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## The Trial Lawyer and the Reptilian Brain: A Critique

Louis J. Sirico, Jr.

*Villanova University Charles Widger School of Law*

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# THE TRIAL LAWYER AND THE REPTILIAN BRAIN: A CRITIQUE

LOUIS J. SIRICO, JR.\*

## ABSTRACT

This Article brings together neuroscience, cultural symbolism, and the strategies of practicing lawyers to critique the reptile strategy, now popular among trial lawyers. The strategy directs the lawyer to trigger the reptilian brains of jurors so that they react instinctively to threats to themselves and their communities.

When humans feel threatened, the reptilian brain, the most primitive part of the brain, takes charge and instinctively controls human conduct. Therefore, if a lawyer can make a juror feel threatened, the lawyer makes an appeal to the juror's reptilian brain and virtually assures a victory. Thus, a lawyer's argument should intensify the juror's fear that his or her physical survival is at stake as well as that of the juror's family and community.

The reptile strategy seeks to make jurors act instinctively and not reflectively. This Article challenges the validity and desirability of this strategy.

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## I. INTRODUCTION

Seasoned trial lawyers often offer these sound pieces of advice:

The lawyer is the most important witness. Find the focus of judgment. Tell stories. Trash the calendar and avoid chronology. Create pictures. Give the jury a wrong to right. Don't tell people what to think; let them find it for themselves. Avoid the paradoxes of persuasion and preparation. Write to the ear and speak to the eye.<sup>1</sup>

Even within the framework that this advice constructs, there is room for different overarching theories. For many trial lawyers, one theory of the moment advances "the reptilian strategy." According to the theory, the brain of our primeval ancestors, the reptiles, survives as part of the human brain.<sup>2</sup> That part of the brain does not act based on emotion or intellectual reflection; it acts on unthinking instinct.<sup>3</sup>

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\* Professor of Law, Villanova University Charles Widger School of Law.

<sup>1</sup> Chris Lutz, *Foreword* to 2 JAMES W. MCELHANEY, *MCELHANEY'S LITIGATION*, at xvi (American Bar Assn. ed. 2013).

<sup>2</sup> Jeremy Lack & Francois Bogacz, *The Neurophysiology of ADR and Process Design: A New Approach to Conflict and Resolution?*, 14 *CARDOZO J. CONFLICT RESOL.* 33, 36 (2012).

<sup>3</sup> *Id.* at 36.

Here is the reptile theory in biological terms. If you poke a snake with a stick, the snake will react by biting you or curling up in a safe position. The snake will act instinctively to protect itself. In the same manner, if the jurors feel a threat to their safety, they will protect themselves by finding against your opponent—for example, a criminal defendant or corporation manufacturing a dangerous product.

When humans feel threatened, the reptilian brain takes charge and controls human conduct. Therefore, if a lawyer can make a juror feel threatened, the lawyer appeals to the juror's primitive reptilian brain and virtually assures a victory. Thus, a lawyer's argument should intensify the juror's fear that his or her physical survival is at stake as well as that of the juror's family and community. If the lawyer uses this strategy successfully, the jurors will mimic the reptile. Instead of protecting themselves by biting your opponent or curling up into a ball, the jurors will punish your opponent by convicting him or her or by inflicting a large damage award on the corporation.

Here is an example.<sup>4</sup> Suppose a lawyer is representing the plaintiff in a medical malpractice action against a physician. The lawyer begins by positing a rule with which everyone would easily agree. Here, the rule would be, "A doctor is not allowed to endanger the public needlessly." The lawyer frames the rule as a "safety rule"—a rule designed to keep the plaintiff and others in the community safe. The lawyer then may propose more specific safety rules; for example, "In choosing among medical procedures, the physician must choose the procedure that is safest." By focusing on rules that require safety and showing that the physician has broken those rules, the lawyer unleashes the reptile brains of the jurors, which have the instinctive goal of protecting the individual and the community. If the lawyer then shows that the defendant has violated safety rules, the reptilian response of the jury guarantees success.

What makes the theory particularly persuasive to the lawyer is the claim that it has the backing of neurobiology, particularly the psychological theory of Paul MacLean,<sup>5</sup> popularized by astronomer Carl Sagan.<sup>6</sup> According to the theory, the most primitive part of the human brain traces its evolutionary beginning to reptiles, human's ancient ancestors.<sup>7</sup> The components of this reptilian brain are often collectively termed the "reptilian complex."<sup>8</sup> An effective appeal to the reptile brain, or reptile complex, is an appeal to protect ourselves, our family, and our community. A successful appeal wins cases.

The theory gained prominence when trial consultant David Ball and trial attorney Don Keenan published their book, *Reptile: The 2009 Manual of the Plaintiff's Revolution*,<sup>9</sup> arguing that appealing to the juror's "reptile brain" would lead to

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<sup>4</sup> See DAVID BALL & DON C. KEENAN, *REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION* 52-66 (2009) (explaining the strategy and offering a similar illustration).

<sup>5</sup> See PAUL D. MACLEAN, *THE TRIUNE BRAIN IN EVOLUTION: ROLE IN PALEOCEREBRAL FUNCTIONS* 15-18 (1990) (explaining MacLean's thesis).

<sup>6</sup> See CARL SAGAN, *THE DRAGONS OF EDEN* 52-77 (1st ed. 1977).

<sup>7</sup> Lack & Bogacz, *supra* note 2, at 36.

<sup>8</sup> Alan Lener, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIPIAC L. REV. 643 (2005).

<sup>9</sup> SAGAN, *supra* note 6, at 52-77.

courtroom victories. The authors have had success in conducting seminars on the strategy for trial lawyers, primarily plaintiff's lawyers.<sup>10</sup> Ball and Keenan's theory also is creeping into judicial opinions and court filings<sup>11</sup> as well as the legal literature. An electronic search finds at least fifty legal secondary sources discussing the reptile theory and, in almost all cases, accepting its validity.<sup>12</sup>

Keenan and Ball summarize their argument with this axiom: "When the reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community."<sup>13</sup> Appealing to the brain's "negativity bias"—the brain's propensity to recall negative experiences and to be influenced by them—is a sensible strategy in persuading jurors to punish injurious actors.<sup>14</sup> The reptilian theory gives greater intensity to this strategy but is not essential to it. Thus, an advocate can exploit the negativity bias without fully accepting the reptilian theory.

The neurobiological underpinning of the reptilian theory brings into play a curious take on evolutionary theory. On the one hand, we view humans as a developing species that is distantly removed from reptiles that act entirely from instinct. On the other, the reptilian theory holds that the heritage of these primeval ancestors controls our conduct even in a courtroom setting that calls for serious, reflective decision making. Thus, here, the evolutionary narrative of progress gives way to a non-narrative story of non-

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<sup>10</sup> See REPTILE, <http://www.reptilekeenanball.com> (last visited Feb. 6, 2017) (promoting seminars and related products).

<sup>11</sup> See, e.g., *Rose v. Colvin*, No. 14-CV-0848PJS/TNL, 2015 WL 4997445, 2015 U.S. Dist. LEXIS 108679, at \*14, \*54 (D. Minn. Aug. 18, 2015) (reporting psychiatrist's description of "road rage" response as part of the reptilian brain); *Calaway ex rel. K.C. v. Schucker*, No. 02-2715-STA-ege, 2013 WL 4505797, 2013 U.S. Dist. LEXIS 119161, at \*5 (W.D. Tenn. Aug. 22, 2013) (rejecting motion to prevent plaintiff from using reptilian brain techniques in his argument); *Lawrence v. McNeil*, No. 3:08cv69/SPM, 2010 WL 2890576, 2010 U.S. Dist. LEXIS 83454, at \*51, \*149 (N.D. Fla. July 21, 2010) (reporting attorney's argument that once the left temporal lobe is "knocked out, then you're back here and your reptilian brain acting out a fight like an animal"); Opp'n to Pet'rs' Verified Petition for Writ of Mandate to Enforce California Public Records Act at \*14-15, *ACLU v. Superior Court*, No. B2593992 (Cal. Ct. App. Nov. 26, 2014) (arguing that "the hypnotic effect of [the reptile] technique radiates from the left petition"); *People v. Chavez*, No. F038767, 2002 WL 31863441, 2002 Cal. App. Unpub. LEXIS 12011, at \*22-24 (Cal. Ct. App. Dec. 23, 2002) (depublished) (rejecting argument that criminal defendant's "rage reaction" was attributable to the reptilian brain's survival instinct); Def.'s Mot. in Limine to Prevent Pls.' Counsel from Invoking the "Reptile" Theory at \*1, *Hardy v. Byrd*, No. 012011CA006694 (Fla. Cir. Ct. Apr. 14, 2014) (arguing that the court should prevent plaintiff's counsel from advancing "reptile" arguments); *In re San-Miguel*, No. 09-15-00134-CV, 2015 WL 8471705, 2015 Tex. App. LEXIS 12548, at \*2 (Tex. Ct. App. Dec. 10, 2015) (reporting psychiatrist's description of alleged offender as having a "psychopathic reptilian predatory scare").

<sup>12</sup> Kenneth Chestek, *Of Reptiles and Velcro: The Brain's Negativity Bias and Persuasion*, 15 NEV. L.J. 605, 615 (2015); Eric Weitz, *Rules and Reptiles in Med-Mal Trials*, TRIAL, June 2010, at 38; David Ball, *Damages and the Reptilian Brain*, TRIAL, Sept. 2009, at 25-26.

<sup>13</sup> BALL & KEENAN, *supra* note 4, at 19; see also Frank Costilla, Jr., *Underlying Principles that Motivate Jurors to Give*, Winter Convention (Am. Ass'n for Just., Cleveland, Ohio) (Feb. 2008) (summarizing the reptile strategy in detail).

<sup>14</sup> See Chestek, *supra* note 12, at 617 (explaining the negativity bias and reporting on psychological studies about the bias).

evolution. The theory holds that humans cannot escape their ancient neurobiological past.

This Article offers a critical evaluation of the reptile brain strategy. It briefly examines the neurobiological foundation—the argument that the part of the brain deriving from the reptile instinctively dominates when provoked—and considers the theory’s limitations. The article then tests the reptile thesis against the ways in which humans have conceptualized reptiles. Finally, it surveys how practitioners think about jurors and argues that the reptile theory encourages lawyers to acquire a negative view of juries and the justice system—a view that also can lead to unsuccessful courtroom results and a warped judicial system.

## II. THE NEUROBIOLOGICAL THEORY

The reptile theory bases its argument on the neuroscience of the 1960s. Building on the work of his predecessors,<sup>15</sup> Paul D. MacLean conceptualized the human brain as consisting of three parts—a triune brain—with each part building on the earlier part and offering newer and more specialized functions.<sup>16</sup> The three parts are the reptilian brain, or R-complex, the limbic system, which surrounds it, and the neocortex, which surrounds them both.<sup>17</sup>

MacLean saw the reptilian brain as acting without reflection:

The reptilian complex is concerned with autonomic functions associated with the body’s physical survival (e.g., circulation and breathing). It also influences instinctive social behaviour (e.g., pertaining to territoriality, social stature, mating and dominance), executes the fight or flight response and controls other mainly hard-wired ritualistic or instinctive behaviours.<sup>18</sup>

In contrast, the limbic system (paleomammalian system or visceral brain) responds to emotion:

The limbic system is the primary seat of emotions (e.g., happiness, sorrow, pleasure, pain), personal identity and related behavioural responses (e.g., sexual behaviour, play, emotional bonding, separation calls, fighting, fleeing). It also houses our affective (emotion-charged) memories and seems to be the seat of our value judgements and informed intuition.<sup>19</sup>

MacLean saw the neocortex (neomammalian system) as the reflective part of the brain and the part separating humans from other living beings:

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<sup>15</sup> ANDREW LAUTIN, *THE LIMBIC BRAIN* 70-71 (2001); *see generally* Karl H. Pribam, *Pribam and MacLean in Perspective*, in *THE EVOLUTIONARY NEUROETHOLOGY OF PAUL MACLEAN: CONVERGENCES AND FRONTIERS* (Gerald A. Cory, Jr. & Russell Gardner, Jr. eds., 2002) (discussing some earlier brain research).

<sup>16</sup> *See* LAUTIN, *supra* note 15, at 83-85 (explaining MacLean’s understanding of the functions of the three parts of the brain); MACLEAN, *supra* note 5, at 15-18 (explaining MacLean’s thesis in a highly technical manner meant for the specialized scientific reader).

<sup>17</sup> LAUTIN, *supra* note 15, at 83-84.

<sup>18</sup> William E. Rees, Trudeau Fellow, Univ. of British Columbia, Trudeau Lecture at Memorial University Newfoundland: Are Humans Unsustainable by Nature? (Jan. 28, 2009).

<sup>19</sup> *Id.* at 4.

The neo-cortex or “rational brain” is the most recent elaboration but occupies over two thirds of the human brain by volume. More importantly, it is responsible for the higher cognitive functions that distinguish humans from other mammals; it is the seat of consciousness and the locus of abstract thought, reason and logic. It makes us uniquely capable of moral judgement and forward planning. The neo-cortex facilitates language, speech and writing and, with these, the very possibility of civilization.<sup>20</sup>

Although MacLean focused on each system’s independent conduct, he also recognized that they interacted. Perhaps he is best known for his work on the significance of the limbic system and the role of emotion in the functioning of the brain.<sup>21</sup>

Today, MacLean’s theory lies at the margins of neurobiology’s mainstream.<sup>22</sup> Although it has its champions,<sup>23</sup> it is subject to serious criticisms. MacLean argued that each of his three brain systems grew sequentially in an evolutionary course with the limbic system growing by accretion on top of the reptilian system and the neocortex growing on top of the limbic system. However, all three systems appear to exist in many living creatures and, over time, adapted in them in different ways.<sup>24</sup> Moreover, each of the three systems interacts with the others so significantly that to

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<sup>20</sup> *Id.* at 4.

<sup>21</sup>

It should be emphasized, however, that the three brain types are in no sense separate, autonomous entities, although they are capable of functioning somewhat independently. . . . They are extensively interconnected, but just how they are connected and function together as a triune brain is a major problem for future investigation.

Paul D. MacLean, *The Brain’s Generation Gap*, 12 THE SOCIAL CONTRACT 185, 185-87 (2002), <http://www.thesocialcontract.com/pdf/twelve-three/xii-3-185.pdf>; *see also* Jaak Panksepp, *Foreword: The MacLean Legacy and Some Modern Trends in Emotion Research*, THE EVOLUTIONARY NEUROETHOLOGY OF PAUL MACLEAN: CONVERGENCES AND FRONTIERS, *supra* note 15, at ix-xxvii (emphasizing MacLean’s focus on the limbic system and the integrative interaction of the parts of the brain); ANTONIO DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 34-51 (2005) (describing a man who lost the functioning of his limbic brain and then could not make simple rational decisions, thus illustrating the necessary role of emotion in the property functioning of the interconnected brain).

<sup>22</sup> *See Introduction*, THE EVOLUTIONARY NEUROETHOLOGY OF PAUL MACLEAN: CONVERGENCES AND FRONTIERS, *supra* note 15, at xxxi; Panksepp, *supra* note 21, at xx (both noting this marginalization and arguing that mainstream neurological thought fails to consider an expansive notion of human thought and conduct); Jeremy Pearce, *Paul MacLean, 94, Neuroscientist Who Devised ‘Triune Brain’ Theory, Dies*, N.Y. TIMES (Jan. 10, 2008), [http://www.nytimes.com/2008/01/10/science/10maclean.html?\\_r=0](http://www.nytimes.com/2008/01/10/science/10maclean.html?_r=0) (quoting Director of the National Institute of Mental Health stating that MacLean’s theory was “outside the mainstream of scientific effort”).

<sup>23</sup> “Moreover, [MacLean’s vision] is not mere speculation but in fact a superb theoretical structure, with abundant predictions, built upon a solid foundational body of data from an extensive study of our brethren species.” Panksepp, *supra* note 21, at x.

<sup>24</sup> *See* Peter Farley, *A Theory Abandoned but Still Compelling*, YALE MED., Autumn 2008, <http://yalemedicine.yale.edu/autumn2008/features/capsule/51224>.

speak of a tripartite brain is inaccurate.<sup>25</sup> Although Carl Sagan accepted MacLean's analysis, he recognized the interplay of the parts of the brain:

Despite the intriguing localization of function in the triune brain model, it is, I stress again, an oversimplification to insist upon perfect separation of function. Human ritual and emotional behavior are certainly influenced strongly by neocortical abstract reasoning; analytical demonstrations of the validity of *purely religious beliefs* have been proffered, and there are philosophical justifications for hierarchical behavior. . . . Likewise, animals that are not human--and in fact even some animals that are not primates--seem to show glimmerings of analytical abilities. I certainly have such an impression about dolphins, as I described in my book *The Cosmic Connection*.<sup>26</sup>

Along the same lines, three authorities on juries make this point:

First and foremost, the basic neuroanatomy presented in some advisors' reptile theory is incorrect. Reptiles do not have fear; they rely on pure habit and instinct. Fear, especially learned fear, emanates from the limbic system, which exists only in mammals. Reptile fans may say, "Who cares about the anatomy if the techniques work?" For us, the mistake triggers threshold skepticism. If reptile consultants are inaccurate about this basic principle, what else in what they put forth may be inaccurate?<sup>27</sup>

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<sup>25</sup> See Thomas H. Maugh II, *Doctor Developed 'Triune Brain' Concept*, L.A. TIMES, Jan. 12, 2008. Here is the technical critique of the triune brain theory:

1. Basal ganglia are found in the brains of the earliest jawed fish, which means MacLean's "reptile complex" originated long before the first tetrapods wriggled onto land.
2. The earliest mammals already had well-formed neocortices, which means at least some "high-level cognitive abilities" predate mammals altogether.
3. Many reptiles exhibit "paleomammalian" behaviors such as familial bonding and child-rearing, and many birds exhibit "neomammalian" skills like tool-making, verbal comprehension and dialect development.
4. In functional terms, a human brain doesn't behave like a series of separate "complexes," but as a unified whole. Some neural networks do inhibit others—but the shapes of those networks have nothing to do with "reptilian" or "mammalian" layers.

Ben Thomas, *Revenge of the Lizard Brain*, SCI. AM. (Sept. 7, 2012), <http://blogs.scientificamerican.com/guest-blog/2012/09/07/revenge-of-the-lizard-brain>; see also Tim Dagleish, *The Emotional Brain*, NATURE REVIEWS NEUROSCI. 582, 588 (July 2004), <http://www.nature.com/nrn/journal/v5/n7/full/nrn1432.html> ("A historical analysis of the development of affective neuroscience reveals that many more brain regions than initially are involved in the processing of emotion and mood.").

<sup>26</sup> SAGAN, *supra* note 6, at 77.

<sup>27</sup> STEPHANIE WEST ALLEN ET AL., *ATTICUS FINCH WOULD NOT APPROVE: WHY A COURTROOM FULL OF REPTILES IS A BAD IDEA*, THE JURY EXPERT (MAY 10, 2010),

From MacLean's theory, Ball and Keenan make the jump to persuasion theory, perhaps inflating the neuropsychological basis: if the reptilian brain controls the human, and survival is not at stake, the rest of the brain enjoys the freedom to use logic and emotion to control conduct.<sup>28</sup> However, if survival is at stake, "the brain shifts into Reptilian survival mode and nothing else matters."<sup>29</sup>

Thus, if the lawyer can show that community safety equates with justice, and that justice lies with the lawyer's argument, the lawyer can successfully appeal to the reptile brain: "This gives us our primary goal in trial: To show the immediate danger of the *kind of thing* the defendant did—and how fair compensation can diminish that danger within the community."<sup>30</sup>

As plaintiff advocates in torts cases, Ball and Keenan encourage jurors to ask three questions: "1. How likely was it that the act or omission would hurt someone? 2. How much harm could it have caused? 3. How much harm could it cause in other kinds of situations?"<sup>31</sup> With these questions, Ball and Keenan seek to show the jurors that the defendant's conduct has endangered the community, and, thus, they seek to awaken the jurors' reptilian brains.<sup>32</sup>

Basing this theory of persuasion on the simple version of the tripartite brain has its attractions. Each component of the brain has a separate function with the most primitive part taking control in times of danger. This neat theory avoids grappling with the complex, interactive brain, which is a brain that eludes an explanation of human responses. Instead, the theory provides a neuropsychology that is easy to understand and that enables making reliable predictions of human conduct. An understanding of the complexity of the brain would require a sophisticated psychological appreciation of how humans make decisions. Moving from a simple neurobiological theory to a complex one, then, requires accepting the likely unpredictability of human conduct and, thus, destroys the foundation of the reptilian strategy.

### III. THE SYMBOLISM OF THE REPTILE

When lawyers adopt the reptile strategy, they bring into play their concept of the reptile and view the jurors in light of that concept. Lawyers, moreover, inevitably must define the reptile personality in light of the culture in which they live. However, their cultural backgrounds necessarily lead to diverse, often contradictory views of the reptile—some of which may lurk in their unconscious. Therefore, the lawyers view the reptile in terms of differing current and age-old symbols that accompany the animal. Thus, when the reptile strategy instructs the lawyer to view the juror-reptile according to one narrow interpretation of a reptile's nature, the strategy imposes an unrealistic requirement that contradicts the rich experience of the lawyer and the juror with the creature.

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[HTTP://WWW.THEJURYEXPERT.COM/2010/05/ATTICUS-FINCH-WOULD-NOT-APPROVEWHY-A-COURTROOM-FULL-OF-REPTILES-IS-A-BAD-IDEA/](http://www.thejuryexpert.com/2010/05/atticus-finch-would-not-approvewhy-a-courtroom-full-of-reptiles-is-a-bad-idea/).

<sup>28</sup> BALL & KEENAN, *supra* note 4, at 17.

<sup>29</sup> *Id.* at 18.

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

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

<sup>32</sup> *See id.* at 35-38.



The reptile strategy characterizes reptiles only as passive creatures until they are aroused to protect themselves and their progeny.<sup>33</sup> Yet, as noted, reptiles appear in a wide variety of other symbolic roles familiar to the lawyer. In some symbolic roles, for example, the reptile may be aggressively evil or be a spiritual healer. As a result of this cultural baggage, the lawyer may be unable to view jurors as fitting one definition of the reptile personality. Consequently, the lawyer's diverse conceptions of the reptile interfere with successfully employing the narrow reptilian strategy.

Here are some examples of the symbolism that accompanies reptiles. We have chosen examples that may be familiar to the contemporary lawyer.

Perhaps the reptiles that identify most closely with those in the reptile theory are the dinosaurs in the third Jurassic Park movie that intensify their destructive rage when attempting to retrieve their eggs and, thus, their progeny.<sup>34</sup> Yet, these dinosaurs are ferocious before their eggs are stolen.<sup>35</sup> Therefore, they do not fully comport with the model in the reptile theory in which the reptile grows fierce only when threatened.

Some reptiles are inherently evil. An example is the sly snake that seduces Eve to eat the fruit of the Tree of Good and Evil in the Garden of Eden.<sup>36</sup> There, the snake is a personification of Satan.<sup>37</sup> The mythical Basilisk, which is mentioned as early as Pliny the Elder's *Natural History*, is the venomous "King of Serpents."<sup>38</sup> In its early movies, Godzilla symbolizes the nuclear bomb and is destructive, but morally neutral.<sup>39</sup>

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<sup>33</sup> Costilla, *supra* note 13, at 2.

<sup>34</sup> See JURASSIC PARK III (Universal Studios 2001).

<sup>35</sup> *Id.*

<sup>36</sup> *Genesis* 3.

<sup>37</sup> See *id.*

<sup>38</sup> In his NATURAL HISTORY, Pliny the Elder described the basilisk in these words:

The basilisk serpent also has the same power [of immediately killing humans who see its eyes]. . . . It routs all snakes with its hiss, and does not move its body forward in manifold coils like the other snakes but advancing with its middle raised high. It kills bushes not only by its touch but also by its breath, scorches up grass and bursts rocks. Its effect on other animals is disastrous: it is believed that once one was killed with a spear by a man on horseback and the infection rising through the spear killed not only the rider but also the horse. Yet to a creature so marvellous as this—indeed kings have often wished to see a specimen when safely dead—the venom of weasels is fatal: so fixed is the decree of nature that nothing shall be without its match. They throw the basilisks into weasels' holes, which are easily known by the foulness of the ground, and the weasels kill them by their stench and die themselves at the same time, and nature's battle is accomplished.

Book VIII, ch. xxxiii (W.H. Jones Trans 1949-54), [http://www.masseiana.org/pliny.htm#BOOK\\_VII](http://www.masseiana.org/pliny.htm#BOOK_VII). In recent years, the basilisk has gained notoriety because of its appearance in J.K. Rowling's HARRY POTTER AND THE CHAMBER OF SECRETS (1999). The giant underground worms in the movie TREMORS (Universal Studios 1990) seem akin to the basilisk.

<sup>39</sup> See Terrence Rafferty, *The Monster that Morphed into a Metaphor*, N.Y. TIMES (May 2, 2004), <http://www.nytimes.com/2004/05/02/movies/film-the-monster-that-morphed-into-a-metaphor.html>.

A reptile also can conquer evil. In the Book of Exodus, Aaron's rod turned into a serpent and swallowed the serpents of Pharaoh's sorcerers.<sup>40</sup> Even this display of power did not humble Pharaoh, and, consequently, God turned the waters of Egypt into blood.<sup>41</sup>

As Carl Jung writes, "But the snake is not just a nefarious, chthonic being; it is also, as we have mentioned, a symbol of wisdom, and hence of light, goodness, and healing."<sup>42</sup> Thus, the common symbol of the medical profession is the staff of Asclepius,<sup>43</sup> a rod with a serpent entwined around it. Asclepius was the Greek god of healing. Because snakes shed their skin annually, they are a symbol of rejuvenation and lived as sacred creatures in the hospitals of ancient times.<sup>44</sup>

Many reptiles have a place among the archetypal symbols. The crocodile, for example, signifies an ancient life form that represents the inner negative energies of humans—an ill-tempered attitude toward life.<sup>45</sup> In western culture, dragons are violent creatures of the universe's primeval chaos. On the other hand, Barney, the television tyrannosaurus rex, is a friend of preschoolers.<sup>46</sup> In Jungian psychology, snakes and other reptiles also are primordial creatures.<sup>47</sup>

On a mystical level, because lizards shed their skin and also hibernate, they become symbols of death and resurrection and echo the Christian theme of Christ's death and resurrection.<sup>48</sup> Quetzalcoatl, the plumed snake of pre-Columbian culture, is a divinity that harmonizes heaven and earth.<sup>49</sup> The uroboros, the snake that swallows

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<sup>40</sup> See *Exodus* 7: 10-13. In the Judeo-Christian scripture, the serpent assumes differing roles. When a dying Jacob blessed his sons, he voiced his hope that Dan would be as strong as a serpent, "May Dan be a snake beside the road, a viper by the path, that bites the heels of the horse so that its rider falls backward." See *Genesis* 49:17 (New English Translation). When the Israelites complained, God sent serpents that bit and poisoned many of them. Then God instructed Moses to make a bronze serpent so that those who looked upon it might live. See *Numbers* 21:6-8. The Gospel of St. John refers to this episode. Jesus proclaims, "Just as Moses lifted up the serpent in the wilderness, so must the Son of Man be lifted up, so that everyone who believes in him may have eternal life." *John* 3: 14-15 (New English Translation).

<sup>41</sup> See *Exodus* 7: 19-21.

<sup>42</sup> CARL JUNG, *AION* 245 (Princeton Univ. Press fifth printing with corrections 1978).

<sup>43</sup> See *Asclepius, staff of*, HANS BIEDERMANN, *DICTIONARY OF SYMBOLISM: CULTURAL ICONS & THE MEANINGS BEHIND THEM* 19-20 (James Hulbert trans. 1994). The staff of Asclepius is sometimes confused with the staff of Caduceus, a rod with two snakes entwined around it. It is the symbol of commerce and negotiation, with the snakes at peace with one another. See HANS BIEDERMANN, *Caduceus*, in *DICTIONARY OF SYMBOLISM*, *supra* note 43, at 54.

<sup>44</sup> See HANS BIEDERMANN, *Asclepius, staff of*, in *DICTIONARY OF SYMBOLISM*, *supra* note 43, at 19.

<sup>45</sup> See HANS BIEDERMANN, *Crocodile*, in *DICTIONARY OF SYMBOLISM*, *supra* note 43, at 80-81.

<sup>46</sup> See BARNEY, <http://www.barney.com/au/> (last visited Feb. 7, 2017).

<sup>47</sup> See HANS BIEDERMANN, *Snake*, in *DICTIONARY OF SYMBOLISM*, *supra* note 43, at 310, 313.

<sup>48</sup> See HANS BIEDERMANN, *Lizard*, in *DICTIONARY OF SYMBOLISM*, *supra* note 43, at 211.

<sup>49</sup> See HANS BIEDERMANN, *Quetzalcoatl*, in *DICTIONARY OF SYMBOLISM*, *supra* note 43, at 366.

its tail and makes a circle, is able to embrace the world like a belt.<sup>50</sup> It symbolizes the eternal return, the endless cycle of death and rejuvenation.<sup>51</sup> On a less cosmic level, Kundalini yoga imagines a snake at the base of the spinal column symbolizing vital energy that mediation awakens and elevates through the body.<sup>52</sup>

As these examples show, the symbolism of the reptile is diverse and sometimes includes contradictory concepts. Because the reptile strategy attempts to limit the trial lawyer's focus to only one symbolic stereotype of the reptile, it must fail. The lawyer's cultural framework is too encompassing to permit a narrow perception of reptiles or, for that matter, humans. An attempt to apply the reptile strategy, then, will prove inauthentic and unpersuasive. This reality weakens the value of the reptilian strategy.

#### IV. THE ALTERNATIVE STRATEGIES OF TRIAL LAWYERS

In evaluating the reptilian strategy, an inevitable question arises: What strategies do practicing lawyers use? Do these strategies point to the value of the reptilian strategy, or do they point in other directions? Our answer is that practicing lawyers use a variety of strategies. Certainly playing on the juror's propensity to recall negative experiences can be an effective strategy; however, it is not the only strategy that lawyers employ.

Lawyers do not seem to adopt overarching grand theories analogous to the reptilian theory. Rather, they tend to invoke familiar themes of explaining the law and facts as clearly as possible. For example, one trial lawyer offers these ten "constants of persuasion": (1) Think inside the box (think how to persuade the individuals in the jury box); (2) Tell a compelling story; (3) Humanize clients and other key witnesses; (4) Warm up the courtroom (with your warmth, sincerity, and humor); (5) Earn the jurors' trust; trust the jury; (6) Set the agenda (use the opening statement to set the argument in way that will dominate the jurors' minds for the entire trial); (7) Prove that standards have been violated or upheld; (8) Don't run from your weaknesses; (9) Undermine adversaries with impeachment and admissions; and (10) Make the jury mad (at the other side).<sup>53</sup>

Another prominent trial lawyer identifies "twelve essential steps to persuasion": (1) Establish and focus on a goal; (2) Tailor your argument to the decision-maker; (3) Cultivate ethos (the audience's perception of the lawyer's character); (4) Base your argument on reason; (5) Build the case with evidence, law, and policy; (6) Appeal to emotion; (7) Use the best medium for the message (for example, PowerPoints, video depositions, and diagrams); (8) Strategically arrange your argument; (9) Argue with style; (10) Use strong delivery; (11) Concentrate on engaging the listener; and (12) Understand the proper use of refutation and rebuttal.<sup>54</sup>

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<sup>50</sup> See HANS BIEDERMANN, *Uroboros*, in *DICTIONARY OF SYMBOLISM*, *supra* note 43, at 362-63.

<sup>51</sup> *Id.*

<sup>52</sup> See HANS BIEDERMANN, *Snake*, in *DICTIONARY OF SYMBOLISM*, *supra* note 43, at 310-12; *Kundalini*, 8 *ENCYCLOPEDIA OF RELIGION* 5266 (Lindsay Jones ed., 2d ed. 2005).

<sup>53</sup> See DAVID BERG, *THE TRIAL LAWYER: WHAT IT TAKES TO WIN* 2-5 (American Bar Assn. ed., 2d ed. 2006).

<sup>54</sup> See PAUL MARK SANDLER, *ANATOMY OF A TRIAL: A HANDBOOK FOR YOUNG LAWYERS*, at xx-xxiv (2d ed. 2014).

A familiar framework for these strategies is Aristotle's tripartite classification of persuasive arguments:<sup>55</sup> *logos*, the persuasive force of reasoning and facts;<sup>56</sup> *pathos*, the emotional appeal;<sup>57</sup> and *ethos*, the appeal of the personal credibility of the advocate.<sup>58</sup> The reptile strategy, however, ignores a wealth of strategies and limits the advocate to only one type of *pathos* argument—fear.<sup>59</sup> Yet, *logos*, *pathos*, and *ethos* each lead to a variety of strategies that may prove effective.

*Logos* lends itself to more than abstract inductive and deductive reasoning.<sup>60</sup> It requires presenting one central theme that gives the juror the ability to reconcile the evidence and arguments in the advocate's favor. Success here requires making a simple argument in plain English that also avoids making contradictory arguments. For example, a poor argument would be: "Mrs. Smith was in the crosswalk when the truck hit her, *but even if she wasn't*, the truck was going excessively fast and the driver and his company are liable under the last clear chance doctrine." By including an alternative, this argument confronts the juror with two contradictory scenarios—the plaintiff was in the crosswalk and the plaintiff was outside the crosswalk.

Here is a better argument:

This elderly lady was struck by a truck going at an excessive rate of speed. Moreover, she was in the crosswalk—not that it matters—for the driver of that truck travelling at *that* rate of speed would be liable to any pedestrian he struck, wherever he ran them down.<sup>61</sup>

Unlike the first example, it avoids the appearance of contradiction. It focuses on the speeding driver so that whether or not the plaintiff was in the crosswalk is irrelevant. Moreover, it relies on evidence and reason.

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Of the modes of persuasion furnished by the spoken word there are three kinds. The first kind depends on the personal character of the speaker [*ethos*]; the second on putting the audience into a certain frame of mind [*pathos*]; the third on the proof, or apparent proof, provided by the words of the speech itself [*logos*]. Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. . . . Secondly, persuasion may come through the hearers, when the speech stirs their emotions. . . . Thirdly, persuasion is effected through the speech itself when we have proved a truth or an apparent truth by means of the persuasive arguments suitable to the case in question.

ARISTOTLE, RHETORICA, bk 1, ch. 2, 1356a in IX THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH (W.D. Ross ed., W. Rhys Roberts trans. 1946).

<sup>56</sup> See, e.g., BERG, *supra* note 53, at 143-49; HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN 35-46 (2013).

<sup>57</sup> See LOUIS J. SIRICO, JR. & NANCY L. SCHULTZ, PERSUASIVE LEGAL WRITING 12-14 (4th ed. Wolters Kluwer 2015); L. TIMOTHY PERRIN ET AL., THE ART & SCIENCE OF TRIAL ADVOCACY 24-25 (2d. ed. LexisNexis 2011).

<sup>58</sup> See PERRIN ET AL., *supra* note 57, at 15-22; SIRICO & SCHULTZ, *supra* note 57, at 14-17; STERN & SALTZBURG, *supra* note 56, at 11-34.

<sup>59</sup> Chestek, *supra* note 12, at 612.

<sup>60</sup> See generally STERN & SALTZBURG, *supra* note 56.

<sup>61</sup> See STERN & SALTZBURG, *supra* note 56, at 38-39 (giving these examples).

In this way, the persuasive argument links up with another *logos* technique: “The secret to showing instead of telling is to let verbs and nouns do the work instead of adjectives and adverbs. . . . With nouns and verbs, listeners make what you say their own idea, not what you told them emphasizes that make judges and juries take sides.”<sup>62</sup> In this example, the advocate emphasizes the evidentiary fact that the truck was speeding and relies on that fact to make the argument.

Pathos arguments compel the decision makers to feel the human dimension of the case.<sup>63</sup> Appealing to only the brain’s negativity bias<sup>64</sup> prevents appeals to other powerful emotions. Thus, it disregards many emotionally based arguments engaging the biases, prejudices, preferences, and leanings of jurors, including empathy<sup>65</sup> and anger.<sup>66</sup> Arguably, the lawyer uses pathos to trigger the desired reptilian response. Once the lawyer triggers that response, the juror acts instinctively, and pathos is no longer needed.

Among the pathos-based strategies, perhaps the most significant one for the advocate is presenting the argument as a story.<sup>67</sup> Although the advocate can tell a story that the audience finds threatening, the advocate also can tell stories that arouse empathy for the client. One of the most compelling stories is that of the hero’s journey.<sup>68</sup> Specifically, “Heroes are those who transform themselves or their societies

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<sup>62</sup> *Id.* at 607.

<sup>63</sup> See JOHN SONSTENG & ROGER HAYDOCK, TRIALBOOK 2 (3d ed. 2010).

<sup>64</sup> See Chestek, *supra* note 12, at 605 (explaining the negativity bias and reporting on psychological studies about the bias).

<sup>65</sup> Susan A. Bandes, *Taz and Empathy*, 58 HOW L.J. 397, 399, 406 (2015) (“Empathy is a capacity for understanding the motives, intentions, and desires of others.”).

<sup>66</sup> “The identification that comes with empathy can motivate kind behavior toward others; anger is often a response to perceived unfairness, cruelty, and other immoral acts.” Paul Bloom, *Against Empathy*, BOSTON REV., Sept. 10, 2014.

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[A] judicial decision must “ring true” with the stories that the audience knows to be true from its experience; that is, the argument must have “narrative fidelity.” Further, it must accept a narrative that is plausible; that is, the argument must have “narrative coherence.” Narrative coherence requires “external coherence;” that is, the narrative must correspond with the audience’s background social knowledge and cultural presuppositions. Narrative coherence also requires “internal coherence;” that is, all the aspects of the narrative—the plot, the characters, the setting—must join together without contradictions.

Louis J. Sirico, Jr. *Opening an Oral Argument before the Supreme Court: The Decline of Narrative’s Role*, THE REVIEW OF LITIGATION ONLINE (forthcoming). For this analysis, I relied heavily on J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING 54, 64-66. (2008); J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 LEG. COMM. AND RHETORIC: 67, 68-71 (2013); see also PHILIP N. MEYER, STORYTELLING FOR LAWYERS (2014) (focusing on storytelling in trials); RUTH ANNE ROBBINS ET AL., YOUR CLIENT’S STORY: PERSUASIVE LEGAL WRITING (2012) (focusing on teaching storytelling to law students).

<sup>68</sup> See Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 SEATTLE U.L. REV. 767, 769 (2006).

through a search for identity and wholeness.”<sup>69</sup> In their journey, heroes accomplish this transformation in seeking wholeness. For example, a domestic violence victim seeking a protective order may be on a caretaker’s journey seeking to protect herself and her family and start on a new life.<sup>70</sup> Yet the reptile strategy prevents telling such stories.<sup>71</sup> At best, it compels the jury to see the client as a victim; it acts instinctively and without reflection, to lash out at a threatening force.

The limitations of the reptile strategy necessarily prevent the lawyer from encouraging the jury to reflect on its obligations and to take responsibility for its task. For example, here is a legendary closing argument by noted trial lawyer Gerry Spence. With this story of a young boy, an old man, and a bird, he insures that the jury understands its role and will be disposed to favor his client:

Once there was a wise old man and a smart-aleck boy. The boy was driven by a single desire—to expose the wise old man as a fool. The smart aleck had a plan. He had captured a small and fragile bird in the forest. With the bird cupped in his hands so that the old man could not see it, the boy’s scheme was to approach the old man and ask, “Old man, what do I have in my hand?” To which the wise old man would reply, “You have a bird, my son.” Then the boy would ask, “Old man, is the bird alive or dead?” If the old man replied that it was dead, the boy would open his hands and allow the bird to fly off into the forest. But if the old man replied that the bird was alive, the boy would crush the bird inside his cupped hands until it was dead. Then the boy would open his hands and say, “See, the bird is dead!” And so, the smart-aleck boy went to the old man, and he said, as planned, “Old man, what do I have in my hands?”

The old man, as predicted, replied, “You have a bird, my son.” “Old man,” the boy then said with disdain, “is the bird *alive* or is it *dead*?” Whereupon the old man looked at the boy with his kindly old eyes and replied, “The bird is in your hands, my son.” It is then that I turn to the jury and say, “And so, too, ladies and gentlemen, the life of my client is in yours.”<sup>72</sup>

With this closing story, the jury understands that it alone has the responsibility for the verdict. The possible fate of the bird encourages it to treat the lawyer’s client as it would the fragile creature in the boy’s hands.

Ethos, the credibility of the advocate,<sup>73</sup> probably plays an equal role in both reptilian and nonreptilian strategies. It is possible, however, that attempting to arouse the allegedly reptilian brain may tempt the lawyer to exaggerate a client’s position so

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<sup>69</sup> *Id.* at 775.

<sup>70</sup> *See id.* at 781-82.

<sup>71</sup> *See* Sirico, *supra* note 67.

<sup>72</sup> Gerry Spence, *Lessons from Lawyers—Arguing Effectively*, PSYCHOL. TODAY, Nov.-Dec. 1995, at 24. For another powerful pathos closing argument by Gerry Spence, see TrailLawyersCollege1, *Gerry Spence—Closing Argument—New York Regional Seminar 2006*, YOUTUBE (Jan. 11, 2011), <https://www.youtube.com/watch?v=RF3TzsEEZbl>.

<sup>73</sup> Paul N. Luvera, *Use Logos, Pathos, and Ethos to be a Great Advocate*, PLAINTIFF TRIAL LAWYER TIPS (Jan. 24, 2014), <http://plaintifftriallawyertips.com/use-logos-pathos-ethos-to-be-a-great-advocate>.

much that the jury loses faith in the lawyer. At the same time, a lawyer employing a different strategy also may fall prey to the same temptation.

Thus, the advice and practices of seasoned trial lawyers show that effective advocacy requires viewing jury members as the complex individuals they are. Even ancients like Aristotle understood that appealing to fear is not enough; many considerations must go into determining how best to persuade people. Effective persuasion requires a deep understanding of the human condition. The simplistic reptile strategy frustrates this effort at persuasion.

#### V. CONCLUSION: BEYOND REDUCTIONISM

The reptilian strategy, then, is an exercise in reductionism. It rests on an outdated and simplified understanding of neuropsychology. It limits the lawyer's understanding of the human condition by assuming that there is one characterization of people—the unthinking reptile. This narrow focus telescopes the lawyer's perspective and makes it impossible to consider the influence of the rich symbolic and archetypal dimensions of both reptiles and humans. Instead of encouraging the lawyer to develop a relationship with warm-blood human beings, it encourages the lawyer to manipulate cold-blooded creatures. And it rejects the many strategies that successful trial lawyers often use.

This reductionism reduces the success of lawyers who adopt it. The resulting disservice to clients, however, is not the only unfortunate consequence. The reptilian strategy encourages lawyers to view jurors in a way that can only harm the legal system. We entrust decision making about the lives and wealth of clients to jurors. Yet, some lawyers endeavor to transform reflective jurors into reflexive animals. In this way, they seek to frustrate a legal process that demands reflective analysis.

Lawyers seeking victories may find it risky to take such a cynical view of jurors. One judge advises, “The most important qualities the jury is looking for in a lawyer are sincerity, honesty, and trustworthiness. . . . Do not underestimate the intelligence of your jury. The jurors will know if you have done so and will resent it.”<sup>74</sup> A prominent trial lawyer also notes that jurors reflect on what the advocate states and promises: “The emotions you stirred and the promises implicit in all that you said will resonate within them throughout the trial.”<sup>75</sup>

A widely held view of the relationship between lawyer and jury is that of collaborators seeking justice. The biographer of Rufus Choate, the great trial lawyer of the nineteenth century, wrote, “His manner to the jury was that of *a friend*, a friend solicitous to help them through their tedious investigation, never that of an expert combatant, intent on victory, and looking upon them as only instruments for its attainment.”<sup>76</sup>

A prominent modern lawyer reflects, “[I]n the end, the jury has to decide who really cares about the case and whom they can trust. We trust people who are real,

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<sup>74</sup> SANDLER, *supra* note 54, at 323.

<sup>75</sup> See BERG, *supra* note 53, at 120.

<sup>76</sup> EDWARD GRIFFIN PARKER, REMINISCENCES OF RUFUS CHOATE 149 (1860) (emphasis in original).

open, and caring.”<sup>77</sup> A contemporary text echoes this theme: “The ability to communicate with the audience, like two friends discussing serious matters over coffee, builds rapport between the advocate and the jury and forms the dividing line between brilliant advocates and merely competent trial lawyers.”<sup>78</sup>

Even if we choose a less idealistic vision of the attorney-juror relationship, common sense tells us manipulating jurors is a risky strategy. Humans weigh evidence and make decisions according to a complex and largely indeterminate method in which reflection and social relationships play vital roles. As with the reptilian strategy, any attempt to reduce that decision making to a simple, manipulative scheme ultimately must disappoint the advocate.

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<sup>77</sup> Marty Nemko, *Trial Lawyer Gerry Spence on Persuasiveness*, PSYCHOLOGY TODAY BLOG (Sept. 26, 2014), <https://www.psychologytoday.com/blog/how-do-life/201409/trial-lawyer-gerry-spence-persuasiveness>.

<sup>78</sup> PERRIN ET AL., *supra* note 57, at 445.



