

# Closing Argument: Tapping the Human Experience

by Drew Findling\*

## I. INTRODUCTION

To every criminal defense attorney there comes the inevitable daydream. That time when you imagine yourself in front of the jury passionately proclaiming your client's innocence. It is a fantasy dominated by your emotion and shared with an imaginary jury. You can sense the jury move with every word you utter. You expect the jury to applaud you at any moment. Finally, at the end of this reverie, you receive the ultimate ovation, a verdict of not guilty. It is your responsibility to convert that daydream into reality. Your closing argument should be that segment of the trial in which each and every emotional element of the trial is exploited in order to gain a favorable verdict for the client. The focus of this Article is how to take advantage of that emotion during closing argument.

Aristotle strongly believed in the importance of emotion in oral presentation. According to Aristotle, psychology, or pathos, is the key to the art of persuasion.<sup>1</sup> Aristotle taught that the speaker must intentionally evoke specific emotions in order to persuade the listener to sympathize with his argument.<sup>2</sup> If the advocate is unable to evoke effectively the appropriate emotions, then the advocate will not prevail. Aristotle's own powerful words declare: "Rhetoric is useful, because the true and the just have a natural tendency to prevail over their opposites, so that, if decisions of judges and juries are not what they ought to be, the defeat must be due to the speakers themselves, and they must be blamed accordingly."<sup>3</sup>

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1. P. LAGARIAS, *EFFECTIVE CLOSING ARGUMENT* 100-01 (1989).
2. *Id.* at 101.
3. *Id.* at 95.

## II. UNDERSTANDING THE CLIENT

First, the defense attorney must be emotionally prepared to maximize his effectiveness during closing. This requires a personal "psyching up process." Specifically, you must sensitize yourself to the plight of the client. Closing argument is the time to argue for the client's freedom. Yet, often, the defense attorney is unfamiliar with the look of freedom as viewed through the client's eyes. This segment of emotional preparation demands that you experience your client's freedom. It is a time to discuss not the facts of the case, but your client's life. Meet with your client's family, learn about your client as a child and how he developed into the adult that will sit next to you at the defense table. You must discover what freedom means to your client in order to convey effectively all the emotion that this image of freedom will conjure up when you ask the jury to grant his freedom. Just as a football team huddles up before a game, you must have your own ongoing pep rally. Your mind and your heart must be filled with the emotional experience of your client's freedom. Only then can you passionately express to the jury why your client is innocent. More often than not, this is a side of your client overlooked or hidden from the jury. But it is this passion that will keep your heart racing and your juices flowing, allowing you to argue to the jury with the savvy so desperately needed.

The closing argument may require a different approach when your client's background is one of poverty and hopelessness. In these situations, you should explore and experience the darkness of the client's dwelling in order to communicate effectively his pathos to the jury. For example, imagine a situation in which your client claims entrapment. As a resident of a housing project, he was given \$500 to hook a confidential informant up with a drug dealer. You must be able to understand and convey the experience of overpowering poverty that engulfed your client when he accepted the money. By visiting his small apartment in that housing project, you will sense the frustration of his existence. You will view the eroded walls full of graffiti, as well as the paint peelings that lay beside his baby's crib. You will notice the rats and roaches racing across the floor, making the apartment as much their home as his. In the corner sits the multigeneration twelve-inch black and white television set beneath the hanger used for an antenna. Each night he and his family watch television shows like *The Cosby Show*, *Knot's Landing*, and *L.A. Law*. They watch others swim in their wealth, while they must permanently tread water just to survive. If you are to put up a successful entrapment defense, the feelings and observations you make while at the client's residence must be in your heart and soul during the closing argument. This type of experience can give you the high octane fuel necessary to capture the imagination of the jury and counter what, to the prosecutor, is proba-

bly just another simple drug case. This may be the only time that the individuals who comprise the jury will ever decide the fate of another human being. You have the responsibility to take advantage of this singular event in their lives by injecting into your closing argument this heightened state of emotion that can only be achieved by this type of psyching up process.

A contrasting scenario involves the tightly knit, loving family that your client will go home to if found not guilty. To convey this feeling properly (regardless of whether your client is out on bail), it is essential to feel the closeness of his family prior to trial. This can only be accomplished by going to your client's household at different times to observe the interaction among the family members. It may be the warmth and love of a big Sunday lunch following church services, or it may be your client's wife with the children at night reviewing their day's homework and tearfully telling you that this is always "daddy's role" and that she hopes their father will be home soon to resume this responsibility. These experiences can give you the necessary charge to explode with emotion and sensitivity during closing argument.

Perhaps you will find yourself representing a client who has been charged with murder and who has little evidence in his favor. The client's psychological tests reveal that he is filled with anger and rage. This client is no less deserving of your emotional involvement. You should never roll over and let the client be swept away without a zealous presentation. Make it your mission to find out why the client is filled with rage and anger. Dig into his past to understand better his psychological profile. If, as a child, he witnessed the murder of his mother as she was thrown from a third-story building, interview those who were also present and observed the client immediately thereafter. Find out how he dealt with this tragic situation. If the client himself was subjected to violence, talk to those who witnessed his scars and beatings. Talk to the physicians and counselors who worked with him and get a feel for how he dealt with his life of horror. These issues will often be inadmissible. They will give you, however, the energy and the compassion to fight for this person, based upon the realization that he is not just another criminal who needs to be caged up, but rather a human being worthy of compassion.

### III. UNDERSTANDING THE ISSUES

The criminal defense attorney is responsible to sensitize himself to the issue or cause that he plans to pursue at trial. One example involves the plight of the previously discussed indigent defendant who has been approached and asked to set up a drug deal. Another example is the plight of a battered woman charged with killing her spouse. It is natural, of course, to be sensitive to the plight of this individual client. You must

also sensitize yourself, however, to the plight of all battered women. It is paramount you always remember that in every case there is a cause. It is essential to read every journal and book available on the subject. If possible, go to discussion groups put on by your local counsel on battered women and meet other battered women who have traveled this avenue of nightmares. Learning and feeling the subject matter will help you to realize that your client is not the only one to have suffered abuse. It will help you communicate to the jury her fear when she was confronted by her abusive spouse. Obviously, the experiences of other battered spouses will be inadmissible in your trial, but this learning process will help you realize that this case does not just involve the plight of your client, but that of all battered women. You will not be advocating the wholesale slaughter of men who abuse their spouses. Rather, this higher level of emotional intensity will energize you and allow you to communicate the pain your client felt not only from the physical and emotional abuse, but also from the many times that society may have turned its back on her when she called out for help on previous occasions. Speaking to other battered spouses who let significant periods of time pass before they opened up to others may give you an insight regarding why your client did not report previous beatings to friends or authorities. Once again, these are not necessarily admissible facts, but heartfelt experiences that will help you in emotionally preparing for this type of sensitive issue.

In a highly publicized trial, defense attorney Charles R. Garry was responsible for representing Black Panther member Huey P. Newton. Many thought that the trial represented the measure of racism in America. During that trial, Garry revealed that he sensitized himself to the plight of African Americans:

I thought I knew something about Negro America because some of my most intimate friends are Negro professionals . . . . It wasn't a week or two weeks after I got this case and I came to the conclusion that I knew absolutely nothing about black America . . . . I was ignorant—as ignorant as any white would be . . . and I thought I was informed. I have had to educate myself. I have had to read everything that I can get hold of.<sup>4</sup>

Likewise, during the sentencing phase of the infamous case of *Leopold & Lobe*,<sup>5</sup> defended by Clarence Darrow, Mr. Darrow revealed that he was on a mission for the youth of America and not just for his two clients. Mr. Darrow stated:

If I should succeed in saving these boys' lives and do nothing for the progress of the law, I should feel sad, indeed. If I can succeed, my great-

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4. See R. MOSES, *JURY ARGUMENT IN CRIMINAL CASES* 168-69 (1985).

5. See *ATTORNEY FOR THE DAMNED* 16 (A. Weinberg ed. 1957).

est reward and my greatest hope will be that I have done something for the tens of thousands of other boys, for the countless unfortunates who must tread the same road in blind childhood that these poor boys have trod; that I have done something to help human understanding, to temper justice with mercy, to overcome hate with love.<sup>6</sup>

In that trial, Mr. Darrow's closing argument consumed two days and resulted in the judge giving the defendants life sentences. This was an extraordinary demonstration of emotional appeal in a case in which the community was pressuring the judge to come back with the verdict of death.

#### IV. IDENTIFYING INDIVIDUAL EMOTIONAL RESPONSES

Once you are emotionally prepared, it is important to identify all other emotional elements of your case. For every individual party involved in the trial, whether they be witness or juror, there are various emotions and virtues that we must catalog and further sensitize ourselves to in order to be more effective during closing argument. Among the many recognized human emotions are aggression, anxiety, defensiveness, dejection, embarrassment, fear, grief, love, pain, prejudice, rage, shame, suspicion, and worry. Identifiable virtues are courage, justice, prudence, temperance, charity, faith, and hope. In addition, there are many human characteristics and traits that are also easily identifiable such as honesty, respectability, truthfulness, and politeness.<sup>7</sup> To help organize each of these emotional elements and view how they affect different parties in the trial, the following chart is extremely helpful:

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6. See *id.* at 87.

7. See EDWARD L. FRIEDMAN, *THE SPEECHMAKER'S COMPLETE HANDBOOK* (1955).

**Emotional Preparation:**

Defendant	Defense Attorney	Prosecutor	Victim	Jury	Judge (Community)	Witness A	Witness B . . .

As you prepare and identify the aforementioned emotions and virtues, list them and explain why they are involved. Then, when you prepare your closing argument, you can remain cognizant of them and how they may affect the emotional level of your presentation. For example, under "defendant," you might list the fear of the battered spouse charged with murder. Or, you may insert the love of the defendant's family who sat loyally behind him throughout the trial. Under "prosecutor," you might list the embarrassment the prosecutor felt when his witness, the snitch, was caught lying during cross-examination. Under "victim," you might list the grief of the victim's family in a murder case, or the aggression of the violent victim in a self-defense case. Under "jury," you might list the jury's fear of convicting an innocent man. Under "defense attorney," you might keep track of the politeness and honesty you demonstrated each time the prosecutor rudely interrupted you with objections. Keeping track of and listing these emotions and virtues will better equip you to prepare an emotionally captivating closing argument.

## V. SUGGESTED TECHNIQUES

Once you have identified and emotionally prepared for trial, there are three techniques that are essential to taking advantage of this emotion in order to ride the emotional roller coaster to victory. The first is factual flexibility. As a defense attorney, you must be prepared to argue a traditionally nondefensive position in order to elicit the appropriate emotional response from the jury. For example, you know that an innocent client will often insist on pleading guilty just because a good deal is on the table. If you find yourself in a trial, however, in which a codefendant has flipped and is testifying against your client, you must remain flexible and be prepared to argue to the jury that only guilty people plead guilty, and that innocent people go to trial. Despite your knowledge of how the system works, you must argue to the jury that the guilty person clearly has done the appropriate thing and pled, but that now he is trying to drag down the innocent victim. You might also point out to the jury that your client had the same opportunity, but that he has taken advantage of his sacred right of trial to prove his innocence. The argument proceeds that if he were in fact guilty, certainly he would have pled and offered evidence against the codefendant. But having no knowledge of wrongdoing, he did not do so. It is now appropriate to stress that it is the testifying codefendant who is manufacturing evidence in order to help himself escape his evil deeds.

Another example of factual flexibility involves the use of pictures in an insanity defense. Although you may find yourself in a pretrial motion arguing against the admission of gruesome photographs, if they are admitted you must remain flexible and consider using them to stroke the appropriate emotional cord of the jurors during closing argument. You may argue that the gruesome photos are the best proof of the client's severe mental illness. I successfully employed such a technique during a 1985 murder trial, *Georgia v. Spriggs*,<sup>8</sup> which took place in Fulton County, Georgia. In *Spriggs* the prosecution, with great delight, introduced the pictures of Ms. Spriggs's six-year old son after she had decapitated him. The prosecution introduced several pictures, each detailing this horrid act. We unsuccessfully tried to prevent the introduction of the pictures in a motion heard outside the presence of the jury. Once they were admitted, however, I employed a flexible approach and centered my closing argument on the importance of these pictures to the defense. The jury returned a verdict of not guilty by reason of insanity. In my closing argument I told the jury: "Those pictures are nothing but evidence of the sick state of mind . . . that's the work of a really sick person who should

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8. Indictment No. A77278 (Fulton County Sup. Ct. 1985).

be in an insane asylum." I had put up an insanity defense and used the pictures actually to emphasize the gruesomeness of my client's act in order to convince the jury that the pictures revealed the work of an insane person.

The second technique necessary in tapping the human experience is slight of hand. Just as the magician directs the audience to his left hand while setting up the trick with his right, the defense attorney will often direct the jury to an isolated emotional issue in order to divert the jurors from addressing what appear to be overwhelming facts against his client. One builds the foundation for developing slight of hand by carefully charting the emotions previously described.

Once you have isolated the single most captivating issue, you must attempt to inject that issue into closing argument as the major theme. The following case is illustrative of this technique: A teenage defendant, convicted twice for stealing cars, was charged with entering an automobile. His defense was that his mother had sent him out to pick up his brother who was visiting friends. Specifically, he claimed that he was sleeping when his juvenile brother called home and requested that his mother pick him and his friends up at a nearby apartment complex. The defendant stated that his mother then instructed *him* to pick up his brother. When the defendant got to the apartment complex, his brother and his brother's friends were breaking into the car. It was alleged that the defendant was a party to the felony of entering an automobile, although he never entered the car. Obviously, the defendant needed his mother to testify that it was she who instructed him to pick up his brother that evening. The mother, however, was the subject of over thirty outstanding warrants for her arrest for credit card fraud and refused to honor her subpoena out of fear that she would be arrested in open court. After this came out in trial, the entire closing argument was fashioned to emphasize how the mother had turned her back on her child. My closing consisted of a reference to *Eleni*<sup>9</sup> by Nicolas Gage in which Mr. Gage's mother sacrifices her life so that her children can escape civil war ridden Greece. Jurors were reminded how Eleni threw up her arms during her execution and shouted "my children" as bullets ripped the life out of her.<sup>10</sup> I then asked the jury to contrast this mother's sacrifice with the defendant's mother, who sacrificed her son in order to protect herself. With all the attention now diverted to the mother's failure to do what was right for her child, the jury did not focus their attention on the actual facts. Instead, they focused on why a woman would act so egregiously as to turn her back on her son. The jurors sided with the defense and convicted the

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9. N. GAGE, *ELENI* 411 (1983).

10. *Id.*

defendant of only a misdemeanor. Several said they did so out of anger towards the missing mother.

In another case, a defendant was charged with the attempted arson of an apartment in which his wife was sleeping with another man. The focal point of my closing argument was the commandment: "Thou shalt not commit adultery."<sup>11</sup> Arguing to the jury, which had been thematically selected to be receptive to this biblical argument, the emphasis was not on what took place at the apartment, but rather on how a man would feel knowing his wife was on the other side of a window, engaging in intercourse with another man. The closing argument concentrated on the credibility of a man who would stoop so low as to sleep with another man's wife and then use the criminal justice system as a means of eliminating her faithful husband. After the jury acquitted the defendant, he received a number of offers from the various jurors, ranging from joining their respective churches to applying for jobs with their companies.

The third technique necessary to ride successfully the emotional roller coaster to victory is linguistic preparation. The first part of linguistic preparation involves mastering word choices and choosing appropriate analogies, stories, and passages that help develop the theme. This involves selecting words that trigger the jurors' emotions. For example, in *Spriggs* the jury was asked to send the defendant to an insane asylum. This archaic term was chosen even though it was hoped that the client would go to a mental health facility where she would be the recipient of compassionate and loving psychological and psychiatric help. As defense counsel, I dealt with the primary emotion of fear: the jury's fear that upon a verdict of not guilty by reason of insanity, the client would get out in two or three weeks. I used the term "insane asylum," therefore, because it is a harsh and cold expression suggesting an institution with high brick walls and barbed wire fences. Using the words "insane asylum" was a method of addressing the fear of the jurors.

In a 1986 murder trial in which the battered woman syndrome defense was used, I argued to the jury that the defendant killed her boyfriend because of fear and survival. In that case the client had never been physically abused by her boyfriend. During their eleven-year relationship, however, he had verbally threatened her many times. After years of verbal threats, he finally physically confronted her, and she stabbed him. By way of symbolism, the jury was told that during World War II, a Jewish person, when confronted by Nazi soldiers, might change his name from Benjamin Goldstein to Ben Smith. This happened not because his Judaism embarrassed him, but because he feared being harmed and chose survival. I also told the jurors that the passenger on a plane that crashed

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11. *Exodus* 20:14

into the Ukraine did not eat the flesh of a deceased passenger because he was wicked and evil, but because he feared death and chose survival. Finally, the jury was told that the defendant, who had been charged with murder, did not kill her boyfriend because she was a murderess, but because she feared imminent harm and chose to survive. Following this argument and the use of the trigger words "fear" and "survival," the jury rendered a verdict of not guilty of all charges. Subsequent to the verdict, a local paper interviewed one of the jurors, who was quoted as follows: "She was afraid. She'd been afraid all those years . . . it's just survival."<sup>12</sup>

The second part of linguistic preparation involves the use of analogies, stories, and passages to help exploit essential emotional elements. Sometimes we find ourselves with key emotional issues, but these issues cannot necessarily be exploited through mere selected words. Instead, they must be cultivated during closing argument. One example is the murder case in which fear and survival were used as trigger words. Those words were developed through the use of stories. Such a story often provides the peg upon which the jury can hang their hats. It allows them to turn to the government and say "you have made a mistake by indicting the defendant, the defendant is not guilty."

A 1988 murder trial in DeKalb County, Georgia provides a good example of the use of an analogy. A female minister was charged with dousing her husband with gasoline and setting him ablaze. He died several days afterwards as a result of these burns. The defendant and an expert on Battered Women Syndrome explained that her primary motivation was fear because her husband had beaten her for many years. My concern was that the gravity of the husband's injury and the finality of the defendant's act would overwhelm the jury. During closing argument I compared my client's situation to recent events involving split second decision making. You may recall the incident involving the *U.S.S. Vincennes*, which shot down an Iranian air bus, killing 290 passengers. People said the captain of the ship acted appropriately. In comparison, the defendant had been beaten many times before. The killing occurred in the midst of yet another beating. I told the jury to compare the defendant to the captain of the *U.S.S. Stark*, who hesitated when his ship was attacked one year previous to the incident involving the *U.S.S. Vincennes*. As you may recall, the captain's hesitation resulted in the deaths of thirty-seven American soldiers. For the same reason that the captain of the *U.S.S. Vincennes* could not hesitate to respond, neither could the defendant hesitate to respond when her husband placed her life in danger.

By using this analogy, I gave the jurors an opportunity to take an incident that many of them had never encountered, and compare it to a cur-

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12. Fulton County Daily Rep., Nov. 13, 1986, at 3, col. 1.

rent event that they had just recently encountered through the media (the incident involving the *U.S.S. Vincennes* occurred approximately two weeks before the trial).

Sometimes the criminal defense attorney finds himself trying to explain to a jury why a client, who would not otherwise be predisposed to involve himself in drug activity, would follow the suggestion of a confidential informant to get involved in a drug transaction. One simple way of explaining to the jury how temptation affects people is to talk about how the serpent in the Old Testament convinced Eve to bite the forbidden apple. Defense attorneys have used this great example of temptation to win many trials.

It is through the development of these stories that jurors who do not normally encounter criminal activity can understand that one's alleged involvement is easily understandable and forgivable.

The attorney's goal is to identify the essential emotions of all parties involved in the trial and heighten the sensitivity of the jurors so that during closing argument, the jurors will be receptive to the emotional appeal and will deliver an emotional verdict. In the legendary *Sweet* case,<sup>13</sup> in which Clarence Darrow argued on behalf of a black youth charged with murder resulting from a discriminatory prosecution, Mr. Darrow told the jury:

The issue not only involves the defendant in this case, but it involves every man who wants to live, every man who wants freedom to work and to breathe; it is an issue worth fighting for, and worth dying for, it is an issue worth the attention of this jury who have a chance that is given to few juries to pass upon a real case that will mean something in the history of race . . . it is not often that a case is submitted to twelve men where the decision may mean a milestone in the progress in the human race. But this case does. And I hope and I trust that you have a feeling of responsibility that will make you take it and do your duty as citizens of a great nation, and, as members of the human family, which is better still.<sup>14</sup>

Ultimately, the criminal defense attorney must express his outrage so that no member of the jury will ever view the criminal justice system in the same way after the closing argument.

## VI. CONCLUSION

An emotional appeal is not a ruse or artifice to be avoided. This profession is one dominated by emotion. You must, therefore, be willing to take

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13. See *supra* note 5, at 229.

14. See *id.* at 258-60.

advantage of each and every emotional element to present your closing argument effectively. The only way for the jury to care is to show them that you care. And the only way to show that you care is to capture the moment and deliver a closing argument that, each time given, seems as if it is the last one you will ever give.