross-examination can be the lynchpin of the case<sup>20</sup> by proffering one's version of the truth. Therefore, this article preferences these functions in considering the influence of televisual media on cross-examination. Because these are measured in relation to verdicts, it is critical to understand how jurors make the decisions that culminate in a verdict.

## II. THE POWER OF STORIES IN JUROR DECISION-MAKING

A verdict represents the jury's version of the truth (albeit "truth" within the parameters of the burden of proof). The discovery of that truth is a function of the way that jurors make decisions. Stories are critical to that process.<sup>21</sup> Indeed, narrative is a natural way of thinking:<sup>22</sup> to understand new events, we

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11. Robert P. Burns, *A Response to Four Readings of A Theory of the Trial*, 28 LAW & SOC. INQUIRY 553, 563 (2003).

12. 2 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE ch. 9 (London, C.H. Reynell 1827); see also 3 *id.* ch. 20.

13. MAUET, *supra* note 10, at 273 (impeaching witness to show s/he cannot be believed, to show bias, or bad character).

14. LARRY S. POZNER & ROBERT J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES § 1.02 (2d ed. 2004); MAUET, *supra* note 10, at 273.

15. J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. Rev. 741, 765 (1988).

16. Tom Singer, *To Tell the Truth, Memory Isn't That Good*, 63 Mont. L. Rev. 337, 340 (2002).

17. JAMES W. MCELHANEY, EFFECTIVE LITIGATION: TRIALS, PROBLEMS AND MATERIALS 24 (1974) (minimize bad evidence from direct testimony); cf. POZNER & DODD, *supra* note 14, at § 1.05 (method of damage control).

18. MCELHANEY, *supra* note 17, at 24; POZNER & DODD, *supra* note 14, at § 1.05.

19. See 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1395 (1974).

20. Burns, *supra* note 11, at 563.

21. Richard L. Wiener et al., *The Psychology of Telling Murder Stories: Do We Think in Scripts, Exemplars, or Prototypes?*, 20 BEHAV. SCI. & L. 119, 120 (2002) (story construction plays a central role in jury decision-making).

22. NORMAN J. FINKEL, COMMONSENSE JUSTICE 69 (1995).

As contrasted against rhetoric, narrative corresponds more closely to the way in which people make sense of experience. Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989).

reference the plot-lines and structures of familiar stories<sup>23</sup> and adapt them to the new circumstances.<sup>24</sup> Research shows that jurors rely on stories to assess and understand evidence, and therefore to determine their verdicts.<sup>25</sup> This “story model” is the “dominant model of juror decision-making.”<sup>26</sup>

According to the story model, jurors understand evidence as a narrative.<sup>27</sup> Jurors reference stories with which they are familiar<sup>28</sup> about similar events<sup>29</sup> in order to reconstruct evidentiary information into a story.<sup>30</sup> In doing so, they draw on familiar plots, common patterns, stock characters, and stereotypic images.<sup>31</sup> The resulting narrative is typically linear with causal relationships<sup>32</sup> and intentional actions<sup>33</sup> reflecting *mens rea* and elements of foreseeability.

Jurors then assess the strength of trial evidence—be it gleaned from direct- or cross-examination—according to whether it fits into the emerging narrative.<sup>34</sup> Ultimately, the story that the jurors adopt must be able to explain

23. *Id.* at 2230 (claiming that the process of human coherence-seeking rituals superimposes narrative structure on life events); see also JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS: CULTIVATION THEORY AND RESEARCH 192-93 (1999) (thinking is essentially narrative in nature).

24. Wiener, *supra* note 21, at 120; FINKEL, *supra* note 22, at 65-66; see also RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 5-6, 8 (2000); SHANAHAN & MORGAN, *supra* note 23, at 193 (stories help us understand the world).

25. Pennington & Hastie, *supra* note 1, at 522.

26. Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL.: APPLIED 91 (2001).

27. Pennington & Hastie, *supra* note 1, at 522 (jurors impose on the evidence a narrative structure).

28. Nancy Pennington & Reid Hastie, *Explaining The Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCH. 189, 190 (1992) [hereinafter Pennington & Hastie, *Tests*].

29. *Id.*; Pennington & Hastie, *supra* note 1, at 521.

These stories may also be constructed from personal experience. Jill E. Huntley & Mark Costanzo, *Sexual Harassment Stories: Testing a Mediated Model of Juror Decision-Making in Civil Litigation*, 27 LAW & HUM. BEHAV. 29, 29 (2003).

30. Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCH. 242 (1986) [hereinafter Pennington & Hastie, *Evidence Evaluation*]; Wiener, *supra* note 21, at 122.

31. SHERWIN, *supra* note 24, at 24, 167; see also FINKEL, *supra* note 22, at 69 (“[S]tory construction . . . lies much closer to the essence of social being . . . . Our norms, imperatives, and moral rules may take form of ‘social representations.’”).

32. Pennington & Hastie, *supra* note 1, at 521.

In explanation-based models of decision-making, individuals construct a causal model to explain available facts. Pennington & Hastie, *Tests*, *supra* note 28, at 189.

33. Pennington & Hastie, *Tests*, *supra* note 28, at 190 (typically, a narrative or story is exemplified by a causal chain of events); Wiener, *supra* note 21, at 122.

34. See SHERWIN, *supra* note 24, at 24; FINKEL, *supra* note 22, at 65 (describing research that jurors transform evidence into stories).

what happened,<sup>35</sup> i.e., it must account for the trial evidence,<sup>36</sup> be consistent, and be plausible.<sup>37</sup> The verdict<sup>38</sup> reflects the most coherent, acceptable story.<sup>39</sup> Functionally, this is the jury's truth.

### III. THE DEFICIENCIES OF STORY-BASED DECISION-MAKING

Because stories help juries deal with large amounts of information,<sup>40</sup> organize events,<sup>41</sup> and prompt inferences,<sup>42</sup> they are invaluable to verdictal decision-making. Notwithstanding narrative's benefits to jury decision-making, however, it can distort the interpretation of and impede the accurate assessment of trial evidence.<sup>43</sup> Experiments show that the first evidence or argument presented to a jury yields the greatest influence<sup>44</sup> on both its interpretation of evidence<sup>45</sup> and which story it deems most believable.<sup>46</sup> For

A narrative is an ordered set of images and sounds that make up a story. See RICHARD A. POSNER, *LAW & LITERATURE* 346, 348 (1998); see also DAVID A. BLACK, *LAW IN FILM: RESONANCE AND REPRESENTATION* 100 (1999).

35. Pennington & Hastie, *Evidence Evaluation*, *supra* note 30, at 242; SHERWIN, *supra* note 24, at 24; FINKEL, *supra* note 22, at 67; Pennington & Hastie, *Tests*, *supra* note 28, at 189.

36. This is referred to as "coverage." Huntley & Costanzo, *supra* note 29, at 31; Pennington & Hastie, *Tests*, *supra* note 28, at 190.

37. This is referred to as "coherence." Huntley & Costanzo, *supra* note 29, at 31; Pennington & Hastie, *Tests*, *supra* note 28, at 191.

38. Within this process, the court's charge delineates the attributes of different verdicts and enables jurors to match their constructed story with the appropriate verdictal category. Huntley & Costanzo, *supra* note 29, at 31; Pennington & Hastie, *Tests*, *supra* note 28, at 189-90, 192 (describing court's charge as delineating decision alternatives).

39. This is described as "certainty." Huntley & Costanzo, *supra* note 29, at 31; see Pennington & Hastie, *Tests*, *supra* note 28, at 190 (principles that determine the acceptability of a story and resulting certainty are called certainty principles).

40. The story is also a filter, reducing a vast amount of information to a manageable amount. FINKEL, *supra* note 22, at 65; SHANAHAN & MORGAN, *supra* note 23, at 192.

41. Pennington & Hastie, *Evidence Evaluation*, *supra* note 30, at 242 (stories help juries organize information); Pennington & Hastie, *Tests*, *supra* note 28, at 190 (stories help jurors organize voluminous and unwieldy information). See also Michael Owen Miller & Thomas A. Mauet, *The Psychology of Jury Persuasion*, 22 AM J. TRIAL ADVOC. 549, 568-69 (1999).

42. Daniel G. Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOL. REV. 1, 5-6 (1984). Linz & Penrod also provide a framework for memory. *Id.* at 6.

43. See generally Carlson & Russo, *supra* note 26, at 91.

44. THOMAS SANNITO & PETER J. MCGOVERN, *COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS* § 5.4 (1985) (research on law of primacy); see also ROBERT ARON ET AL., *TRIAL COMMUNICATION SKILLS* § 15.04 (1996); FINE, *supra* note 6, at 13-14 (using primacy and recency strategically in courtroom).

45. In terms of exploiting the primacy effect, some types of evidence are more powerful than others. When emotional evidence is presented first, jurors are likely to "construct a logic to justify it;" that is, jurors tend to make later presented evidence "fit" with early encountered emotional evidence. Thomas Sannito, *Psychological Courtroom Strategies*, TRIAL DIPL. J., Summer 1981, at 30, 31-32. By contrast, the more fact-based the communication, the more quickly it loses its power. *Id.* at 31-32.

Consequently, emotional evidence should be sequenced first to best exploit the primacy effect; factual evidence should be put on last to take advantage of the recency effect.

example, when mock jurors receive prosecution evidence first, they favor the prosecution story, but when mock jurors receive defense evidence first, they favor the defense story.<sup>47</sup> The first-positioned narrative begins with an inherent advantage in shaping juror decision-making.<sup>48</sup> Because jurors begin imagining a story almost immediately,<sup>49</sup> when starting to construct their story, jurors can draw only on information from the first narrative. Consequently, the initial story told typically becomes the baseline for understanding evidence and assessing truth. Because jurors hear the plaintiff's or prosecution's evidence or preface to its story first, this positioning inures to the benefit of the plaintiff or prosecution.<sup>50</sup>

In addition, the emergent narrative is resilient to competing stories. "[J]urors tend to sustain belief in the validity of their initial theories long after logic suggests those theories have been discredited."<sup>51</sup> Later testimony is assessed according to whether it fits into the initial narrative.<sup>52</sup> If it does, it is accepted; if not, it is likely rejected.<sup>53</sup> Jurors even make subsequent evidence "fit" with evidence encountered earlier, and disregard or misinterpret evidence that is inconsistent with it. As a result, where alternative interpretations of evidence or questions of witness credibility exist, the initial story is privileged

*Id.*; see also Steven Lubet, *Persuasion at Trial*, 21 AM. J. TRIAL ADVOC. 325, 354 (1997); Kim MacInnis Munsinger & Harry L. Munsinger, *Seven Psychological Principles You Can Use to Become a More Effective Lawyer*, 62 TEX. B. J. 894, 896 (1999).

46. See generally Pennington & Hastie, *supra* note 1, at 521; Pennington & Hastie, *Tests*, *supra* note 28, at 193-95.

47. Manipulating "the ease with which one story (favoring the prosecution side of the case) or another (favoring the defense) could be constructed" showed that the first-presented, "easier-to-construct stories dominated verdicts." Pennington & Hastie, *Tests*, *supra* note 28, at 193-95; Pennington & Hastie, *supra* note 1, at 521-533.

48. Hence, the combination of the order in which story elements are disclosed and the rapidity with which jurors construct a story cause misinterpretations to favor the first story-teller (the plaintiff or prosecution) and/or harm the second story-teller (the defense).

49. ARON, *supra* note 44, at § 15.04 (2004) (using primacy and recency to gain the greatest possible effect from evidence).

50. *Id.*

51. Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 LAW & PSYCHOL. REV. 301, 312 (2005) (quoting Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 496 (1987)).

52. Cf. FINKEL, *supra* note 22, at 69 (describing narrative thinking); Wiener, *supra* note 21, at 120 (jurors modify testimony and evidence according to their own pre-existing knowledge structures, to construct their own stories of the case).

53. "Individuals may selectively attend to evidence supporting their existing view and neglect information disputing it, further justifying their pre-existing impressions." Kimberlianne Podlas, *The "CSI Effect" and Other Forensic Fictions*, 27 LOY. L.A. ENT. L. REV. 87, 96 (2006-2007) [hereinafter Podlas, *CSI*] (citing William M. Klein & Ziva Kunda, *Motivated Person Perception: Constructing Justifications for Desired Beliefs*, 28 J. EXPERIMENTAL SOC. PSYCH. 145, 164 (1992); Lorraine Hope et al., *Understanding Pretrial Publicity: Predecisional Distortion of Evidence by Mock Jurors*, 10 J. EXPERIMENTAL PSYCHOL. 111, 117 (2004)).

over later ones and obtains the benefit of the doubt.<sup>54</sup> Relatedly, jurors remember evidence consistent with the initial emergent narrative significantly better than evidence inconsistent with it,<sup>55</sup> further solidifying its dominance.

Not only do jurors preference the initial narrative, but they also shore up its evidentiary weaknesses.<sup>56</sup> An advocate's evidence is seldom perfectly complete: It might omit details or actions typical of the known script. It might even conflict with later-received evidence. Jurors, however, neither consider these apparent shortcomings to undermine the initially-proposed story nor merely gloss over them. Research demonstrates that when individuals who assess the evidentiary strength of a case are confronted with accumulating information contrary to their original conclusion, they do not reassess their conclusion.<sup>57</sup> Rather, they manipulate the contrary information to conform with their initial conclusion.<sup>58</sup> Jurors fill evidentiary gaps with facts and motivations that they have come to know as part of the typical "script."<sup>59</sup> This supplemental assistance fortifies the initial narrative.<sup>60</sup>

Narrative thinking's impact on verdictal decision-making is exacerbated by several factors. Because an individual can consider issues common to only those stories already within her repertoire,<sup>61</sup> pre-existing narratives boast additional power.<sup>62</sup> In addition, those stories typically reflect, and therefore

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54. ERIC SHIRAEV & DAVID LEVY, *CROSS-CULTURAL PSYCHOLOGY* 106 (3d ed. 2007) (personal experience creates perceptual expectations); Voss, *supra* note 51, at 312. In addition, information typical to the known script is most likely to be remembered. Wiener, *supra* note 21, at 122 (when referencing common scripts of actions, mock jurors recalled statistically significant levels of scripted actions, although the witnesses never mentioned those events).

55. Pennington & Hastie, *Tests*, *supra* note 28, at 192-93; Huntley & Costanzo, *supra* note 29, at 31 (describing empirical research on influence of story model).

56. See SHERWIN, *supra* note 24, at 27.

57. Cf. Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 *YALE L.J.* 1050, 1069 (2006) (when confronted with weak evidence, individuals who wish to convict tend to distort it to make it stronger than it is).

58. *Id.*

59. See SHERWIN, *supra* note 24, at 27; Huntley & Costanzo, *supra* note 29, at 29-30 (jurors fill in blanks and ambiguities in testimony; this strongly influences their verdicts); see also Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 *CLINICAL L. REV.* 731, 738-47 (2003) (discussing heuristics in decision-making).

60. Steven Luet, *Trial Theory and Blind Poetics*, 100 *NW. U. L. REV.* 295, 296-97 (2006) (jurors will draw on from cultural narratives or personal experiences to supplement gaps).

61. See generally ROGER BROMLEY, *NARRATIVES FOR A NEW BELONGING: DIASPORIC CULTURAL FICTIONS* 1 (2000) (western culture's "authoritative" narratives foreclose alternative ways of thinking and seeing).

62. SHANAHAN & MORGAN, *supra* note 23, at 193.

limit understandings to, society's dominant themes<sup>63</sup> and those of the dominant social order.<sup>64</sup>

Narrative thinking is also subject to a number of cognitive limitations.<sup>65</sup> For example, when considering how evidence fits into a story, jurors seek coherence,<sup>66</sup> i.e., they mentally reconstruct it to support a single conclusion.<sup>67</sup> This polarizes perceptions so that individuals with a slight inclination toward guilt "amplify their perception of the case"<sup>68</sup> and ignore or alter evidence weakly probative of guilt.<sup>69</sup> When it comes to evaluating behavior, jurors tend to ascribe to it conscious, purposeful motivations, while "denigrating circumstantial causes."<sup>70</sup> Jurors fall victim to hindsight bias<sup>71</sup> when considering whether it was foreseeable that a given harm could occur. Therefore, because they know that the harm did, in fact, occur (hence, they experience the bias of hindsight),<sup>72</sup> they are more inclined to conclude that the defendant should have foreseen the risk.<sup>73</sup> Jurors also overestimate the accuracy of eyewitness identifications<sup>74</sup> and the infallibility of both forensic

63. *Id.*; Winter, *supra* note 22, at 2272; BROMLEY, *supra* note 61, at 1-2 (constructions and resulting understandings are subjective and influenced by region); *see also* JAMES MONACO, HOW TO READ A FILM: THE ART, TECHNOLOGY, LANGUAGE, HISTORY, AND THEORY OF FILM AND MEDIA 122-23 (rev. ed. 1981) (culture impacts the way in which one comprehends filmic images).

64. BROMLEY, *supra* note 61, at 1-2 (typically limited to the language of the dominant social order).

65. Kilback & Tochor, *supra* note 5, at 334 (humans possess limited capabilities for assessing each other); Rand, *supra* note 59, at 731 (impact of characteristic weaknesses of human reasoning on legal decision-making).

66. Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 544-45 (2004). Moreover, people are generally unaware of this shift or of any incoherence. *Id.* at 545.

67. *Id.* at 544-45 (shift toward state of coherence with emerging verdict).

68. *Id.* at 519, 544-45.

69. As a result, evidence is altered to create a mental model supporting guilt. Podlas, *CSI*, *supra* note 53, at 96.

70. Burns, *supra* note 11, at 563.

71. Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959, 994-95 (2003).

72. Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); *see also* NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 62-64 (2000).

As explained by Feigenson, "judgments of the ex ante likelihood or foreseeability of an event are influenced by knowing the ex post outcome (whether the event occurred or not)." Feigenson, *supra* note 71, at 994-95 (describing operation of hindsight bias in 9/11 cases).

73. Therefore, an individual who failed to do more to avoid the risk should be held responsible for not having done so. Feigenson, *supra* note 71, at 959.

For a description of the ways in which emotions impact jurors' risk assessment, *see id.* at 979-82.

74. *See* Tyler, *supra* note 57, at 1068-69; David F. Hall & Elizabeth Loftus, *Recent Advances in Research on Eyewitness Testimony*, in PSYCHOLOGY, PSYCHIATRY, AND THE LAW 417, 419-25 (Charles Patrick Ewing ed., 1985) (describing variables that infect eyewitness accuracy).



evidence<sup>75</sup> and expert testimony.<sup>76</sup> Furthermore, because jurors presume that if evidence is presented it must be probative,<sup>77</sup> any supportive evidence is augmented, thereby lowering the threshold for conviction.<sup>78</sup> Jurors also are inclined toward resolving a crime and providing justice for the victim, rather than questioning the allegations and ensuring that the defendant is not wrongfully assigned responsibility.<sup>79</sup> These and other victim sympathies can incline jurors to hold the defendant responsible, because it helps the victim by holding someone else liable for her loss.<sup>80</sup> Nevertheless, the conclusions resulting from these faulty reasoning processes contribute to the story that the jurors construct and use to determine their verdict.<sup>81</sup>

#### IV. THE IMPORTANCE OF STORIES IN LAW

Indeed, storytelling is also central to law.<sup>82</sup> As exemplified by the case caption of "plaintiff *versus* defendant,"<sup>83</sup> litigation is fundamentally a story of conflict.<sup>84</sup> Every good case recognizes this and is built on a narrative that

75. Scientific evidence is very seductive to jurors, and they tend to overvalue its probity and overestimate its infallibility. Tyler, *supra* note 57, at 1068-69 (describing studies showing that people view evidence as more probative than it is); Edward J. Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2285-86 (1994) [hereinafter Imwinkelried, *The Next Step*].

76. Lee Waldman Miller, *Cross-Examination of Expert Witnesses: Dispelling the Aura of Reliability*, 42 U. MIAMI L. REV. 1073 (1988) (jurors harbor unsupported assumptions of expert reliability).

77. Jurors also consider factors they have been told not to consider. EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 168-70 (2003) (describing empirical research on blind-folding studies of juror decision-making).

78. Tyler, *supra* note 57, at 1052-53.

79. *Id.* at 1066-67.

80. Brian H. Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28 J. APPLIED SOC. PSYCHOL. 1477, 1479, 1487 (1998).

81. For the most part, these errors in thinking promote interpretations of evidence that inure to the benefit of the plaintiff or prosecution.

82. Kimberlianne Podlas, *The Tales Television Tells: Understanding the Nomos Through Television*, 13 TEX. WESLEYAN L. REV. 31, 33, 35 (2006) [hereinafter Podlas, *Nomos*]; Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trail*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135, 136 (Peter Brooks & Paul Gewirtz eds., 1996) ("narrative and storytelling pervade the law").

Robert Cover, one of the first scholars to contemplate law as a narrative, believed that all law existed within a universe of stories. Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurability, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 339 (1994); Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

83. Litigation exemplifies a battle between protagonist and antagonist. Suzanne Shale, *The Conflicts of Law and the Character of Men: Writing Reversal of Fortune and Judgment at Nuremberg*, 30 U.S.F. L. REV. 991, 999-1001 (1996).

84. See Avi J. Stachenfeld & Christopher M. Nicholson, *Blurred Boundaries: An Analysis of the Close Relationship Between Popular Culture and the Practice of Law*, 30 U.S.F. L. REV. 903, 904 (1996) (litigation is a "theatre of battle").

accounts for the evidence and leads to the desired verdict.<sup>85</sup> This is called “the theory of the case.”<sup>86</sup> Much like a screenwriter or novelist,<sup>87</sup> a good lawyer is a good storyteller:<sup>88</sup> she establishes facts, envisions settings,<sup>89</sup> portrays characters through the dialogue of testimony,<sup>90</sup> and underscores certain themes.<sup>91</sup> Consequently, stories are an advocate’s tool for defining “truth,”<sup>92</sup> and the

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85. Lubet, *supra* note 60, at 295; James W. McElhaney, *All About Litigation*, LITIG., Winter 1986, at 2, 2 (discussing methods to persuade factfinders).

86. James W. McElhaney, *Write Briefs That Use the Facts to Establish Your Theme of the Case*, A.B.A. J., April 2006, at 26, 26 (importance of “theory of case” in both trial and appellate litigation); Ann Bloom, “*Milking the Cash Cow*” and Other Stories: Media Coverage of Transnational Workers’ Rights Litigation, 30 VT. L. REV. 179, 179 (2006) (“Law is a storytelling enterprise.”).

87. James W. McElhaney, *Creating Tension*, A.B.A. J., June 1988, at 84, 84 (likening lawyer to playwright). As Christine Alice Corcos explains:

Authors and filmmakers repeatedly combine these elements—persuasive storytelling as method, irony as mechanism, and the courtroom drama as form—to suggest to their audiences that the philosophical and practical relationships between justice as an end and the rule of law as its means require, not complacency, but continual and serious re-examination.

Christine Alice Corcos, *Legal Fictions: Irony, Storytelling, Truth, and Justice in the Modern Courtroom Drama*, 25 U. ARK. LITTLE ROCK L. REV. 503, 506 (2003).

88. Bloom, *supra* note 86, at 180 (“[A] great trial lawyer must also be a gifted storyteller.”); Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855, 1859 (1990) (attorneys are storytellers); Corcos, *supra* note 87, at 525 (lawyer as storyteller).

89. In addition, a good story will draw in visuals to help jurors “envision the facts and events as counsel and the witnesses describe them.” Lubet, *supra* note 60, at 295.

90. Shale, *supra* note 83, at 991–92 (explaining that witness narrative highlights cause, effect, belief, and resolution); Corcos, *supra* note 87, at 567 (usually, witness questioning follows Socratic interrogation):

The lawyer uses the very words of the witness to “prove” or “disprove” according to the rules of evidence the “truth” of the witness’s statement, just as Socrates traditionally and seemingly innocently used the words of his questioners against them to elicit a conclusion different from the one they had originally postulated.

*Id.*; see also *id.* at 583 (“[T]he attorney uses evidence to support his version of the story. Likewise, the witnesses are evidentiary tools.”).

91. For instance, a lawsuit about discrimination presented to follow the commonly understood discrimination narrative will lead one to consider issues attendant to and draw conclusions regarding discrimination. Podlas, *Nomos*, *supra* note 82, at 36.

Lay people expect that legal stories will follow a certain structure, i.e., “that it tells a story about guilt and innocence; that it is peopled by easily recognizable ‘good’ and ‘bad’ characters with understandable motives,” and that the conflict will be resolved by revealing the responsible party. Corcos, *supra* note 87, at 510.

92. See *id.* at 525 (author of law story tries to persuade the reader of the truth of her story and falsity of the competing story); Allen Rostron, *Shooting Stories: The Creation of Narrative and Melodrama in Real and Fictional Litigation Against the Gun Industry*, 73 UMKC L. REV. 1047, 1048 (2005).

courtroom is the crucible hosting this duel of raconteurs.<sup>93</sup> Cross-examination is, therefore, a story-telling mechanism, a mechanism to identify truth.

*Television: Society's Storyteller*

Although the first story told in court is chosen by the initiator of litigation, i.e., the plaintiff or prosecution, that is not the first story jurors hear. Rather, jurors enter the courtroom already versed in stories about crime, attorneys, justice, and legal liability.<sup>94</sup> In our media-saturated culture,<sup>95</sup> many of those stories are told by television.<sup>96</sup> Ninety-eight percent (98%) of U.S. households own a television, making it our most pervasive medium.<sup>97</sup> The accumulation of television's stories and their component characters, scenarios, and ideologies show us how things work<sup>98</sup> and elucidate values.<sup>99</sup> Some stories are plot-driven, but many resemble fables<sup>100</sup> depicting ideological assumptions<sup>101</sup> and normative lessons.<sup>102</sup> Indeed, the moral of the story is often its most important part:<sup>103</sup> whereas the details of underlying scenarios may fade, their meaning remains.<sup>104</sup> In fact, the contemporary proliferation of visual imagery has contributed to a shift in cognition.<sup>105</sup> The linear thinking style dominant in

93. Podlas, *Nomos*, *supra* note 82, at 35; Stachenfeld & Nicholson, *supra* note 84, at 904 ("theatre of battle"); *see also* Bloom, *supra* note 86, at 180 (multiple conflicting stories in courtroom).

Scholars have also noted several similarities between the stage and the courtroom. *See, e.g.*, Richard A. Clifford, *The Impact of Popular Culture on the Perception of Lawyers*, LITIG., Fall 2001, at 1, 1; Corcos, *supra* note 87, at 513.

94. *See* Kimberlianne Podlas, *Broadcast Litigiousness: Syndi-Court's Construction of Legal Consciousness*, 23 CARDOZO ARTS & ENT. L.J. 465, 485-87 (2005) [hereinafter Podlas, *Broadcast Litigiousness*].

95. Bloom, *supra* note 86, at 182 ("[M]edia is literally saturated with stories about law, both fictional and real."); *see* Cary W. Horvath, *Measuring Television Addiction*, 48 J. BROADCASTING & ELECTRONIC MEDIA 378, 380 (2004) (television is central and most pervasive mass medium); L. J. Shrum, *Effects of Television Portrayals of Crime and Violence on Viewers' Perceptions of Reality*, 22 LEGAL STUD. F. 257 (1998) (primacy of television).

96. Podlas, *Nomos*, *supra* note 82, at 36-37.

97. *See* Horvath, *supra* note 95, at 380; Shrum, *supra* note 95, at 257.

98. Yan Bing Zhang & Jake Howard, *Television Viewing and Perceptions of Traditional Chinese Values Among Chinese College Students*, 46 J. BROADCASTING & ELECTRONIC MEDIA 245, 245 (2002) (television communicates rules).

99. Michael J. Porter et al., *Re(de)fining Narrative Events: Examining Television Narrative Structure*, 30 J. POPULAR FILM & TEL. 23 (2002); SHANAHAN & MORGAN, *supra* note 23, at 13-14; *see* FINKEL, *supra* note 22, at 67.

100. SHANAHAN & MORGAN, *supra* note 23, at 23, 192 (depicted via parables or symbolism).

101. SHERWIN, *supra* note 24, at 22.

102. Podlas, *Nomos*, *supra* note 82, at 36. This includes behaviors that are deemed virtuous or vilified and ethical or immoral. *Id.*

103. *See* SHANAHAN & MORGAN, *supra* note 23, at 193-94.

104. *Id.* at 193 (memory of a story commonly focuses on its lesson as opposed to its facts).

105. SHERWIN, *supra* note 24, at 7.

print-based culture is now being displaced by an associative thinking style where symbols and visual representations dominate.<sup>106</sup>

Television also tells stories about law.<sup>107</sup> Law-oriented programs have always been a staple of television programming.<sup>108</sup> Even as the ideologies of these shows have changed over time,<sup>109</sup> they remain popular.<sup>110</sup> Thus, through news reports,<sup>111</sup> reality courtroom programs,<sup>112</sup> and legal dramas,<sup>113</sup> television's narratives become the public's *Emmanuel* of litigation and legal process.<sup>114</sup> In fact, most of what the public knows—or thinks it knows—“about law, [its fact-finding, procedures, application,] lawyers and the legal system”<sup>115</sup> come from these images.<sup>116</sup> Consequently, since the average person does not have any direct experience with the justice system, let alone read journal articles and appellate opinions,<sup>117</sup> television's stories are relatively influential.

106. *Id.*

107. See, e.g., Podlas, *Please Adjust*, *supra* note 2; Richard K. Sherwin, *Foreword: Law/Media/Culture, Legal Meaning in the Age of Images*, 43 N.Y.L. SCH. L. REV. 653, 655 (1999); Lawrence M. Friedman & Issachar Rosen-Zvi, *Illegal Fictions: Mystery Novels and The Popular Culture Image of Crime*, 48 UCLA L. REV. 1411, 1413-14 (2001).

108. See ‘CSI’ Effect: Investigation, Evidence and the Impact of Television on Criminal Law, LEGAL INTELLIGENCER, Aug. 22, 2005, at 2; Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 93 (2005).

109. Phillip Edgar Page, *Foreword: Popular Understanding of Law*, 40 S. TEX. L. REV. 881, 898 (1999).

110. Douglas E. Abrams, *Picket Fences*, in PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE 129, 132, 141 (Robert M. Jarvis & Paul R. Joseph eds., 1998).

111. Dustin Kidd, *Harry Potter and the Function of Popular Culture*, 40 J. POPULAR CULTURE 69, 81 (2007) (news as pop culture); cf. ANNETTE HILL, REALITY TV 80 (2005) (fact-based and reality television both entertain and provide information).

For statistics on crime news coverage in local and national markets, see JEREMY H. LIPSCHULTZ & MICHAEL L. HILT, CRIME AND LOCAL TELEVISION NEWS 10-13 (2002).

112. See, e.g., Podlas, *Nomos*, *supra* note 82; Kimberlianne Podlas, *Blame Judge Judy: The Effects of Syndicated Courtrooms on Jurors*, 25 AM. J. TRIAL ADVOC. 557, 557-58 (2002) [hereinafter Podlas, *Blame*]; Podlas, *Please Adjust*, *supra* note 2.

113. Most of television's depictions of law pertain to the criminal justice system. Kenneth Dowler, *Media Consumption and Public Attitudes Toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, and Perceived Police Effectiveness*, 10 J. CRIM. JUST. & POPULAR CULTURE 109 (2003); see also Erica Sharrer, *Tough Guys: The Portrayal of Hypermasculinity and Aggression in Televised Police Dramas*, 45 J. BROADCASTING & ELECTRONIC MEDIA 615, 616 (2001) (pursuit of criminals has long accounted for a substantial part of the television schedule).

114. See Podlas, *Broadcast Litigiousness*, *supra* note 94, at 485-86; see generally Richard K. Sherwin, *Nomos and Cinema*, 48 UCLA L. REV. 1519, 1521 (2001); FEIGENSON, *supra* note 72, at 14; Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 758-59 (1999); Friedman & Rosen-Zvi, *supra* note 107, at 1414 (pop legal culture's images teach people what to expect of criminal justice).

115. Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1341 (2001).

116. *Id.*

117. Podlas, *Please Adjust*, *supra* note 2, at 3-4; cf. Valerie Hans, *Law and the Media: An Overview and Introduction*, 14 LAW & HUM. BEHAV. 399 (1990) (only small proportion of the public has direct experience with the justice system); WILLIAM HALTOM & MICHAEL MCCANN,

Moreover, it is not necessary that television's legal information be packaged as "real" to insinuate itself into viewer understandings. Entertainment television reaches people that factual programming does not<sup>118</sup> and can impact viewers in ways that news media cannot.<sup>119</sup> In any event, legal fictionals may feature manufactured plots and characters, but they are depicted as realistic, if not factually-based. Sets, such as those on *Law & Order*, resemble real courtrooms and district attorneys' offices, and stories feature real legal procedures such as pre-trial hearings, opening statements, and juries.

Although this realism provides an accepted reference point of truth,<sup>120</sup> this "truth" is not necessarily reality.<sup>121</sup> Because television programs are commodities, their stories are made with an eye toward network profit, advertising dollars, and commercial success.<sup>122</sup> This means that accuracy gives way to drama. Tensions are heightened and plots manipulated to increase drama. Viewer attention spans are short, so television must tell stories quickly and simply.<sup>123</sup> "[J]ustice is seldom controversial and always swift[;]"<sup>124</sup> characters and their actions are stereotyped as "black or white, as right or wrong, as guilty or innocent . . .";<sup>125</sup> and judges make their opinions relevant and known.<sup>126</sup> These images and storytelling conventions become the functional equivalent of law.<sup>127</sup>

DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 11 (2004) (legal narratives pervade and reshape cultural and political understandings of law).

118. Michael Irvin Arrington & Bethany Crandell Goodier, *Prostration Before the Law: Representations of Illness, Interaction, and Intimacy in the NYPD Blue Prostate Cancer Narrative*, 2 POPULAR COMM. 67, 68 (2004).

119. See Dowler, *supra* note 113, at 110-11 (citing studies of fear of crime); Shrum, *supra* note 95, at 257 (viewers gather information from entertainment programs).

120. This is unlike other fictional dramas that feature superheroes, ghosts, or aliens, where the story is bound by fantasy and reiterated through references to the unique settings, spaceships, aliens, and superhuman powers. Whereas those fictionals are clearly make-believe, legal fictionals are based in reality.

121. For example, research has even shown that news media is slanted towards the prosecution. Margaret Bull Kovera, *The Effects of General Pretrial Publicity on Juror Decisions: An Examination of Moderators and Mediating Mechanisms*, 26 LAW & HUM. BEHAV. 43, 46 (2002).

122. Denise D. Bielby, C. Lee Harrington & William T. Bielby, *Whose Stories Are They? Fans' Engagement with Soap Opera Narratives in Three Sites of Fan Activity*, 43 J. BROADCASTING & ELECTRONIC MEDIA 35 (1999).

123. This is commonly accomplished by using stereotypes. Shrum, *supra* note 95, at 258; Kimberlianne Podlas, *Homerus Lex: Investigating American Legal Culture Through the Lens of The Simpsons*, 17 SETON HALL J. SPORTS & ENT. L. 93, 108 n.108 (2007) [hereinafter Podlas, *Homerus Lex*].

124. Podlas, *Nomos*, *supra* note 82, at 58.

125. David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 MARQ. L. REV. 471, 489 (1999).

126. Podlas, *Nomos*, *supra* note 82, at 58.

127. Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425, 450-52 (2000) (popular culture images of law converge with "law on the books").

As a result, viewers may presume that the procedures and behaviors that they see on television are common or normal when they are not.<sup>128</sup> Viewers may impute incorrect meanings to those behaviors.<sup>129</sup> Furthermore, these understandings or misunderstandings can be reflected back onto the real world, in verdicts. Laypeople, however, cannot understand the inaccuracies in television's depictions, let alone the deficiencies in their own knowledge.<sup>130</sup>

The functions and abilities of cross-examination must be considered within this context. It is important to assess critically the ways that television's stories of law influence juror responses to cross-examination and, ultimately, inform their decision-making.<sup>131</sup> With this information, legal practitioners can refine the stories that they tell at trial and cross-examination's contribution to them, by placing them within the context of television's influential narratives.<sup>132</sup>

## V. PROCESSES OF MEDIA INFLUENCE

The dual mechanisms of cultivation theory and heuristic reasoning help explain how television's stories can impact viewers, and hence, insinuate themselves into juror attitudes and belief systems. Cultivation is premised on the idea that television is one of society's primary storytellers.<sup>133</sup> Like other storytellers, television can transmit information and norms.<sup>134</sup> Therefore, the long-term, cumulative exposure to television's stories can lead viewer

128. Jason Low & Kevin Durkin, *Children's Conceptualization of Law Enforcement on Television and in Real Life*, 6 LEGAL & CRIM. PSYCHOL. 197 (2001) (can distort the audience's view of the legal system).

129. Podlas, *Please Adjust*, *supra* note 2, at 12-13 (interpretation of judge's silence and commentary).

130. In addition, the ubiquity of law programs cultivates in the public a sense of familiarity, which leads the public to believe that it has a better understanding of the legal system than it does. Benjamin D. Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461, 464, 496 (people think they know more about criminal law than about other types of law).

131. Page, *supra* note 109, at 898-99; Lin, *supra* note 114, at 759 (importance of examining the way that narrative informs judicial decision-making).

132. Viewers are not the only ones who can be influenced and misled by television's legal narratives. Just as television can lead laypeople to harbor misimpressions of the legal system, legal practitioners uninformed by research entertain mythologies of supposed television influences and can perpetuate television's influence. Bloom, *supra* note 86, at 183 ("Lawyers, judges, and other legal professionals are especially vulnerable to [media stories]."); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 444-45 (2000) (opining that judges may be more susceptible than jurors to media narratives and stereotypes).

133. Podlas, *CSI*, *supra* note 53, at 97-98.

134. Podlas, *Nomos*, *supra* note 82, at 44; Steven Eggermont, *Television Viewing, Perceived Similarity, and Adolescents' Expectations of a Romantic Partner*, 48 J. BROADCASTING & ELECTRONIC MEDIA, 244, 248 (2004); *see also* George Gerbner, et al., *Growing Up with Television: The Cultivation Perspective*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 17, 30 (Jennings Bryant & Dolf Zillmann eds., 1994).

perceptions to mirror what they see on television.<sup>135</sup> A large amount of exposure to these stories can influence attitudes, standards of judgment,<sup>136</sup> and even behavior.<sup>137</sup> Viewers may even become socialized into certain consequent opinions, or eventually adopt attitudes consistent with television imagery.<sup>138</sup> This cultivation effect is not an exact immediate one, where a viewer who sees a program favoring vigilante justice will run out and start shooting criminals.<sup>139</sup> Instead, cultivation is a subtle, cumulative influence<sup>140</sup> based on both heavy, repeated viewing and repeated broadcasting.<sup>141</sup> Thus, a viewer who sees a particular representation constantly on television<sup>142</sup> will presume that representation is common in reality.<sup>143</sup> For example, if she regularly sees television judges yell at litigants, she will assume that judges yell at litigants.<sup>144</sup> The result of the television-cultivated opinions could then prompt opinions that inspire actions. A viewer who regularly sees pre-marital sex on television will believe that pre-marital sex is common. This might cause her to believe that it is socially acceptable, and she therefore may be more likely to be sexually active outside of marriage.<sup>145</sup>

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135. Hyung-Jin Woo & Joseph R. Dominick, *Acculturation, Cultivation, and Daytime TV Talk Shows*, 80 JOURNALISM & MASS COMM. Q. 109, 110 (2003); Patrick Rossler & Hans-Bernard Brosius, *Do Talk Shows Cultivate Adolescents' Views of the World? A Prolonged-Exposure Experiment*, 51 J. COMM. 143, 146 (2001).

136. Shrum, *supra* note 95, at 261-62 (the way television's information is stored in memory and retrieved can influence judgments).

137. Rebecca M. Chory-Assad & Ron Tamborini, *Television Doctors: An Analysis of Physicians in Fictional and Non-Fictional Television Programs*, 45 J. BROADCASTING & ELECTRONIC MEDIA 499, 500 (2001).

138. *See generally* Porter et al., *supra* note 99; W. James Potter & I.K. Chang, *Television Exposure Measures and the Cultivation Hypotheses*, 34 J. BROADCASTING & ELECTRONIC MEDIA 313 (1990); Donald D. Diefenbach & Mark D. West, *Violent Crime and Poisson Regression: A Measure and a Method for Cultivation Analysis*, 45 J. BROADCASTING & ELECTRONIC MEDIA 432 (2001).

139. *See* John L. Sherry, *Media Saturation and Entertainment-Education*, 12 COMM. THEORY 206, 219-20 (2002) (noting that a single program would "not accomplish this objective").

140. Shrum, *supra* note 95, at 260.

141. Sherry, *supra* note 139, at 212.

For a message to have an impact, it must rise to the level of "theme saturation." *Id.* at 220.

142. Contemporary cultivation theory isolates exposure to specific types of programs as the best predictor of viewer beliefs. Chris Segrin & Robin L. Nabi, *Does Television Viewing Cultivate Unrealistic Expectations About Marriage?*, 52 J. COMM. 247, 259-60 (2002); W. James Potter, *Cultivation Theory and Research: A Conceptual Critique*, 19 HUM. COMM. RES. 564, 575 (1993).

143. Podlas, *CSI*, *supra* note 53, at 97-98.

144. Viewers who watch a great deal of a particular type of programming recall the lessons in that programming more easily than will viewers who watch infrequently or not at all. Rick W. Busselle, *Television Exposure, Perceived Realism, and Exemplar Accessibility in the Social Judgment Process*, 3 MEDIA PSYCHOL. 43, 44-45 (2001).

145. Kirstie M. Farrar, *Sexual Intercourse on Television: Do Safe Sex Messages Matter?*, 50 J. BROADCASTING & ELECTRONIC MEDIA 635, 636-37 (2006); *see also* Busselle, *supra* note 144, at 43 (viewer who believes that society is unsafe may be afraid to walk alone at night or purchase a home alarm system). *See generally* Rick W. Busselle & L.J. Shrum, *Media Exposure and Exemplar*

The information cultivated impacts decision-making via heuristic reasoning.<sup>146</sup> Heuristics are informational scripts or examples that create mental shortcuts used in decision-making.<sup>147</sup> They help people process information where it is incomplete or when they must draw conclusions quickly and efficiently. As people interpret their experiences, they automatically reference these heuristics.<sup>148</sup> Therefore, repeatedly broadcasting stories or certain moral associations enables television's dominant narratives and character portrayals to be easily stored in and accessed from memory.<sup>149</sup> In this way, certain televised legal "scripts" become heuristics regarding the legal process, litigation, and legal actors.<sup>150</sup> As a result, they become the standard by which the stories of witnesses, experts, and attorneys are judged.<sup>151</sup>

## VI. TELEVISION'S IMPACT ON VIEWER UNDERSTANDINGS OF LAW

Recent research has provided insight into how television mediates the public's understanding and application of law, as well as the conditions necessary for and types of impacts. Nonetheless, television's ability to cultivate understandings about law does not mean that all legal narratives

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*Accessibility*, 5 MEDIA PSYCHOL. 255 (2003) (viewers rely on television's information to develop understandings of events or social constructs).

146. L.J. Shrum & Valerie Darmanin Bischak, *Mainstreaming, Resonance, and Impersonal Impact*, 27 HUM. COMM. RES. 187, 189-90 (2001) (the heuristic processing model of cultivation effects explains how television information is used in the judgment-construction process); see also Shrum, *supra* note 95, at 262; L.J. Shrum, *Processing Strategy Moderates the Cultivation Effect*, 27 HUM. COMM. RES. 94, 97 (2001).

147. Samuel S. Wineburg, *Historical Problem Solving: A Study of the Cognitive Processes Used in the Evaluation of Documentary and Pictorial Evidence*, 83 J. EDUC. PSYCHOL. 73, 77 (1991).

For a description of some different types of heuristics, see Robin M. Hogarth & Natalia Karelia, *Heuristic and Linear Models of Judgment: Matching Rules and Environments*, 114 PSYCHOL. REV. 733 (2007).

148. The outcomes of heuristic processing are not inevitable, however. People who are instructed to think very carefully about their answers are either not affected or less affected by television portrayals. Shrum, *supra* note 95, at 264-66.

149. *Id.* at 263.

Furthermore, heavy viewers of these portrayals will store them more frequently. Conversely, infrequent portrayals are infrequently stored and non-heavy viewers would do so infrequently. *Id.*

150. Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 430-31 (2006) [hereinafter Podlas, *CSI Myth*]; Richard K. Sherwin, *supra* note 114, at 1521; FEIGENSON, *supra* note 72, at 11; Lin, *supra* note 114, at 758-59.

These heuristics "help us to understand how truth and justice are being constructed and how these constructions capture belief in the everyday practice of law." Richard K. Sherwin, *Introduction: Picturing Justice: Images of Law and Lawyers in the Visual Media*, 30 U.S.F. L. REV. 891, 897 (1996).

151. Sherwin, *supra* note 150, at 897.



broadcast on television do so.<sup>152</sup> Rather, first, a story must achieve a significant level of saturation,<sup>153</sup> i.e., "the depiction or program containing it must be broadcast frequently."<sup>154</sup> Second, a viewer must be exposed to or watch the program very frequently.<sup>155</sup> Third, the story embedded within the program must be clear to viewers, i.e., its narrative must be obvious, consistent, and uncontradicted by competing messages.<sup>156</sup> This is particularly apt to legal programming. Individuals within the legal profession, versed in law, can easily translate procedures and reasons, and therefore pick up on certain cues of television. By contrast, the average viewer can identify and understand only the more obvious depictions. These are substantial hurdles.

### *Normality and Normativity*

Most of television's influence on legal understandings is normative. Law programs do not teach legal rules so much as show viewers what is statistically normal. Often, this normality is translated to become a behavioral norm.<sup>157</sup> Thus, behaviors that are common socialize viewers into how individuals act or when litigation is appropriate.<sup>158</sup>

Television can cultivate opinions about the behavior of attorneys, judges, and litigants. Its consistent, repeated portrayal of the behavior of a legal actor can cultivate in a viewer the beliefs that those behaviors are normal and true to reality.<sup>159</sup> Studies demonstrate that the portrayal of judges on syndi-courtrooms impact viewer expectations regarding judicial behavior<sup>160</sup> and sometimes the meaning of that behavior. Consistent with the syndi-court portrayal of judges as vocal, active interrogators who make moral pronouncements, viewers who watched a significant amount of this genre (hence, repetition in image broadcast and in viewings of that imagery) expected real judges to be vocal, active, and opinionated on the bench. Non-viewing counterparts did not share this opinion.<sup>161</sup>

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152. Podlas, *CSI*, *supra* note 53, at 103.

153. *See supra* note 141 and accompanying text.

154. Podlas, *CSI*, *supra* note 53, at 103.

155. *Cf.* Farrar, *supra* note 145, at 637-38 (factors influencing likelihood of learning from television).

156. Podlas, *CSI*, *supra* note 53, at 103.

157. Norms are social expectations of how one is to act. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996).

158. Kimberlianne Podlas, *As Seen on TV: The Normative Influence of Syndi-Court on Contemporary American Litigiousness*, 11 VILL. SPORTS & ENT. L.J. 1, 18 (2004) [hereinafter Podlas, *As Seen on TV*]; Podlas, *Broadcast Litigiousness*, *supra* note 94, at 478-79 (legal culture comprised of norms), 480-81 (communicating to the public what amounts to a "litigable moment").

159. Podlas, *Broadcast Litigiousness*, *supra* note 94, at 483.

160. *Id.* at 494 (perceptions of litigants and use of litigation); Podlas, *Blame*, *supra* note 112, at 558 (perception of judges).

161. Podlas, *Blame*, *supra* note 112, at 558.

In addition to expectations of behavior, these portrayals can also cultivate attitudes about those behaviors.<sup>162</sup> The actions that television repeatedly depicts are deemed normal,<sup>163</sup> and usually this statistical normality is equated with a presumption of correctness or propriety.<sup>164</sup> For example, syndi-court communicates that small claims litigation is not unusual and that the desire to use the legal system to address more personal issues is not uncommon. These portrayals further attitudes that litigation “for the principle” is normal and not deviant.<sup>165</sup> Yet, if repeated actions are attached to clear condemnation, the action will be deemed wrong. Where television portrays certain roles, such as police officers or lawyers, as behaving in a way that television clearly and repeatedly deems deceitful or amoral, it can reinforce beliefs that such roles or characters are imbued with those characteristics.<sup>166</sup> Syndi-court studies show that certain types of litigants and causes are assigned negative values. As a result, people perceive them (litigation and litigants) as unethical, shameful,<sup>167</sup> or greedy.<sup>168</sup>

#### *Character and Behavioral Values*

Research regarding opinion construction suggests that television’s assignment of a character’s morality might also influence viewers.<sup>169</sup> To some degree, when viewers constantly see a behavior or person attached to a specific value, the audience may come to believe that that behavior or person is imbued with the values consistent with the portrayal.<sup>170</sup> These images become

162. Podlas, *Nomos*, *supra* note 82, at 53-54 (television/syndi-court teaches us moralities regarding law, and associates certain behaviors with particular moral values).

163. *Id.* at 39 (perceptions of litigants and use of litigation), 49-50 (perception of judges); Podlas, *CSI Myth*, *supra* note 150, at 449-50.

164. Podlas, *Nomos*, *supra* note 82, at 57 (television portrayals contribute to how public makes judgments about truth and blame).

165. Kimberlianne Podlas, *The Monster in the Television: The Media’s Contribution to the Consumer Litigation Boogeyman*, 34 GOLDEN GATE U. L. REV. 239, 270-72 (2004) [hereinafter Podlas, *Monster*].

Research shows that heavy viewers of syndi-court, for example, proliferate small claims litigation and believe it is normal to sue over relatively small sums of money or for the principle. *Id.* at 270-71.

166. Kimberlianne Podlas, *Guilty on All Accounts: Law & Order’s Impact on the Public’s Attitudes About Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1 (2008). [hereinafter Podlas, *Law & Order*] (characterization of prosecutors as moral); Podlas, *Nomos*, *supra* note 82, at 53 (“Syndi-court regularly equates legal guilt with moral guilt; the bad act *is* the bad person and vice versa.”).

167. Podlas, *As Seen on TV*, *supra* note 158, at 18-19.

168. Stephen Daniels & Joanne Martin, “*The Impact That It Has Had Is Between People’s Ears: Tort Reform, Mass Culture, and Plaintiffs’ Lawyers*,” 50 DEPAUL L. REV. 453, 454 (2000).

169. *Cf.* Podlas, *Monster*, *supra* note 165, at 271-72 (perceived morality of certain types of litigants).

170. Podlas, *Law & Order*, *supra* note 166.

schema<sup>171</sup> that impact the way we make judgments about truthfulness, blameworthiness, motives for litigation, and counsel's ethical center. The "bad act [becomes] the bad person and vice versa."<sup>172</sup>

This is particularly apt with regard to attorneys. Because the public has limited opportunities to engage practicing attorneys,<sup>173</sup> it learns most of what it knows about them from television.<sup>174</sup> Menkel-Meadow has found that television's repeated portrayal of fictional attorney behavior as ethical or unethical influences viewer perceptions of whether certain actions by real attorneys are ethical.<sup>175</sup> Where television portrays behavior, or an attorney, as ethical, viewers tend to adjudge real attorneys who act similarly as ethical.<sup>176</sup> This is important, because television does not create all attorneys equal. It generally juxtaposes "white-hatted" prosecutors against "black-hatted" defense attorneys,<sup>177</sup> and places prosecutors alone on the moral high ground of legal practice.<sup>178</sup> This is exemplified by *Law & Order*. Content and ethnographic analyses reveal that *Law & Order* celebrates prosecutors as society's moral agents who seek justice, protect the public, and punish wrongdoers.<sup>179</sup> It further demonstrates the positive morality and ethical grounding of prosecutors by showing that they prosecute only the legally or morally guilty.<sup>180</sup> In contrast, defense attorneys are not associated with justice, but are associated with its obfuscation.<sup>181</sup>

Consistent with this, recently-completed research (by this author) shows that a majority of *Law & Order* viewers ascribe to prosecutors the high ethics

171. A schema is "a category in the mind which contains information about a particular subject." Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 279 (1989).

172. Podlas, *Nomos*, *supra* note 82, at 53.

173. Low & Durkin, *supra* note 128, at 197.

174. Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. CRIM. JUST. & POPULAR CULTURE 1 (1995); see also David M. Spitz, *Heroes or Villains? Moral Struggles vs. Ethical Dilemmas: An Examination of Dramatic Portrayals of Lawyers and the Legal Profession in Popular Culture*, 24 NOVA L. REV. 725, 731 (1999) (public learns most of what it knows, though often convoluted and incorrect, about attorneys through media); see generally Mezey & Niles, *supra* note 108, at 93.

175. Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305 (2001).

176. These viewers were law students.

It has been shown that sometimes "[t]he character of disputes broadcast may even communicate that litigation about moral issues or 'because of the principle' is socially appropriate." Podlas, *Monster*, *supra* note 165, at 270-71.

177. ELAYNE RAPPING, *LAW AND JUSTICE AS SEEN ON TV* 4 (2003).

178. *Id.* (displaced by a fascination with prosecutors).

179. *Id.*

180. In fact, their screening abilities are so fine-tuned that often the prosecution charged a suspect before the story disclosed the key evidence proving guilt.

181. Michael M. Epstein, "Separate" But Not "Equally Important": How Law & Order Devalues Detective Work and Defendants' Fifth Amendment Rights, TEL. Q., April 2004, at 4, 7 (ADAs portrayed as having done their best to arrive at a just result), 7-8 (defense attorneys presented as foils).

and ends-justifies-the-means moralities of the program. Research also discloses some positive (but limited) correlation between amount of viewing and positive attitude toward prosecutors. This research is described in detail below.

*Law & Order "Assessment of Prosecutor Morality" Study*

A. The Survey Instrument

Over a four-day period, a questionnaire was administered to fifty (50) individuals waiting in a Legal Assistance Center. Individuals agreed to fill out a survey in exchange for a four-dollar (\$4) Starbucks gift card. The questionnaire posed a number of forced-choice questions. Among other things, participants were asked to:

(1) self-assess the frequency of their television viewing, both descriptively and numerically (in terms of hours viewed per week);

(2) tick off from a finite list which "legal television" programs they regularly watched (programs included syndi-courts, legal procedurals, and legal dramas such as *Law & Order*);

(3) rate their opinion of the morality of prosecutors (hereinafter, the "Moral Assessment") according to the following: *very immoral - immoral - neutral (neither moral nor immoral) - moral - very moral*; and

(4) (describe) place themselves into one of the following categories:

(a) "have existing attitudes that favor prosecutors OR are 'pro'-prosecution/'anti'-defense";

(b) "have existing attitudes that favor the defense OR are 'pro'-defense/'anti'-prosecution"; or

(c) "have no attitudes regarding either group OR are neutral."

Once incomplete surveys were discarded, a total of 48 surveys were analyzed.

B. Analysis

Responses were divided into three "Attitudinal Groups" based on their existing attitudes (that is, their response to number (4), above). These categories were short-handed (as seen in the Table below) as: A (pro-prosecution); B (anti-prosecution/pro-defense); C (neither/neutral). This categorization sought to acknowledge the influence that pre-existing attitudes

might have on both *Law & Order* viewing habits and assessment of prosecutor morality. For example, individuals who self-identify (A), i.e., pro-prosecution, would presumably assess prosecutor morality positively and/or be more inclined to watch television programs that feature prosecutors and support these beliefs. Conversely, individuals who self-identify (B), i.e., anti-prosecution/pro-defense, would presumably assess prosecutor morality negatively (or, at least, less positively than Group A) and might be less inclined to watch television programs that feature prosecutors and portray them in a positive light.

Responses in each Attitudinal Group were then divided into two categories: Heavy Viewers of *Law & Order* and Non-heavy Viewers of *Law & Order*. The focus on heavy viewing (as opposed to an incremental scale of all degrees of viewing) sought to fulfill a pre-requisite of cultivation, i.e., a significant amount of viewing of a particular genre.<sup>182</sup>

The Moral Assessments (3, above) were translated into the numerical values of a Likert scale, ranging from 1 (very immoral) to 5 (very moral). This enabled statistical analysis of the descriptive responses.<sup>183</sup>

### C. Results

As a whole, individuals within the A (pro-prosecution) and B (pro-defense/anti-prosecution) Attitudinal Groups awarded the Moral Assessment scores that one might expect: Group A had high Moral Assessments of prosecutors and Group B had much lower Moral Assessments. Individuals who described themselves as neutral (Attitudinal Group C), while having more moderate assessments than individuals in either Group A or B, made Moral Assessments more in line with those of Group A. In fact, as seen in the Table, individuals in Group C who were Heavy Viewers of *Law & Order* awarded almost the same Moral Assessment scores as individuals within the self-described "pro-prosecution" A group. The Non-heavy Viewers in the "neutral" C Group assessed prosecutors as neutral, being "neither moral nor immoral."

With regard to Attitudinal Groups A and B, the degree or amount of *Law & Order* viewing did not seem to be a separate variable in their Moral Assessments. There was no statistically significant difference between the Moral Assessments awarded by Heavy Viewers of *Law & Order* and Non-heavy Viewers of *Law & Order* (within each of these Attitudinal Groups). Rather, individuals in Group A awarded the same Morality Assessments whether they watched a significant amount of *Law & Order* or not, and individuals in Group B awarded the same Morality Assessments whether they watched a significant amount of *Law & Order* or not.

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182. In fact, the statistical distribution of television viewing is not represented as a Bell curve, with the average amount of viewing at the 100 centered axis.

183. Statistical significance between amounts of viewing (within Attitudinal Group) was analyzed at the P<0.05 level. In addition, a one-way ANOVA across Attitudinal Groups was calculated.

Whereas the morality assessments of those in Groups A and B (i.e., those expressing either pro-prosecution attitudes or pro-defense/anti-prosecution attitudes) seem unrelated to amount of *Law & Order* viewing, this lack of relation did not remain true with regard to those expressing neutral attitudes (Group C). Instead, Heavy Viewers of *Law & Order* in Group C awarded much higher Morality Assessments than did Non-heavy Viewers of *Law & Order*.

*Moral Assessment Scores*

Attitudinal Group	Total Respondents =48	Heavy Viewers of <i>Law &amp; Order</i>	Non-heavy Viewers of <i>Law &amp; Order</i>	
A. pro-prosecution	14	N= 9 4.3 = mean 5 = mode	N= 6 4.3 = mean 5 = mode	no statistically significant difference
B. pro-defense/anti-prosecution	8	N= 5 1.8 = mean 1, 2 = mode	N= 3 1.7 = mean 2 = mode	no statistically significant difference
C. neither/neutral	26	N= 15 4 = mean 4 = mode	N= 11 3.5 = mean 3 = mode	*statistically significant difference between viewer groups

#### D. Discussion

Pre-existing attitudes very likely impact answers regarding one's opinion of the morality of prosecutors, with individuals who self-identify as "pro-prosecution" stating that prosecutors are "moral" or "very moral" and individuals who self-identify as "anti-prosecution/pro-defense" saying prosecutors are "immoral" or "very immoral." These assessments do not appear to be related to how much these individuals see television portrayals of positive, moral prosecutors, i.e., those on *Law & Order*. In fact, both groups watch the television show in similar proportions.

Yet once these extremes are eliminated, a connection between television's portrayals of prosecutors and Moral Assessments of them begins to emerge. This is evident in Group C. First, this group self-described themselves as "neutral" or having no opinion, yet its Heavy Viewers expressed the very opinions of viewers who identified themselves as pro-prosecution. Second, and perhaps more tellingly, the neutrals who watch pro-prosecution portrayals frequently believed that prosecutors are very moral (whether they are aware of

their beliefs as pre-existing pro-prosecution attitudes or not).<sup>184</sup> These results suggest that to some degree individuals might learn from the moral presentation of characters, or that television reinforces positive societal beliefs in law and its agents.

### Legal Content

Although television can teach normative lessons about law and associate moral values with particular characters, there is little evidence that television teaches viewers legal content.<sup>185</sup> Law programs commonly explicate simple legal rules, such as basic contract or tort law.<sup>186</sup> Presumably, if television contributed to content learning, heavy viewers of legal fare would come away with an understanding of some core legal rules. Nevertheless, empirical evidence does not bear this out.<sup>187</sup> One study administered a rudimentary law test to heavy viewers and non-viewers of reality law programs.<sup>188</sup> Heavy viewers did no better on the test than non-viewers—in fact, both groups performed rather poorly.<sup>189</sup> The study concluded that viewers apparently do not “read” the narrative about legal rules or absorb enough of the concrete legal content for it to exert any measurable effect.<sup>190</sup>

Research pertaining to *CSI: Crime Scene Investigation (CSI)* has also failed to demonstrate that television produces sustainable content-based learning. Recently, the mass media has reported prosecutorial claims that a “CSI Effect” is impacting jury decision-making.<sup>191</sup> According to these claims, *CSI* teaches jurors that specific types of cases beget specific types of forensic evidence and that particular kinds of forensic testing can ascertain guilt. The CSI Effect presumes not only that jurors learn these “rules” of police work, but also that when forensic evidence is *not* introduced at trial, jurors will apply those rules inductively. Thus, they will fall prey to a logical fallacy, and conclude that the absence of forensic evidence—even if *not highlighted by the defense or irrelevant to the case*—means that guilt cannot be proven beyond a reasonable doubt.<sup>192</sup> (In

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184. Of course, it is possible that Groups A and B are more self-aware, in that they are able to identify their pre-existing attitudes, whereas the neutrals of Group C are not really neutral, but have pre-existing “pro-prosecution” beliefs of which they are unaware.

185. Podlas, *Nomos*, *supra* note 82, at 50-52.

186. This has been documented through content analysis. See Podlas, *Homerus Lex*, *supra* note 123, at 106-109. Content analysis systematically analyzes amount and programmatic content broadcast. See generally *id.*

187. Podlas, *Nomos*, *supra* note 82, at 52.

188. *Id.* at 50-51.

189. *Id.* at 51-52.

190. *Id.* at 52.

This might be because the moral and behavioral depictions within this genre are so dominant that they overwhelm the legal content. *Id.* at 53.

191. See, e.g., Max M. Houck, *CSI: Reality*, *SCI. AM.*, July 2006, at 85; Kit R. Roane, *The CSI Effect*, *U.S. NEWS & WORLD REP.*, Apr. 25, 2005, at 48.

192. In other words, the CSI Effect causes the jury to wrongfully acquit. Houck, *supra* note 191, at 85; Roane, *supra* note 191, at 50; Jennifer Rosinski & David Weber, *DAs Claim*

fact, an Aristotelian induction of non-guilt from this negative premise produces a logical fallacy, to wit: merely because the presence of forensic evidence of guilt can help prove guilt does *not* mean that the absence of forensic evidence proves the opposite, non-guilt).

Although no research has substantiated a CSI Effect, prosecutors seem to cling to this mythology. A survey of New York metro-area assistant district attorneys disclosed that a majority of them believed that a CSI Effect exists and that it negatively impacted their own prosecutions. Confirmatory research, however, showed that no such effect could have existed in any of the cases noted as “proof:” nineteen of twenty cases that prosecutors identified as being impacted negatively by a CSI Effect had resulted in convictions—exactly the antithesis of such an effect.<sup>193</sup>

No empirical study of mock jurors has substantiated that *CSI* viewing impacts juror verdicts. There is no indication that heavy *CSI*-viewing jurors consider *CSI* or different factors in reaching verdicts than do non-viewers.<sup>194</sup> Indeed, there is no indication that “the demand for scientific evidence as proof of guilt was related to watching crime related television programs. There was certainly no statistical relationship between the respondents who specifically watched the *CSI* program and those who insisted upon some scientific evidence for conviction.”<sup>195</sup> This is hardly surprising: most of the “support” for such an effect comes from a few “self-referential newspaper articles quoting the anecdotes of prosecutors and police investigators,”<sup>196</sup> and it is partly premised on the logical fallacy noted above.<sup>197</sup>

Furthermore, in light of what we know about both the use of stories in and the influence of scientific evidence on verdictal decision-making, if *CSI* has any impact, it benefits the prosecution. The dominant story of *CSI* is one of good, exacting police work. This underscores the validity and impartiality of the law enforcement conclusions that led to arrest and indictment. Moreover, research tells us that jurors are inclined to fill in evidentiary gaps using content drawn from stories of which they are already aware. Consequently, jurors who do not receive forensic evidence at trial may well “fill in the blanks” with the presumption that forensic testing occurred prior to trial and was the basis for arrest.

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*‘CSI’ Spoiling Jurors*, BOSTON HERALD, Nov. 12, 2004, at 2; Richard Willing, “*CSI Effect*” Has Juries Wanting More Evidence, USA TODAY, Aug. 5, 2004, at 1A.

193. Podlas, *CSI*, *supra* note 53, at.107

194. *Id.*

195. Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 362 (2006).

196. Podlas, *CSI Myth*, *supra* note 150, at 462.

197. The so-called “CSI effect” may instead be a rationalization of members of law enforcement who lose. “By attributing a loss to *CSI*’s wrongful influence, a prosecutor can obtain an explanation yet maintain her belief that an acquittal was misguided.” Podlas, *CSI*, *supra* note 53, at 125.



## VII. ACKNOWLEDGING TELEVISION'S IMPACT ON CROSS-EXAMINATION

In litigation, "[w]hoever tells the best story wins,"<sup>198</sup> and cross-examination is a mechanism to tell one's story, i.e., version of truth.<sup>199</sup> In embracing this storytelling function, cross-examination must be organized around the theory of the case<sup>200</sup> and develop the essentials of that narrative. Yet it also must account for the legal narratives that jurors reference in decision-making—to wit, those on television. Certain television tropes could positively contribute to the plot or moral of one's story, thereby leading jurors to one's desired verdict. By contrast, other television narratives or character stereotypes will negatively impact the desired story. Cross-examination must exploit or acknowledge these possibilities accordingly, as guided by four principles: (1) identify the script the story; (2) follow the known script where helpful; (3) highlight deviations from the script where helpful; and (4) fear and avoid the (parallels to the) script.

*Scripting the Story*

At trial, "the story itself, conceived as a whole, is far more meaningful than any of its constituent facts."<sup>201</sup> Therefore, developing a viable narrative is far more important than focusing on constituent facts or legal issues.<sup>202</sup> This significantly diminishes any value of a piecemeal cross-examination, i.e., one where counsel points out several inconsistencies, spread over various topics and the testimony of several witnesses, in hopes of cobbling together a mathematical argument that the evidence is not quite enough to reach the required percentage for a plaintiff's or prosecution's verdict. This strategy does not address either the dominant or opposing narrative and does not help build your own. Too many facts, and subplots, can also reduce the coherence of a proposed story.<sup>203</sup>

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198. Podlas, *CSI*, *supra* note 53, at 280; *see also* James W. McElhaney, *Just Tell The Story*, A.B.A. J., Oct. 1999, at 68, 68-69 (lawyers should be good story-tellers and should organize a case to show there is a wrong to be righted).

199. This "truth" is reinterpreted as the verdict.

200. POZNER & DODD, *supra* note 14, at § 1.09; James W. McElhaney, *Persuasive Organization*, A.B.A. J., Dec. 2006, at 24, 24-25 (2006) (organization around the story is critical in the opening statement).

201. Lubet, *supra* note 60, at 299.

202. *Id.* at 297; *see also* McElhaney, *supra* note 198, at 68 (lawyers should sometimes avoid organizing the story around legal issues).

For instance, the nature of the stories told by attorneys trying capital cases are different; whereas defense counsel tells a complex, layered story, prosecutors focus on plot. Mark Costanzo & Julie Peterson, *Attorney Persuasion in the Capital Penalty Phase: A Content Analysis of Closing Arguments*, 50 J. SOC. ISSUES 125, 143 (1994).

203. Lee L. Bennett, *Defense Community Issues: New Liabilities and How to Respond to the Plaintiffs' Bar*, 69 DEF. COUNS. J. 273, 280 (2002) (critical ability of a trial lawyer "to simplify a mass of evidence and weave it into a coherent storyline").

Urging alternate theories, even when they are consistent, can weaken one's primary contentions, as they might suggest that each alternative story is less credible or confuses issues. Moreover, adding weak arguments to strong ones both weakens the strong ones and undermines the lawyer's truth-giver function.<sup>204</sup>

*Follow Known Scripts*

Sometimes television's "script" creates expectations about the way evidence will unfold and what it means. Narratives consistent with these stories are inherently more believable, and witnesses whose testimony conforms to them are judged more credible. Consequently, cross-examination should follow television's script where helpful.

For example, television programs such as *CSI* and *Law & Order* script arrests and police work. Arrests are predicated on scientific tests that prove guilt; if someone is factually innocent, they have been exculpated prior to trial; and the police tend to be correct in their conclusions, even when they are less than forthcoming about their methods. If cross-examination is able to conform to the known script, it can make the "goal" facts more persuasive.<sup>205</sup> By conceiving of cross-examination as a series of short topic-based discussions<sup>206</sup> or as a series of vignettes that advance the story of case, counsel can show how groupings of facts fit within the smaller, television-substantiated scripts. This can present examples of how the attorney's narrative is most like the stories jurors already know and therefore is credible.<sup>207</sup> Such scripting gives a mediocre prosecutor an advantage because his narrative almost always converges with the prevailing lay understanding of behavior, including, most obviously, our cultural narrative of free will. Hence, the story of "evil actors do evil things of their own free will and therefore must be held responsible for their acts" is easily embraced by a jury.<sup>208</sup> Furthermore, the order of case presentation can work synergistically with scripting. The initiator of litigation is the first to present a story, introduce characters, and propose the moral of the story. This story, therefore, becomes the internal standard or story.<sup>209</sup>

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204. FINE, *supra* note 6, at 9-10; *see also id.* at 4-6 (jurors believe the lawyer knows the truth, and therefore the lawyer must embrace the truth-giver role).

205. McElhane, *supra* note 198, at 68 (organize a case to show there is a wrong to be righted).

206. POZNER & DODD, *supra* note 14, at § 9.01.

207. Each of these "chapters" of cross-examination can undermine the opponent's story of case. *Id.*, § 3.06.

208. Mona Lynch, *The Truth of Verdicts? A Social Psychological Examination of A Theory of the Trial*, 28 LAW & SOC. INQUIRY 539, 542 (2003).

209. The theory of primacy underscores that the first argument presented has the greatest impact on the audience.

In addition, testimony that lacks details or facts, yet tracks a known narrative may be supplemented by the known narrative. Because jurors fill in gaps using a story with which they are already familiar, attorneys suggest facts that are not in evidence. The story of *CSI* teaches viewers that all of this scientific investigation took place long before trial, and, in fact, was what led to the arrest of the defendant. Accordingly, a *CSI*-viewing juror may fill in gaps in the prosecution case with television-cultivated beliefs that: (a) arrests are based on forensics; (b) forensics proves guilt; and therefore, (c) anyone arrested (and on trial) is guilty.

Similarly, television's scripts include character portrayals such as the sleazy defense attorney, the moral prosecutor, and the virtuous litigant who is motivated by the desire for an apology. Cross-examination can draw helpful parallels between television's character types and witnesses or litigants. People generally expect legal drama to "tell[] a story about guilt and innocence . . . peopled by easily recognizable 'good' and 'bad' characters with understandable motives."<sup>210</sup> Consequently, portrayals of characters or stories as worthy or unworthy are attached to a set of motivations and credibility markers that can influence decision-making.

#### *Highlight Deviations from Script*

Whereas jurors will find most believable the trial stories that are consistent with stories they already know, jurors will find stories dissimilar to the ones they know to be more unbelievable or unlikely. Cross-examination, therefore, is an opportunity to point out how and where the opponent's testimony (or story) deviates from the televisually-established script.<sup>211</sup> Exposing an omission (or thereby highlighting a truth) through cross-examination is particularly poignant.

Relatedly, any missing tropes or characters should be addressed. Thus, cross-examination is an opportunity to fill in the important gaps or explain why the gap is so critical, again furthering some aspect of the story.<sup>212</sup> Moreover, if an advocate does not address the gap, research indicates that jurors will fill it in with non-existent evidence anyway, because it is typical to the script.<sup>213</sup>

#### *Fear the Script*

Finally, there exist instances in which counsel should avoid alluding to television's legal scripts. Sometimes these scripts or their cultivated

210. Corcos, *supra* note 87, at 510.

211. Questions might be phrased as: (1) "It's not like . . ."; (2) "This isn't the typical situation where . . ."; (3) "So even though people usually do 'x' you did not"; (4) "You mean you *didn't* . . .?"

212. POZNER & DODD, *supra* note 14, at § 9.06.

213. See SHERWIN, *supra* note 24, at 27; Huntley & Costanzo, *supra* note 29, at 29-30.

expectations and schematic effects will undercut, if not contradict, the story one is attempting to tell. Where a script does so, an advocate might attempt to avoid reference to that script. Accordingly, she might consider whether it is counterproductive to take on an issue through cross-examination. Some stories or “lessons” are so well-entrenched that they are virtually impervious to attack. Spending the airtime of cross-examination debating them is unlikely to convince the jury that their existing stories and understandings are wrong, but instead runs the risk of underscoring those existing beliefs.

For example, research has repeatedly found that jurors overvalue experts and “evidence” that have the patina of science.<sup>214</sup> Yet many forensic techniques, such as dog sniff, bite-mark,<sup>215</sup> hair analysis,<sup>216</sup> and ballistics,<sup>217</sup> have never been scientifically validated. There are strong arguments (that courts are beginning to accept) that these techniques merely carry the patina of science, rather than scientific acceptance, and that neither they nor the testimony of their purported experts should be admitted into evidence. Unfortunately, because jurors already put a great deal of credence in these practices, largely due to stories told on television, it is unlikely that one cross-examination will change the jury’s mind about their validity or importance in the case. Instead, it might remind jurors of existing beliefs or permit opposing counsel to explicate those existing beliefs on re-direct examination. Thus, one’s case might be better served by limiting the amount of time spent on cross-examination or by choosing to dispute scientific evidence or expert witnesses outside of the earshot of the jury or by motion.<sup>218</sup> If all else fails, a stipulation to expertise or the proffered evidence might minimize its impact.<sup>219</sup>

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214. Tyler, *supra* note 57, at 1068-69; U.S. v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (warning that scientific evidence can “assume the posture of mystic infallibility in the eyes of a jury”); Imwinkelried, *The Next Step*, *supra* note 75, at 2285-86 (1994).

215. *Model Prevention and Remedy of Erroneous Convictions Act*, 33 ARIZ. ST. L.J. 665, 666-67 (2001) (though previously accepted, validity now disputed).

216. *Id.*; Paul C. Gianelli, *Scientific Evidence on Civil Cases*, 33 ARIZ. ST. L.J. 103, 118-19 (2001) (courts have re-examined and disallowed hair analysis); *see also* Williamson v. Ward, 110 F.3d 1508, 1520 n.13 (10th Cir. 1997).

217. New Jersey v. Behn, 868 A.2d 329, 340 (N.J. Super. Ct. App. Div. 2005); Mark Hansen, “Bullet” Proof, A.B.A. J., Sept. 2004, at 58.

218. *See, e.g.* James W. McElhaney, *Matters of Timing*, A.B.A. J., July 2005, at 22 (critical nature of making evidentiary objections before trial or in a motion in limine); RONALD L. CARLSON ET AL., DYNAMICS OF TRIAL PRACTICE, 115-18 (2d ed. 1995) (sample of a motion *in limine* to preclude introduction of evidence); Miller, *supra* note 76, at 1085.

Indeed, “[t]he first goal of the cross-examiner is to intercept the testimony before the jury receives it.” *Id.* Thus, an advocate can attempt to exclude testimony. *Id.*

219. *See* MAUET, *supra* note 10, at 327 (describing strategy in stipulating to expert’s qualifications).

## CONCLUSION

Inasmuch as a verdict signifies which story the jury found most believable, it is the jury's truth. This determination of truth is guided not only by the stories told at trial (as developed and underscored through cross-examination), but also by those of which jurors are already aware. Many of these narratives are created and communicated by television. Therefore, whether such stories are accurate, it is important to understand their influence on jurors and their verdicts.

Empirical evidence has shown that television's legal narratives can become normative and behavioral guides, showing audiences what is normal and how judges, litigants, and attorneys act. Yet just as it is imprudent to ignore the potential impact of such stories, it is equally unwise to presume that any story can have any impact. An advocate who attempts to exploit or avoid certain narratives based on urban mythologies (such as the "CSI Effect" and "litigation explosion") rather than facts runs the risk of contributing to her opponent's story and/or undercutting her own. Therefore, although neither empiricism nor the nuances of media theory are the purview of litigators, a rudimentary understanding of their lessons about legal narratives is valuable in developing a powerful trial narrative.