

## STORYTELLING IN LEGAL ARGUMENT

### A Trial Lawyer's View

George Fisher

Judge John Crown Professor of Law, Stanford Law School

Most every trial lawyer tells stories to juries. Prosecutors tell whole plotlines, from motive through cover-up. Their aim is to knit all known facts into a narrative so coherent that it permits jurors to fill evidentiary voids and so compelling that it impels them toward a conclusion of guilt.

Defense lawyers respond in any of three ways. Sometimes they merely yank the loose threads of the prosecutor's narrative, exposing the prosecutor's failure to tell a story in which every known fact fills a natural role. Sometimes they tell a counter-narrative that they say better explains those facts than the prosecutor's contrivance. And sometimes they tell a meta-narrative—a story about the storytellers that traces damaging facts to incompetent or corrupt or scheming cops.

If prosecutors are doing their jobs right and are prosecuting mainly the guilty, their stories should succeed in making sense of scattered evidence. In the face of a truthful prosecution narrative, the most persuasive defense narrative may be one of police perfidy. With a few plausible facts for support, a bad-cops tale can prove fatal to the prosecution. Corrupt cops corrupt the evidence and render every prosecution narrative unbelievable. Prosecutors are not without means of rebuttal. They can rehabilitate their cops and the integrity of their narrative. But eventually narrative, meta-narrative, and counter-meta-narrative can exhaust and confuse the jury. Lacking the coherence and clarity of a single storyline, a prosecutor who bears the burden of proving guilt to each of twelve jurors beyond a reasonable doubt may fail.

The 1995 trial of O.J. Simpson for the murders of his ex-wife and her companion tells these lessons with unusual force. Though better forgotten for its role in trading courtroom majesty for voyeuristic TV and for chafing the nation's unhealed racial wounds, the trial tells the lessons of courtroom storytelling better than any I know.

The prosecution's opening narrative was so straightforward it risked cliché. Violent toward his wife in the past, Simpson was a controlling husband and an obsessed ex-husband, maddened by his loss of control. He fantasized

killing her and took to traveling with a disguise and a lot of cash, both found in his vehicle after his arrest. On the night of his wife's death on June 12, 1994, he perhaps was stalking her as so often before. This night, finding her lightly dressed and in a younger man's company, he went delirious with jealousy and slashed them both to death. Then he raced home to find an airport limousine waiting in his driveway for a planned late-night flight to Chicago. He snuck past the driver into his home and shed and bagged his blood-spattered clothes and tainted knife, threw his luggage into the limo, and somehow made his flight. A knapsack last seen by the limo driver presumably held the blood-soaked evidence—and somehow eluded later searches of airport dumpsters. But in his panicked rush Simpson dropped the prosecution's prize evidence—his famous gloves.

Almost alone, they seemed to prove his guilt. One was found at the crime scene near the scattered bodies, presumably torn in combat from Simpson's hand, the second on the grounds of his estate, perhaps lost in the race to make his flight. They matched by brand, color, and size. And they bore a forensic treasure lode. The glove found on the Simpson estate bore the blood of both victims and of the defendant, the hair of both victims, fibers consistent with the male victim's shirt, and fibers from Simpson's Ford Bronco.

They were, the prosecution said, an artifact of both his crime and his failed marriage—a gift from his wife in happier times. Unusual enough in sunny L.A., the gloves proved to be a distinctive pair. The maker sold them only through Bloomingdale's, which had at the time no branch west of the Mississippi. Produced only between 1982 and 1992, the gloves were never common. The maker sold a total of some 1000 pairs in color brown and size extra large—the color and size in question. At \$55 a pair, they were not gloves for everyman. Yet in the weeks before Christmas 1990, the then-Mrs. Simpson bought two such pairs, as credit card receipts later proved. No doubt they were a gift for her husband, who appeared soon after on TV broadcasts of cold-weather football games holding his mike with just such gloves. TV footage filmed only months before the murders showed him wearing the gloves again.

Confronted with a storyline of such clarity and force, the defense resorted at first to poking narrative holes. Simpson's brace of lawyers dwelled on flaws in policing technique—ungloved hands and irregular evidence transfers dominated much of their early case. A counter-narrative of Simpson's innocence never emerged. Simpson never testified, and the judge deemed a defense theory that his ex-wife fell victim to a Colombian drug cartel too speculative to mention.

Instead the defense turned to a meta-narrative of police contrivance. In particular they turned on Detective Mark Fuhrman.

Fuhrman proved a most cooperative villain. Blown dry and stiffly erect, he seemed at first a consummate pro, speaking with precision, poise, and implacable composure. He flatly denied defense suggestions of his racism and of a particular bias against African-American men with white wives. Boldly—recklessly, it turned out—he refuted his alleged use of the N-word, insisting he had not uttered it in the decade before trial. When late in trial tape recordings emerged capturing Fuhrman’s very derogatory use of that word *forty-one times*, the prosecution had to endure the spectacle of its prize witness refusing to answer further questions on the grounds that his answers might incriminate him.

And so the defense had fodder for its meta-narrative of police fraud. It was simple enough to suggest that Fuhrman, bent on framing the famous football hero with the pretty blond wife, scooped up one glove at the crime scene and dropped it conveniently on Simpson’s estate. Fuhrman had been both places, after all, in the hours after the crime, and he alone found the second glove discarded along a darkened path behind the guest compound of Simpson’s home. They were not Simpson’s gloves at all, the defense claimed—and somehow the undeniable evidence of Fuhrman’s bias and lies obscured abundant evidence that the gloves indeed were Simpson’s. This meta-narrative of Fuhrman’s framing an innocent Simpson scored a theatrical triumph when the prosecution dared produce the gloves for a fitting before the jury. After Simpson struggled and strained to get them on, his chief counsel, Johnnie Cochran, chanted to the jury in closing argument, “If it doesn’t fit, you must acquit.”

It is not worth detailing the prosecution’s failed efforts to undo the damage of the Fuhrman tapes and the Simpson fitting. Those efforts indeed failed, and Simpson walked—and remains—free. More significant was the prosecution’s failure to advance two not so simple truths—that gloves *needn’t* fit well and that Fuhrman’s implausible tale of finding the second glove on the walkway behind Simpson’s guest compound, where Simpson had no business being that night, *must* have been true *precisely because* it was so implausible. I won’t detail those arguments here. I did so elsewhere, some years ago. (See George Fisher, *The O.J. Simpson Corpus*, 49 STAN. L. REV. 971, 1000–16 (1997).) For now it is enough to say that I think those arguments persuasively rebut the defense’s meta-narrative that Simpson was the victim of police malice or zeal. Yet it’s not clear the prosecution could make those arguments.

Any discussion of storytelling in legal argument must consider the audience and its relationship with the lawyers who act as storytellers. There is first of all the matter of makeup. Simpson's prosecutors used eight of their ten peremptory challenges to remove African Americans from the jury. His defense team used nine of *their* ten peremptories to remove *non*-African Americans from the jury. Though perhaps these attempts to bias the jury netted out in neutrality, a stronger suspicion is that this lawyerly spectacle of race-tinged contrivance assured that a story of racial guilt, like the one the defense told about Fuhrman, would strike the jurors as particularly believable.

Even a wholly unbiased jury might prove beyond the reach of the most subtle storylines. That's not a function of juror competence but of the communication mode between lawyers and jurors. Except for the highly stylized rituals of opening statements and closing arguments, lawyers may not directly address trial jurors. And lawyers may never ask jurors questions. Unlike classroom teachers, they may not quiz their students to assess comprehension. Nor may those students pose questions. Despite a slow trend toward permitting closely supervised question asking by trial jurors, the practice is still rare and was not an option in the Simpson case. Unable to gauge their students' understanding, trial lawyers rely instead on repetition, exaggeration, simplification, and slogans to assure that their listeners cannot *possibly* miss the point.

Lost in the process is subtlety. The prosecution's opening narrative of jealousy and rage was suitably unsubtle, as was the defense's responding meta-narrative of police racism and fraud. But the stories the prosecution needed to tell in response—about why gloves don't need to fit well and why hard-to-believe stories are often the most believable of all—were perhaps past the power of the medium to bear.