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The Pros & Cons of the *Reptile* Approach to Trying Cases

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Back in 2009, a former theater director named David Ball and a zealous plaintiff attorney named Don Keenan published a book called *Reptile*, describing it as “the 2009 Manual of the Plaintiff’s Revolution.” The book purports to unlock the secrets of the black box and unleash an army of well-equipped justice seekers (i.e. plaintiff attorneys) to carry the torch of our forefathers and protect the legal system from tort reformers who continue to dangerously infringe upon the safety of Americans by limiting legal remedies for victims around the country.

The essence of *Reptile* is this: Scare jurors into believing that if they fail to act, the acts of the defendant will endanger them or their community. The authors point to a primitive, instinctual component of the brain they call the “reptilian brain” and argue that it cannot resist the temptation of a good fear appeal. They further suggest that current neuro-economic research supports the claims they make in the book.

The book has gained a lot of popularity amongst both plaintiff and defense attorneys. Keenan and Ball have a website where they dub successful plaintiff attorneys “Reptile Allstars.” Its influence has even extended to the King County courthouse as I recently witnessed a defense attorney make a pretrial motion to preclude the plaintiff’s attorney from engaging in “Reptilian” tactics over the course of trial. In light of its increasing popularity, this article analyzes and discusses the pros and cons of the strategies recommended by Keenan and Ball. Overall, *Reptile* regurgitates some sound principles of persuasion in the form of a metaphor, but falls short at times in execution. I’ll start by highlighting some key areas of weaknesses for the theory.

Anger, not fear, drives plaintiff verdicts. This is one area where *Reptile* is fundamentally wrong in a dangerous way. Ball and Keenan suggest that the most effective plaintiff case theories are those that instill fear in jurors. Not only does this unnecessarily raise the bar for plaintiffs (fear is difficult to instill in a litigation setting), but it is an incomplete recommendation at best. Jury verdicts are a product of one of two things: 1) a desire to compensate the plaintiff; or 2) a desire to punish the defendant. The latter is what leads to significant damages. Certainly, fear may factor into the desire to punish the defendant, but a fear appeal alone does not necessarily achieve the goal of motivating jurors to punish. Based on over a decade of experience analyzing hundreds of mock jurors, shadow juries, and actual juries, I would argue that verdicts intended to punish are not born out of an instinctual desire to relieve oneself of threats and fears, but instead are the product of a perceived violation of a core principle. There are frequent, large plaintiff verdicts where the issues in the case in no way presented a threat to the community or the individual juror. This distinction is important because anger-driven



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appeals rely on a much broader array of strategies than do fear appeals, so Ball and Keenan's recommendation significantly limits plaintiffs' strategic options. Furthermore, fear-driven appeals pose substantial risk for plaintiffs. Research shows one of the most common ways people eliminate fear is by focusing on the victim and his or her personal responsibility. For example, if the juror can look at the plaintiff and conclude that the plaintiff made choices the juror would not have made, the juror can pat him or herself on the back and conclude, "this would not happen to me since I would never make those kinds of choices." This resolves the fear for the juror in a much more effective way than a plaintiff verdict and is more consistent with today's culture of enjoying the demise of others. Plus, it's the path of least resistance for jurors coping with fears. After all, how does a verdict in favor of the plaintiff necessarily eliminate the threat? Consequently, fear-driven appeals run a substantial risk of focusing the jurors back on the plaintiff's personal responsibility, which can undermine the plaintiff's case and drive a defense verdict.

The scientific foundation of the book. Research has consistently demonstrated the strong influence of dopamine on human decision-making. *Reptile* appropriately highlights the implications of this research. However, while the authors proclaim that their theory rests on scientific foundation, the science is rarely, if ever, discussed beyond the book's forward. In fact, little to no research has examined how elements of communication and presentation, particularly within the litigation context, interact with the parts of the brain responsible for dopamine releases. The book's authors conveniently skip this issue and instead draw assumptions that their recommended thematic frameworks will result in the desired dopamine releases. In reality, the neuroscience is an unnecessary distraction on this issue, introduced perhaps to give the argument an appearance of cutting-edge science. One need not place individuals into fMRI machines and examine physical brain activity in order to understand that people tend to make decisions they can feel good about. Psychological satisfaction is an essential component of any persuasive appeal. People generally avoid making decisions that lack psychological appeal. In other words, jurors want to render a verdict they can feel good about. This does not provide the plaintiff a unique advantage. Instead, it is a simple message to both sides that an effective thematic framework requires psychological satisfaction. This tends to come more naturally to plaintiffs where cases often have built-in psychological appeal. Conversely, defendants tend to put themselves in a bind by deploying "yah, but" strategies (i.e. strategies that are defensive in tone). There is little to feel good about in embracing a "yah, but" defense. Consequently, defendants need to work hard to develop affirmative case theories that present an entirely different (and competing) theory of the case that provides its own unique psychological satisfaction. Defense attorneys can begin this process of strategy development by asking themselves, "what can jurors feel good about in rendering a verdict for my client?"

Jury selection. Ball and Keenan are fundamentally wrong about effective jury selection strategies. Their primary focus appears to be on building a bond with jurors and



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developing themes during voir dire. First of all, jurors are not persuaded in jury selection. They lack the necessary context and, frankly, the juror who is persuaded within the short timeframe of voir dire is likely to change his or her mind again over the course of trial. The reality is that theme development during voir dire only reveals adverse jurors to the other side. For example, obtaining agreement with a theme in voir dire through either verbal or nonverbal communication on the part of the jurors flags those jurors for the other side, making the other side's job much easier. Personally, I receive about half of the information that goes into making peremptory choices from the other side's voir dire because they engage in such tactics. Jury selection is a vital and limited opportunity at trial to remove biased jurors who may exert adverse influence in deliberations. Any strategy that veers from this focus is borderline malpractice. On a final note, attorneys can "bond" with jurors by being efficient and respectful during voir dire. Jurors' time is valuable. The perception that an attorney may be wasting it in an effort to sell themes poses a threat to such bonding.

There are a variety of other weaknesses of Reptile (such as the recommendation to always incorporate Scripture into a trial presentation), but these three cover the core vulnerabilities of the theory. So let's now switch gears to the book's strengths. While the authors describe the book as a "Manual of the Plaintiff's Revolution," the book's strengths are applicable to both plaintiffs and defendants.

Logic is the servant. Ball and Keenan dismiss the role of logic in jury decision-making, aggressively recasting the old "elephant v. rider" paradigm and arguing that success comes when an attorney wins the emotions of jurors. While this outright dismissal somewhat exaggerates the nature of the relationship, it is fair to say that different principles activate different logical structures. Consequently, competing thematic frameworks often necessitate competing logical frameworks. In other words, logical argument is relative to motivation: if someone wants to believe something, he or she can usually find a logical path to reach the desired conclusion. In academia, this is called motivated rationality. The point Ball and Keenan never quite make, but probably intended to make, is that jury instructions and the verdict form are a means to an end. Motivated jurors can typically find a way to construe jury instructions and the verdict form in a way that allows them to achieve a desired verdict. Attorneys seem to still struggle with the profound implications of this. It fundamentally changes the way one should present a case to a jury. However, what Ball and Keenan fail to acknowledge is that the road to this desired verdict can be rocky for their advocates. Stumbles and momentary loss of confidence along the way during deliberations can undermine the credibility of these advocates and reverse momentum in deliberations by providing opportunities for opposing advocates to seize control of deliberations. Consequently, it is incumbent upon attorneys who have effectively motivated jurors to serve as advocates for their clients in deliberations to outline an easy path for these advocates by demonstrating how the logical structures of the jury instructions and the verdict form can be used to reach the desired end.



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Attorneys often abandon themes during testimony. Ball and Keenan correctly note that many attorneys often ineffectively (or completely fail to) nurture their thematic frameworks during witness testimony. For defendants, cross-examination is an important opportunity for this theme development. It allows the defense to start establishing key themes and arguments during the plaintiff's case-in-chief. The shortcomings of many defense attorneys relate to the failure to adopt strategies that focus on making elements of thematic framework prominent throughout cross-examination. Structure and repetition are a simple way to make themes more prominent. For example, if a key issue is the plaintiff's poor choices, a defense attorney might consider developing twelve cross examination questions that focus on the series of poor choices and asking these questions in the exact same order, using the exact same language, to all relevant witnesses. This simple repetitive structure helps jurors internalize the framework. After about the fifth witness, they will know which question is coming next after an attorney has asked the first three questions of the twelve question pattern. This is a sign of success.

Jurors complete the story. While Ball and Keenan do not explicitly argue this, it is an implicit conclusion in their recommendations. If stories emerge in deliberations, the jury's verdict constitutes the final chapter of that story. This is not theoretical jibber jabber; it has important implications. I previously discussed the importance of psychological satisfaction. A simple, but often neglected component of strategy development is the identification of what the verdict means. Verdicts are statements by jurors. Consequently, every trial strategy should identify and understand the statement that a verdict in favor of the client makes. This ensures that sufficient psychological satisfaction exists and gives jurors something to endorse by finding in favor of the client. This task can be accomplished by an incredibly simple exercise in which the attorney finishes the following statement: A verdict in favor of my client... (does what). Create as many iterations of this statement as possible, playing with a variety of different principles, and choose the one that best simplifies the case and provides strong psychological satisfaction.

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