Themes that Resonate with Today’s Jurors

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Most every corner of our lives can be described with a theme or subtheme. Literature has themes, life has themes, and litigation has themes. “Personal responsibility,” “accountability,” and “empowerment” are a few of the themes that resonate with today’s jurors.

Identifying or creating a theme requires intention and awareness. With thoughtful self-reflection one can decipher his or her life themes. In literary works themes are carefully planned and crafted as a basis of the work. Yet, in litigation many cases proceed without a cohesive theme. Law schools carefully teach lawyers how to craft an effective theory, but provide little to no guidance on how to develop a cogent theme.

To learn how to create effective modern themes for litigation during Trump times and beyond one should understand exactly what a theme is, how to develop a compelling theme and how to apply it for the greatest impact.

# What is a theme?

A theme is a simple central message. Thematic concepts capture the primary emphasis unifying the other aspects of a story. In a literary work it is characterized as the main idea, lesson, or a universal truth. In litigation, it is further described as the essence or heart of the case.

Litigation themes not only encapsulate the facts and evidence, but capture the dominant emotions and values of the case. An effective theme binds together these essential elements. This underlying unifying concept leads to a persuasive message.

To better understand what a theme is *in* litigation let’s take it *out* of the context of litigation for a moment. Every literary work needs a theme. Writers are encouraged to consider a few general questions when constructing or choosing the lesson, moral, or meaning which become the theme. Similarly lawyers might consider these same questions when formulating their themes.

* What is the main conflict or problem in the story?
* How do the changes the main characters undergo help the reader determine the message?
* Why do the characters act this way?

Understanding the answers guides the writer to identify the overarching idea of the work; then the author writes the details of the story consistent with the theme. Ultimately, the author tries to convey insight about how the world works, or how it should work through this concept.

To illustrate think about the stories we know from childhood. (Even the lessons from these examples might apply to litigation.)

* In The Three Little Pigs, the readers learn it's not wise to cut corners (straw house).
* In *Where the Wild Things Are*, by **Maurice Sendak,** the readers learn there are fearsome monsters out there, but if you stare into all their yellow eyes without blinking once, you can tame them and temper them and get home before supper gets cold. It becomes the audience’s job (the jury’s job) to stare the defendants in the eyes and tame them.
* In *Charlie and the Chocolate Factory*, the readers learn that no matter what your vice is — gluttony, avarice, gum-chewing — be prepared to curb it or pay the price.

Another exemplar is that everyone has themes in their lives. It may be hard to identify one’s own, but they are there. A person’s life themes suggest either patterns or a driving force in one’s life.

Similarly, litigation benefits from thematic concepts which are meaningful, endorse a message, presents patterns and have driving forces like literary and life themes. This is precisely what shifts cases from being a list of facts, evidence and law to being a call to action and passion.

## What a theme is not.

A theme is not just a short summary of the facts or a legal concept like negligence. It goes beyond a catchy tag line or pithy slogan when the line or slogan falls short of capturing the essence of a case. Nevertheless, those literary tools can be used to express its message and meaning.

The same case information can lead to both theories and themes, but their purposes are quite different. A theory addresses how the case can legally prevail, it includes the facts, evidence and law. The theory answers the question, can we win? In contrast, themes simplify the complex, provide mental organizers, and personalizes the case for juries. The foundation or connection the jury has with one side or the other often depends on the theme proposed. A sense of shared values between the attorneys, client and jury is attainable with a compelling theme.
The theme answers the question, why will we win?

## Why are themes necessary in litigation?

There are a few psychological reasons why themes are particularly beneficial.[[1]](#footnote-1) First, humans seek efficiency in all things. This includes cognitive efficiency. Simplifying the complex and facilitating understanding and memory both conserve a factfinder’s cognitive energy. Second, humans have limited amounts of attention reserves and benefit from an underlying unifying focus. Juries filter new information through a well presented theme to decide whether to accept and process consistent new information or discard inconsistent information.

Even though themes capture the gist of the case and psychological principles demonstrate their necessity, *persuasion* remains the primary purpose for their use. When lawyers facilitate factfinder understanding (a jury or judge) and make it meaningful, they improve persuasion.

A good theme is akin to a meaningful advertising slogan. Jurors will remember it, filter information through it, and return to it. “Like a good neighbor” means something to people. State Farm metaphorically positions themselves as a neighbor or friend, someone you trust and support. The connotation of neighbor evokes feelings, relationship, and invites action.

These are the same goals for a theme in litigation-- the power to persuade and an invitation for the jury to respond. The well-known tag line for the OJ Simpson trial embodied the theme and made a direct call for action. “If the glove doesn’t fit, you must acquit.” The underlying moral theme of the trial was unfairness—unscrupulousness, bias and mischaracterization were all components of the totality of the facts. The call to action was directly stated in the tag line, but it need not be.

# How is a theme developed?

Crafting the theme often proves challenging for lawyers. Getting to a theme takes more analysis than a cursory overview of the facts. Below are five criteria and five components to aid in developing the theme. After the theme concept is developed then one carefully considers how to convey the theme for optimal persuasion.

## Criteria:

To be effective the underlying thematic concept must satisfy five basic criteria.

* Simple. Themes must be simple, easy to explain and easy to understand. Simplify the complex as much as possible.
* Holistic. A holistic theme represents the gist of the case. It must communicate the essence of the case driven by the facts and law in addition to capturing the emotions involved.
* Value based. Basing a theme on the jury’s core values allows for a sense of shared purpose. It can become the common ground between the jury and client.
* Resonates. A powerful theme connects with the jury. When a juror relates to a message s/he becomes more personally vested and the likelihood of favorable responses increases. A lawyer improves the possibility for a jury to relate to the theme by learning about the case attitudes via jury selection or focus groups. Then develop the theme around these attitudes.
* Memorable. A theme must be understood to be remembered. A confusing or complex theme will be discarded or forgotten. A holistic simple relatable theme is more memorable. Additionally, reinforcing the theme throughout trial makes it more memorable.

## Components to develop:

How does one come up with an idea for the theme? A lawyer doesn’t need to rely on intuition or an “aha” moment. Themes can be carefully crafted and tested for effectiveness. Nevertheless, don’t overlook an “aha” moment of inspiration when carefully working through the following components.

Most themes evolve and change as information is gleaned and theories are refined. An astute attorney will circle back and reflect on each component again as the case matures.

A few questions accompanying each component to guide the lawyer in development.

1st component:

Consider the facts, evidence and emotions of the case. Look for a thread that links the case information together. A common thread can simplify the complex and organize the disjointed. Note that complex and disjointed information favors the defense. Furthermore, the thread can and should include the emotions of the case. Here are some questions to facilitate inquiry.

* + What is similar among the facts and evidence?
	+ What are the patterns within the case information?
	+ What emotions are involved or evoked with this case? Not only the emotions experienced by the parties, but what might someone listening to the story experience?

When someone experiences emotions they find meaning in what is being said. A meaningful theme is a compelling theme.

2nd Component:

Assess the power and control of each person or entity involved plus the power and control differential among them. It may sound straightforward, yet there are more options than one might initially think. Analyze not only the choices which benefit the party making the choice but also those which can be used against the party. Since jurors assess all parties’ power and choices to use that power, lawyers are able to capitalize on the reality of what jurors are already thinking. Helpful questions during this phase include the following.

* + What choices do each of the parties have?
	+ Who controls what?
	+ Who has the greater ability, option or choice (power) to do things differently?
	+ Why did it happen, what were the motivations of each party for doing what they did?

I.e. In medical malpractice cases mock jurors often criticize plaintiffs for choosing to undergo an elective procedure (even if the choice appears a technicality because it is medically recommended), for picking the particular doctor, and for incomplete follow up. These criticisms highlight the need to examine all choices.

Themes involving choices, power, and control resonate with juries today. I.e. The parties’ power differential can lead to a theme involving “prevention.”

3rd Component:

Base a theme on values and moral foundations. Value based themes resonate because jurors can personalize or empathize with it. Since value based themes provide meaning they invite action on the part of the jury. A detached logical approach favors the defense.

When considering various options, contemplate the values and motivations of the defendant *and* those of the plaintiff. A few core values include: status, boldness (can be viewed as agreesive/bulldog), wealth (target for defendants) and love, community, authenticity (target for plaintiff). Be mindful when searching core values lists as they might appear all positive. Many times the most persuasive value of the case is a value perceived as negative, such as “greed,” and describes the misguided values of the defendant.

Another tool to aid in identifying values is to consider one of the common moral foundations. Five common moral foundations include: care, fairness, in group affinity, authority and purity.[[2]](#footnote-2)

* Care Versus Harm: [[3]](#footnote-3) We seek protection and oppose harm to ourselves or others.  It underlies virtues of kindness, gentleness, and nurturance.
* Fairness Versus Cheating: We seek justice based on shared rules and oppose attempts to evade those rules. It generates ideas of justice, rights, and autonomy.
* Loyalty Versus Betrayal: We stand with our own group and oppose threats to that group (also called "In-group affinity"). It underlies virtues of patriotism and self-sacrifice for the group.
* Authority Versus Subversion: We expect obedience to legitimate authority and oppose attempts to subvert that order.  It underlies virtues of leadership and followership, including deference to legitimate authority and respect for traditions. Due to the political climate this may be applied slightly differently now.
* Sanctity Versus Degradation: We want purity and avoid that which arouses disgust (also called "purity").

Look at the list and ask what moral or value is supported by your side of the case. A trend has been to focus on the moral of care or harm. However, when presented properly each of the values drive the same behavior—the need to hold the wrongdoer accountable. The key is to demonstrate the wrongdoer violated a core sense of what is valued and the jury can hold them responsible.

For example in police brutality cases, the defendant’s actions might violate the jury’s sense of community *loyalty* or their perceptions of *authority*.

Once a moral or value is considered then choose words which build on the foundation. Use these words to capture the value and moral concepts at each stage of litigation. If possible begin using them in depositions. Lawyers can refer to a list of moral descriptive words assembled by researchers to guide this process. [[4]](#footnote-4) A few examples are listed.

|  |  |  |
| --- | --- | --- |
| **Moral** | **Virtue** | **Vice** |
| Care | Safe, shield, preserve | Suffer, spurn, endanger |
| Fairness | balance, tolerance and equity | favoritism, unjust or disproportion |
| Authority | duty, respected, compliance | oppose, insubordinate, betray |
| In group affinity | Family, joint, fellow | Imposter, treason, deceive |
| Purity | Abstention, virtuous, pure | Indecent, defile, blemished |

Finally, a highly effective tool to identify applicable values is to review a corporate defendant’s value or mission statement or statement of purpose. They are often value based and can be used against them.

### 4th Component:

Appeal to the more challenging audience on the jury. Some jurors’ preset attitudes and beliefs reflect pro-plaintiff ideals and others reflect pro-defense ideals. Design the theme to appeal to those who will be most cynical of your case.

* What idea appeals to those who are most critical of the plaintiff’s position?

### 5th Component:

Before finalizing the theme, consider both the positive and negative construct and inferences of the theme.

If the theme in a negligence case is “accountability” review closely all ways that the plaintiff can (and most likely will) be held accountable for his or her actions and choices. In all likelihood their accountability will subsequently be compared against the defendant’s accountability.

* How does the theme apply to plaintiffs and witnesses?
* How does the theme apply to the defendants?
* How can the theme be used against the plaintiffs?

## How to convey

In addition to thoughtfully crafting a compelling concept, intentionally choose the form, language, and how to present it. How and when the theme is conveyed can impact its effectiveness.

### No ideal form

There is no ideal form for a theme. It can be a sentence, an idea, phrase or even a word. Here are a couple examples of full sentence themes.

“This case was about a lawful contract that was met with respect from one party and defiance from another.” The core value and moral foundation is *authority*. (contract case)

“You can choose the behavior, but you don’t get to choose the consequences.” (medical malpractice case)

Even though a trial theme reflects a summary of the attorney’s case, attempt to convey it in as few words as possible. If the meaning becomes compromised or diluted by shortening the concept, then use the full description.

“Safety is priority #1” (for accident cases), “the power to kill or be careful” (for personal injury cases), “David vs Goliath” (valuable for many commercial cases), “paying for someone else’s mistakes” (for negligence cases), “this manufacturer knows the difference between fail safe and unsafe” (for product’s liability cases), and a Chicago favorite from Phillip Corboy (Corboy & Demetrio) “destruction of a Van Gogh painting” (for damages) are examples of concise messages.

Don’t overlook the one word message. Sometimes the single word theme exhibits the greatest focus and impact, like a laser beam piercing through the case.

One word themes may include “prevention,” “indifference” (for products liability), “impatience” (for medical malpractice cases), or “greed” (for commercial cases.)

When choosing the theme, regardless of form, remember to satisfy the list of criteria: simple, holistic, value based, resonates and memorable.

### Language

When honing in on how to express the theme, choose words which represent or characterize the thematic concept. Ideas for language can be derived from the values or moral foundations lists. Remember effective language is simple, meaningful, and memorable.

A powerful theme need not require a new intellectual insight. Consider adopting an existing quote, analogy, or impactful word. Since adages, slogans and everyday sayings have been tested in the general public and come preloaded with acceptance, understanding, or meaning, they can prove particularly beneficial. With an existing phrase, a lawyer only needs to apply or analogize to his or her case. Lawyers do not need to recreate the wheel when conveying the idea however creativity may be necessary in some cases.

Options to borrow from include: adages, bible teachings, commercial slogans, quotes, lyrics (especially country western) hashtags etc. Look for universal truths about the issues within the community or trial venue to determine the best options.

### Mechanics and rules of language

Take advantage of the mechanics and rules of language such as the rule of three, alliterations, and repetition when crafting the prose to be used during trial. If it is conveyed indirectly, then less attention to the exact prose is necessary.

### Testing with focus groups and mock trials

To remove the guesswork when crafting themes, conduct decision research like focus groups and mock trials to identify, refine, and test your themes. They allow lawyers to listen to how lay people talk about the case. A focus group reveals key terms or language which convey the gist, values, or case understanding. Focus groups targeting theme development are recommended before the close of discovery and earlier. Testing the themes’ power and persuasiveness are best done with mock trials or trial simulations and may be conducted closer to mediation or trial.

I.e. A recent focus group involving a catastrophic automobile collision with agency as the primary issue proved invaluable. The contract stated the salesman (driver) worked as an independent contractor. He was paid as such; he use his mother’s vehicle for sales calls; and a few other “objective” facts supported the claim he was an independent contractor. The plaintiff claimed the multibillion dollar company he worked for controlled its salesforce like agents. In the focus group a few participants held firm that the letter of the law in the contract decided the issue. Even the parallel juror in the real trial leaned the same way after openings.

Using feedback and language from the focus group, the theme of “actions speak louder than words” emerged (very close to trial). The focus group provided highly useful terms to support the theme. The witnesses were asked questions using the focus group thematic descriptors. Then during closing the theme was addressed head on. The shift was dramatic. The theme and its support drove the jury’s decision making.

# Application

## Start early

It is advantageous to conceptualize possible themes early and allow for evolution over time. When drafted early, a lawyer can build her case consistent with theme. She can supplement facts which might not have been identified otherwise. If the theme is not considered until just before trial then it is limited by the facts. The facts alone will dictate the theme, which means gaps and inconsistencies exist and the lawyer will be boxed in by them. If the theme is developed over the course of discovery, questions supporting or suggesting the theme can be asked of each witness. This builds consistency and flow.

## Direct or indirect

In litigation lawyers have the option of whether to introduce a theme directly or indirectly. When it is direct a lawyer states the theme overtly. It becomes the tag line or slogan. In order to not overuse a tag line have slight variations of language prepared. In the recent trial involving agency we referred to the salesman as “functioning” like a representative or agent, he was “treated” like, “similar” to, “expectations comparable to” someone who was an agent.

Alternatively a lawyer may choose to introduce a theme indirectly. If an indirect method is preferable, the theme must be clearly understood without stating the phrase aloud. It is comparable to not being able to “punish” or “send a message” to a company with damages. A lawyer can “motivate,” “encourage change” or show them the “moral high ground.”

## Integrate throughout litigation

Integrate the theme into all aspects of trial. Envelop the theme concepts at every stage of litigation. Ideally the themes should be used at every phase of litigation including depositions, dispositive motions, mediation and trial.

At trial introduce the theme from the onset—during jury selection. A lawyer can assess a juror’s receptiveness to the concept and refine the theme from the perspective of the juror. Plus, presenting the theme during jury selection frames the issue for the jury. It allows for the jury to filter all future information through the theme, quite beneficial for persuasion.

## Themes in Trump times

Today’s compelling themes continue to be case and venue specific. The key to a successful theme—it is meaningful to the jury and based on the values and morals of the trial venue.

The application and focus of various values have shifted in recent years. One example is in police brutality cases. Opinions of police officers in many communities are no longer favorable. Instead of viewing the morals of *authority* and *fairness* from a virtuous perspective many people feel betrayed by police officers’ actions. Therefore, a theme drawing on their betrayal and injustice is likely to resonate, but a lawyer must know the tenor of the venire on that issue.

# Conclusion

Themes that resonate with today’s jurors convey a simple central message. Themes which satisfy the basic criteria and are conveyed throughout trial are compelling. Compelling themes are persuasive.

Based on our current political and social climate I suspect these base thematic concepts to resonate with jurors in Trump times: personal responsibility, accountability, fairness, empowerment, distrust/dishonest, discrimination and prevention.

1. For information about additional psychological applications, please contact the author. [↑](#footnote-ref-1)
2. Haidt, Jonathan, (March 2012) The Righteous Mind, Why Good People are divided by Politics and Religion. The idea of a finite list of common moral foundations comes from moral foundation theory. Researchers explore the notion that humans think about morality on the basis of five (or more) common foundations. They both unite us (because most people agree with them) and divide us (different cultures and political groups emphasize them differently). Broda-Bahm, Ken [↑](#footnote-ref-2)
3. List from moralfoundations.org and explanations from Broda-Bahm, Ken. (November 30, 2016) The Right Theme? Look It Up in the Moral Foundations Dictionary, Persuasive Litigator blog. http://www.persuasivelitigator.com/2015/11/the-right-theme-look-it-up-in-the-moral-foundations-dictionary.html. [↑](#footnote-ref-3)
4. Moral Foundations Dictionary. [↑](#footnote-ref-4)