

**Ripped From The Headlines:**  
**Juror Perceptions in The “Law & Order” Era**

*Forthcoming Law & Psychology Review*

*Mr. McCoy, I'm not going to sanction a verdict that cannot possibly be sustained on appeal. This conviction isn't based on any proven facts. It's based on the jury's outrage at Mr. Webber's irresponsible and inexcusable conduct.... In the meantime, no matter how profound our grief, our indignation, I can't let you use this court to raise a lynch mob. I won't allow you to exploit the same base actions that Mr. Webber counts on to beef up his bottom line. It's not about being right, Mr. McCoy. It's about doing right.*

*- Judge Wright, Season 10, Episode 1 “Gunshow”*

**I. Introduction**

Jerry Bruckheimer’s *CSI: Crime Scene Investigation* has drawn significant attention from academics, lawyers, and the popular press concerned about the impact the television show’s portrayal of forensic science and crime scene investigation has on real-life jurors.<sup>1</sup> Many have claimed that the show’s highly dramatized, romanticized, and generally unrealistic portrayal of forensic science and the investigative process has significantly altered juror expectations and poses a challenge for lawyers trying criminal cases.<sup>2</sup> The nature of this portrayal’s impact and even the existence of the “CSI effect,” a term first coined in 2002, has been a hotbed of controversy.<sup>3</sup> The concept has been discussed in nearly 400 news articles and more than 100

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<sup>1</sup> Simon A. Cole, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1336 (2009).

<sup>2</sup> Simon A. Cole, *A Surfeit of Science: The “CSI Effect” and The Media Appropriation of The Public Understanding of Science*, PUBLIC UNDERST. SCI. 1, 3 (2013) (first published on April 11, 2013 as doi:10.1177/0963662513481294).

<sup>3</sup> For a detailed discussion of the “CSI Effect,” see Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and The Burden of Proof*, 41 NEW ENG. L. REV. 435, 447-454 (2007).

academic journal articles.<sup>4</sup> Anecdotal evidence abounds in the popular press about the extreme views jurors' have held as a result of the *CSI* franchise.<sup>5</sup> However, empirical studies have found little support for the proposition that this television series has any significant impact on juror's perceptions and case judgments.<sup>6</sup> With all of this attention, the impact of *Law & Order* on jurors' perceptions of the criminal justice system has been largely overlooked.

Only Kimberlianne Podlas' 2008 article and brief sections in Michael Asimow's book, "Lawyers in Your Living Room! Law on Television," focus on the impact of the *Law & Order* franchise on the public.<sup>7</sup> Another scholarly article examines the extent to which *Law & Order*'s portrayal in the 2000-2001 season reflects reality.<sup>8</sup> Yet, of the two police procedural franchises, *Law & Order* seems more likely to be perceived as a realistic portrayal of the system. While *CSI* presents a highly glamourized portrait of the investigative process with lab technicians who carry guns, drive \$50,000 government issue Hummer H2's, and work in labs that have more neon lights than a Los Angeles nightclub, *Law & Order* presents in an almost documentary-like fashion. The "ripped from the headlines" use of high-profile real-life events, the cinéma vérité style of filming, and the use, for many seasons, of scene identifiers at the bottom of the screen that provide specific information, such as date, location (e.g. name of restaurant or street names), and courtroom numbers contribute to the realism of the *Law & Order* franchise. If one were to accept the proposition that television impacts viewers' perceptions of the real-world institutions portrayed, *Law & Order* seems the stronger candidate for materially impacting jurors'

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<sup>4</sup> Cole, *supra* note 2, at 5.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> Cole, *supra* note 1. See also, Donald E. Shelton et al., *Studying Juror Expectations for Scientific Evidence: A New Model for Looking at The CSI Myth*, 47 COURT REV. 8 (2011) and Steven M. Smith et al., *Fact or Fiction? The Myth and Reality of The CSI Effect*, 47 COURT REV. 4 (2011).

<sup>7</sup> Kimberlianne Podlas, *Guilty on All Accounts: Law & Order's Impact on Public Perception of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1 (2008) and LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION 30-31 and 117-128 (Michael Asimow ed., 2009).

<sup>8</sup> Sarah Eschholz et al., *Images of Prime Time Justice: A Content Analysis of "NYPD Blue" and "Law & Order,"* 10 J. CRIM. JUST. & POP. CULT. 161 (2004).

perceptions. Additionally, *Law & Order* has had significantly longer to permeate the cultural consciousness.

The original *Law & Order* series debuted on September 13, 1990 and aired for 20 consecutive years, ending its run in mid-2010. The hugely popular series has led to a number of spinoffs (*Special Victims Unit* – “*SVU*”; *Criminal Intent*; *Los Angeles*; *Trial by Jury* and *UK*) and a TV movie (*Exiled*). While only *Law & Order: SVU* continues to air new episodes, television viewers can find an episode from the *Law & Order* franchise on television at almost any time of the day. A look at the “TV Guide” grid shows 14 episodes of the *Law & Order* franchise playing on August 3, 2013, with episodes playing consecutively from 12:30 A.M. until 11:00 P.M., on multiple channels.<sup>9</sup> Despite its popularity and longevity, very little attention has been paid to the potential impact of Dick Wolf’s *Law & Order* and its narrative on potential jurors.

Wolf’s “ripped from the headlines” storytelling frequently bases episodes on real events, contrary to the warning at the outset of every show.<sup>10</sup> The writers often add a twist to fit the desired portrait of justice.<sup>11</sup> In *Law & Order*, the “major case squad” investigates a wide variety of violent crime, *SVU* focuses on sex crimes and crimes involving children, and *Criminal Intent* and *Los Angeles* were a bit of a hodgepodge. Wolf’s franchise has crafted an idealized view of the justice system grounded in Packer’s Crime Control model of justice.<sup>12</sup> This streamlined model of justice, focused on speed, efficiency and order maintenance is unconcerned with the

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<sup>9</sup> TV GUIDE (last accessed Aug. 1, 2013), <http://tvguide.com/listings>.

<sup>10</sup> The disclaimer at the beginning of many episodes states, “The following story is fictional and does not depict any actual person or event.” However, anyone that has watched the show knows this is simply not true. In an interview, Wolf comments, “[his] Bible [for the show] is the front page of the *New York Post*.” Wolf “take[s] the headline, but the body copy is never the same.” <http://www.tntdrama.com/dramalounge/article/?oid=26513>

<sup>11</sup> For example, in 2004, convicted child killer Joel Steinberg was paroled from New York State prison. In a follow up to an episode that had aired at the time of Steinberg’s conviction 14 years earlier, *Law & Order* aired an episode entitled “Fixed.” Wolf’s twist to the story was that a motorist struck Jacob Lowenstein (the Steinberg character) with a car and left him to die.

<sup>12</sup> Podlas, *supra* note 7, at 4. For viewers who have followed the franchise from its inception, the narrative has changed over time, becoming more crime control oriented in later decades. As Elayne Rapping notes, even *Law & Order* too more liberal positions in its earliest seasons than it did later. ELAYNE RAPPING, LAW AND JUSTICE AS SEEN ON TV, 24 (2003).

rights of the suspect/accused.<sup>13</sup> The narrative is carefully crafted to brush aside rights abuses, portray these abuses as an integral, routine part of the justice process, and ultimately demonstrate that these actions are justified.<sup>14</sup> Viewers are drawn to sympathize with the police and prosecutors who protect us, regardless of their misconduct and foibles, and loathe those that “get in the way” of justice. Wolf and his writers carefully construct this narrative through both micro and macro-level storytelling devices, ranging from the character arcs and casting choices of the particular characters to the overall plot of each episode and.

Given the relatively infrequent contact most Americans have with the criminal justice system, studies indicate that much of the information the public receives about how the system operates comes from television – frequently fictional programs.<sup>15</sup> The prosecutorial/police bias found in *Law & Order*, and many of today’s police procedurals and legal dramas (particularly those that manage to last several seasons on the air), and the inaccurate portrayal of a smooth, quick, and nearly flawless system *may* shape juror’s perceptions and core principles of the justice system.<sup>16</sup> This paper analyzes *Law & Order*’s narrative (as the archetypal police procedural), discusses the various techniques the franchise employs to construct that narrative, considers the potential impact of this narrative on peoples’/jurors’ perceptions of the justice system and makes suggestions for future research.

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<sup>13</sup> HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

<sup>14</sup> Podlas, *supra* note 7.

<sup>15</sup> Conny L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3J. CRIM. JUST. & POP. CULT. 1 (1995).

<sup>16</sup> A number of studies have shown that television shows, including fictional portrayals of the legal system have significant impact on the public’s perceptions of the justice system and its component parts. For example, Salzman and Dunwoody studied the impact of popular culture representations of lawyers impacted first-year law students’ perceptions of the legal profession. Victoria S. Salzman & Philip T. Dunwoody, *Prime-Time Lies: Do Portrayals of Lawyers Influence How People Think About the Legal Profession?* 58 SMU L. REV. 411 (2005). Over the course of his career, George Gerbner explored the impact of television on viewers’ perceptions of various aspects of the legal system. Gerner and his team of research assistants administered a large sample survey and discovered that heavy television viewers (those watching more than four hours a day) were significantly influenced in their perceptions. He found, contrary to prior research, that heavy television viewers developed a fear of crime victimization that he dubbed “mean world syndrome.” Harry F. Waters, *Life According to TV*, 6 NEWSWEEK 136 (1982).

## II. The “*Law & Order*” Narrative

With few exceptions, each episode in the *Law & Order* franchise follows a single case, or a series of related crimes, *e.g.*, serial rape or murder, from start to finish.<sup>17</sup> Each episode is divided into two parts, the first focusing on the police and their support staff as they investigate the crimes and the second focusing on the District Attorney and their efforts to resolve the case either by plea or trial. Episodes typically open with a crime in progress or the discovery of a crime that has recently been committed. Over the course of the episode viewers go on the ultimate “ride-along.” We follow the detectives and their support staff of medical examiners and forensic technicians from the crime scene through the city as they collect and process evidence, interview witnesses and arrest and interrogate suspects. Once the “bad guy” has been detained, the episodes bring in “the District Attorneys who prosecute [these crimes].”<sup>18</sup> We follow the detectives and lawyers, both prosecution and defense, in a variety of legal proceedings, from plea negotiations to suppression hearings and trials. Episodes frequently provide viewers with a feeling of closure, either through a plot device or twist or with some form of legal determination of guilt. As in reality, finality in a case can come in a variety of forms. First, the *Law and Order* D.A.’s frequently attempt to leverage the evidence against a suspect the potential for a more lenient punishment to plea-bargain the case before trial. However, in contrast to reality, in which approximately 95% of cases end in a plea, in *Law and Order* a plea bargain is reached in only a hair under 35% of the cases.<sup>19</sup> Approximately 47% of the cases goes to verdict.<sup>20</sup> Consistent

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<sup>17</sup> Podlas, *supra* note 7, at 23-4.

<sup>18</sup> In the opening sequence of the original *Law & Order* franchise, the narrator voices over, “In the criminal justice system the people are represented by two separate and equally important groups - the police who investigate the crime and the district attorneys who prosecute it. These are their stories.”

<sup>19</sup> According to a database of the cases depicted in the *Law & Order* series, 153 cases resulted in a plea bargain. This number reflects cases, rather than episodes because on several occasions a case lasts more than one episode. <http://www.overthinkingit.com/2012/11/13/the-law-and-order-database-all-20-seasons/>.

<sup>20</sup> *Id.*

with the crime control narrative of justice portrayed in the series, trials most often yield a guilty verdict.<sup>21</sup>

According to this franchise, expedience and efficiency are the keys to keeping “the people” safe. Detectives routinely harass and physically abuse suspects and skirt the bounds of constitutionality in their applications for warrants, their interrogations and their investigative practices. The truth is portrayed as a malleable concept, with police and prosecutors presenting facts in only the light most beneficial for their case.<sup>22</sup> District Attorneys push the limits of legality - sometimes even crossing them - suppressing evidence, lying to judges and bending the truth if it makes “putting the bad guy away” easier. However, these practices are made to seem justified and necessary. In contrast to lawyer shows and police procedurals of prior generations, *e.g.*, Perry Mason, *Law & Order* does not present us with the “humble, country lawyer” representing an innocent, wrongfully accused client.<sup>23</sup> These defendants are violent, obviously guilty offenders that no upstanding citizen would feel bad for. Anyone that represents due process, particularly defense attorneys, and the occasional by-the-book District Attorney, *e.g.* Sonya Paxton, is portrayed as a “shyster” and an impediment to justice. These rights-minded individuals are to be loathed and mocked because respecting rights doesn’t bring justice.<sup>24</sup> The desire to foster the pro-police/prosecution sentiment is at times so strong that characters will engage in dialogue openly justifying questionable policing tactics and mocking those that stand

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<sup>21</sup> In the original franchise, across the 20 seasons, five times more cases that go to verdict result in a guilty verdict than a not guilty verdict. *Id.*

<sup>22</sup> In the investigative phase of a criminal case, the “truth” is somewhat malleable. The Supreme Court has upheld the right of police to lie to suspects during the course of interrogation. *Frazier v. Cupp*, 394 U.S. 731 (1969). However, the lies in this series extend beyond the interrogation room and are directed at parties other than the suspect, including judges in warrant applications.

<sup>23</sup> Rapping, *supra* note 12, at 37.

<sup>24</sup> The defense lawyers in *Law & Order* represent Packer’s due process model of justice. This model, in contrast to the crime control model, is rooted in respecting the rights of the accused and ensuring a fair process. Justice is about the process, rather than the outcome. As discussed later in this article, this principle is routinely mocked by the police and prosecutors in the *Law & Order* franchise.

by the law's protections.<sup>25</sup> The police and prosecutors that enforce and uphold the law are “the people's” knights in shining armor. They preserve order and protect us from a world filled with rapists, murders and an assortment of other violent, “evil” criminals.

The series portrays a world with inordinately high clearance rates.<sup>26</sup> In the *Law & Order* franchise, the hard working detectives *always* get the “bad guy,” and there is seldom an ultimate error, *e.g.*, wrongful conviction.<sup>27</sup> Through Wolf's careful storytelling, the police and prosecutors are embedded in our consciousness as heroes, even when the tactics they use are legally or constitutionally questionable at best. Viewers come to see “two separate but equally important” entities as the thin [blue] line between chaos and order, and whatever they do, even when it shatters the line separating the legal from the illegal, is “good,” and necessary to keep us safe. The narrative/themes were succinctly captured in a USA Network advertisement for a SVU episode marathon in 2007 – “If you like coffee, donuts and a *little flexibility with constitutional rights*, then we've got a marathon for you.” The line was voiced over a series of clips showing detectives abusing suspects. The following sections will explore in detail how Wolf crafts his

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<sup>25</sup> See *infra*, Sec. III, Part C.

<sup>26</sup> The clearance rate, as the FBI defines it for the purposes of Uniform Crime Reporting, means one of two things. First a crime can be cleared by arrest. When an offense is cleared by arrest, at least one person must be arrested, charged with the commission of the offense and the case turned over for prosecution. Second a crime can be cleared by “exceptional means.” In these cases, “elements beyond law enforcement's control prevent the agency from arresting and formally charging the offender.” To clear a case *exceptionally*, the law enforcement agency must have identified the offender, gathered enough evidence to support arrest and prosecution, identified the offenders location, and encountered a circumstance outside the control of law enforcement that prohibits the agency from arresting, charging and prosecuting the offender. A crime may be counted in the clearance rate for a year other than the one in which it was committed. <http://www2.fbi.gov/ucr/cius2009/offenses/clearances/> The actual homicide clearance rate in New York City (cases for which an arrest was made) has hovered between 59-75% between 2008 and 2012. Excluding cold cases, the NYPD cleared approximately 57% of homicides in 2012. The rape clearance rate ranged between 40-75%. This is a significant departure from the near 100% clearance rate one might assume from watching seasons of *Law & Order*. See <http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/newyork.pdf> Reuven Blau & Brad Hamilton, *This Job is Murder*, N.Y. POST, April 25, 2010, [http://www.nypost.com/p/news/local/this\\_job\\_is\\_murder\\_Io0fUMUyvKjq8r9zSH1a6L](http://www.nypost.com/p/news/local/this_job_is_murder_Io0fUMUyvKjq8r9zSH1a6L) and Sean Gardiner, *Data Will Show Crime-Solving Rates*, THE WALL STREET JOURNAL, Feb. 14, 2013, <http://online.wsj.com/article/SB10001424127887323478004578304271801515226.html>.

<sup>27</sup> *Law & Order: Trophy* (NBC television broadcast, Jan. 31, 1996), *Law & Order SVU: Poison* (NBC television broadcast May 11, 2004), *Law & Order SVU: Justice Denied* (NBC television broadcast), *Law & Order SVU: Unstable* (NBC television broadcast Sept. 23, 2009).

narrative and shapes our views using a variety of techniques, including basic psychological principles, character backstories, the casting of characters, dialogue and specific plot events.

### III. Building Viewers' Preferences

#### A. Laying the Foundation

While the *Law and Order* franchise are “procedurals” focused on the cases that comprise the episodes, rather than the individual characters in the episodes, the individual characters and their various backstories play an important role in crafting the narrative.<sup>28</sup> The franchise employs a variety of psychological principles and relies on human emotion to induce viewers to side with those characters the Crime Control model says are “the good guys.” Wolf’s series begins building viewers preference for the prosecutors and police at a fairly basic/fundamental level through the “mere exposure effect.” This psychological principle holds that people tend to develop a preference for things simply because they are familiar with them. Thus, seeing a particular group of characters/actors more frequently than another group will naturally lead viewers to prefer those characters with whom they are more familiar.

In the roles of police and prosecutors viewers are exposed to fewer and more frequently appearing characters/actors than they are in the role of defense lawyer. In *Law and Order*, viewers are exposed to 13 different detectives over the course of the series 20 years and 456 episodes. Captain Anita Van Buren (S. Epatha Merkerson) appears in 391 episodes, the most appearances by a single character in the series.<sup>29</sup> Second to Van Buren among police, Detective

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<sup>28</sup> While Wolf and his writers suggest that the focus of the procedural is not the characters and their backstories, and contend viewers are not provided with much backstory, over the course of the hundreds of episodes both long-time watchers and the more casual viewers can glean significant information about central characters’ pasts, lives outside of work, and personal opinions about issues relevant to crafting the narrative. Amy Chozick, *Dick Wolf’s Drama: This is His Story*, N.Y. TIMES, OCT. 5, 2012, <http://www.nytimes.com/2012/10/07/arts/television/chicago-fire-and-the-changing-dick-wolf.html?pagewanted=all>.

<sup>29</sup> Full Cast and Crew for Law & Order, INTERNET MOVIE DATABASE, [http://www.imdb.com/title/tt0098844/fullcredits?ref=tt\\_cl\\_sm#cast](http://www.imdb.com/title/tt0098844/fullcredits?ref=tt_cl_sm#cast) (last visited Aug. 1, 2013).

Lenny Briscoe (Jerry Orbach) appeared in 274 episodes.<sup>30</sup> The two “cowboy cops,” who particularly embody the narrative of doing anything necessary to close a case, Detectives Mike Logan (Chris Noth) and Ed Green (Jesse L. Martin) appeared in 111 episodes and 198 episodes, respectively.<sup>31</sup> The prosecutors also appear frequently. Seven individuals play Assistant District Attorneys, with the most frequently appearing A.D.A. making 85 appearances.<sup>32</sup> Jack McCoy (Sam Waterston) appears in 368 episodes, with only two other individuals playing the Executive A.D.A. (EADA).<sup>33</sup> Over the course of our encounters, the viewer becomes familiar with these individuals. In contrast to the police and prosecutors, 38 different individuals played defense attorneys in the original *Law and Order*. No single actor appeared in more than 13 episodes (Tovah Feldshuh as Danielle Melnick was the most frequently appearing).<sup>34</sup> Additionally, these appearances are often spread out across the shows entire run, unlike even the less frequently appearing police and prosecutors who mostly appear in consecutive episodes.

A similar phenomenon exists in *SVU*. Captain Donald Cragen (Dann Florek) and Detective Olivia Benson (Mariska Hargatay) appear in nearly all of the 319 episodes, including when Cragen was placed on administrative leave following being framed for a crime.<sup>35</sup> In *SVU*, 11 different individuals play A.D.A.s; however, two actresses have played the role in the majority of the episodes. Casey Novak (Diane Neal) appears in 113 episodes and ADA Alex Cabot (Stephanie March) appears in 96 episodes.<sup>36</sup> In contrast, 39 defense attorneys appear in *SVU*. Trevor Lanagan (Peter Hermann) is the most frequently encountered defense attorney,

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Full Cast and Crew for *Law & Order: Special Victims Unit*, INTERNET MOVIE DATABASE, [http://www.imdb.com/title/tt0203259/fullcredits?ref=tt\\_cl\\_sm#cast](http://www.imdb.com/title/tt0203259/fullcredits?ref=tt_cl_sm#cast) (last accessed Aug. 1, 2013).

<sup>36</sup> *Id.*

appearing in 27 episodes over an eight-year period (2002-2010).<sup>37</sup> In addition to frequent exposure to “the good guys,” Dick Wolf is keenly aware that “sex sells.” In addition being a well-known advertising maxim, the “beauty is goodness” trope and the bias in decision-making that physical attractiveness causes have been widely explored by psychologists.<sup>38</sup>

The phenomenon that “what is beautiful is good” was first studied in 1972.<sup>39</sup> Dion, Berscheid and Walster investigated the tendency to attribute more favorable characteristics to attractive target individuals.<sup>40</sup> The results indicated that in the absence of any other information about an individual, participants attributed more favorable personality traits and more successful life outcomes to individuals rated as more physically attractive.<sup>41</sup> Since their study, subsequent research has established “what is beautiful is good” as a strong and generally accepted phenomenon within social psychology.<sup>42</sup> The role of this phenomenon in individuals’ perceptions has been studied in a variety of settings, including perceptions of political candidates, likelihood of future success in the workplace, and juror decisions in mock trials.<sup>43</sup> The phenomenon has also been investigated in the portrayal of characters in film. Smith, McIntosh and Bazzinni studied the “beauty is goodness” stereotype in a sample of popular films

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<sup>37</sup> *Id.*

<sup>38</sup> See e.g., Ronald Mazella & Alan Feingold, The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis, 24 *J. APPLIED SOC. PSYCH.* 1315 (1994) [meta-analysis of 80 mock jury studies dating back to the early 70’s, 25 of which focused on the impact of defendant or victim appearance, finding that jurors were less likely to find physically attractive defendants guilty than those who were physically unattractive]. The phenomenon is found outside of the legal realm, including in employment outcomes. See e.g., Megumi Hosoda et al, The Effects of Physical Attractiveness on Job-Related Outcomes: A Meta-Analysis of Experimental Studies, 56 *PERSONNEL PSYCH.* 431 (2003) [meta-analysis of experimental studies on the biasing effect of attractiveness on job related outcomes, finding attractive people fared better than unattractive people on a number of outcomes].

<sup>39</sup> Kenneth Dion et al., *What is Beautiful is Good*, 24 *J. PERSONAL. SOC. PSYCH.* 285 (1972).

<sup>40</sup> *Id.*

<sup>41</sup> Melissa K. Surawski & Elizabeth P. Ossoff, The Effects of Physical and Vocal Attractiveness on Impression Formation of Politicians, 25 *CURRENT PSYCH.* 15 (2006).

<sup>42</sup> *Id.*

<sup>43</sup> See *supra* notes 38-42.

spanning five decades.<sup>44</sup> Their study found that attractive characters were portrayed more favorably than unattractive characters on multiple dimensions.<sup>45</sup> Wolf continues this tradition with well-dressed detectives and model-esque Assistant District Attorneys.<sup>46</sup> Half of the Assistant District Attorney's (including the few who appeared only once or twice) across *Law & Order*, *SVU*, and *LA* were attractive females 30 years old or younger when they began their *Law & Order* careers.<sup>47</sup> Several of the male characters, particularly in more recent seasons, are dressed in wardrobes that look like they belong more in Hollywood than an NYPD squad room. Their suits are slimly tailored, and often far more expensive than you would find your average NYPD detective or Manhattan ADA wearing.<sup>48</sup> These glamorous characters are juxtaposed with older, more demure, mostly male, defense attorneys.<sup>49</sup>

In addition to relying on basic psychological principles, Wolf carefully develops the character backstories of the police and prosecutors. Throughout our exposure the writers weave details into the episodes that make the police and prosecutors more relatable and sympathetic, particularly in comparison to their defense counterparts. It's not only the amount of information provided about the police and prosecutors that is important, however. The nature of that information also play a significant role in Wolf's portrait of justice - their portrayal as "family-oriented," sometimes religiously devout, and often patriotic (extending beyond their service as

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<sup>44</sup> Stephen M. Smith et al., Are the Beautiful Good in Hollywood? An Investigation of Beauty-and-Goodness Stereotype on Film, 21 BASIC AND APPLIED SOC. PSYCH 69 (1999).

<sup>45</sup> *Id.*

<sup>46</sup> The female ADAs that accompany Ben Stone, Jack McCoy, and the various other Executive ADAs have been everything from "Bond Girls" to beauty pageant participants to professional models. Carey Lowell was a "Bond Girl," Alana de la Garza was "Miss Photogenic" in the Miss El Paso Teen USA, and Angie Harmon, Diane Neal, Melissa Sagemiller and Sharon Stone were professional models.

<sup>47</sup> Ages at the time role began: Jill Hennessy, 25; Angie Harmon, 26; Elisabeth Röhm, 28; Stephanie March, 26; Diane Neal, 27; Michaela McManus, 25; Annie Parisse, 30; Alana de la Garza, 30; and Bridget Regan, 24.

<sup>48</sup> Danni Pino, who plays Detective Nick Amaro, regularly wears well-tailored shirts and suits with a Dior Chiffre Rouge watch that retails for more than \$4,000. His outfits often look more like what a well-paid actor would wear than a Detective Second Grade in the NYPD. ADA Rafael Barba is regularly seen wearing well-tailored, three-piece suits and suspenders, as is EADA Michael Cutter.

<sup>49</sup> In total, 48 of the defense attorneys were male.

police officers). The following section will look at exemplars of the various characters, their roles in crafting the overall narrative, and the way that *Law & Order* writers craft the characters' backgrounds to contribute to the narrative.

## *B. Building Characters*

### 1. Detective Elliot Stabler

There is perhaps no single character that embodies the themes of the *Law & Order* franchise better than *SVU* Detective Elliot Stabler. The aggressive, righteously indignant detective will do just about anything to get the bad guys off the streets. Stabler has a penchant for violence and intimidation, using threats and physical force when it obviously violates a suspect's rights, all in the name of saving the world from "scum." Despite his personal foibles and his love of "enhanced" investigative tactics, viewers like him. Christopher Meloni's portrayal of Stabler was so effective at drawing viewers he became one of the highest paid television actors, along with co-star Mariska Hargitay and his departure from the show drew so much press and disappointment from viewers that facebook pages were created calling for boycotts of the show in the hopes of bringing him back.<sup>50</sup>

Detective Stabler frequently manifests an "in your face" attitude. His in your face interrogation and investigative style is seen in a number of episodes. In Season 6, Episode 17, "Rage," Stabler interrogates an individual suspected of murdering a teenage girl.<sup>51</sup> With only 24 hours to hold the suspect and little convincing evidence to charge him, the interrogation becomes heated. The psychopathic Gordon Rickett (Matthew Modine) attempts to play mind games with Stabler. Fed up with Rickett's games, desperate to solve the case and put away another bad guy, and struggling with his own personal issues, Stabler's rage comes to a head. He comes within

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<sup>50</sup> Viewership and ratings remain strong in his absence, showing that while Meloni, as an actor, and Stabler, as a character, drew viewers, the narrative, themes, and storylines are a significant draw for viewers.

<sup>51</sup> *Law & Order SVU: Rage* (NBC television broadcast Mar. 1, 2005).

inches of the seated suspect's face and yells at Rickett, "I should put you in pigtails, you little bitch. Come on you little bitch, I want you to cry for me."<sup>52</sup> Eventually, Stabler spits on the suspect's face and his Captain enters the interrogation room to pull him out. Yet, intimidation and spitting are some of the more mild manifestations of Stabler's volatile behavior. In Season 8, Episode 20, Stabler is investigating a complicated case involving the death of a man's family.<sup>53</sup> As the investigation unfolds and the evidence the detectives uncover doesn't "add up," Stabler begins to suspect that the surviving member of the family is actually the perpetrator. Unable to get what he believed to be truthful information out of the suspect, Stabler barricades himself in the interrogation room and puts the suspect in a choke hold until the suspect begs for his life. In *Law & Order* style, Stabler's illegal and violent style is vindicated when the suspect admits he killed his wife and kids. Even this behavior, scarily, does not top the list of Stabler's most violent acts. In Season 10, Episode 2, Stabler and the SVU detectives are investigating whether a teen who turns himself into the squadroom has actually committed any crimes.<sup>54</sup> The teen admits to having pedophilic urges, and knowing these feelings are wrong wants to protect society from himself. When the detectives find out the teen has visited a "self-help" website created by an individual with pictures of young children to "help" potential pedophiles resist their urges, the detectives decide to investigate the sites creator. Eventually, the website's creator posts a picture of Stabler's daughter on the website. Stabler visits the man's home and attacks him before the other SVU detectives arrive. In other episodes, Stabler variously cuts off a suspect's oxygen,<sup>55</sup> spits on a suspect in interrogation,<sup>56</sup> throws a suspect against the window and punches him,<sup>57</sup>

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

<sup>53</sup> *Law & Order SVU: Annihilated* (NBC television broadcast May 8, 2007).

<sup>54</sup> *Law & Order SVU: Confession* (NBC television broadcast Sept. 30, 2008).

<sup>55</sup> *Law & Order SVU: Liberties* (NBC television broadcast May 19, 2009).

<sup>56</sup> *Law & Order SVU: Rage*, *supra* note 51.

<sup>57</sup> *Law & Order SVU: Angles* (NBC television broadcast Nov. 1, 2002).

roughs up a suspect with a broken arm,<sup>58</sup> and crushes a suspect's throat with the back of a chair.<sup>59</sup> Stabler's rage is sufficiently legendary that it is the subject of a YouTube highlight reel.<sup>60</sup> Despite his seemingly out of control rage, viewers like Detective Stabler, and as such we ignore his significant transgressions and enjoy watching him.<sup>61</sup>

While Stabler routinely violates some of the most fundamental rights of this country's criminal justice system, it would be difficult for anyone to call him unpatriotic. Viewers are frequently reminded of Stabler's dedicated service to protect the country that extends well beyond his work as an NYPD detective. Stabler is a marine and a Desert Storm veteran – a fact we are often reminded of both in dialogue and by the Eagle, Globe and Anchor tattoo prominently displayed on his forearm.<sup>62</sup> He's also a devout family man. A father of five children, Stabler has been married to his wife since he was a teenager.<sup>63</sup> Stabler frequently mentions his children in episodes, and they often appear in the squad room to see him. Once again we are reminded he is a protector. Just as he protected the U.S., Stabler is fiercely protective of his family, sometimes to the point of breaking the law for them. In Season 6, Episode 21, Stabler's daughter Kathleen is arrested for DUI.<sup>64</sup> Ultimately, Stabler is called to the station to pick her up and he uses his power as an NYPD detective to make the charges disappear. Even as a protector, Stabler ultimately realizes that sometimes doing the best for his family means not protecting them. Eventually, Stabler burns his daughter's license and makes her turn herself in, realizing

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<sup>58</sup> *Law & Order SVU: Choreographed* (NBC television broadcast Nov. 28, 2006).

<sup>59</sup> *Law & Order SVU: Disappearing Acts* (NBC television broadcast Oct. 25, 2002).

<sup>60</sup> Unstabler: 12 Seasons of Elliot Stabler Being a Dick, YOUTUBE (Feb. 7, 2001), <http://www.youtube.com/watch?v=Uq-Ank1HG1Q>.

<sup>61</sup> Stabler built a sufficiently large following that his exit from the series brought about Facebook fan pages begging to bring back Stabler. The comments sections on webpages talking about his departure are littered with comments about viewers who called for Meloni to return to the series.

<sup>62</sup> Stabler is said to be a Desert Storm veteran, who specialized in hand-to-hand combat. *Law & Order SVU: Annihilated*, *supra* note 53.

<sup>63</sup> *Law & Order SVU: Gray* (NBC television broadcast Nov. 17, 2010).

<sup>64</sup> *Law & Order SVU: Blood* (NBC television broadcast May 10, 2005).

that he would be a bad father if he let her get away with bad behavior unscathed.<sup>65</sup> The final key component to making Stabler likeable and respectable, despite his serious aggression, is his religious devotion. Detective Stabler is portrayed as a devout Catholic.

Like his past as a Marine, we are reminded of his religiosity both in dialogue and visually. Stabler has a large crucifix tattoo on his bicep (actor Chris Meloni's own tattoo). In one episode, Stabler is interrogating a Reverend, and notes that he went to 12 years of Catholic school and is quite familiar with what scripture says.<sup>66</sup> These beliefs sometimes make it hard and disappointing to deal with the cases he deals with. But, his religious beliefs have also proven useful in investigating cases. In Season 10, Episode 17, Stabler agrees to pray with a suspect who is also Catholic, in the hopes of eliciting a confession from the suspect, with whom Elliot began to sympathize because of the suspect's past as a child soldier in Uganda.<sup>67</sup>

Yet, Stabler is never portrayed as *perfect*. He is believable and likeable because, ultimately, he is human, fallible and "like us" in many ways. Stabler's family is important, but his personal life is not perfect. His job often gets in the way, causing serious struggles between his wife and him. Stabler's long hours and close partnership with Detective Olivia Benson often made his wife worry that he preferred spending time with Olivia to being at home.<sup>68</sup> His habit of making cases personal and internalizing the pain the gruesomeness that comes with working in the "sex crimes" unit also creates tension in his home-life.<sup>69</sup> Stabler bottles his feelings and doesn't share his job stresses at home in the hopes of not dragging his family into the dark

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<sup>65</sup> *Law & Order SVU: Responsible* (NBC television broadcast Apr. 3, 2007). Two years after her DUI, Stabler decides to take away Kathleen's license and burn it.

<sup>66</sup> *Law & Order SVU: Abomination* (NBC television broadcast Nov. 11, 2003). Stabler is interrogating a reverend suspected of murdering a gay man, who was protesting at the victim's funeral. When the suspect quotes Leviticus about a man lying with another man, Stabler sarcastically remarks to the suspect that the Bible also says that he can sell his daughters into slavery and be put to death for working on a Sunday.

<sup>67</sup> *Law & Order SVU: Hell* (NBC television broadcast Mar. 31, 2009).

<sup>68</sup> *Law & Order SVU: Burn* (NBC television broadcast Jan. 9, 2007).

<sup>69</sup> *Law & Order SVU: Monogamy* (NBC television broadcast Jan. 4, 2002).

realities he often has to face with the crimes his unit investigates, but as the series shows this attitude makes his personal life difficult and at times isolates him from his family.<sup>70</sup> Besides being likeable, we, as viewers, understand and often accept his aggressive and violent behavior because it stems from the best intentions and as the series portrays – it is effective. Detective Stabler is a white knight using whatever means necessary to get the bad guys off the street and his 97% case closure rate is portrayed as justifying the tactics.<sup>71</sup> Stabler is just one example of an archetype in the *Law & Order* franchise. Detective Nick Amaro (Danny Pino), Stabler's replacement after actor Christopher Meloni decided to leave the show, is in many respects a carbon copy of Detective Stabler. Amaro's aggressive style, family focus and troubles, religiosity, and effectiveness should feel familiar to viewers. *SVU*, is not the only series in the franchise with the archetypal "cowboy cop." In the original *Law & Order* series, several characters have played this role. Detective Mike Logan (Chris Noth), the original "volatile detective," has a sympathetic, but rough upbringing. We learn about his troubled home life as a child, with an abusive and alcoholic mother,<sup>72</sup> and his troubled relationship with the Catholic Church, as a result of being molested by a parish priest as a young child.<sup>73</sup> Like Stabler, Logan is a loose cannon, with a volatile temper that eventually leads to his transfer out of the major case squad, but he is effective.<sup>74</sup> Detectives Ed Green (Jesse L. Martin) and Joe Fontana (Dennis Farina), who appeared on the original series following Logan's departure, continued the tradition of the cowboy cop in the franchise. The similarities between these detectives across the various

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<sup>70</sup> *Id.*

<sup>71</sup> *Law & Order SVU: Haystack* (NBC television broadcast Feb. 20, 2007).

<sup>72</sup> *Law & Order: Indifference* (NBC television broadcast Nov. 27, 1990).

<sup>73</sup> *Law & Order: Bad Faith* (NBC television broadcast Apr. 26, 1995) and *Law & Order: Breeder* (Jan. 19, 1994).

<sup>74</sup> *Law & Order: Pride* (NBC television broadcast May 24, 1995). This is Logan's last appearance in the original *Law & Order* series. Noth was fired and his character is written out as having been transferred to Staten Island after punching a homophobic politician.

series illustrate that a rose by any other name would smell as sweet.<sup>75</sup> In contrast to Stabler and the other “results-oriented” characters, due process oriented characters are often portrayed in a negative light and viewers are left largely unfamiliar with details that would make them likeable or human.

## 2. Executive Assistant District Attorney Sonya Paxton

A by-the-book District Attorney, Paxton (Christine Lahti) provides a stark contrast to the law enforcement characters in the franchise and the other ADAs. Even on the surface, Paxton is markedly different from the other police and prosecutors. First, Christine Lahti is much older than the other female ADAs in the franchise.<sup>76</sup> With the exception of Sharon Stone, ADA Joe Marlowe, Lahti’s character marks a significant departure from the young model-esque ADAs viewers have become accustomed to. Like her law enforcement colleagues, EADA Paxton is interested in keeping the streets of New York safe. However, she represents a due process oriented model of justice. Viewers learn that EADA Paxton was assigned to prosecute SVU’s cases by District Attorney Jack McCoy because of the high rate of overturned verdicts among SVU cases (presumably due to the questionable tactics the SVU detectives and prior ADA’s used to build cases and secure convictions).<sup>77</sup> Her job is to make sure that the results are unassailable.<sup>78</sup> As dictated by the narrative, her role as a due process character means she’s to feel unfamiliar, be disliked, and have a short-lived stint on the show.

Paxton starts off on rocky ground with the detectives. In her first episode, Paxton interrupts an interrogation saying – “93 seconds – the suspect asked for his lawyer and you kept

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<sup>75</sup> WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

<sup>76</sup> In 2009, at the time of her first appearance in the *SVU* series, Lahti was 59 - nearly two decades older than the majority of the other actresses who played prosecutors in the franchise.

<sup>77</sup> *Law & Order SVU: Unstable*, *supra* note 27.

<sup>78</sup> *Id.*

questioning him for 93 seconds. That’s a violation of his right to counsel.”<sup>79</sup> Stabler is angered by her actions, assuming she’s the suspect’s defense lawyer.<sup>80</sup> She and Stabler butt heads as she tells the detectives how to run their investigation. Paxton tells the detectives to “[s]top playing fast and loose with defendant’s rights.”<sup>81</sup> Paxton is shown to be keenly aware of the social science relevant to the task of building solid cases. As the episode progresses she continues to question the Special Victims Unit’s investigative tactics, including their use of a non-sequential photo array, noting that 75% of wrongful convictions stem from witness misidentification.<sup>82</sup> Yet, she experiences significant pushback from the detectives who believe they know the best way to get the job done.

We know very little about the character, and what we do know about her is almost entirely about her professional career. Viewers are told that she was the first to secure a capital conviction after the death penalty was reinstated in New York in 1995.<sup>83</sup> We know she was a homicide prosecutor in the 1980s and we’re led to believe that generally she’s had a very successful career.<sup>84</sup> Besides being unable to relate to the character through any personal information, the writers actively endeavored to make EADA Paxton an unlikeable character.

Paxton is an alcoholic who suffers a spectacular downfall when she shows up to court to try a case drunk.<sup>85</sup> Behaving peculiarly and arriving late for court, Paxton claims to have been in

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<sup>79</sup> *Id.*

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

<sup>81</sup> When Paxton tells Stabler that he continued to question the suspect for 93 seconds after asking for his lawyer, Stabler responds, “We’ll leave you to your client, counselor.” Stabler assumes Paxton is a defense lawyer because of her attitude about violating the suspect’s Sixth Amendment right to counsel. Further bewildered when Paxton states that she may be wearing couture but that she doesn’t represent scumbags, Stabler says, “So who exactly do you represent?” *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Law & Order SVU: Hammered* (NBC television broadcast Oct. 14, 2009).

a car accident.<sup>86</sup> Visibly shaken, the judge asks if she is feeling ok.<sup>87</sup> The defendant, who also happens to be an alcoholic, says that Paxton's story about being in a wreck is a lie and that she can see that Paxton is intoxicated.<sup>88</sup> The judge orders Detective Benson to administer a Breathalyzer to EADA Paxton, who fails, leading to a mistrial.<sup>89</sup> After this spectacle, Paxton is sent off to rehab. Despite her egregious misconduct she eventually returns from rehab and maintains her by-the-book ways. In Season , Episode , the SVU squad is investigating a rape case at the university Stabler's daughter attends.<sup>90</sup> Purportedly there is useful information in the suspect's school disciplinary file; however, the university is unwilling to cooperate with the police investigation and release the student's file. Stabler's daughter steals the file, on her own, not at her father's prompting, which would make the evidence inadmissible as "fruit of the poisonous tree."<sup>91</sup> However, Paxton and Stabler get into an argument when he brings the file to her office, because she is unconvinced that he didn't direct his daughter to steal the file. Ultimately, EADA Paxton's character-arc only last a total of seven episodes over two seasons before she is killed. The writers succeeded in their effort to leave viewers unable to relate, and despising the character. In an interview with *Hollywood Outbreak*, Christine Lahti stated that when the episodes featuring EADA Paxton aired, people approached her and told her they hated her character so much.<sup>92</sup>

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

<sup>87</sup> *Id.*

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

<sup>89</sup> *Id.*

<sup>90</sup> *Law & Order SVU: Gray*, *supra* note 63.

<sup>91</sup> *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 614 (1989). See also, *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) ("The test [is whether the citizen] must be regarded as having acted as an instrument or agent of the state."). The Supreme Court in *Skinner* held that "Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities." 489 U.S. at 614.

<sup>92</sup> *Christine Lahti Returns to "Law & Order: SVU" Still Itching for a Fight*, HOLLYWOOD OUTBREAK (Nov. 17, 2010), <http://www.hollywoodoutbreak.com/2010/11/17/christine-lahti-returns-to-law-order-svu-still-itching-for-a-fight/>.

### 3. Defense Attorney Randolph J. “Randy” Dworkin

Defense attorneys in the *Law & Order* franchise come in a variety of forms ranging from the issue-driven, professorial type like Barry Moredock (John Cullum) and Bayard Ellis (Andre Braugher) to the showman like Randy Dworkin (Peter Jacobsen). While the defense lawyer’s physical appearance varies, and Dworkin is more disheveled and less “shark” looking, he is an exemplar of how *Law & Order* is able to craft its view of justice through characters. The defense lawyer is the ultimate schemer in the franchise’s narrative.<sup>93</sup> Their job is to manipulate and game the system, twist the facts, and help factually guilty people walk free.<sup>94</sup> We encounter Dworkin just three times, but he does exactly these things.<sup>95</sup> His most exemplary performance comes in Season 13, Episode 11, in which he is defending a bookie who killed his business partner. His anxious, disheveled buffoon character belies his intelligence and legal prowess.<sup>96</sup> During jury selection, while the A.D.A. is determining whether jurors are death-qualified and asking them case relevant questions, Dworkin asks one prospective juror about his tie, and another he talks to about the temperature in the courtroom.<sup>97</sup> In the following scene, A.D.A. Serena Southerland and E.A.D.A. McCoy are talking to District Attorney Arthur Branch about jury selection.<sup>98</sup> Southerland tells McCoy and Branch that she did some research into Dworkin’s background and found that he was a Harvard Law graduate, clerked for a judge in the Southern District of New York, and made partner at a major firm but decided to go out on his own, and has had a stellar career since.<sup>99</sup> Still puzzled by Dworkin’s odd act at jury selection McCoy knows something is

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<sup>93</sup> Podlas, *supra* note 7, at 38.

<sup>94</sup> *Id.*

<sup>95</sup> Dworkin appears in *Law & Order: Chosen* (NBC television broadcast Jan. 15, 2003), *Law & Order: Bounty* (NBC television broadcast Oct. 1, 2003) and *Law & Order: Thinking Makes it So* (NBC television broadcast Mar. 29, 2006).

<sup>96</sup> *Law & Order: Chosen*.

<sup>97</sup> *Id.*

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

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

amiss – he notes that a buffoon doesn't clerk for a Federal judge.<sup>100</sup> We later discover that Dworkin had stacked the jury with Jews in the hopes of playing on their sympathy for the defendant, who was stealing money from his business partner to send to Israel and had killed the business partner to be able to continue to do so. Sarcasm abounds throughout the episode and there is clear mutual hostility during the trial between the ADA's and Dworkin. Ultimately, as is usually the case in this series, and in keeping with the crime control narrative, the defendant is found guilty. After the trial, when Dworkin sees Southerland and McCoy in a restaurant he sits down at their table, congratulates them, and indicates that he supports giving to Israel, but did not support his client's actions.<sup>101</sup> The dialogue indicates that as a defense attorney the trial is a game and being a lawyer is an occupation. This is contrasted with the prosecutors who firmly believe that they are on the right side of their cases and are almost "called" to the profession – they are true believers.

### *C. Plot/Dialogue*

In addition to carefully crafting the characters we encounter, the *Law & Order* writers create a portrait of justice through the plot and dialogue of every episode. Just as the character development part of the narrative takes place at both the macro and micro levels, so does the use of the plot to further the particular portrait of justice. At the macro level, the extremely high case closure rate suggests a world in which the detectives and their questionable tactics are highly effective at apprehending criminals. Arrests are made in a nearly every episode of the *Law & Order* franchise. In fact, between dialogue noting Detective Stabler's 97 percent case closure rate (defined as an arrest for the crime) and the closure of nearly every case depicted in the episodes of the *Law & Order* franchise, it might seem to viewers as though the detective squads, and their

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

particular brand of police work, are able to make arrests in almost 100 percent of cases.<sup>102</sup> The reality is strikingly different. According to statistics, the NYPD cleared only 57% of the homicides *committed* in 2012 in New York City.<sup>103</sup> And of the crimes for which a suspect was arrested, conviction rates are far lower than the 80-plus percent obtained in the *Law & Order* franchise.<sup>104</sup> In 2012 the New York County (Manhattan) District Attorney secured convictions in approximately 57 percent of violent felony arrests.<sup>105</sup> In that same year, the Bronx District Attorney secured convictions in 42.8 percent of violent felony arrests.<sup>106</sup> The closure and conviction rates portrayed in *Law & Order* may falsely lend credence to the effectiveness of the techniques employed by the detectives.

Additionally, the extremely high arrest and conviction rates in the show may lead viewers to assume that most individuals charged or brought to trial are factually and legally guilty. While this may be a fair assumption – prosecutorial discretion means prosecutors like to try only the cases they are confident they can win – these perceptions may be difficult for individuals to put aside when stepping inside the jury box. Thus, the portrayal may undermine the presumption of innocence afforded criminal defendants.<sup>107</sup>

At a micro level, through a mix of overt and subtle cues, dialogue and plot signal the appropriate path to justice and identify the “good guys” and “bad guys.” For example, in the *SVU* episode “Pretend,” Detective Stabler says to his partner, “If a cold chill just ran up your spine,

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<sup>102</sup> *Law & Order SVU: Haystack*, *supra* note 71.

<sup>103</sup> See, *supra* note 26 and accompanying citations.

<sup>104</sup> See, *supra* note 19 and accompanying database for *Law & Order* conviction rates.

<sup>105</sup> <http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/newyork.pdf>.

<sup>106</sup> <http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/bronx.pdf>.

<sup>107</sup> One reason for the results obtained in *Law & Order* may be that police and prosecutors are extremely good at screening cases and proceeding in cases only when a defendant is factually guilty. The overall narrative would seem to indicate this is the case. See Podlas, *supra* note 7, at 33 for her discussion of the prosecutor’s screening abilities in *Law & Order*.

it's because a defense attorney just walked in here.”<sup>108</sup> When the defense lawyer announces to the detectives that he needs to report a rape, Stabler mockingly asks if the lawyer's client has taken advantage of him.<sup>109</sup>

*SVU* episode “True Believers” is quite possibly the “ideal type” episode that captures both the micro and macro level storytelling approaches in the *Law & Order* franchise.<sup>110</sup> Instead of a “whodunit,” this episode begins with a voyeuristic view of the crime in progress.<sup>111</sup> The viewer sees the events leading up to the victim's rape and sees the perpetrator hold the victim at gunpoint before raping her. There is no mistake about who the perpetrator is. The viewer is taken through the stages of the investigation, in which one team of detectives chases down the wrong individual on a street before another team of detectives finds the individual we know to be the perpetrator and chases him through some housing projects and into his family's apartment. The suspect is charged and brought to arraignment. When the defendant's bumbling public defender cannot keep which case he is appearing for straight, the lawyer is suddenly and mysteriously replaced by slick, civil rights lawyer Bayard Ellis.<sup>112</sup> The distaste for defense lawyers and the pro-police/prosecution slant to the narrative becomes apparent.

Ellis is a former criminal defense lawyer turned Civil Rights attorney, who took his great wealth and opened a clinic to help the underprivileged remedy civil rights violations.<sup>113</sup> The detectives in the squad room characterize Mr. Ellis' change in career direction as “trying to buy a clean conscience.”<sup>114</sup> Implicitly, according to the detectives, upholding a defendant's Sixth Amendment right to adequate and zealous representation should leave one with an “unclean”

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<sup>108</sup> *Law & Order SVU: Pretend* (NBC television broadcast May 15, 2007).

<sup>109</sup> *Id.*

<sup>110</sup> *Law & Order SVU: True Believers* (NBC television broadcast Nov. 2, 2011).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

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

<sup>114</sup> *Id.*

conscience. Yet, even with his now nobler choice of work, the detectives feel that Ellis is “still putting criminals back on the street.”<sup>115</sup> Ultimately, the case is brought to trial with a defendant viewers know from the opening sequence is the perpetrator. Ellis engages in some legal maneuvering trying to get damning evidence excluded. Fortunately for the detectives and the ADA, the defense motions *in limine* to exclude an improper ID of the defendant by the victim (the defendant was ID’ed in a highly suggestive manner) and exclude evidence of a firearm that Ellis claims the police cannot adequately place on the defendant, are denied.<sup>116</sup> Ultimately, however, Ellis is able to shred the complainant’s credibility, suggesting that the injuries she suffered and attributed to her rape were actually from consensual sex the night prior to her alleged rape, with a man who looked similar to the defendant. As a result of Ellis’ slick lawyering, the defendant is found not guilty on all charges. The way this episode is structured makes obvious that the acquittal is factually wrong and is simply the product of shady legal maneuvering.

#### **IV. Cultural Preference and Impact on Perceptions**

The longevity and strong ratings of the *Law & Order* franchise would seem to underscore the cultural preference and salience of the particular narrative/view of the world. The franchise began 23 years ago and has included more than one thousand original episodes between the five series.<sup>117</sup> Three of the series are in syndication and can be found on major network channels at

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* The defendant was ID’ed in a “field showup.” In this procedure, the witness is asked “Is this the perpetrator?” The procedure is known to be highly suggestive. The court in *People v. Sandoval* 70 Cal. App. 3d 73 (1977) stated that “[s]uch a procedure should not be used, however, without a compelling reason because of the great danger of suggestion from a one-to-one viewing which requires only the assent of the witness.” *Sandoval* at 85. In *True Believers*, the SVU detectives put the victim in the back of an unmarked and drove by the location where the suspect had been detained. The suspect was standing on the sidewalk handcuffed, with his hands behind his back, and two detectives standing next to him.

<sup>117</sup> The original *Law & Order* aired 456 episodes, *SVU* has aired 319 episodes, *Criminal Intent* aired 195 episodes, *LA* aired 22 episodes, and *Trial by Jury* aired 13 episodes. *Law & Order UK* has aired 41 episodes.

nearly any time of the day.<sup>118</sup> Major cast members/character have departed and new cast members/characters have joined, but viewership has remained strong.<sup>119</sup> The preference for the themes and view of the world portrayed in *Law & Order* becomes all the more obvious when the success of the franchise is contrasted with procedurals that adopt more liberal, due-process oriented, issue-driven themes. These shows often struggle to last more than a few seasons and are often relegated to less than ideal timeslots.

For example, Steven Bochco's *Raising The Bar* followed members of all parts of the judicial system, including the public defender's office, the District Attorney's office and a select few judges and their staff.<sup>120</sup> The character portrayals and themes were vastly different from *Law & Order*. Whereas the defense lawyers were high paid, slick "shysters" in *Law & Order*, *Raising the Bar* focused on the underpaid and overloaded public defenders.<sup>121</sup> The PDs were portrayed as idealistic, true-believers who zealously represented marginalized members of society, while the prosecutors were the aggressive conviction-seeking "monsters," willing to distort the truth and

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<sup>118</sup> *Law & Order*, *SVU*, and *Criminal Intent* are in syndication on several channels including USA Network, ION, Bravo, and Oxygen.

<sup>119</sup> Even with a slip in ratings to 6.6 million viewers from as high as 12+ million, *SVU* remains one of NBC's highest rated/most-watched television shows. *Law and Order: SVU Renewed: Season 14 Coming to NBC, Chicago Fire Gets Series Order*, HUFFINGTON POST (May 9, 2012), [http://www.huffingtonpost.com/2012/05/09/law-and-order-svu-renewed-season-14\\_n\\_1503465.html](http://www.huffingtonpost.com/2012/05/09/law-and-order-svu-renewed-season-14_n_1503465.html).

<sup>120</sup> *Raising the Bar* focused on four public defenders, three ADAs, two judges and one judicial clerk in its 25 episodes. The series aired two seasons in 2008 and 2009 before being cancelled.

<sup>121</sup> As a NY Times article puts it "Part of what makes 'Raising the Bar' so loopy is its commitment to this peculiar politics of personal responsibility and to a sappy liberalism that means none of the accused represented by Jerry Kellerman and his compatriots in the public defender's office are ever all that bad. They are just mentally ill, or poor and struggling, or innocent." Ginia Bellafante, *The Crux of the Matter is Lawyers, Not the Law*, NY TIMES (Aug. 31, 2008), <http://tv.nytimes.com/2008/09/01/arts/television/01bar.html>. Following the episodes, the lawyers in both the public defender's office are portrayed as overworked and underpaid. They're seen passing off cases to other lawyers because of scheduling conflicts and overloaded dockets. Jerry Kellerman (Mark Paul Gosselar) is regularly seen struggling to manage all of the files he has to keep track of and he always seems disheveled and out of sorts. In one episode, the caseload becomes seriously burdensome when Kellerman has two clients going to trial at the same time. A stubborn Judge Farnsworth (John Michael Higgins) refuses to grant Kellerman a continuance on one of the cases meant Jerry was running back and forth between courtrooms trying to manage, until the judge eventually agreed to a continuance. *Raising the Bar: Trout Fishing* (TNT television broadcast Aug. 4, 2009).

block justice from happening just to win.<sup>122</sup> The show took a more true to life approach to portraying the judicial system, showcasing the imperfect nature of the system and highlighting the triumphs, losses and compromises for both prosecutors and public defenders. The series lasted only 25 episodes before it was cancelled. *In Justice*, a 2006 series based on the Innocence Project, focused on the “National Justice Project” who worked to free the wrongly convicted. The episodes followed individual cases, much like *Law & Order*, but focused on the reasons for miscarriages of justice generally, and as applied to each case. The series was cancelled after 13 episodes. *Law & Order*’s cultural ubiquity may have a serious impact on people’s perceptions of justice and the legal system.<sup>123</sup>

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<sup>122</sup> In contrast to the wheeling and dealing for plea bargains the defense lawyers in *Law & Order* engage in, Kellerman and his fellow public defenders truly believe in their clients. In the first episode of the series, Kellerman is handling a rape case and in an indignant tone complains to the prosecutor, “I’m begging you here, my guy did not do this rape. If you win, you’re gonna lock up an innocent guy. You’re gonna orphan his kids - widow his wife.” *Raising the Bar: Pilot* (TNT television broadcast Sept. 1, 2008). In episode two, Kellerman is defending a man accused of murder. The eyewitness who can prove the defendant’s innocence is in Guatemala. ADA Michelle Earnhardt uses an immigration technicality to keep the witness from being allowed to re-enter the United States and testify in order to help her to gain a conviction. ADA Earnhardt is made to appear concerned with convictions, rather than truth. *Raising the Bar: Guatemala Gulfstream* (TNT television broadcast Sept. 8, 2008).

<sup>123</sup> The possibility that *Law & Order* has a serious impact on viewer’s perceptions of the legal system depends on ones belief about the relationship between television viewing and perceptions of reality. The direction of the relationship between television content and society’s beliefs is significantly contested among media studies scholars. See e.g., William J. McGuire, *The Myth of Massive Media Impact: Savagings and Salvagings*, in PUBLIC COMMUNICATION AND BEHAVIOR 173-257 (George Comstock ed., 1986). While cultivationists contend that television plays a significant role in shaping society’s beliefs about the real world, reflectionists would suggest that society’s beliefs shape television programming – television stations give the viewers what they want based on already held beliefs. [McNeely, *supra* note 15.] The direction of the relationship between television and viewers’ attitudes is unsettled. Ultimately, noted scholars Robert Hawkins and Suzanne Pingree question the value of attempting to understand the relationship between television narratives and perceptions of social reality through a unidirectional lens. Instead they propose that there is likely to be a reciprocal relationship between television depictions and social reality. *Id.*

While the debate remains unsettled, some would argue that cultivation is an appropriate framework for considering the impact of prime-time television on perceptions of the legal system because a key tenet of cultivation theory states that television is most influential in cultivating attitudes where people have little opportunity to gain first-hand experience. [Michael Pfau *et al.*, *Television Viewing and Public Perceptions of Attorneys*, 21 HUMAN COMM. RESEARCH 307, 310 (1995)] Fairly few people encounter the justice system and its component actors in a meaningful way. A survey of 983 individuals found that television is a frequent source of information about the legal system for at least 19% of the public. [*Id.*] Another study observed that more people learn about the legal system from television and film than from first-hand encounters. [Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC. REV. 185 (1987)] Thus, cultivationism may be an appropriate lens through which to consider the *Law & Order* narrative, and its impact on viewer’s perceptions of the legal system.

Approximately 98 percent of American homes have at least one television, and the average American watches 4 hours of television a day – a significant portion of that viewing occurs during “prime time.”<sup>124</sup> Because of the significant amount of time spent watching television, prime-time programs represent a potentially powerful source of images about the social world, with the power to transform reality.<sup>125</sup> Television programs represent “a continuous stream of ‘facts’ and impressions about the way of the world.”<sup>126</sup>

Since the late 1970’s and early 1980’s, few studies have been conducted to understand exactly what messages and lessons about the justice system, as a whole, people are taking away from these television encounters. In 1977, Gerbner et. al. conducted a survey that determined that viewers who watch four or more hours of television a day tend to overestimate the prevalence of violent crime in U.S. cities.<sup>127</sup> They concluded that television programs cultivated a view of the world as a mean and scary place.<sup>128</sup> In 1980, Haney and Manzolati hypothesized that television’s misrepresentations of various aspects of the criminal justice system could impact jurors’ attitudes.<sup>129</sup> They conducted a survey on jury eligible participants, in which they concluded that people internalize the things they see on television, particularly regarding the motivations and demographics of criminals.<sup>130</sup> In November 1992, Pfau et al. conducted a survey to understand public perceptions of lawyers.<sup>131</sup> Their study found that television had a significant influence on

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<sup>124</sup> *State of the Media, Trends in TV Viewing – 2011 TV Upfronts*, NIELSEN (APR. 2011), <http://www.nielsen.com/content/dam/corporate/us/en/newswire/uploads/2011/04/State-of-the-Media-2011-TV-Upfronts.pdf>.

<sup>125</sup> McNeely, *supra* note 15, at 1-2.

<sup>126</sup> George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, 26 J. COMMUNICATION 173, 178 (1976).

<sup>127</sup> George Gerbner et al., *TV Violence Profile No. 8: The Highlights*, 27 J. COMMUNICATION 171 (1977).

<sup>128</sup> *Id.*

<sup>129</sup> Craig Haney & John Manzolati, *Television Criminology: Network Illusions of Criminal Justice Realities*, in READINGS ON THE SOCIAL ANIMAL 125-136 (Elliot Aronson ed., 1984).

<sup>130</sup> *Id.*

<sup>131</sup> Pfau et al., *supra* note 122.

perceptions of the profession, including for practicing lawyers.<sup>132</sup> Taking the evidence suggesting that television has the power to cultivate attitudes and perceptions of the justice/legal system as a backdrop, the remainder of this section considers the potential impact of the *Law & Order* narrative and themes on the perceptions of false confessions, eyewitness testimony, the presumption of innocence, and more generally the best way to run the system.

The storylines portrayed in the *Law & Order* franchise may lead viewers to perceive the investigative tactics used by the detectives as normal, effective for producing truthful information, and perhaps even, in the extreme view, *necessary* for the expeditious resolution of cases. Careful attention should be paid to the portrayal with respect to the detectives' use of tactics shown to produce confessions and incriminating statements. The war on terror has highlighted the unreliability of information obtained through "enhanced interrogation techniques." The Daily Beast, The Washington Post, The New York Times and likely every major news outlet has at some point in the last 12 years featured articles on the use of torture and its tendency to produce unreliable information.<sup>133</sup> The prevalence of these articles and "sound bites" from experts on the issue has undoubtedly educated many otherwise uninformed Americans about the problems associated with conducting highly coercive interrogations. These images, have likely led members of the public to form cognitive schema and develop heuristics by which they assess whether treatment of a suspect produces unreliable information.<sup>134</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> See e.g., Andrea J. Prasow, *How Illegal Interrogations Hurt the U.S.*, THE DAILY BEAST (MAY 7, 2011), <http://www.thedailybeast.com/articles/2011/05/07/does-torture-work-how-illegal-interrogations-hurt-the-us.html>; Peter Finn & Joby Warrick, *In 2002, Military Agency Warned Against 'Torture,'* THE WASHINGTON POST (Apr. 25, 2009), [http://articles.washingtonpost.com/2009-04-25/politics/36898701\\_1\\_harsh-interrogation-attachment-joint-personnel-recovery-agency](http://articles.washingtonpost.com/2009-04-25/politics/36898701_1_harsh-interrogation-attachment-joint-personnel-recovery-agency); Clyde Haberman, *Bearing Witness to Torture*, THE NEW YORK TIMES (Oct. 30, 2007) <http://www.nytimes.com/2007/10/30/nyregion/30nyc.html?ex=1351396800&en=f579de2b17446a9b&ei=5090&partner=rssuserland&emc=rss>.

<sup>134</sup> In the 1970s Daniel Kahneman and Amos Tversky showed that individuals assess the probability of an uncertain event, such as the guilt of a defendant, by relying on a limited number of heuristic principles. These heuristics help reduce the complexity of the task to simple judgments. While Kahneman and Tversky admit the utility of these

The tactics the detectives of *Law & Order* engage in do not align with the images of torture and coercion that have been engrained in our collective consciousness and lambasted for producing unreliable information during the latter half of the war on terror. The images of coercion and torture are likely to conjure images of waterboarding, detainees hooked to car batteries, loud music and cacophonous noises played over PA systems, and prolonged sleep and sensory deprivation. The detectives of the Major Case squad and the Special Victims unit abuse suspects' rights and attempt to intimidate them through threats and "mild" physical abuse. Furthermore, the *Law & Order* franchise portrays a high level of success in using these tactics. These tactics are portrayed as frequently producing information useful for building a case that is later vindicated by trials and plot devices that portray guilty verdicts not only as legal conclusions, but also as representative of the "ground truth." Additionally, the familiarity with the more startling images of terror suspects and military interrogators might lead viewers to assume that the techniques displayed in the *Law & Order* franchise do not rise to the level of brutality that would produce inaccurate information and false confessions. However, reality and scientific research have demonstrated that tactics used during police interrogations, tactics frequently used in *Law & Order*, can and do lead to false confessions.

According to the Innocence Project, more than 25 percent of the wrongful convictions overturned by DNA evidence have involved a false confession.<sup>135</sup> And, as their summary quickly and clearly states, scholarly work on false confessions has indicated that actual or perceived intimidation by law enforcement, use of force or perceived threat of force, stress, hunger, limited

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heuristics, they also note that they can lead to severe and systematic error due to bias. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124 (1974) and their subsequent book of the same name for a further discussion of the use of heuristics in decisionmaking and the ills that can result from the use of the various heuristics.

<sup>135</sup> *False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT (Aug. 1, 2013, 3:00 PM), [http://www.innocenceproject.org/Content/False\\_Confessions\\_Recording\\_Of\\_Custodial\\_Interrogations.php](http://www.innocenceproject.org/Content/False_Confessions_Recording_Of_Custodial_Interrogations.php).

education, and deceptive interrogation techniques are frequent contributors to false confessions.<sup>136</sup> As Richard Leo notes, police-induced false confessions result from a multistep process.<sup>137</sup> That process begins with the erroneous assumption, prior to the interrogation, that the suspect is guilty. Certainly, we see this in the interrogation room in *Law & Order*. The detectives are quite frequently convinced that the individual they've just "hailed in" for questioning *is* the "perp" and all they need is the time to break the suspect down until he or she explicitly confesses or provides information that makes it obvious that he/she is guilty. The assumption of guilt is followed by coercive interrogation tactics that are much more subtle than popular images of coercion/torture, frequently taking place at the level of psychological/emotional coercion - the promise of leniency if the suspect simply tells the police what happened or the promise that if the suspect refuses to cooperate the detectives will make sure the suspect "gets the max." Finally, contamination can give a false confession the aura of legitimacy.<sup>138</sup> Confessions do not end at "yes, it was me, I admit, I did it."<sup>139</sup> Confessions include details that an innocent person seemingly should not know. However, as Leo points out, the interrogation method that is often used is leading, which "contaminates" the confession, meaning even a *false* confession may contain some accurate information.<sup>140</sup> The interrogator provides details and motives and induces the suspect to agree with these details or repeat these details, allowing even an innocent person to make a confession with some accurate details.<sup>141</sup> Some critics have suggested that this three-step process that Leo details is attributable to the method of interrogation police in the United States

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<sup>136</sup> *Id.*

<sup>137</sup> Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY LAW 332 (2009).

<sup>138</sup> *Id.* at 337.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

are taught – the Reid Method.<sup>142</sup> This extremely subtle coerciveness is highly unlikely to rise to the level of perceptibility and will not fit the public’s prototype of coercive actions that produce false confessions/information - particularly when the advocates of the technique don’t recognize that the method is likely to induce unreliable information. Coupled with the inability of either police or the average person to discriminate between true and false confessions to a meaningful extent, the misinformation and distorted picture presented in the *Law & Order* franchise is especially dangerous.<sup>143</sup>

Eyewitnesses play a key role in the investigation and prosecution of crimes in the *Law & Order* franchise. Bystanders provide investigative leads provided and trial testimony and victims (particularly in *SVU*) often provide lineup identifications, leads testimony, and trial testimony. In the *Law & Order* franchise, these individuals are portrayed as frequently providing valuable and *accurate* evidence. The information obtained from eyewitnesses frequently provides information that leads to other investigative clues and often the arrest of a suspect. Coupled with the prosecution’s overall success rate in winning cases and the portrayal of guilty verdicts as representative of factual truth and the “right” conclusion, rather than simply being “legal truth,” viewers might believe that eyewitnesses are always a quality/reliable source of information. Information associated with the weaknesses in eyewitness testimony and police lineups (identifications), *e.g.*, the inaccuracies associated with cross-racial identification and the detrimental effects of presenting a simultaneous lineup versus a sequential lineup, are either entirely excluded from the show’s dialogue or only given passing mention and written off.<sup>144</sup> The

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<sup>142</sup> See *e.g.*, Saul Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215 (2005).

<sup>143</sup> Saul M. Kassin *et al.*, “*I’d Know a False Confession if I Saw One*”: *A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211 (2005). Kassin *et al.* found that students were better able to discern between true and false confessions than police investigators. Police investigators judged more of the false confessions to be true than did students.

<sup>144</sup> See *generally* the work of Elizabeth Loftus and Gary L. Wells.

informed know that eyewitness identification is frequently unreliable. Laboratory studies have long shown that false identifications happen frequently. We've also seen erroneous identification in real cases, outside of the laboratory. Mistaken eyewitness identifications have led to approximately 75 percent of the more than 300 wrongful convictions later overturned by DNA evidence.<sup>145</sup> Social scientists have long demonstrated that a variety of factors can lead to mistaken eyewitness identifications.<sup>146</sup> Additionally, recent research on error in identifications made during lineups has suggested that the way a lineup is administered has significant implications for identification/misidentification.<sup>147</sup> In 2011, Gary Wells, noted eyewitness identification scholar, and several colleagues conducted a meta-analysis of the lineup literature.<sup>148</sup> They found that while there are fewer accurate identifications using sequential lineups, that is to say that there are fewer people who identify an individual in the lineups, the number of erroneous identifications is also lower, making identification more diagnostic.<sup>149</sup> As of this writing, only New Jersey *mandates* a jury instruction on factors related to the accuracy of eyewitness testimony/identification.<sup>150</sup> As such, unless an expert is called to testify, jurors would be left with evaluating eyewitness identifications and testimony based on their *a priori* assumptions/knowledge about the quality/reliability of the identification, the witnesses stated confidence in the identification, or some discernible flaw, unrelated to the scientific flaws, in the identification. Given what we know from real world cases and scientific research, witnesses

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<sup>145</sup> *Eyewitness Identification Reform*, INNOCENCE PROJECT (Aug. 1, 2013, 3:05 PM), [http://www.innocenceproject.org/Content/Eyewitness\\_Identification\\_Reform.php](http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php).

<sup>146</sup> See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANNU. REV. PSYCHOL. 277 (2003) for a discussion of the factors relating to the accuracy of eyewitness identification.

<sup>147</sup> See e.g., Nancy Steblay *et al.*, *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAV. 523 (2003) and Nancy Steblay *et al.*, *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations; A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459 (2001).

<sup>148</sup> Nancy Steblay *et al.*, *Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion*, 17 PSCHOL. PUB. POL., LAW 99 (2011).

<sup>149</sup> *Id.*

<sup>150</sup> *State of New Jersey v. Larry R. Henderson*, 27 A.3d 872 (N.J. 2011).

bring a high level of confidence (perhaps overconfidence) in eyewitness evidence and their knowledge about the quality of the evidence. A 2005 survey by the District of Columbia public defenders with assistance from renowned eyewitness and memory expert Beth Loftus and a survey research company showed a serious lack of understanding about the quality of eyewitness testimony and why and how it can be wrong among the public.<sup>151</sup> A 2011 study in the *Journal of Contemporary Criminal Justice* assessed perceptions of eyewitness testimony and its impact on jury verdicts.<sup>152</sup> The results highlighted the significant influence of eyewitness testimony on juror decisionmaking.<sup>153</sup> Additionally, the study found that some jurors rely on general notions about the reliability of eyewitness testimony, rather than an assessment of the witness on the stand.<sup>154</sup> Given the inaccuracies in laypersons general understanding of eyewitness testimony this finding is particularly concerning. Furthermore, studies have shown witnesses to be inaccurate in their own indications of their confidence in the correctness of their identification.<sup>155</sup> The reliance on general perceptions and the general lack of information about the flaws of eyewitness testimony are all the more concerning in light of television's portrayals of the information/testimony as reliable. The *Law & Order* franchise may reinforce the inaccurate view of eyewitness identification as a "perfect" piece of evidence and lead viewers to overvalue the evidence that should otherwise be questioned.

Finally, and perhaps most frightening, the *Law & Order* narrative may impact the presumption of innocence. The proposition that a defendant is presumed innocent at trial, and

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<sup>151</sup> Richard S. Schmechel *et al.*, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS 177 (2006).

<sup>152</sup> Lauren O'Neill Shermer *et al.*, *Perceptions and Credibility: Understanding the Nuances of Eyewitness Testimony*, 27 J. CONTEMP. CRIM JUST. 183 (2011).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See Kevin Krug, *The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Area of Research*, 3 APPLIED PSYCH CRIM. JUST. 7, 31-4 (2007) for a discussion of the literature exploring the relationship between confidence and accuracy in eyewitness identification.

that the prosecution must establish its case beyond a reasonable doubt is a fundamental tenant of our system. The defense is under no obligation to present a case or attempt to establish the defendant's innocence. However, the system portrayed in the *Law & Order* franchise may undermine this fundamental principle and contaminate jurors' assumptions about criminal defendants. The detectives in *Law & Order* investigate numerous leads, pursue several theories of the crime and sometimes bring several suspects in for interrogation before an individual is charged with the crime. Ultimately, when a suspect in the show is pled out, put on trial and convicted, or "wrongly" acquitted, the implication is always that the defendant was factually, not just legally guilty. If viewers believe this portrayal is realistic or representative of the way the investigative process and criminal justice system operate, viewers may believe the mere fact that an individual is brought to trial is indicative of guilt. According to the arc of a *Law & Order* episode, this view would be logical. By the time the case gets to trial, the police and ADA *know* they have the right person and their view is later vindicated. Thus, the person on trial *must be* guilty, because if he/she wasn't, the ADA would not have brought the defendant to trial – the individual would've been excluded earlier in the investigative process like they are in the show. This belief is impermissible.

The issues associated with undermining the presumption of innocence can be expressed in probabilistic terms. At the most basic level, the view of the world portrayed in in *Law & Order* could lead to an inappropriately high estimate of a criminal defendant's "prior probability" of guilt.<sup>156</sup> The presumption of innocence means that a juror should start with an estimate that the prior probability of a defendant's guilt is approaching zero (e.g., .01 or .001).<sup>157</sup>

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<sup>156</sup> In Bayesian statistical terms, the prior probability is the probability of a proposition before the date/evidence is taken into account.

<sup>157</sup> Michael J. Saks & D. Michael Risinger, *Baserates, The Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions*, 4 MICH. ST. L. REV. 1051, 1061 (2003).

Each piece of evidence should cause a juror to update his/her “prior,” increasing the probability of guilt if the evidence is convincing or maintaining the estimate if the evidence is wholly unconvincing. At the end of the case, when jurors are asked to deliberate, the “posterior probability”<sup>158</sup> will either pass the threshold necessary to make a finding of guilt “beyond a reasonable doubt” or not. It is improper, given the presumption of innocence, for a juror to begin a trial with a belief that the prior probability of guilt is higher than this “approaching zero” number.<sup>159</sup> This error is compounded by the assumptions that are made when an individual assumes a higher prior probability of guilt, particularly when that assumption is based on the portrait of justice portrayed in *Law & Order*. This assumption implicitly incorporates beliefs about the evidence against the defendant (and the legitimacy/quality of that evidence). Thus, to say that the prior probability of the defendant’s guilt is .6, for example, *must* include some assumption about the evidence that the police collected and that the state may present (I say may, because there may be evidence that could establish the defendant’s guilt that is deemed inadmissible) that makes the suspect more likely to be guilty than not. Then, when the evidence is heard at trial and the “prior” is updated, the juror is updating his/her “prior” that has already included a general assessment of the evidence, leading to evidence inappropriately being included twice in the estimate of guilt.

The majority of Americans have little contact with the justice system. Thus, much of their information about the way the system operates comes from television, mostly *fictional* television.<sup>160</sup> The *Law & Order* franchise presents a particular portrait of the way the system operates, based primarily in the Crime Control Model. Based on ratings and longevity, and a

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<sup>158</sup> In Bayesian terms, the posterior probability is the probability of the hypothesis given the prior probability and the evidence presented for/against the hypothesis. Thus, the posterior probability in a criminal case is the probability that the defendant is the perpetrator given the evidence presented in court.

<sup>159</sup> Saks & Risinger, *supra* note 157.

<sup>160</sup> McNeely, *supra* note 15.

comparison of those measures against similar shows with a Due Process narrative, there appears to be a clear cultural preference for the view of justice portrayed in *Law & Order*. Based on media studies research, television has the power to shape viewers' perceptions of the real world institutions portrayed. For *Law & Order*, that may lead to a view that certain police/investigative tactics are useful, successful, and perhaps even necessary, even when research shows otherwise. Additionally, viewers may overvalue eyewitness testimony, believing it to be nearly infallible. Finally, the portrayal of the way the investigative process and judicial system operate in *Law & Order* may significantly undermine the presumption of innocence, leaving viewers to believe that if a case makes it to trial the defendant is significantly more likely to be guilty than not.

## **V. Conclusion and Suggestions for Future Research**

The impact of the *Law & Order* franchise on society, and particularly on potential jurors, has been greatly understudied. Over the last decade, significant attention has been paid to the “CSI Effect,” with little evidence that such an effect exists.<sup>161</sup> *Law & Order*, given its long run, cultural ubiquity, and its more documentary-like portrayal of the various aspects of the legal system, is arguably more likely to play a part in the lay public's general understanding of the legal system and collective conscience, particularly with respect to views about how criminal investigations and cases should proceed. The creator and writers use a variety of techniques, from basic psychological principles, like mere-exposure, to dialogue and plot to build viewers' preference for a Crime Control model of justice. The police and prosecutors in this view are portrayed as the “good guys” keeping the people safe from a dangerous world of criminals, and their tactics, regardless of how draconian and unconstitutional they may be, are necessary to get the job done effectively and expeditiously. On the other hand defense lawyers, the occasional by-the-book ADA, and even the Constitution are portrayed as impediments to justice. They

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<sup>161</sup> See *supra* Section I and footnotes 1-6.

obfuscate and distract from the correct outcome – a guilty verdict. The show suggests that if a suspect isn't guilty, he or she isn't brought to trial.<sup>162</sup> The cops end up with the right person. This narrative may lead viewers, and thus potential jurors, to believe this is the way the system actually works. These beliefs may lead to incorrect assumptions about the reliability of various types of evidence and the techniques for gathering information, including eyewitness testimony and the use of coercion/intimidation – though not “torture” in the post-9/11 waterboarding sense. Empirical research, in the form of surveys and experiments, is needed to examine the influence of this franchise, and others modeled on it, on various perceptions of the justice system, including – and particularly – the likelihood that a defendant brought to trial is guilty.

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<sup>162</sup> See, *supra* note 107 and Podlas, *supra* note 7, at 33 for a discussion of prosecutorial screening in *Law & Order*.