TELLING STORIES

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“When truth conflicts with narrative, it’s the truth that has to apologize.”

Over the last year or so, I heard four judges introduced as having been raised by a single mother. I was raised by a single mother for some years; I had not thought to add that to my resume. That seems to be a good story. Supreme Court justices are often introduced with their stories—usually overcoming the odds. (We might think there’s something to this, because people who’ve never known difficulty can’t empathize with others in similar situations. I don’t know if that’s true. But that’s the story.) And if the nominee didn’t overcome the odds, well, then there’s some other story. When John Roberts—who has had most things go his way—was introduced at his senate confirmation hearings, one of his supporters told a nice story about some other lawyer who did pro bono work, and then opined that Roberts was similar. At Justice Ketanji Brown Jackson’s hearing, some people told positive stories about her: “Your story is a wonderful example of the American Dream fulfilled.” The nominee told stories about her dad reading law books while she applied herself to her coloring books. Others told bad stories about her, although those seemed to be made-up. No matter; they were still good stories.

The desire for narrative is powerful. Groups raise funds with stories: a story of a cuddly animal or horrors that happened to a family. Policy is battled out with narratives: positions are embodied by personalities, the heroes and villains of the story. Beliefs on issues of great consequence—racism, poverty, gun rights, equal rights—are contested by attacks on, and defenses of, specific people. Social media is personality and narrative-driven.

Lawyers feast on stories. They are told, again and again, to have—a good story. While the focus on telling stories is to juries, judges too are

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2. “I firmly believe that John Roberts shares in the belief that lawyers have an ethical duty to give back to the community by providing free legal services, particularly to those in need.” Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 54 (2005) (presentation by Sen. John Warner).

targets. We know the old saw: get the judge to first want to rule your way, then give him a (legal) reason. Here are some examples, beginning with Quintilian two thousand years ago, and then to contemporary commentators:

“For as soon as they (the judges) begin to be angry, to feel favorably disposed, to hate or to pity, they begin to take a personal interest in the case, and just as lovers are incapable of forming a reasoned judgment on the beauty of the object of their affections, because passion forestalls the sense of sight, so the judge, when overcome by his emotions, abandons all attempt to enquire into the validity of the arguments and is swept along by the tide of passion and yields himself unquestioning to the torrent.” The orator must devote all of his power to moving the judge (or jury) emotionally “for it is in its power over the emotions that the life and soul of oratory is to be found.”

Lawyers Need to Tell a (Great) Story!

[Zealous advocacy means you need to make the story as relatable and compelling as possible to convince the judge and jury to accept your side.

... . . .

In law school, we learn that judges are objective and rational. This is often true, but it is an undeniable fact that judges can be persuaded by emotion.

Storytelling in the courtroom? Storytelling for paralegals? Yes and yes. Although law school focuses on how to use solid, factual evidence, it’s not the facts that sway juries. It’s the story. In fact, one successful trial lawyer claims stories are drop-dead critical.

9 Tips for Crafting a Courtroom Narrative

You have to get beyond the facts of a case to the story behind the case.

... . . .

When crafting your narrative, focus on the people, not the problem.


5. Lawyers Need to Tell a (Great) Story!, Masterfile (Sept. 5, 2021), https://masterfile.biz/blog/lawyers-need-to-tell-a-story/.

The Power of Storytelling for Lawyers

Jurors will only care about your “case” when it is presented in a way that involves them directly; the best way to do this is through the strategic sequencing of a fact-based story frame in which the jurors are the story’s heroes.7

[A]ny really good attorney is a masterful storyteller who can shape that evidence and the law into a compelling narrative.8

[T]he power skill that I think every lawyer should learn is #storytelling. Storytelling is a powerful tool to inform, influence, and inspire. It forges connections among people, and between people and ideas.9

When an attorney is speaking to a jury about their client’s story, a simple list of facts and statistics will not illicit an emotional response from jury members. As social creatures, humans depend on emotional responses to not only pair with memories in order to recall them later, but to learn from information that’s in front of us. This is why characters and storytellers who reach legendary status resonate so strongly with us. When we feel strong emotions about another’s experience, we place ourselves in that person’s shoes and can feel as though we really experienced the event ourselves.10

One item is particularly interesting because it both captures our bias for the narrative and its juxtaposition with abstract analysis:

Storytelling as Part of Our Trial Tools

To start with, why storytelling? Because our brains are formed genetically in a way in which telling stories is the chief method of learning as well as communication. Some scientists believe that listeners enter a trance like state when being told a story. They say

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people suspend awareness and concerns as they focus on the tale being told. They are touched at the deepest level causing emotional responses on an unconscious basis. Storytelling is a powerful tool because it is compelling. Not only that, it is difficult to grasp abstract ideas. The surest way to keep interest is to tell a story, not report facts, narratives or chronologies. Our human history has involved storytelling, cave painting and song singing as the primary means of communication before writing. While we may not tell stories sitting cross-legged in front of the fire, our brains still respond to stories. In the past, we passed our ideas and historical information from generation to generation by written stories. It’s part of the human race and it’s evolution. In 1986, Gerry Spence published an article in the American Bar Journal in which he wrote:

“Of course, it’s all storytelling—nothing more. It is the experience of the tribe around the fire, the primordial genes excited, listening, the shivers racing up your back to the place where the scalp is made, and then the breathless climax, and the sadness and the tears with the dying of the embers, and the silence—the jury wants to hear a story. They are hardwired for it.”

But imagine you just lost a big case. The judge or a juror tells you they went for the other side because they had a good story. How about the facts? The law? The juror shakes her head, quoting some of the material above. She says, “You told us to go past the facts of the case. So we did. We focused not on the legal problem, but the people (the other guy looked deserving), and decided for the other side because it made us feel like heroes. It was just an unconscious emotional thing. You both told stories: we liked the other one better.”

How confident are you in the justice system now? Not so much.

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It’s not just lawyers who press their stories. Judges also use stories to persuade their audience—the parties, and other judges and posterity—that they are right. I vaguely recall a column by former clerks at the Supreme Court who said one could tell how a death penalty opinion would come out by reading the first few lines—if they speak to the horrors of the crime, the death penalty was to be affirmed; if they addressed the defendant’s troubled background and malign influences, they were reversing. And sure enough, a few minutes’

research revealed cases right on point. The first paragraph of the *per curiam* opinion in *Andrus* tells you right away it’s reversing:

Death-sentenced petitioner Terence Andrus was six years old when his mother began selling drugs out of the apartment where Andrus and his four siblings lived. To fund a spiraling drug addiction, Andrus’[s] mother also turned to prostitution. By the time Andrus was twelve, his mother regularly spent entire weekends, at times weeks, away from her five children to binge on drugs. When she did spend time around her children, she often was high and brought with her a revolving door of drug-addicted, sometimes physically violent, boyfriends. Before he reached adolescence, Andrus took on the role of caretaker for his four siblings.\(^{12}\)

You can quickly figure the dissent’s views:
While providing a lengthy (and one-sided) discussion of Andrus’s mitigation evidence, the Court never acknowledges the volume of evidence that Andrus is prone to brutal and senseless violence and presents a serious danger to those he encounters whether in or out of prison. Instead, the Court says as little as possible about Andrus’s violent record.\(^{13}\)

The dissent goes on to describe the “senseless murders” and the rest of the defendant’s long history of violent crime.\(^{14}\)

Read this opening of the majority opinion in this case and guess what it does with the death penalty:

On April 15, 2013, Dzhokhar and Tamerlan Tsarnaev planted and detonated two homemade pressure-cooker bombs near the finish line of the Boston Marathon. The blasts hurled nails and metal debris into the assembled crowd, killing three while maiming and wounding hundreds. Three days later, the brothers murdered a campus police officer, carjacked a graduate student, and fired on police who had located them in the stolen vehicle. Dzhokhar attempted to flee in the vehicle but inadvertently killed Tamerlan by running him over. Dzhokhar was soon arrested and indicted.\(^{15}\)

Here’s the dissent:
During the sentencing phase of his murder trial, Boston Marathon bomber Dzhokhar Tsarnaev argued that he should not receive the death penalty primarily on the ground that his older brother

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13. *Id.* at 1889.
14. *Id.* at 1890–91.
Tamerlan took the leading role and induced Dzhokhar’s participation in the bombings. Dzhokhar argued that Tamerlan was a highly violent man, that Tamerlan radicalized him, and that Dzhokhar participated in the bombings because of Tamerlan’s violent influence and leadership. In support of this argument, Dzhokhar sought to introduce evidence that Tamerlan previously committed three brutal, ideologically inspired murders in Waltham, Massachusetts. The District Court prohibited Dzhokhar from introducing this evidence.16

At the other end of the judicial hierarchy—my courtroom—I see the use of stories to influence the outcome all the time. I even get it in discovery motions: each side accuses the other of being the bad guy, often going back to the beginning of the case, or earlier, to weave a story of malevolent intent and perfidy. Or despite the insinuations of party A accusing party B of withholding documents, B is actually the hero, having at every turn agreed to extensions of time and producing millions of pages of paper. Of course, these stories with all their drama—the baseless accusations in the complaint, the frivolous defenses, the millions of pages previously produced, and last year’s agreement on new dates for depositions—none of these is actually at stake in the discovery motion which is about, say, responding to interrogatories. Instead, the stories are designed to tell me who the hero is, and who the miscreant, and have me reward the hero.

Storytelling can be bad for judges and eventually bad for lawyers. It is the main source of red herrings in legal writing: judges spend enormous amounts of time sorting papers to isolate the issues and pertinent facts. Introducing facts at a jury trial “beyond the facts of a case to [get to] the story behind the case” risks reversal, because the facts will assuredly not be innocuous; they will make one side look very bad. That’s called prejudice and courts of appeal reverse when they find it. Summary judgment motions require a separate statement of undisputed facts. Some lawyers lard these up with paragraphs devoted to the long sad story of the case, the evil ways of the other side. But because the motion must be denied if any of the facts are truly in dispute, every fact added increases the odds of a motion denied.

The problems posed by storytelling are not just the waste of judges’ time or a few side-tracked motions. Storytelling capitalizes on a deeply held bias:

16. Id. at 1042–43 (Breyer, J., dissenting).
17. When judges use narratives to frame the case for the jury, trouble results. In Pinter-Brown v. Regents of the University of California, the verdict was reversed for a “miscarriage of justice” when the “[t]rial court framed this case as part of a centuries-long fight against discrimination and inequality. The court not only invoked the words of Dr. Martin Luther King, Jr., one of our nation’s most respected and revered civil rights leaders, it also quoted one of the most well-known lines from Dr. King’s famous and venerated ‘I Have a Dream’ speech. At the apogee of the civil rights movement, Dr. King told the world that the ‘arc of the moral universe bends toward justice.’ Here, the judge told the jury it was their job to be Dr. King and to help bend that arc.” Pinter-Brown v. Regents of Univ. of Cal., 261 Cal. Rptr. 3d 486, 512 (Cal. Ct. App. 2020).
the narrative fallacy. Stories tie together disparate facts into a pattern—whether the pattern is “real” or not. In so doing it blinds us to facts inconsistent with the pattern, and it gives significance to facts that otherwise have none.\textsuperscript{18}

Because our minds need to reduce information, we are more likely to try to squeeze a phenomenon into the Procrustean bed of a crisp and known category (amputating the unknown), rather than suspend categorization, and make it tangible. Thanks to our detection of false patterns, along with real ones, what is random will appear less random and more certain—our overactive brains are more likely to impose the wrong, simplistic narrative than no narrative at all. . . . [O]ur minds are not good at handling the non-anecdotal and tend to be swayed by vivid imagery, making the media distort our views of the world . . . .\textsuperscript{19}

We are so deeply in need of a pattern we will believe almost anything. “We will prefer even a conspiracy theory or a junk theory to no theory at all.”\textsuperscript{20}

In a way, there isn’t much difference between outlandish conspiracy theories and scientific explanations. Both are connective tissue among facts or statements. In both, observed facts and theories have a reciprocal relationship, each informing the other. The difference is that in science, logic and the scientific method, which attend to empirical facts, govern.\textsuperscript{21} For conspiracy theories, “associative” reasoning prevails. That is, any association may suffice, such as those based on emotion, similarity of any sort, a clever meme, the fame of the speaker, or simply salience.

In the narrative fallacy, the story gives significance to the facts, not the other way around. It’s a framing device. Whether true or false, the story causes people to give money, join organizations, and take other action. These stories engage the emotions\textsuperscript{22}—that’s the point. The narrative fallacy is a gateway drug: once it kicks in, it makes room for a host of kindred fallacies as well. These include the halo effect, by which we give credence to a person with entirely unrelated stellar attributes, such as promoting a good-looking person, believing Linus Pauling (a two-time Nobel laureate with prizes in chemistry and

\textsuperscript{18} Nassim Nicholas Taleb, The Black Swan: The Impact of the Highly Improbable (2007).

\textsuperscript{19} Nassim Nicholas Taleb, The Bed of Procrustes 149 (2015).


\textsuperscript{22} Annie Murphy Paul, Your Brain on Fiction, N.Y. Times (Mar. 17, 2012), https://www.nytimes.com/2012/03/18/opinion/sunday/the-neuroscience-of-your-brain-on-fiction.html ("Brain scans are revealing what happens in our heads when we read a detailed description, an evocative metaphor or an emotional exchange between characters. Stories, this research is showing, stimulate the brain and even change how we act in life.").
for peace) when he tells us to take vitamin C to prevent cancer. It includes following the advice of a rock star on how to alleviate hunger in Africa.

With the narrative fallacy and its associative reasoning, we are more willing to mistake correlation for causation. The links forged by associative reasoning make any conclusion plausible. Primed by the narrative fallacy, we are more likely to fall victim to the availability heuristic (or availability bias), by which we overestimate the likelihood of events we can easily recall or which have an emotional charge.

Because we are easily tired and it takes a lot of concentration to stay logical, we frequently slip to the narrative, and other cognitive, fallacies. We stop thinking rationally. We make the wrong decision.

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A few words on “jury appeal.” This usually refers to a case we’d rather try to the jury than to a judge. A case with little jury appeal (if a jury is inevitable) perhaps shouldn’t be brought at all—despite its legal merit. To be clear, this use—and this is the common use—of “jury appeal” denotes the exploitation of the jury’s biases. A case has jury appeal when a party believes it will do better with a jury, because a jury unlike a judge (it is thought) will be emotionally motivated by the appearance or presentation of a witness or party (the halo effect), or, commonly, the narrative. Perhaps it will be a “David and

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25. Reading a story of an airplane crash or child’s kidnapping leads people to fear flying and keep kids indoors, even though the odds of these events are in fact extremely low. “While high-profile police shootings might lead you to think that cops have the most hazardous job, statistics show that loggers are likelier to die on the job than cops.” Kendra Cherry, What is the Availability Heuristic?, VERYWELL MIND (Sept. 5, 2023), https://www.verywellmind.com/availability-heuristic-2794284.


Goliath” story, or one about how a defendant company is good citizen, contributing to the community. It may be the “Horatio Alger story of a man born in poverty to a Baptist minister, who worked his way through public schools and distinguished government service before rising to the top of one of the most celebrated companies in American history.

There’s a special kind of storytelling that lawyers think most appeals to juries. The case is said to be about issues far greater than the mere facts of the case. It is not about the client, but about poverty in America; whether the police shall be accountable; whether discrimination is to be tolerated in this county. In a breach of contract case, it’s about holding people to their promises, the essential glue of commerce. It’s about responsibility; justice; Evil Corporations, Frivolous Suits, and so on. The Bible—the Greatest Story Ever Told—is invoked, often an attempt to displace the court’s instructions.

Pretty much every closing argument does this: the invocation of a high narrative, to place the case into a context that will grab the jury, so that the jury will conceive its role as the coda of justice on a broad scale. The high narrative having been established, the present case will, it is hoped, benefit from its luster. If the case is susceptible to such a narrative, it has jury appeal. In most cases, “jury appeal, for better or worse, is directly related to the visceral reactions of sympathy, bias[,] and prejudice. I do not mean that you generate those feelings in a manipulative or evil way; rather, I am merely recognizing the fact that certain aspects of the law of damages rely upon the jury’s ’gut’ reaction.”

There’s a name for this principal appeal to the jury: the synecdochic fallacy. It’s a trap. It’s purporting to refer to the whole by invoking a part of the whole. This comes up frequently in anti-SLAPP law, where defendants hoping to strike complaints often have to show that the claims refer to issues of broad public interest. So for example they might take a statement about a kid’s cake made with bits of icing that (mistakenly) resembles pills; and argue

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30. Valley Casework, Inc. v. Comfort Constr., Inc., 90 Cal. Rptr. 2d 779, 785 (Cal. Ct. App. 1999) (“[I]ssues of subrogation are not covered by the arbitration agreement, but are more suitable for resolution in the forum of a jury trial, where Valley intends to assert its ‘jury appeal’ as a small company fighting a big insurer.”).


33. For the younger set, I note this was an epic 1965 film on Jesus Christ.

34. People v. Hughes, 39 P.3d 432, 499 (Cal. 2002); see, e.g., People v. Tully, 282 P.3d 173, 258 (Cal. 2012); People v. Wash, 861 P.2d 1107, 1135 (Cal. 1993).


the statement is about broad issues of children and drugs. This is nonsense: the statement was just about the cake in that case. Lawyers try this on judges all the time: “Selling an herbal breast enlargement product is not a disquisition on alternative medicine. Lying about the supervisor of eight union workers is not singing one of those old Pete Seeger union songs (e.g., “There Once Was a Union Maid”). And . . . hawking an investigatory service is not an economics lecture on the importance of information for efficient markets.”

There’s a bigger story, lawyers argue. And as the jury’s (or judge’s) eyes rise to the cosmic narrative of enormous consequence, they leave the facts of the case.

The concomitants of the narrative fallacy are antithetical to the rules we say apply in court. Every jury is instructed, “[d]o not let bias, sympathy, prejudice, or public opinion influence your verdict.” The passion and sympathy so central to telling stories in court is banned: “jurors [are instructed] that they ‘must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion[,] or public feeling.’”

It is, of course, improper [for the prosecutor] to make arguments to the jury that give it the impression that “emotion may reign over reason,” and to present “irrelevant information or inflammatory rhetoric that diverts the jury’s attention from its proper role, or invites an irrational, purely subjective response.”

Of course it is improper. Defaulting to an emotional reaction is exactly the opposite of what the jury is supposed to do. It generates a result unconstrained by the law and facts of the case, but rather a function of one’s own internal state. Two cases note exactly this contrast, i.e., the displacing effect of emotion relative to the facts and law of the case:

Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror’s own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors’ emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary.

39. JUD. COUNCIL OF CAL. CIV. JURY INSTRUCTION 100 (2023).
42. Saffle v. Parks, 494 U.S. 484, 493 (1990). The law in this specific area may be more convoluted, and I don’t pretend to summarize it here. For example, the California Supreme Court has said: “We have acknowledged that emotion need not be eliminated from the penalty determination. Although emotion must not reign over reason, it need not, indeed, cannot, be entirely
[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction.43

The practical advice cited above urges storytelling to generate strong emotions and specifically to engender a close connection between the juror and the parties in the case.44 But this is an appeal to “the sympathy or passion of the jury [and is] misconduct.”45 In criminal cases this is known as the “Golden Rule” inviting “the jury to put itself in the victim’s position and imagine what the victim experienced. This is misconduct, because it is a blatant appeal to the jury’s natural sympathy for the victim.”46 And we know perfectly well that “[e]vidence that serves no purpose other than to appeal to the sympathies or emotions of the jurors has never been considered admissible.”47

The situation is no different in civil cases. Punitive damages awarded as a result of “passion or prejudice” are set aside.48 Techniques designed to transform the jury into the hero of the story—protecting the public, speaking as the conscience of the community—are all entirely improper.49 As one commentator has noted, the presumed efficacy of this approach is to invoke the “reptilian brain,” that is, the most instinctive level of human emotion. He accuses “[p]laintiffs’ counsel across the country [as having] used this tactic during trial to elicit an emotional “fight or flight” response from jurors to invite them to decide cases based on their desire to protect themselves, their loved ones, or the larger community from danger, instead of the evidence presented and the law governing the claims at issue. Put another way, reptilian tactics

43. People v. Dykes, 209 P.3d 1, 50 (Cal. 2009) (internal quotes omitted).
45. “When we feel strong emotions about another’s experience, we place ourselves in that person’s shoes and can feel as though we really experienced the event ourselves.” Thomas, supra note 10.
46. The misconduct is arguing, e.g., “Suppose instead of being Vickie Melander’s kid this had happened to one of your children.” People v. Pensinger, 805 P.2d 899, 918 (Cal. 1991).
49. The “reptile theory arguments . . . [such as when] an attorney in closing argument argued that the jury is ‘the conscience of this community,’ that it will ‘speak on behalf of all the citizens,’ and that it will ‘make a decision what is right and what is wrong; what is acceptable, what is not acceptable; what is safe, and what is not safe.’” Russell v. Dep’t of Corr. & Rehab., 287 Cal. Rptr. 3d 778 (Cal. Ct. App. 2021).
cause jurors to make decisions using the part of the brain used to survive, rather than the part used for intelligent thought.\footnote{50}

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It is strange that the beating heart of widely accepted litigation practice should be the widely condemned narrative fallacy, designed to shortcut logical decisionmaking by an appeal to the heuristics of emotion. Indeed, some simply embrace, perhaps we could say trumpet, the use of “informal” cognitive fallacies to persuade judges and juries.\footnote{51} One commentator’s views are strikingly explicit:

Rhetoric often employs appeals to emotion and other informal logical fallacies that distract from logic and reason. In order to be effective, lawyers must know how and when to employ logical error in their arguments and appeals. Legal argument, discourse, and rhetoric are awash with logical fallacies. Consider the following abbreviated list of informal fallacies that logicians condemn, each of which is commonplace in the law: the appeal to pity, the fallacy of complex question, the fallacy of special pleading, the red herring, the slippery slope argument, the straw man fallacy, fallacies of personal attack (such as the genetic fallacy, ad hominem arguments, and the fallacy of poisoning the well), the appeal to terror, fear, or force, and the appeal to authority or prestige.

\textit{If one were scrupulously to avoid all of these types of logical error, it would be almost impossible to be effective as a lawyer.} Not only does the law tolerate logical error, but competent lawyers are expected to know how and when, and in what manner and to what extent, to make arguments that would be considered fallacious by logicians.\footnote{52}

Many litigators would agree: they cannot imagine a system in which they cannot seek to sway with their rhetoric, and there seems to be little to distinguish such suasion from storytelling designed to steal one’s heart. For thousands of years legal rhetoric has sought to “deeply stir the emotions.”\footnote{53} Surely it is futile to extirpate it now. Tilting at windmills comes to mind.


But it depends on what we mean. Stories have at least two entirely legitimate functions. Some lawyers conflate these (sometimes deliberately—more on that below) with narrative’s prejudicial version; it’s the judge’s job to keep these distinct.

First, context is often needed for interpolation. This context is circumstantial evidence, which is obviously admissible when it has a logical tendency to prove something material. The provision of that context is often a story, a series of events which suggest to the jury a state of mind, a plot, a purpose, or knowledge of fact. A story can also imply actions: we say the defendant stole the car because he was found in it three minutes after it was stolen. The interpretation of words in a contract often needs context: both the context of the other words, as well as the actions and exchanges of the parties leading up to the contract’s signing—in effect, the story of the deal.

Second, stories are told to put the judge or jury at the scene, making them as close to an eyewitness as possible. We often think photographs are better than words, and video better still. Lawyers often choose to present deposition testimony by video instead of the recorded or spoken word. The preference for video is one for accuracy—making the viewer into an eyewitness. But where there are no visuals, words must do; and those words must be vivid. True, a dramatic story could be misleading, but a colorless recitation will be misleading in its own way, doing nothing to explain the urgency of a situation; why someone felt intimidated and gave in to importuning; why someone thought he had to promptly sign a document; or step on the brakes; or, faced with months of insubordination, fire an employee—and so on. Making an audience feel as if it was “there” is a valued aspect of rhetoric. It is also uncomfortably close to the impermissible use of rhetoric to fabricate sympathy for a party. But there’s a difference: like the use of context, the story is used to illuminate a material fact.

I said above that lawyers sometimes deliberately conflate the valid uses of narrative with prejudicial ones. The lawyer identifies a remote reason for the evidence, using a string of inferences to link the evidence to a material issue. But this isn’t done in good faith. The real reason the lawyer wants the evidence is to further a misleading narrative. For example, in a “David and Goliath” case (say, for breach of contract), the “little guy” wants to introduce the wealth of the other side. The proffered rationale is that the wealth shows the big guy knew it could easily defend a lawsuit and so didn’t care if it breached, which is a sort of an incentive to breach, and so supports the notion that it did breach, or

54. See People v. Lenix, 187 P.3d 946, 964 (Cal. 2008) (“circumstantial evidence may support a logical conclusion”).
intentionally breached. Most of these links are associative, not logical, reasoning. The truth of course is that the little guy just wants to curry favor with the jury using a David and Goliath story. In a car accident case, the plaintiff wants to introduce evidence of community awards, letters from famous people commending plaintiff for food distribution a decade ago. There is always some way to link this to an issue in the case: the community awards are for work which in the future plaintiff would be interested in recommencing, but the injury suffered in the accident will make that more difficult. Of course, plaintiff could just testify that he did the work, but it’s the commendations from famous people which the lawyer wants, to influence the jury.

Once apparent, these issues are relatively easy to handle in bench trials and motions, including in limine motions. They are more difficult to handle during closing argument to the jury (when we dislike interrupting) or otherwise as these narrative themes are implicitly or expressly developed at trial.

First, the judge should make it clear that the judge doesn’t side with commentators who think it’s fair to employ the narrative fallacy. Second, a jury instruction expressly calling out and warning against the practice may help. If the jury is told the instruction is given in each case it won’t be thought to accuse the lawyers in a given case. And knowing the instruction will be given may encourage lawyers to avoid fallacious argument. For example, this could be added to CACI 113:

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against parties or witnesses because of their disability, gender, gender identity, gender expression, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[,] or [insert any other impermissible form of bias].

I alert you, as I do every jury I work with, that lawyers and self-represented parties sometimes stray from arguing the facts and law of the case. Sometimes they do this intentionally, and sometimes unintentionally. They may argue the case is about bigger issues, about the big guy versus the small guy, about corporate America, or holding an entire group of people or companies agencies to account, or about sending a message, or other stories that seek to trigger emotions and take your attention away from the specific facts and laws that apply to this case. The lawyers will seek to avoid this, but you too must be on your guard not to let these other stories influence or bias you for or against any of the parties or witnesses. Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

58. The italicized text is meant simply to get the ball rolling on a new instruction. It likely needs adjustment: (1) in cases with punitive damages (which can be used to send a sort of message); and (2) perhaps to account for attacks on witness credibility.
The American jury is viewed by some as the last great embodiment of populism, the devolution of central government’s power to the people. We give juries sometimes intractable questions to be resolved based on their good judgment and their famed “common sense.”\textsuperscript{59} And we don’t want to know too much about how they do it.\textsuperscript{60} If we trust them with life and death, evictions, and the transfer of untold sums of money, surely juries can account for bombast, exaggeration, red herrings, and other devices of rhetoric.

But there’s a superseding interest here, one entrusted ultimately to judges. It is to ensure a minimum level of fairness, regardless of the ability of the lawyers to spellbind. Parties are delighted to win based on the emotional story of their case. But the losing side will believe—often rightly—it has been snookered.


\textsuperscript{60} For this reason, jury verdicts are difficult to impeach. See People v. Hutchinson, 455 P.2d 132, 137 (Cal. 1969); Bandana Trading Co. v. Quality Infusion Care, Inc., 80 Cal. Rptr. 3d 495, 500 (Cal. Ct. App. 2008).