

Theory and Theme



Chapter One



A view of the Palace of Justice in Nuremberg, Germany, where the International Military Tribunal held proceedings in 1945 and 1946. Twenty-four of the most important political, military, judicial, and economic leaders of the Third Reich were prosecuted for war crimes and crimes against humanity. Of these 24 defendants, 12 were sentenced to death, three were given life sentences, four were given terms of imprisonment, and three were acquitted.

The 21 prisoners shown in the dock during the International Military Tribunal (IMT) in Nuremberg, Germany, 10 December 1945. The 1945 Conference at London created the IMT in August, 1945, and the Charter of the IMT detailed the nature of the crimes which would be considered and the procedure which would be followed. There were 24 accused war criminals, but 3 were tried in absentia. Hermann Göring, commander of the German Luftwaffe, was one of those sentenced to death, but he committed suicide the night before he was to be executed.

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I. THEORY OF THE CASE:

A. What Happened?

1. **Trials Are About Factual Disputes:** Every trial involves factual dispute. If nothing were in dispute, there would be no reason to conduct a trial. Sometimes the dispute is about the identity of the perpetrator—some other dude did it. Sometimes the dispute is about the mental state of the actor—the gun went off by accident. Sometimes the dispute is about the mental state of the victim—there was sexual intercourse but it was entirely consensual. But there is always a factual dispute. As trial or defense counsel, we ask the fact finder—the panel or the military judge—to resolve these disputes. That is, in essence, what every trial is: each party trying to persuade the fact finder that the dispute should be resolved in its favor based on the evidence.
2. **What Are You Trying To Prove?** As trial or defense counsel, in each of your cases, you have a belief about what facts are true and what facts are not. As trial counsel, you have brought charges based on your belief that the facts support the guilt of the accused. As defense counsel, you are asserting either that the facts the government is using to support a finding of guilt are not true or that there are additional facts, disputed by the government, that lead to a conclusion that the accused is not guilty. Regardless of which side you represent, you must ultimately stand before the fact finder and deliver your version of what did and did not happen.
3. **What Is A Theory Of The Case?** So what does all this have to do with case theory? This *is* the case theory. *What happened* is the theory, or more precisely, *what you must prove or disprove in order to prevail* is the theory. Once you answer that simple question, you have created your theory of the case. And everything else—voir dire, opening statement, direct examination, cross examination, closing argument—flows from your theory of the case. The case theory is the trunk from which every branch of litigation hangs. And so every case begins with the question: What happened?

- B. **The Elements of a Winning Theory:** Needless to say, if you do not have a strong, memorable, persuasive, and—perhaps most important—provable theory, then you do not have a strong, memorable, persuasive or provable case.

1. **The Theory Must Be Logical:** You are telling a real story about real humans living in the real world. And so the case theory should reflect common understandings about human behavior. If there are seemingly counterintuitive

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elements in your case, you must resolve these so that you are able to help the fact finder understand the logic behind them.

- **Example:** If you are the prosecutor in a sexual assault case in which the victim did not disclose the crime until a long time after it was committed, this needs to be explained as part of the case theory. Members of the general public hold the mistaken belief that any victim of a crime would immediately report it to the police, and many believe that a delay in reporting casts doubt upon the veracity of the account. In a sexual assault case involving a delayed disclosure, you simply cannot leave such a fact out there for the panel to speculate upon. The fact finder needs to understand the logic behind it. So ask the victim about the delay. The victim may have delayed reporting because the perpetrator was her father and she loved him and did not want him to get in trouble. Thus, the seemingly counterintuitive fact is explained in terms of human behavior that every panel member will understand; and what might have seemed a weakness in the case becomes part of a powerful and persuasive theory.
2. **The Theory Must Be Legally Sound:** The case theory should establish every element of the crime or the defense. The facts contained in your theory should lead inescapably to the legal conclusions you need the fact finder to make in order for you to win. So ask yourself how the facts that will be presented during the trial match up with the law that applies to the case.
 - **Example:** My client was forced to defend himself when he was attacked by Danny Johnson with a pool cue. He stabbed Johnson only because, had he not done so, Johnson would have seriously hurt him or perhaps even killed him.
 3. **The Theory Must Be Simple:** The simpler and more straightforward your theory of the case, the more likely the fact finder will remember it during deliberations. So the theory should be as simple and straightforward as possible.
 - **Example:** Liza Smith loved the party life. But the responsibilities that go along with caring for a two-year-old daughter got in the way of her party lifestyle. And that is why Liza Smith decided to kill her daughter, Rebecca, and dispose of the body in such a way that nobody would ever find her.
 4. **The Theory Should be Short:** If your case theory takes up more than a paragraph or two on a page or takes more than about 30 seconds to a minute to recount orally, shorten it.
 5. **The Theory Must Be Concrete and Not Abstract:** Elements of crimes are

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abstract. The facts you plan to present in support of each element are concrete. Once you have developed your theory and you know those facts that underlie each element, state the elements of the offense in terms of the facts, not the legal elements. For example, compare the following two sentences:

“Jones killed Smith with a premeditated design to kill.”

Versus

“Jones decided to kill Smith, seized his weapon, loaded it, pointed the weapon at Smith’s head, and pulled the trigger.”

6. **The Theory Must Be Compelling:** Panel members are instructed in each court-martial that their verdict must be based on the facts and the law and not on sympathy or passion. But in the real world, you will not win without having a case theory that appeals to the panel’s emotions and morals. Panel members—and military judges for that matter—want to believe that they are doing the right thing and that their verdict is consistent, not only with the law, but also with their own values. So the theory should be constructed carefully to be emotionally and morally compelling. Put another way, the fact finder will render a verdict consistent with the fact finder’s conscience. Moral, cultural, and social values play in every case, and good advocates use them to their advantage.
 - a. **Our Facts:** A 19-year-old woman with a history of drug abuse is living on her own, working part-time serving fast food. She is raped by two United States Army officers in uniform who ply her with drugs and forcibly sodomize her while imprisoning her in a room in her own home.
 - b. **Values Flowing From Our Facts:** Think about the moral, cultural, social values that are at play on both sides of this scenario, and how these might influence your theory of the case:
 - i. Soldiers, public servants, Army officers, wearing our nation’s uniform, smoking crack;
 - ii. Two married men in their 30’s having sex with a 19-year-old, even if the sex is consensual;
 - iii. A teenager with a drug habit;
 - iv. A high school drop-out;
 - v. Big versus small;
 - vi. Power versus powerlessness; and
 - vii. Strong versus weak.

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7. **The Theory Must Explain Motivations:** Even though motive is usually not an element of an offense, explaining to the fact finder WHY a person committed or could not have committed an offense goes a long way in advancing your theory of the case and making your account make sense. Stated another way, telling a compelling story—the essence of trial advocacy—should include an explanation of why the characters in your story acted the way they did.

II. THEME:

- A. **What is a Theme?** Every case has a theme—a short phrase or sentence that conjures up the entire episode. Like the refrain from a popular song, the theme should be short, memorable, and catchy: “Don’t Worry. Be Happy.”

B. Some Examples You Might Recognize:

1. “If it doesn’t fit, you must acquit.” (In a murder case where part of the evidence was a bloody glove that seemingly did not fit the hand of the accused).
2. “If he couldn’t have her, nobody was going to have her.” (In a domestic violence homicide case).
3. “Madoff wanted the pleasures of wealth without having to work for them.” (In a fraud case).
4. “‘Roger, Sir.’ That was Sergeant Wilson’s answer to what he understood to be a lawful order.” (In a war crimes case involving battlefield homicide).

- C. **How to Use the Theme:** Hit the fact finder over the head with the theme as often as possible during every part of the trial. Use it as an attention step—initial volley—in both opening statement and closing argument. (See Chapter 3, *Opening Statements*, and Chapter 11, *Closing Arguments*.) Use it to the extent possible throughout the trial: weave it into your voir dire; sum it up during direct and cross examinations of witnesses. If you have done your job well, the panel members will be repeating your theme during deliberations.

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DRILLS

Developing a Theme and Theory in *U.S. v. Mallick* (See Appendix): Below are separate drills for trial and defense counsel. Supervisors can use these drills in one of several ways.

For shorter hip-pocket sessions of 15-45 minutes, have participants review the hypothetical, *U.S. v. Mallick* in the Appendix, prior to class. They can then work on one section of the exercise at a time. At the first session, have the participants write down and deliver orally what they believe happened. At the second session, have them articulate what formal charges or what defenses arise from their version of events. At the third session, have them articulate the elements of the charge or the defense arising from this narrative.

For longer sessions, 1-2 hours, supervisors can have counsel work in teams and complete multiple parts of the exercises during the session, ending with an articulation of the theory and the theme. If counsel need more practice, feel free to have them conduct the same exercise with *U.S. v. Anderson*, also in the Appendix, or with one of their own newly assigned cases.

1. Trial Counsel:

- a. Write down using a page or less what you believe happened.
- b. On a separate sheet, write down what charges under the U.C.M.J. arise from these events.
- c. List the elements of each charge.
- d. For each element of each charge, list the facts from the fact pattern that you will present to prove that element.
- e. Based on what you believe happened and the law, draft a theory of your case. Remember that it must be
 - i. Logical;
 - ii. Legally sound;
 - iii. Simple;
 - iv. Short;
 - v. Concrete; and
 - vi. Compelling.

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f. Create a theme based on the above.

2. Defense Counsel:

- a. Write down using a page or less what your defense to the charges will be.
- b. On a separate sheet, write down either
 - i. If it is a statutory defense, what the elements of the defense are; or
 - ii. If your defense is reasonable doubt, what facts are in dispute.
- c. List the elements of each charge.
- d. For each element, list those facts you dispute and those facts about which there is no dispute.
- e. List those facts which you will set out to prove that are different from what the government will prove and which are disputed by the government, that tend to show that your client is not guilty.
- f. List the evidence you will present in support of these facts.
- g. Based on what you will argue happened and the charges, draft a theory of your case. Remember that it must be
 - i. Logical;
 - ii. Legally sound;
 - iii. Simple;
 - iv. Short;
 - v. Concrete; and
 - vi. Compelling.
- h. Create a theme based on your theory.