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# The “CSI Effect”: Better Jurors through Television and Science?

## **Abstract**

This Comment discusses how television shows such as CSI and Law & Order create heightened juror expectations. This will be published in the Buffalo Public Interest Law Journal's 2005-2006 issue.

## THE “CSI EFFECT”: BETTER JURORS THROUGH TELEVISION AND SCIENCE?

BY MICHAEL MANN<sup>†</sup>

In Arizona, a man charged with a burglary in Tempe was acquitted, even though a witness testified about seeing the defendant dragging a stereo from the store, and burglary tools were in his car when he was arrested. The *Arizona Republic* reported jurors said the police should have found the man’s fingerprints inside the store.<sup>1</sup>

As criminal cases across the country go to trial at the state and federal levels, both prosecutors and defense counsel have paid close attention to a new phenomena known in criminal justice circles as the “CSI effect.” Many are convinced that in this modern age of forensic science, the “CSI effect,” which refers to the hit CBS television show *CSI: Crime Scene Investigation*,<sup>2</sup> gives

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<sup>1</sup> See Jane Ann Morrison, ‘CSI effect’ may have led Binion jurors to demand harder evidence, *LAS VEGAS REV. J.*, Dec. 2, 2004, at 1; see also Jim Walsh, *Prosecutors: Crime Shows Blur Reality; ‘CSI Effect’ is Raising Juries’ Proof Standards*, *ARIZ. REPUB.*, Aug. 29, 2004, at 1A.

<sup>2</sup> *CSI: Crime Scene Investigation* (CBS television series, 2000-Present), has topped industry ratings since it first aired in 2000, and is consistently one of television’s highest rated and most watched programs. Its enormous success has prompted creators to create two spin-offs, *CSI: Miami* (CBS television series, 2002-Present) and *CSI: NY* (CBS television series, 2004-Present), and has inspired more competition in the genre of television crime dramas that feature special effects to recreate graphic forensic science. Some of that competition includes NBC’s *Crossing Jordan* (NBC television series, 2001-Present) and Court TV’s reality based show *Forensic Files* (Court TV television series, 2000-Present). The plot of the original *CSI* series is loosely based on Las Vegas’ real life crime scene investigators. As one of the top labs in the country, the Criminalistics Division features cutting-edge forensic technology in each

jurors heightened and unrealistic expectations of how conclusively forensic evidence can determine a defendant's innocence or guilt.<sup>3</sup>

As early as the 1970s, programs depicting the criminal justice system became both serious and sophisticated, offering viewers a version of "justice," which has for better or worse, helped shape our understanding of the American criminal system.<sup>4</sup> Through weekly television dramas discussing hyper-technical police procedures and legal proceedings, the criminal justice system has shifted into mainstream popular culture—a scary place since police and legal matters are presented to television viewers with no frame of reference. While certainly not all of the information the public learns by watching crime dramas should be discounted as immaterial, it has lead far too many viewers to think that when they tune in, they see an accurate portrayal of the criminal justice system at work. In fact, to some viewers, these television shows are a lesson in law transmitted into their living rooms.<sup>5</sup>

The purpose of this Comment is to identify, describe, and analyze how prosecutors and defense attorneys wrestle with the heightened standards set by fictional crime dramas. While there is no single definition of the "CSI effect": prosecutors argue the phenomenon causes juries to require a higher standard of evidence to convict; defense attorneys claim it makes juries more likely to

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episode as the "night shift" recreates and deconstructs events to determine how a crime really happened. Intertwined at the end of each episode, is a logical study of cause and effect that finds the criminal—if one is to be found, and the search for motive or intent. *See generally* CSI:guide.com, <http://www.csiguide.com/csi.asp> (last visited May 28, 2006).

<sup>3</sup> *See, e.g.*, Amanda Cameron, *TV Fails to Show Crime-Solving Reality*, N.Z. HERALD, July 10, 2005, at 37; Rick Weiss, *Forensic Science Perfect? Only on TV: 'CSI' Raises Expectations of Prosecutors*, J. GAZ., Feb. 28, 2005, at 8; Alan Boyle, *Crime Sleuths Cope with "CSI" Effect: Forensic Experts Dogged by TV Expectations*, MSNBC, Feb. 20, 2005, <http://www.msnbc.msn.com/id/7003715/print/1/displaymode/1098>.

<sup>4</sup> *See* ELAYNE RAPPING, *LAW AND JUSTICE AS SEEN ON TV* 21 (2003).

<sup>5</sup> *See, e.g.*, Jamie Stockwell, *More Juries Taking TV to Heart*, HOU. CHRON., May 28, 2005, at A2; Ed Treleven, *'The CSI Effect' on Real Juries: Some Jurors are Expecting to See in the Courtroom What They See on TV*, WISC. ST. J., June 19, 2005, at A1.



convict based on forensic evidence alone; and some invoke the term to describe how *CSI* encourages students to study forensic science in much the same way that *ER*<sup>6</sup> drew newly interested individuals into medicine and *L.A. Law*<sup>7</sup> into the legal profession.<sup>8</sup> This Comment will explore how it affects jurors and in turn influences the American criminal justice system.<sup>9</sup>

### I. THE ORIGINS OF THE “CSI EFFECT”

The term “CSI effect” is only the latest catchphrase to describe juror reactions to how the legal system is portrayed on television and in the media. In the past, other pop culture terms were coined to identify similar effects. For example, the term “Oprahization”<sup>10</sup> described instances when jurors failed to hold a defendant responsible for their crime because of their own victimization, such as abuse as a child. Similarly, the “Perry Mason Syndrome,”<sup>11</sup> referring to the hit TV show, describes the expectations on defense attorneys to coerce an admission from the prosecution’s star witness upon cross-examination. Now, the “CSI effect” has entered the lexicon as one of the most popular

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<sup>6</sup> *ER* (NBC television series, 1994-Present).

<sup>7</sup> *L.A. Law* (NBC television series, 1986-1994).

<sup>8</sup> See Simon Cole & Rachel Dioso, *Law and the Lab: Do TV shows really affect how juries vote? Let’s look at the evidence*, WALL ST. J., May 13, 2005, at W13.

<sup>9</sup> See *id.*

<sup>10</sup> The term “Oprahization” was coined by California’s attorney general Dan Lungren, characterizing it as: “[T]he idea that people have become so set on viewing things from the [TV talk show host]Oprah [Winfrey] view, the Geraldo view or the Phil Donahue view that they bring that to the jury box with them. And I think at base much of that tends to say, ‘We don’t hold people responsible for their actions because they’ve been the victim of some influence at some time in their life.’” RICHARD K. SHERWIN, *WHEN LAW GOES POP* 271-72 n.33 (2000) (citing Sophronia Scott Gregory, *Oprah! Oprah in the Court*, TIME, June 6, 1994, at 30).

<sup>11</sup> See *infra* note 36 and accompanying text.

television shows in America,<sup>12</sup> catching the imagination of audiences and indoctrinating the American public to believe that scientific evidence is available and irrefutable in every criminal proceeding.

Today's Hollywood portrayals of police work have offered millions of Americans a glimpse into the criminal justice system and a profession, which until recently, has remained behind the scenes of everyday life. This intended sense of realism has shaped the public's understanding of criminal investigations, and has been evident in real courtrooms, as jurors demand more evidence before they are willing to vote for a conviction. Increased pressure to provide "hard" evidence has sent prosecutors scrambling to build a case that meets not only a legal standard, but also a fictional "Hollywood" standard. Books, television and other forms of mass media have always influenced our criminal justice system.<sup>13</sup> However, few have had such an impact or at least as much public interest as *CSI*. This is, perhaps, because television is the most influential medium since it projects real life images directly into viewers' living rooms and a weekly television show like *CSI* will naturally make more of an impression than a once-watched movie or long ago read book.

Prosecutors who bear surprising negative verdicts, credit the primetime success of *CSI* with causing jurors to have heightened expectations of what they will see when they enter a courtroom.<sup>14</sup> Rarely do television prosecutors lack the evidence

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<sup>12</sup> Continually Nielsen has rated *CSI*, *CSI: NY* and *CSI: Miami* as top ten television shows in their time slots. See Kate Aurthur, *Viewers Find Grisly 'CSI' Just Yummy*, N.Y. TIMES, Feb. 11, 2006, at B8; Rick Kissell, *CBS makes case with surging 'CSI'*, DAILY VARIETY, Sept. 27, 2004, at 1; Sid Smith, *Murder, they wrote; Police TV shows are all the rage, and here's why*, CHI. TRIB., Feb. 12, 2006, at C1.

<sup>13</sup> The National District Attorneys Association's magazine offered an excellent assessment of what effect shows like *CSI* have on jurors. See Karin H. Cather, *The CSI Effect: Fake TV and Its Impact on Jurors in Criminal Cases*, 38 PROSECUTOR 9 (Mar./Apr. 2004).

<sup>14</sup> See, e.g., Wendy Ruderman, *TV Fictions Entangle a Courtroom: A Woodbury Murder Trial Raises the Question: Do Juries Expect Too Much from Forensic Science?*, PHILA. INQ., May 20, 2005, at B7; Zofia Smardz, *The Jury's Out:*



needed to convict a defendant, which leaves real-life jurors scratching their heads looking for the same definitive evidence seen on television—the deoxyribose nucleic acid (DNA), ballistics and fingerprints—even when such evidence simply is not available.<sup>15</sup> But, are unrealistic expectations held by jurors as a result of watching *CSI* and other crime dramas such as Dick Wolf's *Law & Order*,<sup>16</sup> marginalizing actual criminal investigations?

Undoubtedly, forensic science is paramount to public perceptions of guilt and innocence. Witnesses no longer play a large role in crimes because humans can be fallible or simply lie. This premise has helped the greater science community teach prospective jurors from a young age that the only reliable proof is scientific evidence. When murder is committed, investigators “need only to look at the body, as it is now through science, the dead can appear on behalf of the prosecution.”<sup>17</sup>

a. *The rise of forensic science in the courtroom*

At the turn of the century and during the rise of organized crime, criminal defense attorneys frequently topped “underfunded and inexperienced public prosecutors,”<sup>18</sup> in ways that some

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*How 12 Reasonable People Got Hung Up on Reasonable Doubt*, WASH. POST, June 26, 2005, at B1.

<sup>15</sup> See Carlene Hempel, *TV's Whodunit effect Police Dramas are having an unexpected impact in the Real World: The public thinks every crime can be solved, and solved now— just like on Television*, BOSTON GLOBE, Feb. 9, 2003, Mag., at 13.

<sup>16</sup> *Law & Order* (NBC television series, 1990-Present).

<sup>17</sup> Julie Johnson-McGrath, *Crime and Popular Culture: Witness for the Prosecution: Science Versus Crime in Twentieth-Century America*, 22 LEGAL STUD. F. 183, 185 (1998). The author is referring to the autopsy performed by forensic pathologists to help investigate crimes.

<sup>18</sup> See *id.* at 186 (citing Lawrence Fleischer, *Thomas E. Dewey and Earl Warren: The Rise of the Twentieth Century Urban Prosecutor*, 28 CALIF. W. L.



reformists worried would undermine the criminal justice system. In an effort to bolster the power of prosecutors, science emerged as the state's most successful tool in preventing crime. The *jury* was specifically targeted as one of "the major stumbling block[s] to a more efficient justice system."<sup>19</sup> A new dependence on the use of scientific evidence emerged in criminal prosecutions and the need for forensic scientists to show the benefits of their new techniques moved down a path where juries were forced to believe in scientific evidence and expert testimony offered by the state.<sup>20</sup> As one commentator put it:

Throughout the twentieth century, politicians, prosecutors, and forensic scientists sought to ensure juries' appreciation of and belief in scientific evidence through a widespread public relations campaign, one of the aims of which was to convince the public of the superior probative value of scientific evidence. The campaign was carried out through magazine articles, World's Fair exhibits, short stories, books, and Hollywood movies: the propaganda had supporters ranging from Harvard University and Erle Stanley Gardner to local police departments eager to convince taxpayers of the need to fund a municipal or state forensics lab. The message was simple: disinterested, "objective" science was the best weapon against crime. The widely studied Cleveland, Missouri, and Illinois Crime Surveys of the 1920s, along with the 1927 National Research Council Report, "The Coroner and the Medical Examiner," urged the establishment of municipal scientific crime detection laboratories, independent from machine politics. The FBI opened its highly publicized Scientific Crime Detection Lab in 1932. An exhibit on the scientific virtues of the medical examiner system versus the corruption and suspect cause-of-death diagnoses of the coroner's office at the 1933 Century of Progress Fair in Chicago nicely captured the didactic tone of the campaign. According the exhibit text, the coroner was "a political official usually without professional qualifications . . . whose medical findings are questioned by courts and insurance agencies."

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REV. 1 (1991-1992)); Lawrence Friedman, *The Development of Criminal Law*, in *LAW AND ORDER IN AMERICAN HISTORY* 6-24 (Joseph M. Hawes ed., 1979).

<sup>19</sup> See Johnson-McGrath, *supra* note 17, at 186.

<sup>20</sup> See *id.* at 186-87.



The medical examiner, on the other hand, was a non-political official, expert in medicolegal pathology, who conducts a scientific investigation into the cause of death, whose work is purely medical [and] whose impartial findings are accepted by court and jury in criminal cases and by insurance companies and compensation boards in accident cases.<sup>21</sup>

Today, juries are not required to afford more weight to expert testimony, yet at the earlier part of the twentieth century, this was considered an enormous insult to the medical establishment.<sup>22</sup> They believed that lawyers and judges gave no deference to their expertise. In the hopes of fighting back, the “medical profession continually tried to have courtroom procedures and evidentiary rules changed to its advantage, attempting to privilege medical testimony over that of lay witnesses, exempt physicians from cross-examination, or circumvent the jury process altogether.”<sup>23</sup>

Alternatively, some in the medical profession chose to bolster the use of forensic science by undermining the reliability of direct eyewitness testimony. In 1908, Harvard psychologist Hugo Münsterberg published the best-selling book titled *On the Witness Stand: Essays on Psychology and Crime*, where he argued how “visual perception, memory, the power of suggestion, and other aspects of applied psychology . . . affected the ability of people to accurately bear witness to events they had observed.”<sup>24</sup> While there is likely some truth to his assertions, Professor Münsterberg’s findings further discredited testimony from even the most disinterested witnesses, raising more reliability questions and

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<sup>21</sup> *Id.* at 192 (citations omitted).

<sup>22</sup> *See id.* at 187.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 197. A later edition of Münsterberg’s book in 1925 actually had a foreword by New York Governor Charles S. Whitman, also a former district attorney. *See* HUGO MÜNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1925).

further helping usher in the use of science, which was seen as far more objective.<sup>25</sup>

In the early 1940s, reformers sought to make the criminal justice system more efficient and looked for new ways to manage the evidence presented to juries during trial. One commentator even suggested the formation of a National Scientific Commission, which would be comprised of members from the scientific and legal communities who could set forth the necessary minimum standards for forensic evidence presented at trial and a system for certifying expert witnesses who appear on the stand for the prosecution and defense.<sup>26</sup> Even the legendary Roscoe Pound suggested a “Ministry of Justice,” which would act just like the National Science Commission, but would also be charged with proposing “legislation that would declare scientific theories true,” effectively eliminating or approving “junk science” for the courtroom.<sup>27</sup>

In the following decade, a number of new books and articles also entered the forensic science dialogue with provocative titles such as *How to Get Away with Murder* and *Horse and Buggy Coroner: Alibi for Murder*.<sup>28</sup> These works were each written to reach the public and engage them in this new forensic science technology—the proverbial “CSI effect” before *CSI*. It was not long before forensic science made it onto the big screen with a movie about Harvard’s Department of Legal Medicine called *Mystery Street*.<sup>29</sup> Today, primetime television slots are filled with crime dramas that put the same forensic science on display that those in the criminal justice field sought to introduce years earlier. In this age of technology, one would be hard pressed to find a better medium than television to do so.

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<sup>25</sup> See Johnson-McGrath, *supra* note 17, at 197.

<sup>26</sup> See *id.* at 190-91 (citing Hubert Winston Smith, *Scientific Proof and the Relations of Law and Medicine*, 1 CLINICS 1353, 1393 (1943)).

<sup>27</sup> See *id.* at 191 (citing Roscoe Pound, *A Ministry of Justice as a Means of Making Progress Medicine Available for Courts and Legislatures*, 1 CLINICS 1644, 1644-57 (1943)).

<sup>28</sup> See *id.* at 196.

<sup>29</sup> See *id.*; *MYSTERY STREET* (MGM 1950).



b. *Television and the courtroom*

There is no denying television's influence on today's justice system. Television entertains the masses and creates a unique fictional world where we can sit back and view programming meant to appeal to each of us in a different way.<sup>30</sup> Due to today's "reality television" craze, fictional programming is at a competitive disadvantage. Writers are under pressure to convince viewers there is some degree of authenticity to their scripts. However, the public's insatiable desire for reality must be satisfied in a one-hour time slot. As a result, much of the less entertaining minutiae of police work is eliminated for the sake of good, broad-based entertainment appealing to viewers on different levels.

During this "Hollywoodization" process, much of the content that accurately depicts real life criminal investigations is left on the cutting room floor, leaving viewers with a false sense of understanding how complex and challenging investigative work can be. The finite time allowed to a single episode of a television show, coupled with the public's demand that *scientific* answers come quickly and mysteries be *solved* neatly, result in a portrayal of forensic science that could not be more contrary to real life. An excellent example is when laboratory results from a very costly DNA test, a process often requiring weeks to complete, are available in mere minutes in the plot of a television show. While such misinformation about a profession is not limited to law enforcement,<sup>31</sup> it is only within the legal profession that the public

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<sup>30</sup> See Edward Rubin, *Response: Television and the Experience of Citizenship*, 68 TEX. L. REV. 1155, 1157 (1990) (discussing the effects of television on its viewers).

<sup>31</sup> Television shows such as NBC's hit drama *ER*, have frustrated the medical profession because of public perception of how emergency rooms should be run. See also Jacqueline Connor & Anne Endress Skove, Nat'l Center for State Courts, *Trends in 2004: Dial "M" for Misconduct: The Effect of Mass Media and Pop Culture on Juror Expectations* (2004),

is relied upon to serve in our justice system as jurors; playing a critical role in the distribution of justice.

*c. Education through television*

The ongoing debate over the value of information the public receives from watching primetime crime dramas is superfluous. There is no question that crime dramas *do* educate the public. Even Justice John Marshall Harlan wrote in an opinion that “television is capable of performing an educational function by acquainting the public with the judicial process in action.”<sup>32</sup> Yet, there is a fine line between fostering education and embellishing a profession that prides itself on the accurate application of science and meticulous investigation.<sup>33</sup> After jurors informed a court in one case that a bloody coat admitted into evidence was never tested for DNA in a murder trial, one judge commented, “TV had taught jurors about DNA tests, but not enough about when to use them.”<sup>34</sup> Unbeknownst to the jurors in that trial, the defendant did not dispute being at the murder scene, giving investigators no reason to test the shirt.<sup>35</sup>

The influence of television and movies on the legal system is not a new concept. In the 1970s, defense attorney Perry Mason was able to get a confession out of the “real criminal” by the episode’s end credits.<sup>36</sup> Christopher Stone, director of the Vera

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<http://www.ncsconline.org/WC/Publications/Trends/JurDecTrends2004.html>  
(last visited May 28, 2006).

<sup>32</sup> *Estes v. Texas*, 381 U.S. 532, 589 (1965).

<sup>33</sup> For an excellent review forensic inaccuracies and impossibilities that exist in some very well known Hollywood movies see generally James E. Starrs, *Woeful Delights: Forensic Science at the Cinema*, 4 GREEN BAG 2d 409 (2001); James E. Starrs, *More Woeful Delights: Forensic Science at the Cinema, the Sequel*, 5 GREEN BAG 2d 407 (2002).

<sup>34</sup> See Richard Willing, ‘CSI effect’ has juries wanting more evidence, USA TODAY, Aug. 5, 2004, at 1A.

<sup>35</sup> *Id.*

<sup>36</sup> Some commentators have referred to a “Perry Mason Syndrome,” and similar to a “CSI effect,” this places the burden on criminal defense attorneys. In one case, a defense attorney who unexpectedly lost a case approached a juror and asked what had happened. The juror said: “When you cross-examined the



Institute of Justice recalls how Mason influenced the legal profession. “When Perry Mason first aired, lawyers were not allowed to approach witnesses to question them,” but producers were unable to “fit both Mason and the witness in the same frame, so the directors had Mason walk over and lean on the witness rail.”<sup>37</sup> After watching this staging, juries began to expect all lawyers to lean on the witness rail, and if they did not, jurors seemed confused and thought the attorney did something wrong.<sup>38</sup> Even before Mason, television shows like *Dragnet*<sup>39</sup> helped to educate the public and are credited by many for saving the *Miranda*<sup>40</sup> ruling, which at the time was very unpopular with the law enforcement community.<sup>41</sup> *Dragnet* provided a forum for the public to observe how the reading of *Miranda* rights to a defendant

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prosecution’s key witness, you did not get him to confess.” The lawyer realized he had not been able to measure up to the fictional Perry Mason. See Fred Graham, *The Impact of Television on the Jury System: Ancient Myths and Modern Realism*, 40 AM. U. L. REV. 623, 628 (1991). Aside from what is said in the courtroom, judicial opinions have been found to incorporate Hollywood into their descriptions. See, e.g., *State v. Garofola*, 599 A.2d 954 (N.J. Super. Ct. Law Div. 1988) (finding “[t]he State’s theory brings to mind a scene from the popular movie ‘Beverly Hills Cops Two.’” The court proceeds by comparing Eddie Murphy’s fictional character with the defendants in the case); *State v. Howard*, 668 S.W.2d 191, 194 (Mo. Ct. App. 1984) (defendant self-proclaims that his qualifications for self-representation consisted of being a “good Republican” and that he “had watched Perry Mason on TV a few times.”); *West v. Commonwealth* 780 S.W.2d 600, 601 (Ky. 1989) (defendant was compared to Dirty Harry by the prosecution).

<sup>37</sup> See Amy Lennard Goehner, *Where CSI Meets Real Law and Order*, TIME, Nov. 8, 2004, at 69. For other examples of how television has effected the public’s standards see generally Brett Kitei, *The Mass Appeal of The Practice and Ally McBeal: An In-Depth Analysis of the Impact of these Television Shows on the Public’s Perception of Attorneys*, 7 UCLA ENT. L. REV. 169, 172 (1999).

<sup>38</sup> See Goehner, *supra* note 37, at 69.

<sup>39</sup> *Dragnet* (NBC television series, 1951-1959).

<sup>40</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that a confession could not be introduced as evidence unless the defendant had been informed of their rights, including the right to remain silent).

<sup>41</sup> See Goehner, *supra* note 37, at 69.

was far less of an obstruction for an officer to perform his or her duties than originally believed.<sup>42</sup>

As today's jurors continue to watch more and more crime dramas, some forget how to distinguish experiences that are real and those that are fiction.<sup>43</sup> They lack training and experience in the criminal justice discipline to know what they should believe and what is created for their viewing pleasure. In fact, *Law & Order* prides itself on taking contemporary courtroom events in its popular "Ripped from the Headlines" episodes and turning them into creative storylines. Crimes capturing the attention of national news media are then re-created with a new twist in the plot to keep viewers on the edge of their seats. The title itself implies some degree of truth, but often has little resemblance to the actual crime on which it is based. Take, for example, the jury selection for alleged Oklahoma City bomber Terry Nichols. During voir dire, a prospective juror first told the court that Nichols must be guilty since Timothy McVeigh was also convicted and sentenced to death for the same crime. Only later did the juror tell the court that her views were not based on the guilt of McVeigh, but on a set of facts aired on an episode of *Law & Order*.<sup>44</sup>

Most recently, Andrea Yates, the Texas mother who drowned her five children, had her conviction overturned after an expert witness in the case incorrectly testified that before Yates killed her children, an episode of *Law & Order* portrayed a similar scenario where a mother was found not guilty by reason of

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<sup>42</sup> See *id.*

<sup>43</sup> See L.J. Shrum, *Crime and Popular Culture: Effects of Television Portrayals of Crime and Violence on Viewers' Perceptions of Reality: A Psychological Process Perspective*, 22 LEGAL STUD. F. 257, 267 (1998). In addition, it is argued that we must learn what effects television viewing habits have on our cognitive reasoning to be able to shape our own "direct" experiences and not those which Hollywood produces. *Id.* There is considerable legal study on the psychology of jurors. See generally RONALD MATION, COMMUNICATION IN THE LEGAL PROCESS (1988); DONALD E. VINSON, JURY PERSUASION: PSYCHOLOGICAL STRATEGIES & TRIAL TECHNIQUES (1993).

<sup>44</sup> See SHERWIN, *supra* note 10, at 16.



insanity.<sup>45</sup> The expert witness, a psychiatrist and consultant to *Law & Order*, demonstrates just “how the lines between fact and fiction, life and art, can become confused in the minds of even the most rigorously trained experts.”<sup>46</sup> If an *expert* is confused as to what is reality and what is fiction, how can we blame a *juror* from being confused?

One mantra *CSI* drills into a viewer’s head is that people can lie, but the evidence cannot. Today, most attorneys in a case with forensic evidence would have concerns during voir dire that jurors know too much, or at least believe that they know more than they really do. In a 2000 study conducted by the American Bar Association (ABA), 780 high school students across the country were surveyed to determine their knowledge and attitudes toward the legal system.<sup>47</sup> The most telling result of this survey was the relationship between law television show viewing habits and student knowledge. The survey found for example, that students who regularly watched *Ally McBeal*<sup>48</sup> were far more likely to score “medium low” (3-4 correct answers) or “low” (0-2 correct answers) on the knowledge index, compared to other students who reported that they regularly watched other popular law shows.<sup>49</sup> Students who watched other legal shows such as *Law & Order* did marginally better.<sup>50</sup> While the data does not allow researchers to

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<sup>45</sup> See Edward Wyatt, *Even for an Expert, Blurred TV Images Became a False Reality*, N.Y. TIMES, Jan. 8, 2005, at B7.

<sup>46</sup> *Id.*

<sup>47</sup> A.B.A. Div. for Pub. Educ., Law Day Survey, *What Do High School Students Think and Know about Topical Legal Issues?* (Spring 2000), <http://www.abanet.org/publiced/lawday/studsurvey2000.html>.

<sup>48</sup> *Ally McBeal* (FOX television series, 1997-2002) was a comedy television series starring Calista Flockhart, a single lawyer with eccentric colleagues and most notably a “dancing baby” that occupied her imagination.

<sup>49</sup> A.B.A. Survey, *supra* note 47.

<sup>50</sup> For example, the ABA survey found that 30% of the students who watched *Ally McBeal* scored either “medium low” or “low” on legal knowledge, compared with 25% of students who watched *The X-Files* (FOX television series, 1993-2002) regularly, 20% of students who regularly watched *The*



determine the cause of these results, it certainly raises significant questions about whether shows, like *CSI*, that have some basis in reality, teach young viewers important lessons about law enforcement. However, it can also be argued that students who are better informed choose to watch shows like *CSI* and *Law & Order*.<sup>51</sup> While the ABA study found no correlation between demographic and behavioral variables and overall legal knowledge, the survey did find that other factors such as the amount of television students watched, the source of where they gathered news, experiences outside of school and access to the Internet were not related to the amount of information they knew about legal concepts.<sup>52</sup>

## II. PURPOSEFUL USE OF SCIENCE

From a purely historical perspective, the public's interest in science themed crime dramas can be traced back long before top rated television shows like *CSI* and *Law & Order*. In the 1970s, *Quincy M.E.*<sup>53</sup> was the first show to generate a following in the field of forensic science, and in the 1980s, *The Silence of the Lambs*<sup>54</sup> was an extremely popular movie that sparked interest in this once overlooked science.<sup>55</sup> Few can also deny the impact of O.J. Simpson's trial, where millions of Americans tuned in daily to follow a real case that introduced, for the first time to many viewers, new scientific techniques and the use of DNA evidence.<sup>56</sup>

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*Practice* (ABC television series, 1997-2004) and *NYPD Blue* (ABC television series, 1993-2005) and finally, 18% for those students who report they watch *Law & Order*. See *id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Quincy M.E.* (NBC television series, 1976-1983) was a forensic mystery series in the mid-1970s that starred Emmy award-winner Jack Klugman who worked in the L.A. Coroner's Office and, similar to *CSI*, used detective-like techniques to prove his medical findings.

<sup>54</sup> *THE SILENCE OF THE LAMBS* (Orion Pictures 1991).

<sup>55</sup> See Tara Martin, *On Call*, CHARLESTON GAZ., Apr. 25, 2004, at 4B.

<sup>56</sup> See Mark Sappenfield, *From Lindbergh to Laci, A Growing Forensics Fancy*, CHRIST. SCI. MON., Apr. 24, 2003, at 1.



But even prior to these examples, Americans have long been interested in cases where investigators relied on the use of science to help solve their mysteries, from the Lindbergh baby kidnapping<sup>57</sup> in the 1930s to the Kennedy Assassination.<sup>58</sup>

a. *Portraying reality*

To help feed the American appetite for mysteries, television programs like *CSI* and *Law & Order*<sup>59</sup> blanket our airwaves and cable television. Good storylines are not enough to garner attention, making producers work hard to ensure what we see on television is portrayed as accurately as possible.<sup>60</sup> For example, on *CSI*, co-producer and technical consultant Elizabeth Devine is an actual former forensic expert with the Los Angeles sheriff's department, and is responsible for checking scripts and contributing to the storyline, at times even phonetically spelling

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<sup>57</sup> The case of the Lindbergh baby kidnapping and murder is still part of the American psyche. Charles Lindbergh's status as a world-famous aviator and the subsequent trial caused a worldwide sensation.

<sup>58</sup> See Sappenfield, *supra* note 56, at 1. Interest still continues in the Kennedy assassination. In a magazine article written after the movie *JFK*, the author discusses the "magic-bullet" theory, which questioned whether the same bullet could have hit both Kennedy and Texas Governor John Connelly, the article discusses how "neutron activation tests indicate that the fragments in Connelly's wrist did come from the bullet in question." See Richard Corliss, *Who Killed J.F.K.?*, TIME, Dec. 23, 1991, at 68; see also Weisburg v. U.S. Dep't of Justice, 438 F. Supp. 492, 499-503 (D.D.C. 1977) (discussing a Freedom of Information Act request for the laboratory results on Kennedy Assassination).

<sup>59</sup> *Law & Order* has even more spin-offs than *CSI*, including *Law & Order: Special Victims Unit* (NBC television series, 1999-Present), *Law & Order: Criminal Intent* (NBC television series, 2001-Present), and *Law & Order: Trial by Jury* (NBC television series, 2005).

<sup>60</sup> For an excellent overview of the science used in the television show *CSI*, see KATHERINE RAMSLAND, THE FORENSIC SCIENCE OF C.S.I. (2001).

out forensic jargon for the actors.<sup>61</sup> To create episodes with a touch of reality, *CSI* has a researcher and an actual crime scene investigator on staff.<sup>62</sup> One of those forensic experts, Max Houck, is the director of the Forensic Science Initiative at West Virginia University and serves as an informal consultant to the head researcher and star of *CSI*, David Berman.<sup>63</sup> Houck recognizes that a hit television show must be “sexy” to the viewer, but is convinced that *CSI* is also interested in using science that is accurate and exists.<sup>64</sup> Even Berman, the show’s head researcher is quick to admit that shows like *CSI* take some shortcuts along the way, citing as a prime example, how prosecutors receive DNA results in the show’s 44-minute time span.<sup>65</sup> While there is certainly a balance between entertainment and real science, entertainment always outweighs the latter. In some respects, the creative license on forensic science is a lot like a form of propaganda. When stretched to the limit, how can a viewer accurately decipher the truth in methods and techniques? While it is doubtful that disclaimers need to be flashed at the beginning of each episode (however, some *Law & Order* episodes do so), with respect to the question of whether a show is based on reality, some guidance is necessary for viewers who could potentially weigh real evidence in real criminal cases.

Ultimately, like all forms of media, television operates on profit motive. Once a show has struck a chord with viewers, advertising dollars will follow. As long as the cash flow is consistent, the accuracy of the scripts in relation to real life crime becomes less and less important.

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<sup>61</sup> See Bill Brioux, *Chalk it up to Experience; Prime-Time Crime Drama Walk a Thin Blue Line between Drama and Reality*, WINNIPEG SUN, Jan. 26, 2003, Sun. Mag., at M1.

<sup>62</sup> See Martin, *supra* note 55, at 4B.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

b. *Juries require more forensic evidence at trial*

Scientific evidence has been so common at trials in recent years that jurors take exceptional notice when none is offered.<sup>66</sup> For example, during the high profile Central Park jogger case in the 1990s, a news account reported that “[a]mong the defense’s strongest points in attacking the prosecution’s case was the surprising absence of physical evidence—no weapons, no blood stains, no strands of hair, no pieces of skin, no footprints linked any of the teenagers to the crimes.”<sup>67</sup> If nothing more, this is a great distortion of the legal burdens at trial. However, a jury could buy it.

Several commentators suggest that the increased use of forensic evidence began with decisions by the Warren Court in the 1960s.<sup>68</sup> Limitations on evidence gathering and landmark cases like *Miranda*,<sup>69</sup> *Gideon*<sup>70</sup> and *Escobedo*,<sup>71</sup> prevented officers from using traditional techniques like interrogations and lineups.<sup>72</sup> Therefore, something had to compensate for law enforcement’s “inability” to do their jobs. While this weak hypothesis seems like

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<sup>66</sup> See Paul C. Giannelli, *Scientific Evidence in Criminal Prosecutions*, 137 MIL. L. REV. 167, 169 (1992).

<sup>67</sup> *Id.* (citing Rorie Sherman, *Technology Emotion Key in Jogger Case*, NAT’L L.J., Aug. 20, 1990, at 8).

<sup>68</sup> See Giannelli, *supra* note 66, at 169.

<sup>69</sup> 384 U.S. 436 (1966).

<sup>70</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (finding the right to appointed counsel).

<sup>71</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964) (finding the right to remain silent).

<sup>72</sup> See Giannelli, *supra* note 66, at 169 (citing Richard Fox et al., *The Criminalistics Mission: A Comment*, in LEGAL MEDICINE ANNUAL 1 (Cyril H. Wecht ed., 1972)). In the early 1970s, a state appellate judge found in *Worley v. State*, 263 So. 2d 613, 616 (Fla. Dist. Ct. App. 1972) (concurring opinion), that “[i]n this day and age...where recent decisions of the United States Supreme Court establish stringent guidelines in the investigative, custodial and prosecutorial areas a premium is placed upon the development and use of scientific methods of crime detection.” See Giannelli, *supra* note 66, at 169.

nothing more than an excuse to use scientific proof, the actual entrance of forensic science techniques has far more to do with being right than finding a just result. In other words, it is injustice prevention. We hope good jurors take their role in the criminal justice system seriously and want to serve proudly and conclude properly. Scientific evidence, at least the evidence shown on television, ensures accuracy and reconfirms their beliefs.

The Supreme Court has found that “modern community living requires modern scientific methods of crime detection lest the public go unprotected.”<sup>73</sup> If forensic evidence is not presented, some jurors would contend the state has not met their high burden of proof of “beyond reasonable doubt.”<sup>74</sup>

*c. Demands from the Fourth Estate*

There are always cases which for one reason or another are forced into the national spotlight by the news media. The most common cases involve celebrities who find their way into legal troubles or cases where an outrageous criminal act has occurred. Such crimes tend to bring attention to forensic evidence as television pundits and attorneys fill the cable airwaves analyzing a defendant’s guilt or innocence based on the evidence available to the public.

In the recent Scott Peterson case, both the press and the public could not understand why it would take weeks and possibly months to analyze the DNA when two bodies, later confirmed to be Laci Peterson and her unborn child, were washed ashore.<sup>75</sup> With national attention focused on this tragic story, many expected the identification to happen within the next news cycle.<sup>76</sup> What the public did not understand was that in even the best of

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<sup>73</sup> *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957).

<sup>74</sup> See Morrison, *supra* note 1, at 1; see also Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791, 793 (1991) (discussing how expert testimony is becoming increasingly important as technological advances allow courts to use science to help determine cases).

<sup>75</sup> See Sappenfield, *supra* note 56, at 1.

<sup>76</sup> See *id.*

circumstances, it would take at least a week of nonstop work to properly identify Peterson's body.<sup>77</sup>

Consider also the cross-dressing millionaire Robert Durst, who in 2003 was acquitted in Galveston, Texas for killing his neighbor, even after admitting to shooting him, chopping up the body and dumping it into the ocean.<sup>78</sup> Despite what many considered to be overwhelming evidence, prosecutors could not convince jurors to convict. Even though Durst admitted he killed him, his victim's head could not be found, allowing the defense to successfully argue Durst had acted in self-defense, with the head containing key evidence to prove such a theory.<sup>79</sup> In fact, Robert Hirschhorn, a jury consultant for the defense says he purposely selected jurors who watched *CSI* and similar shows for the trial, a task that was not difficult.<sup>80</sup> A survey conducted by the defense of the 500-person jury pool found that close to 70 percent watched some type of crime drama.<sup>81</sup>

In addition to a "lack" of forensic evidence, which was cited in the recent acquittal of actor Robert Blake,<sup>82</sup> O.J. Simpson showed millions of viewers what can happen when forensic evidence is mishandled, a major consideration for juries. In Peterson's case, the jury looked beyond forensic evidence and gave a carefully considered verdict, which took into account circumstantial evidence. Nevertheless, these cases are only more recent examples of well-publicized trials that required the use of

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<sup>77</sup> See *id.*

<sup>78</sup> See Chris Ayres, *The Evidence is Clear: American Justice has Lost the Script*, LONDON TIMES, Sept. 28, 2004, at 15; see also John Springer, *Millionaire Durst Acquitted of Neighbor's Murder*, COURTTV.COM, Nov. 11, 2003, [http://www.courttv.com/trials/durst/verdict\\_ctv.html](http://www.courttv.com/trials/durst/verdict_ctv.html).

<sup>79</sup> See Goehner, *supra* note 37, at 69.

<sup>80</sup> *Id.*

<sup>81</sup> See Willing, *supra* note 34, at 1A.

<sup>82</sup> See Andrew Blankstein & Jean Guccione, "*CSI*" Effect Hinted by Blake Jurors, POST-GAZETTE, Mar. 20, 2005, at A14; Richard Winton, *District Attorney Calls Blake Jury 'Stupid'*, L.A. TIMES, Mar. 24, 2005, at B1.

forensic evidence. However, there are many more. The case against Claus von Bulow was based on scientific evidence.<sup>83</sup> Similarly, serial killer Ted Bundy's case used "hypnotically-refreshed" testimony and scientific evidence that showed a bite mark.<sup>84</sup>

Even in cases that do not involve violent crimes, there seems to be a demand for forensic evidence. In domestic diva Martha Stewart's trial, the prosecution put a Secret Service ink expert on the stand. While prosecutors attempted to persuade jurors that he was a trustworthy witness, he lied on the stand in a case where Martha Stewart was tried for lying.<sup>85</sup> Judge Miriam Goldman Cedarbaum found that the expert witness was not considered part of the prosecution's team, but Stewart's defense team argued that the only reason this expert was placed on the stand by the prosecution was to play into the jury's high expectations of forensic evidence of Stewart's alleged lie.<sup>86</sup>

### III. QUESTIONS OF FAIRNESS AND JUSTICE

The "CSI Effect's" demand for more evidence at trial has brought to light another issue: "junk science."<sup>87</sup> Like in Martha Stewart's trial, often overpaid and under qualified consultants are hired to contribute some "razzle-dazzle" to a trial.<sup>88</sup> Professor Samuel Gross argues that the use of expert testimony is the "essential paradox" in cases. "We call expert witnesses to testify about matters that are beyond the ordinary understanding of lay people (that is both the major practical justification and the formal

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<sup>83</sup> See *State v. von Bulow*, 475 A.2d 995 (R.I.), *cert. denied*, 469 U.S. 875 (1984).

<sup>84</sup> See *Bundy v. State*, 471 So. 2d 9, 18-19 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986); *Bundy v. State*, 455 So. 2d 330, 348 (Fla. 1984), *cert. denied*, 476 U.S. 1109 (1986).

<sup>85</sup> See *On the Record with Greta Van Susteren: Legal Analysis of Martha Stewart Trial Developments* (FOX News Channel television broadcast, July 19, 2004).

<sup>86</sup> *Id.*

<sup>87</sup> Hempel, *supra* note 15, at 13.

<sup>88</sup> *Id.*

legal requirement for expert testimony), and then we ask lay judges and jurors to judge their testimony.”<sup>89</sup>

Anyone in the science community will admit that even some of the more traditionally reliable forensic tests have flaws. For example, one commentator suggests that evidence as basic as fingerprints have not been adequately tested to be classified as anything more than “junk science.”<sup>90</sup> While this is an extreme statement, a general concern of the defense bar is that forensic scientists work with law enforcement agencies to analyze and support criminal prosecutions.<sup>91</sup> It is their livelihood. Forensic scientists must therefore continually “convince” their clients that their services are needed for them to be successful professionally.<sup>92</sup> Such an incentive to “sell their services” could potentially lure forensic scientists to promote an impression that their techniques are more reliable and accurate than they are, and their conclusions trustworthy.<sup>93</sup> Other commentators suggest that because of these incentives, forensic scientists are closer to that of a trade guild than

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<sup>89</sup> Samuel Gross, *Expert Evidence*, 1991 WISC. L. REV. 1113, 1182 (1991).

<sup>90</sup> See Simon A. Cole, *The Use and Misuse of Forensic Evidence; Fingerprinting: The First Junk Science?*, 28 OKLA. CITY U. L. REV. 73 (2003); Tara Marie La Morte, Comment, *Sleeping Gatekeepers: United States v. Llera Plaza and the Unreliability of Forensic Fingerprinting Evidence under Daubert*, 14 ALB. L.J. SCI. & TECH. 17(2003).

<sup>91</sup> See William C. Thompson, *A Sociological Perspective on the Science of Forensic DNA Testing*, 30 U.C. DAVIS L. REV. 1113, 1114 (1997). It is of important note that many forensic undertakings are spoiled by technician error, negligence in handling the evidence or investigator biases (i.e., leaning strongly toward producing a suspect and conviction).

<sup>92</sup> *Id.* This is clearest when commercial forensic laboratories advertise their services to the legal community, but it is much more subtle in the public sector where government forensic scientists must prove their value each year for budgets to be increased. See also Paul C. Giannelli, Essay, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL’Y & L. 439 (1997).

<sup>93</sup> Thompson, *supra* note 91, at 1114.



unbiased members of a scientific discipline.<sup>94</sup> There is a “tendency for [forensic scientists] to be co-opted, that is, to adopt the goals of their clients as their own.”<sup>95</sup> Forensic scientists are part of the same team as their employer—either the prosecution or defense — and therefore lose their required objectivity and neutrality that is required in a proper scientific investigation.<sup>96</sup>

On its face, it seems like a clear conflict of interest. Experts brought into the courtroom to satisfy a jury’s desire for reliable scientific evidence must take a side. This conflict exists not in the beginning of a case where police and prosecutors want to find out what has happened, but rather when law enforcement officials have a theory as to what they believe has happened.<sup>97</sup> In some circumstances, it is imaginable that a forensic scientist, who wants to ensure justice is served, could convict the person who is actually guilty—even if evidence may point in a different direction than the defendant on trial.<sup>98</sup> No better example is Larry “No Relation to Martha” Stewart, the Secret Service ink expert referred to earlier, who was charged with perjury at Martha Stewart’s trial in 2004. Thus, the goal of helping the prosecution win at trial

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<sup>94</sup> *Id.* Because there is a limited market for those who would purchase their services, forensic scientists may choose not to publicly challenge the reliability of their techniques or avoid publishing anything that could reflect poorly on the profession. Such acts are inconsistent with the self-scrutiny performed by traditional scientists. *Id.* In addition, too often forensic scientists offer an “opinion,” and a prosecutor treats it as fact. See Johnson-McGrath, *supra* note 17, at 193. For additional reading on the unreliability of forensic evidence, see generally Michael J. Saks, *Toward More Reliable Jury Verdicts?: Law, Technology, and Media Development Since the Trials of Dr. Sam Sheppard: Scientific Evidence and the Ethical Obligations of Attorneys*, 49 CLEV. ST. L. REV. 421, 436 (2001) (discussing the ethical issues between expert witnesses with lawyers and the courts); La Morte, *supra* note 90, at 171 (arguing forensic fingerprint identification must be reexamined).

<sup>95</sup> See Thompson, *supra* note 91, at 1115.

<sup>96</sup> *Id.*; see also Johnson-McGrath, *supra* note 17, at 198 (noting that forensic scientists have been almost monopolized by government labs, and their one-sidedness defeats their objectivity).

<sup>97</sup> Thompson, *supra* note 91, at 1115.

<sup>98</sup> *Id.*

could potentially conflict with a goal of scientific detachment and neutrality.<sup>99</sup>

At its most extreme, the desire to present forensic evidence can lead to misconduct by the prosecution or defense. For example, in *Miller v. Pate*,<sup>100</sup> a prosecution expert testified that bloodstains on underwear were type-A, matching the defendant's blood type. To make his point, the prosecutor waived the "bloody" underwear in front of the jury during closing argument. It was only discovered in later proceedings that the underwear did not have blood, but rather the stains were made by paint and the prosecutor knew this at the time of trial.<sup>101</sup> In another Supreme Court case, the Court found a prosecutor "improperly argued with an expert witness during a recess of the grand jury after the witness gave testimony adverse to the government."<sup>102</sup>

These examples are just that, examples. Such questionable activity is far from routine for either side, but this desire to prove a case with irrefutable facts of science can lead to improper testimony in some cases and blatant misconduct in others. One must wonder whether an expert is clearly explaining the pitfalls and disadvantages to jurors in clear language. Is an expert tempering their words, as they should, or falling into the trap of TV expectations? Does the expert explain why, in certain situations physical evidence is not available or relevant? For example, in the recent Kobe Bryant rape investigation,<sup>103</sup> a DNA test could never show whether sex between Bryant and his accuser was forced or consensual. There is no genetic marker for such things, and there never will be. If juries expect more, then expert witnesses have to work around these increased expectations and make their presentations even *more* confident than they would otherwise.

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<sup>99</sup> *Id.*

<sup>100</sup> *See Miller v. Pate*, 386 U.S. 1 (1967).

<sup>101</sup> *See id.*

<sup>102</sup> *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988).

<sup>103</sup> *People v. Bryant*, 03-CR-204 (Dist. Ct. Eagle Co., Colo. 2004).

In sum, all that is clear about scientific evidence is that scientific evidence is not clear. Luckily, despite what jurors want to see, our adversarial system of justice remains intact and every test taken in the field will get its test in the courtroom as well.

a. *Defending against television*

Prosecutors have made no secret of their concerns about high juror expectations in media. Hundreds of articles have been penned on the subject, undoubtedly every time a “slam dunk” case is lost. However, defense attorneys also have their reasons to probe the viewing habits of jurors during voir dire. Some fear that jurors might hold them to the heightened standards of Perry Mason and other famous defense attorneys, expecting them to completely vindicate their clients and identify the guilty.<sup>104</sup> This is an impossible standard for even the most skilled defense attorney and actually switches the burdens of proof proscribed by law.<sup>105</sup> It is not a defense attorney’s burden to prove his client’s innocence, as Mason did in each and every episode.

There are obviously other inherent disadvantages for defense attorneys, with perhaps the most commented upon being the use of scientific evidence at all. Most often, forensic science is available only to the upper echelons of the government and has been used almost exclusively by the prosecution.<sup>106</sup> Defendants in the majority of cases lack the financial resources to pay for lab testing or expert witnesses who require compensation to testify in

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<sup>104</sup> David Ray Papke, *The American Courtroom Trial: Pop Culture, Courthouse Realities, and the Dream World of Justice*, 40 S. TEX. L. REV. 919, 930 (1999). In addition, Edward Bennett Williams, a well respected trial lawyer, found that Perry Mason created false expectations among his clients and that even the best defense attorneys would be lucky to win an acquittal in a majority of their cases. *Id.* (quoting Edward Bennett Williams, *The High Cost of Television’s Courtroom*, 3 TELEVISION Q. 11, 12-15 (1964)).

<sup>105</sup> Namely, the prosecution must prove “beyond a reasonable doubt” that defendant is guilty of the crime charged.

<sup>106</sup> See Johnson-McGrath, *supra* note 17, at 196.



court.<sup>107</sup> Furthermore, even if forensic scientists are put on the stand for a defendant, there is a high likelihood that their testimony will be attacked as nothing more than a “hired gun,” or as marginal members of their profession who were brought into the case only to confuse the jury.<sup>108</sup> To justify their often one-sided use, scientists cite their scientific responsibility for objectivity and unwilling nature to assist the defense unless a defendant is actually innocent,<sup>109</sup> but such promises are unlikely to make those facing prosecution sleep better at night.

There are even more concerns on the appellate level, as the “effect” has created a legal atmosphere that the use of science, DNA in particular, is required to fix an injustice.<sup>110</sup> The bar has been raised very high, and nothing short of DNA seems to permit the overturning of a wrongful conviction.<sup>111</sup> The inherent value of scientific evidence has also made it easy for the government to overlook Fifth and Sixth Amendment violations that are often at the bottom of wrongful convictions—like faulty police photo lineup procedures and videotaping of police statements.<sup>112</sup> The public and law enforcement officials seem very comfortable with

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<sup>107</sup> *Id.* at 198. In addition, there has been a lot written on the idea of giving defense teams their own forensic scientists. See Henry C. Lee, *Forensic Science and the Law*, 25 CONN. L. REV. 1117, 1124 (1993).

<sup>108</sup> Johnson-McGrath, *supra* note 17, at 198.

<sup>109</sup> See *id.*

<sup>110</sup> See Kirk Makin, *The reliance on science as a cure for injustice*, THE GLOBE & MAIL, Nov. 22, 2004, at A1.

<sup>111</sup> See *id.* For example, Neil Gerlach, professor of sociology at Canada’s Carleton University argues in his book *THE GENETIC IMAGINARY: DNA IN THE CANADIAN CRIMINAL JUSTICE SYSTEM* (2004), that while science can increase public confidence in the criminal justice system, it has also convinced the general public that eyewitness testimony is faulty, informants will say anything and police officers and prosecutors are overzealous and can be untrustworthy.

*Id.*

<sup>112</sup> See Makin, *supra* note 110, at A1.

“hard science,” but in every wrongful conviction proven by science, there are other problems.<sup>113</sup>

#### CONCLUSION

Forensic evidence undoubtedly plays a critical role in our legal system and has an enormous impact on the outcome of cases. Other forms of evidence, such as lay witnesses or confessions can be unreliable, but the notion that science is both exact and indisputable, often compels judges and juries to afford forensic evidence an enormous amount of deference.

When juries receive their instructions and retreat to the deliberation room, each juror brings their own biases and life experiences with them, perhaps even ideas gathered from the latest episode of their favorite television show. Yet, there remains a great inconsistency about American views toward juries. Americans often praise the system, claiming that we have the fairest judicial system in the world, but on the other hand, do not like the way the jury system works and do not trust the decisions they reach.<sup>114</sup> It therefore rests on the lawyers to remind jurors that the burden of proof is beyond a *reasonable* doubt, not beyond a *scientific* doubt.

Perhaps the “CSI effect” is only a fad. When *Quincy, M.E.* first aired, lawyers were concerned that juries would demand fingerprints in every case.<sup>115</sup> That fear has passed. We are taught since grade school that science is the only sure thing, the only discipline that demands exact proof. It can be tested and re-tested, a way to confirm the truth in areas where we have no other indicator. Therefore, for a jury to decide guilt or innocence of a defendant on trial, it is no wonder that it is science they look to, not their own intuition, because a juror who is truly open minded wants to be properly convinced. It is a great responsibility to serve on a jury and have someone’s life in your collective hands. In a perfect world, no one dares to make a mistake. Because of

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<sup>113</sup> *Id.*

<sup>114</sup> See STEPHEN J. ADLER, *THE JURY: DISORDER IN THE COURTS* xiii (1994).

<sup>115</sup> See Goehner, *supra* note 37, at 69.



television series like *CSI* and *Law & Order*, jurors are no longer in the dark as to what kind of tests can be conducted at a crime scene. They demand more, and understandably so.

Perhaps the best and most overlooked result of shows like *CSI* is that they contribute to the public's understanding of the law. These shows reassure us that the "bad guys" can only run so far before they are caught, and the "good guys" are there to protect us. There is little reality in any of the television crime dramas discussed in this paper, but they portray the American criminal justice system in a light that most Americans are happy to accept; if nothing else they offer the hope that the system works. Few Americans have ever seen a "real" trial up close, and even fewer have witnessed a criminal investigation. However, almost all Americans have watched, from their living rooms, what they believe both should look like. Crime dramas not only provide us with a basic understanding of the criminal justice system, but provide us with a "dream world of justice."<sup>116</sup> Yet prosecutors and defense attorneys alike can only cringe at the thought that while "justice may be blind . . . [it] also manages to tune in to *CSI*."<sup>117</sup>

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<sup>116</sup> See Papke, *supra* note 104, at 932; see also Scott R. Simpson, Comment, *Report Card: Grading the Country's Response to Columbine*, 53 *BUFF. L. REV.* 415, 420 (2005) (discussing how television and the media "plays a significant role in how Americans perceive the world around them.").

<sup>117</sup> See Joline Gutierrez Kreuger, *Jurors quizzed on 'CSI effect'*, *ALBUQUERQUE TRIB.*, Feb. 7, 2005, at 2.