

## *In Law as in Life, the Power of Context*

BY SAM SOMMERS

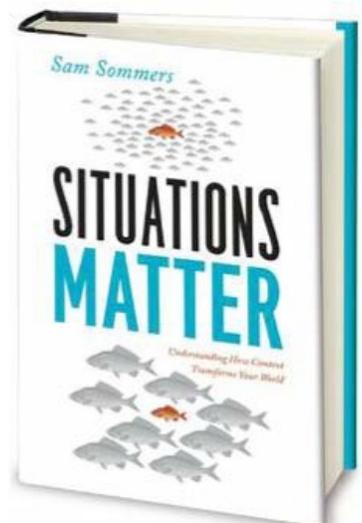
*Samuel R. Sommers, Ph.D., is associate professor of psychology at Tufts University in Medford, MA. His research specialties sit at the intersection of experimental psychology and law. He has published over two-dozen articles on topics including jury decision-making, jury selection, and general issues related to race and the legal system. He has consulted as an expert in multiple criminal cases, including capital trials in California, Massachusetts, New Hampshire, North Carolina, Oregon, and Texas. His new general-audience book on the psychology of everyday life, [Situations Matter: Understanding How Context Transforms Your World](#), was released in December 2011. He blogs on the science of daily interaction for [Psychology Today](#) and can be followed on Twitter [here](#).*

*Editor's Note. Sam Sommers has written several articles for The Jury Expert on his research. When his new book published in late December, 2011 we asked him to write a piece for us on how context matters in everyday life and in the courtroom. We are grateful to Sam for taking time at the beginning of an academic semester and in the throes of book release media requests (he's hoping for a Daily Show visit) to write this brief article for us.*

Human nature is surprisingly context-dependent. That is to say, situational factors exert a dramatic influence on people's cognitive, attitudinal, and behavioral tendencies—how we think, what we feel, and what we do.

This is a conclusion that should hardly come as news to trial consultants or attorneys or the litigants with whom they work. After all, much of trial strategy involves explicit consideration of how context can best be manipulated to the advantage of one side or the other. *What questions and question wording will elicit the most useful information during jury selection? Which order of witnesses would be most persuasive? What framing of these data will be most accessible for jurors?* Questions like these are, essentially, questions about context.

But while the effective attorney and consultant must be keenly aware of the power of situations to shape perception and judgment, the average layperson typically overlooks the role of context in daily life. This is the focus of my new book, entitled [Situations Matter: Understanding How Context Transforms Your World](#). The book was written for a general audience and explores the influence of context on a wide range of domains including be-



havior in crowds, self-perception, gender differences, sexual attraction, and racial prejudice. For each of these aspects of human nature, the same lesson emerges from the scientific data: while our actual tendencies are transformed by context, we typically overlook this power of situations, instead relying on assumptions regarding supposedly stable personalities.

As just one example, consider our knee-jerk tendency to blame bad behavior on “bad apples.” So we hear about, say, the tourist who dies while riding the subway, with hours lapsing before anyone intervenes or even notices that something is amiss. Our reaction when reading this story in the newspaper? To indict the other train passengers (or maybe even city dwellers everywhere) as abnormally apathetic and callous human beings.

But lost in this fixation on personality is much of the true nature of human nature. Our typical reaction to the indifference of subway commuters overlooks the ordinary circumstances that render all people less likely to get involved in the affairs of others. Like the diffusion of personal responsibility that happens in crowds: Studies indicate that even in emergencies, we’re less likely to intervene when we are part of a large group than in more intimate settings. In fact, just visualizing a crowd decreases the likelihood that we help.

What does any of this have to do with trial consulting, litigation advocacy or courtroom proceedings more generally? Especially since I proposed above that given the nature of their work, trial consultants should be more aware than most people of the impact of context on human nature? Well, at the end of the day, consultants and litigators direct their efforts toward winning over the hearts and minds of lay jurors, often through working with lay witnesses. Accordingly, this blind spot in people’s general perceptual tendencies – this inclination to look past context and instead see those around us in more dispositional, personality-centric terms – is one that trial consultants and trial attorneys ignore at their own peril.

In fact, here are three specific examples of how people’s tendency to overlook context plays a role in how jurors may view your case:

**1. Eyewitness Memory.** That eyewitness memory is not always what it’s cracked up to be has been demonstrated by decades of research findings. But the persuasiveness to jurors of a confident eyewitness is also well-documented. The compelling nature of eyewitness testimony owes, in large part, to jurors’ relative insensitivity to context.

When jurors see a confident eyewitness take the stand and state with near 100% certainty that the person she saw during the incident in question is now seated directly in front of her in the courtroom, that’s powerful stuff. A variety of life experiences have taught us that confident people are usually confident because they’re right. Especially in a setting like the courtroom where the stakes are high and – in many instances, at least – the witness has no motivation to lie.

Alas, when it comes to eyewitnesses, confidence turns out to be malleable. Information learned after making an identification – whether through conversations with fellow witnesses, media accounts, or even just an assumption that when a case proceeds to trial it must be because the prosecution thinks the witness picked the right person – can inflate an eyewitness’s confidence. As someone who has started to do some expert witness consultation in criminal matters, I’ve now seen several cases in which a tentative identification during a photo array morphs months later into 95-100% eyewitness certainty on the stand. Absent preventative efforts from the trial attorney (perhaps including an expert witness), jurors are likely to look right past the circumstances that inflate eyewitness confidence and simply see a confident eyewitness.

Jurors also have a hard time putting themselves in the shoes of eyewitnesses. Ask your average layperson if he would be able to identify someone seen during the commission of a crime, and he'll answer in the affirmative. In the hypothetical, it seems like an easy task: you see a face and pick it out later. But we tend to underestimate the aspects of the situation that would work against us as actual eyewitnesses: the stress of being caught up in a potentially dangerous incident; the limited viewing opportunity and otherwise poor viewing conditions often afforded eyewitnesses; the pressure felt to make an identification so as not to throw a wrench in the momentum of the investigation.

Quite simply, lay intuitions regarding eyewitness memory don't give nearly enough credit to the power of context to shape the eyewitnessing experience. When going up against eyewitness evidence in trying a case, this is a blind spot that consultants and litigants must address directly.

**2. Confessions.** A similar story can be told for how jurors perceive confession evidence. In more than one-quarter of DNA exonerations, a false confession played some role in the original, erroneous conviction. Why? Because of the mentality that confessions always come from people who know they're guilty – the assumption that no one would ever confess to something they hadn't done.

Except we know from research that there are contextual factors that make a false confession more likely. Overt, blatant forms of coercion, obviously. But also less readily evident factors such as the fabrication of incriminating evidence (which, of course, police are allowed to do during an interrogation). And anything that might render a suspect's memory for the events in question less than crystal clear.

In my book, I tell the story of Marty Tankleff, who at age 17 was convicted of the murder of his parents on Long Island, largely based on a confession that he immediately retracted. Eventually, he was freed thanks to DNA evidence, but not until spending half of his life in prison. Marty's so-called confession came while still in shock at having discovered his parents' dead bodies, and after hours of interrogation without a lawyer. Finally, after having been lied to and told that his hair was found in his dead mother's hands and that his father had emerged from a coma before dying just long enough to finger him as the culprit, Marty relented briefly and said, "Yeah, I did it."

Those four words sealed Tankleff's fate with the jury, even though he almost immediately retracted them and never did sign the written confession statement. And even though forensic evidence was inconsistent with the theory that Marty had stabbed and bludgeoned his parents to death, and another suspect who owed half-a-million dollars to Marty's father suddenly fled the state after the murders and checked himself into a spa under an assumed name.

Again, all because jurors were unable to grasp the power of the situation in which Marty Tankleff had found himself during the interrogation. Research suggests that these jurors were not unique: in a study by Saul Kassin and Holly Sukel at Williams College, mock jurors were to evaluate the summary transcript of an interrogation in which a detective obtained a murder confession by yelling and waving his gun in a threatening manner. Respondents recognized that the confession wasn't voluntary. They reported that it wouldn't affect their judgment of the trial. They claimed that they'd disregard it entirely. And then, when asked to render a verdict, they were still four times more likely to think the defendant was guilty than were other mock juries never told about a confession.

**3. Racial Bias.** As with other aspects of human nature, we often think about racial bias in dispositional terms. Our default tendency is the “bad apple” view of racism, in which the only actions we are willing to label as discriminatory are those exhibited by individuals harboring racial animus or ill intent.

For example, at a societal level, our discourse on the issue of race has settled into a familiar and futile rut: We typically steer clear of the topic until a high-profile incident raises allegations of dispositional racism. These allegations are inevitably followed by immediate denials. Debate then shifts to evaluating the evidence provided by the accused, presumably to prove how fair-minded his or her character really is (e.g., the touting of good intention, past philanthropy, or even simply having a few Black friends). These debates go nowhere, as proving dispositional racism or discriminatory intent is nearly impossible when no one wants to admit to such a disposition or intent.

Or, indeed, when the parties in question genuinely harbor no negative intent, as we know can be the case with contemporary forms of bias. Field studies reveal that job résumés with a Black-sounding name receive 2/3 the number of callbacks as résumés with a White-sounding name, even though few who work in human resources intentionally contribute to this disparity. And recent class action suits assert that borrower fees (and sometimes rates) are often set higher for non-White applicants versus White applicants, though, again, absent systematically pernicious intent among brokers.

So in the discrimination lawsuit, civil rights action, capital punishment appeal, or other case that hinges on questions of bias, it is this “bad apple” view of discrimination with which consultants and litigants must wrestle. The default assumption of most jurors (and judges) remains discrimination = bad intent. Accordingly, when the individuals in question come off as well-meaning people – or when the organization/institution in question has in place praise-worthy diversity-based initiatives or training – the default judgment will often be that no discrimination could have occurred.

In short, research on ongoing racial disparities in society illustrates that we have clearly not reached the post-racial utopia that some have proposed of late. But we have continued on a trajectory toward a dispositional view of racial bias, one in which many laypeople assume that bias only comes from bad people – or, at least, people who consciously harbor bad and biased beliefs. That there are a variety of contextual factors that renders disparate outcomes more likely – such as subjectivity of evaluations and total discretion in a decision processes – is a conclusion not readily apparent to many who make decisions in cases such as these.

## *Conclusion*

To close, my argument, here and in the book, is that learning to appreciate the power of context has the potential to make you a more effective person, in domains personal as well as professional. I would not be surprised if offering this conclusion to an audience of trial consultants and trial attorneys is, in many respects, preaching to the converted. But a refresher course never hurts, particularly when one’s professional days are spent thinking about how best to frame messages presented to a lay audience. While people’s general neglect of the power of context can pose challenges for the mundane interactions of daily life, in the high-stakes legal arena, it becomes a glaring blind spot that trial consultants and litigants simply can’t afford to overlook.

Image Credit: [\*Situations Matter\*](#)