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The Jury EXPERT

The Art and Science of Litigation Advocacy

A BiMonthly E-Journal

Volume 22, Issue 4 July 2010

<p>What We Do (and Don't) Know about Race and Jurors' Sam Sommers considers his past research on race and juries and what lessons can be generalized from the findings. Page 1</p>	<p>Wall Street's reaction to jury verdicts involving publicly-traded litigants Experienced trial consultant considers the ups and downs of the stock market in relation to jury verdicts and damage awards. Page 13</p>	<p>Reptile Brain, Mammal Heart An experienced trial consultant and attorney writes on why the popular 'reptile theory' is incomplete for understanding juries. Page 17</p>	<p>Persuading with Probability How can attorneys explain statistical evidence to jurors effectively? A statistician explains & a trial consultant reacts. Page 29</p>	<p>Tattoos, Tolerance, Technology, and TMI: Millennials Two trial consultants review the facts on the Millennials (aka Generation Y) and consider what you can use in voir dire, case presentation and preparation. Page 33</p>	<p>The Convoluted Spectrum of White Guilt Reactions A doctoral student reviews the literature on white guilt and three trial consultants discuss courtroom applicability. Page 47</p>	<p>Presumed Prejudice, Actual Prejudice, No Prejudice: Skilling v. U.S. A law professor and well-known blogger reviews the recent Skilling decision & what it means for litigation. Page 57</p>	<p>Emotions in the courtroom Our legal system relies on 'thinking' but jurors' decisions are made with emotion and thought. Exploring the role of emotion. Page 61</p>
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What We Do (and Don't) Know about Race and Jurors¹

by Samuel R. Sommers

Samuel R. Sommers, Ph.D. is Associate Professor of Psychology at Tufts University in Medford, Massachusetts. His research examines the influence of race on perception, judgment, and social interaction, with a particular focus on jury decision-making and jury selection. He has testified as an expert witness on matters of racial bias and eyewitness memory in several criminal trials and conducts diversity workshops for legal professionals and other organizations. For more details regarding his research, consulting, and blogging activities, see [his webpage](#).

Ten years ago, my colleague, Phoebe Ellsworth, and I published two articles describing the influence of a criminal defendant's race on jurors' decision-making (Sommers & Ellsworth, 2000; 2001). These papers were based on experimental simulations in which we asked mock jurors to read and evaluate trial summaries. In one version of each summary, the defendant was depicted as a White man. In the other, using the exact same set of case facts, the defendant was a Black man.

¹Adapted from Sommers, S.R. and Ellsworth, P.C. (2009). "Race salience" in juror decision-making: Misconceptions, clarifications, and unanswered questions. *Behavioral Sciences and the Law*, 27, 599-609.

Our goals in these studies were to provide empirical insight into the controversial issue of race and jury decision-making, as well as to try to make sense of inconsistent findings in previous research (for detailed reviews, see Mitchell, Haw, Pfeifer, & Meissner, 2005; Sommers, 2007). The basic finding of our studies was that the influence of a defendant's race on White jurors depends on whether or not the issues in a trial are racially-charged. We called this variable "race salience."

Since 2000, both of these articles have accumulated dozens of citations from fellow researchers. Several times a year, Phoebe and I are contacted by colleagues with requests for assistance in their efforts to generalize or extend our original results. Each of us has described this work in various colloquia and conferences. In addition, in hearings for two separate trials in 2008, I was asked to consider the application of these published findings to a capital case under review.

On the basis of these experiences, we have come to realize that the concept of "race salience" remains ambiguous and in need of clearer definition, and that several misconceptions regarding our published findings have emerged. In the present article, I seek to clarify the idea of "race salience" by reviewing published research, considering the ways in which the term has been interpreted, addressing common misconceptions, and identifying questions that remain in need of empirical investigation in this area of race and juror decision-making.

The Original "Race Salience" Effects

The design of our first study in 2000 was straightforward: White and Black mock jurors read several brief summaries of trials involving interracial crimes in which the defendant was either White or Black. Because the prevalent assumption among researchers and others had been that juror racial bias would be greatest in cases involving blatantly race-relevant issues (e.g., Fukurai, Butler, & Krooth, 1993; King, 1993), each of our summaries described a racially-charged incident. For example, one involved a mugging in which the victim was told that he should go back to his own neighborhood; another was a church arson motivated by racial animus. Our data indicated that Black mock jurors were less likely to convict a Black versus White defendant. Contrary to expectation, however, White mock jurors' judgments did not vary by defendant race.

These were not the first mock juror data to indicate that the influence of a defendant's race can be greater on Black than White jurors. A few years earlier, Skolnick and Shaw (1997) reported such findings using a trial summary based on the O.J. Simpson case. And in a publication by the Center for Equal Opportunity, archival analyses of actual case outcomes were used to advance the thesis that contemporary juror racial bias is characteristic of Black, but not White jurors (Reynolds, 1996; for more detailed criticism of this thesis, see Sommers & Ellsworth, 2001).

In spite of these previous conclusions, we remained unconvinced that the influence of race on White mock jurors had suddenly become a matter of history. After all, a number of well-designed analyses have demonstrated robust effects of victim and defendant race in real cases (e.g., Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 2001; Bowers, Steiner & Sandys, 2001; Daudistel, Hosch, Holmes, & Graves, 1999). In addition, many prosecutors and defense attorneys remain convinced that White jurors favor the prosecution in cases involving Black defendants, and continue to select juries based on this conviction despite Supreme Court prohibitions against such a practice (see *Batson v. Kentucky*, 1986; Sommers & Norton, 2008).

So what might account for the disparity between such real-world evidence that White jurors are influenced by the race of a defendant and mock juror experiments indicating



no such effects? To answer this question, we turned to the social psychological literature on race and social judgment. In doing so, we uncovered a likely explanation, namely one revolving around White mock jurors' concerns about appearing prejudiced.

Psychological theories of contemporary racial bias suggest that although Whites today still harbor negative sentiment and associations regarding particular groups, they are often loath to appear prejudiced (Dovidio & Gaertner, 2004; Gaertner & Dovidio, 1986). Gaertner and Dovidio (1986) described this new, more ambivalent type of racial attitude as "aversive racism," and proposed that the underlying negative sentiment harbored by Whites tends to emerge in certain situations but not in others. Specifically, their theory suggests that many contemporary Whites refrain from expressing bias or making biased judgments when they are in situations that "threaten to make the negative portion of their attitude salient" (p. 62). In other words, remind White people that they harbor racial bias (or that they're motivated to be fair-minded people who don't act on such bias), and they often become fairer in how they see the world.

We set out to assess this prediction in a legal context by creating trial conditions that would make Whites' race-related motivations more or less salient. In Study 2 of our 2000 paper, we modified a domestic assault case we had used previously to create two versions: in one the defendant used racially-charged language; in the other there was no reference to race by the defendant during the incident. In both versions participants learned the race of the defendant and victim, and all other information about the alleged assault was held constant. In short, the only difference between versions was that one altercation was situated in a racially-charged context and the other was not.

Our findings revealed that in the racially-charged version of the case, White mock jurors' judgments were similar to the responses we observed in Study 1: there was no significant impact of defendant race. However, when the incident was not a racially-charged altercation, White mock jurors were influenced by defendant race (as were Black jurors). More precisely, White mock jurors were now significantly more likely to convict the defendant when he was Black as opposed to White. Whether or not a trial described a racially-charged incident proved a useful consideration not only for explaining our own results for White mock jurors across studies (Sommers & Ellsworth, 2000), but also for reconciling previous findings (see Sommers & Ellsworth, 2001). That our data also converged with theoretical predictions from social psychology regarding contemporary racial bias lent them that much more credibility.

In writing up these results, one major challenge was to decide how to describe our critical variable. After much discussion--on our own and with anonymous reviewers--we decided on "race salience." The term fit with the aversive racism model, which offered predictions regarding "making salient" the potential racism of jurors' attitudes. It was broad enough to include the design we had used--namely, whether or not the incident in question was racially-charged--while also permitting us to speculate about additional ways in which mock jurors' anxieties about racial bias might be activated. Indeed, in the Discussion of our first article we suggested the following possibilities for empirical evaluation: "...racial issues may become salient in any number of ways, including, for example, pre-trial publicity, voir dire questioning of potential jurors, opening and closing arguments, the nature of police testimony, attorneys' demeanors, and sometimes the nature of the crime itself" (Sommers & Ellsworth, 2000, p. 1371).

Subsequent Examinations of "Race Salience"

In the years since our studies appeared in press, other researchers have continued to examine the idea we referred to as "race salience," in almost every instance by using the very same manipulation: whether or not the crime in question was racially-charged. For example, we replicated our results using a different sample population and a trial summary involving a fight between Black and White members of a diverse basketball

team (Sommers & Ellsworth, 2001). In this study, White mock jurors were not significantly influenced by a defendant's race when the alleged assault came during the course of an altercation in which racially inflammatory language was used, but in a non-racially-charged version of the same trial, White jurors were more likely to convict a Black defendant than a White defendant.

Other researchers have reported consistent findings. Thomas and Balmer (2007) reported on an extensive, four-year project in England and Wales that involved juror interviews as well as a mock jury simulation. Among mock juries, they observed no evidence of bias based on defendant race when the trial video depicted an assault as racially-motivated, but defendant race did have a significant impact on White jurors when the assault was not racially-motivated. Cohn, Bucolo, Pride, and Sommers (2009) showed White American college mock jurors a video summary of trial in which a Black defendant was accused of attempted vehicular homicide after a dispute in a parking lot. In both versions of the video, the defendant claimed self-defense and said he was trying to get away from an unruly and threatening mob, but in only one version did he indicate that the crowd's animosity towards him was racially-motivated. Mock jurors were less likely to convict the defendant in the racially-charged scenario, and only in the race-neutral condition did participants' scores on a written measure of old-fashioned racism predict their verdicts.



Although these articles (Cohn et al., 2009; Sommers & Ellsworth, 2001; Thomas & Balmer, 2007) referred to the critical variable as "race salience," in all of them, the actual manipulation was whether or not the alleged incident was racially-charged. That is, none of these studies examined any of the other possible forms of race salience we outlined in our 2000 article, but rather replicated our original study. The only exception to this tendency was a mock jury experiment that examined the impact of race-relevant voir dire questions on participants' subsequent trial judgments (Sommers, 2006). The race-relevant voir dire included items such as "This trial involves an African-American defendant and White victims; how might this affect you?" and "In your opinion, how does the race of a suspect affect the treatment s/he receives from police?" The race-neutral version included no questions related to race. Results indicated that before deliberating, both White and Black mock jurors who were given the race-relevant voir dire were less likely to believe

that the Black defendant was guilty than were mock jurors given the race-neutral voir dire.

In short, whereas subsequently published studies have continued to use the term "race salient," with one exception they have assessed this concept in only one way: by comparing mock jurors' judgments in cases involving racially-charged versus race-neutral incidents. To be even more precise, these studies have compared 1) White mock jurors' judgments of interracial criminal incidents in which the defendant has allegedly acted on racial motivations or in response to the racial motivations of others with 2) White mock jurors' judgments of interracial trials that make no reference to race except in the presentation of defendant and victim demographics.

As such, a few years ago in a review of race and jury decision-making, I characterized the extant literature as follows: "Factors that have been found to increase the likelihood that a Black defendant receives harsher treatment from White jurors than a White defendant include the... absence of racially charged issues at trial" (Sommers, 2007, p. 174, emphasis added). Indeed, in the effort to further clarify what has actually been found in this line of inquiry, I have started referring to the conditions of the Sommers and Ellsworth (2000; 2001) studies as "racially-charged" and "race-neutral" in articles, academic presentations, and court

testimony. This is the actual manipulation examined in the Sommers and Ellsworth (2000; 2001) experiments and almost all subsequent investigations. With the benefit of hindsight, this would have been a more precise, less ambiguous description to use in our original papers, especially given that other investigations of the original "race salience" idea remain possible but as of yet unimplemented.

Misconceptions about "Race Salience"

Conversations with colleagues, students, jurists, and other legal professionals have revealed that many are unaware that the scope of the published conclusions on this matter remains so narrow. Some people seem to believe that several varieties of "race salience" have been investigated, and others have interpreted the idea in ways inconsistent with our original intent. For example, two years ago I served as an expert witness in a pre-trial hearing in a capital murder trial. During this testimony, the judge asked whether research on "race salience" indicated that a jury would be less likely to convict a defendant who shot a police officer while yelling racial epithets than one who committed the same acts without evidence of racial animus. I explained that this was not what the research indicated and, moreover, that the impact of "race-salience" on jury decision-making had not achieved the same high level of convergent validity--across case type, variable definition, and research methodology--as the questions more directly under review at the hearing: the relationship between defendant/victim race and sentencing outcomes in capital trials. More generally, four common misconceptions regarding "race salience" seem to have emerged, each meriting clarification.

Misconception #1: "Race salient" means simply informing mock jurors of the defendant's race. On more than one occasion, a researcher hoping to extend previous findings has, in informal conversation, alluded to plans to examine "race salience" by only identifying the defendant's race to mock jurors in one condition. This is not consistent with the "race salience" idea described by Sommers and Ellsworth (2000; 2001). There were no "race-blind" conditions in these studies: all mock jurors knew the race of the defendant and the victim in all conditions (and knew that they were of different races). Moreover, such a design would be of dubious applicability to real trials, in which the defendant's race is readily apparent.

Similarly, some researchers have proposed to vary race-salience by including written information about a defendant's race in all conditions, but only including a photograph in certain conditions, thereby rendering minority status more obvious. This would literally be a manipulation of the salience of race in the study, but it is not what we meant by the phrase. Again, in retrospect, we might have been wiser to have chosen a different term, but from the very first mention of "race salience" in the abstract of Sommers and Ellsworth (2000, p. 1367), we have used this term to refer to salient "racial issues" at trial, not the salience of race as a general construct.

Misconception #2: White juror bias cannot occur when racial issues are salient at trial. An unfortunate and inaccurate conclusion that some attorneys have drawn from the research is that juror racial bias cannot occur in trials with salient racial issues. In recent years, in two separate cases involving Black defendants, I testified as an expert and was cross-examined by a district attorney whose primary argument was that much of the publicity surrounding the case in question was racially-charged, ergo White juror bias could not have occurred. Of course, published data do not suggest that racial bias only exists when there are no salient racial issues at trial, nor would any responsible scientist offer such a conclusion in press or in court.

Like all behavioral research, the investigation of race and jury decision-making generates probability-based conclusions. That White mock jurors in the Sommers and Ellsworth (2000; 2001) studies did not differentiate between a White and Black defendant when the trial in question was racially-charged does not mean that racial bias never occurs in such trials. Put differently, the conclusion that White jurors are more likely to exhibit racial bias absent salient racial issues at trial no more rules out the possibility of juror bias in

racially-charged cases than the link between smoking and lung cancer rules out the possibility that a non-smoker will develop the disease. Furthermore, in a real trial with an actual defendant sitting in front of them, some jurors may find themselves influenced by stereotypical associations that are not conjured up by written or video trial summaries, suggesting that many mock juror studies may very well underestimate the actual impact of race on jurors. In any case, even if, as experimental research suggests, racial bias is most likely to emerge absent salient racial issues at trial, psychological theory does not suggest that it magically disappears in racially-charged cases.

Misconception #3: Salient racial issues at trial always lead to White juror leniency. It is easy to see how someone could arrive at the conclusion that race salience always translates into leniency towards a Black defendant. In some studies, White mock jurors' conviction rates for a Black defendant have dropped significantly when comparing a race-neutral to racially-charged trial condition (e.g., Cohn et al., 2009; Sommers & Ellsworth, 2001). But it is important to note that in other studies, Whites were no more lenient towards Black defendants in a racially-charged case than in the race-neutral case.

Juror racial bias, however, was affected by this manipulation across studies: In the racially-charged cases White jurors perceived Black and White defendants as equally guilty, but in the race-neutral cases they perceived the Black defendant as guiltier than the White defendant (e.g., Sommers & Ellsworth, 2000, Study 2). In other words, the major conclusion of our previous investigations is that White juror racial bias is less likely to occur when racial issues are salient at trial, not that White jurors are always more lenient towards Black defendants in such circumstances. Juror bias, by definition, requires a comparison point, which is typically the conviction rate for a White defendant in the identical case scenario. Juror leniency and lack of juror racial bias are not the same outcome, however, and our findings focus on the latter, not the former. Therefore, it would not be an accurate reading of the literature to suggest--as did the judge in my capital murder trial example above-- that a Black defendant would be treated more leniently by White mock jurors if it were revealed that he, in the course of allegedly committing a murder, made inflammatory statements indicative of racial animus. Not only does such a prediction carry little intuitive appeal, but it is also inconsistent with previous research.

Indeed, in judging such a racially-charged incident, White mock jurors may very well be appalled by the alleged behavior no matter the defendant's race. However, racial bias--once again defined as different judgments of a White versus Black defendant given identical case facts--should be more likely to occur for a similar murder in which the incident in question is not inherently racially-charged (e.g., a garden-variety murder with no racial motivation). Sometimes salient racial issues at trial simultaneously render a defendant more sympathetic (e.g., Cohn et al., 2009), thereby leading to increased leniency towards a Black defendant as well as a reduction in racial bias. But in other instances the aspects of a case that make race salient also cast a negative light on the defendant (e.g., Sommers & Ellsworth, 2000), leading to a reduction in bias without a corresponding increase in leniency.

Misconception #4: All race-salience manipulations have equal impact. As alluded to above, the method of creating "race salience" is critical in determining the nature of its impact. Whereas introducing evidence that an altercation resulted from racial conflict may serve to make salient mock jurors' concerns about racial bias, doing so may also render the defendant less sympathetic and more likely to be convicted regardless of race, such as when the defendant himself has allegedly made disparaging racial remarks during an altercation. Furthermore, given that most experiments have defined "race-salience" in the same way, we know too little to draw conclusions about the relative impact of factors such as race-relevant pre-trial publicity, voir dire questioning, or attorney arguments.

For example, it may be tempting to conclude that eliminating juror racial bias is as easy as allowing a defense attorney to raise race-related issues during opening and closing arguments. Such a proposition has little to no empirical support, however. As detailed above, there is no reason to believe that salient racial issues at trial preclude the possibility of juror racial bias, and no published studies have directly tested hypotheses such as this one. Cohn et al. (2009) referred to one unpublished study in which a defense attorney's arguments regarding institutional racism led White mock jurors to demonstrate leniency towards a Black defendant (Bucolo, 2007). Depending on the precise nature of such arguments, though, the intentional effort to infuse racial issues into a trial may also be met with resistance or even resentment by White jurors (see Sommers, 2006; Sommers & Norton, 2006). In an aborted study that we never published, we had the defense attorney in a trial summary offer closing arguments that included sweeping allegations of police racism. There was little in the actual facts of the case to support these allegations, and they were completely ineffective in reducing racial bias in White mock jurors. In sum, it is premature to offer conclusions regarding the relative impact of different types of "race salience" when almost all published studies have examined a single instantiation of the concept.

Whither "Race Salience"?

Many unanswered questions regarding these issues await additional empirical investigation. First, although researchers continue to write in general terms about "race salience," in almost every published investigation this variable has been assessed in the same way. If researchers and legal practitioners hope to draw conclusions regarding the effectiveness of courtroom procedures for combating juror racial bias, each procedure must be examined empirically. For example, does race-relevant voir dire render juror racial bias less likely? Only one published experiment addresses this question (Sommers, 2006). This study showed that mock jurors' pre-deliberation judgments became more lenient with race-relevant voir dire, but neither the content of the deliberation nor the jury verdicts were affected; in addition, this study only examined mock jurors' judgments in a case with a Black defendant, making it difficult to draw conclusions regarding effects on juror racial bias. Other hypothesized means of varying "race salience" have not been studied at all.



It is also important to note that so far investigations of race salience have been exclusively mock juror/jury experiments. The applicability of such experiments to what goes on in actual courtrooms is an issue with which psycholegal researchers continually wrestle (e.g., Bornstein, 1999; Kerr & Bray, 1995). Would archival analysis of real case outcomes indicate less influence of a defendant's race in racially-charged trials? Such an analysis would pose numerous challenges, requiring researchers to quantify the degree to which the crime was racially-charged, factor into consideration the racial composition of the jury, and, of course, control for a wide range of potentially confounding variables. But whether through such an analysis or another methodology, the burden remains on researchers to demonstrate that the effects of race salience are not limited to mock juror simulation studies, thus providing the type of convergent validity that renders empirical findings more conclusive and persuasive.

Conclusion

The Sommers and Ellsworth (2000; 2001) articles help reconcile some of the inconsistencies found in the experimental literature on race and jury decision-making, and refute the belief that contemporary juror racial bias is the exclusive province of Black jurors (e.g., Reynolds, 1996; Skolnick & Shaw, 1997). However,

the implications of this research have often been misunderstood or overextended, a fact for which we bear much responsibility. My present objective has been to clarify the nature of our previous findings and to address common misconceptions about what was meant by the term "race salience." Briefly stated, what we know now about this variable is little more than what we knew upon first introducing it almost a decade ago: White mock jurors are more likely to be biased by a defendant's race in cases in which race remains a silent background issue at trial than in cases in which the nature of the trial emphasizes race as an important issue.

Actually, the most accurate description of our findings from 2000 and 2001 does not even require the phrase "race salience," an ambiguous term which we occasionally regret. Rather, our studies indicated that racial bias among White mock jurors was less likely to emerge in trials for racially-charged incidents. A more general examination of "race salience" has not yet been conducted, requiring as it would different means of inducing race salience, converging methodologies, and investigations of underlying process--none of which currently exist in the published literature. These are some of the questions towards which we would steer investigators interested in continuing this line of inquiry.

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We asked three experienced trial consultants to offer their reactions to this article. On the following pages, George Kich, Theresa Zagnoli and Sean Overland offer their thoughts.

George Kich responds to Sam Sommers

George Kitahara Kich, Ph.D. is a trial consultant and partner at Bonora D'Andrea LLC in San Francisco, California. He consults on civil and white collar criminal cases nationwide.

The Gift of Privilege

Professor Sommers evaluates and critiques the usability of research on race salience (whether or not racially-charged factors play a role in juror verdicts) in his short and carefully written article. His paper examines the difficulties of taking interesting and apparently straight-forward research and applying it to the day-to-day realities of criminal trials. He critiques four misconceptions about "race salience" research using examples of erroneous conclusions by judges, attorneys and experts, indicating again that highly-controlled and limited research results, especially about race, must be thoughtfully applied, if at all. Because "social desirability", modern racism, implicit biases and unconscious attitudes all play major roles in people's behaviors and statements about race, it is one of the most difficult areas to accurately assess. Fortunately, he makes several suggestions about the range of "racially-charged" factors that should be studied with jurors that would aid applicability.

A fascinating example of Professor Sommers' expert approach is in this article that describes his own [courtroom consultation](#). We also have a recent example locally in the BART shooting case where there have been mixed evaluations of how race and the jury may affect the verdict: "[Lack of blacks on jury won't aid Mehserle defense, experts say](#)".



When it comes to criminal trials, I have wondered if anyone could honestly say they presume that justice is in fact racially "color-blind." Perhaps the only time "color blind" justice happens is when everyone involved is White, so the antagonisms, stereotypes and prejudices associated with race differentness just do not apply. I ran across an interesting quote from a review of a collection of [essays about race and the jury](#): that "... so-called 'color-blind' justice presupposes the logic and experiences of whites--not blacks...." I thought again about the importance of an often invisible factor in many people's experience: the relative amount of one's social and cultural privilege. I wondered how much these ideas might explain some of what Professor Sommers was trying so carefully to dissect in his current paper. Perhaps the social and cultural privileges that

come with whiteness affect White jurors so that they do not, for instance, have a race-oriented need to protect a White defendant, or to question the Prosecution's story about charges against a defendant who is White. There are no personal experiences, historical reference points or media showing race being an antagonistic or charged variable when everyone is White. However, when a "racially-charged" circumstance comes up, as in a courtroom, they are suddenly on notice, and might then appear to be fairer, as Professor Sommers notes. Jean Moule, an associate professor at Oregon State University, shows [one way where race salience research can be brought right into one's personal life](#), where I believe we all need to start. I appreciate Professor Sommers for his continuing work in trying to parse this very interesting and necessary personal and interpersonal dynamic.

Theresa Zagnoli responds to Sam Sommers

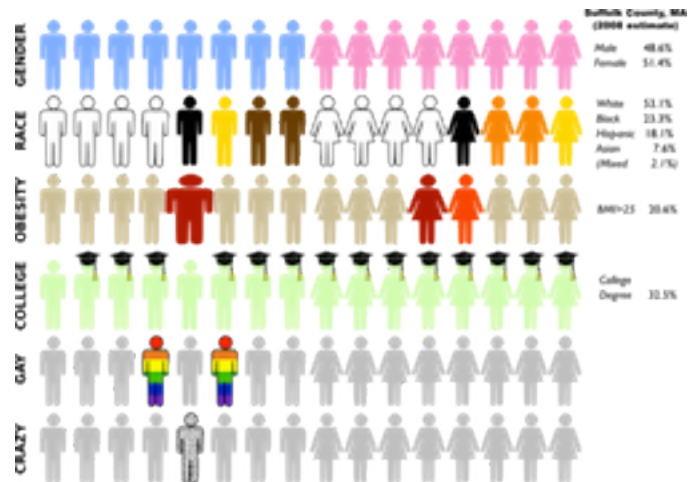
Theresa Zagnoli is a founding partner of Zagnoli McEvoy Foley LLC. She has more than 25 years of experience in trial and communication consulting.

Hats off to Sam Sommers. “What We Do (and Don’t) Know about Race and Jurors” published in The Jury Expert is a solid effort at explaining how his (and others’) research gets misquoted, misused and misinterpreted. Not only did Sam state clearly the boundaries of the research, but he also took some of the blame. That act itself was refreshing enough to make me read on.

I will use the article the next time my client wants to hide the race of a party in a mock trial. I will use this article when a lawyer wants to bring out race issues after the case has already been presented in the form of “additional” information. And, I will use this article in each incident that an attorney believes that seating a jury is as simple as white + white = win or black + black = win or white + black = win. Or, whatever dummed down, misinterpreted, and over-expanded use of this research they can come up with.

I would like to see more research on the *voir dire* issue. As a practitioner, it serves no purpose to know that race-relevant *voir dire* affects pre-deliberation judgments but not verdict. As a researcher, however, it makes the wheels go round.

Dr. Sommers provides us all with some interesting ideas to test in our own research. With an abundance of variables that we cannot control, our findings may not help the bigger question of white jurors’ reactions to black defendants. But, if we pay attention to the idea that there is a relationship between racially charged fact patterns and outcome, and design our studies with such questions in mind, it might provide us with case studies and anecdotal results worth pondering.



"What We Do (and Don't) Know about Race and Jurors": Sean Overland Responds to Samuel Sommers

Sean Overland, PhD is a trial strategy and jury consultant based in Seattle. His company, the Overland Consulting Group, specializes in assisting clients facing complex civil litigation.

I should preface my response to Sommer's new article by admitting that I'm a bit of a Sommers fan. I promised myself that I wouldn't gush too much, but I think his work and his collaborations with Ellsworth are the kind of scholarship one reads and thinks, "Yep, they're on to something here." Their methods are simple and elegant, their results are robust, and their work has important real-world implications. And I'm clearly not alone in my esteem, because their articles are widely cited and, more importantly, have begun to affect the real-world practice of law. But unfortunately, some readers have misunderstood the nature and scope of their findings, so Sommers' new article clarifies their earlier work, explains what it does and does not mean for legal professionals, and seeks to guide future research to better understand how jurors make decisions in racially-charged cases.

One of the biggest misconceptions about Sommers' work centers on the meaning of "race salience." Confusion about the term is understandable, because circumstances that may seem "race salient" to most people are not necessarily what Sommers and Ellsworth are referring to. For example, a criminal trial involving a white victim and a black defendant is not necessarily "race salient" or even "racially-charged" as the terms are used by Sommers. Instead, "race salience" refers to jurors being made aware that racism could affect the jury's decision. Perhaps a more accurate term than "race salient" or "racially-charged" (but certainly a less catchy one) would therefore be "juror racism salient."

In their research, Sommers and Ellsworth found that priming white jurors to think about how racism might affect their decision against a black defendant was the key to altering white jurors' behavior. If white jurors were confronted with the possibility of appearing to violate our race-neutral norms, then white jurors tended to behave differently than they would if the trial was "white washed" and the potential effects of race were ignored. Specifically, when the influence of race was ignored and white jurors' implicit biases and secret mistrusts were allowed to remain under the surface, white jurors were more likely to convict a black defendant than a white defendant for the same crime. However, if jurors were made aware of the potential effects of racism, and the problems of unfair treatment and racial bias were brought to the forefront of jurors' attention, then white jurors' verdicts for the same crimes did not vary by defendant race.



Sommers' latest article is much more than an academic clarification, and has real importance for attorneys and trial consultants. In this article, Sommers re-emphasizes the boundaries of the "race salience" work to date and clarifies some of the practical misconceptions. The key take-away for legal practitioners from Sommers' work should be that making jurors aware of the possible influence of racism on the jury's decision will make white jurors, on average, no more likely to convict a black defendant than a white defendant. However, race salience does not make white jurors more lenient toward any given black defendant, nor does it mean that white jurors' biases disappear completely.

Perhaps the most important caveat for legal practitioners is that we still know relatively little about how best to make racism salient to a jury. Is asking jurors about their racial attitudes during voir dire sufficient? Or must the possibility of racism be re-raised throughout the trial to keep the issue fresh in jurors' minds? But could an attorney overemphasize race salience, thereby alienating white jurors? There is a great deal we still do not know about how, when and why "race salience" works, and Sommers concludes his article with a call for additional research to help us better understand this important phenomenon.

Citation for this article: [*The Jury Expert*](#), 2010, 22(4), 1-12.

Wall Street's reaction to jury verdicts involving publicly-traded litigants

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For most technology, pharmaceutical and healthcare firms, patents and copyrights are the direct result of their research and development efforts and are vital to their revenues. The stock performance of these companies can be directly linked to the quality of their intellectual property portfolio (Dang, Lev, & Darin, 1999). To protect their intellectual property, many of these firms use litigation as means for obtaining licensing revenues or to prevent other competitors from bringing products to market. Defendants in these lawsuits may be enjoined from offering certain products and also pay substantial damages. Accordingly, the outcome of litigation involving important intellectual property may substantially raise or lower publicly-traded companies' revenue prospects and impact their stock prices.

Companies that win or lose other types of litigation may also affect shareholder value. The resolution of antitrust lawsuits potentially alters the market in a particular industry. The outcome of contract disputes may change a firm's prospects, and compensatory and punitive damages awarded in product liability lawsuits could cripple a company. Because of the stakes involved, the investment community reacts considerably to jury verdicts in these bet-the-company cases causing firms' stock prices to soar or plummet.

In this article, we assess the immediate effect of jury verdicts on stock prices. We assessed 35 jury verdicts from January 2005 to June 2010 that impacted the shareholder value of 40 litigants (22 plaintiffs and 18 defendants). In each of these cases, one or more litigants were publicly traded and had a market capitalization of \$200M or more.

Most of the jury verdicts in our research involved patent infringement and validity issues (28 cases). Jury verdicts in three product liability, two contract, one trademark and one copyright case were also included. As a comparison, we also evaluated stock price changes of 27 publicly-traded companies that settled significant litigation during this time frame.

Plaintiff Wins / Defense Losses

Plaintiff Wins

Not surprisingly, the market reacts very positively to plaintiffs who prevail at trial. The average stock price increased +18.9%¹ following the jury verdict for the 18 plaintiffs in our sample. The stock price changes of these litigants ranged from +2.4% to +99.4%.



Defense Losses

For defendants involved in material litigation (15 litigants), the stock performance of these companies declined an average of -21.6% after the verdict was reached, with a range of -6.0% to -67.8%. Although these defendants state their intent to appeal the jury's verdict, the sting of the unfavorable decision and uncertainty of any appellate court ruling tend to keep their stock prices at depressed levels.

For both plaintiffs that won and defendants that lost at trial, smaller companies tended to have greater stock price changes post-verdict. For these companies, the litigation tended to reflect a greater proportion of their current and prospective revenues.

Plaintiff Losses / Defense Wins

Plaintiff Losses

In contrast, the stock prices of the four plaintiffs in our research that lost at trial tend to remain at depressed levels over time, with an average initial decline of -38.3%, with stock price changes ranging from -4.8% to -73.2%. In two of the four cases in our research in which the plaintiffs lost at trial, these litigants' business models were based on deriving revenues through patent licensing. These plaintiffs' stock prices declined substantially after receiving an unfavorable verdict.

Defense Wins

Defendants' best-case scenario is to avoid losing any litigation. In our research, the market did not generally react to most defense wins and we found only two material cases in which the defendants' stock performance increased when they prevailed at trial. The stock prices of these litigants had modest gains of +9.2%. With the threat of an unfavorable ruling lifted pending any appellate reversal, the market may react somewhat favorably to winning at trial. However, for most publicly-traded defendants, winning their cases may prevent stock price losses rather than provide any gains.



Settlement Outcomes

Plaintiff Settlements

On average, plaintiffs that settled had an average closing price of +24.3% after the agreement was announced (20 plaintiffs), with stock price changes ranging from -15.3% to +70.5%. The market reacted favorably to many of these settlements as the terms of the agreement enabled the plaintiffs to successfully protect their intellectual property and/or provided additional revenues. However, for other plaintiffs, the investment community was disappointed by the terms of the settlement and its stock prices declined.

Defense Settlements

The stock price gains of defendants that settled were comparable to plaintiffs, with an average increase of +26.5% following the settlement (seven defendants). The stock price changes of these defendants ranged from +9.6% to +84.8%. In some cases, these gains are misleading as the defendants who settled had had substantial stock price declines after losing at trial and the settlement represented a sliver of good news.

Conclusion

For publicly-traded companies engaged in high-stakes litigation, the market reacts significantly to the outcome of jury trials. Although we screened for litigation that was material to the litigant(s), there may be a self-selection bias as only verdicts that impacted stock prices were analyzed. Nonetheless, in many of these cases, the litigants stock prices changed +/-10%, reflecting, on average, tens of millions of dollars in shareholder value gained or lost based solely on juries' decisions.



When engaged in high-stakes litigation, it is important for counsel to consider how the investment community may react to winning and losing jury trials. The stock prices of companies who win at trial tend to increase, but the shareholder value of plaintiffs that lose can decline substantially, particularly companies that derive most of their revenues from patent licensing. In contrast, the best-case scenario for many defendants is winning at trial and avoiding stock price losses. For defendants who receive unfavorable jury verdicts, their shareholder value may decline considerably, on average more than the corresponding stock price increases of plaintiffs.

Because the sting of a loss is generally experienced more acutely than the satisfaction of any gains (e.g., Kahneman & Tversky, 1979), defendants may be eager to settle their litigation at less-than-favorable terms. In contrast, plaintiffs may look to hold out for more desirable concessions before settling. Many defendants are especially inclined to settle after receiving an unfavorable jury verdict. Defendants in this situation will have much less negotiating

leverage than they had prior to losing at trial. Although the market reaction is positive to such settlements, the stock prices of these defendants tend to be below the prices traded prior to the verdict. The market is generally positive to plaintiffs who settle their litigation at optimal terms. However, if the settlement is below the market's expectations, the plaintiff may have been better off going to trial.

As the market reacts considerably to the outcome of jury trials, plaintiffs and defendants need to conduct pre-trial jury research to determine their case strengths and weaknesses and gauge the likelihood of winning and losing at trial. For both plaintiffs and defendants, this research will help inform whether potential jury verdicts are above or below market expectations and settlement offers. Importantly, jury research and consulting may be invaluable for providing companies engaged in critical litigation with the best opportunity to preserve or enhance shareholder value.

¹ Stock price changes are based on the closing price traded after the verdict was reached. For jury verdicts that were announced after market hours, stock prices were based on the closing price the following day. The stock price change was then determined based on the difference between the closing prices prior to- and post-verdict.

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Citation for this article: [*The Jury Expert*](#), 2010, 22(4), 13-16.



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The Reptile Brain, Mammal Heart and (Sometimes Perplexing) Mind of the Juror: Toward a Triune Trial Strategy

Jill P. Holmquist

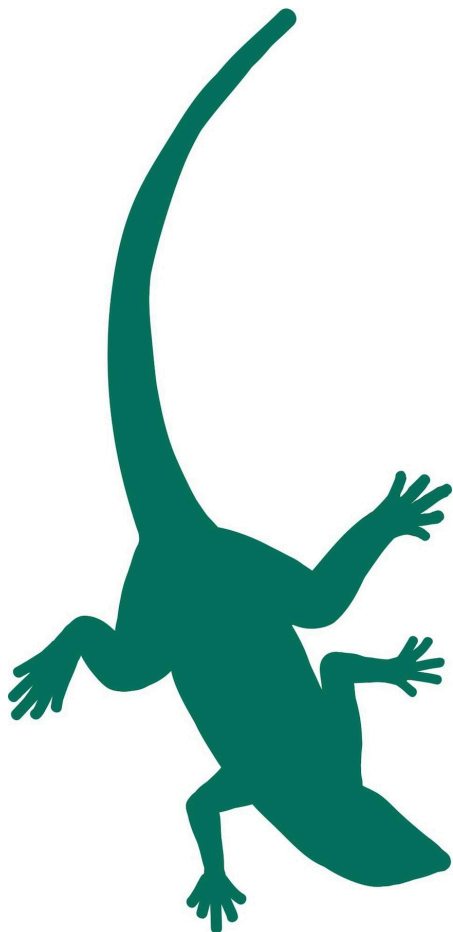
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In our quest to perfect our trial skills and improve outcomes, lawyers and trial consultants have, for at least 30 years, turned to science. Our understanding of it is incomplete and our implementation imperfect, yet we make progress. But sometimes our incomplete knowledge does a disservice, as does the treatment of the triune brain in David Ball and Don Keenan’s *Reptile: The 2009 Manual of The Plaintiff’s Revolution*.

In the Reptile Manual, the authors frame trial strategy in terms of reptilian survival. Why? Because, they say, (a) jurors see you, plaintiffs’ counsel, “as a menace to their survival”;¹ (b) “it is too late to respond with logic alone or even with emotion”;² and, therefore, (c) to prevail, plaintiffs’ attorneys must frame their cases to activate jurors’ reptilian survival mode.³ In Ball and Keenan’s approach, your (the attorney’s) survival is at stake because jurors think you threaten their survival; therefore, you need to show jurors that the defense is the real threat. You need not be in terror mode, but otherwise the reptilian angle is not a bad trial strategy, but it is a one-dimensional strategy.

The Reptile, the authors say, invented, built and runs the brain and abandons emotion and logic when survival is at stake.⁴ Its tools are dopamine and anxiety and terror.⁵ Since emotion and logic are “too late”, counsel must demonstrate the immediate danger of acts like those of defendants because “[w]hen the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.”⁶ The “method and purpose,” the authors say, “is to get jurors to decide on the entirely logical basis of what is just and safe, not what is emotionally moving.”⁷

As a marketing tool, this conception of the Reptile is brilliant (it was, after all, developed by marketing guru Clotaire Rapaille). But for the lawyer who might literally apply the admonition to appeal only to the “logic” of the Reptile, it is folly. Ball and Keenan mention emotions, altruism and hypocrisy, among other



non-reptilian characteristics, but their methodology is expressly based on triggering the reptile's fear reaction. But the reptile is only one aspect of the human brain; to ignore the others, the emotional and reasoning parts, is to ignore what makes us human.

The Three-in-One Brain

"[I]n its evolution, the human brain has developed to its great size while retaining the chemical features and patterns of anatomical organization of the three basic formulations characterized as reptilian, paleomammalian and neomammalian."

-Paul D. MacLean

Dr. Paul D. MacLean, taking an evolutionary approach to neurobiology, proposed that the human brain has three distinct evolutionary parts or layers, which he described as reptilian, paleomammalian and neomammalian.⁸ MacLean began using the term "triune brain" meaning three-in-one [tri=three, one=one] to illustrate that the three parts "intermesh[] and function[] together."⁹ Thus, although they can operate "somewhat independently," they cannot function autonomously.¹⁰

The Primitive Reptilian Brain

The reptile brain, or R-complex, is composed of the most primitive structures of the brain. It regulates the organism's daily routines and its display behaviors (its means of communication), which include territorial and mating displays.¹¹ It contains "[p]rimitive systems related to fear, anger and basic sexuality."¹² MacLean believed it is also involved in the "struggle for power, adherence to routine, 'imitation,' obedience to precedence and deception."¹³ These are innate, instinctual routines and behaviors that enable the organism to survive and procreate.¹⁴

Not surprisingly, automatic fight/flight or freeze reactions to danger are also part of the reptilian brain, although not exclusively. It is this response that Ball and Keenan focus on—the innate fight/flight instinct of the Reptile—that which needs neither emotion nor logic. In extreme cases, it can, indeed, take over the brain. That response to acute stress triggers a shift in blood flow from upper areas of the brain to the body, preparing it for escape. (The opposing reaction is freezing, another adaptive behavior.) Ball and Keenan counsel that contrasting safety with danger, even danger remote in time or probability, will impel the juror to act for her own survival.

However, given that trials differ significantly from the kind of immediate threat that triggers a fight/flight response, it is possible that a different kind of reptilian response could be provoked. Based on MacLean's description, if we only appeal to the Reptile's survival instincts, we could conceivably trigger undesirable responses in jurors. The reptilian brain independently might interpret a lawsuit as a power struggle of no relevance to itself. It might refuse to abandon precedent ("they met federal regulations, why require more?") or see deceptive practices as entirely natural. Instead of activating the fight/flight mode, the Reptile might simply freeze; fighting expends valuable resources better conserved for the self. The Reptile is, after all, first



and foremost interested in survival—for itself and its progeny.

The Emotional Paleomammalian Brain

Man becomes man only by his intelligence, but he is man only by his heart.
-Henri Frederic Ariel

The paleomammalian brain (“paleo” meaning ancient or primitive), also referred to as the limbic system, sits above the rudimentary reptilian brain. Its components are critical to the experience of primary (innate) emotions: fear, anger, happiness, sadness and disgust.¹⁵ Emotion occurs when this part of the brain detects something present or occurring (even before the mind overtly recognizes it) and it triggers both a change in body state and thought process.¹⁶ As that process suggests, the limbic system acts on the reptilian brain just as the reptilian brain acts on the limbic system; they are interdependent—it is not just a one-way relationship as Ball and Keenan suggest.¹⁷ The paleomammalian brain evolved because it helped mammals survive. Therefore, we must reach not just the Reptile but the Old Mammal, as well.

It is important to recognize that both the reptilian and the paleomammalian brains are preverbal and much of their processing is unconscious.¹⁸ We often only gain awareness of that processing indirectly through a behavior or emotion.¹⁹ At least one study has shown that our brains arrive at decisions before we are consciously aware of them.²⁰

Rapaille talks about pre-conscious emotional processing and explains that, because words are only layered over what we experience, we “can’t believe what people say.”²¹ For that reason, he seeks to understand the emotional imprinting that occurs within the limbic system.²² His emphasis on the emotional part of the brain reveals that he subsumes the paleomammalian brain in his use of “Reptile”. (Reptile is, after all, much catchier than “the Old Mammal.”)

We must not underestimate the importance of our emotional paleomammalian brain. It brought sophisticated vocal communication. It enabled learning by linking emotions with experiences and storing them in memory so we could categorize them, which led to the formation of secondary emotions—feelings—that required a larger, more complex brain.²³

In initiating the development of secondary emotions, the paleomammalian brain also gave us the recognition of self and, consequently, the recognition of others’ *selfness*.²⁴ As a result, we developed social consciousness, which, according to the Social Brain Theory, also necessitated a larger, more complex brain.²⁵ Its processes help us understand others’ thoughts and predict their actions. Thus, emotions were critical to the development of the neomammalian brain, the part that gives words to our thoughts and all manner of higher functioning.

With the evolution of the paleomammalian brain came a new hormone, oxytocin.²⁶ It acts as a neurotransmitter and is exclusive to the mammalian brain and it is critical for bonding with our children and with other people.²⁷ It also counteracts the reptilian response to stress.²⁸ In addition, it fosters trust and empathy in men and women.²⁹ Empathy motivates us to act in others’ interests and not solely our own; it is what gives us “heart.”³⁰

The Reasoning Neomammalian Brain

The neomammalian (or new mammalian) brain is the cerebral cortex. It is an amazing learning, problem-solving, and deliberative organ.³¹ It evolved to control instinctive behavior because we must be flexible to deal with our complex and variable environment.³² It is creative and enables us to think abstractly, deal with

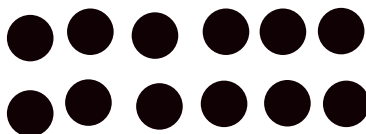
ambiguity and take different perspectives.³³ Together, the caring, emotional paleomammalian brain and the reasoning, elaborative neomammalian brain formulated moral codes.³⁴

Moral codes should not be confused with Rapaille's Culture Codes that Ball and Keenan recommend using. Rapaille defines a "Code" broadly as "the unconscious meaning we apply to any given thing."³⁵ For example, the code for health in the U.S. is "mobility".³⁶ Codes are culture-specific and therefore time-specific. They are, essentially, frames developed from the collective experiences of individuals in specific settings. They are not immutable. Take, for instance, the positive Code for doctor, "Hero." In some cases, doctors share the Code identified for nurses, "Caregiver."³⁷ Jurors who feel doctors "are" Caregivers become angry when they fail to meet up to that standard. Such frames are very useful and provide a reference for framing evidence and judging conduct. Using frames that are culturally accepted is advantageous.

It bears repeating that Rapaille identifies Codes by looking at emotional imprinting—the early emotional associations we acquire with positive experiences.³⁸ We use emotion-linked Codes or frames to make emotional associations with present objects and events. When we anticipate certain behavior and it does not meet our expectations, i.e., it does not fit our frame, we have an emotional response. Yet Ball and Keenan say we do not want to appeal to emotions. To be fair, they do acknowledge that we may evoke jurors' emotions. But their premise—provoking the Reptile to action by exposing risks to its survival—is based on the idea that we do not want jurors to decide on the basis of emotion. Instead, they say, appealing to the evolutionarily important Reptile produces an entirely "logical" self-preserving response.

Their deemphasis of emotions ignores the reality that emotions, both positive and negative, were an evolutionary adaptation of the Reptile brain that *enhanced* survival. Moreover, problems with emotional processing can be *detrimental* to survival.³⁹ Ball and Keenan are not alone in this deemphasis; our cultural emphasis on the rational brain pervades nearly every intellectual field.

Indeed, Courts also tend to neglect emotion; American rules of evidence permit the exclusion of relevant evidence from trial on the basis of "undue prejudice," the "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."⁴⁰ But what of error caused by lack of emotion? Do we ever recognize the potential that the exclusion of emotion-inducing evidence can deprive jurors of the rational emotional information they need? Antonio Damasio would point to Descartes as the source of this error, faulting his statement, "I think, therefore I am." Damasio's point is not merely that I feel, therefore I am. It is that I am, therefore I think.



The (Sometimes Perplexing) Mind of the Juror

Higher-level thinking, the domain of the neomammalian brain, is the pinnacle of human development. Culturally, we have long viewed the cerebral cortex as a fount of transcendent rationality, albeit self-interested rationality, in an irrational world. In that view, the cerebral cortex disengages from emotions and the body (which is largely governed by the reptilian brain).⁴¹

That is one reason the minds of jurors can seem so perplexing to trial lawyers. We have an intellectual misconception of what the mind is. But the conscious mind is the product of the combination of the body and the triune brain—reptilian, paleomammalian and neomammalian. We have been educated to speak to a "rational" brain that does not, in reality, exist. If we speak to jurors as if they have a purely reptilian brain, we make the same mistake.

Summary of the Three Parts of the Brain

	Reptilian Brain	Paleomammalian Brain	Neomammalian Brain
Primary Function	Regulate the body and generate immediate survival reactions	Generate basic emotions and memories and vocal communication	Process information from and direct the rest of the brain, using sophisticated reasoning
Characteristics	Generates the fight / flight and freeze responses, shifting blood flow from the cerebral cortex for fast physical reaction or immediate survival	Gives fear, anger, happiness, sadness and disgust, a sense of self, and bond with and empathy for others	Allows us to learn complex concepts, reason about our experiences and develop a moral framework

The other reason is that our understanding of others’ minds is entirely inferential—and the inferences come from our own subjective description of unconscious thought processes.⁴² To be sure, many of those processes are highly accurate. We have mirror neurons that enable us to understand the intent of others’ actions and the emotions they are experiencing.⁴³ We use heuristics (rules-of-thumb frames) in decision-making with surprisingly accurate results.⁴⁴ But our—and their—processing is largely pre-conscious, shaped in part by life experience, and it is highly influenced by our contemporaneous feelings.⁴⁵ It is difficult enough to try to relate to people under those circumstances; to misunderstand, overlook, or misdirect jurors’ emotions can create an additional impediment, for emotions play an important role in jurors’ appraisal of others’ conduct and in jurors’ decision-making. Therefore, it is important to understand jurors’ neurologically-based moral foundations.

The Three Human Ethics

There are many theories of morality, but just one is based on the evolved triune brain structure. Triune Ethics Theory, developed by Darcia Narvaez, posits that evolution has yielded three ethics, the Ethics of Security, Engagement and Imagination, corresponding to the reptilian, paleomammalian and neomammalian brains, respectively.⁴⁶ Being neurological, these Ethics are immutable; their application may vary, but their essence does not change.

When the Security Ethic is engaged, security needs can trump the other moral perspectives. The reptilian brain’s influence can manifest in maintaining ingroup hierarchy and standards, often through shaming, threat and deception, and following precedent and tradition. Without the influence of the other ethics, “it is prone to ruthlessness and attaining a security goal at any cost,” inflexibility, intolerance of outgroups, and reduced helping behavior towards others.⁴⁷ At its extreme, a reptilian response can lead to “tribalism, rivalry and mob behavior.”⁴⁸

The Ethic of Engagement “is rooted in the mammalian emotional systems that drive us towards intimacy such as play, panic (encompassing sorrow and loneliness from social separation), and care.”⁴⁹ Conformist and submissive behaviors may come from this Ethic because of the need for connection. Unlike the Security Ethic, the Ethic of Engagement is shaped in part by early life experience, particularly nurturance. When the Engagement Ethic is operating, we exhibit empathy and altruism; to engage, we must understand and genuinely care for others.⁵⁰ This may be why this part of the brain is believed to be “a primary force behind moral behavior.”⁵¹

The Ethic of Imagination, like the Ethic of Engagement, is very involved in moral judgment and is also shaped by developmental influences. In dangerous situations, it can problem-solve rather than reflexively

react. It is also outward focused, so it enables us to have a sense of community and a desire to act for the good of others. When engaged, it is the master.

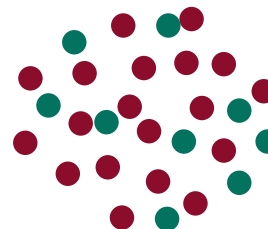
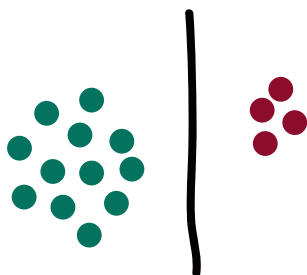
The Ethic of Imagination masters the other Ethics because the neomammalian brain processes the emotions that are generated by the paleomammalian brain and the signals it receives from the reptilian brain. It is the only part of the brain connected to every other distinct part of the brain. It is there that we *integrate* internal and external information and signals from the reptilian and mammalian brains. The prefrontal cortex is also the most involved in the cerebral cortex’s emotion processing. Because the role of the prefrontal cortex in emotional processing is so great, higher level thought is inextricably linked to emotions.⁵²

It has “the ability to countermand instincts and intuitions with ‘free won’t’”—the ability to choose how we react to particular events, which seems to be an exclusively human ability⁵³ It can explain and reframe behavior. Notably, it may do so through the use of narrative.⁵⁴

Higher level thought is only “rational” when it combines our conscious thought with our emotions and all of the unconscious processing that has taken place and can override instinct. We can deliberately reframe our perceptions and reactions. As mentioned earlier, the failure to process emotions properly (or the loss of ability to do so) can produce decidedly irrational behavior.⁵⁵ This is equally true when behavior relates to moral judgments. “[T]o make a good judgment one must feel the meaning of the judgment.”⁵⁶ Therefore, in evolutionary terms, we are “most moral ... when the Ethic of Engagement is linked with the Ethic of Imagination.”⁵⁷

Summary of the Three Ethics

	Security	Engagement	Imagination
Positive Characteristics	In extreme circumstances, overrides other brain systems to preserve the body and, in less extreme circumstances, heightens awareness and vigilance	Promotes intimacy with care, play, and panic (discomfort in social separation); gives us empathy and altruism	Outward focused; generates complex feelings; allows us to make choices about how we react; enables reflective thought, appraisal of conduct, and creative problem-solving
Negative Characteristics	Use of shaming, threat and deception to maintain ingroup standards; intolerance of outgroups, inflexibility, and reduced helping behavior	Submissiveness and conformist tendencies; emotional extremes	Indecisiveness; unnecessary elaboration of and rumination on emotional states





The Triune Trial Strategy

“We are, and then we think,
and we think only inasmuch as we are,
since thinking is indeed caused by the
structures and operations of being.”
-Antonio Damasio

We are at our best operating in both Ethics because our sense of being is combined with the desire to understand others’ being and we are reasoning from the conscious brain that is creative, flexible, abstract, and reflective.

From this moral perspective come the weightiest verdicts. We harshly punish murderers because they’ve deprived another of the ultimate *being*—living. We punish child molesters harshly because they’ve violated the most innocent form of *being*. We award huge damages against people and corporations when they carelessly or callously harm someone’s *being*, whether by death or irreparable damage. (In some cases, the damage is seen as worse than death—suffering in *being* can be torture.) When the violation is perceived as willful, the harm needn’t be great. The violation of another’s *being* is the ultimate moral lapse.

Such violations offend us, then outrage unselfishly, solely for the other. Is there Surely. Does that make our emotional-least.



us, and compel us to right the wrong—an evolutionary benefit to that? rational decision less real? Not in the

However, as we know from personal experience, moral state. Moreover, individuals differ in the each can be predisposed to use one Ethic or another, depending on the situation.⁵⁸

we do not always operate in our highest way they draw on their moral foundations. We

The impact of formative life experiences on mammalian brain development explains some of our predisposition. Situational or affective priming can also affect our predisposition.⁵⁹ We likely have genetic predispositions as well. For example, research has shown that women across cultures tend to be more altruistic and, consistent with the Social Brain Theory, have more gray matter volume in the cerebral cortex than do men.⁶⁰ Similarly, research has shown that in stressful or dangerous situations, women tend to attend to their emotions and behave accordingly (dubbed “tend-and-befriend”) while men tend to attend to visual stimuli and have a greater fight/flight response.⁶¹

Given the multiple bases for our predispositions to use one Ethic or another in varied situations, the best trial strategy is a triune strategy: appealing to all Ethics, all aspects of the triune brain.

A rules-based strategy, such as that recommended by Ball and Keenan, will engage the Security Ethic, which is oriented toward rules and maintaining order. Because rules appeal to the Security Ethic, when we frame

and communicate issues in terms of rules, the danger is neglecting the Engagement and Emotional Ethics, which are critical to making moral judgments.

Rules do not always trigger a “danger” signal. We break rules all the time without dire consequences. Rules are malleable; they are highly situation-dependent, so sometimes they yield to other rules. They are also very susceptible to rationalization. In cases where the likelihood of harm is low, for instance, we may minimize rule breaking. In addition, rules invite comparison of fault because we are all rule-breakers. When delivered without passion, rules are a big yawn. Defense attorneys do not want jurors to be in touch with their emotions. They want your delivery as dry and uninspiring as possible.

A fully developed narrative, with both emotional and rational elements designed to arouse our shared sense of humanity and feelings of empathy and altruism, will inspire the Engagement and Imagination Ethics. This incites a moral response.

Moral judgments motivate jurors and yield weightier verdicts; mere rule-breaking does not rise to that level because the reptilian brain does not care for others. This is why Ball and Keenan’s admonition to appeal only to the Reptile’s safety interest is flawed. Their “harms and losses” approach should appeal to the Engagement and Imagination Ethics, but this requires attorneys to take a more empathic, emotionally-connecting approach than Ball and Keenan advocate.⁶² That is not to say we should disregard the tendency of people who feel endangered to operate out of the Security Ethic.⁶³ We simply need to speak to all three Ethics.

Consider an example: if a manufacturer complies with federal regulations but does not take steps that would protect one person out of 100 million, even though we have a rule that we owe a duty to prevent a foreseeable harmful event, jurors might decide it is economically and practically infeasible for manufacturers to prevent every conceivable danger. But if we frame the argument in terms of the manufacturer’s knowing disregard of the danger because it increases profit, jurors will have a different reaction—the company failed to value human life more than money! We may disagree about how bad a rule violation is, but the violation of the Ethics of Engagement and Imagination is a moral violation.

We do not want to fall into the trap of believing that emotions do not matter. Incorporating emotions and morality requires both procedural and substantive approaches; the structure of the message (narrative and/or rules-based) must match the content of the message (empathic and/or rules-following). These approaches are also relevant to jury selection; plaintiffs will generally fare better at trial with jurors who operate from the Engagement and Imagination Ethics; defense attorneys will generally fare better with people who predominantly come from a Security Ethic. Plaintiffs and defendants in cases where harms are less obvious, where either side could be the violator or the victim, can be more challenging to frame in the Engagement and Imagination Ethics. But that is what we have the Imagination Ethic for.

Interestingly, the distinct characteristics of people operating from the combined Engagement and Imagination Ethics and those of people operating from the Security Ethic correspond well to Jonathan Haidt’s “five psychological foundations” which appear to be evolutionarily based as they are consistent across cultures. They are Harm/Care, Fairness/Reciprocity, Ingroup/Loyalty, Authority/ Respect, and Purity/Sanctity.⁶⁴ These values are a good starting point for designing jury selection questions, especially in personal injury cases. People who are politically liberal tend to prioritize the Harm/ Care and Fairness/ Reciprocity foundations (factors of greater importance in the Engagement and Imagination Ethics) when making moral judgments. The politically conservative (and pro-tort-reform) also value Harm/Care and

Fairness/Reciprocity, but give more consideration to Ingroup/Loyalty, Authority/ Respect, and Purity/ Sanctity (factors of greater importance in the Security Ethic) than do liberals. The more conservative the

decision-maker, the more important the last three factors become.⁶⁵

Not surprisingly, there is some evidence that political attitudes correlate with genetics and with physiological responses to stimuli.⁶⁶ For example, conservatives or “absolutists” tend to have stronger disgust reactions, which arguably relates to the Purity/Sanctity foundation.⁶⁷ They also have greater physiological responses to threats.⁶⁸ In addition, absolutists have more persistent habitual responses, in keeping with the reptilian preference for rules.⁶⁹ Liberals, or “contextualists,” tend to be more open to new experiences and more willing to attend to and resolve conflicting information and moral choices.⁷⁰

When thinking about these differences, the labels absolutist and contextualist are beneficial because they are less prone to stereotype and bias. Contrary to what one might expect, “liberal” and “conservative” genetic traits are not associated with party affiliations; party affiliation appears to be socialized.⁷¹ Therefore, rather than fixating on political affiliations in jury selection, it would be better to consider orientation toward Haidt’s five foundations and Narvaez’s Triune Ethics Theory and formulate questions accordingly. Haidt’s five foundations can help in the development of trial themes, as well. Keep them in mind when doing focus group research so you can identify which moralities people are drawing on in assessing your case. We may need to incorporate a rules-based frame to speak to those who predominantly think in reptilian terms, but, ideally, every juror will gain a moral perspective and motivation. We want all jurors to judge from their highest and best selves.

The Triune Trial Strategy encourages analyzing cases from the perspective of all three brains. In preparation for trial, develop structure and content that appeal to all three of our brains. Gear voir dire toward eliminating people with an Ethic that is less beneficial for your clients. Use your own Ethic of Engagement to connect with jurors and encourage candor. Use that Ethic throughout trial with your client, witnesses, the judge and jurors. But most importantly, prepare your cases imaginatively to meet all jurors’ Ethics. Speak to them as they are.



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³ *Id.* at 18, 30.

⁴ *Id.* at 17-18.

⁵ *Id.* at 25-26.

⁶ *Id.* at 8, 19.

⁷ *Id.* at 39.

⁸ Some have criticized MacLean’s conception of the triune brain as being too simplistic. See, e.g., the discussion by Jaak Panksepp, *Forward: The Maclean Legacy and Some Modern Trends in Emotion Research*, *The Evolutionary Neuroethology of Paul MacLean: Convergences and Frontiers* (2002).

⁹ Paul D. MacLean, *The triune brain in evolution: role in paleocerebral functions* 9 (1973).

¹⁰ *Id.*

¹¹ Id. at 16, 100.

¹² Darcia Narvaez, *Triune ethics: The neurobiological roots of our multiple moralities*, New Ideas in Psychology (2007) [doi:10.1016/j.newideapsych.2007.07.008] retrieved July 4, 2010 from <http://neuroanthropology.net/2009/05/15/triune-ethics-on-neurobiology-and-multiple-moralities/>.

¹³ Id. at 100.

¹⁴ Rapaille essentially conflates the reptilian brain with the paleomammalian brain. Rapaille, *The Culture Code: An Ingenious Way to Understand Why People Around the World Buy and Live as They Do* (2007). However, in an earlier work, he accurately described the triune brain and properly attributed emotion to the paleomammalian brain. Gilbert C. Rapaille, *7 Secrets of Marketing in a Multi-cultural World*, 96 (2001).

¹⁵ Antonio Damasio, *Descartes' Error: Emotion, Reason and the Human Brain*, 149 (1994) (Other scholars have identified other innate or "primary" emotions).

¹⁶ Id. at 131.

¹⁷ Id. at 119.

¹⁸ See, e.g., J.A. Bargh, & T.L. Chartrand, *The unbearable automaticity of being*, 54 *American Psychologist* 462-479 (1999).

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²⁰ Chun Siong Soon, et al., *Unconscious determinants of free decisions in the human brain*, *Nature Neuroscience* (April 13th, 2008).

²¹ Rapaille, *The Culture Code*, *supra* n. 14, at 13-14.

²² Id. at 5.

²³ Damasio, *Descartes' Error*, *supra* n. 15, at 134.

²⁴ See, e.g., Antonio Damasio, *A Neurobiology for Consciousness, Neural Correlates of Consciousness: Empirical and Conceptual Questions*, 111-120, 117 (2000); Yoshiya Moriguchi, et al., *Empathy and Judging Other's Pain: An fMRI Study of Alexithymia*, 17 *Cerebral Cortex* 2223--2234 (2007); and Arnold B. Scheibel, *The Origin and Evolution of Intelligence* 31 (1997) (describing "Theory of Mind.").

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²⁷ See, e.g., R. Hurlemann, et al. *Oxytocin enhances amygdala-dependent, socially reinforced learning and emotional empathy in humans*, 30 *J. Neurosci.*, 4999-5007 (2010); A. Meyer-Lindenberg, *Impact of prosocial neuropeptides on human brain function*, 170 *Progress in Brain Research* 463-70 (2008); P. Kirsch, et al., *Oxytocin modulates neural circuitry for social cognition and fear in humans*, 25 *J Neurosci.* 11489-93 (2005).

²⁸ Narvaez, *Triune ethics*, *supra* n. 12, at 9.

²⁹ James C. Harris, *Social neuroscience, empathy, brain integration, and neurodevelopmental disorders*, 79 *Physiology & Behavior* 525-531 (2003); Paul J. Zak, *Oxytocin Increases Generosity in Humans*, *PLoS ONE* 2(11): e1128. doi:10.1371/journal.pone.0001128, retrieved July 12, 2010 from <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0001128#pone.0001128-Sober2>.

³⁰ See, e.g., Gerald A. Cory, Jr., *Reappraising MacLean's Triune Brain Concept*, *Evolutionary Neuroethology of Paul MacLean: Convergences and Frontiers*, 21 (2002). Although other-serving behaviors contribute to our own self-preservation and perpetuation, that does not render our emotions of love and affection or motivations to help others false or nonexistent. Damasio, *Descartes' Error*, *supra* n. 15, at 125.

³¹ Narvaez, *Triune ethics*, *supra* n. 12, at 10.

³² Damasio, *Descartes' Error*, *supra* n. 15, 124.

³³ Id.

³⁴ Narvaez, *Triune ethics*, *supra* n. 12; Joshua Greene, *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *Science* 2105-2108 (2001).

³⁵ Rapaille, *The Culture Code*, *supra* n. 14, at 5.

³⁶ Ball and Keenan, *Reptile* at 78.

³⁷ *Id.* at 82, 93.

³⁸ *Id.* at 5. It is also worth noting that Rapaille says in sales, relationships are paramount; “Connection is the magic word.” Rapaille, *7 Secrets of Marketing in a Multi-cultural World*, *supra* n. 14, at 25 (emphasis in original).

³⁹ Damasio, *Descartes’ Error*, *supra* n. 15, 53. Damasio discusses a number of cases of patients with brain lesions. Other examples include sociopathology/psychopathology, i.e. the absence of empathy, which has been linked to deficits in the limbic system. R.J. Blair, *The amygdala and ventromedial prefrontal cortex: functional contributions and dysfunction in psychopathy*, 363 *Philos. Trans. R. Soc. Lond. B Biol. Sci.* 2557-2565. 2008. Autism, which is detrimental to individuals, is linked with deficits in the limbic system. James C. Harris, *Social neuroscience, empathy, brain integration, and neurodevelopmental disorders*, *supra* n. 26.

⁴⁰ Federal Rules of Evidence, Rule 403, Notes of Advisory Committee on Rules. Most states have adopted some form of the Federal Rules.

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⁴⁵ Norbert Schwarz, *Warmer and More Social: Recent Developments in Cognitive Social Psychology*, 24 *Annual Review of Sociology* 239-264, 247 (1998).

⁴⁶ Narvaez, *Triune ethics*, *supra* n. 12.

⁴⁷ *Id.* at 5.

⁴⁸ *Id.* at 4.

⁴⁹ *Id.* at 6.

⁵⁰ Ball and Keenan erroneously attribute altruism to the Reptile because of the evolutionary advantage altruism confers. But, again, in doing so, they discount the enormous role emotions have in influencing the mind and behavior. (*Reptile*, at 42.) They also say the Reptile “is about community” because of its self-interest. However neurobiology shows the Reptile is about ingroups and outgroups rather than emotional engagement in “community.” (*Id.* at 27.)

⁵¹ Narvaez, *Triune ethics*, *supra* n. 12 at 10.

⁵² *Id.*

⁵³ *Id.* at 11 (quoting R. Cotterill, *Enchanted looms* (1998)).

⁵⁴ *Id.* at 12.

⁵⁵ Damasio, *Descartes’ Error*, *supra* n. 15, 52-53; Michael Koenigs, et al., *Damage to the prefrontal cortex increases utilitarian moral judgements*, 446 *Nature* 908-911 (2007) [doi: 10.1038/nature05631].

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⁵⁸ *Id.* at 2, 12.

⁵⁹ *Id.* at 13-15.

⁶⁰ Hidenori Yamasue, Sex-Linked Neuroanatomical Basis of Human Altruistic Cooperativeness, 18 *Cerebral Cortex* 2331-2340 (2008) [doi:10.1093/cercor/bhm254] (This may also explain the low frequency of autism in females.)

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⁶⁴ Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 *Science* 998-1002, 1000-1001 (18 May 2007).

⁶⁵ *Id.* at 1000.

⁶⁶ David M. Amodio, et al., *Neurocognitive correlates of liberalism and conservatism*, 10 *Nature Neuroscience* 1246-1247 (2007) [doi:10.1038/nn1979]; Douglas R. Oxley, et al., *Political Attitudes Vary with Physiological Traits*, 321 *Science* 1667-1670 (2008) [doi: 10.1126/science.1157627]; John R. Alford, et al., *Are Political Orientations Genetically Transmitted?* 99 *The American Political Science Review* 153-167 (May 2005).

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⁶⁹ David M. Amodio, et al., *Neurocognitive correlates of liberalism and conservatism*, *supra* n. 67.

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Citation for this article: *The Jury Expert*, 2010, 22(4), 17-28.

Persuading with Probability: The Prosecution of O.J. Simpson

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A litigator who uses probabilistic arguments to his advantage has a powerful and persuasive tool at his disposal. Even an elementary knowledge of probabilistic thinking and knowing when to and when not to employ probabilistic principles can make the difference between convincing a jury of a statement's truth versus allowing them to arrive at their own conclusions independently and often naively. In *People v. Simpson*, Cochran's infamous "If it does not fit, you must acquit," instruction to a naive jury was used with astounding success, and was laden with epistemological determinism. Little did the jury know that Cochran's statement, if it were truly an honorable and fair practice for determining a trial's outcome, would imply that virtually every single case that has ever been tried must result in the acquittal of the accused. Why? Because nothing ever fits, ever. Statistically (read: logically, rationally), all we can conclude is that the probability of the available evidence is rather low given the assumption of innocence - however, it is never zero, it is never statistically impossible. If the probability of the observed evidence is low given the assumption of innocence, the statistical (again, read "logical") decision is to reject the assumption of innocence, and infer guilt. But again, the probability can never be equal to zero. What this means practically is that there is always a chance that an innocent man is found guilty, and that no amount of, or nature of evidence will ever be enough for the observed evidence (or "data") to perfectly disagree with the assumption of innocence. Cochran, of course, did not tell the jury this. He instead ignored probability altogether, and implicitly swayed a suggestible jury on how to arrive at a verdict decision that is so contrary to longstanding and elementary probabilistic principles in statistical decision theory from which the very "reasonable doubt" criteria is housed.

What the Prosecution Should Have Done

The prosecution should have used a probabilistic argument to their advantage by arguing that the probability of the available evidence (e.g., DNA match, etc.) was extremely low if indeed the accused was an innocent man. A simple analogy and instruction to the jury would have done the trick:

To the jury:

"If a coin is assumed fair, meaning that the probability of heads is equal to that of tails on any given flip, then what am I to think of the coin after flipping it one hundred times and getting 100 successive heads? The probability of data like this (i.e., the 100 heads), when assessed statistically, is so low that we end up casting doubt that the coin is fair in the first place. In other words, our witness of a series of flips like this is an extremely rare event if the coin were actually fair. Consequently, we end up rejecting the assumption of "fairness" and conclude instead that the coin is biased."



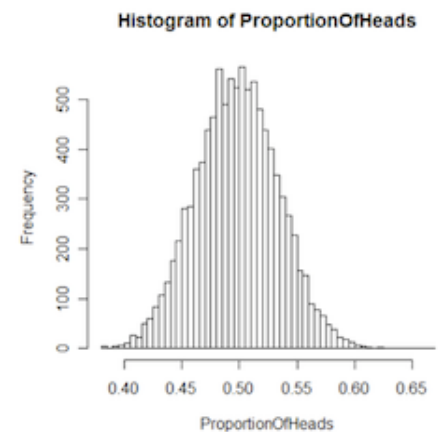
Drawing on the above coin analogy, it would have been so easy for the prosecution to link this type of reasoning to the task of the jury:

"Likewise, if Mr. Simpson is indeed innocent, then the probability of having this kind of surmounting evidence against him (e.g., DNA match, etc.) is astronomically low to be virtually impossible - rationally, rejecting the assumption of innocence is a no-brainer, just as rejecting the assumption that the coin is fair is a no-brainer. In other words, our witness of a series of events as has been presented to the court is an extremely rare event if the accused were actually innocent. Consequently, he must be guilty within a reasonable doubt."

However, the jury was never presented with this type of probabilistic framework, and so they were easily swayed by Cochran's deceptive and deterministic (and logically false) non-probabilistic argument. Had the prosecution encouraged the jurors to think and decide using statistical reasoning, they would have been rationally obligated to convict Mr. Simpson, just as easily as they would have found the coin to be unfair. Teaching the jury a few basic probabilistic principles would have done wonders in instructing them on how they were to decide the verdict.

The Lesson: Probability is Your Ace in Court

The take-home message here is that by either introducing or avoiding probabilistic principles into an argument, a trial lawyer can set the criteria by which a juror will decide. As in the O.J. Simpson case, if probability works against you, one can deliberately deny probabilistic ideas in the verdict instruction as Cochran did, and adopt a more deterministic approach. If, however, probability works for you, then one can easily illustrate using an elementary coin-flip example how it is the jury's job to assess the probability of the available evidence given the assumption under test, that of innocence of the accused. If that probability is quite low, one has a strong statistical argument to conclude the assumption of innocence must be doubted, and hence rejected.



Always present and interpret evidence with a keen awareness of how you are or how you are not using probabilistic reasoning in your argument to a jury. It can make the difference between winning and losing a case.

We asked a trial consultant to respond to this article and Ken Broda-Bahm offers his thoughts below.

Ken Broda-Bahm responds to Persuading with Probability: The Prosecution of O.J. Simpson

Ken Broda-Bahm is a senior litigation consultant with Persuasion Strategies in Denver, Colorado.

Dr. Denis makes the argument that litigators should express arguments more accurately using probabilistic terms. It is hard to argue against the use of greater logical rigor in delivering and interpreting arguments in court. At the same time, however, it is the lawyer's responsibility to understand the reactions to those arguments from a jury that may lack even a basic knowledge of logical probability. The question that I would

like to raise is whether the choice to portray innocence or guilt in explicitly probabilistic terms is at war with either the default human tendencies toward handling probabilities, or the practical demands of advocacy.

Most people are likely to be naive thinkers when it comes to probability. We can understand the general concepts, and we are fine with broad constructs like "more likely," "less likely," and "highly unlikely." Yet, outside of realms of mathematics or coin flips, it seems unlikely that most people would be able to logically quantify chance. To take Dr. Denis' example of the preferred formulation, the prosecutor can say that the evidence against Mr. Simpson is equivalent to a coin hitting heads in 100 out of 100 flips, but is it? Does the courtroom spectacle of Mr. Simpson failing to get the glove onto his hand take that number down to 80? Possibly, 50? Or maybe to 25? If that seems like a square peg trying to fit into a round hole, it is because it is an attempt to apply mathematical rules to a matter of fuzzy human judgment. Jurors want to think about Mr. Simpson as guilty or innocent, and even for those who understand and are willing to apply a "beyond a reasonable doubt" standard, it is unlikely that this standard could ever be put into mathematical terms.

Attempts to quantify the chances of innocence or guilt can come at a cost to the credibility of the advocate. For example, I suspect that no prosecutor would want to stand before a jury and state that the accused is "probably" guilty, or worse yet, to compare their case to a series of coin flips. Invoking the real element of fundamental uncertainty may be logical but it seems unlikely to persuade. To the prosecutor, and to the world-view that the prosecutor invites the jurors into, the accused is guilty, plain and simple. Juries can, should, and often do rely on burden of proof and comparative probability to resolve an impasse created by the two different narratives, but when the advocates themselves on either side make their arguments explicitly probable by invoking burden of proof, it is generally a sign that their case is not going well.



It is likely that Mr. Cochran expressed his argument in definite rather than probable terms simply because it made for a more effective argument that way. If you grant the defense the benefit of the doubt, realizing that is hard for many to do on *People v. Simpson*, Mr. Cochran's argument focused on the single anomalous fact that casts into doubt the entire body of evidence from the prosecution. Rather than expressing it as a degree of doubt introduced by the single fact, it is better and arguably more accurate to express it based on its bottom line: if the killer had smaller hands than Mr. Simpson, then Mr. Simpson is not the killer. We now know that there were many reasons other than possible innocence why the gloves "didn't fit": e.g., shrinkage while in evidence storage (later in the trial, Mr. Simpson tried on a new glove of the same style and it fit perfectly). The fact that the

prosecution failed with this jury to see the failed fitting as a logical ruse shows perhaps that jurors treated the glove less as a logical refutation and more as a metaphor for the many argued facets of the prosecution's case that didn't fit perfectly. Dr. Denis' point that it will never fit perfectly is well taken, but the solution isn't to

treat jurors as machines capable of calculating probability, but to treat them as narrative reasoners who assess the rough comparative likelihood of two different stories.

Daniel Denis responds to Ken Broda-Bahm

In his reply to my article, Ken Broda-Bahm argues that a prosecutor would be at a disadvantage to introduce the concept of probability into a juror's decision-making process. Though he is absolutely correct that most jurors (and judges) have some difficulty with assimilating probabilistic arguments, we do appear to be in agreement that probabilistic thinking *is* in the brainwork of a juror regardless of whether or not he or she is aware of it. What is the "comparative likelihood" task Broda-Bahm alludes to other than a job of assigning probabilities? Further, how likely does a story have to be before I, the juror, send a man to jail? How likely does that same story have to be before I send the same man to death row? It is a question of chance, and one cannot escape probabilistic thinking in arriving at a legal verdict, assuming it be a rational one.

To clarify, I am not arguing that attorneys introduce probability concepts into *every* case, nor am I suggesting that we ask jurors to perform complicated and seemingly trivial academic mathematical computations of real empirical probabilities. Far from it. My point rather is that there are instances where the simple *concept* of probability can be effectively used as a powerful weapon of persuasion and instruction. At minimum, it behooves counsel to be aware of when probability concepts are, or are not put in play by their opponent, so they may counter with greater success.

Mr. Cochran essentially told the jury that if a piece of evidence does not fit *perfectly* into the mental imagery of a guilty man, then regardless of all the other pieces that *do* fit (and fit quite well), the accused must be set free. The suggestible jury was likely unaware that his instruction was pure manipulative nonsense, and the least the prosecution could have done was to anticipate with their own preparatory lesson on how, logically, they were to arrive at a rational verdict. Teaching a jury how to make rational decisions, which necessarily implies the instruction of very basic and elementary probabilistic reasoning, may be a worthwhile investment in your case. If jurors were better educated on how to assess evidence as inputs to a decision, perhaps they would make better ones, instead of basing them on emotional, political, and other heavily biased breeding grounds that are the faithful servants of irrational decision-making.

Citation for this article: [*The Jury Expert*](#), 2010, 22(4), 29-32.

Tattoos, Tolerance, Technology, and TMI: Welcome to the land of the Millennials

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For Baby Boomers, the don't-trust-anyone-over-30 lyrics to "My Generation" by [Pete Townshend](#) of [The Who](#) (1965) bespoke the generation gap. Pete wrote these lyrics at the age of twenty.

*"People try to put us d-down
Just because we get around
Things they do look awful c-c-cold
I hope I die before I get old"* ([Pete Townshend & The Who](#))

But "My Generation" lives on. [Green Day](#) covered it in 1991. [Hillary Duff](#) covered it in 2004. While some of us think no one does it like *The Who*, the lyrics continue to speak to subsequent generations—from punk rockers to a Disney 'tween' star turned crooner.

While it seems impossible it was that long ago when we were inundated with media complaints about Generation X, it has been 20 years since Time Magazine ([1990](#)) published a lengthy descriptive article on the then "new generation". Reading that piece now is a bit of a shock—what we said *then* about Generation X sounds very much like what we say *now* about the Millennials.

Believe it or not, the eldest Millennials are now approaching 30. The literature on this generation (like the nascent literature on Generation X before them) is filled with sweeping generalizations (predominantly negative) rather than a reliance on the data. For Generation X, that negativity in media depictions did not begin to change until Gen X members began to write about themselves and the lens through which we viewed them changed. Thus far, that has not happened for the Millennials. And when it does, the writing may be found in graphic novels, comic books, and websites that are Millennials' primary tools of communication.

We review the generational stereotypes and assumptions (very briefly) and then cover the actual data/evidence that describes the Millennial generation. Then, we examine what the actual data means for Millennials in the jury box.

Who are the Millennials?

Birth years:

While there is some disagreement, the [Pew Research Organization](#) (2010) defines the Millennial Generation as those born since 1980. (Others mark the start of this generation in the late 1970's and end it with those born in 1993 or 1994.) Regardless of quibbles over the beginning and the end of the generational markers—all agree the Millennial generation is similar in size to the Baby Boomer Generation (currently at more than 77 million).

Generational monikers:

As with generations before them—the Millennials have had multiple nicknames as they passed through various life phases/stages. They have been referred to as:



- Generation Y (as they came after X);
- Nexters (they were the 'next' generation);
- Echo Boomers (they are largely the children of the Boomers and will rival if not surpass the size of the Baby Boomer generation);
- iPod Generation (we assume you get this one);
- Generation Why (because they ask so many questions about 'why' things are the way they are);
- Internet Generation (they were the first generation for whom the internet has always existed);

- Generation Me (some see them as narcissistic and entitled, but then again, every generation seems to see teens and 20's that way);
- Boomerang Generation (they keep returning to their parent's homes);
- and 'thumbers' (in reference to their texting skills on handheld devices).

Finally, the Millennial label (in reference to their being the first generation to come of age in the new millennium) stuck (although Generation Y/Gen Y remains a persistent second label).

"They are such narcissists..."

Much emphasis has been placed on the sense of entitlement and increased narcissism some see in the Millennials. [Jean Twenge](#) and [Kali Trzesniewski](#) along with [Brent Donnellan](#) are the most cited dueling researchers in this area. (See [their joint publication](#) in a previous issue of *The Jury Expert*.) Twenge cites evidence that the Millennials (whom she refers to as 'Generation Me') are more narcissistic than previous generations while Trzesniewski and Donnellan beg to differ. Media coverage of Millennials is exceptionally focused on this argument and thus, it is widely believed that Millennial means narcissist.

The statistical arguments of these academics is beyond most of our comprehension. Perhaps the simplest explanation has recently been put forth by a third group of academic researchers:

there have simply not been enough studies done that are truly representative of the US population (Deal, Altman and Rogelberg, 2010).

As you might expect, the studies all have been done on college students. So we simply can neither assume nor conclude that members of the Millennial generation are any more narcissistic than preceding generations. Further, these researchers say there is no real evidence that Millennials are lacking in respect for others nor that they are unwilling to “pay their dues”. (Deal, Altman and Rogelberg, 2010).

Free-wheeling stereotypes and assumptions:

As with most younger generations, much of what we read in both professional publications and in the popular media is based on opinion, anecdotal data and assumptions. In the legal arena, some of us call that bias. Yet, lawyers are as guilty of anyone of perpetuating these stereotypes via presentations, blog posts, and even articles ([The Jury Room, 2010a](#)). Few seem willing to take the time to review the actual data and thus anecdotal observations translate into stereotypes which are freely shared and so biases are perpetuated.

What’s in a Name?

Generational names are the handiwork of popular culture. Some are drawn from a historic event; others from rapid social or demographic change; others from a big turn in the calendar.

The Millennial Generation falls into the third category. The label refers those born after 1980 – the first generation to come of age in the new millennium.

Generation X covers people born from 1965 through 1980. The label long ago overtook the first name affixed to this generation: the Baby Bust. Xers are often depicted as savvy, entrepreneurial loners.

The Baby Boomer label is drawn from the great spike in fertility that began in 1946, right after the end of World War II, and ended almost as abruptly in 1964, around the time the birth control pill went on the market. It’s a classic example of a demography-driven name.

The Silent Generation describes adults born from 1928 through 1945. Children of the Great Depression and World War II, their “Silent” label refers to their conformist and civic instincts. It also makes for a nice contrast with the noisy ways of the anti-establishment Boomers.

The Greatest Generation (those born before 1928) “saved the world” when it was young, in the memorable phrase of Ronald Reagan. It’s the generation that fought and won World War II.

Generational names are works in progress. The zeitgeist changes, and labels that once seemed spot-on fall out of fashion. It’s not clear if the Millennial tag will endure, although a calendar change that comes along only once in a thousand years seems like a pretty secure anchor.

([Pew Research, 2010](#), p. 4)

Here is a brief run-down of what we hear routinely but what is unsupported by the consensus of the data. Millennials are “disloyal, anxious and disrespectful” (Kovarik, 2008). They are self-centered, not motivated, disrespectful and disloyal (Myers and Sadaghiani, 2010). They are a generation of “whiners” (Hershatter and Epstein, 2010). They are illogical, likely to be unwashed and not professional ([Greenfield, 2009](#)). They are narcissistic, self-important and entitled ([Jones, 2010](#)). They are ‘whiny’ losers, ungrateful, insubordinate, and unwilling to ‘pay their dues’ ([Greenfield, 2008](#)).

It goes on and on. In online forums, those who step in to disagree or to defend often are squelched and demeaned. We have all seen this in focus group deliberations, in the media and heard about it happening in the jury deliberation room. Opinion and stereotype bandied about as fact and data.

It seems odd that we allow the perpetuation of such negative stereotypes about generational

affiliation but decry those based on sex, race and religion. It is a long-held truism that there are more differences *within* generations than *between* them. As Deal, Altman and Rogelberg (2010) observe:

Tension between generations is more a result of the combination of lack of data and over-reliance on opinion rather than empirical results. If we shine a light on data rather than relying on ill-informed opinion, the generational conflict and misunderstanding that exist in the workplace would diminish.

(Deal, Altman and Rogelberg, 2010)

Shining a light on the data

Despite the wealth of opinion shared in various media about Millennials, there is only limited information based on actual data. We will share the empirical data in the following pages—organized for clarity into the following categories: early family life; political affiliation; religion; education; employment; diversity/tolerance/values; technology; internet; texting; social networking; and of course, tattoos and piercings.

You will note that our sources are almost entirely from 2008 to 2010. Context is critically important as we review the data. The economic recession has changed things dramatically for all of us, and the Millennials (as the most recent graduates) have been hard hit economically. Data from prior to the economic collapse is no longer accurate or relevant to our understanding of the Millennials, their values and behavior, life experiences, and perspective on their futures.



Early family life:

Millennials had very different childhoods than either the Boomers or Gen X. Only 62% were raised by both parents—compared to 71% for Gen X; 85% for Boomers; and 87% for Silents ([Pew Research, 2010](#)). They also had highly structured and supervised lives (with group sports, camps, lessons) compared to the Gen X experience of being “latchkey kids” (Fernandez, 2009).

They rank parenthood and marriage far above career and financial success but are not racing to the altar—only 21% are married now. This is less than half the rate of their parents’ generation at the same stage in life. Interestingly, they get along well with their parents and they are more likely to be living with family members now (47%) than were either Gen X (43%) or Boomers (39%) at this life stage ([Pew Research, 2010](#)).

Political affiliation:

Millennials are characterized by being both politically and socially liberal. They are more likely than other generations to self-identify as both liberal and Democrat. They are credited with putting Barack Obama in the Oval Office as they chose Obama over McCain 66% to 32% while voters over age 30 divided their votes 50/50 ([Pew Research, 2010](#)).

Religion:

Millennials are the least overtly religious generation in modern American times. Fully one-quarter of them are not affiliated with any religion (a much higher proportion than we saw in older adults at the same age). These religiously unaffiliated Millennials variously describe themselves as atheist, agnostic, or ‘nothing in particular’. They attend fewer religious services but tend to pray about as often as elders did in their youth

([Pew Research, 2010](#)). In short, not being affiliated is exactly that, and may not be anything more than a disinclination to join a religious group. And it doesn't reflect nearly as much about faith, belief, or attitudes about spirituality as it would have in prior generations.

Education:

It was predicted early on that Millennials would likely be the most educated generation in history (Howe and Strauss, 2000). This has not entirely come to pass. While Millennials are entering college in record numbers (more than 50%), they are doing so with a lower level of the general knowledge previous generations possessed (Deal, Altman and Rogelberg, 2010). There are questions as to what educational levels they will ultimately achieve as well as a sense that, even with college degrees, Millennials enter the workforce with 'holes' in their knowledge base.

Currently, female Millennials are achieving more educationally than males—perpetuating a trend that first began with Generation X ([Pew Research, 2010](#)). Millennials also seem to have a 'looser' definition of what constitutes 'cheating' than previous generations. They see standards for what constitutes cheating on tests as

Millennials in the Legal Workplace

Many of you are aware of the firestorm that has been playing out in the legal 'blogosphere' about the work ethic, attitude, narcissism and general childishness of the Millennial attorney.

In the September 2010 issue of *The Jury Expert*, we'll present what the literature actually says about the Millennial work ethic, workplace tensions, management strategies, and the reality of the evolution required each time a new generation enters the workforce.

more stringent than those for homework or written papers ([Science Daily, 2010](#)). As one of our children (who shall remain nameless) explained: "We don't cheat on tests—we just cheat on extra credit!"

Employment:

Full-time employment among Millennials has dropped significantly in the past four years while remaining largely unchanged for older working age adults ([Pew Research, 2010](#)). The unemployment rate for Millennials is close to 20%. They are also the least likely generation to be covered by health insurance. Given their higher rates of obesity, there are concerns about declining health status as they age ([Pew Research, 2010](#)).

While career consultants initially recommended Millennials consider teaching until the economy turned around—now school districts are being decimated by budget cuts. Oddly, despite the economy and their generational employment rate, Millennials

are turning down job offers at the same rate their peers did in 2007 in a much better economy ([Warner, 2010](#)). Millennials want 'fulfilling work' and that seems to mean holding out for a job they feel good about doing (Meister and Willyerd, 2010).

Millennials tended to job-hop prior to the recession but are now staying put for financial security. It is expected they will revert to changing jobs frequently once the recession has passed and they feel financially more secure (Haserot, 2009). However, one-third of them report they do not expect to job-hop when the economy improves ([Pew Research, 2010](#)). This is supported by financial sources reporting Millennials are becoming more fiscally conservative—focused on saving for retirement and employment stability (Fund Action, 2009).

Millennials in the legal profession are particularly hard hit with the expectation that at least 1/3 of graduating law students will not find employment in law firms ([The Jury Room, 2010](#)). According to the Pew Research report on Millennials ([2010](#)), 37% of Millennials are unemployed or out of the workforce. This is the highest share among this age group in more than three decades. Despite the poor economy and job market, Millennials remain upbeat about their own economic futures ([Pew Research, 2010](#)).

Diversity/tolerance/values:

Millennials tend to act on values that Boomers and Gen X only espouse. For instance, it is expected that ‘green’ products will become more important (Gottlieb, 2010). They are more likely to roll up their sleeves and do volunteer work than donate money and they are less brand-loyal than previous generations (Reisenwitz and Iyer, 2009). However, their views of businesses are not substantially different from their elders and unlike older generations, and they think the government should “do more” (Pew Research, 2010). They have grown up with recycling and do it naturally (McKay, 2010). According to the Pew Research report (2010), Millennial males have a lower rate of military service (2%) compared to Gen X (6%), Boomers (13%) and Silents (24%).

They are also the most racially tolerant (by their own report and with the agreement of other generations). They are more accepting of immigration than older generations. More accepting of single moms, gay parents, cohabiting and interracial marriage (Pew Research, 2010). It is important to note that Millennials do not endorse the preceding by a plurality—they are simply more tolerant of them than older generations.

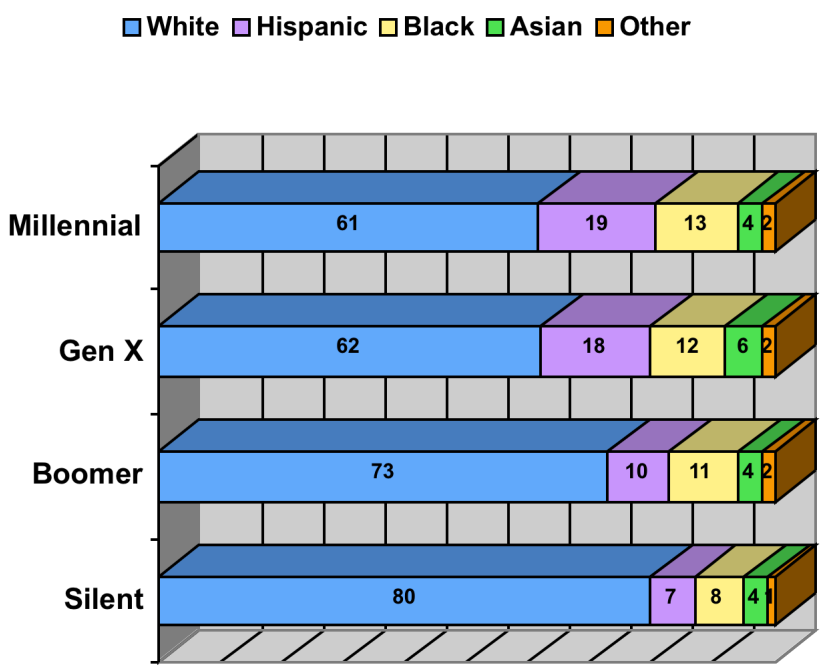
Finally, Millennials have a wary eye on those around them. Two-thirds of them believe “you can’t be too careful” when dealing with people. This tendency, however, has been true of younger generations for at least three decades and is not new with the Millennials. More recently, the trust those 30 and older have in others has dropped and there is a less significant gap between the old and the young when it comes to trust in others (Pew Research, 2010).

Technology:

Technology represents the new “generation gap”. In 1969, when Pew Research asked if there was a major difference in the point of view of younger people and older people today, 74% said there was. This likely doesn’t surprise any of us!

However, in the 2009 survey, 79% endorsed the idea of a ‘generation gap’. This time, the ‘gap’ is defined as comfort with technology rather than a disparity in values. Despite the ‘gap’ being bigger now than it was at the height of the Boomer’s entry into adulthood—there is not the same tension surrounding the differences. Technology has simply been ever-present for the Millennials. They are the first ‘always connected’ generation and their multi-tasking handheld gadgets are almost like an extra body part (Pew Research, 2010). The cell phone/smart phone is a watch, alarm clock, radio, and often television, too. Almost all of them (83%) sleep with their phones at hand, and they are more likely (41%) to rely on a cell phone as their only phone (Pew Research, 2010).

Race/Ethnicity in 2009
(% by generation) Pew Research, 2010



They are “digital natives” while the rest of us are mere “digital immigrants” (Hershatter and Epstein, 2010). Millennials are unique in their use of technology ([Pew Research, 2010](#)) but then so is every generation (Deal, Altman and Rogelberg, 2010). Millennials are early adopters of technology with technology embedded in almost everything they do. They assume technology can be adapted for their needs—because it always has been (Simons, 2010). Their technical sophistication results in a sense that the world is smaller, more diverse and highly networked (Patterson, 2007).

As many positive facets as there are to the Millennials’ facile use of technology, there are some who believe the constant presence of technology has resulted in a change in ‘hard-wiring’ for the Millennials. While they seem more effective in multi-tasking, in their response to visual stimulation and in their filtering of information— some say that they appear less adept in face-to-face interaction and in deciphering non-verbal cues (Hershatter and Epstein, 2010). Some go to the extreme and assert that all this use of technology is “dumbing down” our youngsters and damaging their brains ([Bumiller, 2010](#); [Richtel, 2010](#)). Brain scientists disagree ([Pinker, 2010](#)).

Internet use:

The Millennial’s comfort with technology goes hand in hand with their use of the internet. While Boomers and Silents remain most likely to rely on television news and newspapers—both the Millennials and Generation X tend to use the internet just as much (if not more) for news ([Pew Research, 2010](#)). Millennials are more likely (62%) to connect to the internet wirelessly when not at home or work than are Gen X (48%) or Boomers (35%) or Silents (11%).

There are racial and educational differences in how Millennials use the internet. While 95% of white Millennials are online, only 91% of black Millennials and 73% of Hispanic Millennials are online. This gap narrowed between 2006 and 2008 but Hispanics continue to lag behind. The more education you have, the more likely you are to be both on the internet and on social networking sites—74% of college attendees versus 47% of those not attending college ([Pew Research, 2010](#)). Finally, 1/3 of all entering college freshman have blogs. Millennials live on-line ([Pryor, Hurtado, DeAngelo, Sharkness, Romero, Korn, and Tran, 2008](#)).

Millennial’s internet use results in an almost native ability to quickly gather and research multiple pieces of information. They are able to digest and understand data quickly and thoroughly. However, they seem quite unaware that some sources of information are more valid than others. Thus they are prone to miss nuances in information, miss the problems of response bias, and not evaluate information contextually (Hershatter and Epstein, 2010).

Texting:

According to the Pew Research study ([2010](#)), 88% of Millennials send text messages (compared to 77% of Gen X; 51% of Boomers and 9% of Silents). Younger kids send more texts than older ones. African American kids text even more—among those who texted in the previous day, African American kids sent or got 50 text messages as compared to 20 texts among Caucasian kids.

Texting amongst Millennials is ubiquitous. They do it constantly. They are much more likely to text when driving ([Pew Research, 2010](#)). And Millennials don’t just sleep with their phones (83%)—10% of them think it’s okay to interrupt sex to return a text message ([Rothschild, 2010](#)). Wow! Although to be fair—the same study shows that 6% of those over 25 agree so it isn’t just the Millennials. Focus, people, focus!



Social Networking use:

Social network sites (such as Facebook, Twitter, MySpace) have been present for years and Millennials access them more than other generations. The Pew report ([2010](#)) shows roughly 8% of all adults use Twitter (14% of Millennials; 10% of Gen X; 6% of Boomers; and 1% of Silents).

Three-quarters of the Millennials have profiles on social networking sites but, contrary to common wisdom about Millennial's poor judgment in what they share online, most of them report they have placed privacy boundaries on their profiles ([Pew Research, 2010](#)). They report a deep-seated mistrust of the intentions of social networking sites and an increase in privacy concerns as they attempt to control their on-line reputations. They are more diligent than older adults in controlling access to their profiles, in deleting unwanted posts on their pages and limiting online information about themselves ([Holson, 2010](#)). This may be due in part to the fact that (surprisingly) the Millennials are the generation most hard hit by identity theft. On average, it takes them 132 days to detect fraudulent activity compared to 49 days for older victims ([Tompkins, 2010](#)).

Tattoos and piercings:

No discussion of the Millennial generation would be complete without addressing the topic of tattoos and piercings. We are fascinated by the popularity of tattoos among the Millennials. Almost 4 in 10 (38%) Millennials have tattoos (as compared to 32% of Generation X; 15% of Boomers; and 6% of Silents). Further, about half of those with tattoos have between 2 and 5 tattoos and 18% have 6 or more tattoos ([Pew Research, 2010](#)). There are musings about whether we can assess juror morality by counting tattoos ([The Jury Room, 2010b](#)), whether tattoo location means anything ([The Jury Room, 2009](#)), or if the presence of a tattoo can tell us which way a potential juror is likely to see our case ([The Jury Room, 2010c](#)). [Keene and Handrich confess that having kids in this age group has prompted a wish to understand that goes well beyond intellectual curiosity.]

Oddly enough, there may be some reason to believe there is utility in tattoo observation! While there is no evidence that tattoos are a form of political expression for the Millennials—both political party affiliation and ideology are correlated with having a tattoo!

Among those under age 30, 44% of Democrats (and Independents who lean Democrat) have at least one tattoo. Among those who are Republican (or Independents leaning Republican)—31%.

43% of Millennials self-identifying as liberals have tattoos. Only 12% of self-identified conservative Millennials have tattoos ([Pew Research, 2010](#)).

Alas, 72% of the Millennials say their tattoos are hidden beneath their clothes ([Pew Research, 2010](#)). We doubt most jurisdictions would allow you to ask Millennial age jurors to disrobe. A second intriguing tidbit of information is that Millennials have body piercings at almost 6x the rate of other generations. We have no idea what this means although 1/4 (23%) of the Millennials have a piercing somewhere other than the earlobe ([Pew Research, 2010](#)).

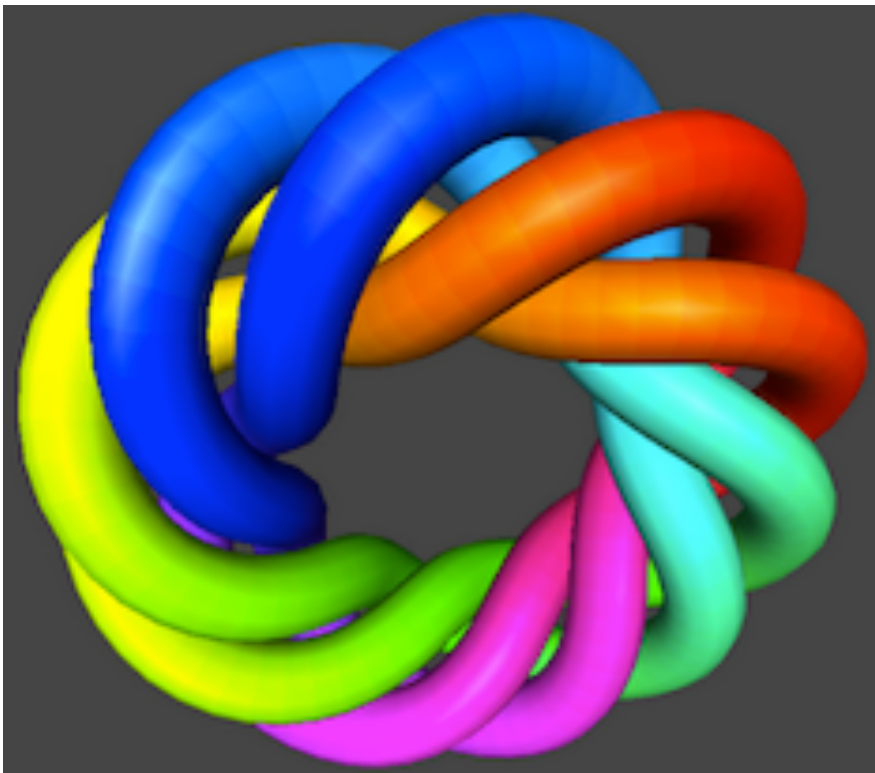


Summary

The Millennials as a group are both the same and different than we have assumed. They are bright and educated, but missing important and basic information. They are racially diverse and tolerant but not all-accepting and inclusive—simply more tolerant than prior generations. They decorate their bodies with piercings and tattoos more than anyone other than their closest friends might realize.

We cannot say if they are more narcissistic or not—there simply hasn't been research we can generalize as of yet. We can safely say that every older generation has said that about every younger generation. We can also say that Millennials are used to speaking their minds (they were not raised to be 'seen but not heard') and their communication style can certainly be less than tactful and diplomatic. They do not have much regard for hierarchy and will "overstep bounds" in the eyes of those who do. They have taken the Boomer admonition to "Question Authority" to new levels. Yet they are used to having activities supervised and clearly defined. They want to be sure they are doing things 'right'. They are sensitive to criticism—perhaps overly so. It is easy to imagine a greater fear of failure (due to a sense of being constantly scrutinized, living in a more fragile world, and being hatched into a difficult economic world) than prior generations.

They value connection (to family, friends, and coworkers). They are much more social than Generation X. They are politically and socially liberal and less traditionally religious than preceding generations. They value education and success but there are questions regarding their general fund of knowledge. They are more obese than prior generations and their health status (as they age) is cause for concern. They are pragmatic and more frugal than we have given them credit for with lower brand loyalty than previous generations (which, understandably is a concern for marketers). They are not very trusting of others (but most of us are not these days). They are "digital natives" and this carries with it both significant skills and deficits in work proficiency. They live and breathe technology and gadgets. They blog, and text and network online. They are young.



Finally, they are also individuals. There is not really a description of "the Millennial" that will help you to 'profile' them as jurors. It is far more reasonable and informed to say that there is a Millennial world view and lifestyle, but the diversity of values, interests, and personalities is as diverse among them as any other group. These are broad brush strokes that describe an aggregation, not individuals. Individual Millennials would fairly disagree with many of the descriptors above as being "not me"! Prior generations did the same thing as descriptions of their generations came out in the aggregate. The attitudes, values and life experiences of individual jurors are more important for you to assess than simply their generational assignment. The generational profile can help you understand how to most effectively communicate with them, but to understand them requires listening, not presuming.

TMI! TMI! Talk about information overload! How do I use this?

Feeling like this is too much information? There are numerous ways litigators can put it to use.

1. Challenge your assumptions and beliefs.

- a. Millennials are not necessarily narcissistic or uninterested in people. They care about making a difference. Don't write them off as jurors when your case is about how others have been harmed (whether through injury, contract breach, patent infringement, or corporate malfeasance).
- b. If you connect with a Millennial juror—who typically feels disrespected by authority—you have a vocal and determined advocate in the jury room.
- c. Not all Millennials are internet wizards. And while Hispanic Millennials lag behind on internet use—they aren't the only ones! Do not assume competence with all things technology.
- d. Tattoos and hair colors not found in nature are signs neither of loose morality nor intellectual failings. Think of them as the bell-bottoms and long hair of the 2000's. They are simply a form of self-expression.

2. Case themes

- a. Millennials led very structured and protected early lives. Themes of how investors/plaintiffs/trainees were not protected, trained or supported may resonate with them. Betrayal of trust is a serious violation. The trial theme trifecta of T-L-C (training, leadership and communication) can be especially powerful.
- b. Connection is important to the Millennials. They value family, friends and coworkers. Case themes that speak to the value of relational connection will likely resonate with them as well.
- c. Tolerance is a strong suit of many of the Millennials. When your case benefits from tolerance of differences—Millennials may be a good bet.
- d. Millennials want 'fulfilling work', not merely a job. They want to 'make a difference'. Themes of 'meaning', 'righting wrongs' and 'fairness' will resonate with them. They are idealists.
- e. Millennials are much more concerned about privacy than we think. Case themes that emphasize privacy violations will resonate with many of them.

3. Considerations for pretrial research and voir dire

- a. **Liberality:** Millennials are politically and socially more liberal than previous generations. This is true even among personally conservative people. Consider how this may (or may not) mesh with your story.
 - i. Consider the odd correlation between tattoos and liberality and political affiliation. If you know what orientation is better for your case and have limited voir dire—tattoos may be a good “Millennial demographic” for you to consider.
- b. **Religiosity:** Millennials are less religiously affiliated than previous generations were at the same age with one-quarter variously describing themselves as atheist, agnostic, or 'nothing in

particular'. This may have implications for your case as well although it is important to bear in mind that Millennials religious affiliation may modify with age.

- i. For more information on atheism at trial, review our article on atheism in the courtroom. ([Keene and Handrich, 2010](#)).
- c. Connecting the dots: Millennials are good at connecting the dots in testimony but not so good at identifying source validity. Help them learn how to determine which source is likely more trustworthy through effective presentation of expert witnesses ([The Jury Room blog, 2010d](#)).
- d. Corporate defendants: Millennials are not much different than prior generations in their attitudes toward business but they have a different (more nuanced, less black and white) attitude toward cheating. They may require a higher standard of proof to find a corporate defendant guilty of wrongful behavior.
- e. Tolerance: Millennials are more racially diverse and more tolerant than previous generations. When “differentness” (religious, racial, ethnic origin, immigrant status, or language spoken) plays a role in your case, the Millennials may serve as the voice of tolerance in deliberations.
- f. 1/3 of all incoming college freshman have blogs. While this is a useful tool for juror research (in terms of identifying attitudes and life experiences), it is also a potential threat to trial confidentiality. Find out who has a blog and monitor them before, during, and perhaps even after trial.

4. Case presentation:

- a. Multimedia: Millennials are used to multi-tasking and want a variety of sensory input. Do not lecture. Use graphic evidence. Be succinct. Be amusing. Incorporate video, graphics, and physical evidence. Keep them engaged.
- b. Remind them about the rules (and explain why the rules are important): Millennials want to do the right thing but their smart-phones are virtual appendages. They are so used to checking facts and learning more via the internet that they will do it without a second thought. They text as they breathe: automatically. Educate, repeat. Educate, repeat. And then, do it again.
 - i. For a thorough review of Jurors and the Internet (including recommendations on jury instructions) see our earlier paper here in *The Jury Expert* ([Keene and Handrich, 2009](#)).

There are certainly additional ways for you to use the research findings we've outlined throughout this article. Our hope is that this summary of the knowledge we have now can replace some of the stereotypes/biases many of us have been unknowingly reinforcing. As we mentioned earlier, we'll look at Millennials in the law firm in the next issue of *The Jury Expert*.

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Citation for this article: *The Jury Expert*, 2010, 22(4), 33-46.



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The Convoluted Spectrum of White Guilt Reactions: A Review of Emerging Literature

Alexis Robinson

Alexis Robinson is a Doctoral student in the Experimental Forensic Psychology Program at John Jay College of Criminal Justice in New York City. Her research interests include jury racial composition, gender dynamics, and memory effects on jury decision making. She presented mock-juror research on race/crime stereotype congruence at the 2008 meeting of the American Psychology-Law Society. She has interned with the consulting firm, Litigation Insights since 2008.

Psychologists define white guilt as the dejection or compunction that Whites feel when they witness a discriminatory act or observe the consequences of a racist act (Steele, 1990). White guilt manifests itself in common settings and every day interpersonal encounters. Feelings of white guilt may arise from the simplest realizations of white privilege to the complicated cognitive processes required by jurors as fact-finders in a civil or criminal trial. White guilt may cause some jurors to empathize with a victim while causing other jurors not to respond to the victim at all. Other jurors may respond to their feelings of white guilt by punishing the victim. Jurors' unpredictable reactions to guilt-inducing circumstances introduce a dangerous gamble for plaintiffs and defendants in civil and criminal cases. Emerging research on white guilt can provide attorneys and consultants with new tools to combat the uncertainty that arises when white guilt turns up in the courtroom.

When white guilt strikes

Whether or not someone will experience a white guilt reaction depends on a number of factors, including the strength of that person's racial identity, the source of the potentially guilt-inducing information, and their group's prior actions to help the victimized group (Doosje, Branscombe, Spears, & Manstead, 2006). The magnitude of the white guilt feelings are affected by the significance of the individual's ingroup or racial identity. Ingroup identity tempers the group-based guilt that an individual will experience because of his or her group's transgressions upon another group. Doosje and colleagues used Dutch students' national identity to manipulate group membership while using Indonesians as the focal outgroup. Dutch students with strong ingroup or national identities were less likely to endorse financial compensation to the oppressed outgroup, Indonesians (Doosje et al., 2006).



Additionally, the source of the derogatory information interacted with the strength of the Dutch students' ingroup identity to affect levels of group-based guilt (Doosje et al., 2006). Dutch students were less likely to evidence feelings of white guilt when an outgroup member described the inequality and maltreatment that the Dutch government perpetrated against the Indonesians. Authors reported a significant interaction between ingroup identification and the source of negative information on the amount of group-based guilt participants reported. Students who had strong national identities experienced more group-based guilt than those with weak national identities only when the negative information came from an ingroup, Dutch source.

However, when the negative information originated from an outgroup source, the students with strong national identities experienced less group-based guilt than students with weak national identities (Doosje et al., 2006).

Finally, information that the group previously apologized or financially compensated the outgroup interacted with the Dutch students' national identity strength to affect their reported amount of group-based guilt (Doosje, 2006). Strong identifiers reported less group-based guilt when they were told that the Dutch government financially compensated the Indonesians than when they were told that the Dutch apologized to the Indonesians. This research demonstrates that group, and maybe even racial, identity can affect the levels of white guilt and the way individuals respond to those feelings of the group-based guilt (Doosje et al., 2006).

The concept of guilt is self-focused; however, white guilt is different from individual personal guilt because white guilt is group-based. Individuals experience white guilt because of their identity as a member of the White racial group (Iyer, Leach, & Crosby, 2006). The self-focused nature of white guilt prompts Whites to alleviate their own feelings of guilt instead of helping the outgroup by fostering racial equality. Alternatively, sympathy focuses on the status and well being of the outgroup. White sympathy motivates whites to improve the minorities' position in society. The focal concept of sympathy examines the minority group's problems as opposed to blaming and punishing Whites for unjust behaviors. Determining whether the individual will respond with white guilt or white sympathy depends on how the racial inequality is framed. For example, an individual is more likely to experience white guilt if a criminal defendant's position poverty-stricken life is framed as a disadvantage to the outgroup (African Americans) as opposed to an ingroup (Whites) advantage. The self-focused measure, belief in white privilege, was a reliable predictor of white guilt. Iyer and colleagues deduced that white guilt was a self-focused emotion because the outgroup-focused measure, belief in discrimination, did not predict white guilt (Iyer et al., 2003).

The emergence and strength of white guilt feelings also depends on an individual's awareness of white privilege, their ideas about the prevalence of racial discrimination, and their own levels of racial prejudice (Swim & Miller, 1999). White guilt will occur more frequently in people who have an awareness of white privilege than those who do not acknowledge that Whites are advantaged in our society. Additionally, Whites who believe that racial discrimination is prevalent are more prone to developing white guilt than Whites who deny that the incidence of racial discrimination is common. Not surprisingly, Whites who score high on measures of prejudice are less likely to report feelings of white guilt than Whites who display low levels of prejudice. Levels of prejudice moderate the amount of guilt a White person will feel after observing or engaging in a racist act, for instance, a racial slur (Swim & Miller, 1999).

Who is most likely to experience white guilt?

Spanierman, Potat, Beer, and Armstrong (2006) performed a cluster analysis on a college student sample to help distinguish the differences between the types of white guilt responses. They discovered five distinct clusters, each with their own specific demographic characteristics and racial attitudes. These typologies may help with predicting an individual juror's response to a racial slur or other racist act that is integral to the trial. The table below describes the similarities and differences between each of the clusters. Spanierman et al. describe Cluster A as "unempathetic and unaware" of minority groups' problems. They have very little education about multicultural issues, most of their friends are White, and they experience very little guilt about the inequalities between Blacks and Whites. Cluster B is comprised of persons who are "empathetic but unaccountable" when it comes to minority groups' problems. They have some multicultural education, they are not afraid of Blacks, and most of their friends are minorities. Cluster C members, "informed empathy and guilt", have the greatest amount of multicultural education, are strong

supporters of affirmative action programs, and most of their friends are racial minorities. Cluster D is the "fearful guilt" Whites. Most of their friends are white, they are highly afraid of people who are not white, and they experience a lot of white guilt because of racial inequalities. Spanierman et al. describes Cluster E as "insensitive and afraid". Cluster E members report little to no exposure to minority groups, little support for affirmative action programs, most of their friends are White, and they are highly afraid of non-White individuals (Spanierman et al., 2006).

Spanierman, et al., (2006)	Cluster A: Unempathic & Unaware	Cluster B: Empathic but Unaccountable	Cluster C: Informed Empathy & Guilt	Cluster D: Fearful Guilt	Cluster E: Insensitive & Afraid
Experience with multicultural education	Low prevalence of multicultural education	Some multicultural education	Highest prevalence of multicultural education	Some multicultural education	Low prevalence of multicultural education
Exposure to minorities	Normal distribution of exposure	Normal distribution of exposure	Skewed toward moderate exposure	Skewed toward moderate exposure	None to small amount of exposure
Support for Affirmative Action	Normal distribution of support	Normal distribution of support	Skewed toward high support	Centered around the mean	Skewed toward low support
Political Affiliations			51% Democrat, 19% Republican, 13% Independent	More likely Democrat	47% Republican, 27% none/other, 20% Democrat
Racial Attitudes			Greatest level of racial awareness & cultural sensitivity		Highest prevalence of blatant racial issues
Friends	75% of friends are White	75% of friends are minorities	75% of friends are minorities	75% of friends are White	75% of friends are White
Gender Differences	Highest proportion of the men (29%)	Highest proportion of men (28%)	Contained the most women & the least men. Comprised of more than 75% women	Comprised of more than 75% women	Gender balanced
White Guilt Types	Low white guilt	Low white guilt	Highest white guilt	High white guilt	Low white guilt
Fear of Non-Whites	Moderate fear	Low fear	Low fear	High fear	High fear
Empathy	Low empathy	High empathy	High empathy	Moderate empathy	Low empathy

Reactions to racial slurs

Racial slurs are an effective way of making white guilt salient (Kawakami, Dunn, Karmali, & Dovidio, 2009). However, research on racial slurs indicates that Whites' responses to those blatant acts of racism can vary (Devine & Monteith, 1993). Even low prejudiced people maintain some racial prejudices, and when asked to provide a hypothetical response to an incident involving a racial slur, they have time to consider the correct response (Devine & Monteith, 1993). However, when presented with an actual opportunity to react to a racial slur, the person has less time to overcome their prejudices before they must respond to the act. When asked to predict how they would respond to witnessing a racial slur, individuals overestimated the amount of personal distress they would feel; they also overpredicted their actions in response to a racial slur (Kawakami et al., 2009). Kawakami and colleagues (2009) had participants either read about an encounter

where someone mentions a racial slur, or where they experience an encounter where research confederates say a racial slur in the presence of the White participant.

Kawakami, Dunn, Karmali, and Dovidio (2009) predicted that this hastened real-time reaction in a real-life encounter would prevent participants from discouraging the confederate's prejudice. When participants read about the "moderately racist" and "extremely racist" comments, they reported more personal distress than the participants who read a similar story without racist comments did. However, when placed in an actual setting, participants reported the same low amount of personal distress across all conditions. Surprisingly, participants were more likely to pick the White partner in the racist comment conditions (63%) than in the no comment condition (53%) (Kawakami et al., 2009). Whites cannot predict, with a satisfactory degree of accuracy, how they will react to hearing a racial slur.

In the courtroom, jurors' reactions to a racial slur can reduce the effects of their racist attitudes. Cohn, Bucolo, Pride, and Sommers (2009) examined whether making race salient by adding racial slurs in defense witness testimony could reduce the likelihood of conviction for a black defendant in an attempted vehicular homicide case. Participants who viewed videotaped testimony that witnesses yelled racial slurs at the defendant were less likely to find him guilty than participants who did not hear testimony about the racial slurs. Cohn and colleagues discovered an interaction between participants' scores on the Old-Fashioned Racism Scale and race salience on verdict. Individuals who scored high on the racism scale were more likely to acquit the defendant if they heard the testimony about the racial slurs than if they heard testimony that did not mention racial slurs. Authors believed that hearing racial slurs would remind jurors that their verdict could be interpreted as racist, which would in turn prompt the juror to decide the case fairly. Cohn and colleagues speculate as to why racist peoples' verdicts are affected by racial slurs but they have overlooked the role of white guilt in the conviction rates of defendants in racial slurs cases.

Reactions to white guilt feelings

Jurors' reactions to racial slurs are unpredictable because of the effects of other unidentified variables. Swim and Miller (1999) found that the degree to which one is racially prejudiced moderates the relationship between hearing a racial slur and experiencing white guilt. Low prejudiced persons are more likely to experience white guilt after hearing a racial slur than high prejudiced individuals are. After controlling for political affiliation and other demographic variables, level of racial prejudice and white guilt predicted participants' support of affirmative action programs. A mediational relationship was also predicted, such that white guilt will mediate the relationship between beliefs in white privilege and endorsement of affirmative action programs. Individuals who are aware of white privilege and experience high levels of white guilt are more likely to approve programs that help African Americans. (Swim & Miller, 1999).

No longer simple white guilt

Because of their awareness of racial discrimination, Whites experience affective, cognitive, and behavioral effects (Spanierman & Heppner, 2004). Whites experience a range of emotions in response to their awareness of racism. Researchers classified these emotions into one of three distinct categories: white guilt, white empathy, and white fear. They may be anxious or fearful that non-Whites will take their job or status in society. Whites may feel angry, sad, or helpless when they realize the how deeply racism is ingrained in our culture. Some Whites may also respond with apathy to racist acts (Spanierman & Heppner, 2004). In addition to white guilt, empathy, and fear, Whites may develop white shame as another affective response to racism (Harvey & Oswald, 2000). White shame differs from white guilt in the degree to which the self is the focus of the condemnation. White shame is self-focused while white guilt focuses on the specific actions or inactions that caused the negative feelings. There is a positive relationship between guilt and empathy

such that persons who experience more guilt over an action or inaction are more likely to empathize with the victim than persons who do not have feelings of guilt, while shame relates to feelings of "hostility" toward the victim. Individuals will respond with either egoistic or altruistic motivation to alleviate their feelings of guilt and shame. Egoistic motivation provokes the person that is experiencing the guilt or shame to fix the situation so that they may feel better about themselves. Alternatively, altruistic motivation aims to help others without any concern for personal gain (Harvey & Oswald, 2000).

Although altruistic motivation is ideal for a juror's response to a racist act in the courtroom, White jurors who can empathize with the victim of a racist act are more likely to try to help the victim than white jurors who do not empathize (Harvey & Oswald, 2000). Harvey and Oswald (2000) manipulated White participants' feelings of guilt by exposing them to a notorious civil rights video that depicted police dogs attacking African American protesters. Participants' responses on guilt and shame measures confirmed that there is a stronger relationship between white guilt and personal distress than there is between white guilt and empathy for the victim. For participants, the civil rights video induced personal distress; however, the opportunity to self-affirm after viewing the video alleviated the participants' distress. Participants who were able to self-affirm, by listing their own positive attributes after viewing a white guilt inducing civil rights video, were more likely to support affirmative action programs than participants who did not receive the opportunity to self-affirm. Following, in the courtroom, a juror may be more likely to act prosocially toward the victim of the racist act if the juror is given the opportunity to make self-affirming positive statements (Harvey & Oswald, 2000).

Current research informs us of the spectrum nature of white guilt attitudes and the intricate circumstances that can provoke or suppress white guilt reactions. In the courtroom, attorneys and consultants must discern which type of white guilt reactions that jurors will have in response to their client or to a witness. Framing the inequality as a disadvantage for African Americans can help to alleviate the guilt that White jurors feel.

Additionally, encouraging potential jurors to self-affirm during the voir dire process can prevent White jurors from feeling shame and from subsequently punishing the victim. Contemporary research may inform us on how white guilt can manifest itself within and outside of the courtroom, but additional research is necessary to investigate the provoking nature of racial slurs and other blatantly racist acts on the spectrum of white guilt that jurors will exhibit in race-salient trials.

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We asked three experienced trial consultants to consider this literature review and respond to further the applicability to the courtroom. On the following pages, Andy Sheldon, Alison Bennett and Beth Foley offer their perspectives.

The Convoluted Spectrum of White Guilt Reactions

Response by Andrew Sheldon

Andrew Sheldon, JD, PhD (Andy@SheldonSinrich.com) began trial consulting in 1984 after careers as a lawyer and as a psychotherapist. His involvement in the retrials of 8 civil rights murder trials led to his continued study of racial issues in litigation of all kinds.

Ms. Robinson has done us a great favor by reviewing the panoply of White People's reactions to racial discrimination. She has also tried to apply some of the research results to the courtroom. She may have succeeded. As with all social science research, only the practical application of these categories in the courtroom will tell us how useful they are. In the meantime, Ms. Robinson has helped us think about the variety of ways we respond to racially motivated bad acts.

We all know that there are problems with trying to estimate the scope and depth of a person's racial attitudes and feelings. Heck, some of us are not even aware we have any racial attitudes; others of us swear we could

never be biased. With a juror who is not aware of any real racial prejudice in themselves, we should not expect their responses in voir dire to be helpful. "Biased against Blacks? Me? Not me. Sure I can be fair."

Moving beyond outright denial of racial prejudice, however, is the fertile ground for this review of literature. Although we are probably much more likely to have dealt with the total absence of any voir dire that deals with racial attitudes in the jury pool and with situations where race, while clearly an issue in the case, is never discussed, what happens, for instance, if you run into a juror who says, "Yes, I do feel guilty about slavery," or less directly, "I think its shameful the way some people hate others because of their race or skin color"? What do we know about how those attitudes affect juror decision-making?

The helpfulness of this literature review is that it highlights some ways that we can evaluate a potential juror's racial bias by giving us a White Guilt Scale, for want of a better term. The scale (let's call it White Guilt Scale A) includes these measures:

1. Ingroup identity
2. Source of juror's information about the outgroup
3. The ingroup's history of helping behaviors toward the outgroup
4. Awareness of white privilege
5. Personal estimate of prevalence of racial discrimination
6. Personal level of racial prejudice

These six categories suggest some good sources of questions for a supplemental juror questionnaire when we are trying to ferret out the role of racial bias. For example, we have asked potential jurors to respond to this statement to explore number 5, above: "Racial violence is not really a problem in this community any longer."

But it gets better (for trial consultants looking for ways to evaluate racism in a juror) when we see the next scale by Spanierman, et al (White Guilt Scale B). It contains these items:

1. Experience with multicultural education
2. Exposure to minorities
3. Support for affirmative action
4. Political affiliations
5. Racial attitudes
6. Friends who are minorities
7. Gender
8. White guilt (folded in as one component of this matrix)
9. Fear of non-whites

The most interesting aspect of Scale B is that the authors of the study use multiple factors to arrive at an estimate of racism in a scale from "Unsympathetic and Unaware" to "Informed Empathy and Guilt." This scale is full of possibilities. It contains simple demographics (e.g., Political party, gender) and it contains subjective items (e.g., fear of non-whites). If one were looking to reduce the number of very racist people in a jury, here are three groups of people (clusters A, B and E) that emerge as a starting point for that evaluation. Without digging further into the strength of the correlations in the Spanierman, et al, study, or its overall validity, still it offers a reasonable cognitive grid for evaluating juror attitudes.

I recall a criminal case in which an African American woman was accused of murdering her ex-husband, also African American. Her defense was that her violence against the man was justifiable because she suffered from Battered Woman Syndrome. The jury agreed and acquitted her. Part of the jury selection dynamic

involved attempting to spot jurors who would not bring their negative racial stereotypes to bear in judging her motivations. Would Whites believe that Blacks allowed more spousal violence to exist in their relationships? Would Black women think that sisters got what sister's deserved? Who would want to "rescue" the defendant, a Black woman who was a victim, and who would want to punish the defendant because she had murdered a man who was The Victim?

Clearly, negative gender stereotypes were inextricably interwoven with racial issues in the case but how helpful it would be to have a matrix like those discussed by this author to facilitate our thinking about the role of race in juror decision-making.



Response to The Convoluted Spectrum of White Guilt Reactions: A Review of Emerging Literature

by Alison K. Bennett

Alison K. Bennett, M.S., a Senior Litigation Consultant with [Bloom Strategic Consulting](#), has accumulated extensive nationwide jury research and litigation consulting experience. Ms. Bennett specializes in jury research in the form of mock trials and focus groups, witness communication training, and jury selection.

In my opinion, the most intriguing concept in this article is the difference between the concepts of "White guilt" and "White shame," and how that difference might play out in the courtroom. According to the author, "there is a positive relationship between guilt and empathy such that, persons who experience more guilt over an action or inaction, are more likely to empathize with the victim than persons who do not have feelings of guilt, while shame is related to feelings of 'hostility' toward the victim." Despite the author's contention that the "jurors' unpredictable reactions to the guilt-inducing circumstances introduce a dangerous gamble for plaintiffs and defendants in civil and criminal cases," it appears as if it can be beneficial to seat jurors with "White guilt," while the risky gamble is more confined to seating a potentially punitive juror filled with "White shame." With this in mind, it would be helpful to have more information on how to identify the "White shame" juror, although watching each juror's response to the voir dire questions may provide some clues. Jurors who become uncomfortable during questioning about racial bias could be classified as those more prone to "White guilt," while jurors with an uncomfortable and angry affect are perhaps those more likely to be affected by "White shame."

While I am skeptical about whether or not a juror's "White guilt" or "White shame" can be successfully addressed in the courtroom by either "framing the inequality as a disadvantage for African Americans...to

alleviate the guilt" or "encouraging potential jurors to self-affirm during the voir dire process (to) prevent White jurors from feeling shame and, subsequently, punishing the victim," I think consideration of the "White guilt" hypothesis could be a useful tool during jury selection.

For example, the author wrote "belief in discrimination did not predict 'White guilt,'" so a juror's simple acknowledgement of discrimination would not likely be helpful. However, since "White guilt" occurs more frequently in people who have an awareness of "White privilege" than those who do not acknowledge that Whites are advantaged in society, using the voir dire process to identify jurors with an awareness of "White privilege" could be useful. Additionally, since, as the author notes, those who believe racial discrimination is prevalent are more prone to developing "White guilt" than Whites who deny that the incidence of racial discrimination is common, it would be helpful to identify jurors with this belief as well.



Finally, the author cites studies suggesting juror reactions to a racial slur can reduce the effects of racist attitudes. The author cited studies theorizing that hearing a racial slur "would remind jurors that their verdict could be interpreted as racist, which would in turn prompt the juror to decide the case fairly." This may be true, but there may be an easier way to reach the same benefit without emphasizing evidence of racial slurs and betting on a juror's reaction.

We know that most jurors take jury duty very seriously and are personally invested in rendering a just verdict. Additionally, social psychology teaches us that jury deliberations are a living example of social group dynamics, where peer relations play an important role throughout the process. Since most jurors, as peers, are concerned with their social presentation and their ability to persuade others in the group, jurors filled with racial bias will typically go out of their way to avoid the appearance of bias in order to preserve their standing and the respect of their peers in the jury. As a result, psychological group dynamics in the courtroom can trump an individual's bias - such as a racial bias - in the jury decision-making process if addressed proactively. Thus, if jurors are made aware of racial bias issues during voir dire, they may seek to level the playing field and avoid the appearance of impartiality by sympathizing more with the disrespected plaintiff or defendant, as many of the studies cited in this article indicated. Therefore, raising awareness of potential racial bias and the role racism plays in the facts of the case might be sufficient to condition jurors affected by "White guilt" or "White shame" to sympathize with the plaintiff or defendant and avoid making decisions tainted by racial bias.

Response to The Convoluted Spectrum of White Guilt Reactions

by **Beth Foley**

Elizabeth Foley is a founding partner of Zagnoli McEvoy Foley, LLC with more than 18 years of experience in trial consulting and studying and teaching communication.

This Convoluted Spectrum of White Guilt Reactions is an interesting analysis of things I have observed in mock jury research, and in actual juries, over the years. I appreciate this article bringing me a new vocabulary and the clusters to distinguish degrees of white guilt.

The cases where white guilt has been most apparent to me involve civil trials in large urban venues: Defendants who work in the legal arena and have a high level of authority and African American plaintiffs who sue the authority figures for personal injury and wrongful death. My approach to managing white guilt in these highly charged cases is to focus on the jury dynamics and how the jurors will likely react to each other during deliberations. In other words, any one juror's profile is less important to me than the interaction of the jurors, for precisely the reasons the authors describe.

In all cases, the trial story and the evidence are critical, but jury dynamics play an equally important role in decision making. For example, if there are white jurors who fit into clusters C, D & E (Informed and aware of inequities, most of their friends are white, and fearful of people who are not white) and there is an articulate, persuasive African American juror(s) advocating for the plaintiff, there is a high probability the plaintiff will win liability and receive significant damages. Even if the defendant is African American.

In this dynamic, it is typical to see the African American juror(s) educate and enlighten the white jurors about the long history of racism in the country and the venue.. This education process goes on all the time during mock deliberations, but what is interesting is the detailed personal examples many African Americans can offer to argue their position. These examples usually include references to racial slurs and instances of financial inequities. In effect, the deliberation itself is triggering white guilt, regardless of the case facts or how an individual white juror felt coming into deliberations.

White jurors in categories C, D and E react in many different ways, but in general they acquiesce to the African American juror(s) when race is the topic. What happens is the white jurors do whatever they can to ease their guilt, discomfort or fear of confrontation. The white jurors display both egotistic motivation to stop their own guilt and altruistic motivation when they award large damages to the plaintiff(s).

It's a combination of degree of white guilt and a juror's leadership ability that has driven verdicts in these types of cases. A different jury dynamic where, for example, a strong, articulate African American juror advocating for the plaintiff and white jurors in Cluster A or B advocating for the defense might end in a hung jury.

For all these reasons, I keep my eye on the jury composition and dynamics when recommending who my client should strike.

Citation for this article: [*The Jury Expert*](#), 2010, 22(4), 47-56.



Presumed Prejudice, Actual Prejudice, No Prejudice: Skilling v. U.S.

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Introduction

The U.S. Supreme Court recently decided *Skilling v. U.S.*, a 110-page opinion written by Justice Ginsberg.² As some may recall, the case stemmed from the 2001 bankruptcy and ultimate collapse of Enron Corporation. At the time, it was the largest bankruptcy in the history of the United States. Jeffrey Skilling, the former CEO of Enron, was convicted in federal district court in Houston, Texas (where the former headquarters of Enron was located) of 19 fraud-related criminal counts; however, he was acquitted on nine other counts. He was sentenced to 292 months of imprisonment.

In *Skilling*, the two main arguments before the Supreme Court were: (a) did the pretrial publicity associated with defendant's trial prevent him from receiving a fair trial; and (b) is the Honest Services doctrine found in 18 USC §§1343 and 1346 (Mail/Wire Fraud) unconstitutionally vague? With respect to the first question, which is the focus of this article, the Supreme Court held that the defendant "did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him." As to the second question, the Supreme Court redefined the Honest Services doctrine to include only bribery and kickbacks. This resulted in the case being remanded to the 5th Circuit Court of Appeals for further review.

Initial Trial and Appeal

The pre-trial publicity issue was first raised in November 2004 when the defendant, prior to the start of his trial, requested a change of venue arguing that "hostility toward him in Houston, coupled with extensive pretrial publicity, had poisoned potential jurors." As part of his change of venue motion, the defendant submitted, "hundreds of news reports detailing Enron's downfall, as well as affidavits from experts he engaged portraying community attitudes in Houston in comparison to other potential venues." The trial judge denied the motion finding that the pretrial publicity was insufficient to create a presumption that the defendant would not receive a fair trial. The judge noted that the media coverage "had been objective and unemotional, and the facts of the case were neither heinous nor sensational." Moreover the judge asserted, "effective voir dire would detect juror bias."



The 5th Circuit Court of Appeals, which heard the defendant's appeal, partially agreed with the defendant and found a presumption of juror prejudice based on: (a) the negative media coverage; (b) co-defendant's guilty plea; and (c) large number of victims in the greater Houston area. The 5th Circuit, however, did not

overrule the trial court because it found that the presumption of jury prejudice had been rebutted by the jury selection process. Specifically, the 5th Circuit held that "the volume and negative tone of media coverage generated by Enron's collapse created a presumption of juror prejudice....however, that presumption is rebuttable, the court examined the voir dire, found it 'proper and thorough,' and [that] the District Court had empaneled an impartial jury."

Presumed Prejudice

In deciding *Skilling*, the Supreme Court further divided the defendant's fair trial argument into two distinct questions: (a) "did the District Court err by failing to move the trial to a different venue based on a presumption of prejudice?" and (b) "did actual prejudice contaminate Skilling's jury?" With respect to the first question, the Supreme Court, unlike the 5th Circuit, found that the defendant had not established a presumption of juror prejudice. The question of whether presumed jury prejudice was rebuttable was left unanswered by the majority opinion. Justice Alito, however, in his concurring opinion did address this issue. He stated presumed jury prejudice was rebuttable and that "[c]areful voir dire can often ensure the selection of impartial jurors even where pretrial media coverage has generated much hostile community sentiment."



In finding no presumed jury prejudice, the Supreme Court distinguished the facts of *Skilling* from those in *Rideau v. Louisiana*,³ which established the precedent for presumed jury prejudice. In *Rideau*, the defendant, who was charged with murder, had his jail cell confession televised three times to large local audiences. Since so many potential jurors from the small local community had viewed the confession, defense counsel for *Rideau* moved for a change of venue. The trial court denied the motion and the defendant was convicted of capital murder. In 1963, the Supreme Court overturned the defendant's conviction finding that the television confession along with the kangaroo court proceedings violated the defendant's due process rights. In *Rideau*, the Supreme Court, due to the presumed jury prejudice, found it unnecessary to even "examine a particularized transcript of the voir dire."

In differentiating *Skilling* from *Rideau*, the court drew the following distinctions.

- (1) Unlike *Rideau* who was tried in a small local community, *Skilling* was tried in the 4th largest city in the U.S. Thus, in *Skilling*, there was a much greater likelihood of finding impartial jurors who had not been subject to the large volume of pre-trial publicity.
- (2) The local news stories about Enron and *Skilling*, although not necessarily favorable, were not blatantly prejudicial like in *Rideau*.
- (3) There was approximately a 4-year gap between Enron's bankruptcy and *Skilling*'s trial.
- (4) *Skilling* was acquitted on nine counts.

The Supreme Court went on to say that the 5th Circuit presumed juror prejudice based primarily on the magnitude and negative tone of the media attention directed at Enron. But "pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial."⁴ The Supreme Court made it clear that it wanted to reserve instances of "presumed prejudice" to those rare extreme occasions.

Actual Prejudice

After dispatching the defendant's argument concerning presumed jury prejudice, the Supreme Court moved on to the issue of actual jury prejudice. Here, the defendant asserted that the "[v]oir dire...did not adequately detect and defuse juror bias." This too was rejected by the Supreme Court, which held that the jury selection process as a whole to include voir dire was adequate to seat unbiased jurors. The majority made note of the 77-question 14-page juror questionnaire drafted primarily by defense counsel that was sent to 400 potential jurors. Of the approximately 374 people that responded to the questionnaire, the judge granted hardship exemptions to about 90 individuals and excused another 119 for cause.

As for the actual voir dire, the trial judge questioned potential jurors both individually and as a group. In addition, the judge permitted counsel for both sides the opportunity to ask a limited number of follow-up questions. The trial judge also afforded the defendant two additional peremptory challenges. The total time for voir dire was approximately five hours, which was highlighted by the defendant in his appeal. The Supreme Court, however, noted that there was "[n]o hard-and-fast formula dictat[ing] the necessary depth or breadth of voir dire." Furthermore, the Supreme Court stated that when pretrial publicity is an issue "primary reliance on the judgment of the trial court makes [especially] good sense."

Dissent

The dissent written by Justice Sotomayor focused on actual jury prejudice as she and the other dissenters appeared to be in agreement with the majority on the lack of presumed jury prejudice. Not surprisingly, the dissent painted a much different picture of the pretrial publicity that occurred prior to the trial calling it "massive in volume and caustic in tone." And, unlike the majority, the dissent pointed out numerous deficiencies in voir dire ranging from inadequate inquiry by the trial judge to the limited ability of the attorneys to ask follow-up questions of potential jurors. The dissent found that "the District Court's inquiry lacked the necessary thoroughness and left serious doubts about whether the jury empaneled...was capable of rendering an impartial decision." In addition, the dissent relying on *Irvin v. Dowd*⁵ was less willing than the majority to accept the "jurors' promise of fairness" at face value.



Finally, the dissent called into question the total time spent on voir dire noting that the "5-hour voir dire was manifestly insufficient to identify and remove biased jurors" given the "extraordinary circumstances" surrounding the case. By way of comparison, other high-profile trials have had a much more extended voir dire e.g., Timothy McVeigh (18 days), Zacarias Moussaoui (14 days) and Dennis Kozlowski (7 days). These examples of extended voir dire occurred even after several of the aforementioned defendants had their trials moved.

Takeaways

There are several important concepts to take away from *Skilling*. First, trial courts receive significant deference in deciding whether a juror can be fair, and appellate courts are hesitant to overrule trial courts on this issue. Second, the presumed jury prejudice standard is very high and reserved for those rare situations like *Rideau*. Third, the length of voir dire in and of itself is not determinative of whether an impartial jury has been empaneled. In deciding this issue, the court is going to examine the entire jury selection process. Thus, juror questionnaires have gained even more value because they can make up for a truncated voir dire.

In fact, the Supreme Court went so far as to say that "[t]he questionnaires confirmed that, whatever community prejudice existed in Houston generally, Skilling's jurors were not under its sway."

Fourth and probably most interesting was the role of the justices' litigation experience or lack thereof on the holding of Skilling. According to one attorney who wrote a brief on behalf of the defendant, "[i]t is disconcerting to see the majority working so hard to demonstrate that the prudent course of action--a venue transfer--was not the better choice, especially when the only justice who has experience both as a district judge and with voir dire in high-profile cases is pointing out just how wrong things went in Mr. Skilling's trial."⁶

Some questions left unanswered by Skilling include whether or not presumed jury prejudice is ever rebuttable. The defendants argued that it couldn't be rebutted. Justice Alito, however, in his concurring opinion seems to think it can, but this issue was not taken up by the majority. This question may go unanswered for some time as cases like Skilling are rare and may become even more so in the future because the media saturation level found in Rideau is difficult to replicate in the Digital Age with so many various methods by which to obtain news.

References

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² Skilling v. U.S., 561 U.S. ___ (2010)

³ Rideau v. Louisiana, 373 U.S. 723 (1963)

⁴ Nebraska Press Assn. v. Stuart, 427 U. S. 539 (1976)

⁵ Irvin v. Dowd, 366 U.S. 717 (1960).

⁶ Tony Mauro, In 4 Key Rulings, Supreme Court Limits Fraud Statutes' Reach, National Law Journal, June 25, 2010.

Citation for this article: *The Jury Expert*, 2010, 22(4), 57-60.

Emotions in the courtroom: “Need for affect” in juror decision-making

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“The law is reason, free from passion.” Aristotle’s declaration continues to guide the philosophy of our legal system, and it is expected a jury will weigh all evidence equally and without bias before rendering a verdict. However, emotions are intertwined with any human enterprise, particularly decision-making (Forgas, 1995; Kuvaas & Kaufmann, 2004). Despite a juror’s honest attempt to not be swayed by emotion, some cases can be emotionally draining or attorneys might attempt to elicit emotional reactions from jury members to cloud their judgment. As such, when selecting a jury, it is important to consider individual differences in how one manages and uses one’s emotions when making decisions. The purpose of this paper is to discuss the role of emotions in legal decision-making and to discuss how the psychological construct of “need for affect” (NFA) can help trial consultants identify strike-worthy jurors.

The Role of Emotions in Decision-Making

Research suggests individuals frequently make decisions that are congruent with their mood-state (Forgas & Bower, 1988; Schwarz, 2000). Forgas and Bower (1988) posited that judgments are more likely to be affected by mood-congruent information when the target is complex, ambiguous, and there is no pre-existing evaluation of the target. Typically, this is the context in which a juror must make a decision about a defendant. A primary explanation for mood-congruent judgments is individuals recall material that is similar to the mood-state being experienced (Kuvaas & Kaufmann, 2004; Schwarz, 2000). Therefore, individuals are more likely to remember positive information for a target when in a good mood and negative information when in a bad mood (Forgas & Bower, 1987; Schwarz, 1990). For example, a juror who viewed gruesome pictures of a crime scene is likely to feel disgusted and/or angry and is subsequently more likely to remember case information that is not in favor of the defendant (i.e., the target of the decision-making) and to judge the defendant more negatively. Mood-congruency judgments can also be explained by the likelihood that an individual will directly attribute the cause of their current mood state to the target they are

evaluating (Forgas, 1995). For example, if a juror received a promotion at work while serving on a jury, he or she might misattribute feelings of enthusiasm and happiness to the defendant, thus making a decision favoring the defendant.

Need for Affect in Judgments

Until this point, the information regarding how affect influences decisions has assumed all people have the same motivation for processing emotionally-laden information; however, this may not be the case. Just as some people are more motivated to think through issues and find more enjoyment from thinking (i.e., need for cognition), some people may be more motivated to approach emotion-inducing situations and to seek out emotions (Cacioppo & Petty, 1982; Maio & Esses, 2001). Maio and Esses (2001) developed the need for affect (NFA) construct which is a personality variable defined as “the motivation to approach or avoid emotion-inducing situations” (p. 538). Using a measure they designed to assess NFA, they found that individuals with high NFA were more likely to approach emotional experiences and use emotions to help guide their behavior and judgments, whereas individuals with low NFA were motivated to avoid emotional experiences, especially when the emotions were intense and dangerous (Maio & Esses, 2001).

Maio and Esses’ (2001) research suggests an emotion-approach tactic (i.e., High NFA) is related to mood intensity, willingness to explore emotions (particularly positive emotions), ability to understand and utilize emotions, and high need for cognition. Furthermore, individuals with an approach tactic were more willing to experience strong negative emotions than individuals who endorsed an emotion-avoidance tactic. An emotion-avoidance tactic (i.e., Low NFA) is related to difficulty identifying, describing, and expressing emotions as well as an ambivalence toward emotional expression. Furthermore, individuals endorsing low NFA were more likely to avoid experiencing negative emotions, particularly ones that were distressing and anxiety-arousing.

Additional research exploring how the NFA construct is related to decision-making found that individuals with high NFA remembered more information from an affect-based message than from a cognitive-based message (Haddock, Maio, Arnold & Huskinson, 2008). An affect-based message is one in which the primary persuasive tactic is to appeal to one’s emotions and to generate an emotional response about an object. A cognitive-based message is one in which the primary persuasive tactic is to appeal to one’s logic and to create new beliefs or ideas about an object. Moreover, individuals with high NFA recalled more information from an affect-based message than individuals with low NFA. Thus, the NFA construct appears to be a crucial concept in explaining how individuals process and respond to emotionally-laden information or emotional experiences.

The Role of NFA in a Legal Setting

Provided the integral role emotions play in decision-making, particularly when an individual is motivated to attend to the emotional components of an argument, we propose that NFA (Maio & Esses, 2001) can be used in a legal setting to help attorneys and trial consultants identify individual differences in how emotions influence jurors’ attitudes and guide their decision-making. Although limited, prior research has shown the utility of the NFA construct, as measured by the NFA scale, in predicting verdict and sentencing decisions. The NFA scale is comprised of two-factors (emotional-approach and emotional-avoidance) and is a 26-item questionnaire with good internal reliability ($\alpha > .80$).



An initial study examining the role of NFA in juror decision-making manipulated a defendant's level of remorse (i.e., remorseful vs. non-remorseful) in the context of the sentencing phase of a capital trial (Patty, Cramer, Adams, & Brodsky, 2009). Introductory psychology students at the University of Alabama provided a sentencing recommendation of either Life in Prison without Parole or the Death Penalty after viewing a video clip of the defendant exhibiting high and low levels of verbal and nonverbal remorse. Overall, mock-jurors' endorsement of high NFA was predictive of recommending a life sentence. In other words, the ability to predict whether a juror would recommend a life sentence increased as jurors endorsed higher scores on the "emotion-approach" factor of the NFA scale. A potential explanation for this finding is that mock-jurors were observing an emotional situation in which a defendant provided verbal and nonverbal accounts of remorse for his actions (an event with a positive mood valence), and jurors who were motivated to approach and process this emotional situation (i.e., individuals with high NFA) likely had related emotional experiences triggered. In support of the literature discussing mood-congruent judgments, jurors who were motivated to approach and process the positive emotional experience were primed to recall previous positive experiences and were likely to recommend the more "positive" sentencing recommendation of Life in Prison without Parole. Furthermore, this study revealed the "emotion-avoidance" factor on the NFA scale did not predict sentencing recommendation. This finding substantiates our initial explanation because individuals with low NFA were likely not motivated to utilize the emotional-stimuli (i.e., remorse) in their decision-making, and thus, there was no predisposition for their judgment to be mood-congruent.

A second study examining the role of NFA in legal decision-making investigated whether an individual's NFA would predict verdict decisions in a case that exposed jurors to emotionally-arousing evidence (Adams, Neal, Titcomb, & Griffin, 2010). It was hypothesized that after viewing graphic evidence (i.e., crime scene photos), jurors who endorsed high NFA would be more likely to experience a negative mood state and subsequently provide more guilty verdicts. Introductory psychology students at the University of Alabama viewed the video-recorded testimony of a mock-expert witness as well as multiple graphic images of the crime scene that contained blood and a dead body. Results revealed that participants who endorsed high NFA rated the defendant's likelihood of guilt significantly higher than individuals who endorsed low NFA. Similar to the explanation described for the previous study, it is likely that jurors who were motivated to attend to and process the emotionally-laden stimuli (i.e., individuals with high NFA) experienced negative emotions after viewing the graphic photographs (e.g., anger, sadness, disgust), and thus, they were primed to recall negative information about the case as well as negative past experiences. A mood-congruent judgment would be a guilty verdict.

Implementing NFA in a legal setting

This article has discussed the important role emotions play in decision-making, particularly within a legal setting; therefore, it is important to be aware of how jurors process and incorporate emotions in their judgments. To accomplish this, attorneys and trial consultants can use items from the NFA scale during jury selection. According to Brodsky (2009), social-psychological scales can be useful tools in trial consultation work because they provide questions that have been systematically developed and validated. Obtaining answers to items from a researched scale gives trial consultants and/or attorneys more meaningful information than answers obtained from self-developed questions because we know how well the items measure the content of interest as well as their limitations (Brodsky, 2009).

Similar to how items from the Need for Cognition scale are often used to identify jurors who are motivated to process complex arguments, items from the NFA scale can be incorporated into the voir dire process to identify jurors who are motivated to approach emotional information and rely on emotional stimuli to make decisions. Knowing such information about potential jurors can help attorneys strike high-risk jurors who might be manipulated easily by emotionally-laden arguments and case details. On the flip

side, if an attorney has a case in which he is depending upon a strong emotional reaction to get a favorable judgment, identifying individuals with low NFA would be helpful when determining whom to strike.

For practical purposes and time constraints, an attorney or trial consultant would likely want to administer only select items of the NFA scale, as opposed to all of the questions. Depending upon the freedom granted to attorneys during the voir dire process, one can request the items be added to a supplemental juror questionnaire, incorporate the items into voir dire questioning, or submit questions to the judge to ask during voir dire. If the latter method is an attorney's only option for incorporating items into the voir dire process, it might help to provide an empirical explanation for why the questions are being submitted so the judge has a better understanding of the context and purpose of the questions.

If any attorney's goal is to strike jurors who would be inclined to rely on feelings and incorporate emotional stimuli into their decision-making, then the following items from the NFA scale would provide the most reliable and construct-valid information:

- 1) It is important for me to be in touch with my feelings.
- 2) I think that it is important to explore my feelings.
- 3) I am a very emotional person.
- 4) It is important for me to know how others are feeling.
- 5) Emotions help people get along in life.
- 6) Strong emotions are generally beneficial.



Each item is answered on a seven-point scale of *Strongly Disagree* to *Strongly Agree* with a neutral option of *Neither*. Stronger agreement with the aforementioned items is representative of individuals with high NFA who are motivated to approach emotions and incorporate emotions into their decision-making; therefore, attorneys will want to strike jurors who express strong agreement with these items.

If an attorney's goal is to strike jurors who avoid emotions and do not rely on feelings to make decisions, then the following items from the NFA scale would provide the most reliable and valid information:

- 1) I find strong emotions overwhelming and therefore try to avoid them.
- 2) Emotions are dangerous – they tend to get me into situations I would rather avoid.
- 3) I would prefer not to experience either the lows or highs of emotion.
- 4) If I reflect only on my past, I see that I tend to be afraid of feeling emotions.
- 5) I would love to be like “Mr. Spock,” who is totally logical and experiences little emotion.
- 6) I have trouble telling the people who are close to me that I love them.

These items are answered in the same manner as the other items. Stronger agreement with these items is representative of individuals with low NFA who are motivated to avoid emotions and are not likely to rely on feelings to make decisions; therefore, attorneys will want to strike jurors who express strong agreement with these items.

In addition to assisting with jury selection, knowing whether the jury is comprised of individuals with primarily a high or low NFA can inform attorneys or trial consultants about appropriate trial strategies. For example, if the jury has a majority of individuals with a high NFA, a prosecuting attorney will want to maximize the impact of any emotional evidence that evokes a negative mood state within the jurors. In that same situation, a defense attorney would know to be prepared to mitigate such emotionally-evocative evidence while at the same time proffer any evidence that might produce positive emotions among the jury.



Summary

Although Aristotle described a legal system free of passion and prejudice, individuals reference both cognitions and emotions when making legal decisions. As such, attorneys need to account for individual differences in how jurors process and incorporate emotional information into their judgments. This article described the psychological construct of need for affect (NFA) and presented research that suggests it can be helpful in identifying jurors who are most and least likely to approach emotional situations and integrate emotions when making decisions. Practically, items from the NFA scale developed by Maio and Esses (2001) can be used during the

voir dire process to determine which jurors are most strike-worthy and to subsequently develop trial strategies that will be best received by the selected jury.

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Citation for this article: [*The Jury Expert*](#), 2010, 22(4), 66-66.

Editor's Note

It's the dog days of summer here in the heart of Texas but this issue is sure to keep you glued to your computer screen! Once again, we have a variety of pieces that are thought-provoking and provocative but also carefully researched and written. To start us off, Sam Sommers reviews the research he's done over the past ten years and sets the record straight on what we know (and what we don't know) about race and jurors. All of our stock portfolios have taken hits and been on something of a stomach-wrenching course for the past while but Eric Rudich has been watching something odd: how Wall Street reacts to the litigation verdicts of publicly traded litigants. Read and learn. Daniel Denis has an eye toward numbers as well but his focus is on how to talk to jurors about probability so they "get it".

Doug Keene and I review the literature (the real literature) on the Millennials (also known as Generation Y) and discuss how you can use this knowledge to inform your litigation advocacy (and learn a bit about tattoos along the way). Alexis Robinson looks at the phenomenon of white guilt and how it plays into jury deliberations. Thaddeus Hoffmeister examines the impact of the Skilling verdict and what we need to consider as we move forward in a changed litigation arena. And finally, Desiree Griffin and Emily Patty take a look at the need for affect (aka emotion) in jury decision-making. Why even go outside? Make some coffee (or maybe a cool drink) and sit down to read the July issue of *The Jury Expert*! And, as always, please comment on our website so we know what you're thinking and what you're especially interested in and intrigued by.

[Rita R. Handrich, Ph.D., Editor](#)

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The Jury Expert [ISSN: 1943-2208] is published
bimonthly by the:

American Society of Trial Consultants
1941 Greenspring Drive
Timonium, MD 21093
Phone: (410) 560-7949
Fax: (410) 560-2563
<http://www.astcweb.org/>

The Jury Expert logo was designed in 2008 by:
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