

1967

## Closing Argument to the Jury for the Defense in Criminal Cases

G. Arthur Martin

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

G. Arthur Martin, Closing Argument to the Jury for the Defense in Criminal Cases, 58 J. Crim. L. Criminology & Police Sci. 2 (1967)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## CLOSING ARGUMENT TO THE JURY FOR THE DEFENSE IN CRIMINAL CASES

G. ARTHUR MARTIN

For a number of years G. Arthur Martin has lectured at Northwestern University's annual Short Course for Defense Lawyers in Criminal Cases. His address on "Closing Arguments to the Jury for the Defense in Criminal Cases" has always been received with acclaim. We are here privileged to perpetuate it in printed form.

Mr. Martin is one of the world's great defense lawyers in criminal cases. He is also highly respected for his integrity and professional ethics by his fellow members of the Canadian Bar, as is evidenced by their selection of him to serve as Chairman of the Discipline Committee of the Law Society of Upper Canada. Another testimonial to that effect is his recent (1966) election as a Life Bencher of that Society.

Mr. Martin is a Gold Medalist graduate in law at both Toronto University (1935) and Osgoode Hall Law School (1938), and the recipient of an honorary Doctor of Laws degree from Queen's University (1962). He was appointed Queen's Counsel in 1945, and he is an honorary lecturer at Osgoode Hall Law School.

An earlier article of Mr. Martin's upon the subject of closing arguments, and of which the present one is an enlarged revision, appeared in *Law Society of Upper Canada Special Lectures: Jury Trials* (1959), published by Richard De Boo, Ltd., Toronto.

It is a commonly accepted viewpoint that the address to the jury is not as important as cross-examination or as strategy in a criminal trial.

While there may be an element of truth in this assertion, I am convinced, after practicing in the field of criminal law for almost thirty years, that the address to the jury often exerts a decisive influence on the outcome of a criminal prosecution. It is very seldom indeed that cross-examination, however skilfully conducted, *obviously* destroys or answers the case for the prosecution.

A successful cross-examination by defense counsel may elicit facts that are inconsistent with the case put forward by the prosecution or it may elicit facts that support the theory of the defense; it may elicit important contradictions in the testimony of prosecution witnesses; and it may highlight improbabilities in the case for the prosecution. The total effect, however, may not be apparent to the jury. The function of the closing address to the jury is to weave these materials and the evidence called on behalf of the defense, if any, into a cohesive argument either for the purpose of destroying the case against the accused, or for the purpose of putting forward an affirmative defense, or for the purpose of achieving both these results.

An effective address must, of necessity, however, have as its foundation a carefully planned and skilfully presented case in order to provide the

material upon which a convincing argument can be built.

The preparation and presentation of an effective address may be likened to the painting of a picture by a skilful artist. The artist has certain materials with which to work, his paints. By proper blending, emphasis, and arrangement of his colors he can create a picture which will have meaning, which is capable of arousing certain feelings in the viewer. It is capable of evoking the response which the artist wants to create.

The same colors applied to the same canvas by a person lacking the necessary skill or creative power will be only a collection of daubs of paint without meaning or power to influence.

The lawyer, like the artist, has certain materials to work with, the evidence. By properly assembling the evidence, by arranging it in the most effective order, by appropriate emphasis, the skilful lawyer can paint a meaningful picture in words, which is capable of evoking the desired response, by arousing feelings in a jury that cause them to want to accept the arguments addressed to their reason.

The same evidence presented to the jury in a haphazard or disjointed way without suitable order or emphasis has no power to influence and if such a presentation arouses any feeling in the jury it will be a feeling of boredom and their response is likely to be negative.

### THE PREPARATION

The preparation of a good jury address begins long before the trial. As the preparation of a case proceeds, beginning with the initial attorney-client interview, and passing on through the stage of the preliminary hearing and the interviewing of witnesses, counsel must inevitably, if he is to conduct a successful defense, form a theory upon which the defense is to be conducted. He should constantly be thinking about the case, formulating in his mind how he will explain this particular piece of apparently adverse evidence or how to place this particular fact before the jury so that they will feel its full impact from the defense point of view. He should, above all, be considering the order in which he will marshal the facts at his disposal for presentation to the jury. This type of thinking should continue up until the moment he commences his address.

### THE MANNER IN WHICH A JURY ADDRESS SHOULD BE DELIVERED

Each person must develop his own style of speaking, the style that is natural for him; but it must be attractive. The mere imitation of the style of some great defense counsel can never be effective because sincerity will be lacking, although the study of great speeches is instructive. There are, nevertheless, certain basic principles which apply to the manner in which the address should be delivered.

In the first place, you should have made extensive notes on the matters upon which you propose to touch and have settled the order in which you intend to deal with them; to do so will clarify your thinking and help you to argue the case in a logical order rather than in a disjointed, rambling fashion. But your mind should be so full of your address that by the time you rise and bow to the presiding judge and to the jury you do not need to consult your notes. Place them on the table beside you—they give you a feeling of confidence. You can run your eye over them two or three times during your address to make sure you have not overlooked anything, since your references to the evidence must be absolutely accurate. You should never have anything in your hands while addressing a jury (except, of course, where you deliberately read a short excerpt from the transcript or from an accurate note to emphasize its importance).

The hands, as well as the eyes, can compel at-

tention. Never use a lectern. Always stand in a spot about four feet in front of the jury in the centre of the jury-box where you can observe them all. Do not pace about in front of the jury; stand in the one place, and always look directly at the jury. It is a lot harder for the jury to turn you down when you are looking at them than if you are looking down at the floor or up at the ceiling or, worse still, at the audience. Never exceed the limits of good taste in your address to the jury.<sup>1</sup>

Advocacy, like architecture has changed greatly in the last half century. It is more streamlined, more functional, less ornate. Acting has also changed. The modern actor loses himself in his role. The exaggerated posturing of another era, rather than moving us, strikes a comic note.

A jury address should be, in essence, a man to man talk; its purpose is to convince the jury that your client is innocent or that, at least, there is too much doubt about his guilt to convict him. The jury should enter upon their deliberation with the feeling that the lawyer for the accused has a good case, not that he is a brilliant orator. He has given a perfect performance when the jury are, for the time being, not conscious that he is a professional pleader. That does not mean that the address should be dull or tedious; far from it. Counsel should move from one aspect of the case to another easily, fluently, and without pausing so that the argument gathers momentum as it is delivered. The simplest language can be the most moving and create the greatest drama. In another context consider the effect of the three words uttered by General Douglas MacArthur when he left Corregidor in 1942: "I shall return" or, the words he uttered in 1944, when he landed on Leyte: "I have returned."

Consider also the words of Sir Winston Churchill uttered when the battle of Britain was raging:

<sup>1</sup> A number of years ago I was defending a woman who was jointly charged with capital murder, along with her husband. The woman was acquitted but the husband was convicted of manslaughter. The husband was very ably defended and the verdict of manslaughter really amounted to a victory for his counsel. However, during his closing address to the jury his counsel said "Don't try to play God in this case". One of the members of the jury came over to speak to me after the case and told me that every member of the jury was deeply offended by the admonition of counsel not to "play God in this case".

I was somewhat surprised at the remark of counsel when it was made, but it had not occurred to me that it would arouse such deep resentment in the jury.

"Never was so much owed by so many to so few."

Those words will last forever.

Some of the passages in the great jury addresses of Clarence Darrow, collected in *Attorney for the Damned*, are worthy of careful study. You will see that the words used are simple, the sentences short, but the language is emotive and the sentence construction is dynamic. Above all, be sincere, and speak with conviction.

One would be well advised to bear in mind Mr. Edgar Lustgarten's description of Sir Edward Clarke in *Defender's Triumph*:

Despite his extraordinary catalogue of achievement, Clarke's place in the hierarchy of advocates is not altogether easy to assess. As a cross-examiner he certainly was not equal to Russell. As a lawyer he was not the peer of F. E. Smith. As a tactician a good many have eclipsed him. But then it was as none of these that he excelled. Clarke's endowment was persuasiveness, and his weapon was the speech—not the smooth persuasiveness of wheedling or blandishment, but that powerful persuasiveness that springs from deep sincerity; not the speech of conventional court rhetoric, but the speech informed with the passionate eloquence of genius.

In complex, abstruse, or tricky litigation Edward Clarke might not invariably shine. But when he was concerned as a principal participant with the terrible simplicities that govern life and death, he had it in him to exert an appeal that sometimes bordered on the irresistible.<sup>2</sup>

I venture the opinion that the skill and eloquence with which Sir Edward Clarke defended Adelaide Bartlett will never be surpassed. Mrs. Bartlett was a young and beautiful woman, married to a man considerably older than herself. She had conceived an attachment, which was reciprocated, for the Reverend George Dyson. Mr. Bartlett fell ill in December of 1885. On December 27th Mrs. Bartlett asked the Reverend Dyson if he could procure chloroform for her. She informed him that her husband had an internal disorder that was shortening his life and which sometimes caused him great pain and during such times she was able to soothe him by the use of chloroform. On December 29th the Reverend Dyson handed

Mrs. Bartlett a bottle of chloroform. Mr. Bartlett died either late in the evening of December 31st or in the early morning of January 1st. The post mortem revealed chloroform in the stomach which was stated to be the cause of death. Mrs. Bartlett was the only person present when her husband died. On January 6th she disposed of the bottle of chloroform by dropping it from the window of a moving train. Her statement that her husband was suffering from some internal disorder was proved not to be true.

Some witnesses, particularly Mr. Bartlett Senior, Clarke destroyed by his cross-examination. With respect to other witnesses, where the substance of their testimony could not be destroyed, their evidence was made to take on a different character and did not appear so completely damning as it had at first impression.

Chloroform when swallowed has a hot and fiery taste and would cause acute pain. The theory of the prosecution was that Mrs. Bartlett had first rendered her husband insensible by an external administration and then had poured the chloroform down his throat. Clarke's cross-examination of the prosecution's medical witnesses was directed to showing that this was a virtually impossible feat. When chloroform was inhaled by sleeping adults they almost invariably woke up. But even if it could be assumed that Mrs. Bartlett had succeeded in accomplishing this virtually impossible feat of rendering her husband insensible by external administration, the second phase of the operation would be utterly impossible, as only a skilled anaesthetist would be able to recognize when the process had proceeded to a point where the patient was insensible and yet sufficiently relaxed, that the chloroform could be poured down his throat. We shall see later how the improbabilities inherent in the prosecution theory were woven into the closing argument of Sir Edward Clarke.

After the acquittal of Mrs. Bartlett, Lord Chief Justice Coleridge wrote to Sir Edward Clarke congratulating him on his advocacy. The postscript to the letter stated: "I hear a good thing attributed to Sir James Paget<sup>3</sup>—that Mrs. Bartlett was, no doubt, quite properly acquitted, but now it is to be hoped in the interests of Science she will tell us how she did it."<sup>4</sup>

<sup>3</sup> A noted surgeon.

<sup>4</sup> SMITH & CLARKE, E., *THE LIFE OF SIR EDWARD CLARKE*, 187 (1939).

## THE FORM THE JURY ADDRESS SHOULD TAKE

Every good jury address from the time of Cicero has had the same construction, namely: (a) *The introduction*; (b) *The argument*; and (c) *The peroration*.

## THE INTRODUCTION

The purpose of the introduction is to awaken the jury to the grave responsibilities they have assumed, to impress upon them the fact that if they erroneously convict the accused it is almost impossible to correct their error. They should be made to feel that the presumption of innocence and the requirement of proof beyond a reasonable doubt are vital living principles which exist for their protection as well as that of the accused. The language used to achieve this purpose must depend upon the style and creativity of the particular counsel.

In the Trial of Madeleine Smith for the murder of her lover Pierre Emile L'Angelier, which took place in Scotland a little over a hundred years ago, her counsel, John Inglis, The Dean of the Faculty of Advocates, opened his closing address to the jury in this simple yet highly effective and dramatic manner:

Gentlemen of the Jury, the charge against the prisoner is murder, and the punishment of murder is death; and that simple statement is sufficient to suggest to us the awful solemnity of the occasion which brings you and me face to face.<sup>5</sup>

This opening, although magnificent, would be unwise, if not indeed improper, in any case where the death sentence is not mandatory on conviction.

Another purpose of the opening is to overcome or alleviate prejudices which may exist because of the nature of the case, rumors, or stories carried by various news media. At the same time, however, I do not suggest that you embark on your address upon the assumption that the jury are prejudiced against your client or intend to give him less than justice. Such an approach is offensive and insulting. It may be appropriate to say:

Gentlemen of the Jury, when you were sworn as jurors in this case each of you promised that you would give the accused a fair trial, that you would give his case the same

anxious consideration and afford him the same presumption of innocence and the same benefit of a reasonable doubt that you would have a right to expect at the hands of twelve of your fellow countrymen, and I know you mean to keep that promise.

Where counsel, by the use of peremptory challenges, might have excluded all of the proffered jurors, even though on the "voire dire" they had sworn that they were capable of trying the accused without prejudice and of arriving at a verdict solely on the evidence, counsel may find it useful to tactfully remind the jury that this could have been done, and he should do so particularly in a case where prejudices are deeply rooted, as in narcotics cases. I have sometimes said:

You all swore that you would approach this case without any bias or prejudices. I believed every one of you, else I would not have accepted you. *I chose you* as the judges of this man because I believed you when you said that you would presume that he was innocent unless and until the evidence established his guilt beyond a reasonable doubt.

Don't tell the jury that the accused is entitled to be judged as they would *like* to be judged. That is not his right at all, and it leaves the way open for Counsel for the prosecution to say:

Gentlemen, the accused is not entitled to be judged as you would *like* to be judged. If you were on trial you would *like* to be acquitted no matter how guilty you were. The accused must be judged on the law as the judge will give it to you, as that law applies to the facts as you find them from the evidence presented in this trial.

Don't make a direct appeal for sympathy. That gives the prosecution a chance to say something like this:

My learned friend has made an appeal to you for sympathy. I am sure we all feel sympathy for a man in the position of the accused, but you have taken a solemn oath to try this case on the evidence, and you must not be swayed by sympathy for the accused any more than you must allow yourself to be swayed by sympathy for the deceased, a fine strong young man cut down in the prime of life. Nor must you allow yourself to be swayed

<sup>5</sup> 41 NOTABLE BRITISH TRIALS, *Trial of Madeleine Smith*, 233 (Jesse ed. 3d ed. 1927).

by sympathy for the deceased's widow or his five children who are now left without a father.

Assemble your facts in such a way that the defendant is placed in a sympathetic light. Dwell on the terrible provocation your client endured before reacting to it, how hard he worked to support his wife and family. But emphasize those things in the appropriate part of the address, not at the beginning. The appeal to the emotions is much better made not at the beginning but later on in the address as you deal with topics calculated to arouse the feelings of the jury: the accomplice trying to escape the consequences of his crime by shifting the blame to the accused; the father trying to give his children sound moral instruction and schooling while the unfaithful wife that he killed in the heat of sudden provocation was neglecting her sacred obligations.

During your address it is advisable to refer to your client on occasion as "Tom Jones", or "Mr. Jones", rather than continuously as the "prisoner", or "the accused". In that way you personalize him; he is then associated with the man who has the nice little wife and of whom the five neighbors spoke so highly. It is harder to hang Tom Jones than to hang "the prisoner". In your peroration, however, it is better to refer to your client as "this man", "this woman", or "the defendant".

In your opening remarks you should define with great clarity and simplicity the issues before the jury—the elements of the offense with which the defendant is charged, and which the prosecution must prove beyond a reasonable doubt. For example, where the accused is charged with a crime involving a specific intent, point out that it is not enough for the prosecution to prove that the accused did the act or that he did the act carelessly, but that the prosecution must prove that he did it for the express purpose of bringing about the consequence charged in the indictment.

#### RIGHT TO DEAL WITH THE LAW APPLICABLE

The rule which prevails in most jurisdictions is that although counsel may not quote from decided cases he may state the principle of law which he deems applicable insofar as it is necessary to do so to make clear what the defense is.<sup>6</sup>

<sup>6</sup> In *Pianosi v. C.N.R.*, (1944) 1 D.L.R. 161, Robertson C.J.O. said: "No doubt, there are occasions when, to make his summing up of the evidence understandable and to the point, it is proper enough that counsel should make some preliminary statement of a principle of law governing the case in hand, a statement that,

#### IMPROPRIETY OF EXPRESSING PERSONAL OPINION

It is improper to express a personal opinion as to the innocence of your client or your belief in the truthfulness or otherwise of a witness. The reason for this is obvious. If it were permissible for defense counsel to express his opinion that the defendant was innocent, it would equally be proper for prosecuting counsel to express his opinion that the accused was guilty. The verdict of the jury might thus depend not on the evidence but on the prestige or stature of counsel making the declaration. If it were ever to become accepted practice for defense counsel to express a personal opinion as to the innocence of the defendant, the failure to express such an opinion on any occasion would be construed as an admission on the part of counsel that he believed his client guilty.<sup>7</sup>

when made, it is customary to say is subject to the governing direction of the presiding Judge."

Also see BUSCH, *LAW AND TACTICS IN JURY TRIALS* 987 (1949).

<sup>7</sup> *Reg. v. McDonald* (1958) O. R. 413; 6 Wigmore, *Evidence* § 1806 (3d ed. 1940). In the trial of William Palmer for murder, Sergeant Shee (afterwards Mr. Justice Shee) in his speech for the defense said:

I commence his defense, I say it in all sincerity, with an entire conviction of his innocence.  
The Attorney-General, Sir Alexander Cockburn, in his address said:

Gentlemen, you have, indeed, had introduced into this case one other element which I own I think would have been better omitted. You have had from my learned friend, the unusual, and I think I may say unprecedented, assurance of his conviction of his client's innocence . . . I can only say I think it would have been better if my learned friend had abstained from so strange a declaration. What would he think of me if, imitating his example, I at this moment stated to you, upon my "honour", as he did, what is my internal conviction from a conscientious consideration of this case. The best reproof which I can administer to my learned friend is to abstain from imitating so dangerous an example.

In his charge to the jury in that case, Lord Chief Justice Campbell said:

Witnesses very properly have been brought from all parts of the kingdom to assist in his defense; and he has had the advantage of having his case conducted by one of the most distinguished advocates at the English bar. Gentlemen, I most strongly recommend to you to attend to everything that fell so eloquently, so ably, and so impressively from that advocate, with the exception of his own private personal opinion. It is my duty to tell you that that ought to be no ingredient in your verdict. You are to try the prisoner upon the evidence before you, according as that evidence may be laid before you upon the one side and on the other, and by that alone, and not by any opinion of his advocate.

14 NOTABLE BRITISH TRIALS, *Trial of William Palmer*, 128, 295, 297 (Knott ed. 3d ed. 1912).

## THE ARGUMENT

In my early years at the Bar I would spend about forty minutes of a forty-five minute speech on the introduction and the last five minutes on the facts. I traced the history of the jury system back to a period before the Norman Conquest and I dwelt at length on the sad fate of my client pacing up and down in a prison cell for years if the jury found against him. Experience has taught me that jury verdicts are won by a convincing argument on the facts, the specific facts; they are not, as a general rule, swayed by broad sweeping declamation. I am consequently of the opinion that after dealing briefly with those fundamentals of justice that should be called to the attention of the jury, and after outlining the issues before them, counsel should then commence his argument.

One of the most effective ways of commencing the argument of the case is by stating, or rather re-stating, the case for the prosecution. The statement must be absolutely accurate, but the prosecution's case is stated in such a way as to highlight any improbabilities in the case and to bring within the statement every fact favorable to the defense. This technique was used with superb skill by Sir Edward Clarke in his closing argument on behalf of Adelaide Bartlett:

It is a marvellous thing that you are asked by the prosecution to accept—you are asked—and when I use that phrase I do not mean that you will be urged, but what I do mean is, that this is what you must accept if you accept the idea of guilt or the contention of guilt—you are asked to believe that a woman who, for years, had lived in friendship and affection with her husband; who during the whole time of his illness, had striven to tend him, to nurse him, and to help him; who had tended him by day, who had sacrificed her own rest to watch over him at night, had spent night after night without going to her restful bed, simply giving to herself sleep at the bottom of his couch that she might be ready by him to comfort him by her presence; who had called doctors, who had taken all the pains that the most tender and affectionate nurse possibly could, that by no possibility any chance should be lost of the doctors ascertaining what his trouble was, and having the quickest means to cure it—that woman

who had watched over him, had tried to cheer him, had talked of going away, had talked lightly when they were together before the doctor in order to give spirits to that husband—you are asked to imagine that that woman on New Year's Eve was suddenly transformed into a murderess, committing crime, not only without excuse, but absolutely without any object—you are asked to believe that by a sort of inspiration she succeeds in committing that crime by the execution of a delicate and difficult operation, an operation which would have been delicate and difficult to the highest trained doctor that this country has in it.<sup>8</sup>

This kind of argument lends itself to any case where there are improbabilities in the prosecution's case which can be exploited, and it has the advantage of putting them before the jury at an early stage of the argument. Counsel can then return to this theme for fuller treatment later in his argument when he devotes a separate part of his address to a discussion of the subject of probability.

The manager of a bank was charged with knowingly receiving stolen bonds which he had cashed for persons who were not customers of the bank. When it was subsequently ascertained that the bonds were stolen, the manager, upon being questioned, said that he had cashed the bonds for three different persons. The procedure of the bank required the person in the bank who cashed the bonds to obtain a receipt, called a bond suspense voucher, for the cash from the person to whom it was paid. The manager produced three receipts which purported to bear the signatures of three different persons. The addresses on the three receipts placed there by the manager were all fictitious. The manager said he was given the addresses by each of the three persons cashing the bonds and wrote them down in good faith. A handwriting expert called as a witness by the prosecution stated *that all three signatures written on the receipts were written by one person and that each signature was in the handwriting of the accused's co-defendant, one R, against whom there was a considerable amount of evidence of dealing or attempting to deal in stolen bonds.*

<sup>8</sup> 40 NOTABLE BRITISH TRIALS, *Trial of Adelaide Bartlett*, 294-5 (Hall ed. 3d ed. 1927).

The cross-examination of the employees of the bank established that the accused had made all proper entries in the records of the bank and had sent the bonds to the Bank of Canada for cancellation; and, also, that he would know that the Bank of Canada had a master list of all bonds reported to have been stolen.

Counsel for the defense commenced his closing argument in this way:

Now what is the charge made against Mr. M.? In substance it is this: he is charged that he did, knowingly, have in his possession certain bonds which he knew were stolen.

It is conceded, of course, that Mr. M. cashed these bonds, so the element of possession is not important. It has been proven that these bonds were stolen. The crucial question for you gentlemen to decide is, did he know that the bonds were stolen. And the Crown must prove to your satisfaction and beyond any reasonable doubt that Mr. M. knew that these bonds were stolen. Mere carelessness is not enough, mistaken judgment is not enough, even recklessness is not enough. The Crown must prove that he knew that these bonds were stolen.

What is the theory of the prosecution in this case? It is this, that Mr. M. knew that these bonds were stolen; that R, without any effort to disguise his handwriting—because that is the evidence [of the Crown's handwriting expert]—handsigned Exhibits 23, 24, and 25; that Mr. M., who had been with the bank for thirty-eight years, it being the only job he ever had, and with the kind of character that he has earned in fifty-four years of living, knowing that those bonds were stolen, took them into the bank, had the usual records made in accordance with the practice of the bank, that is, the bond suspense vouchers; had them entered in the ledger, the serial numbers copied down on the shipping list and the bank cancellation stamp applied on those bonds; that he, knowing that they were stolen, knowing that the Bank of Canada would have a list of those stolen bonds so that within a matter of hours, or days, or at the most a week it would become known that they were stolen; with that knowledge and with the certain knowledge that the source of those bonds as to their being taken into the

bank would be directly traced to him—and he further made sure of that by putting his own handwriting on the original receipts, put in the date, the maturity and the addresses, made sure that he could be identified as the man who took them in—that with the knowledge they were stolen, he took those in knowing that inevitably the responsibility for taking them in would come back to him.

Now that is what the prosecution asks you to believe in this case. Any theory of guilt on the part of Mr. M. necessarily involves your finding that this man deliberately committed an act of suicide, social, economic and moral. That is, must be, has to be, any theory of guilt in this case as far as Mr. M. is concerned.

And for what? So that the bank could get payment of a thirteen hundred dollar overdraft which R. owed and for which Mr. M. was in no way responsible. That does not make sense.

If the case is a comparatively simple one or does not lend itself to the kind of argument presented above you may prefer to begin your argument by simply saying:

Now, gentlemen, let us examine the evidence upon which you are asked to find beyond a reasonable doubt that my client is guilty of this serious crime.

There are several ways in which argument may be presented:

(a) By stating the facts and submitting that certain conclusions should be drawn from those facts;

(b) By stating the facts and inviting the jury to draw the desired conclusion;

(c) By stating the facts and asking the jury what conclusions they draw from them. (This, however, is a rare art. The facts must be accurately stated but marshalled in such a way that the only conclusion the jury can draw is the desired one.)

All three methods of argument are usually used at different times during the address. You should never attempt to force your conclusions upon the jury, but rather lead them to come to the desired conclusion by their own effort. I would like to give you an example of what I consider a superb style of jury persuasion, although the argument was not made before a jury in the ordinary sense.

In the year 1910 Senator Benn Conger, a member of the New York Senate, charged that Senator Jothan P. Allds demanded and received from Conger a bribe of one thousand dollars to influence his legislative conduct. The charges were investigated by the Senate convened as a Committee of the whole house. Martin W. Littleton, acting for the defendant Allds, developed at length that in such a proceeding the defendant was entitled to the common law presumption of innocence. He likened the presumption of innocence to the testimony of a living witness, and referred to that witness as a venerable witness who had existed in the common law for centuries.

The following are some passages from the argument of James W. Osborne, counsel for Conger, in reply:

On the 5th day of January, 1910, this defendant was informed by two reputable witnesses that Conger charged him with having demanded and accepted \$1,000 in bills in order to influence his legislative conduct. That took place on the 5th of January, 1910. Old presumption of innocence comes in and slaps his hand on Jo's shoulder and says: "You are innocent of that charge."<sup>9</sup> I leave it to everybody within the sound of my voice to say what Innocence would have done under those circumstances. I say that Innocence would have found Benn Conger if he was within the United States and said "I demand from you, Benn Conger, an explanation of this charge you make against me."

I say that if you assume that Jo Allds was innocent at that time, his immediate conduct just after the charge was made in itself will drive that old Presumption of Innocence shrinking and shamefaced out of this room.

Imagine you, Mr. Senator, or you, Mr. Senator, or any man within this chamber, who has blood in his veins, being charged with having accepted a bribe of \$1000 to influence his legislative conduct. Imagine you being charged, and what do you do, nothing.

You know so well and I know so well the power of innocence; you know so well the forcefulness of innocence and the eloquence

of innocence. You know that if Jo Allds had walked up to Benn Conger and said "Conger, on what ground do you charge me, an innocent man, with taking \$1,000?" Conger would have shrivelled up; he would not have dared face Innocence. . . .

. . . Jo Allds treated that charge with as much indifference as if you charged a frog with swallowing a fly. He was as absolutely calm, as absolutely cold-blooded about it. Where was that spark of righteous indignation that Innocence is expected to show. Where was that overwhelming passion, that awful indignation that every honest man shows when he is falsely charged with crime. Show me the slightest trace of it. . . .

Now, I ask you what Guilt would have done under those circumstances, and I say, that Guilt would have done just exactly what Jo Allds did. Guilt would have nursed that corruption fund; it would have kept its mouth shut; it would have made peace. . . .

I ask you to give this man the benefit of every reasonable doubt, but I ask you, when you argue this case, to say to yourselves:

What would Innocence have done under a similar set of circumstances,

What would Guilt have done,

What did Jo Allds do?<sup>10</sup>

This kind of argument can be just as readily used for the defense. For example, in many prosecutions for fraud, embezzlement, and conspiracy, the prosecution is forced to rely on records seized in the possession of the accused under a warrant. Frequently the doing of the acts alleged is not capable of being controverted; the only issue is the criminal intent of the defendant. In such a case an effective argument can be made on the basis that the only evidence before the jury are records kept by the accused which the prosecution concedes are accurate.

Would a man who was perpetrating a fraud or engaged in a conspiracy keep accurate records of the transactions? Would he employ qualified accountants to check the accuracy of the books? Would he be filing accurate income tax returns as to his profits?

What would a dishonest man do? Wouldn't he falsify records to conceal what he was doing?

<sup>9</sup> In my view this otherwise splendid argument is somewhat marred by this facetious way of dealing with Mr. Littleton's argument. Mr Osborne could simply have said "by all means let us commence by assuming that Senator Allds is innocent but let us also examine the facts."

<sup>10</sup> HICKS, FAMOUS AMERICAN JURY SPEECHES, 606-607, 612, 657 (1925).

Wouldn't he try to divert cash into his own pockets to evade payment of income tax on the profits? Ask yourselves: What would a guilty man do? What would an innocent man do? What did the defendant do?

The usual order of argument in defending a criminal case is:

- (a) The destruction of the case for the prosecution;
- (b) The marshalling of the evidence for the defense.

It is inevitable and sometimes desirable that there should be some intermingling of both parts of the argument. This is done by exposing the inherent improbability of the testimony for the prosecution, attacking the credibility of prosecution witnesses, scrutinizing their motives, pointing out inconsistencies in their evidence, and then directing the argument to assembling the facts which support the defense. I have found that sometimes in difficult criminal cases it may be preferable as soon as the opening remarks are concluded to summarize what the defense is and then proceed in the usual manner. Lawyers often talk about the "theory of the defense". You should not do this before a jury. The jury is liable to equate "the theory of the defense", with something the defense lawyer has concocted in his mind.

Let me give you an example of a case where the defense was summarized near the beginning of the closing argument.

Dr. Blank is charged with using an instrument on Miss X with intent to procure a miscarriage. Miss X testified that Miss Y, a friend of hers, who was a nurse, recommended that she see Dr. Blank. Miss X testified that she went to see Dr. Blank at his office at 4:15 p.m. on August 31st. She stated that she paid him \$250 to perform the operation. She later became ill and had to go to the hospital. On being questioned at the hospital she said Dr. Blank had performed the operation. The police arrested Dr. Blank and took a statement from him in which he denied that Miss X had ever been in his office or that he had ever treated her or seen her. The police seized Dr. Blank's office diary and they found Miss X's name down in the diary recording an appointment at 4:15 p.m. on August 31st. Dr. Blank's explanation for the presence of the name in the diary was that sometimes a person might call and make an appointment and then not show up; that this is what must have occurred, and since there was no

patient with whom to associate the name the entry left no impression. Counsel said in opening his argument:

Ladies and gentlemen of the jury, I want at the very threshold of my address to you to place fairly and squarely before you what the defense in this case is. It is this. The complainant, Miss X, with the assistance of her friend Miss Y, a nurse, attempted to bring on a miscarriage. She became ill. Miss Y told her to call Dr. Blank for medical attention. She did call Dr. Blank and he made an appointment for her to come. She then panicked and decided not to go, fearing that questions might be asked which would lead to an investigation and sought to see the matter through without medical attention. She became so ill that she finally had to go to the hospital. She was interrogated. She denied she had done anything to bring on the miscarriage. When that was not believed she had to say something to shield herself and her friend Miss Y and she said the first thing that came into her head, that Dr. Blank had done it, perhaps hoping there would be no more to it. From that time on she was stuck with her story. All the circumstances point to this.

Counsel thus gave an explanation, at the outset, of the two most difficult things to answer:

- (a) Why would Miss X single out Dr. Blank from among all the doctors in a city of two million people to accuse?
- (b) The presence of Miss X's name in the diary.

The argument then proceeded to attack the evidence of Miss X and Miss Y by showing that it was not consistent with the facts proved by other witnesses, that their story was inherently improbable, and that they had a strong motive to lie. Then counsel proceeded to marshal the evidence in support of the defense advanced.

There is an old saying among defense counsel that every fact has two faces. Sometimes what appears to be a most damaging fact can be turned into a fact favorable to the defense. You should examine every item of adverse evidence to see if some argument in favor of the defense cannot be based upon it. This is the way counsel dealt with the fact that Miss X's name was in the diary:

There is one fact that proclaims the innocence of this man more than anything else. The name of Miss X in the book; if he had

done anything to this woman, would he leave that name there? It was in pencil; wouldn't he obliterate it?

If he were engaging in activity of this type, would he use that kind of permanent book in the first place? Would he not make a memo on a scratch pad and destroy it, or carry the appointment in his head? Yet there it is for all to see, available to the whole wide world.

Do not forget this: two experienced police officers, one of twenty-nine years' experience, experience in investigating charges of this type, went there looking for some instrument that could have performed the operation, described by this girl, in an office where obviously no attempt to conceal or obliterate anything had taken place. They found no such instrument. They brought nothing to this courtroom except this book which cries for this man's acquittal.

The presence of the diary supplied a basis for two arguments. Firstly, it showed that the accused had no consciousness of guilt since he had not destroyed it or concealed it. Secondly, the fact that the diary was not destroyed or concealed supported a conclusion that *nothing* in the office had been concealed or destroyed. Since nothing had been concealed or destroyed and no instrument was there which could have performed the operation described it was impossible for the defendant to be guilty.

In the trial of Madeleine Smith, the prosecution proved that the deceased was stricken with attacks of illness on the following dates: Thursday the 19th of February 1857, Sunday the 22nd day of February, and Sunday the 22nd day of March. He died on Monday, March 23rd. The cause of death was arsenic poisoning. The symptoms of all three illnesses were similar, and it was the case for the prosecution that arsenic had been administered on all three occasions by the accused.

The accused purchased arsenic *quite openly* on Saturday February 21st, March 6th and March 18th. The first illness of the deceased [Mr. L' Angelier], therefore, had preceded the first known purchase of arsenic by the accused.

The closing argument to the Jury by Defense Counsel, John Inglis, is brilliant.<sup>41</sup> Let us see what use he makes of these facts:

You have it proved very distinctly, I think—to an absolute certainty almost—that on

<sup>41</sup> 41 NOTABLE BRITISH TRIALS, *Trial of Madeleine Smith*, 245-246 (Jesse ed. 3d ed. 1927).

the 19th February the prisoner was not in possession of arsenic. I say proved to a certainty for this reason—because when she went to buy arsenic afterwards, on the 21st February and the 6th and the 18th March, she went about it in so open a way that it was quite impossible that it should escape observation if it came afterwards to be inquired into. I am not mentioning that at present as an element of evidence in regard to her guilt or innocence of the second or third charges. But I want you to keep the fact in view at present for this reason, that if she was so loose and open in her purchases of arsenic on these subsequent occasions, there was surely nothing to lead you to expect that she should be more secret or more cautious on the first occasion. How could that be? Why, one could imagine that a person entertaining a murderous purpose of this kind, and contriving and compassing the death of a fellow-creature, might go on increasing in caution as she proceeded; but how she should throw away all idea of caution or secrecy upon the second, and third, and fourth occasions if she went to purchase so secretly upon the first, that the whole force of the prosecutor has not been able to detect that earlier purchase, I leave it to you to explain to your own minds. It is incredible. Nay, but, gentlemen, it is more than incredible; I think it is disproved by the evidence of the prosecutor himself. He sent his emissaries throughout the whole druggists' shops in Glasgow, and examined their registers to find whether any arsenic had been sold to a person of the name of L' Angelier. I need not tell you that the name of Smith was also included in the list of persons to be searched for; and therefore, if there had been such a purchase at any period prior to the 19th February, that fact would have been proved to you just as easily, and with as full demonstration, as the purchases at a subsequent period. But, gentlemen, am I not struggling a great deal too hard to show you that the possibility of purchasing it before the 19th is absolutely disproved? That is no part of my business. It is enough for me to say that there is not a tittle or vestige of evidence on the part of the prosecutor that such a purchase was made prior to the 19th; and, therefore, on that ground, I submit to you with the most perfect confidence as regards that

first charge, that it is absolutely impossible that arsenic could have been administered by the prisoner to the deceased upon the evening of the 19th of February.

Now, see the consequences of the position which I have thus established. Was he ill from the effects of arsenic on the morning of the 20th? I ask you to consider that question as much as the prosecutor has asked you; and if you can come to the conclusion, from the symptoms exhibited, that he was ill from the effects of arsenic on the morning of the 20th, what is the inference? That he had arsenic administered to him by other hands than the prisoner's. The conclusion is inevitable, irresistible, if these symptoms were the effect of arsenical poisoning. If, again, you are to hold that the symptoms of that morning's illness were not such as to indicate the presence of arsenic in the stomach, or to lead to the conclusion of arsenical poisoning, what is the result of that belief? The result of it is to destroy the whole theory of the prosecutor's case—a theory of a successive administrations, and to show how utterly impossible it is for him to bring evidence up to the point of an actual administration. I give my learned friend the option of being impaled on one or other of the horns of that dilemma, I care not which. Either L'Angelier was ill from arsenical poisoning on the morning of the 20th, or he was not. If he was, he had received arsenic from other hands than the prisoner's. If he was not, the foundation of the whole case is shaken.

The logic is irresistible. Since the accused made three purchases of arsenic openly it would be illogical to suppose that she made an earlier secret purchase. If the deceased was stricken with arsenic poisoning on February 19th and 20th it was administered by a hand other than that of the accused because she had no arsenic in her possession at that time, having made her first purchase on February 21st.

In your argument to the jury you should endeavor to explain every adverse fact. You should endeavor to answer the arguments that you feel sure will be made by the prosecution. Tell the jury that under the law [if it be so in your jurisdiction] once the accused says one word in his own defense or calls a single witness to testify on his behalf the prosecution has the right

to address the jury last and you will have no opportunity to answer him. Therefore you must, as best you can, anticipate the argument he may make having regard to the line of cross-examination he has pursued and the questions he has put to his own witnesses. You see it is well to suggest you are using his conduct of the case as a means of anticipating his probable arguments, otherwise the jury may think you are able to anticipate his arguments because you recognize the weaknesses in your own case.

It is always a good thing to have some one to attack in a criminal case. It takes the spotlight off the accused. It does not usually pay to attack the prosecutor unless he has done something manifestly unfair, which would be rare. Sometimes the conduct of the police merits an attack, but do not attack them unless it is warranted. The motives of important prosecution witnesses should be scrutinized with care and whenever possible made the subject of attack. This is particularly true of accomplices.

#### ACCOMPLICES

You should not merely content yourself with advising the jury that the court will instruct them that it is dangerous to act on the uncorroborated evidence of accomplices; you should explain why this rule developed. Explain to them that a man caught red-handed in a crime may try to buy immunity or a lighter sentence by trying to shift the blame on someone else, or he may want to drag someone else down with him purely from malice. You usually cannot prove any bargain between the accomplice and the police, but you can still argue that that was his motive. Sometimes you can bring out that his hope of a light sentence seems to have been realized. I sometimes say:

Gentlemen, why should you, with the responsibility for this man's fate resting on your shoulders, convict him when the law itself from the wisdom of experience, the same law that you have taken an oath to uphold, says that it is a dangerous thing to do? Why should you convict a fellow human being on evidence which the law itself says is dangerous to act upon?

Most accomplices are pretty hard to shake on cross-examination unless you are fortunate enough to get hold of an earlier statement that is incon-

sistent with present testimony. You should anticipate an argument by the prosecution that the accomplice was not broken down in cross-examination, that he gave his evidence frankly and without inconsistencies. You might deal with that argument somewhat along these lines:

Now, counsel for the prosecution may say that this witness was not broken down in cross-examination, that he could not tell such a consistent story or give such accurate evidence as to the details of the crime if he were lying. Why, of course he can give you accurate details of the crime; he knows them; he committed it; he is guilty of it. No doubt ninety-nine percent of his testimony is true. All he had to do was add one lie that my client told him to do it. That one lie would not be hard to remember. It would not be hard to be consistent about that one lie.

You may also argue, of course, that the accomplice is merely substituting the defendant for an associate or friend whom he wants to protect.

#### ARGUMENT FROM PROBABILITIES

In arguing a case to a jury, one of the strongest arguments is that which is based on probability. People will believe that which accords with their own experience and the recorded experience of others. They will be reluctant to believe that which they regard as improbable. If there are any improbabilities in the prosecution's case you should marshal those improbabilities to the fullest extent. Let me give you an example.

A man was charged with arson; it was alleged that he burned down his own factory. The principal witness was a man against whose character nothing could be proved. He said he was sitting on his veranda on a warm Saturday evening in August, across from the accused's factory. He heard an explosion, the glass in the windows shattered. He could see the flames in the building. At the same time he saw the accused, who was the owner of the factory, come out the front door, get into his conspicuous green Volkswagen station wagon and drive away. The accused was a man of excellent character. His business was good. The building was not overly insured. The witness' story, however, could not be broken down except that it could be shown that he was pretty vague about most things except hearing the explosion and seeing the accused come out about the same

time. Now, this is the way the case was argued:

(1) Was it probable that a man of the accused's character would commit this crime?

(2) If the jury could bridge that gap, is it probable that he would set fire to this building resulting in loss to himself with no possibility of profit?

(3) If the jury could imagine the first two events happening, was it conceivable that, when as owner he could set fire to the building in the middle of the night, he would pick 7:30 P. M. on a warm Saturday evening when he would know all the neighbors would be sitting on their front porches watching?

(4) Even if you could imagine him picking that time to do it, could you imagine him leaving by the front door in a conspicuous car, known by the whole neighbourhood to be his, when he could have gone out the side entrance down a lane and be seen by no one?

The jury thought that the Prosecution's case was too improbable.

Another persuasive type of argument is based upon what the prosecution has not proved. Sometimes you do not have too much to go on in the way of affirmative argument. In that case you list all the things the prosecution should have been able to prove if your client was in fact guilty. The failure to prove those things is an indication that they have the wrong man. For example, your client is charged with theft. None of the money has been traced to him. There is no evidence of undue spending by him since the date of the crime. He was not pressed for money, and hence had no motive to commit the crime. Thus you establish the improbability of his committing it.

#### MOTIVE

It is, of course, trite law that if the case against the accused is fully proved the failure to prove a motive is not fatal. There may be a motive which is not known. Nevertheless, where the case depends on circumstantial evidence, proof of a motive strengthens the case for the prosecution and, conversely, the apparent absence of a motive raises doubts as to the guilt of the accused.

It is more probable that men are killed by those who have some motive for killing them than by those who have not.<sup>12</sup>

In the previously discussed trial of Madeleine Smith the prosecution established that the ac-

<sup>12</sup> MACRAE ON EVIDENCE, 67 (2d ed. 1952).

cused had written many letters to the deceased, L'Angelier, her former lover, which were surprisingly indiscreet for a young woman especially in Victorian times. After her ardor cooled she became engaged to another man and pleaded with L'Angelier to return her letters, since the exposure of the letters would ruin her. L'Angelier refused to give them up and threatened to reveal them to her father. The prosecution argued that her motive for murdering L'Angelier was to prevent him from exposing her. The argument of her counsel with respect to the alleged motive is a model. After referring to certain letters written by the accused to L'Angelier pleading for the return of her earlier letters her counsel said:

The thing is preposterously incredible; and yet it is because of her despair, as my learned friend called it, exhibited in that and similar letters, that he says she had a motive to commit this murder. A motive. What motive? A motive to destroy L'Angelier? What does that mean? It may mean, in a certain improper sense of the term, that it would have been an advantage to her that he should cease to live. That cannot be a motive, else how few of us are there that live who have not a motive to murder some one or other of our fellow creatures. If some advantage, resulting from the death of another, be a motive to the commission of a murder, a man's eldest son must always have a motive to murder him that he may succeed to his estate; and I suppose the youngest officer in any regiment of Her Majesty's line has a motive to murder all the officers in his regiment; the younger he is the further he has to ascend the scale; the more murders he has a motive to commit. Away with such nonsense. A motive to commit a crime must be something a great deal more than the mere fact that the result of that crime might be advantageous to the person committing it. You must see the motive in action—you must see it influencing the conduct before you can deal with it as a motive; for then, and then only, is it a motive in the proper sense of the term—that is to say, it is moving to the perpetration of the deed. But, gentlemen, even in this most improper and illegitimate sense of the term, let me ask you what possible motive there could be—I mean, what possible advantage could she expect from L'Angelier ceasing to live, so long as the letters remained? Without the return of his

letters she gained nothing. Her object—her greatest desire—that for which she was yearning with her whole soul, was to avoid the exposure of her shame. But the death of L'Angelier, with these letters in his possession, instead of ensuring that object, would have been perfectly certain to lead to the immediate exposure of everything that had passed between them. Shall I be told that she did not foresee that? I think my learned friend has been giving the prisoner too much credit for talent in the course of his observations upon her conduct. But I should conceive her to be infinitely stupid if she could not foresee that the death of L'Angelier, with these documents in his possession, was the true and best means of frustrating the then great object of her life.<sup>13</sup>

Not only is the alleged motive for murdering L'Angelier, thus discredited, but his death is shown to be of no possible advantage to the prisoner; whereas the death of L'Angelier with the letters in his possession would inevitably lead to the exposure of her previous relationship with him and bring to light the letters. She, therefore, had a motive *not* to murder him.

#### GOOD CHARACTER

Evidence of good character is cogent evidence of the improbability of the accused being guilty. You should explain to the jury what character is. You might say something like the following:

What is character? Character is the sum total of a man's habits. Habit is one of the strongest forces in the world. That is why parents are at such pains to teach their children the good habits of honesty, decency and truthfulness. They know that those habits once formed will govern the course of their lives. It takes years to build good habits; they cannot be changed in a day. You have heard from the testimony of his neighbors the kind of character this man has for honesty. Do you think it probable or even possible that he would suddenly depart from that character, from those settled habits of honesty and decency and commit this crime?<sup>14</sup>

<sup>13</sup> NOTABLE BRITISH TRIALS, *Trial of Madeleine Smith*, 265-6 (Jesse ed. 3d ed. 1927).

<sup>14</sup> The above is based, in part, on a passage in an Address to the jury by U. S. Lesh in defense of Dr. Millard F. Keiter, reproduced in BRUMBAUGH, *LEGAL AND PUBLIC SPEAKING*, 803 (1932).

## THE DEFENCE OF ALIBI

Where a defense of alibi is put forward it is usually made the subject of a strong attack by the prosecution. Normally the accused's alibi is only supported by members of his family or by his friends. The evidence of such witnesses is usually viewed with caution by the jury, because it does emanate from family and friends who have an interest in the outcome of the proceedings. Well, with whom would the accused likely be, but with his family or friends?

The prosecution may seek to minimize the testimony of a wife by saying:

I have no doubt that under ordinary circumstances Mrs. Jones, the prisoner's wife, is a very estimable woman, but she has a very great interest in the case; naturally she does not want her husband to go to jail. I certainly think that if I were ever in trouble my wife would want to defend me just as loyally as Mrs. Jones did her husband, whether I was innocent or guilty.

You might deal with such an argument by saying something like this:

Well, gentlemen, I cannot help it if my client as a law-abiding citizen was home in bed where he ought to be at 3 o'clock in the morning, and consequently the only person who can prove that is where he was is his wife. If any of you gentlemen were charged with having committed a crime at 3 o'clock in the morning, is there anyone who could prove where you were at that hour but your wife?

## FAILURE TO CALL THE ACCUSED

One of the difficult questions upon which counsel has to make up his mind in his address to the jury is whether to endeavor to explain his failure to call the accused when he has not done so, or whether to make no reference to it. Now, there are different views upon this subject. My own view is that it is better to make no reference to the fact that the accused has not been called, with one possible exception. The exception applies where the prosecution has put in a statement made by the accused which contains his defense. It then might be appropriate to say that since the accused has given his explanation there is nothing more he can say. You can enhance the value of that explanation by pointing out that it

was given by your client at the earliest opportunity he had to give it, namely, when the police interviewed him. His explanation is not something that he thought up long after.

Under normal circumstances, to mention your client's failure to testify merely magnifies that failure, and if, in addition, the reasons advanced by counsel for that failure are not convincing to the jury, they are apt to assume the worst. My instinct tells me that this is so, although others hold different views and they may be right.<sup>15</sup> Moreover, if counsel does attempt to explain his failure to call the accused he must avoid doing so in a way that amounts to giving unsworn testimony.

## AN ACCUSED WITH A PREVIOUS CRIMINAL RECORD

Where an accused who has a prior criminal record has testified on his own behalf, with the result that his criminal record is disclosed to the jury, obviously counsel must endeavor to overcome the prejudice this will almost inevitably create in the minds of the jury. It may be well to advise them that if this trial were taking place in England, which is the source of the American and Canadian legal systems and where the administration of justice commands the admiration of the world, they would not be allowed to know of those previous convictions for fear they would attach to them a value that they do not have in deciding whether the accused is guilty.

Counsel might also point out that the Goddess of Justice is always depicted wearing a blindfold while holding the scales of justice in her hands. That is so that her decision will not be improperly influenced by extraneous factors and prejudices.

If, of course, the prior convictions are many years ago and there has been an interval of honest effort, much sympathy can be gained for the accused by the efforts he has made in the interval to live down his past record.

In the Mancini murder case the great advocate Sir Norman Birkett (afterwards Lord Justice Birkett) used the criminal record of the accused to advantage to explain away apparently incriminating behavior on the part of the accused. Mancini had a criminal record. He was living at Brighton with Violette Kaye, a prostitute, whose earnings were used, in part at any rate, for his support. There was evidence of a quarrel between

<sup>15</sup> Mr. Arthur Maloney, in his able address, *Addressing the Jury in Criminal Cases*, presents the opposite viewpoint. See 33 CAN. BAR REV. 373 (1955).

Mancini and his mistress on May 10th, 1934. Shortly thereafter Mancini sent a telegram to her sister purporting to be from Violette saying she had gone abroad and he told others the same story. Mancini moved away from the flat where he and his mistress had been living and moved to a new address, taking with him a trunk. About July 15th he left Brighton and was later arrested. A search of his apartment revealed the decomposed body of Violette Kaye in the trunk. She had been killed by an injury which fractured her skull. There were blood stains on Mancini's clothes. There were many other apparently incriminating circumstances. Evidence was given by a young woman that he had asked her to set up a false alibi. He was alleged to have said to another witness that he had hit her with a hammer and a charred hammer was found among the rubbish at the address where Mancini and the deceased had lived together. Much of this evidence was weakened or destroyed by cross-examination. A sensational and irresponsible press had published stories, which were completely false, to the effect that he had assaulted and wounded other women. Mancini testified that he had returned to the apartment where he lived with the deceased and found her dead. He was afraid that because of his record and his mode of life the police would not believe his story. Sir Norman Birkett stressed in his argument that none of Mancini's prior convictions were for crimes of violence and argued that fear engendered by his criminal record and not guilt was the reason for the lies, the flight, and the horrible means of hiding the body.

#### AN ACCUSED TESTIFYING ON HIS OWN BEHALF

Where the accused has testified on his own behalf, you should make the most of that fact in your argument. You should point out that accused has told the jury in the only way he can that he is innocent, namely, by taking the witness stand, giving his evidence under oath and submitting to cross-examination. Point out that is all that any member of the jury could do to prove his innocence under like circumstances. If he has been a good witness you will, of course, infer that only an innocent man could have withstood the skillful cross-examination to which he was subjected. If there are flaws in his testimony you will point out the strain that even an innocent man charged with a serious crime is under; perhaps the strain is even greater in the case of an inno-

cent man. You will thus explain any shortcomings in his testimony.

#### THE PERORATION

The purpose of the peroration is to bring the speech to a climax and to appeal to the emotions of the jury in a way that will strengthen the arguments addressed to their intellects. The peroration or conclusion of a good jury address should not be stereotyped; it should fit in with the nature of the trial, the issues involved, and the mood that you believe has been created in the courtroom. A peroration which might be suitable in one kind of murder case might not be suitable in another. A peroration which might be suitable in a murder case might be quite unsuitable in a case of receiving stolen goods.

The stately eloquence of Sir Edward Clarke's peroration in the Trial of Adelaide Bartlett was entirely suitable for that particular case, the times, and the particular genius of the defense counsel:

There are trivial incidents sometimes about the conduct of every case, but we, the ministers of the law, are ministers of justice, and I believe that, as a case like this goes on from day to day, there comes into your hearts a deep desire which is in itself a prayer that the spirit of justice may be among us, and may guide and strengthen each one to fulfil his part. That invocation is never in vain. The spirit of justice is in this Court to-day to comfort and protect her in the hour of her utmost need. It has strengthened, I hope, my voice; it will, I trust, clear your eyes and guide your judgment. It will speak in calm and measured tones when my lord deals with the evidence which aroused suspicion, and also with the evidence which I hope and believe has demolished and destroyed that suspicion, and that spirit will speak in firm and unflinching voice when your verdict tells to the whole world that in your judgment Adelaide Bartlett is not guilty."<sup>16</sup>

In a case where the accused, an elderly man, was charged with murdering his wife by beating her to death with a hammer the defense was that the fatal injuries were inflicted while the accused was in a state of automatism brought on by

<sup>16</sup> 40 NOTABLE BRITISH TRIALS, *Trial of Adelaide Bartlett*, 343 (Hall ed. 3d ed. 1927).

anxiety over his wife's failing health; that since his behavior was unconscious and involuntary there was no criminal liability.<sup>17</sup>

Counsel concluded his argument in this way:

This man was not the *cause* of the tragedy that brings us here to-day. He was the *victim* of it. All the evidence points to this. I ask you to send him out of this courtroom in the twilight of his life with the consolation that twelve men among whom he has lived honorably all his life have announced to the whole world that he is not guilty of any crime.

The dramatic peroration of Sir Edward Marshall Hall in the *Greenwood* murder case emphasizes the dreadful finality of a jury's verdict in a murder case:

Your verdict is final, necessarily final. Science can do a great deal; these men with their mirrors, multipliers, and milligrams, can tell you to the ten-thousandth or the millionth part of a grain the constituents of the human body. Science has enabled us to talk from here to thousands of miles away without any intervening wire or visible means of communication. Science has enabled us to kill thousands and tens of thousands by obnoxious gases, and can enable us to blow Carmarthen to pieces with one little explosive. But science cannot do one thing: that is, to find the vital spark which converts insensate clay into a human being. Once the life is gone out of a man, be it as a result of a Jury's verdict of murder, or be it by any other cause, life is at an end, and no power of science can replace it. . .

I ask you to remember the scene in "Othello", where the jealous Moor made up his mind to kill Desdemona:

Othello enters Desdemona's chamber, makes up his mind to kill her relentlessly, for he believes her to be unchaste, and seeing her lying there he thinks of the effect of killing her as compared with putting out her light, and he says: "Put out the light", and then he puts out the light.

If I quench thee, thou flaming minister,  
I can again thy former light restore,  
Should I repent me: but once put out thy  
light,

Thou cunning'st pattern of excelling nature,  
I know not where is that Promethean heat,  
That can thy light re-lume.

Are you by your verdict going to put out that light? Gentlemen of the Jury, I demand at your hands the life and liberty of Harold Greenwood.<sup>18</sup>

Pre-eminent among modern perorations is that of Sir Norman Birkett in his defense of the accused Mancini, whose trial we discussed earlier:

Defending counsel have a most solemn task, as my colleagues and myself know only too well. We have endeavoured, doubtless with many imperfections, to perform that task to the best of our ability. The ultimate responsibility—that rests upon you, and never let it be said, never let it be thought, that any word of mine shall seek to deter you from doing that which you feel to be your duty. But now that the whole of the case is laid before you, I think I am entitled to claim for this man a verdict of not guilty. And, members of the Jury, in returning that verdict you will vindicate a principle of law—that people are not tried by newspapers, not tried by rumour, not tried by statements born of a love of notoriety, but tried by British juries, called to do justice and decide upon the evidence. I ask you for, I appeal to you for, and I claim, from you, a verdict of not guilty. *Stand firm.*<sup>19</sup>

<sup>17</sup> Regarding this defense, consult *Fain v. Commonwealth* 78 Ky. 183 (1879); *Regina v. Minor*, 112 Can. C.C. 29 (1955); *Regina v. Charlson*, 39 Cr. App. Rep. 37 (1955); *Bratty v. A. G. for Northern Ireland*, 3 W. L. R. 965 (1961); *Bleta v. The Queen*, S. C. R. 561 (1964); *Somnambulist Homicide*, 5 RES JUDICATA 29; *Automatism and Criminal Responsibility*, 21 MOD. L. REV. 375 (1958); WILLIAMS, *AUTOMATISM, ESSAYS IN CRIMINAL SCIENCE* 345 (Mueller ed. 1961).

<sup>18</sup> NOTABLE BRITISH TRIALS, *Trial of Harold Greenwood*, 238-239 (Duke ed. 3d ed. 1930).

<sup>19</sup> LUSTGARTEN, *DEFENDER'S TRIUMPH* 237 (1951). See, also, HYDE, *NORMAN BIRKETT, THE LIFE OF LORD BIRKETT OF ULVERSTON* 394-418 (1964).