

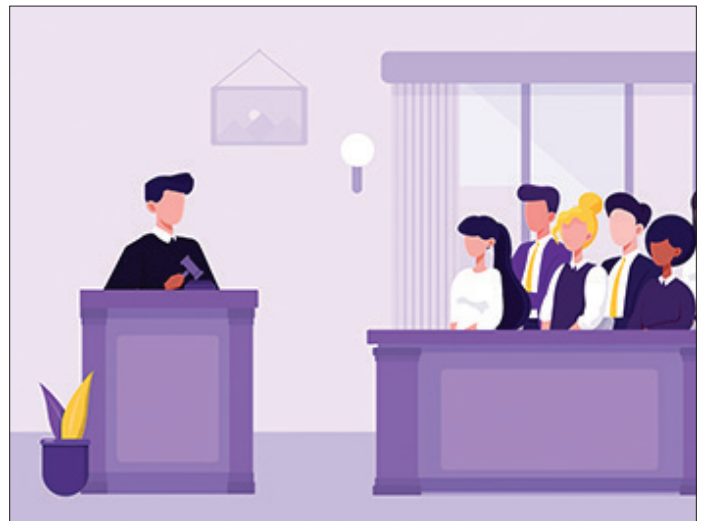
Overcoming 'Reptile Dysfunction' at Trial, Part III: Core Values of the Brain

By Christopher Ritter

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This is the third in a series of articles presenting the “Theory of Core Values” as an explanation of how jurors reach their verdicts. I developed this theory over the past 40 years as a trial lawyer, law school professor, and persuasion strategy consultant. The first article criticized the “Reptile Theory,” which suggests trial lawyers obtain their best verdicts by relying on base emotions that appeal to the primitive reptilian portions of jurors’ brains. I don’t entirely reject the Reptile Theory; but it lacks needed nuance.

Instead, I believe that, while jurors must unanimously agree on the same verdict, each juror takes a different path to this conclusion based on how she individually prioritizes 11 core values. Never does a case trigger all 11 core values; *but every case involves some combination of them*. No individual juror is motivated by all 11 core values, *but all are motivated by some combination, usually two or three*. Trial lawyers can use a process I call “Mental Mining” (the subject of a future



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article) to determine what combination of core values will be most effective in their specific case.

The 11 core values divide into three groups, each connected with a part of the body traditionally associated with emotion and decision making: the heart, the head, and the gut. In my second article I examined the heart’s core values: *compassion; empathy; mercy; and fairness*. Here I discuss the head’s core values: the duty of accepting *personal responsibility*; the perceived objective certainty of

science; and the orderliness and predictability of *checklisting*.

The Core Value of Personal Responsibility

“We all make mistakes; it’s what we do afterwards that counts the most.” This advice from my grandfather, O.E. Ritter, summarizes the essence of the core value of personal responsibility. In short, jurors respond poorly when a wrongdoer (whether an individual, company, or other entity) denies an actual harm occurred, fails to acknowledge their role in causing that harm, or perhaps worst of all, tries to cover-up their wrongdoing.

Triggering the core value of personal responsibility generally requires your trial team taking jurors through at least four and sometimes five steps:

- **First Step:** Establish the existence of a clearly applicable standard, which usually exists by virtue of social convention, a contract between the parties, or the law.
- **Second Step:** Demonstrate a violation of that standard, whether intentionally or by mistake.
- **Third Step:** Prove which party or parties violated the standard. This is usually, but not always, the defendant.
- **Fourth Step:** Assess whether the party causing the harm acknowledges the damage and his role in causing it to occur.

There is often, but not always, a fifth step in cases involving punitive damages, a failure by the defendant to mitigate, or contributory negligence:

- **Possible Fifth Step:** Assess what efforts, if any, the wrongdoer has taken to prevent similar harm in the future.

Violating the core value of personal responsibility triggers various negative effects for the offending party. At a minimum, her credibility is impugned and her motives questioned. Other jurors will reject the offending party’s claim or defense in its entirety and adjust damages either upward against responsibility-evading defendants or downward for blame-shifting plaintiffs. In the most extreme cases, triggering this core value can also activate the core value of vengeance (discussed in a forthcoming article) leading to a disastrous “nuclear verdict.” We may just have seen this in the \$83.3 million defamation verdict against former President Trump in the Southern District of New York.

When appropriate, parties should carefully consider whether to include a *mea culpa* as part of their case. From 2010 to approximately 2012, the Government charged various C-level executives from several public companies with approving the wrongful backdating of stock options. Many observers found the accounting principles at issue to be new, untested, and ambiguous.

The trial teams I worked with adopted two widely divergent strategies (each reflecting the personality of the C-level defendant). One adamantly, as if metaphorically stamping their feet, denied *doing anything wrong whatsoever!* The other defendant acknowledged that while, in retrospect, it appeared he may have made a mistake the missteps were neither unreasonable (since the GAAP rule was new) nor intentional and thus, there was no criminal fraud. Jurors who valued personal responsibility clearly favored the second approach, especially

if the defendant could then demonstrate how their company had subsequently changed its compliance regimen.

The Core Value of Science

In my first article, referenced earlier, I briefly described the most tragic case I have ever worked on. It involved a homeless schizophrenic mother who drowned her three young children because she sincerely believed God ordered her to do so.

In defending her, we argued this was a clear case of being not guilty by reason of insanity. Several jurors later told us to reach that conclusion they needed to know and trust that the defendant's mental illness was "real." Expert testimony by a neurobiologist about the chemical origin of schizophrenia triggered these jurors' *trust* in the core value of science and allowed them to come to this conclusion, though they were completely repulsed by what defendant had done.

The perceived objective certainty of *science* is a potent motivating core value. Science embodies certain powerful characteristics. It is systematic, objective, structured, and based on extended observation and experimentation. Its results are verifiable and reproducible. At the center of this core value is the ability to *trust* someone with expertise and objectivity, warranting special deference in answering "the hard questions."

This form of *trust* is different from that in other core values. For example, compassion based jurors are not compassionate because they trust someone telling them to feel this way; they are compassionate because they

trust themselves to gauge when it is appropriate to *be* compassionate. Jurors whose core value is science must place their trust *outside themselves with a third party*, as in the case described above, with the expert neurobiologist. This raises numerous strategic issues associated with using expert witness at trial; again, the topic of a future article.

I am often asked if COVID and the nation's explosive reliance on social media have reduced the number of jurors relying on the core value of science. I do not believe so. As evidence, I rely on discussions I periodically have with my brother. Even with our great affection and respect for each other, we do not see eye-to-eye on a few issues, including vaccinations and COVID. We support our positions by relying on widely different sources. I cite reports from the CDC; he bolsters his arguments with far less familiar sources, sometimes gleaned from obscure corners of the internet. Ironically, whatever the source of our information, whatever the conclusion, whatever the argument, we both remain motivated by the same core value – our belief in science.

The Core Value of Checklisting

Several years ago, I noticed after a New York State court judge read his instructions to a jury, certain jurors cocked their heads and stared into space, obviously in deep contemplation. I could see them mentally going through a checklist based on the instructions. For example, offer...check; acceptance...check; consideration...check, therefore plaintiff proved there was a contract. Or defendant made a statement...check; the plaintiff believed the

statement...check; it was reasonable to do so... wait, no it wasn't so *no check*, therefore plaintiff has *not* proven fraud.

I call this process "checklisting." Checklisters value the orderliness and predictability associated with rule following. They take comfort knowing they can find The Answer by checking off the elements the Court gives them in the jury instructions.

Checklisting is a very powerful core value because the court expressly endorses it, starting in *voir dire* by telling jurors, "you must apply the law as I give it to you." At the same time, the court expressly discourages other core values, for example, "You shall not base your verdict on compassion or sympathy." In real life, neither instruction completely restricts jurors from relying on the full pantheon of core values.

Checklisting is also extremely powerful because it often (not always) can eclipse other core values. We often hear jurors say, "I can't believe I voted for the defendant. I HATE large corporations, but I had to because it met the requirements of the law!"

My most powerful example of this was a case in which my clients sued one of the country's largest gun retailers for permitting

the "straw purchase" of a gun by a convicted felon, who then used the weapon to shoot two police officers. The gun store knew the person buying the gun was acting for someone else. Several jurors who found the defendant liable strongly supported the Second Amendment. Nevertheless they voted against the gun seller because the plaintiffs were able "to check all the boxes" to prove "negligent entrustment." As one juror told us after the verdict, "Sure, I support the right to bear arms, but this was NOT a Second Amendment case; this was all about negligent entrustment, which the plaintiffs proved."

In my next article I will finish a review of the core values by examining the core values of the gut: Common Sense, and what I sometimes refer to as the "three furies:" vengeance, self-interest, and prejudice. I hope you will join me.

Chris Ritter *is an attorney and a senior advisor at IMS Expert Services which provides guidance in all aspects of case analysis and persuasion strategy development, mock trial and focus group research, and witness preparation. He taught law and tried cases for almost 20 years and has been involved in over 200 mock jury and focus group projects.*