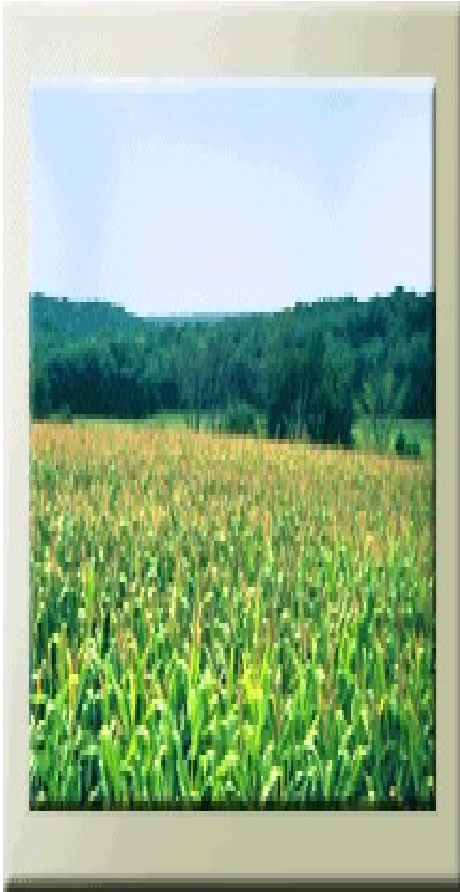


If You Build It, They Will Come....

Creating and Utilizing a Meaningful Theory of Defense



by
Stephen P. Lindsay¹

Introduction

So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself “why me?” “Why do I always get the dog cases? It must be fate.” You calmly place the file on top of the stack of ever-growing canine files. You reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to angel status. Just as you think a change in profession might be in order, your co-worker steps in the door -- new file in hand -- lets out a piercing howl, and says “this one is the dog of all dogs. The mutha of all dogs.” Alas. You are not alone.

Dog files bark because there doesn’t appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa (Kansas?). *If you build it, they will*

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come... And they came. And they watched. And they enjoyed. Truth be known, they would come again if invited -- even if not invited. Every dog case is like a field of dreams. Nothing to lose and everything to gain. Out of each dog case can rise a meaningful, believable, and solid defense. A defense that can win. But as Kevin Costner's wife said in the movie, [I]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

WHAT IS A THEORY AND WHY DO I NEED ONE?

Having listened over the last twenty years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear that there exists great confusion as to what a theory is and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. They are, though, very different concepts. So what is a theory? Here are a few definitions:

That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.

Tony Natale



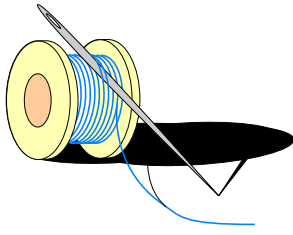
One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.

Mario Conte

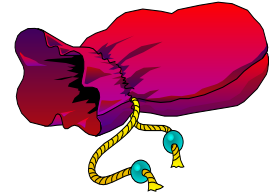
A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocence or reduces culpability.

Vince Aprile

Although helpful, these definitions, without closer inspection, tend to leave the reader with a “huh” response. Rather than try and decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same, three essential elements.



Common Thread Theory Components



1. Each has a factual component (fact-crunching/brainstorming);
2. Each has a legal component (genre);
3. And each has an emotional component (themes/archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it is helpful to have a set of facts with which to work. These facts will then be used to create possible theories of defense.

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden: Is a “pretty, very intelligent young lady” as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with do to her history of abuse by her uncle and recently moved to a foster home in another school district).

She said that things were not going well at home. That her step-dad, Barry Rock was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside but when Barry got home he would send us to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning Barry came to school and told her teacher that he caught her cheating – copying someone’s homework. She denied having sex with the boy or cheating. She was very upset that she isn’t allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class to then meet again later in the day with a police officer present. At that time Betty stated that since she was 10, Barry would tell her if she would do certain things he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded and before marrying Barry had quite

a bit of contact with social services due to her weak parenting skills. She stated that this has been going on more and more frequently in the last month and estimated it had happened ten times.

Betty is an A and B student who showed no sign of academic problems. After reporting the abuse she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden: is Betty's 35 year old mentally retarded mother. She is "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems which caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock: is a 39 year old mentally retarded man who has been married to Kim for 5 years and they live together in a small trailer living off the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor Barry was interviewed for 6 hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer yes when asked if he had sex with Betty and yes to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him and he knew that it was wrong but he did it anyway.

Barry has been tested with IQ's of 55, 57 and 59 over the last 3 years. Following a competency hearing, the trial court found Barry to be competent to go to trial.²

The Factual Component of the Theory of Defense

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming, is the essential process of setting forth facts that appear in the discovery and through investigation. It is critical to understand that the facts are nothing more, and nothing less, than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Don't draw conclusions as to what a fact or facts might mean. And don't make the common mistake of attributing the meaning to the facts given to them by the prosecution or its investigators. It is too

²This fact problem was developed by the Kentucky Department of Public Advocacy.

early in the process to give value or meaning to any particular fact. At this point the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

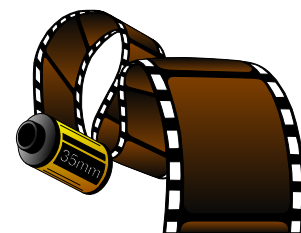
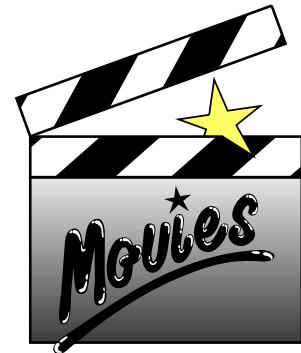
<u>Judgmental Facts (wrong)</u>		<u>Non-Judgmental Facts (right)</u>
Barry was retarded		Barry had an IQ of 70
Betty hated Barry		Barry went to Betty's school and went to her classroom confronted her about lying accused her of sexual misconduct talked with her about cheating dealt with her in front of her friends
Confession was coerced		Barry was questioned by several officers Barry was not free to leave the station Barry had no family to call The questioning lasted 6 hours

The Legal Component of the Theory of Defense

Now that the facts have been developed, in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense – the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as “self defense,” “alibi,” “reasonable

doubt” and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. “Alibi” is usually interpreted by jurors as “he did it but has some friends that will lie about where he was.” “Reasonable doubt” is often interpreted as “he did it but they can’t prove it.” Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. By looking to Hollywood and cinema, thousands of movies have been made which have as their focus some type of alleged crime or criminal behavior. When these movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. *It never happened (mistake, set-up);*
2. *It happened but I didn’t do it (mistaken identification, alibi, set-up, etc.);*
3. *It happened, I did it, but it wasn’t a crime (self-defense, accident, claim or right, etc.);*
4. *It happened, I did it, it was a crime, but it wasn’t this crime (lesser included offense);*
5. *It happened, I did it, it was the crime charged, but I’m not responsible (insanity, diminished capacity);*
6. *It happened, I did it, it was the crime charged, I am responsible, so what? (Jury nullification).³*



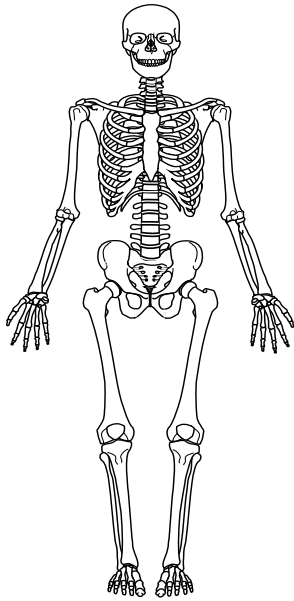
The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend

³The genres set forth herein were created by Cathy Kelly, Training Director for the Missouri Public Defender’s Office.

a case based upon the legal genre “it never happened” than it is on “the defendant is not responsible” (insanity).

Using the facts of the Barry Rock example, as developed through non-judgmental brainstorming, try and determine which genre fits best. Occasionally facts will fit into two or three genres. It is important to settle on one genre and it should usually be the one closest to the top of the list thereby decreasing the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened) but could also fit into the second category (it happened but I didn’t do it). The first genre should be the one selected.

WARNING ! ! ! !



The genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory and is not the your theory of defense. The genre is just the second element of the theory of defense and there is more to come. Where most lawyers fail in developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test-drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed From Home By Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

“Rock” – Barry, Innocent Man, Mentally Challenged Man;

“Wrongfully Tossed” – removed, ejected, sent-packing, calmly asked to leave;

“Troubled” – vindictive, wicked, confused;

“Stepdaughter” – brat, tease, teen, houseguest, manipulator.

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus is on someone or some thing other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus doesn’t even have to be on an animate object. Consider the following examples:

- Troubled Teen Fabricates Story For Freedom;
- Overworked Guidance Counselor Unknowingly Fuels False Accusations;
- Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter;
- Underappreciated Detective Tosses Rock at Superiors.

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component of the Theory of Defense

The last element of a theory of defense is the emotional element. The factual element and the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability and believability to the facts and

the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes

Archetypes, as used herein, are basic, fundamental corollaries of life which transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when your child is in danger, you protect the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to their child.

Other archetypes include: love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a step-child;
- Children will lie to gain a perceived advantage;
- Maternity/Paternity is more powerful than marriage;
- Teenagers can be difficult to parent.

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

Themes

In addition to providing emotion through archetypes, primary and secondary themes should be utilized.

A *primary theme* is a word, phrase or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

Recalling the O.J. Simpson case, a primary theme developed in the theory of defense and advanced during the trial was “if it doesn’t fit, you must acquit.” Other examples of primary themes include: One for all and all for one; Looking for love in all the wrong places; Am I my brother’s keeper? Stand by your man (woman?); wrong place, wrong time, wrong person; and when you play with fire you are going to get burned. Although originality can be successful, it is not necessary to re-design the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the chapters of Nashville:

TOP 10 COUNTRY/WESTERN LINES

10. Get your tongue outta my mouth cause I'm kissen' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.

3. My wife ran off with my best friend, and I sure do miss him.
2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.⁴

Primary themes can often be strengthened by incorporating secondary themes. A secondary theme is a word or a phrase used to identify, describe or label an aspect of the case.

Examples of Secondary or Sub-Themes

- A person: “never his fault;”
- An action: “acting as a robot;”
- An attitude: “stung with lust;”
- An approach: “no stone unturned;”
- An omission: “not a rocket scientist;”
- A condition: “too drunk to fish.”

There are many possible themes that could be used in the Barry Rock case. Some examples include:

- Blood is thicker than water;
- Bitter Betty comes a calling;
- To the detectives, interrogating Barry should have been like shooting fish in a barrel;
- Sex abuse is a serious problem in this country. In this case it was just an answer.
- The extent to which a person will lie in order to feel accepted knows no bounds.

⁴Many thanks to Dale Cobb, and incredible criminal defense attorney from Charleston, South Carolina, who was largely responsible for assembling this list.

Creating The Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the theory of defense paragraph. Although there is no magical formula for structuring the paragraph, the adjacent template can be useful.

Theory of Defense Paragraph Template

Open with a theme;
Introduce protagonist/antagonist;
Introduce antagonist/protagonist;
Describe conflict;
Set forth desired resolution;
End with theme.

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and tinkered with to get them to this level. They are not perfect and can be improved. However, they serve as good examples of what is meant by a solid, valid and useful theory of defense.

THEORY OF DEFENSE ONE

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. “Barry, if you just tell us you did it this will be over and you can go home. It will be easier on everyone.” Barry Rock is a very simple man. Not because of free choice but because he was born mentally challenged. The word of choice at that time was that he was “retarded.” Despite these limitations Barry met Kim Gooden, herself mentally challenged, and the two got married. Betty, Kim’s daughter, was young at that time. With the limited funds from Social Security disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home to live in, and provided for her many needs. Within a few years Betty became a teenager and with that came the difficulties all parents experience with teenagers. Not wanting to do homework, cheating to get better grades, wanting to stay out too late, and experimenting with sex. Being mentally challenged, and only being a step-parent, Barry tried to set some rules - rules Betty didn’t want to obey. The lie that Betty told stunned him. Kim’s trust in her daughter’s word, despite Barry’s denials, hurt him even more. Blood must be thicker than water. All Barry wanted was for his family to be happy like it was in years gone by. “Everything will be okay Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it.”

THEORY OF DEFENSE TWO

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled Betty Gooden walked into the Guidance Counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and her step-father were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her step-father punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself - NO. Of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would be so much simpler if her step-father were gone. As she waited in the Guidance Counselor's office, Bitter Betty decided there was no other option - just tell a simple, not-so-little lie. Sex abuse is a serious problem in this country. In this case it was not a problem at all because it never happened. Sex abuse was Betty's answer.

The highlighted portions in each of the examples denotes primary themes and secondary themes – the emotional component of the theory of defense. The emotional component is strengthened by describing the case in ways that embrace an archetype or archetypes (desperation in the first example and shame towards parents in the second). It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective – the first focusing on Barry and the second on Betty.

CONCLUSION

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. The theory will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, what witnesses are necessary to call in the defense case, and what to include and how to deliver the closing argument. The theory of defense may never be shared with the jurors word for word. But the essence of the

theory will be delivered through each witness so long as the attorney remains dedicated and devoted to the theory.



In the end, whether you chose to call them dog cases or view them, as I suggest you should, as a field of dreams, cases are opportunities to build baseball fields, in the middle of corn fields, in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. If you build it, they will come.....