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Using Prominent Criminal Jury Trials to Teach Theme

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1. Introduction

Theme is vitally important in persuasive advocacy, whether written or oral. It took me several jury trials and a few seasons coaching high school mock trial to feel like I understood how to persuasively use a theme as a lawyer. Thus, I wanted to develop an exercise that helped first-year law students begin to grasp the idea of using a theme to advocate for their client. I created an exercise using opening statements from prominent criminal jury trials. In the end, the students really engaged with this exercise and were exposed to several different real-world examples of using theme to advocate.

2. The Exercise

In preparation, I reviewed the opening statements from several different prominent criminal jury trials that took place during 2021. I anticipated that many of the students would be familiar with the facts of the cases because they all received significant media coverage.¹ I also wanted to select cases where the

¹ Prior familiarity with the trial is not necessary for this exercise. An opening statement typically tells a story, so the students will quickly learn about the facts of the case during

attorneys used a clear and obvious theme within their opening statements. I ultimately chose two trials for my students to review: (1) *State of Georgia v. Travis McMichael* and (2) *State of Minnesota v. Kimberly Potter*.²

Next, I created a worksheet for the students to utilize while watching the opening statements outside of class. Specifically, the worksheet contained various questions for them to answer as they watched. These questions asked them to identify the theme from each side's opening, to think about what each attorney did in general that they liked or did not like, and whether they felt persuaded by each statement.³ The worksheet also provided the students with excerpts of the ABA's Criminal Justice Standards for prosecutors and criminal defense attorneys.⁴

the exercise. I intentionally selected cases from the media because I believed the students would be more interested in discussing them.

² The full opening statements for each side were fairly lengthy, so I selected portions from each side's opening, totaling approximately 30 minutes for each side.

³ My worksheet for the *Potter* trial is attached as "Appendix A." I used the same questions for the *McMichael* worksheet.

⁴ The ABA standards provided foundation for some interesting discussion topics regarding the differences between each side in a criminal case. Below are the two ABA standards excerpts:

Excerpt from ABA Standard 3-1.2: The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

Crim. Just. Standards for the Prosecution Function, Standard 3-1.2(b) (A.B.A. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

Excerpt from ABA Standard 4-1.2: Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.

Id. at Standard 4-1.2(b).

After students completed the worksheet as homework, we used it as a starting point for the following class discussion. The students really engaged in this discussion, which led to many insightful and thought-provoking comments and questions. At the conclusion, I had the students reflect on how they could use theme in their upcoming legal writing assignment.

3. Theme Illustration and More

These two trials provided great examples of how lawyers can use themes to be persuasive in their arguments, as well as other helpful talking points for a first-year class. This section aims to provide a brief framing of the facts of each case, a discussion of the main themes from each opening, and a series of discussion points for each.⁵ Ideally, it should serve as roadmap of a lesson plan for any professor looking to implement this exercise in their class.

3.1 *Georgia v. McMichael*⁶

On February 23, 2020, Ahmaud Arbery was running through a neighborhood in Brunswick, Georgia. Upon observing him running down the street, Travis McMichael armed himself with a shotgun, and he and his father, who also armed himself with a revolver, began pursuing Arbery in their truck. A neighbor observed the chase and joined in his truck.

For background purposes, the residents in this neighborhood were particularly alert during this time. For several months before February 23, there were numerous reports of burglaries in the area. One particular house, which was under construction, had a surveillance camera. The video from the last few months appeared to show Arbery several times walking through the house and looking around. Residents also frequently expressed concern about crime in the area in a Facebook neighborhood group.

⁵ For the sake of space, this section does not aim to provide the entire detailed facts as presented to the juries over the course of weeks for both trials. Instead, I merely summarized the facts based on the opening statements to give the reader some background information and context prior to addressing the various themes and discussion points.

⁶ For videos of the opening arguments for both sides, see PBS NewsHour, *WATCH: Prosecution Makes Opening Remarks in Trial of Killing of Ahmaud Arbery*, YOUTUBE (Nov. 5, 2021), <https://www.youtube.com/watch?v=9yo7XRLeakI>; PBS NewsHour, *WATCH: Defense Makes Opening Remarks in Trial of Killing of Ahmaud Arbery*, YOUTUBE (Nov. 5, 2021), <https://www.youtube.com/watch?v=p7yzKGVqG1w>.

After pursuing Arbery through the neighborhood, the three men were able to “trap” Arbery. As Arbery ran around the truck, McMichael shot him with the shotgun. It then appeared from the cellphone video, taken by the neighbor, that the two struggled over the shotgun, until McMichael shot Arbery two more times, killing him. After the trial, the jury ultimately returned a guilty verdict for all three defendants.⁷

In her opening statement, the prosecutor emphasized that this case was about “assumptions and driveway decisions.” The prosecutor not only started with this theme but repeated it throughout her opening. She referred to many different assumptions that the three defendants made leading up to their murder of Arbery, several of which were made while standing in their own driveway. In doing so, the prosecutor directly tied the evidence of the case to the theme.

Conversely, McMichael’s attorney used a theme that focused on “duty and responsibility,” arguing that McMichael had a duty and responsibility to protect himself, his family, and his neighborhood. He then sought to portray his client as a father, a son, a prior officer of the United States Coast Guard, and someone who simply wanted to help protect his community that day. In using this theme, the defense sought to paint his client in a more favorable light, perhaps in a way that the jury could more easily relate to or understand, especially given the prior burglary reports from that area.

To begin the discussion, I started with the questions from the worksheet. This allowed us to identify the above themes and begin discussing why those were used and whether they were effective.

In building on these points, the students raised several other interesting observations and comments, which could serve as discussion points for future professors employing this exercise. For example, the students found it very persuasive when the prosecutor used the three defendants’ own statements against them in support of her theme. Specifically, she pointed out that several times the defendants told the police that they “assumed” Arbery had done something wrong.⁸

⁷ I chose not to spend time focusing on the various charges that each of the defendants faced or why the prosecutors chose these charges versus other options. I wanted to keep this exercise focused on the theme and advocacy components. Thus, it may be helpful to highlight this to students in advance to narrow the discussion and avoid “off topic” questions.

⁸ I found that this technique tied in nicely to the problem we were working on for our class persuasive writing assignment, where the students would need to use specific statements from our facts to support their analysis.

Further, the defense's theme of "duty and responsibility" allowed us to discuss why the defense may have chosen this theme and to consider whether it helped paint the client in a more favorable light. We further discussed the defense's strategy of attempting to counter the prosecution's "assumptions" theme by stating that he would be focusing on "facts," not assumptions, as he highlighted how this was a case of self-defense with McMichael defending his neighborhood and himself.

Lastly, the two parties used video in completely different ways within their openings to support their themes. The prosecution played the video of McMichael shooting Arbery multiple times. By comparison, the defense never showed it.⁹ Instead, he focused on the video that depicted Arbery repeatedly entering the same open, unsecure construction site within the neighborhood over the course of several months. The defense then connected these prior instances to his theme, explaining why McMichael felt a "duty and responsibility" to protect his community. Thus, this allowed us to highlight the legal advocacy techniques of counterarguments and strategically organizing the argument around the strongest point.

3.2 Minnesota v. Potter¹⁰

On April 11, 2021, Daunte Wright was driving through Brooklyn Center, Minnesota, when he was stopped by police officers, Kim Potter and a training officer, for minor traffic violations. After identifying Wright, the officers determined that there was an outstanding arrest warrant regarding a gross misdemeanor charge for carrying a gun without a permit. The training officer asked Wright to step out of the vehicle and informed him that he was under arrest. Upon hearing this, Wright turned and got back into his vehicle, attempting to leave. The training officer, as well as a third officer, began trying to grab Wright and attempted to remove the keys from the ignition. In response, Potter approached the vehicle and drew her firearm. She yelled, "I'll tase you! I'll tase you!" followed by "Taser! Taser! Taser!" She then shot Wright in the chest with her firearm, killing him. After the trial, the jury found Potter guilty of first-degree and second-degree manslaughter.

During her opening statement, the prosecutor used a variety of thematic ideas surrounding the idea of a police officer's duty to "protect the sanctity of

⁹ Some students found this problematic, feeling like he was hiding from the evidence. Others noted that since that video was not beneficial for him, he strategically focused on what he decided were his stronger arguments.

¹⁰ For opening statements in this trial, see KARE 11, *WATCH LIVE: Kim Potter Trial Opening Statements*, YOUTUBE (Dec. 8, 2021), <https://www.youtube.com/watch?v=cWjknUgrck>.

life.” First, the prosecutor focused on the “power and responsibility” that officers possess, their position of “public trust,” their “commitment to public service,” and their accountability “to the communities they serve.” To support this theme, the prosecutor quoted the actual oath that Potter took as a police officer with the Brooklyn Center Police Department. She then emphasized the amount of training officers receive to ensure that they can successfully fulfill the above responsibilities, highlighting the 26 years of experience that Potter possessed as an officer. Ultimately, the prosecutor summed up her theme up by stating: “This case is about the Defendant Kim Potter betraying her badge, and betraying her oath, and betraying her position of public trust.”

On the defense side, there was not necessarily a single identifiable theme, but instead, what appeared to be three main themes. First, throughout the statement, the defense argued that “All Mr. Wright had to do was stop,” and that if he had stopped resisting and trying to escape, then he would not have been shot. Second, the attorney emphasized who Potter was—a mother, a wife, a field training officer, someone who mentored victims of domestic violence, and a member of the honor guard. Similar to Travis McMichael’s attorney, this theme attempted to paint Potter in a different, more favorable light than portrayed by the prosecution. Lastly, the defense emphasized their theory of why she should not be found guilty—it was a mistake. She meant to pull out her Taser, and instead, she accidentally retrieved her firearm.

During our in-class discussion, the students found the prosecutor’s theme very persuasive. In particular, they found it effective when the prosecutor quoted the oath Potter took and then repeatedly reiterated how she had violated this oath. This allowed us to discuss parallels between this opening and the prosecutor’s opening in the *McMichael* case, where both used prior statements from the defendant to support their theme. Further, I was able to relate this idea of reiterating theme throughout an opening to tying in one’s theme throughout a persuasive legal writing assignment.

Additionally, the students raised an interesting discussion point about the prosecutor’s demeanor, noting that her serious and organized approach provided them with a sense of trustworthiness. On the other hand, many found the defense attorney’s demeanor distracting and unprofessional at times, such as when he raised his voice and banged on the podium. This brought up a great discussion point for me to pose to the class: If they were in the defendant’s seat, how would they want their attorney to act in their defense and why?

Lastly, of all the themes, the students found the defense theme of blaming Daunte Wright for not stopping the least persuasive. They found it offensive and thought it diminished the lawyer’s credibility. While acknowledging that some

of the other points were effective, it appeared they could not get past their feelings on the “victim-blaming” theme to find the opening persuasive as a whole.¹¹ Finally, these themes as a whole allowed us to discuss how, depending on who your client is, a lawyer could use two vastly different themes for the same set of facts.

4. Additional Benefits and Discussion Points

Admittedly, when I began developing this exercise, I did not intend to specifically address anything beyond theme. But as I prepared to deploy it, I realized that it allowed us to touch on the two new important amendments to ABA Standard 303.

First, the ABA amended Standard 303(b) to require law schools to provide “substantial opportunities” for students to develop their “professional identity.”¹² This exercise accomplished this in several ways. To start, it exposed the students to client-centered advocacy, which is arguably the most important function of a lawyer. Additionally, we saw examples of anticipating and responding to counterarguments, an important aspect of legal writing and oral advocacy. Further, it provided an opportunity for them to reflect on the different communication styles they observed and what type of communication style would best suit them and their personality. In addition to client advocacy, this exercise showed the importance of a lawyer’s ability to communicate legal information to a non-lawyer, such as a jury, or more often, a client.

¹¹ Several other discussion points arose during our in-class meeting. The first involved the prosecutor’s use of the video versus the defense attorney’s use of still shots from the video. This allowed us to think about how each side might want to strategically use a piece of evidence. A second point related to the idea of guilty pleas, alternative dispute resolution, and negotiations. Students asked why these cases didn’t resolve before trial or why the defense attorneys didn’t “force” the defendants to accept a plea. This allowed us to cover how cases rarely proceed to a jury trial, to discuss the role of attorneys in accepting a resolution, and to reflect on what each side would have wanted to come to a resolution. A third example is, as noted in the worksheet, the ethical responsibilities of each side. I posed several reflection questions to them about the important responsibilities of a lawyer—how would they feel representing one of the defendants? What if they were the prosecutor and lost? How do you represent a client you believe to be guilty? What about a client you believe to be innocent?

¹² *Revisions to the 2021-2022 Standards and Rules of Procedure for Approval of Law Schools*, Standard 303(b) (A.B.A. Feb. 2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/21-22-standards-book-revisions-since-printed.pdf.

Second, the ABA also amended Standard 303 to add subsection (c), which requires law schools to educate students on bias and racism.¹³ This exercise allowed me to effectively highlight how important and powerful a career these students are about to embark on. I asked them to think about how, as lawyers, they have the opportunity to effectuate change in many ways, whether by (1) prosecuting a defendant who committed a crime for racist reasons, (2) defending an individual who was the victim of bias or racism, (3) representing a client who experienced workplace discrimination, or (4) advocating to change a law that is being applied unfairly and unequally.¹⁴

5. Things to Consider

Prior to deploying this exercise, I spent time thinking it through to ensure that it went smoothly and would benefit the students. Thus, I want to briefly raise the following things to consider: (1) providing students with a warning that these jury trials contain potentially triggering material, (2) whether your students will be able to consider and discuss the sensitive nature of these trials in a respectful and considerate manner, and (3) how you will handle any comments that are potentially insensitive or disrespectful.

6. Conclusion

Using an opening statement from a criminal jury trial to illustrate theme proved to be interesting and effective for my first-year students. I was pleasantly surprised with their enthusiastic participation throughout the exercise. I was further shocked by how many took the time to let me know how much they enjoyed it and asked if we could look at additional trials later in the semester.

¹³ *Id.* at Standard 303(c).

¹⁴ I note these as an example of a few that we focused on this semester. There are certainly many other avenues of discussion that could be implemented with this exercise as the backdrop.

Appendix A
Real World Theme Recognition

Content Warning: As noted in my Syllabus, we will sometimes discuss and observe emotionally distressing or difficult topics. These videos contain such content. If you find it too difficult or troubling to watch these videos and discuss these topics, please do not hesitate to talk to me or your Dean's Fellows.

Part 1

Instructions: Please watch the prosecution and defense opening statements from the *Minnesota v. Potter* and answer the following questions.

Prosecution:

1. What theme did the prosecutor use for their opening statement?
2. Did you find the theme effective for this side of the case? Why or why not?
3. What else did you find persuasive about the prosecutor's opening statement? Why?
4. Was there anything that you did not like about the defense's opening statement? Why?
5. Please read the following excerpt from the ABA Standard 3-1.2 on the duty of a prosecutor:

The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising

discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

Defense:

1. What theme did the defense use for their opening statement?
2. Did you find the theme effective for this side of the case? Why or why not?
3. What else did you find persuasive about the defense's opening statement? Why?
4. Was there anything that you did not like about the defense's opening statement? Why?
5. Please read the following excerpt from the ABA Standard 4-1.2 on the duty of a defense attorney:

Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.