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Terror Management Theory and Jury Decision-Making

by Joel D. Lieberman and Jamie Arndt

Despite the canon that trials are to be heard by fair and impartial juries, social science research and practical experience teaches us that jurors will often harbor their own biases, and utilize these biases in their decision-making. Jurors enter the courtroom possessing a multitude of life experiences that may exert some degree of influence on their final verdict decisions. This, of course, is why attorneys use voir dire to uncover aspects of jurors' lives that may be relevant to the case at hand, to the extent that they are permitted to do so. However, research in the area of social psychology indicates that it may behoove attorneys to go beyond focusing on jurors' lives, and, depending on case facts, also consider how jurors might respond to situations that lead them to think about, even if only quite briefly, their inevitable death. Considerable empirical work has been conducted on Terror Management Theory (TMT; see Greenberg, Solomon, & Arndt, 2008, and Greenberg, Solomon, & Pyszczynski, 1997, for a review) examining the far-reaching influence of people's awareness of death (or "mortality salience") on social behavior. An emerging line of TMT research has specifically focused on how knowledge of our "existential finitude," so to speak, affects legal decision-making (Arndt, Lieberman, Cook, & Solomon, 2005).

Terror Management Theory

Terror management theory is based heavily on the writings of cultural anthropologist Ernest Becker, and in particular his book *The Denial of Death*, for which he won the 1973 Pulitzer Prize. According to TMT, humans have evolved a unique capacity for incredibly complex thought. Humans can think in terms of time, in terms of symbols, and can hold themselves as the object of their attention. Such capacities allow humans to meaningfully contemplate our own life and mortality. That is, we know that we exist, and as such, we also know that one day we will not exist. According to the theory, this knowledge is problematic to the extent that humans also possess a basic animal-based desire for self-preservation. To resolve this conflict and manage the intense fear associated with knowledge of death, individuals participate in and defend a “cultural worldview.” Cultural worldviews represent complex belief systems that define socially valued behaviors. By living up to the prescriptions of socially sanctioned behavior, one can obtain a sense that one’s existence is meaningful and that we are important participants of a larger, and enduring, entity. This can take many forms, such as investing in one’s religion, nation, or even more broadly, one’s culture. Unfortunately, as decades of social science theory and research have taught us, cultural worldviews are relatively fragile social constructions; to believe that we are participating in important socially valued activities we need to have other people recognize, support, and reward the behaviors that we construe as valuable and meaningful.

Given the cultural relativity of our beliefs and values, it is inevitable that we encounter others with different belief systems and values. This is likely increasingly the case with the continued globalization of the world community. According to TMT, individuals with different belief systems pose serious threats to the validity of our own worldview, because their existence undermines the importance of our own belief structure. Thus, people are prone to respond to such threats with some form of psychological defense, often by ridiculing, derogating, attacking, or minimizing the worldview threat. By engaging in worldview defense in this manner, one can re-exert the superiority of his or her worldview.



Thus, one of the basic predictions of TMT, known as the “mortality salience hypothesis,” states that reminders of mortality will cause an individual to invest in and defend their cultural belief system, leading that person to respond favorably to others who support his or her worldview and negatively to those who threaten it. To test this hypothesis, studies have typically reminded some participants of their mortality (by any of a variety of techniques, ranging from having participants respond to a questionnaire prompting them to write briefly about the prospect of their death, to interviewing them in proximity to places, like funeral homes or cemeteries, that are likely to elicit death-related thought). Other participants are typically randomly assigned to contemplate another, generally aversive, topic so as to determine the effects of thinking about death relative to other distressing experiences. To date, over 350 published empirical studies have provided support for this hypothesis, across a wide range of samples, in laboratories throughout the United States, as well as in at least 17 nations (Motyl, Pyszczynski, Cox, Siedel, & Maxfield, 2008; Pyszczynski, Rothschild, & Abdollahi, 2009).

Death Reminders Within (and Outside) the Courtroom

Within the confines of a courtroom, jurors may be exposed to death-related reminders in a variety of contexts. Within a criminal case the charges against the defendant may focus on mortality related issues, such as in a homicide trial (particularly one in which capital punishment must be considered by jurors; see Judges; 1999; Kirchmeier, 2008), an attempted murder trial, or in cases where serious bodily injury occurred to the victim. However, mortality reminders are, of course, present in civil trials as well, such as in personal injury trials where fatalities result. In addition, even if

case facts are not morality related, external events just prior to the trial, or those that occur during it, may trigger mortality-related thoughts among jurors. For example, one trial consultant has speculated that the September 11th attacks produced strong mortality salience that may have had an impact on juror decisions in criminal and civil cases tried immediately after the attacks (Rowland, 2002). Of additional concern, however, is research indicating that even unconscious exposure to reminders of death can prompt individuals to defend their cultural beliefs more fervently (Arndt, Greenberg, Pyszczynski, & Solomon, 1997).

As noted above, individuals typically respond to mortality salience by defending their cultural worldview in any one of a number of manners including exhibiting negative reactions to others who are different. Empirical research has demonstrated that this can lead to greater distress when engaging in behaviors that violate cultural values (Greenberg et al., 1995), increased hostility toward individuals who pose a threat to the social values defined by one's worldview (Rosenblatt et al., 1989), increased liking for Americans among American participants (Greenberg et al., 1990), and other such preferences for those who share similar beliefs. For example, in both Israel and the United States, mortality salience has led participants to more negatively evaluate immigrants (Florian & Mikulincer, 1997; Motyl et al., 2008). Further, following mortality salience Japanese participants became more negative in their evaluations of a target who criticized Japan (Heine, Harihara, & Niiya, 2002). As it has been shown that (in some circumstances) jurors may be more lenient to defendants who are similar to them on factors such as race, socio-economic status, important beliefs, and religion (Devine et al., 2001; Mazzella & Feingold, 1994), the relationship between mortality salience and defendant juror similarity may be important to consider. This is particularly true given the fact that the defendant-juror similarity effect may not always work in a straight-forward way. In some cases, a "black-sheep" effect may occur (Kerr, Hymes, Anderson, & Weathers, 1995), where jurors are actually more punitive towards defendants with similar backgrounds (i.e., when the demographic factors the juror has in common with the defendant make that juror a minority on the jury). Indeed, previous TMT research has demonstrated that after thinking about death, Hispanic-Americans attempted to distance themselves psychologically from their Hispanic heritage when they were made aware of negative stereotypes associated with Hispanics (Arndt, Greenberg, Schimmel et al., 2002).

Reminders of death have also been shown to lead people to think in more stereotypic ways when forming impressions of others (e.g., Schimmel et al., 1999). Such findings are particularly concerning given the myriad of ways stereotypes may be utilized by jurors as they contemplate what type of person the defendant is, or listen to witness testimony (or even attorney presentations), and consider how trustworthy those individuals are. For example, it has been repeatedly demonstrated that jurors (and even judges) are more lenient to physically attractive defendants (Lieberman 2002; Mazzella & Feingold, 1994; Stewart, 1980; 1985). Based on the findings of previous TMT studies, we would expect biases such as the attractiveness-leniency effect to exert more a more powerful influence under conditions of mortality salience. Further, as indicated by recent research, awareness of death can even influence what types of people are found most attractive and desired (Kosloff, Greenberg, Sullivan, & Weise, 2009).

TMT and Reactions to Lawbreakers

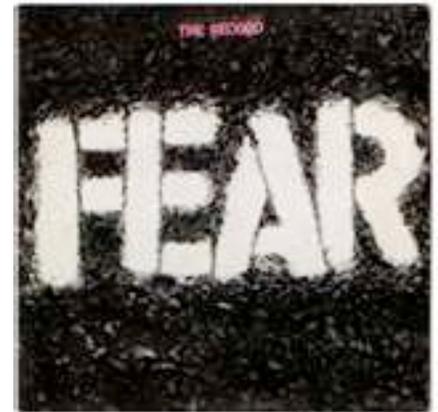
Worldview threats may come in many forms, but perhaps most relevant to legal decision-making are threats posed by lawbreakers. Laws represent the formalized rules of what is deemed acceptable and unacceptable behavior within a culture. When an individual violates those rules, they are undermining the values (and cultural worldviews) of the majority of citizens. Consequently, one would expect people's own insecurities about their mortality to provoke harsh reactions to lawbreakers. This possibility was the focus of initial TMT research examining the decisions of municipal court judges (Rosenblatt, Greenberg, Solomon, Pyszczynski, & Lyon, 1989, Study 1). In that study, judges were reminded of their own mortality or not and presented with information about a case where a woman was arrested for prostitution. After reviewing the case materials, judges were asked to set bail amounts for the lawbreaker. The

results indicated that judges who had thought about their death set bail amounts that were significantly higher than those who were not asked to contemplate their death.

Although the basic finding that mortality salience leads to more punitive reactions to lawbreakers has been replicated in a number of studies, more recent research has indicated that the relationship between psychological concerns about death and legal decision-making is more complex. For example, in a study on reactions to hate crime offenders, Lieberman, Arndt, Personious, and Cook (2001) found that participants who had thought about their death reacted more punitively towards hate crime perpetrators when no specific information about the victim (e.g., nationality, sexual orientation) was provided (Study 1). This reflects the general propensity for reminders of death to increase punitive reactions toward lawbreakers as described above. However, when participants were provided with information that indicated the victim was attacked because they possessed characteristics that represented a worldview threat to both the attacker and the participants' themselves (e.g., a Jew relative to a Christian), mortality salient participants were more lenient to the perpetrators (Study 2). Thus, in some cases, reminders of death will produce increased negative reactions to lawbreakers, but in other cases, greater leniency may be exhibited.

Fair Process Concerns

TMT has been shown to be relevant to a variety of other legal issues including fair process concerns and compliance with judicial admonitions (see Arndt et al., 2005). van den Bos and Miedema (2000) and van den Bos (2001) also found that procedural fairness is a worldview component that individuals are motivated to protect out of existential concerns. Empirical research has demonstrated that this finding has implications for how evidence is used in a variety of cases. For example, in a recent study on juror decision-making in capital cases, reminders of death led participants to more carefully attend to the quality of expert testimony, and more appropriately utilize mitigating factors (Shoemaker & Lieberman, 2009). Shoemaker and Lieberman attributed this to people's heightened thoughts of death creating a need to treat the defendant in a more legally appropriate manner due to enhanced fair process concerns.



Further, although the awareness of mortality appears to lead individuals to initially be more punitive towards a defendant, this effect is attenuated when fair process concerns are salient due to specific judicial directives or individual differences. For example, in a pair of studies on the influence of inadmissible evidence, Cook, Arndt, and Lieberman (2004) found that mock jurors who were inclined to follow their own belief systems rather than the law (either identified as "high nullification prone participants" on a pretrial personality measure, or who had been given associated judicial instructions) inappropriately used inadmissible evidence under control conditions where their mortality had not been made salient. However, mortality salience actually reversed this trend among the high nullification prone participants. In that case, mortality salience participants were appropriately less punitive in the inadmissible condition compared to conditions where the evidence was ruled admissible or omitted. Thus, heightened awareness of mortality appears to motivate people to uphold relevant principles of their worldview that often include carefully following the law and an increased desire for fair treatment of others.

Developing Case Presentations

From the perspective of attorneys and trial consultants, TMT may be effectively applied through the development of case presentations or through jury selection. On the surface it may appear that the nature of certain

cases makes mortality salience inevitable. However, case aspects by themselves may not always be sufficient to trigger strong mortality salience effects.

For example, it appears that mortality salience effects are most powerful when an individual contemplates their own death, rather than the demise of another. Greenberg et al. (1994) obtained weaker mortality salience effects when they directed participants to think about mortality in general or about the death of a loved one compared to participants who were asked to specifically think about their own deaths. Similarly, when given information about a civil case, stronger mortality salience effects (i.e., bias in favor of an American company) were obtained when mock jurors contemplated their own mortality rather than mortality in general (Nelson et al., 1997). During a trial, it may be possible for an attorney to capitalize on this finding in closing statements by asking jurors to think about what it would be like if they were the victim and experienced a near-death experience in the last moments of their life. At the same time, evidence also indicates that mortality salience effects may follow from even very fleeting, and unconscious, reminders of death (Arndt et al., 1997); thus, in the absence of controlled investigations, it is not always clear how and when thoughts of death may be put into play with the greatest impact.

Alternatively, an attorney might want to mitigate potential mortality salience effects from occurring. One method for achieving this may be to increase how rationally jurors approach the information to which they have been exposed. What we have been referring to as mortality salience effects tend to occur when individuals are in a more relaxed “experiential” state of mind where they rely on their gut instincts and emotional reactions, but are not apparent when jurors are in more rational and analytic mindsets (Simon et al., 1997). Research has shown that specific directives to adopt either a rational or experiential mindset can be successful. However, judges may prevent attorneys from encouraging jurors to be rational and analytic in their consideration of the evidence during opening and closing statements. In that case, analytic processing may also be achieved through evidence presentation. For example, it may be possible for expert witnesses to present testimony that emphasizes statistical analyses, such as the method of calculating DNA match probabilities or economic projections of future earnings.

It may also be possible to mitigate the consequences of thoughts of death by emphasizing a sense of shared humanity between jurors and relevant parties in the case (e.g., the defendant). Motyl et al. (2008) found that individuals were less likely to exhibit negative attitudes toward immigrants following reminders of death when a sense of common humanity had been reinforced by drawing participants’ attention to familial similarities between themselves and immigrants. This approach was likely successful because of positive feelings most people typically associate with their families as well as the near-universal nature of the family experience. Consultants may be able to effectively use mock trials or focus groups to identify successful approaches for case presentations when mortality salience is an issue.

Jury Selection

The impact of mortality salience may also be either enhanced or mitigated through the identification of specific types of jurors who are likely to be more or less susceptible to these effects.

Age and Terminal Illness. If asking an individual to contemplate their own death produces worldview defensive reactions that may affect juror decision-making, would elderly or terminally ill jurors exhibit the same mortality salience induced behaviors? Should an attorney concerned with mortality salience effects harming his or her case exercise peremptory strikes on such jurors? On the surface, it appears that attending to these background characteristics would be beneficial, however, research has indicated otherwise (Maxfield et al., 2008). As individuals move closer to their actual death by aging or contracting terminal illnesses the effects of mortality salience may be redirected away from the trenchant defense of cultural values. This finding has been attributed to a re-focusing of

mortality-based concerns. As the reality of death sets in, individuals' acceptance of that inevitability assuages the need for worldview defensive reactions, and people prefer to manage such fears through other means.

Self-Esteem. Self-esteem has been shown to have an important anxiety-buffering function in the face of death-related thought, leading individuals with high levels of self-esteem to typically exhibit attenuated mortality salience effects (e.g., Harmon-Jones et al., 1997; van den Bos, 2001). Consequently, an attorney concerned with mortality salience-related factors adversely affecting his or her case may want to use pretrial surveys to identify and challenge jurors who appear to be experiencing situational or dispositional factors that could be associated with low self-esteem.

Additional Individual Differences. Several other personality factors have been shown to moderate terror management processes as well, including attachment style (individuals with more secure attachment styles respond differently to reminders of death, preferring to affirm their relationships rather than denigrate others) and depression (greater depression is associated with more powerful mortality salience effects - Greenberg et al., 1993; Mikulincer & Florian, 2000; Motyl et al., 2008; Simon et al., 1998). Unfortunately, attachment style and depression may be difficult personality factors to ascertain in a limited voir dire. However, other relevant individual differences may be more easily identifiable, such as authoritarianism. It is a well-known finding that authoritarians are generally more conviction prone as jurors, unless the defendant is an authority figure (Lieberman & Sales, 2007). TMT research has also found that authoritarian tendencies are activated by thoughts of death (Greenberg et al., 1990). Finally, jurors' attitudes towards religion may be particularly relevant. Greater endorsement of religious fundamentalist beliefs has been shown to be associated with certain mortality salience effects, and in particular situations, may be especially influential. For example, Vess, Arndt, Cox, Routledge, and Goldenberg (in press) found that religious fundamentalists are more likely to endorse faith-based medical interventions to illness after being reminded of death, and are more sympathetic to parties charged with (religiously motivated) medical neglect. During voir dire, religious identification or involvement may be obtainable through pretrial surveys, or to some extent by physical observation (e.g., religious jewelry or clothing).

Conclusions

A variety of case aspects may remind jurors of their own mortality during a trial. Research on TMT indicates that such reminders lead people to more trenchantly defend and uphold the values and beliefs associated with their cultural worldview. This can lead to the utilization of individual biases when considering case evidence or parties (or even an emphasis on procedural fairness). The relationship between people's concerns about mortality and case factors may be complex and produce interactive effects. Ultimately, the nature of a juror's worldview, and the salience of key aspects of it, will influence the direction and intensity of potential bias. Although some general principles can be applied in predicting the nature of mortality salience effects (e.g., if there are no other relevant factors present mortality salience should lead to more punitive reactions to lawbreakers and self-esteem is likely to attenuate such effects), it is most useful to consider the impact of death-related thought in a case specific manner. Consequently, it is essential for attorneys to work with trial consultants to identify how jurors are likely to respond to aspects of the case that may be highly salient during a trial.

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Response to Lieberman and Arndt

We asked three experienced trial consultants to respond to Lieberman and Arndt's article on terror management. Bob Kaufman, Julie Howe and Greg Cusimano offer their responses on the following pages.

TMT: "Salience" in the Courtroom?

By Bob Kaufman

Bob Kaufman, Ph.D., A.B.P.P. is a board certified forensic psychologist who serves as an expert witness in a variety of civil and criminal cases. He is also a senior trial consultant with BonoraD'Andrea, LLC in San Francisco, and an ASTC member.

Terror Management Theory (TMT), as described by Lieberman and Arndt, is a fascinating look into the complexity of the human mind, and how it can influence an individual's behavior. As they describe, TMT may have some direct utility in the courtroom. But how a theory like this, which is conceptual in nature, and has been "tested" via specific controlled research conditions, can be directly applied to jury selection in particular, raises both challenges and serious questions. At the end of the day, jury selection is about getting to know individuals' life experiences, views, attitudes and to some degree their psychological fabric, in a contracted process and in an unnatural setting. TMT offers attorneys and trial consultants a compelling construct to consider, but we're going to have to be inventive and thoughtful regarding how the ideas are played out in court.

What TMT shows us

In essence, TMT is about how people react when some of their deepest emotions are aroused, especially fear, uncertainty, helplessness and a sense of threat to their very existence. In such instances, the theory suggests that people will invoke and defend a view of the world and others that protects their sense of self, aliveness and purpose. For some, the response is adaptive; for others not. Individuals affected the most are vulnerable to lapses in empathy and caring about others they perceive to hold a different set of cultural values. These effects could have impact in the courtroom, most probably in cases thought to arouse "mortality salience." In such instances, if we can learn something about an individual's vulnerabilities, response modes and default settings, maybe we can get a glimpse into how that individual will react to the legal case at hand.

Problems in the courtroom

As the authors note, there are some hurdles to the direct application of TMT in the courtroom. Limited kinds of cases are likely to achieve the threshold of "mortality salience", and the findings in controlled experiments of the impact of mortality salience on views and decision-making are mixed and clearly situation-specific. I would add that mortality salience is not likely to be a static, "either-or" phenomenon, but rather something that can be experienced in degrees and for varying lengths of time – sometimes only fleetingly. And further, the kinds of conditions that might trigger mortality salience are different for different people. That is to say, what one person finds terrifying or even life threatening, another person might not. For example, a case of violent crime might shake some people to the core, but not be nearly so de-stabilizing for others.

Furthermore, TMT is about some of our most complex social and emotional processes – how we handle fundamental fears we face as mortal beings; how we construct world views that have meaning for us and offer us a way to experience our place in the world, while having an insulating effect on unwanted thoughts or emotions. It's the kind of stuff that people spend a long time exploring in their lives. To think that these ideas can be readily understood and/or ascertained in a brief impersonal encounter (i.e. jury selection) is, of course, not very realistic. But maybe there's something to be gained here, and some ways to answer the question on every attorney's mind when picking a jury – "Is this particular juror better or worse than others who might serve, and why?"

Possible pathway to understanding jurors

It is clear that an array of cases can arouse the kinds of feelings and behaviors the authors describe. Violent crimes, civil rights cases, personal injury cases or others involving life-threatening events certainly come to mind. It makes sense that attorneys need to learn something about how jurors cope with fears, traumatic events, and perhaps even day-to-day conflicts. These cases have the potential to stimulate the kinds of deeper emotions and personal defense systems implied in Lieberman and Arndt's article. Hence in jury selection, attorneys should learn not only whether jurors have had prior experiences that might be analogous to the specific case-related issues, but also do their best to learn about other instances when a juror's sense of well being was seriously threatened. How have they coped with these experiences in the past? What scars might be left? How have these shaped their views?

Given that voir dire is not the same as an intake interview with a psychotherapy client, attorneys may have little experience with how to get at the emotional experiences described in TMT. Good trial consultation can be invaluable in assisting attorneys with constructing a voir dire that can elicit information on sensitive topics. Attorneys need to strike that balance between probing for information versus respecting the privacy and dignity of prospective jurors. Considerable thought must be paid to how questions are crafted to enhance the possibility that jurors will share their experiences, and not just shut down. Most attorneys realize that the manner in which jurors respond to voir dire questions can, at times, yield as much information about the juror as the content of the answers. Having a jury consultant in the courtroom provides another set of eyes to observe the process, pick up on emotional cues and evaluate their origins in light of the content of the juror's responses.

*Operationalizing the constructs for effective jury selection*

Given the limits set forth (i.e. that we cannot measure or evaluate mortality salience per se in the courtroom; that we are lucky if we can get peeks into individuals' cultural worldviews, much less understand it in any depth; that the research findings on the impact of mortality salience are decidedly mixed), there are a few things that attorneys *can* do. We get glimpses into jurors' minds and attitudes via several means:

Supplemental Juror Questionnaires

- Whenever possible, push for a supplemental juror questionnaire. When you can get it, fight hard for those questions that might reveal important underlying attitudes and experiences that are relevant to the content and themes of the case. For example, in cases that involve violent crimes, don't just ask whether the juror has ever been a victim of a crime themselves, but also be sure to ask whether jurors have *witnessed* a violent crime, or whether *family members* have been a victim of or witnessed a crime. Inquire about *other* kinds of trauma, including natural disasters or other situations that might arouse mortality salience. Be sure to ask about religious affiliations (if you can), social and political group affiliations and, of course, what jurors read and watch on TV or what internet sites they visit most frequently. The more extreme the answers, the more the possibility that an individual will retreat to rigidly held beliefs under duress. For example, a prospective juror may have had a close friend or family member who was hurt or killed by a drunk driver. Some people might come away from that experience appreciating the fragility of life and even adopt a more caring and compassionate attitude towards people. On the other hand, if that juror has become a member of an organization that takes on fighting drunk driving as a cause célèbre, then it is *possible* that they are steeped in anger, and will seek to punish more harshly people they believe have engaged in wrong doing.

Voir dire: Acknowledging that judges and venues vary greatly in the extent and latitude they afford during voir dire, consider the following:

- Focus your efforts, aiming to go deeper with jurors you believe are likely to be leaders on the jury.
- With individuals who have experienced or witnessed traumatic or very disturbing events, be sure to ask if the juror is comfortable talking about their experience before plunging into the topic. Ask how individuals about their emotional responses to the events and where they have derived support. Jurors who have not come to reasonable terms with these kinds of events may have coped by hardening themselves to terrible events and can have little tolerance for anyone who is upset by trauma or suffering from it.
- It can be helpful to ask how jurors handle expectable conflicts on their jobs. These can reveal mini-collisions of worldviews. Find out about management experience and for those in supervisory positions, ask how they handle personnel issues when employees become emotional.
- Overall outlook on life, which can contribute to self-esteem and serve to buffer against defensive reactions, can be revealed in a variety of ways in voir dire. Ask about job satisfaction, interests outside of work, and even plans or goals for the future.
- Watch out for individuals who appear to be harsh and strident in the content of their responses and in their demeanor in court. These may be clues to identifying jurors with rigidly held beliefs who are likely to defend those views at all cost.

The “jury is out” on the direct applicability of TMT in the courtroom. But the concept certainly highlights how important and challenging it is to understand jurors’ psychological make-up and how it influences attitudes and opinions. It’s certainly an area where good trial consultants can have a positive impact.

How to Apply “*Terror Management Theory*” in a Courtroom

By Julie Howe

Julie E. Howe, Ph.D., is a New York City based trial consultant with a background in social psychology. As the principal in her firm, J. Howe Consulting (www.jhoweconsulting.com), Dr. Howe consults nationwide on all phases of litigation for both civil and criminal cases.

“*Terror Management Theory*” provides consultants and attorneys an added dimension to consider as they seek to better understand juror behavior. Even with a cursory understanding of the underpinnings of this *theory*, attorneys can better prepare their case for trial, make informed decisions during jury selection and develop themes that are likely to resonate with a jury.

The idea that jurors come to the courtroom with their own “cultural worldview” is not a new one, nor is it new to any attorney who has ever conducted voir dire that a juror’s cultural worldview will affect how the juror views a case. However, the research indicating that reminders of a threat to a juror’s own mortality might trigger a response that causes him or her to instinctively defend their own cultural worldview provides an added dimension to ferreting out biases that might influence a verdict is something for attorneys and consultants to think about.

One of the intriguing aspects of this theory is its efforts to explain so much about human behavior, including juror behavior. At first blush, it seems simple enough: people are focused on self-preservation and use various defense

mechanisms to protect their own cultural worldview. However, understanding which mechanism they use and what circumstances trigger the mechanism makes the application of this theory more complex. When applying the theory to juror behavior, we want to understand what might lead a juror to be more punitive and/or lenient in a specific case. Because the theory can explain both outcomes, it is a challenge for attorneys to decide how to apply it for the outcomes he or she desires. At the least, attorneys need to be aware of the possible biasing effects and attempt to mitigate undesirable outcomes.

When preparing a case, consider how *TMT* might play into your case evaluation and trial preparation, jury selection and theme development.

Evaluate and Prepare Your Case with *TMT* in Mind:

What factors in your case might threaten a juror's worldview? Are there factors that are likely to increase "mortality salience"? Death penalty and murder cases are obvious ones. Civil cases that involve wrongful death and serious personal injury also focus on death. Look for the less obvious factors in your case that might lead a juror to contemplate his or her own mortality.

A juror who is likely to consider, consciously or unconsciously, whether: "it could have been me?" enhances the saliency of the juror's own mortality. When evaluating your own case, think about the circumstances, facts, parties, victims, defendants, similarities and dissimilarities of potential jurors, etc. The more likely it is that a juror can place him or herself in a situation that threatens mortality, the greater the effects of *TMT* (e.g. defending one's own cultural worldview leading to possible bias).

As an example of the complexity in applying *TMT* and thinking from a defensive attribution theory perspective, jurors may try to protect their own worldview by attempting to distance themselves and say to themselves "that would never happen to me." To do this, to protect and defend their cultural worldview, they often derogate or stereotype victims. The greater the worldview difference, the easier it is to do. On the other hand, when it's more difficult for a juror to derogate the victim or it's harder to deny that "it could have been me," then they may be more punitive toward the defendant. Again, this is easier to do when there is more cultural difference and inconsistency with the juror's worldview.

Thus, it's essential to evaluate the case facts, the parties in the case, particularly the "victim" and the defendant in terms of jurors' worldviews and mortality salience. The more "innocent" the "victim," the more punitive jurors might be. The more culturally different the defendant, the more punitive jurors might be. Depending on your legal perspective, think about ways to demonstrate similarities and differences between jurors and victims/defendants as well as putting jurors "in the shoes of" or "out of the shoes of" the victim/defendant.

A "terrorism case" is a classic example of the effects of *TMT*. The defendant is already "culturally different" from the average juror (depending on the venue), sometimes Muslim, born in another country and not an American citizen – the ultimate "out-group." Combine that with the fact that "terrorism" threatens the mortality of large numbers of innocent people of whom the juror could be one. In cases with significant threats to worldview and mortality, stereotypic thinking is enhanced as is intergroup bias as well as an increase in conformity among deliberating jurors.

Evaluate Jurors with *TMT* in Mind:

Keep in mind the zeitgeist of the times and what is happening within the venue that might enhance prospective jurors' mortality salience. Some might argue that post 9/11 people do not feel as safe as they once did and therefore jurors are more aware of their own mortality, particularly during the years after 9/11 when the administration and media

bombarded them with the “war on terror” and need to “protect” and keep American citizens “safe” from “attack.” Consider the local venue/community. Have events happened that might enhance jurors thinking about their own mortality (e.g., environmental issues where many in the community fell ill, a mining accident, or other types of accidents or tragedies where people died, a crime spree that has people on edge, etc.). The events do not necessarily have to relate to your case to affect mortality salience which can then have an impact on the outcome of your case.

Pay attention to the particular cultural worldview of individual jurors and how it might influence their perception of case facts (including traits of the defendant and “victim”). Then assess if there are any juror experiences that might make mortality more salient. Regardless of your case facts, ask if anyone (or anyone close to them) has passed away within the last year, known anyone who was murdered, seriously injured, had a near death experience, etc. Follow up questions are crucial: Was it the actual juror, someone close to them, what were the circumstances, and, importantly, how long ago did it happen and do they still think about it. These types of follow ups will give clues as to the salience of thoughts of mortality.

Lieberman and Arndt propose that the salience affect is more powerful when individuals contemplate their own death, rather than that of another. However, also inquire about the death of another person close to the juror, or if not the death the victimization of a person close to them. Often jurors who have family members who have been victims may be more angry and punitive than the actual victims themselves.

The authors’ note individual differences that make jurors more or less susceptible to the effects of *TMT*: self-esteem, attachment style and depression, authoritarianism, and religious endorsement. To the extent possible, it’s important to question and identify jurors with these individual differences and judge how they pertain to your case. Another individual difference to incorporate is “need for cognition,” a personality variable reflecting the extent to which people engage in and enjoy cognitive activities. It stands to reason that those with a high need for cognition would be less susceptible to the effects of *TMT*.



Develop Themes that Resonate with Cultural Worldviews:

Although themes are usually case specific, the article hinted at “universal” worldviews that could be turned into very effective themes. For example, familial themes help humanize defendants and connect them to the juror’s worldview, principles of fairness resonate with both criminal and civil juries, lawbreaking in criminal cases and rule breaking in civil cases are universally effective themes, as are themes that involve safety, prevention and protection. All of these generic themes can be connected to the average juror’s worldview, and be framed in ways that address jurors’ concerns about their own mortality. Importantly, develop the theme consistent with the facts and issues in your case. Emotional themes focused on garnering sympathy are likely to work well when there is a higher degree of mortality salience. Although rational themes are likely to be better when there is less risk of the biasing effects of *TMT*, the authors suggest that presenting more rational arguments and information can mitigate the effects of *TMT*.

Other Comments:

Procedural Fairness: The link to Procedural Justice Theory is an example of the breadth *Terror Management Theory* has in explaining human behavior. While the idea of procedural fairness resonates with most jurors’ worldview, using it to mitigate the effects of *TMT* in cases where there are significant facts and evidence that run counter to a juror’s worldview is particularly interesting. I found the reference to death penalty cases an interesting juxtaposition. The notion that, in a death penalty case, jurors might be more attuned to procedural fairness (more attentive to quality of expert testimony and more appropriately use mitigating factors) because of the magnitude of the decision would be

interesting to examine in light of the considerable body of research suggesting that established procedures for jury selection in capital cases leads to conviction prone juries. Similarly, generally speaking, jurors who are typically more authoritarian tend to be conviction prone, yet these are also the types of jurors who buy into procedural fairness and look up to the judge for cues.

Dangerous Defendants and Courtroom Protections: Picture a courtroom with additional guards, bailiffs or U.S. Marshalls stationed around the room – with firearm at hand, a defendant in a prison-issue uniform, possibly shackled, etc. Certainly such an environment would lead jurors to think about the dangerousness of the defendant and their own mortality. Is the jury anonymous? Although Judges attempt to minimize the significance of these “protections” the implications of dangerousness is clear to jurors. Perhaps *TMT* could provide support for defense motions opposing anonymous juries, etc.

Emotion and Information Processing: One of the core components of this theory has to do with emotion and how individuals process information. The authors touch on the fact that the “mortality salience effect tends to occur more frequently in individuals who are more experiential and who rely on their gut instincts and emotional reactions, and less so in jurors who have more rational and analytic mindsets.” They suggest that the effects of *TMT* can be mitigated by efforts to have the jurors approach information more rationally. Thus it seems that identifying jurors who tend to process information more cognitively as opposed to peripherally would be an important factor in understanding and mitigating the effects of this theory. However, the authors’ suggestion that one could induce jurors to think rationally by presenting more data, statistics, etc., does not address the debate about juror comprehension of complex information. Depending on the case facts and one’s perspective, attorneys should examine ways to induce rational thinking by encouraging logic and common sense and discouraging emotional reactions.

Conclusion:

Lieberman and Arndt wisely note the importance of thinking about this theory case by case. Attorneys should rhetorically ask themselves: What facts and issues about the case, the parties, defendants and victims, etc., might fit or run counter to jurors’ worldviews? What issues might affect mortality salience among jurors? What questions can be asked in voir dire to uncover a juror’s particular cultural worldview and mortality salience? How can the case be presented to enhance or mitigate the possible effects of *TMT*?

A comment on Terror Management Theory & Jury Decision-Making

By Greg Cusimano

Gregory S. Cusimano is a practicing attorney and trial consultant from Gadsden, Alabama. Greg a principal in Winning Works, LLC, along with David Wenner, AZ developed the Jury Bias Model, which has been celebrated as transforming trial and preparation strategies.

There is no doubt we are aware of our mortality. Thoughts of death provoke anxiety. Our normal nature is to move away from pain and toward pleasure. Anxiety is painful. One way we resolve the anxiety of knowing that life is finite is to develop a worldview or “Cultural worldview” as referred to by Lieberman and Arndt. As long as we live and protect our worldview we maintain a sense of security, calm and self-esteem. Life has meaning. We like people who share our worldview, who agree with us, who believe as we believe, and who feel as we feel. We think they are bright, friendly and reasonable. We recognize bias exists in others, but not ourselves. We believe that if others are reasonable and knew what we know, they would believe as we believe. Lee Ross, a

Stanford social psychologist, says that we believe we see the world as it is and if others do not see it the same way, they do not see it as it is. Ross calls this conviction “naïve realism”.

Stewart Chase, an economist over 200 years ago said, “For those that believe, no proof is necessary, for those who do not believe, no proof is possible.” The same is true today, especially in the courtroom. This article is instructive in that regard. Lieberman and Arndt say, “Thus, one of the basic predictions of TMT, known as the ‘mortality salience hypothesis’ states that reminders of mortality will cause an individual to invest in and defend their cultural belief system, leading them to respond favorably to others who support his or her worldview and negatively to those who threaten it.” We as lawyers or trial consultants must discover the belief systems or cultural worldviews of those who make up our juries. If possible, we must strike those whose worldviews are so foreign we cannot prevail, and mold, sequence, and structure our trial story to be as consistent with the worldviews of the decision-makers as possible. “Mortality salience”, or making mortality salient, heightens one’s desire to protect their worldview. Being primed about our own death generates fear, and we often unconsciously attempt to destroy what we fear and embrace and protect beliefs we hold dear. Some do not believe in undeserved suffering. Those with such a cultural or spiritual worldview believe suffering always has a purpose, or a reason. If you represent or work for the plaintiff in a personal injury action, that worldview can undermine your case and unconsciously drive decision-making. The Just-World Hypothesis holds that many people who serve as jurors tend to believe that the world is “just”, and if suffering or injustice occurs without apparent reason, then there must be something the plaintiff or victim did to deserve it. People need to believe in a just world where people get what they deserve. This rationalization reduces anxiety and supports the belief that the world is a safe and just place.

As lawyers or consultants, all this begs the question, “How do we discover the worldviews of those who make up our juries?” We must first discover the beliefs in order to understand how they will affect the case. My suggestion is jury research—focus groups, surveys, and engaging in any and every activity that helps us understand how our potential jury is likely to think and believe. What cultural worldviews are present? TMT helps to explain the roots of certain worldviews. In the process of jury research, we will discover “jury proof”, i.e., what we need to show or prove that leads the jury to the conclusion we desire. Jury proof is not necessarily the same as legal proof although it may be. We need to adduce and include jury proof in structuring our trial story to address Terror Management Theory and whatever worldviews held by our jurors. We can use it if it helps us, and counter it if it hurts. However, we must first be aware it exists and then discover how it interacts with our trial theme and story.

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13,450+

13,450. That's the number of reads our May issue of *The Jury Expert* had as of Monday, July 20 (the day before we published this issue). Our online debut issue (in May 2008) had a few more than 500 reads. Over the past year we have grown a lot and we are grateful to the thousands of you who read our pages every issue. And even more grateful (dizzily so!) when you pass us on to your friends and colleagues.

We are also grateful to the academics and researchers who write for us and turn theory into practice and especially grateful to the members of the American Society of Trial Consultants (ASTC) without whom we would not exist. ASTC member trial consultants continue to inform, educate and surprise us with creative and practical articles focused on improving litigation advocacy. So thanks to all of you and to paraphrase a young Sally Fields--"you like us, really like us".

This issue is filled with lessons for uncertain times. We have articles on terror management theory and how to use it at trial, two articles on damages in times of recession (does it make a difference in awards and if so, how?), getting the most out of videos at trial, exploring the TODDI defense (this other dude did it!), how to prepare your witness for the environment change from office to actual courtroom, and negotiating in the new millennium. Plus our July favorite thing and a book review. It's hot outside! Stay inside, enjoy the air conditioning and read *The Jury Expert*!

--- *Rita R. Handrich, Ph.D.*



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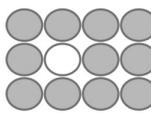
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