

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 third 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 fourth and final part will print in the April issue.

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

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 graduate program in screenwriting. A screenwriter and author of best-selling fiction and nonfiction, Walter wrote *Essentials of Screenwriting* (Penguin Books, 2010). Walter lectures and conducts 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 III: Managing Popular Culture's Influence

by Ronald M. Sandgrund, Esq., InQ.

Juror #2: "It's hard to put into words. I just think he's guilty.
I thought it was obvious from the word, 'Go.'
Nobody proved otherwise."

Juror #8: "Nobody has to prove otherwise. The burden of proof
is on the prosecution. The defendant doesn't even have to
open his mouth. That's in the Constitution."
—*Twelve Angry Men* (1957)

"I don't like juries having the wool pulled over their eyes.
I don't think that's what the Constitution is about.
I don't really want to have any part of getting guilty people off."
—Nancy Grace, TV legal commentator¹

"The one thing that doesn't abide by
majority rule is a person's conscience."
—*To Kill a Mockingbird* (1962)

Popular culture generally has been defined as "culture based on the tastes of ordinary people rather than an educated elite."² This four-part article discusses the effect that popular culture, primarily TV and the movies, has on jurors, lawyers, and judges. Part I explored whether and how popular culture influences juror perceptions of judges, lawyers, and trials. Part II examined ways lawyers have tried to take advantage of or negate the potentially powerful shadows that popular culture casts on civil and criminal trials. This Part III investigates whether popular culture may be undermining the rule of law. Later, in Part IV, our panel will discuss which movies and TV shows they love, and love to hate, when it comes to how they depict lawyers, judges, and trials—and which have had the greatest influence on their lives.

1. See Nancy Grace quotes, www.brainyquote.com/quotes/quotes/n/nancygrace486830.html.

2. Online *Oxford Dictionary*, www.oxforddictionaries.com/us.

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

Ambulance-chasing lawyers and defense attorneys bending and breaking the rules, if not the law; judges yelling and screaming at lawyers and scolding witnesses; corporate evildoers jousting with prostituting plaintiff's experts; lawyers sleeping with clients, judges, and opposing counsel: this and much more—just turn on your TV and watch its courtroom dramas and reality shows unfold during a single day. Some may ask: (1) How can popular culture not serve to undermine a fair view of lawyers, judges, and our judicial system and not unduly influence jury verdicts? *or* (2) Does the rule of law really have nothing to fear from popular culture, despite the media's supposed dramatic excesses?

Richard Walter, chair of the UCLA Film School's graduate screenwriting program, has stated:

"Art" is the first part of "artificial." Movies are reel, not real. As I do not go to a hardware store for a tuna fish sandwich, I do not go to the movie theater for "truth." If I do, I'll get lousy "truth" and a lousy movie. The "truth" in film is not about the facts, not about the data, but about the emotions. The latter are completely real. All the rest is fake, fake, fake.¹

Maybe so, but does the average juror view it all as "fake, fake, fake"? In a recent conversation, when I described my sampling of TV and movie story lines set out above to Professor Walter, he responded:

Why are they "excesses"? Is Medea's murder of her children dramatic excess? Is Richard III's murder of his nephews dramatic excess? Isn't much of what you characterize as "dramatic excess" just a regular part of dramatic narratives?

In an effort to cast some light on whether popular culture could undermine the rule of law, the Inquiring Lawyer spoke with Professor Walter, as well some of Colorado's leading jurists, top trial lawyers, and a jury consultant. Those discussions follow.

Is Popular Culture Undermining the Rule of Law?



Inquiring Lawyer: Are there real dangers presented by the influence of popular culture on jurors—if so, what do you believe they are?



Tina Habas: Not truly "dangers" in my view. Instead, the influence of popular culture must change the way lawyers speak to jurors. Lawyers who fail to recognize that people are influenced by their own experiences in life are destined to walk away feeling as though juries are unpredictable and random, which they most decidedly are not.



Judge Robert McGahey: I suppose the biggest danger is a jury thinking that what they see on TV or in the movies is the way the system actually works. We know that isn't true; no case ever resolved in fifty minutes with three commercial breaks. This could, in extreme cases, lead jurors to ignore the law or create evidence to fit their erroneous conception of what should happen. But I don't think that happens very often.

InQ: Professor Walter?



Prof. Richard Walter: Even if the court and the lawyers fail to adequately correct any misimpressions created by the media, does this truly affect verdicts and justice? I think not if there's a worthy judge presiding [and] doing her or his job properly.

InQ: Mal?



Malcolm Wheeler: I think there are some dangers. My private practice has largely centered on defending large corporations in class actions, product liability litigation, antitrust litigation, and intellectual property litigation. Over the years, I have seen many movies and television shows based on class actions, and tort, patent, environmental, and securities law issues. Some that come to mind are *Class Action* (1991), *Dallas Buyers Club* (2013), *The Wolf of Wall Street* (2013), *Boiler Room* (2003), *Michael Clayton* (2007), *Erin Brockovich* (2000), *The Verdict* (1982), and *Flash of Genius* (2008). Those that I have seen have uniformly been written with an anti-corporate or pro-plaintiff slant. They generally depict what purport to be legal procedures and proceedings, words and actions of corporate officers and employees, and lawyers' words and actions, in a way calculated to lead viewers to have a negative view of corporations, corporate personnel, and lawyers representing them. Given this essentially unbroken series of films spanning several decades, and given that most jurors are never exposed in their own lives to these types of legal issues and scientific and engineering data—and other factors that have to be weighed and decisions that have to be made that underlie the legal matters in these films—it seems likely that the consistent theme of “corporations are bad” has some anti-corporate effect on some percentage of the population of potential jurors.

InQ: I think you are correct that there are few movies depicting corporations heroically, but I can think of some that are anti-plaintiff or, at least, anti-plaintiff lawyer—like *The Fortune Cookie* (1966), which centered on the stereotypical “ambulance chaser.” And, I believe the same negative impression of plaintiff lawyers may be gained from certain attorney TV advertising. Professor Walter?

Walter: Generally, bigness is the enemy in stories, and corporations are generally big. David is always the hero over Goliath. Individuals, not groups, tend to be the heroes, and the latter the enemies. Perhaps anti-corporate bias gets folded into that. Purported anti-corporate bias in movies may have nothing to do with attitudes regarding corporations, politics, economics, etc., but may be more about underdogs versus overdogs, small versus large.

InQ: Marjorie, does popular culture present risks to the rule of law?



Marjorie Sommer: Yes and no. There are dangers in the way TV alters jurors' perceptions of reality and, as a consequence, affects their decision making. As we discussed earlier [see Part I], “cultivation” is premised on the idea that long-term, cumulative exposure to television's stories can lead viewer perception to mirror what they see on TV. A large amount of exposure to these stories can influence attitudes, standards of judgment, and behavior.

InQ: Professor Walter, I can see from your expression that you disagree.

Walter: Yes, please give me even merely a shred of evidence that's true. How does such exposure affect jury decision making or

their verdicts? How does one know that it does and, if so, how does one know that people watching oodles of these shows are not already of a certain mindset, which attracts them to the shows, not the other way around? It's like the finding that kids who watch seven or eight hours of TV a day are more violent than kids who don't. Is this a measure of the TV they're watching or of the neglect they're experiencing? Is not a child who watches so much TV *ipso facto* a victim of neglect?

InQ: Marjorie?

Sommers: The cultivation effect is not an immediate one—it is a subtle, cumulative influence based on both heavy, repeated viewing and repeated broadcasting. Thus, a viewer who sees a particular representation constantly on TV will presume that the representation is common in reality.

InQ: That is one of the risks Mal Wheeler identified.

Sommer: Repeatedly broadcasting stories or certain moral associations enable television's dominant narratives and character portrayals to be easily stored in and accessed from memory. In this way, certain televised legal scripts become heuristics regarding the legal process, litigation, and legal actors. They become the standard by which the stories of witnesses, experts, and attorneys are judged. Accordingly, where television portrays behavior or an attorney as ethical, viewers tend to judge real attorneys who act similarly as ethical. This is important because in television all attorneys are not created equally. Generally speaking, TV pits “good guy” prosecutors against “bad guy” defense attorneys, and places prosecutors, as opposed to defense attorneys, on the moral high ground of the legal practice. For example, *Law & Order* portrays prosecutors as society's moral stewards who seek justice, protect the public, and punish wrongdoers. These TV “agents of justice” prosecute only the legally or morally guilty. In contrast, defense attorneys are not associated with justice, but are associated with confounding the judicial process.

InQ: That was Larry Pozner's observation, as well.

Sommer: As a result, research has demonstrated that a majority of *Law & Order* viewers attribute the high ethics and ends-justifies-the-means moralities of the program to the prosecution in the real world. Yet, many also believe that the *CSI* effect has created a real danger to the system, because they believe this effect has led jurors to expect proof by scientific testing and forensic evidence, thus raising the burden of proof to a higher level than beyond a reasonable doubt. In other words, if the prosecution can't produce proof through scientific means, and has to rely on eye witnesses or circumstantial evidence, the fear is that jurors will acquit in greater numbers because of a lack of this kind of proof, even though a strong case for guilt was made. The other side of the *CSI* effect is that jurors are now more likely to find police officers and those who work in police labs more credible, and therefore place more weight on their testimony, leading to a higher conviction rate. This is known as the “defense effect.” Truthfully, in my view, the greater danger to our judicial system is presented by the media, with its 24/7 presence and influence in our lives.

InQ: Professor Walter, do you disagree?

Walter: I think the greater danger is thinking that the greater danger is too much information and too much media access to too many people. Would it be better to trash the First Amendment and stifle media's right to report on trials, as is the case in some places such as the United Kingdom? I say better too much information than too little.

InQ: Marjorie, please continue.

Sommers: Whenever a sensational criminal story breaks, we're flooded with accounts; all of the perceived evidence and so-called facts are recounted incessantly, and "talking heads" discuss the case and all of its intricacies to death. Thus, the real danger is whether a person charged with a crime in a high-profile case can get a fair trial, or conversely, depending on the media spin, whether the State will get a fair trial. That is why community attitude and change of venue surveys in these kinds of high-profile cases is so important to the process and to ensuring that pretrial publicity has not made it impossible to secure a fair and impartial jury. Social media and the Internet also pose real dangers to the judicial process, if not managed by the court. There have been numerous accounts of jurors going online and googling the attorneys and parties of the case and looking up all kinds of information relative to a case that was not presented in court.

InQ: Bob, any concerns from your perspective as a public defender?



Bob Pepin: I suspect that jurors may second-guess the jury instructions because so much is thrown out there via so many media outlets about the law, burdens, standards, definitions, etc. And yes, I think some jurors may assume that information is being hidden from them because they are exposed to the knowledge that this happens, the details about what the excluded information is, and commentary as to how that information might have affected the jurors and whether it was right or wrong for the court to exclude it.

InQ: Professor Walter, your thoughts? Might popular media have a corrupting effect on juror verdicts?

Walter: If film and television has any responsibility, it's to those who support these media, and to those it hopes will be its audience, its customers. And that responsibility is not to teach or enlighten them (though in an ancillary way that might on occasion come to pass, too) but to make them experience transcendent emotion, that is, arouse and provoke their passion. If the real question is: Does pop culture's romanticizing and idealization of the legal practice when treated as drama confuse the general public regarding our justice system's realities? then I say that it is really, really difficult to measure such "influence." You can ultimately only guess about this stuff. Whatever the jurors' expectations, the real question is how do the expectations and their clash with actuality affect trial outcomes, if at all?

InQ: Stan, your thoughts?



Stan Garnett: The primary risk in criminal cases is that popular culture can cause jurors to see crime in the abstract rather than involving human beings. The danger here is that an innocent person can be convicted because he or she has been objectified as a criminal or that the concerns of a victim in a case are somehow minimized by the procedural protections surrounding a defendant.

Can the Trial Judge Control Popular Culture Spillover in the Courtroom?

InQ: Can any of the theoretical dangers we have been discussing be mitigated by how a judge manages a trial? If so, what strategies have judges employed and what strategies would you like to see them employ? Let's start with a jurist. Judge McGahey, your thoughts?

Judge McGahey: To the extent the danger exists, I think a judge can gently remind jurors that what they are doing is reality and not a movie. This can be done lightly and even with humor. For example, I will use the line I referred to above about "resolution in fifty minutes" to remind jurors who like TV crime or lawyer shows that this isn't fiction. I say that I've never sequestered a jury in nearly forty years as a lawyer or as a judge, and then add, "but it sure happens a lot on TV and in the movies, doesn't it?" And sometimes I steal a line from a judge I once appeared in front of: "Please remember that no one in this courtroom is in the entertainment business."

Walter: I agree. Wise judges can render moot all these popular culture versus rule of law concerns.

InQ: Tina, as a former judge, any thoughts on how the court can preserve and protect the rule of law?

Habas: Perhaps one of the most effective ways a judge can manage a trial is by educating the jurors about what is about to happen. Telling the jurors that they are about to hear an opening statement, and also what that opening statement is intended to do, will greatly enhance the juror's ability to listen, because they are no longer worrying about what their role may be. Judges who take little notice of their jurors during trial are bound to have confusing results, because a knowledgeable jury is a good thing. This also keeps jurors engaged throughout the trial, and provides them with the knowledge that they are indeed an integral part of the trial.

InQ: Mal, what can judges do to mitigate any negative, if not dangerous, effects flowing from the daily bombardment of jurors by the media?

Wheeler: I don't think the dangers themselves can be mitigated. What judges can do, however, is permit lawyers to conduct wide-ranging *voir dire*; more liberally use individual *voir dire* in cases in which answers by one or more jurors are more likely to taint other members of the *venire*; and, in cases with substantial resources or rights at stake, more liberally permit, or even encourage, the use of pre-*voir dire* written questionnaires, all for the purpose of trying to identify *venire* members who have been influenced by the type of films I previously referred to.

InQ: Larry?



Larry Pozner: What I believe best counteracts the negative effects of popular culture in the courtroom (there are some positive effects, as well) starts with a very stern judge, who conveys the message that jurors are servants of our justice system and that they must live by its rules when sitting in judgment. The judge must be the heart of the courtroom, and when he or she firmly warns the jurors not to discuss the case among themselves before closing, or not to google trial-related evidence or issues, or not to watch TV news coverage of the case, and to adhere to their oath as jurors to follow the court's instructions, they have to believe the judge means business and that they should do exactly as they are told. All these rules are intended to prevent the system from being improperly influenced by popular culture, and I believe they work very well.

InQ: Marjorie, what suggestions does a jury consultant have for lawyers in dealing with popular culture?

Sommer: The perceived *CSI* effect, whether real or not, could be confronted in the courtroom, with attorneys and judges questioning jurors about their viewing habits regarding *CSI* and other lawyer shows, and making sure that these prospective jurors understand that much of what they see on TV is made up. Additionally,

jury instructions could be used to deal with the implications of forensic evidence and the lack thereof.

InQ: Stan, your thoughts?

Garnett: It is very important how a court manages a trial. Judges need to respect the amount of time involved in cases and need to make sure that the lawyers have the freedom to try the case within the rules of professional conduct as they see fit. Judges who try to force cases into unrealistic time limits run a risk of unfair results.

Are the Dangers of Popular Culture on Trials Overblown?

InQ: Are the dangers of popular culture on jurors overblown? If so, why do you believe this to be the case?

Habas: Yes. Many times, lawyers will try to explain away a “bad” result by blaming the decision maker. They will grab onto any convenient explanation that takes away the potential of their own failures. This is becoming even more prevalent as our juries become younger and younger.

Wheeler: I don’t think the dangers I have previously discussed are overblown.

InQ: Larry, is our jury system losing the battle to popular culture?

Pozner: In the end, I don’t believe popular culture is having a significant negative effect on the rule of law, but I think it clearly is hurting the average person’s perception of our justice system—but only in the same way popular culture tends to take a hard look at and occasionally insult all of society’s institutions. That said, I trust the jury system.

Still, I think that popular culture can have a negative effect on the rule of law in a particular case and that this can be serious problem. For example, I believe Nancy Grace’s program² contributes to the erosion of the rule of law because her over-the-top commentary can badly bias potential jurors. While everyone reacts differently to stressful situations, she’ll argue that one prominent defendant is “acting guilty” by doing one thing today—such as refusing to talk to the police or running from the crime scene—but another prominent defendant is “acting guilty” by doing the opposite thing another day—that is, by talking to the police or hanging around the crime scene. Or she’ll say, “No mother would act that way,” when it is impossible to predict how anyone would react under stress. Of course, however, the response can never be to try to control what people like Nancy Grace say.

Walter: Bravo!

InQ: Professor Walter, what are your thoughts on talking heads like Nancy Grace?

Walter: I call her Nancy dis-Grace; that said, her influence is miniscule. There’s not a shred of evidence that she hurts justice. Too, too much authority is assigned to her. She’s a horror; so what? One more bad TV talk show. Still, isn’t it good for a democracy to have its institutions challenged and even disrupted and insulted? Won’t further examination and evaluation strengthen institutions that are worthy?

Pozner: The concerning thing for me, however, are people who are presented as disinterested and knowledgeable commentators but who are actually just shills for one side or the other. They typically prejudge the evidence, and won’t want to examine the evidence in context. They are concerned only with how well a piece of evidence might serve as today’s sound bite.

InQ: But isn’t Nancy Grace merely reflecting popular opinion and popular biases?

Pozner: Yes, absolutely.

Walter: I disagree. How does one know for sure? I say not necessarily. Nancy Grace rants and raves, and people like to watch rants and raves just like they gather around car crashes and watch road rage on YouTube. They do this not because they’re crazy or evil but because they are human.

Pozner: It is the job of lawyers to educate jurors in the courtroom and balance the distorting effects that popular culture might have.

Walter: Bravo! It is the job of lawyers and judges, not the job of Nancy Grace and other media entertainers and commentators, to educate jurors.

Pozner: Also, where the talking heads might ignore nuance, jurors get it. Take the O. J. Simpson trial. I was informally consulting with one of the defense attorneys in that case, summarizing for him the daily news coverage. When I would report that the prosecution’s latest police officer witness came across on the evening news as intelligent and credible, he would chuckle and tell me that the news didn’t cover the two other police officers who testified that same week who also came across as intelligent and credible. The only problem for the prosecution was that each officer gave starkly different testimony about the same event. The bottom line is this: TV commentary on high-profile cases is intended to be entertainment.

Walter: And there’s nothing wrong with entertainment.

Pozner: Our legal system is not intended to provide entertainment.

Walter: But inevitably it does. I love to wander around real courthouses and drop in on real trials to observe. Much of what happens is boring, but some is rivetingly entertaining in the sense that it is engaging, meriting my attention and consideration and contemplation. What’s wrong with that? Isn’t a courtroom a theater with a raised platform up front and a galley for the audience? Does not a trial or deposition transcript read like a play?

Pozner: My concern is that we live in an increasingly highly polarized society, and we are starting to view our judicial system through the same lens. And this can have a hangover effect. If someone appears to be manipulating the system—even if they are simply exercising their constitutional right to an attorney or not to incriminate themselves—then they must be guilty. TV and movies may be teaching us not to trust the legal system. Conversely, something like the O. J. Simpson case can have enormous educational value.

Walter: And isn’t such examination of the legal system essential to justice? Should we not forever analyze and question that system and call it to account for itself?

InQ: Marjorie, does social science research shed light on lawyer concerns emanating from the way mass media saturates us with popular culture and its effect on trials?

Sommer: Yes, and the research does not bear out many of these concerns. For instance, despite prosecutorial concerns, the acquittal rate has not gone up. And research studies have shown no increased expectation of forensic evidence among *CSI* viewers. In fact, *CSI* viewers were more likely than non-*CSI* viewers to find eyewitness testimony valuable when reaching a verdict without scientific evidence. Other surveys have shown that *CSI* and non-*CSI* viewers did not differ significantly in their perceptions of the accu-

racy and necessity of forensic evidence in investigating crimes; in some instances, non-viewers perceived forensic science to be more accurate than viewers did. In a study conducted in 2006 and 2007, there was no indication that *CSI*-viewing jurors acquitted in cases that warranted convictions, nor that they relied on forensic evidence to a greater degree than those who did not watch *CSI*.

Furthermore, long before *CSI*—and, thus, before it could have any so-called effect—I heard mock jurors say they wanted forensic evidence—for example, DNA testing—in the sexual assault cases we worked on. This is because they were reluctant to convict in a strictly “he said/she said” case where forensic evidence was lacking. Thus, the lack of scientific evidence raised reasonable doubt with our jurors. Likewise, social scientists have pointed out that rather than a real *CSI* effect, in reality it’s just “sour grapes” on the part of the prosecution: a prosecutor surprised or just disappointed by an acquittal uses the *CSI* effect as a ready and appealing explanation for the loss, when, in actuality, they lost their case because of “a reasonable doubt”—an absence of evidence sufficient to convict, not the *CSI* effect. 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.

Additionally, because so many legal dramas such as *Law & Order* portray prosecutors as wearing the white hat, cultivation [the “cultivation effect” is discussed in Part I of this series] would lead us to believe that this gives any prosecutor an advantage with jurors who are frequent viewers of these shows. These jurors would be more inclined to find merit with the prosecution’s case. The media itself has exaggerated the danger by playing up the existence of the *CSI* effect, claiming that TV is driving jury verdicts all across America, TV’s false reality fools jurors, and *CSI* has a major effect on real-life juries. However, these conclusions are not based in fact or any research studies, but rather, as mentioned above, rely on sour grapes anecdotes from prosecutors who lost cases and needed to find some explanation for the loss. While there have been instances where jurors wanted more forensic/scientific evidence to convict, the acquittals may have been more the result of the prosecutor’s failure to prove their case beyond a reasonable doubt than any *CSI* effect.

InQ: Bob, do you think the effects of popular culture are too magnified in lawyers’ minds?

Pepin: I understand why some might feel that the dangers presented by popular culture are overblown. In trial, jurors receive instructions; are told to just pay attention to what they see and hear in the courtroom; and are informed not to allow bias, prejudice, or preconceived notions to intrude in their sacred task. They all say

that is what they will do or they are politely asked to leave. And, I think most of them try to keep that promise. Also, they are told that we assume they don’t leave their common sense and judgment derived from their life experiences at the courthouse door. Increasingly, that life experience includes the forces you have labeled “popular culture.” However, I can take you to everyday gatherings where the opinions of helmet-headed “legal commentators” are cited by nonlawyers with a solemnity typically reserved for quotations from the Bible, the Talmud, or the Koran [Qur’an]. Are the dangers overblown? I am not so sure.

InQ: Stan, your thoughts as a prosecutor?

Garnett: I’ve been trying cases a long time. I tried well over 100 before the Internet, Facebook, and other such social media. I believe that not much has changed and, in fact, that concerns about popular culture creating danger in fairness of trials are overblown.

Conclusion

Some lawyers and judges share the concern that popular culture could theoretically undermine the rule of law or, at a minimum, impair the accuracy of the general public’s understanding of the law and the way trials function, perhaps affecting some verdicts. Some believe that the risk exists that the law may be undermined in particular cases, especially ones that have caught the media’s spotlight. However, social science research lends little support for this conclusion. The best bulwarks against the distorting effects of popular culture are a serious and demanding judge, allowing extensive *voir dire* by the attorneys themselves, and the court’s instructions on the law to the jury. Lifting the restrictions on post-trial juror interviews by lawyers might help us all gain better insight into the question whether popular culture is undermining the rule of law; however, intruding into the jury decision-making process and disrupting jurors’ lives post-trial with questions from the occasional obnoxious lawyer who is disappointed with his or her trial result may militate against such expanded inquiries.

In the next and last installment of this series, we examine how our panelists themselves have been influenced by popular culture, and which movies and TV shows they believe do the best and worst jobs of “telling it like it is” in the courtroom trenches. Look for it in the April issue.

Notes

1. See Sandgrund, “When Your Expert Witness is a Screenwriter: An Interview with Richard Walter,” *The Docket* (Nov. 2004), www.denbar.org/docket/doc_articles.cfm?ArticleID=3950.

2. The program is, unsurprisingly, titled “Nancy Grace.” See www.hlntv.com/shows/nancy-grace. ■