

Introduction to The Inquiring Lawyer

by Ronald M. Sandgrund, Esq., InQ.

This is the third article by the Inquiring Lawyer addressing a topic that Colorado lawyers may consider often but may not discuss publicly in much depth. The topics in this column are being explored through dialogues that may involve lawyers, judges, law professors, law students, and law school deans, as well as entrepreneurs, journalists, business leaders, politicians, economists, psychologists, academics, children, gadflies, and know-it-alls (myself included).

These discussions may tread on matters sometimes considered too highly regarded to be open to criticism, or even simple exami-

nation. I take full responsibility for these forays, and I recognize that I may be subject to assessment and criticism myself. (Please be gentle!) If you have an idea for one of these columns, I hope you will share it with me via e-mail at rms.sandgrund@gmail.com.

This month's article is the first of a four-part conversation about the effects, if any, of popular culture—TV, movies, books—on juror perceptions and lawyers' and judges' courtroom behavior. The discussion's second part will print in the February issue.

Dialogue: Does Popular Culture Influence Lawyers, Judges, and Juries?—Part I

Participants



Ron Sandgrund

Ron Sandgrund, of counsel with the Sullan Construction Defect Group of Burg Simpson Eldredge Hersh Jardine, P.C., has been a trial and appellate attorney since 1982, representing, early in his career, primarily product manufacturers, insurance companies, and small businesses, including real estate developers and builders, and then later, representing mainly property owners and homeowner associations in construction defect, insurance coverage, and class action disputes. He is a frequent author and lecturer on these topics, as well on the practical aspects of being a lawyer.



Stanley Garnett

Stan Garnett was elected Boulder District Attorney in 2008. Before that, he was a trial lawyer for twenty-two years at Brownstein, Hyatt, Farber and Schreck, where he specialized in complex litigation in state and federal courts across the nation. Garnett received his BA degree in 1978 from the University of Colorado (CU), graduating Phi Beta Kappa, and his JD degree in 1982 from CU Law. From 1982 to 1986, he was a Denver Deputy District Attorney.



Christina M. Habas

A native Denverite, Tina Habas received her undergraduate degree from the University of Denver (DU) and her law degree from DU Law. She began practicing with Watson, Nathan & Bremer, P.C., representing governmental entities and school districts, and handling general litigation, employment law, and civil rights disputes. She moved to Bruno, Bruno & Colin, P.C., where she represented law enforcement officials. In December 2003, she was appointed as a Denver District Court Judge, serving in the domestic, civil, and criminal divisions. She retired from the bench in 2012 to resume working as a trial lawyer. Her current practice focuses on representing catastrophically injured people.



Robert L. McGahey, Jr.

Judge Robert McGahey, Jr. has been a Denver District Court Judge since January 2000. He has served in all three divisions of the Denver District Court. Before his appointment, he was a civil trial lawyer for more than twenty-five years, during which time he tried more than 100 jury trials. McGahey is a graduate of Princeton University (*magna cum laude*) and DU Law. He has been a frequent instructor for the National Institute for Trial Advocacy and has been an adjunct professor at DU Law since 1985, teaching Basic and Advanced Trial Practice and the Judicial Externship Seminar. He received the Ruth Murray Underhill Teaching Award in 2013, presented by the DU Law Faculty Senate.



Robert W. Pepin

Bob Pepin, a graduate of CU Law, has been a criminal defense lawyer since 1982, when he became a deputy with the Colorado State Public Defender's system. Bob's eleven-year state defender stint included serving in three regional offices, heading the Adams County Regional Office for five years, and training new attorneys. He spent six years as private counsel with Recht & Pepin, P.C., and has been an assistant federal public defender for the District of Colorado since 2000.



Larry S. Pozner

Larry Pozner is a founding partner of the thirty-lawyer litigation firm Reilly Pozner LLP. The firm has been named by the *National Law Journal* as one of America's "Top 10" litigation boutiques. *The Best Lawyers in America* has listed Pozner for Bet-the-Company Litigation Criminal Defense: Non-White-Collar and Criminal

Defense: White-Collar. Pozner is a past president of the 10,000-plus member National Association of Criminal Defense Lawyers. He is co-author (with Roger J. Dodd) of *Cross-Examination: Science and Techniques, 2d Ed.* (LexisNexis, 2009).



Marjorie J. Sommer

Marjorie Sommer is a co-founder and senior trial consultant at Focus Litigation Consulting, LLC. Previously, she was president of two highly successful jury research and trial consulting firms based in Denver, and practiced law for many years before that. Sommer has worked in the trial consulting field for more than twenty years, and has facilitated more than 1,000 focus

groups and mock trials. She has consulted in virtually every area of the law, and has spoken to approximately 10,000 people across the country (in twenty-nine states and the District of Columbia) about actual case issues and facts to assist her clients in better understanding how jurors perceive, deliberate, and decide their cases. She has taught jury issue-related CLE courses in Colorado, California, Florida, Arizona, West Virginia, and Wyoming. She received her BA degree, *magna cum laude*, from the University of Florida in 1973, and earned her JD degree in 1975 from the University of Florida College of Law.



Richard Walter

Professor Richard Walter is a celebrated storytelling guru, movie industry expert, and longtime chairman of UCLA's legendary graduate program in screenwriting. A screenwriter and author of bestselling fiction and nonfiction, Professor Walter wrote *Essentials of Screenwriting* (Penguin Books, 2010). Walter lectures and con-

ducts screenwriting master classes throughout the world. He is a sought-after Hollywood script doctor. Walter wrote the earliest drafts of *American Graffiti* (1973). His former students have won five "Best Screenplay" Oscar nominations and three Oscars in the past five years. They have written eleven films directed and/or produced by Steven Spielberg. His former students also write for television. Walter is a court-recognized expert in intellectual property litigation and has testified as an expert witness in disputes involving many films, including the entire James Bond series.



Malcolm E. Wheeler

Malcolm (Mal) Wheeler is the co-founder of Wheeler Trigg O'Donnell, LLP, one of the country's leading product liability and commercial litigation firms. Wheeler's practice has focused on large and complex business litigation and product liability litigation, especially nationwide "pattern" litigation, class actions, and major

appeals. He has briefed and argued cases in the U.S. Supreme Court, the U.S. Courts of Appeals, and state appellate courts throughout the country. He is a Fellow in the American College of Trial Lawyers and a Fellow in the International Academy of Trial Lawyers. Wheeler also has authored many journal articles on product liability and class actions.



Introduction to Part I of the Dialogue

by Ronald M. Sandgrund, Esq., InQ.

“Now I am confident that you gentlemen will review, without passion, the evidence that you have heard, come to a decision and restore this man to his family.”

—*To Kill a Mockingbird* (1962)

“It doesn’t matter what I believe, it only matters what I can prove.”

—*A Few Good Men* (1992)

“I don’t mind if you try my case for me, your Honor, but for God’s sake, don’t lose it!”

—*The Verdict* (1982)

Popular culture generally has been defined as “culture based on the tastes of ordinary people rather than an educated elite.”¹ This four-part article discusses the effect that popular culture—primarily TV, movies, and popular fiction books—has on jurors, lawyers, and judges. In this Part I, we explore whether and how popular culture influences juror perceptions of judges, lawyers, and trials. Part II examines ways lawyers have tried to take advantage of or negate the potentially powerful shadows that popular culture casts on civil and criminal trials. Part III investigates whether popular culture is undermining the rule of law. Part IV asks our panel which movies and TV shows they love and hate when it comes to how they depict lawyers, judges, and trials—and which have had the greatest influence on each of them.

In March 1996, a few weeks before my law partner Scott Sullan and I were about to begin trying one of the few certified class

actions in the United States ever to be submitted to a jury, a lawyer friend of ours with much more trial experience than we suggested that we read one of John Grisham’s recent best-selling novels involving a class action lawsuit, so that we could consider our case from the typical juror’s perspective. I read the book, decided I was not much of a Grisham fan, but learned little else. Also, my sense was that, after the first day of our trial, the jurors cast aside any preconceptions they may have formed due to watching movies and TV and reading the latest courtroom blockbuster, and were focusing solely on the evidence. We obtained favorable verdicts on every claim for relief but, because post-trial juror interviews were discouraged, we learned little about the jurors’ thought processes, including the impact, if any, of Grisham’s book, despite the fact some of the jurors acknowledged being Grisham fans during *voir dire*.

Most trial lawyers take for granted that jurors’ life experiences shape how they perceive and react to trial proceedings. Intuitively, these same trial lawyers assume that TV and movies comprise a significant part of these experiences. In fact, since very few jurors have any exposure to courtrooms, trial lawyers, or judges beyond what they see and hear on the big and little silver screens (tablets, desktops, notebooks, phablets, and smart phones), it may be reasonable to assume that these media may play a role in shaping juror expectations. Lawyers and judges, in turn, may try to predict the effect that this exposure has on jurors and seek to mitigate or exploit these media impressions. As the psychologist and economist Daniel Kahneman explains in his book *Thinking, Fast and Slow*, the subtle and not-so-subtle influences that “stories” have on us can be indirect, yet significant.²

Dialogue: Does Popular Culture Influence Lawyers, Judges, and Juries?—Part I

Popular Culture’s Influence

How much weight do lawyers give to the influence of movies, television, and novels on our legal system? While legal commentators have spilled a lot of ink and consumed a lot of bytes analyzing the effects of popular culture on the law, there is a consensus that any conclusions are inherently suspect, because (1) quantitative data is sparse; (2) pre-trial juror interviews are limited to *voir dire*; and (3) post-trial interviews by lawyers are greatly discouraged, if not forbidden, by many judges.³

Psychologist and jury consultant Dr. Cynthia Cohen argues in “Media Effects From Television Shows—Reality or Myth?”⁴ that eccentric TV lawyers such as William Shatner’s Denny Crane (*Boston Legal*) and Calista Flockhart’s Ally McBeal boost perceived public trust in male lawyers and competence in female lawyers by the contrast they present to real lawyers. Cohen has found that mock juror preferences for particular TV series often

track whether they are plaintiff-oriented or defense-oriented. In her juror interviews, she also has found strong evidence of the “*CSI* effect”: jurors tend to believe that guilt cannot be proven beyond a reasonable doubt without some supporting scientific evidence (although Dick Wolf, creator of the *Law and Order* series, tells Cohen that the phenomenon should more properly be called the “*Law and Order* effect,” since that show predated *CSI*).

Cohen also has found a positive correlation between juror trust in lawyers and how much television they watch. She concludes that jurors expect first-rate courtroom storytelling and graphics. Stories that dominate the news can have an outsized effect on juror perceptions according to Cohen, and the key to overcoming these impressions is to focus on the unique facts of the case at hand so as to distinguish it from TV’s latest obsession. Cohen believes that lawyers should address TV and popular novel perceptions head on, because these perceptions form a part of the “jurors’ knowledge

base.” She says that people who do not like lawyers tend to not watch law-related TV and movies and rely, instead, on negative stereotypes. Not surprisingly, Cohen advocates the use of jury consultants to help manage the effects of popular culture on juror mindsets.

In an effort to cast some light on the subject, the InQuiring Lawyer spoke to some of Colorado’s leading jurists; top trial lawyers; a jury consultant; and a screenwriter-media pundit, who is also chair of the UCLA Film School graduate screenwriting program.⁵ Those discussions follow.

Do TV and the Movies Affect Juror Perceptions of Lawyers and Judges?



InQuiring Lawyer: Judge McGahey, have you found that popular culture, especially as drawn from or reflected in television and the movies, strongly influences how jurors expect lawyers and judges to behave in the courtroom, and how jurors expect civil and criminal trials to unfold in the courtroom? If so, what are those expectations?



Judge Robert McGahey: Let me give a lawyer-like answer: yes and no. I believe that the *CSI* effect is real, particularly in criminal cases. Defense lawyers spend a great deal of time talking about forensic evidence—or the lack of it, which requires prosecutors to put on what I call “anti-*CSI* evidence” to explain why there isn’t DNA evidence in every garden-variety burglary case. On the other hand, post-trial discussions with jurors leads me to believe that most of them do not want real lawyers to act like TV lawyers, and that jurors are turned off when they think a courtroom is being used like a TV studio.

InQ: Tina, you are a trial lawyer and were a district court judge for many years. What are your thoughts?



Tina Habas: Before I was appointed to the bench, there was not nearly the number of popular culture references to lawyers that we have seen in the last fifteen years. Even so, we had to contend with *L.A. Law* more than *Perry Mason* when considering what jurors had as a reference to the justice system. Once I took the bench, I had the invaluable opportunity to debrief jurors after every trial. When I had the opportunity to speak to jurors directly following their verdicts, jurors nearly always told me that what they saw in the courtroom was very different from what they imagined might occur there. Most of the time, they were very grateful for that difference. They had expected that the judge would not take control if things began to get out of hand, and that the lawyers would be yelling at each other throughout the trial. On the unfortunate side, they also expected that cases would move much more quickly than they actually do.

InQ: And how did the jurors view lawyers?

Habas: Jurors have a very specific view of what lawyers will be like—that we are narcissistic, know-it-all who simply want to force our views on them. And, as Judge McGahey notes, jurors also had a very specific expectation in criminal trials, and often assumed that every criminal trial would include testimony about DNA, fingerprints, or other scientific evidence, even when the nature of the case does not justify the use of those techniques. In those trials, jurors would sometimes find that the prosecution failed to meet its burden of proof, because the scientific or technical evaluations were

not done. Since leaving the bench, I recognize that there may be a lack of understanding of the justice system, and try to make certain that my behavior does not mimic the less-than-professional behavior in pop culture. I also recognize that jurors are far more sophisticated about evidentiary issues than we often anticipate.

InQ: Mal, what are juror expectations like in civil cases? Do television and the movies strongly influence how jurors expect lawyers and judges to behave and trials to unfold?



Malcom Wheeler: Because post-verdict interviews of jurors by me or my colleagues in my cases have not generally sought to make that determination, I can make only a few observations. Television and movie depictions of lawyers’ conduct in trials do not appear to have strongly influenced most jurors’ expectations as to whether a lawyer should (a) try to distract the jury by, for example, loudly shuffling papers, talking to co-counsel, or repeatedly moving a chair, while opposing counsel is examining a witness on direct or cross; (b) interrupt opposing counsel, a witness, or a judge; or (c) overtly, whether by audible words, noise, or gesticulation, express agreement, disagreement, pleasure, or displeasure with testimony of a witness during opposing counsel’s examination on direct or cross. Lawyers in television shows and movies commonly engage in those tactics, but post-verdict interviews of jurors consistently have informed me that I have benefited when my opponents have engaged in those tactics. I infer from this that either jurors do not so substantially expect lawyers to engage in those tactics that they are willing to forgive it when it occurs, or jurors expect it and dislike it when they experience it.

InQ: Larry, what is your sense of juror expectations when it comes to lawyer courtroom ethics?



Larry Pozner: What makes TV and the movies most interesting are often depictions of unethical behavior by lawyers and judges that go beyond the pale. As a result, some jurors expect misbehavior. Happily, instead, jurors find that courtrooms are tightly run, and the actual courtroom experience is far less dramatic. There are many fewer surprise witnesses, blurted-out confessions, or other odd behaviors that are often dramatized but rarely occur in the courtroom. TV and movies also often highlight the subversion of justice.

The desire to create dramatic situations frequently rests on creating an unjust premise. For example, the media often depicts cops using tricks to “convict the guilty,” while the actual use of such tricks is way overblown. Still, as recent revelations concerning a Brooklyn cop [Det. Louis Scarcella] have shown,⁶ justice can be subverted in real life, but not nearly as often as shown on TV. Let’s face it: the more entertaining the TV or movie drama, the less it syncs with reality.

InQ: Professor Walter, your thoughts?

Prof. Richard Walter: Yes, reality is free. A movie requires the purchase of a ticket or payment of a fee to the cable company. Planes that land safely don’t make the news. If you want not only to sell books but to write good ones, you have to write about the dark side. That’s what drama does. Worthy dramatic narratives require conflict every inch of the way. Not consensus, but confrontation. Not agreement, but controversy. Not dispassionate, expansive, informed, intelligent discourse, but blood-and-guts, life-and-death wreckage. Nobody wants to see “The Village of the Happy, Nice People.”

Law is conflict at its core, which is why I believe there are so many courtroom and legal dramas, because they've all got toe-to-toe, head-to-head conflict.

InQ: Yes, as John Grisham has said, "Nobody wants to read about the honest lawyer down the street who does real estate loans and wills. If you want to sell books, you have to write about the interesting lawyers—the guys who steal all the money and take off. That's the fun stuff."⁷

InQ: Larry?

Pozner: Actual trials are so much more boring than depicted on TV and in the movies: no preening lawyers, no biased or bizarre speech-making judges, no screaming jurors. The heart of most courtroom dramas consists of two things: cross-examination of witnesses and closing argument. Everything else appears to be immaterial. As a result, in actual trials, jurors pay very close attention to cross-examination. Still, by the time closings are given, the case is already won or lost. Also, popular culture teaches nothing about procedure. You just can't make a good movie about the rules of civil or criminal procedure. Yet, procedure dominates actual trials.

InQ: Bob, as a long-time public defender, what's your perspective on popular culture's influence on jury trials?



Robert Pepin: I don't know to what degree popular culture influences how jurors expect us to act in a courtroom, but I sure have my suspicions. Those who watch relatively well-written TV and movie courtroom dramas enjoy the benefit of teams of writers spewing perfect paragraphs from the mouths of intriguing and beautiful actor-lawyers. I think some potential jurors expect us to perform similarly. Folks sitting in the jury box may know better but do they force themselves to exercise that knowledge? I'm sure some do and some don't. Those who watch televised real trials may have more realistic expectations. The pace of a theatrical trial, even on live TV, doesn't drag the audience through the recesses and legal wrangling that are part of any actual jury trial; jurors can't possibly be expecting what they get in that regard. I know they express frustration, even anger, at the pace of trials. As to the story of the case, artistically produced trials are the product of skillful editing, crafted to build to some sort of crescendo. Of course, the most dramatic moments are often at the end, or strategically placed to fit either the pace of the production or wherever necessary to enhance the story outside the courtroom. The story is presented seamlessly, and there are answers to most mysteries. TV and movie audiences don't see the sausage being made—they just eat the breakfast. It is natural for prospective jurors to expect a similar, ready-for-breakfast presentation. And they do expect the stories presented to them to be interesting and well told. Those are reasonable expectations, and too few of us pay sufficient attention to that basic need.

InQ: Do I sense some uncertainty in your observations?

Pepin: Yes, practicing these last several years has left me feeling out of touch with jurors. I grew up where *voir dire* by the attorney was a large part of the jury trial, when we were usually speaking with only twelve, thirteen, or fourteen jurors at a time, and after each verdict, I talked with any juror willing to give me a few minutes. Those experiences, in those years, made me feel as though the jurors were really part of their own system and that trial lawyers had better information on which to base their choices on behalf of their client.

InQ: And today?

Pepin: These days, I feel severely limited. I am allowed to submit suggested questions for the courts to ask the *venire* but, even if every proposed question is asked, I am not the one following up on the answers. That process, even though I know it is being executed with a fair eye by smart judges, is no substitute for my being able to actually discuss the issue with the person in the box. Time with the jury is limited. Jury questionnaires take up additional time, offer logistical hurdles, and often are not allowed. The local federal rules limit the amount of contact attorneys are allowed to have with jurors post trial, and it is left to each individual judge to respond to requests for respectful interaction between trial counsel and willing jurors. Consequently, I have spoken with members of only one jury since 2001. So much of what I have to offer here during this discussion is based on conversations with other attorneys and my experienced intuition. The "experienced" part feels thin these days.

InQ: You sound disappointed with the modern trend of shortening *voir dire*.

Pepin: I think we need to turn back this pervasive movement toward limiting *voir dire*. I recognize that is where the momentum lives these days. But we need more opportunity to interact with jurors, to understand their influences, perspectives, and opinions—not less. I don't think jury instructions can do much more to combat the effects of popular culture. They provide structure, outlines, and law, but telling people to not be biased, prejudiced, etcetera can't go much further than it does. I know jurors and judges get impatient with the process and the litigants. Some of that is time and caseload pressure; I get that. Some of that impatience is driven by attorneys who don't do *voir dire* very well; I get that, too. But the media-saturated world we live in cries out for more, not less, inquiry.

InQ: Marjorie, as a jury consultant, your perspective may be the most objective. What do you think jurors are expecting when they enter a courtroom?



Marjorie Sommer: Jurors enter the courtroom already well versed in stories about the justice system, crime, attorneys, and legal liability. They've gotten their "lessons in the law" from the popular culture, primarily television. TV is our most pervasive medium—98% of U.S. households own a television. Through TV news, reality courtroom programs, and legal dramas, television's narrative has, to a certain degree, become the public's expectation of litigation and the legal process. The truth is that much of what the public knows or thinks it knows about the law, legal procedures and the system, juror responsibilities, lawyers, judges, and the respective behavior of each juror comes from these televised images.

I believe that the general public has three common perceptions about lawyers: they dress to impress, they try to force their own point of view, and they object a lot. No doubt they got these perceptions from watching lawyers on TV, who are generally dressed expensively, and are often portrayed as pushy, argumentative, and overbearing. And, yes, on lawyer shows, the lawyers do object a lot! Prime time legal dramas certainly show attorneys captivating the jury with dynamic stories and dramatic opening and closing arguments. Unfortunately, from my experience, most lawyers are not as captivating as their small screen counterparts; thus, real trial lawyers often fall short of juror expectations of powerful and engaging storytelling and entertaining opening and closing arguments.

The average person does not have any direct experience with the justice system; consequently, television's stories are very influential in our society. These stories may feature manufactured plots and

characters, but they are depicted as very realistic and oftentimes factually based. Sets resemble real courtrooms and law offices, and stories feature real legal procedures such as hearings, opening statements, cross-examinations, and juries. Unfortunately, while appearing very real to the average viewer, the fact is that accuracy often gives way to drama. This is necessary because of the medium itself and the fact that viewer attention span is relatively short. As a result, television must tell stories quickly and simply. In these shows, justice is always swift and uncontroversial, and characters and their actions are painted in black-and-white terms—right or wrong, guilty or innocent. These images and storytelling conventions become the functional equivalent of law and the system to the average person. As a result, viewers presume that the procedures and behaviors they see on TV are common or normal when, in actuality, they often are not.

Popular culture has had an effect on the public's perception of attorneys. For instance, pop culture focuses on the more dramatic areas of legal work (the trials), and spends little time showing lawyers engaged in such mundane tasks as legal research, brief writing, discovery, etcetera.

InQ: Professor Walter?

Walter: The attempt to replicate the look and feel of reality in movies that Ms. Sommer describes is hardly limited to law stories. Anybody who watches TV or film dramatizations to learn lessons about something is going to get lousy lessons and bad TV or film. While lawyers may be depicted inaccurately in media, aren't all groups and professions romanticized and idealized in film and TV?

InQ: Marjorie, what about daytime "reality" TV; how does it play into the juror's calculus?

Sommer: Daytime legal shows such as Judge Judy depict judges as active, opinionated directors of courtroom proceedings. This milieu cultivates a judge-centered vision of the courtroom and sanctions a courtroom proceeding that is detectably authoritarian and includes intense moral condemnation by the judges. Consequently, studies have shown that frequent viewers of these shows (that is, those who watch them more than once a week) believe that this is the way judges should act. In fact, as it turns out, the viewing of daytime television was more instrumental than people's exposure to real-life courts in the shaping of what those polled expected of their courts and judges.

InQ: Professor Walter?

Walter: But does the subversion of the jury's expectations due to idealized depictions on TV affect their verdicts and justice and due process? Is there even a shred of incontrovertible evidence that it affects it at all?

InQ: Marjorie, any other thoughts?

Sommer: There is greater diversity on today's lawyer shows, both in ethnicity and gender, and consequently, this is what most people expect to see. Furthermore, the expectation established by popular culture is a trial team that appears like an ensemble cast—not a team where the only person of color or the only female plays the role of the silent or submissive sidekick.

InQ: Stan, what is your view as a prosecutor on whether popular culture affects juror perceptions?



Stanley Garnett: I believe that there has been some influence from popular culture about expectations of lawyers and judges, although I am not sure it is significantly different from the days pre-dating television. Probably the most significant expectation I deal

with routinely with picking a jury and discussing with jurors is that trial is much longer and has fewer interesting moments than what is depicted on television or movies. When viewers are used to seeing complex courtroom dramas developed and resolved within an hour, they need to understand that in the real world, things take much longer.

Do TV and the Movies Affect How We View Right and Wrong?

InQ: Have you found that popular culture, especially television and the movies, strongly influences how jurors perceive what makes a "just" result, either in the civil or the criminal sphere? First, let's hear from a former and then a current judge.

Habas: No.

McGahey: I don't think so, at least not overtly. My experience with jurors, both as a lawyer and as a judge, reinforces the brilliance of the jury system. Jurors generally make their decisions based on evidence and the law, despite what some lawyers think. I can give you numerous examples of jurors saying they felt sympathy for a particular party, but still returned a verdict against that party, because they understood what their job was.

Walter: Bravo to those jurors!

InQ: What do the trial lawyers think? Mal?

Wheeler: It's unclear whether it is the news media, popular culture, or a combination of them that strongly influence how jurors perceive what makes a "just" result in civil actions. Pretrial jury research in several of my own cases, pretrial jury research in cases handled by lawyers in other firms with whom I have spoken, and articles published by jury consultants about their research have shown that jurors often begin a trial with information or misinformation obtained through media stories describing or purporting to describe events related to, similar to, or indirectly bearing on issues in the case being tried. For example, at least some jurors have formed opinions about the U.S. Food and Drug Administration and pharmaceutical manufacturers that affect how those jurors are likely to perceive what result will be "just" in a civil product-liability case brought by an injured plaintiff against a manufacturer of a prescription drug approved by the FDA. It seems likely that at least some such perceptions derive from popular culture.

InQ: Bob, what's your take on this as a public defender?

Pepin: I cannot say that television and movies strongly influence how jurors perceive what makes a "just" result. Today, we hear highly credentialed legal and "justice" commentators presupposing and announcing guilt. There are even "learned" expressions of outrage over verdicts reached by jurors who have struggled to do their best. Comedians and talk show hosts castigate jury awards and verdicts. Everything is second-guessed in a very public way. Is "right" or "wrong" or "just" ever just accepted any longer? Probably not.

InQ: Professor Walter, your thoughts?

Walter: I would ask, "Why should 'right' or 'wrong' or 'just' ever just be accepted?" Isn't finding answers to these questions a complex, subtle, and nuanced enterprise?

InQ: Larry, your thoughts?

Pozner: TV and the movies are rife with examples of unjust rulings—actual criminals getting off on technicalities—while in the real world, this rarely happens. Also, I think that what constitutes a "just result" has taken on special meaning in America: it has come to mean "the result I am entitled to." Rather than acknowledging our imperfect system and the justice that we must settle for,

too many litigants feel cheated if they do not get the result they want, rather than recognizing that the system worked as it was supposed to. I have found that corporate clients are the most realistic and least emotional about trial results, often remarking after a disappointing verdict that, “Yes, I can understand the jury’s reasoning.”

One criminal defendant I represented stands out in my mind—this after so many years of practice since then. As a public defender, I had a client who was charged with felony murder. He was convicted, and the only sentence he could get was life imprisonment; there was no judicial discretion to alter the sentence. Still, a sentencing hearing was held and, although the defendant had nothing to lose or gain at the hearing, he thanked the judge for a fair trial and for being treated fairly by the judicial system.

InQ: Stan, what’s the view from the prosecutor’s chair?

Garnett: I don’t believe, frankly, that television and the movies have strongly influenced jurors’ views of a just result. In fact, I believe what’s wonderful about jury trials in America and continues to be so is that jury trials appeal to a fundamental sense of fairness and resolution that is deeply imbued in Americans, regardless of current culture. I believe Americans have a fundamental sense of fairness, of the burden of proof, and of the presumption of innocence, and that to some extent this consciousness is rooted in religious understandings of justice and fairness. My basis for these beliefs is thirty-two years of picking juries and talking to jurors afterward. I have tried close to 300 jury trials, many of them for several days. I think that picking lots of juries and listening to their comments, particularly in the Colorado system that permits extensive questioning by the lawyers, provides a pretty good basis. Since trial work is an art, not a science, one’s intuition is the strongest asset, and it is this basis on which I rely most.

InQ: And what does the jury consultant think about the effect of popular culture on juror’s findings of right and wrong in the criminal courtroom?

Sommer: The “cultivation effect” has influenced jurors’ perceptions of a “just” result in the criminal courts. The cultivation effect, in this context, is that regular viewers of certain television programming or avid consumers of other varieties of pop culture come to see social reality differently. This effect does not come about from a unique individualized work, but rather from being exposed repeatedly to a certain genre. For example, evidence exists that heavy television viewing leads to an exaggerated sense of how much violence and crime there is in society. Consequently, because jurors have cultivated the belief that crime and violence are rampant, they may have a greater incentive to do something about this perceived state of affairs and give the prosecution the benefit of the doubt, convicting in close cases. However, believers in the *CSI* effect maintain that jurors are acquitting defendants more readily today in cases where forensic evidence is absent or insufficiently probative—that is, the “strong prosecutor’s effect.” On the other hand, many defense attorneys believe *CSI* and similar programs have produced an opposite effect through their positive portrayals of state-employed forensic scientists, thereby enhancing the credibility of such witnesses in real life, giving an advantage to the prosecution and leading to wrongful convictions. I have found neither to be the case in my trial consulting practice.

Walter: So, in short, popular culture has no such effect, which has been my contention all along.

InQ: How about in civil proceedings?

Sommer: In the civil arena, excessive media coverage of high-profile civil cases has also influenced perceptions of the civil trial process. We all know what happened with the wide reporting of the infamous McDonald’s coffee case. Although the average person knew virtually none of the facts that led to the verdict in that case, because of the spin given to it by the media, most people believe the verdict was wrong, and cite that case as the prime example of a frivolous lawsuit that had an unjust result. In every case where I have sat through jury selection, and in many of my jury research exercises, where the subject of frivolous lawsuits is raised, the McDonald’s coffee case is always given by someone as an example.

Walter: I have to ask, “So what?” Aren’t the courts supposed to operate free of public opinion? What’s wrong with a lot of people thinking a verdict was wrong?

InQ: Marjorie, is there social science research that relates to these popular culture effects?

Sommer: The reporting of large monetary awards in high-profile cases has also led to acceptance by many people that these types of awards are commonplace. Social science offers one explanation for this: the “availability heuristic”—that is, judgments of the likelihood of a particular event are a function of the ease of recalling similar past events. Research has demonstrated that the availability heuristic influences a variety of decision-making situations, but unfortunately can often lead to biased judgments. In the context of civil litigation, the consequences of relying on the availability heuristic to determine liability and damages can be significant, specifically when the available information is in the form of media coverage of the atypical award. The risk is that jurors will use this information as an anchor—that is, a typical award—and adjust their own case-specific damage awards accordingly. Ultimately, this can lead to larger damage awards decided by juries. Research studies have borne this theory out. In a study where jurors were exposed to news articles describing a varying verdict awarded in a products liability case—a case significantly different from the one they were ultimately asked to evaluate for liability and damages—it was found that reading about a very high verdict shortly before mock jurors were asked to evaluate another case drastically effected the amount they awarded.

Walter: Still, one must ask, was the effect causal or merely coincidental?

Conclusion

Lawyer intuition, post-trial juror interviews, mock trials, real-time observation by judges, and social science research appear to support the conclusion that juror beliefs and perceptions are influenced by popular culture when those jurors assume their seats in the jury box. However, popular culture’s ultimate effect on juror decision making is subject to strong debate. Does popular culture actually affect verdicts? Does it ever pervert justice? Because it is impossible to accurately measure this phenomenon, lawyers and judges may be left only with instinct and intuition to guide them. In the next installment of this series, we examine how lawyers try to exploit and mitigate popular culture’s assumed influences.

Notes

1. Online *Oxford Dictionary*, www.oxforddictionaries.com/us.
2. Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011). Consider the “narrative fallacy,” which refers to the human tendency

to construct stories around naked facts. Talib, *The Black Swan* 309 (Random House, 2007).

3. Elkins, "Popular Culture, Legal Films and Legal Film Critics," 40 *Loyola of L.A. L. Rev.* 745 (2011), digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2573&context=llr.

4. See Asimov, ed., *Lawyers in Your Living Room! Law on Television* 27-35 (American Bar Association, 2009).

5. Professor Walter also happened to marry my sister, so he could not turn down my interview request! I previously interviewed Professor Walter in "When Your Expert Witness is a Screenwriter," *The Docket* (Denver Bar Association, Nov. 2004), www.denbar.org/docket/doc_articles.cfm?ArticleID=3950.

6. See *The New York Times* (Sept. 5, 2013), www.nytimes.com/2013/09/06/nyregion/as-doubts-over-detective-grew-prosecutors-also-made-missteps.html?pagewanted=all&_r=0:

After a murder defendant took the stand and accused a Brooklyn homicide detective, Louis Scarcella, of beating a false confession out of him, the detective had someone important vouch for his trustworthiness to the jury: the prosecutor. "The defense wants you to accept that Detective Scarcella is going to come in here and throw away 24 years of his life, wants you to believe that Scarcella is going to risk his pension, his livelihood and his profession to obtain a confession," said Kyle C. Reeves, then a prosecutor with the Brooklyn district attorney's office. "He's going to risk all that? Very, very unlikely." Despite the confident speech, by the time Mr. Reeves defended the detective in that 1997 murder trial there was already growing evidence available to prosecutors that Mr. Scarcella's work was marred by persistent and troubling patterns.

7. See www.mlquotes.com/authors/john_grisham/about/books. ■