The Scarlet Letter Effect: The Adulterous Defendant on Trial for Spousal Murder

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The Scarlet Letter Effect:
An Adulterous Defendant Accused of Spousal Murder and The Story Model
By
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Introduction

“If the hussy stood up for judgment before us five ... would she come off with such a [light] sentence as the worshipful magistrates have awarded? Marry, I [think] not!”

“At the vary least, they should have put the brand of hot iron on Hester Prynne’s forehead.”

In Nathaniel Hawthorne’s The Scarlet Letter Hester Prynne wears the letter “A” affixed to her chest to mark that she, a married woman, committed adultery. The story of The Scarlet Letter is that of a “romantic triangle.” Hester Prynne, the beautiful young wife of an aging, introverted scholar, is separated from her husband for two years after leaving her home in England to the wild frontier of the “New World.” She finds herself lonely and without friends and falls in love with Arthur Dimmesdale, an attractive, young minister. Hester bears Dimmesdale’s child and names her Pearl because she “was purchased at great price.” Hester is condemned by the townspeople, especially the women, as reflected in the quotes above, who feel that Hester should receive a much more severe punishment than forcing her to stand on the scaffold and wear the letter “A” for life.

Hawthorne presents Hester as strong and dignified in the midst of this public shame. Resolutely, she bears the shame and punishment alone and never reveals the

2 Id. at 49.
3 Nicholas J. Karolides, Margaret Bald & Dawn B. Sova, 100 Banned Books: Censorship Histories of World Literature 401 (summarizing Nathaniel Hawthorne, The Scarlet Letter, supra note 1).
4 Id.
name of Pearl’s father, even though, by doing so, would lessen her punishment. Hester’s absentee husband, Roger Chillingston, emerges from the frontier and the two decide to keep the fact that he is her husband a secret. Roger Chillingsworth, Hester’s husband, is a bitter and physically misshapen man that treats the ailments of Dimmesdale and uncovers that the minister is Pearl’s father. The evil Chillingsworth falsely befriends Dimmesdale and slowly destroys him. Under the weight of his secret and Chillingsworth’s interference, Dimmesdale sinks deeper into physical decay and Chillingsworth decays morally.\(^5\)

Heroically, through relentless good works, Hester wins the respect of the townspeople. The Scarlet Letter evolves to represent “angel.” As he seems to understand the end is near, Dimmesdale confesses publicly that he is Pearl’s father as he stands holding hands with Hester and Pearl on the very scaffolding where mother and child were publicly shamed. Not long after, Dimmesdale dies and Hester and Pearl go Europe.\(^6\)

The image of Hester Prynne and her Scarlet A represent, as a mental shortcut in our culture, not only, the judgment and shame society imposes on those who step outside of their marriage, but also, the assumptions we make about a person who commits adultery. As the magistrate in The Scarlet Letter is the decision making body of the colony he decides Hester’s punishment, and in some way shields the process from the severe bias and judgment of those in the settlement. It is questionable whether our jury system offers such protection to adulterous spouse on trial. True, it is not our court’s role to shield the guilty from harsher punishment. It is, however, a fundamental pillar of our

\(^5\) Id at 402.

\(^6\) Id.
justice system of our democracy that the accused receive a fair trial.\(^7\) “The jury in
criminal trials is one of the most deeply rooted and highly valued of our constitutional
rights.”\(^8\) This article is not a statistical analysis of the probability of an adulterous
spouse’s conviction for murdering his/her spouse. On the other hand, it is intended as a
conceptual study and analysis of legal storytelling and persuasion and how evidence of a
defendant’s unfaithfulness severely affects the persuasiveness of his/her story.

Once a defendant’s history of infidelity is introduced to a jury and the defendant
is branded with a metaphorical Scarlet Letter, how is persuasiveness of his/her “story”
effected? Like Hester Prynne, is the defendant forever burdened and branded, unable to
step out from under the cloud of assumptions that branding carries? Does the infidelity
and the resulting “Scarlet Letter Effect” provide each jury member with a context and
texture by which to filter all the information that overshadow all else presented by the
defense, and for that matter, the resulting halo-adorned prosecution? I propose that the
adulterous defendant’s story will never be fully believable, palatable, or cohesive to the
jury. Rather, the defendant may be doomed like Hester’s silent lover Arthur Dimsdale\(^9\) –
not able to utter the truth until he has nothing to loose and yet physically and emotionally
eroded by the secret. In a justice system that seeks the truth at a price of letting a
thousand guilty free, so as not to convict one innocent, is the adulterous spouse ever able
to express their truth? Is there an equally clear and powerful counter-story that attorneys

\(^7\) Judy Hershkowitz, Justice Marilyn Kelly Keynote Speaker at Jury Inservice Program, at
http://www.michbar.org/news/releases/archives01/marilyn_kelly.cfm (May 21, 2001) (Last visited April
28, 2007).

\(^8\) Michael J. Saks, Foreword to THE JURY TRIAL IN CRIMINAL JUSTICE xxi (Douglas D. Koski ed., Carolina

\(^9\) Id.
of adulterous defendants must employ so the accused is able to realize his/her fundamental right to a fair trial? On the other hand, in the Court’s role as “gatekeeper,” do we already have the mechanism, if properly applied, to exclude this unfairly prejudicial evidence and prevent the manipulation of jurors?

The Scarlet Letter conjures images an outcast inflicted with shame making it a clear example of an everyday communication device. One theory of jury decision-making is that individuals process and understand information by trying to fit the pieces into various narratives, stories, or schemas.¹⁰ I will explore how societal views affect persuasiveness when the adulterer is on trial for spousal murder.

First, I will discuss the idyllic intentions of the jury system and, at its heart, the “unbiased” juror’s decision-making process. Next, I address how seminal research indicates that the “unbiased juror” who decides a verdict by taking in to account only that which is presented in the courtroom is not realistic. Rather, The Story Model is becoming widely accepted as an accurate description of how jurors assimilate and filter information given at trial through their own experiences and beliefs. Third, I will examine how America’s Puritan roots have influenced the current climate of adultery in our society. Fourth, I will highlight a recent decision in the Indiana Court of Appeals, Camm v. Indiana¹¹, where the court recognized the fatal effect of testimony of adultery on the defendant’s right to a fair trial. Next, I will explore how the prosecutor in Camm¹²

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¹² *Id.*
uses adultery evidence to construct a cohesive narrative. In contrast, I will examine how a
defense attorney faced with this type of evidence could structure an effective counter-
story. In conclusion, I offer a suggestion for a test that limits the admissibility of adultery
evidence in spousal murder cases. I suggest the court limit the admissibility by temporal
proximity and factual connections very closely related to the alleged events as way to
prevent the abuse of this type of evidence.

The Jury

The jury trial is the central element in the American conception of justice.13 The
central role of the jury accorded in its justice system makes America distinctive among
other nations.14 The Sixth Amendment guarantees the right to trial by jury for criminal
cases.15 The right to trial by an impartial jury, insulated from influence by oppressive
political powers, is one of the oldest and least controversial guarantees in the
Constitution.16 In the Eighteenth Century, Blackstone celebrated the institution as part of
a "strong and two-fold barrier . . . between the liberties of the people and the prerogative
of the crown" because "the truth of every accusation . . . [must] be confirmed by the
unanimous suffrage of twelve of his equals and neighbors indifferently chosen and
superior to all suspicion."17 However, United Supreme Court attempts to define the form


14 Id.

15 U. S. CONST. amend. VI, (stating "In all criminal prosecutions, the accused shall enjoy the right to a
speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been
committed").

16 HASTIE, PENROD, & PENNINGTON, supra note 13, at 1.
and function of trial by jury reflects the difficulty in defining how a representative and impartial jury should be constituted and how it should behave. Similarly, the “interposition of commonsense judgment” has been explicated to mean the promotion of an effective deliberation process. Ideally, this commonsense judgment includes the “counterbalancing of various biases,” to “minimize potential bigotry” and to “assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”

Most conceptions of the juror’s decision-making process assume that the process is primarily cognitive, even rational in character. There is an apparent contradiction between the conception of the ideal juror as a “logical reasoning machine” and such

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17 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349-350 (T. Cooley 4th ed. 1896). The other of the “two-fold barrier” was, of course, indictment by grand jury. See also U. S. CONST, amend. VI, Annotated, http://caselaw.lp.findlaw.com/data/constitution/amendment06/04.html#f44 (last visited April 21, 2007).

18 HASTIE, PENROD & PENNINGTON, supra note 13, at 3. See Williams v. Florida, 399 U.S. 117 (1970) (holding that the traditional twelve member jury size is not a requirement for state criminal or civil trials); Ballew v. Georgia, 435 U.S. 223 (1978) (lowering the limit on jury size six in state criminal trials); Thompson v. Utah, 170 U.S. 343 (1898) (requiring, at the federal level, twelve members in all criminal trial juries); Colgrove v. Battin, 413 U.S. 149 (1973) (requiring only six members in federal level civil trials). See also, the Court’s line of cases attempting to establish conditions and procedures for representative and impartial jury trials, and on juror competency to try cases involving complex legal matters, even curtailing the right to jury trial in very complex matters (Swain v. Alabama, 380 U.S. 202 (1965); Ristaino v. Ross, 424 U.S. 589 (1976); Witherspoon v. Illinois, 391 U.S. 510 (1968); Dairy Queen Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theaters Inc. v. Westover, 359 U.S. 500 (1959); Ross v. Bernhard, 1970). See also, the court has also has expanded the right of jury trial to include relatively small claims and minor criminal offenses (Duncan v. Louisiana, 391 U.S. 145 (1968), Baldwin v. NY, 399 U.S. 66 (1970).

19 HASTIE, PENROD & PENNINGTON, supra note 13 at 5.


21 Reid Hastie, Emotions in Juror’s Decisions, 66 Brook. L. Rev. 991 (1999). E.g., FED. R. EVID., 403, Advisory Note, (commenting that one consideration in deciding whether to exclude evidence should be to avoid “unfair prejudice,” defined as “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one.”) (emphasis added).
moody, emotional and passionate creatures as human beings. Traditionally, those involved in the legal system have believed jurors evaluate evidence elementally\(^{23}\) and with logical ascertainment of values of doubt. However, over the last 20 years Pennington and Hastie have led a revolution theorizing how jurors make their decisions holistically.\(^{24}\) What many people believe to be the best current theory of juror decision making is the “Story Model.”\(^{25}\)

**The Story Model**

Formal justice processes like the criminal trial require the participation of average citizens who have no formal legal training.\(^{26}\) Because of the relative secrecy of the deliberation room, many of us are fascinated with how the individual juror, within a small group decision-making format, understands the facts in a case and arrives at his or her verdict.\(^{27}\) Seminal research concludes that a “story model” emerges so “that jurors [will]

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\(^{22}\) ROBERT C. SOLOMON, A PASSION FOR JUSTICE 34 (1990) (noting the discrepancy that exists, “the idea that justice requires emotional detachment, a kind of purity suited ultimately to angels, ideal observers, and the original founders of society, has blinded us to the fact that justice arises from and requires such feelings as resentment.”)

\(^{23}\) Michael S. Pardo, *Juridical Proof, Evidence and Pragmatic Meaning: Toward Evidentiary Holism*, 95 Nw. U. L. Rev. 399 (2000). See JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 37.6 at 1046-1071 (describing “elementally” in the sense that particular crimes or civil actions are proven through the proof of various separate elements).

\(^{24}\) Pardo, *supra* note 23.


impose narrative story organization on trial information.”28 Logically, in order for those without legal training to participate in formal justice procedures (rules of evidence, uses of case law or opinions, etc.) they must engage some parallel form of social judgment that aligns legal questions with everyday understandings.29 The story is an everyday form of communication that enables jurors to follow a diverse cast of courtroom characters and the case, and reason about the issues in it.30 Despite the maze of legal jargon, lawyers’ mysterious tactics, and obscure courtroom procedures, any criminal case can be reduced to the simple form of a story.31

Stories are a systematic way of storing, bringing up to date, rearranging, comparing, testing and interpreting available information about social behavior32. “As witnesses deliver testimony bearing on alleged illegal behavior, a juror operates much like someone reading a detective novel or watching a mystery movie complete with multiple points of view, subplots, time lapses, missing information, and ambiguous clues.”33 Yet, because each “constructs a decision from a toolbox of prejudices and

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27 S. Solomon, Civil Practice, supra note 25 at 966.


29 D. Koski at 283, supra note 26.

30 Id.

31 Id.

32 Id.

33 Id. at 283.
heuristics” that are a result of unique beliefs and experiences, each juror’s narrative structure will be different. 

There are three ways that stories and storytelling appear in the legal arena. First, litigants may tell stories to jurors. Second, jurors may try to make sense of the evidence they receive by fitting it into some kind of story pattern. Therefore, jurors are likely to build a story based on the evidence given to them, and the evidence that best fits a juror’s preferred story is likely to be given greater weight while contradictory evidence is discounted or disregarded. Third, the jury as a group may try to arrive at a collective story while trying to reach a verdict.

The juror is a sense-making information processor who strives to create a meaningful summary of the evidence available that explains what happened in the events depicted through witnesses, exhibits, and arguments at trial. Pennington and Hastie suggest that the story that a juror chooses cause the decision they reach. Seminal research concludes, “jurors impose a narrative story organization on trial information.”

34 Samuel H. Solomon, Civil Practice, supra note 25 at 966.
36 Id. at 559.
37 Id.
38 Id.
40 Id. at 541
41 Id. at 557 (1991); See also, Nancy Pennington & Reid Hastie, Evidence Evaluation in Complex Decision Making, J. Personality & Soc. Psychol. 242 (1986)[hereinafter Pennington & Hastie, Evidence Evaluation];
“Because all jurors hear the same evidence and have the same general knowledge about
the expected structure of stories, difference in story constructions must arise from
differences in our world knowledge: that is, differences in experience and beliefs about
the social world.”  
Powerful evidence exists from social psychologists that stories,
including those we call stereotypes, are a fundamental mechanism of human cognition.  
The use of narratives to simplify, organize and interpret our sensory perceptions is not a
failure of human reason; it is human reason.  
Within each stereotype, shorthand of various behaviors exists.

However, success in the courtroom is measured by the articulation of better
theories, where "better theories" means "better than the available alternatives." If
witnesses and jurors differ in their understanding of society and social action, stories that
make sense to one actor in a trial may be rejected by another.  
Because stories are symbolic reconstructions of events and actions, those who cannot manipulate symbols

Nancy Pennington & Reid Hastie, Perceptions and Decision Making: The Jury’s View: The O.J. Simpson
Colo. L. Rev. 957 (1996) [hereinafter Pennington & Hastie, Perceptions and Decision Making].

Pennington & Hastie, The Story Model, supra note 10, at 557. (Pennington and Hastie formulated the
Story Model after performing 10 years of emphirical research. The jurors used in the study were
volunteers from an actual jury pool who were asked to decide the outcome of what they were told was an
actual case. Pennington and Hastie then conducted extensive interviews with the juror on how they
perceived events and relations, and how they drew inferences.).

See Pennington & Hastie, The Story Model, supra note 10, at 556; Nancy Pennington & Reid Hastie,
Evidence Evaluation, supra note 37 at 244 (1986). See also, Nancy Pennington and Reid Hastie, Juror


See Pennington & Hastie, Perceptions and Decision Making, supra note 41.


Id.
within the narrative form are at a disadvantage even when they are telling the truth.\textsuperscript{48} The biases that result from storytelling in trials are more subtle and more difficult to combat bias that is based on straightforward prejudice.\textsuperscript{49} There is an inherent clash between the “law’s demand for truth and justice with the modern mind’s demand for closure and clarity.”\textsuperscript{50}

### The Current Climate of Adultery

Due to the Puritan heritage of the United States, that provided the backdrop for The Scarlet Letter, adultery has been a crime in most American jurisdictions.\textsuperscript{51}

> “The same solemnity of demeanor… as befitted a people amongst who religion and law were almost identical… the mildest and the severest acts of public discipline were alike made venerable and awful. Meager, indeed, and cold was the sympathy that a transgressor might look for from such bystanders, at the scaffold. On the other hand, a penalty, which in our days, would infer a degree of mocking infamy and ridicule, might then be invested with almost as stern a dignity as the punishment of death itself.”\textsuperscript{52}

In 1650, the Puritans of the Commonwealth made adultery a capital offense by statute,\textsuperscript{53} and although this statute was nullified after the Restoration,\textsuperscript{54} the Puritans in the

\textsuperscript{48} Koski, 	extit{supra} note 26 at 284.

\textsuperscript{49} Id. at 285.

\textsuperscript{50} Sherwin, 	extit{supra} note 25 at 41.


\textsuperscript{52} Hawthorne, 	extit{supra} note 1 at 47.

\textsuperscript{53} 4 W. Blackstone, \textit{Commentaries} 64-65.

\textsuperscript{54} Weinstein, 	extit{supra} note 51 at 225. \textit{See also}, Stat., 12 Car. 2, cap. 12 (1660).
American colonies made adultery with a married woman a capital offense. In colonial times, adultery was seen almost entirely as an offense against morality and chastity and far less as a wrong against the husband. As in all capital cases of the time, convictions were rare. This Puritan legacy, however, remains with us, and adultery remains a criminal offense in a number of states, but is rarely prosecuted. Further, the Reformation absorption of the romantic love tradition into marriage had an especially telling impact on American history. The Calvinist-Puritan view of companionate marriage established romantic marital love not as one ideal among others, but as the exclusive form in which sexual and affectional feeling could legitimately be expressed.

Nathaniel Hawthorne, born in Salem, Massachusetts, was a descendent of early Puritan settlers. This heritage would haunt him and influence his writing all his life.


56 In Rhode Island, in 1661, a husband forfeited his bond of £10 when his wife failed to appear to answer a charge of adultery. R. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 194 (2D ED. 1959) (citing Hick's Case, 1 R.I. Court Rec. 76, 77, 79 (1661-62)).

57 Id.


59 Weinstein, supra note 51 at 225.

60 Bantam Books, Foreword to HAWTHORNE, supra note 1.
The Scarlet Letter was an enormous success at its release in 1850, completely selling out in a few days.\textsuperscript{62} Many literary critics praised the novel.\textsuperscript{63} However, religious literature and clergymen denounced the book as a “dirty story” that belonged only in a “Brothel Library.”\textsuperscript{64} According to one religious journal, “this is a story that should not have been told” because Hester and Dimmesdale “did not exhibit remorse” for “the criminal deed.”\textsuperscript{65}

After the initial upset, little attention was paid to the novel for nearly 100 years.\textsuperscript{66} Interestingly, it resurfaced in 1949 in Justice Curtis Bok’s deciding opinion in Commonwealth of Massachusetts v. Gordon.\textsuperscript{67} In discussing the status of obscenity, Justice Bok points out how community morals evolve. As an example, he explains, “Hawthorne's ‘Scarlet Letter' was once referred to as ‘a brokerage of lust’ but had become much more accepted with time.”\textsuperscript{68} Further, years later, the book has become a

\textsuperscript{61} \textit{Id.}
\textsuperscript{62} N. Karolides, M. Bald & D. Sova, \textit{supra} note 3 at 402.
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{66} N. Karolides, M. Bald & D. Sova, \textit{supra} note 3 at 402.
\textsuperscript{68} \textit{Id.}
staple in the literary diet of most high school and college English students in spite of repeated calls for its banishment.\textsuperscript{69}

Cultural values are cycles driven by a centripetal and centrifugal forces, constantly and simultaneously pushing outward and inward in ever widening circles. The aftermath of the Civil War caused the “voice of the Reformer to be heard in the Land” and “[t]he stage… set for a stern and rigorous revival of the spirit of the Puritan forefathers.” Post 9/11 climate is marked with the deafening imposition of morality; the roots of the Puritan restrictions on sexual and affectional feelings are still present. The idea that such feelings and actions must be contained within the walls of marriage lingers in the air of everyday American life. Although the Supreme Court has expanded the right of privacy and characterized private sexual intimacy as a “fundamental right”,\textsuperscript{70} pop culture, in a desperate attempt to throttle married individuals, widens the definition of adultery to include activities such as “cyber-cheating”, “computer sex,” “telephone sex,” even “emotional affairs” where touching is not even required.\textsuperscript{71} As the definition of

\textsuperscript{69} N. Karolides, M. Bald & D. Sova, supra note 3 at 402 (stating in 1961, parents of students in Michigan objected to the assignment of the novel in high school English classes, claiming that it was “pornographic and obscene.” They demanded that the book be taken out of the curriculum, but the request was denied. In 1966, a national sample of English department chairpersons uncovered the only successful challenge to the book was when a “high school principle declared the book too ‘frank’ and ‘revealing’ and removed it from the recommended reading list. In 1977, a the book was removed from a high school English curriculum because it dealt with a clergyman’s involvement in fornication. In 1982, a request was denied to remove the book from an assigned reading curriculum when the parent claimed the novel was about “adultery,” “a womanizing preacher,” and “prostitution.”).


\textsuperscript{71} See e.g. Bonura v. Bonura, 505 So. 2d 143, 145 (La. Ct. App. 1987) (holding that a woman who had not had intercourse had committed adultery); S.B. v. S.J.B., 609 A.2d 124, 126 (N.J. Super. Ct. Ch. Div. 1992) (holding that lesbian sex constituted adultery). See also Karan Peterson, Infidelity Reaches Beyond Having Sex, USA Today, Aug. 1, 2003, at 8D (quoting infidelity expert Shirley Glass “affairs do not have to include sex”); Buck Wolf, Defense Dating in the Age of Cyber-Cheating: Love Detectors, Cyber Wingmen, and Internet Code for Philanders,
adultery grows more and more encompassing, there are more people engaged in infidelity than ever before. Yet, surprisingly and notably, despite the prevalence of extramarital activity, the vast majority of people criticize departures from monogamy: one-survey states “87% said that extramarital ‘always wrong’ or ‘almost always wrong.’”

Logically, because there are as many as 70% of spouses who have been unfaithful and 87% of people believe adultery is wrong, there must be some overlap between the two groups. A portion of people who condemn infidelity yet they have been involved in affairs themselves. This indicates that increased acceptance is not a result of the frequency of infidelity. Rather, there is a two-headed self-loathing creature at work in our society.

To agitate society’s schizophrenic fever further with extramarital affairs, many experts conclude that there is not only “a new crisis of infidelity,” but also a “crisis of

http://abcnews.go.com/Entertainment/WolfFiles/story?id=952334&page=1 (Last Visited April 22, 2007); “Cyber-Cheating and Emotional Affairs Message Board,” http://messageboards.ivillage.com/iv-remotional (containing 5154 posts as of April 22, 2007); Phil McGraw, Is Internet Porn cheating?, DR. PHIL.COM, http://drphil.com/articles/article/54/ (Last visited April 22, 2007) (claiming watching internet porn is cheating because “it is disrespectful of one’s relationship” and may cause negative emotional harm” to a N. KAROLIDES, M. BALD & D. SOVA, supra note 3 at 402spouse. “It is a perverse and ridiculous intrusion into your relationship. It is an insult, it is disloyal and it is cheating.)

Brenda Cossman, The New Politics of Adultery, 15 Colum. J. Gender & L. 274, 284 (2006). (See also, Statistics indicate that extramarital affairs are more common than not. One study reports that half of all husbands admit to committing adultery while between “a third to forty percent of all wives say they have been unfaithful....” Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, 30 J. Fam. L. 45, 54 (1991) (citing L. Atwater, THE EXTRAMARITAL CONNECTION 15-16 (1982)); See also Phyllis Coleman, Who’s Been Sleeping in My Bed? You and Me, and the State Makes Three, 24 Ind. L. Rev. 399, 416 N. 2 (citing one study which estimates that 70% of married men and 50% of married women have affairs and another study which concludes that as many as 70% of spouses have been unfaithful);

epidemic proportions.”\(^{74}\) All forms of media frame adultery as a highly contagious disease from which each viewer, reader or listener should take immediate action to inoculate their relationship.\(^{75}\) Engaging individuals’ fear, the *Wall Street Journal* announces, “Divorce is contagious.”\(^{76}\) To alarm its readers further, the article describes how divorce can break out in offices in a “measles pattern” and that working couples should take steps to “vaccinate their marriages.”\(^{77}\) In Linda Singer’s book entitled *Erotic Welfare: Sexual Theory and Politics in the Age of Epidemic*, she adds infidelity to the list of sexual epidemics created in the wake of the sex panic created by AIDS that continue to pervade American social, political, and cultural life.\(^{78}\) Some argue the epidemic of infidelity “demands an intervention of control,” and “a managerial response to minimize the risk of further contamination.”\(^{79}\) In addition, the “sexually monogamous marriage” quickly becomes “the new front line in the war on this epidemic.”\(^{80}\) The message to the

\(^{74}\) Cossman, *supra* note 72 at 284

\(^{74}\) *Id.*


\(^{77}\) *Id.*


\(^{79}\) Cossman, *supra* note 72.
American public is a terrible, disease that lurks in every corner ready to invade you or your spouse and destroy your life. Further, inherent in this campaign of fear, are the assumptions about the adulterer. Like Hester, the adulterer is still subject to marking and branding resulting in exterior shaming by those in their communities who might discover their transgressions, as well as, the internal shaming they inflict upon themselves. This fear and panic of the adultery epidemic carries over to all aspects of American life (including the courtroom). Put simply, this permanent branding and the judgments that go with it creates The Scarlet Letter Effect.

**Camm v. Indiana**

*Camm v. Indiana* involves an adulterous defendant accused of murdering his spouse.\(^8^1\) In a rarely seen decision, the Indiana Court of Appeals recognized the irreparable harm and destruction evidence of the defendant’s affairs could cause in a spousal murder case.\(^8^2\) The defendant was on trial for murdering his wife, Kim, seven-year-old daughter, Jill, and five-year-old son, Brad, in the garage of the family home, located about 15 miles outside of Louisville, Kentucky.\(^8^3\) The may have occurred sometime after 7:30 pm when the three usually arrived home from swimming practice.\(^8^4\)

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\(^8^0\) Cossman, *supra* note 72, *See e.g.,* Beck Gernsheim, *On the Way to a Post-Familial Family: From a Community of Need to Elective Affinity*, in *LOVE AND EROTISM* 53 -70 (1999) (stating that marriage can now be entered into and exited from by choice. This represents a transformation in the terms of intimacy whereby individuals now seek an emotionally rich and companionate relationship. When relationships no longer fulfill their intimacy objectives they can be dissolved.) *See also,* SINGER, *supra* note 78 (stating the family “is being repackaged as the latest safe sex prophylactic social device”).

\(^8^1\) Camm, 812 N.E.2d 1127 (2004).

\(^8^2\) *Id.*

\(^8^3\) *Id.*
David Camm, a State Police Trooper for many years, claimed he had been playing basketball at a nearby church from 7:00 pm to approximately 9:20 pm. He described to the police that when he arrived home and discovered the gruesome scene, he could tell immediately that Kim, who was lying outside of the car in a pool of blood, was dead, but he thought Brad might still be alive. He recounted that he reached over Jill, and pulled Brad out, immediately performing CPR. When he realized Brad was indeed dead, he called the police for help and then ran across the street to his grandfather’s house.

The state indicted Camm with murder after a blood spatter expert opined a small amount of Jill’s blood on the bottom corner of Camm’s t-shirt was the result of high velocity impact spatter and not a result of pulling Brad from the car. On January 7, 2002, because of the extensive media coverage jury selection began in a neighboring county. At trial, the state’s key piece of physical evidence, Camm’s expert challenged the t-shirt. The state also presented extensive evidence of Camm’s infidelity, specifically, evidence that he had had affairs with at least 12 women over the course of 9 years during his marriage to Kim. The most recent prolonged sexual relationship

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84 Id.
85 Id.
87 Id.
88 Id.
89 Id.
90 Id.
occurred three years prior to the murders in 1997.\textsuperscript{93} Some of the women testified to intimate details of their relationships with Camm, such as, when, where and how they engaged in sexual activities.\textsuperscript{94} Amazingly, in spite of objections, the jurors heard such invasive testimony as the shaving of pubic hair.\textsuperscript{95}

Under the guise of "always relevant" motive, evidence the prosecution presented extensive evidence of Camm’s personal life.\textsuperscript{96} However, the Indiana Court of Appeals ruled that even though motive evidence seems “always relevant” it is not “always admissible.” Rather, “if the state’s claim of relevance to motive is too strained and remote to be reasonable, the extrinsic act evidence is inadmissible.” The court unequivocally concludes, “Camm was unfairly prejudiced by the introduction of extensive evidence and argument regarding his poor character, where the evidence regarding his philandering was not reasonably related to any proper purpose under Indiana Evidence Rule 404(b), including proof of motive.”

\textbf{How the Prosecutor Uses Evidence of Adultery}

“Every gesture, every word, and even the silence of those with whom she came in contact, implied, and often expressed, that she was banished…”\textsuperscript{97}

\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{94} NATHANIEL HAWTHORNE, THE SCARLET LETTER 77-78 (2003).
A major consideration in the decision whether or not to prosecute lies within the hands of the prosecutor and depends largely on whether the evidence supports a complete, coherent story that is easy for a jury to understand. Therefore, the prosecution usually seeks to present a single, linear story with a beginning, middle, and end. In this case, the prosecution also used a very clear cultural schema that created coherence in what could have been a dizzying array various facts. Thus, the prosecutor skillfully opens the case with the theme that Camm was an Adulterer and, in turn, a Womanizer:

“You will hear the Defendant was a predator of women. Their marriage was plagued by the Defendant’s continuous affairs. And these aren’t affairs based on admiration and love. These were sexual encounters that were disrespectful and humiliating … He collected and devoured women… And you will hear that while married to Kim those eleven years there were at least fifteen other women…From strippers, to co-workers, to professional women, married or unmarried, the Defendant collected them just the same.”

The prosecutor gives a clear beginning to the jury. The back-story he provides for shadows not only who committed the crimes at question, but also the true and just verdict. This vivid and structured beginning provides the jury with a mental map of the cohesive story he will present during trial. At closing argument, Stan Faith, the prosecutor, ironically clad in his fire engine red shirt\(^{98}\) again mixes linear story with strong adultery imagery by reviewing his study from his beginning: The Affairs.

“In November 1994, the Defendant set upon himself in an orgy of annihilation. In November of 1994 the Defendant looked upon the surface charms of Stephanie Neely, and having no ability to refute his whims, betrayed

his wife and kids... The Defendant went back to Kim where he betrayed her repeatedly and deliberately. He betrayed not only the honor to his family, but the trust of his badge and the honor of his profession. He used his power to prey upon vulnerable women, the ones that he stopped. The Defendant cared for no one. He sought only his pleasures and it pleased him to invite his secret lover in the very presence of Kim... He preyed upon woman after woman over the years. The Defendant is a devourer of women. He cares nothing for his immediate family, or extended family. He is willing to bring down upon their heads a holocaust of extermination and destruction.

The prosecution takes the image of an adulterer and expands upon it to the point of giving the jury a clear last step. The most important psychology mechanism at play during jury deliberation is attribution or, more simply put, whom to blame. 99 Under the linear story presented by the state in this case, David Camm is not only to blame for his wife’s misery, the destruction and murder of his family, but the destruction of society. The story has a clear beginning, middle and end causing cohesiveness and confidence by the juror in his/her decision. Cleverly, the prosecutor triggers the beginning with Camm’s actions – his first affair. The middle of the story is the lying and deception that invaded the Camm marriage like a cancer, the result of by David Camm’s immoral actions. The end, everyone can see coming a mile away, Camm’s actions finally reaching climax with the murder of a beautiful wife and two innocent, darling children. This narrative paints a picture with David Camm squarely positioned in the center and it seems to fit. In some respects, the prosecutor is able to push Camm to the fringes of society. By using imagery like “annihilation” and “holocaust” aligns him with those who wreak havoc on the world like terrorists and Nazis. Further, the image of the “Big, Bad

Wolf\textsuperscript{100}: The Womanizer, who uses women and carelessly spits them out, is a strong cultural icon and one we can all describe.\textsuperscript{101} In this opening statement, the prosecutor uses this cultural icon as a mental shortcut for jurors to accept the actions and motivation he is attributing to Camm. He laces in savage imagery of “collecting” and “devouring” bodies. This conjures a brutal and bloody image of the defendant’s wake. He explains the defendant is not motivated by “admiration or love,” but, by disrespect. These images contextualize every piece of evidence the state then presents. Bloody crime scene pictures and mistresses will create a cohesiveness and goodness of fit to this story.

Faced with incomplete, ambiguous, conflicting or complex evidence, juries fill in the gaps, constructing a coherent episode that follows typical narrative style, with a beginning, middle and an end, with all casual relationships specified.\textsuperscript{102} In this case, the state gives the jury, by pointing to Camm’s infidelity, a strong cultural stereotype that allows them to frame the evidence within their kaleidoscope of world knowledge.\textsuperscript{103} The state’s “possession of a powerful image”\textsuperscript{104} of Camm with a plausible story of him as a womanizer allows the jury to “fill in the blanks.”\textsuperscript{105}

\textsuperscript{100} \textit{The Classic Fairy Tales} 8 (Maria Tatar ed., 1999) (pointing to Susan Brownmiller’s proposition that “Little Red Riding Hood” recounts a cultural story that holds the gender bottom line by perpetuating the notion that women are at once victims of male violence even as they must position themselves as beneficiaries of male protection: ‘Sweet feminine Little Red Riding Hood is off to visit her dear old grandmother in the woods. \textit{The wolf lurks in the shadows, contemplating a tender morsel}. Little Red Riding Hood and her grandmother, we learn are equally defenseless before the male wolf’s strength and cunning . . . The wolf swallows both female with no sign of struggle . . . Red Riding Hood is a parable of rape. There are frightening male figures abroad in the woods – we call them wolves, among other names – and females are helpless before them.”) (emphasis added).

\textsuperscript{101} \textit{Id.}

\textsuperscript{102} Larson, supra note 44 at 185-186.

\textsuperscript{103} \textit{Id.} at 186.
How the Defense Could Structure a Counter-Story

Such a strong iconic story, as the one presented by the prosecution in Camm v. Indiana, must be combated with another strong story. Perhaps, alluding to a Beauty and the Beast theme where the male figure is far from perfect, but has a tender heart and would never hurt Beauty.\textsuperscript{106} The defense attorney must metaphorically bring David Camm back into the folds of society. Rather, one of the defense attorney in this case described her strategy, “I am going to the substance. Going brick by brick; the wall will come down.”\textsuperscript{107} “Wearing a microphone so he didn’t have to raise his voice, the defender slowly retraced his steps, trying to explain why his client acted the way he did after the murder.”\textsuperscript{108} Yet, the defenses argument fails by leaving the jury craving for certainty and the ease with which we embrace it.\textsuperscript{109} At this point, the defense is putting the focus on making excuses for the Defendant’s behavior. This is effectively giving the jury only one story to choose from – the prosecution’s story. Under the Story Model Theory, the defense highly likely to loose, and they did

\textsuperscript{104} Frank O’Connor, Counsel for Oedipus, in Law in Literature: Legal Themes in Short Stories 442, 444 (Elizabeth Villers Gemmette Ed., 1992).

\textsuperscript{105} Id.

\textsuperscript{106} Fairy Tales, supra note 100 at 25-31, “Beauty and the Beast,” unlike most fairy tales, accommodates two developmental trajectories. It …charts the challenges facing Beauty, but also registers the transformation sustained by Beast” who is only rumored to be Beast. There are many variants of “Beauty and the Beast,” for example, “The Snotty Goat” (“snot ran down his nose, slobber ran from his mouth”).

\textsuperscript{107} Camm’s Defense Attorney Speaks, \url{http://www.wlky.com/video/1310407/index.html} (Last visited April 22, 2007).

\textsuperscript{108} Glatt, supra note 98 at 307.

\textsuperscript{109} Sherwin, supra note 25 at 41.
The schema of the violent womanizer is familiar and easy to follow. In contrast, the defense argument operates in a strange and mysterious world dominated by unknown. It is a place where events are difficult, if not impossible, to explain, casual reasoning fails; things just happen. Such a place offers no outcomes, no closure; the only constant is uncertainty. In stark contrast with the prosecutor’s precise story that equates to “marching orders,” “such acausal happenings” of the defense presentation take and leave the jurors “no where.” They conjure a world robbed of personality, motivation, intentionally, resulting in a story robbed of structure that allows the listener to make sense of human actions and interactions.

There were plenty of facts that would lead to a strong counter-story, such as: 1) Camm’s 10 alibi witnesses,\textsuperscript{10} 2) Camm would have had had only 30 minutes to commit the entire crime (including molest his daughter and arrange the bodies and clean up\textsuperscript{11}, 3) the bodies were arranged in a very strange fashion\textsuperscript{12}, 4) Jill’s shoes were oddly lined up on top of the car\textsuperscript{13}, 5) the palm print and sweatshirt placed a violent man with a shoe fetish at the scene\textsuperscript{14}, 6) this other man was not even arrested until after Camm’s first

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{11}\textit{Id.}
\item \textsuperscript{12}\textit{Id.}
\item \textsuperscript{13}\textit{Id.}
\item \textsuperscript{14}\textit{Id.}
\end{itemize}
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trial\textsuperscript{115}, 7) Camm had never been violent in anyway with any of the victims\textsuperscript{116}, 8) Camm’s last affair was 3 years before the murder\textsuperscript{117}. However, a strong, cohesive counter story is essential to be effective at trial, not one by one or “brick by brick.”

Of course, the defense attorney’s first step would be to try to keep such evidence of adultery out under the 401/403 balancing test or under the character evidence prohibition. After all, evidence of this caliber is unfairly prejudicial because of the innate biases and prejudices that accompany the stereotype of an adulterer. However, assuming this fails, maximum persuasiveness would come from taking this story out of the domestic sphere, making the adultery evidence of no relevance, and therefore given very little weight by the jurors. According to Pennington and Hastie’s analysis of the O.J. Simpson trial, this is precisely what the defense team did by explaining away technically relevant domestic violence evidence in the story context.\textsuperscript{118} Jurors revealed in their post-trial interviews why they disregarded evidence of domestic violence. One juror commented, “This was a murder trial, not domestic abuse. If you want to get tried for domestic abuse, go in another courtroom and get tried for that.”\textsuperscript{119} Another juror explained, “I could not lay a heavy consideration [on it] as far as that being a motive. I

\textsuperscript{115}CBS, \textit{supra} note 109.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}

\textsuperscript{118}Nancy Pennington & Hastie, \textit{Perceptions and Decision Making, supra} note 41 at 967.

feel that if a person is capable of extreme rage, then these types of things happen a bit more often than maybe once every four or five years.”120

The defense attorney in the Camm case should sure to explain to the jury that this not a trial about David Camm’s fidelity. As previously discussed, even though more and more people are participating in adulterous acts many still think these acts are always or mostly “wrong” is pervasive. Innate in committing an affair is the ability to lie and deceive. To make light of the adultery would surely result in backlash. Therefore, a defense attorney should try to remove the acts of infidelity from the same sphere as murder separating the heinous act from the domestic bumps in the road.

For example, David Camm was never violent with any of the women with whom he was sexual. He never once threatened Kim or any other woman. It would be wise to paint him as somewhat hedonistic yet fallible creature. He should be someone that sought out pleasure and fun, but was never forceful or violent. David Camm should be the person that was enjoyable to be around. If he was a charismatic person that attracted women, but never hurt a fly, it is much harder to commit to the state’s story that he was a monster. O.J.’s defense team presented him in a similar way. One juror in particular concluded that the domestic violence incidents happened only when O.J. and Nicole were out to have a good time and drank too much.

That juror commented,

“Now, if you put all those together, they were always drinking. Both of them, all of them. They were always drinking. Here they are drinking, tempers flaring...What they presented to me, well, I related it all to they had been

drinking... But I didn’t think it was necessarily motive for murder.”121

Additionally, like O.J., David Camm was a loving and caring father who shielded his children from any marital hiccups. Something that portrays the prosecution as misleading is also important to this counter-story. The defense could bring The Scarlet Letter Effect to the attention of the jury. The defense attorney could equate this to a particular episode in the holocaust or witch hunt where someone just an average person who is being singled out by a vengeful, irrational judge and jury. Reel the jury into the fact that this country does not tolerate such things. This would increase the persuasiveness of his/her story, even in light of such damaging evidence, by “induc[ing] [the] jurors” through vivid imagery appealing to their own sense of justice and emotion so they will “adopt favorable orientations toward the evidence.”122 The closing arguments of Darden and Cochran illustrate this practice:

“The People put on their case, the defense put on their case, and I assert the defense case is a bunch of smoke and mirrors, all about distracting you from the real evidence of this case. So imagine the smoke, imagine the burning house, imagine you are standing in front of a burning house. And from the inside you can hear the wail of a baby, a baby’s crying, a baby in fear, a baby about to loose its life. And you can hear that baby screaming. And you hear the wail. Now, that baby, that baby is justice... and you want to do the right thing for justice is about to perish. Justice is about to be lost. Baby Justice is about to be lost. So you start to wade through the smoke trying to get to that baby. You have got to save that baby. You have to save Baby Justice. And if you happen to run into some smoke, find your way through the smoke. And if you happen to run into a few defense attorneys in the way, just ask them

121 Cooley, supra note 120 at 127-28.
122 Pennington & Hastie, Perceptions and Decision Making, supra note 41 at 966.
to politely step aside and let you find your way through the smoke.”

In addition, one could build a strong “The Real Killer” story as was used in the O.J. Simpson trial. There is strong direct, physical evidence, including a confession that Charles Boney committed the murder.\textsuperscript{123} There is no physical evidence that places Camm at the scene at the time of the murder. The one piece of evidence offered in his indictment, the 8 tiny blood droplets found on the corner of his shirt, is not equivocally a result of high impact blood spatter. Unfortunately, this is a case of hindsight is 20/20. This information was not yet available at Camm’s first trial.

\textbf{Conclusion}

The manipulation of cultural icons and stereotypes is an abuse of the story model that some scholars have warned against. Such a manipulation is a sly, sneaky way of invoking latent, repressed or subconscious prejudices in jurors, so that they accept a story as believable and fill in all the other blanks. Fitting the evidence into a strong cultural story seen many times before, whether it is the truth about what really happened, acts as a “Pass Go, Collect $200” card for the manipulating attorney. Is it true that just because a man is sexually promiscuous that he is a cold-blooded killer? The prosecution in the Camm case simply equates the two and offers the jury a complete story that each jury member can easily picture and grasp. Camm’s sexual promiscuity seals the image of Camm as a predator of women. The array of deeply integrated, culturally inherited and socially instilled storylines that we carry often subconsciously, in our heads recapitulate.

\textsuperscript{123}CBS, \textit{supra} note 109.
Because jurors use old stories to comprehend the evidence in cases, they are deciding, everyday experiences and “media exposure have a profound impact on how jurors decide cases.” In a society where most of the prior stories used by jurors to comprehend evidence are learned from the media, it is common for jurors to find a direct analogy, retrieve previously inferred template, or even construct a novel narrative in order to make sense of the evidence. A template or an abstraction derived from several events presented in the media, of the expected order of events in a typical kidnapping, bank robbery or most jurors easily access toxic spill. Similarly, the story of the Womanizer who engages in general abuse of women, including unfaithfulness is a common script played in all forms of media in today’s society and easily played in the mind of most people.

However, the Indiana Court of Appeals reversed Camm’s conviction because it concluded that “evidence of a defendant’s marital infidelity is not automatically admissible as proof of motive” and the state “must do more” than show the defendant was “unhappily married” to support the contention that “he or she had a motive to murder his or her spouse.” The court stated that it was apparent the evidence was introduced for the sole purpose of portraying Camm as “bad.”

As story model application becomes more and more prevalent in practice, lawyers may work more self-consciously to tell convincing stories and the result, like the


125 Id.

prosecution in the Camm case, they may be more persuasive. However, I head the question, “will justice be enhanced thereby?” In the current state of affairs, I think not. We must be particularly cognitive of “omissions, inconsistencies, and plot lines that flow from deep (usually hidden) beliefs and assumptions” and how they operate in the courtroom. These beliefs often stem from “subconsciously assimilated story forms, myths, and popular images.” It is important for those in the legal profession to recognize and assess the effect of these ingrained preferences on how people tell and hear stories, while being particularly alert to the exploitation of instinctive preferences for story closure and tantalizing scripts and stereotypes. For after all, when the jury chooses one story over another because a cunning attorney was able to manipulate the minds of each of the jurors, it can result in the loss of an innocent person’s liberty or life. This goes against a fundamental pillar of our American justice system and is tragic.

While I urge practitioners to present evidence in a fashion that lay people can understand and assimilate, I caution the court that, it too, must adjust accordingly. “As an important part of our obligations, we must increase our knowledge of cultural and cognitive tendencies – the preconceptions and mental pictures that enable us to frame reality through the legal narratives we use. If applied effectively, the 401/403 balancing test may provide the protection needed. The cultural climate of societal perceptions of adultery combined with skillful use of the story model can result in evidence of adultery

127 Lempert, supra note 35.
128 Sherwin, supra note 25 at 41.
129 Id.
130 Id.
being given far too much weight to the point of unfair prejudice beyond the probative value. The acts of adultery must be connected temporally or factually to the crime. In light of this understanding of the story model of juror decision making combined with the detrimental effects of evidence of infidelity and the stereotypes and scripts it invokes, I propose all courts should adopt the test given by the Indian Court of Appeals to minimize the chance of wrongful conviction and the abuse of “motive” evidence.

Citing Henson v. State\textsuperscript{131} and cases of other jurisdictions, the Indiana Court of Appeals held that evidence of marital infidelity is not automatically admissible as proof of motive in a trial for murder or attempted murder of the defendant’s spouse. Instead, to be admissible as proof of motive, the court held that evidence of a defendant’s extramarital affairs should be accompanied by 1) evidence that such activities precipitated violence or threats between the defendant and the victim, or 2) that the defendant was involved in the affair at the time of the completed or contemplated homicide. The admissibility of such evidence may be further constrained by concerns of 1) chronological remoteness, 2) insufficient proof of the extrinsic act, or the general concern that the unfair prejudicial effect of certain evidence might substantially outweigh its probative value in a particular case.\textsuperscript{132}

Protecting our justice system from covert manipulation of the innate human information processes by excluding such unfairly prejudicial evidence is not to say that justice is a result of cold-hard fact assessment devoid of all emotion. Rather, the human element of our jury system is what makes it so vital to our system. In fact, the human

\textsuperscript{131} Jack Kenney, 48-NOV Res Gestae 40 (2004). See also 2 Am Law Reports 5\textsuperscript{th} 465 (1994).

\textsuperscript{132}
element can be what prevents injustice by creating an inherent checks and balance system. My only hope is that practitioners can refrain from manipulating jurors through moral and emotional triggers simply to place a check in the win column. As what many would call a naïve law student, not yet damaged by the “real world” practice of law, I still expect that the goal of our profession is to seek only the truth.