ARTICLE

Negative Narrative
Reconsidering Client Portrayals

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I. Introduction

The defendant in a murder case is a selfish, immature lout who cheated on his wife, the victim. Should the lawyer attempt to minimize the bad qualities of the client, unearth good qualities to balance out the bad, or something else? Lawyers are regularly advised to present positive portrayals of clients, on the theory that this will encourage decisionmakers to respond favorably to their client and allow the client to prevail. Much of the relevant literature, including trial manuals from a variety of common-law jurisdictions, legal writing materials, and the literature of applied legal storytelling, recommends a narrative with a primarily positive story about the client, or assumes it.[1] The difficulty is that although this orientation may work for many cases, it ignores instances in which a negative client portrayal is the most persuasive approach. Legal practice includes cases demonstrating the use of negative client portrayals in a way distinctly at odds with the majority of texts on trial advocacy, a point explored using two cases studies on the negative continuum from common-law juris-dictions in North America and Asia. In addition to unnecessarily limiting narrative options, the general preference for positive client portrayals may encourage unwarranted and potentially unethical departures from the evidence.

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1 For a full review of the literature recommending primarily positive stories, see *infra* section II.

In this article I make two arguments. First, in the right case, a persuasive narrative incorporating a negative client portrayal should be actively considered as a valuable option. Rather than a choice made reluctantly when the evidence does not support a primarily positive client portrayal, it is a persuasive strategy in its own right. Legal cases "are, of course, stories,"[2] and I focus on negative client portrayal as it occurs in persuasive legal narrative, understood as a persuasive version of the facts that incorporates narrative techniques and structures. To address persuasive narratives with a primarily negative client portrayal, I focus on narratives used by lawyers to present a fuller construction of the facts, as opposed to using strategies used to avoid facts—for example, challenging the adequacy of the other side's evidence[3] or substituting a legal position or a legal value for a factual position.[4]

Second, I argue that narratives with negative client portrayals should be included in advocacy literature and better theorized in relevant literature such as applied legal storytelling. Negative client narrative is not an example of high-minded advocacy standards that cannot be met in practice, but rather a case of the advocacy literature not getting the persuasive dynamic quite right to begin with. The fact that advocacy literature does not address negative client portrayals suggests that its uniform goal of positive client portrayal should be reconsidered. I argue here that the ultimate goal of client portrayals—previously described by different authors as favor, likeability, empathy, or sympathy—should be reframed as points on a continuum, with varying degrees of positive and negative qualities. Such a continuum should be adopted because this kind of mechanism is more likely to produce an effective case theory well grounded in the evidence and ethical practice.

II. The Preference for Narratives with Positive Client Portrayals

A. Advocacy-Advice Literature

The literature of advocacy includes a variety of materials: trial and advocacy manuals; biographies of successful lawyers with anecdotes and

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2 Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning From Social Science*, 7 Ohio St. J. Crim. L. 7, 14 (2009).

3 *See* W. Lance Bennett & Martha S. Feldman, Reconstructing Reality in the Courtroom, 94–95, 98–107 (1981); Stefan H. Krieger & Richard K. Neumann, Jr., Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis, 141–75 (3d ed. 2007). In Bennet & Feldman's terminology, the article focuses on redefinition and reconstruction narrative strategies, as opposed to challenge strategies. In Krieger and Neumann's terminology, it focuses on the story model, as opposed to the legal elements or chronology models.

4 Brian Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Section*s, 32 Rutgers L. J. 459, 473 (2001).

personal and professional history; legal writing materials meant to introduce and develop law students' abilities in advocacy; and, more recently, applied legal storytelling, or the study of persuasive storytelling. Although their subject matter varies, when these collections consider how to present the client, as a whole they assume or expressly advise that to prevail a lawyer should paint a positive picture of the client, one in which the client's good points are brought out and highlighted.

The genre of trial and advocacy manuals has been around for some time; a 2016 study of the "early modern era" begins with the 1500s.[5] The genre expanded considerably starting in the 1970s, particularly in the U.S.[6] These texts have a specific audience of "aspiring and practicing lawyers interested in learning how to be effective trial advocates."[7] They emphasize "winning, strategy, tactics, techniques, persuasion, and effectiveness," and advocates "are told how to achieve success, excellence, impact, and power and how to gain an edge."[8] Advocacy manuals represent the "conventional wisdom or perhaps the state of the art on effective advocacy,"[9] but they do not necessarily embody a reflective practice.[10]

A review of recent advocacy-advice literature in common-law juris-dictions suggests that client portrayals tend to be situated in discussions of the trial theme, or the case theory—the condensed, conjoined statement of a case's law and fact that organizes trial evidence and seeks to guide the decisionmaker to a favorable judgment.[11] The trial theme affects the entire trial, including the opening and closing arguments made by lawyers. An "opening statement should lead the fact finder to a conclusion that a party is entitled to win. The plaintiff will naturally take the 'offensive' and explain the story in a positive way."[12] A Canadian text advises lawyers to present "your case in its most favourable light."[13] There is a perceived need to humanize the client, particularly in criminal defense, whereby the lawyer "must attempt to place [the] client in a sympathetic light."[14] The criminal defendant needs to be seen as a human being, so that it is harder

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5 *See* Philip Gaines, From Truth to Technique at Trial: A Discursive History of Advocacy Advice Texts 12, ch. 12 (2016).

6 *Id.* at 3.

7 *Id.*

8 *Id.* at 4.

9 *Id.* at 5.

10 *Id.* at 5, 10.

11 Mauet's Fundamentals of Trial Techniques 8–9, 60–61, 250 (Thomas Eichelbaum ed. 1989).

12 Roger Haydock & John Sonsteng, Opening and Closing: How to Present a Case ⸿ 2.42 (1994).

13 John A. Olah, The Art and Science of Advocacy 17-7 (1990).

14 *Id.* at 17-27.

to convict.[15] In civil cases, it is critical particularly with jurors that they "empathize with the plaintiff."[16] On occasion, a claimant is confronted with a "likeable defendant," prompting advice that the claimant needs to overcome that likeability and show that the defendant nevertheless did not meet the required standard of behavior.[17]

The advice to present a positive portrait of the client does not mean that negative facts should be ignored. One textbook on courtroom psychology notes that acknowledging and refuting opposing argument and facts damaging to the client's case strengthens lawyer credibility and gives counterarguments to receptive decisionmakers.[18] This advice is common,[19] and the issue has been subjected to empirical research that corroborates the wisdom of addressing negative information in most situations.[20] However, the assumption in trial manuals is that the client portrayal will be primarily positive, and that negative information will be defused by and integrated into that positive narrative. The trial theme should be consistent with all the facts the decisionmaker will believe at the end of the case, including those that seem adverse to the client's position,[21] and the theme must make all the evidence work for the client "*as if it were a **positive part of your proof**.*"[22] This key point is sometimes made even more assertively:

> Be candid with the jury. Beat your opponent to the punch. Anticipate his attacks on your case and be prepared to respond to them. Give the jury your best explanations. Tell them why your opponent must fail. If you defuse your opponent's arguments, you will deny him the effect of surprise and draw the sting from this argument. *But do not let your adversary deflect you from your closing; your summary should not be an apology.*[23]

A second category of advocacy materials are texts used in legal writing and advocacy courses for law students and pre-professionals. A narrative incorporating a positive client portrayal is suggested here as well.

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15 PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 250 (1979).

16 OLAH, *supra* note 13, at 17-28.

17 *Id.*

18 RICHARD C. WAITES, COURTROOM PSYCHOLOGY AND TRIAL ADVOCACY § 2.05, 30 (2003).

19 *See* Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy* 60 RUTGERS L. REV. 381 (2008); GEOFFREY D.E. ADAIR, ON TRIAL: ADVOCACY SKILLS: LAW AND PRACTICE 373 (1992). For a discussion on incorporating the opposing party's good points, see Ronen Perry & Dana Weimann-Saks, *Stealing Sunshine*, 74 L. & CONTEMP. PROBS. 33, 33–38, 45–46 (2011).

20 *See* Stanchi, *supra* note 19, at 381–92, 409–34.

21 RALPH ADAM FINE, THE HOW-TO-WIN TRIAL MANUAL 16 (3d ed. 2005).

22 *Id.* at 17 (emphasis in original).

23 OLAH, *supra* note 13, at 17-24 (emphasis added) (citation omitted).

The trial theme should enable students to "highlight favourable facts and minimize the impact of unfavourable ones."[24] Lawyers' use of story structures to present facts to judges and juries is well-documented,[25] so students should strive to "create an appealing story" that emphasizes positive facts about their clients and de-emphasizes negative facts.[26]

Like trial manuals, legal writing texts advise students to acknowledge negative facts. While addressing coverage in the context of trial story integrity, one text states that students

> cannot craft a very persuasive story by ignoring negative facts. In fact, audiences appreciate a storyteller who acknowledges the dark side of his characters and deals honestly with them. The trick is to be able to develop a compelling tale that *in some way* recognizes the existences of these facts.[27]

A common strategy is to sandwich bad facts between good facts,[28] and "[m]ost legal writing texts, at a minimum, encourage students to present the facts from their clients' point of view; to emphasize positive facts . . . ."[29]

Legal writing texts assume that the client portrayal in persuasive legal narratives will be primarily positive. The highlighting of positive facts about the client together with the accommodation of negative facts is suggested from the very early stages of litigation, such as the client interview. In Steven Lubet's semi-fictional "Biff" story,[30] the client seeks a lawyer's advice on whether he can sue for assault, the reasonable fear of being hurt, based on an incident that occurred at an airport. While in the airport terminal waiting for a flight, the client sees an empty seat and sits down. The seat next to him has folded up newspapers upon it, and the seat next to that has someone sitting in it, referred to as "Biff." When the client sits down, Biff says, "Someone was sitting there." The client is confused, looks around, and turns to Biff to clarify. Biff then says, "I'm telling you that my father is sitting there." As the client starts to pack up his things, Biff says, "And he's coming back," raising his voice. The client protests,

24 CATHY GLASER ET AL., THE LAWYER'S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY 355 (2002); *see also id.* at 358, 363, 364, 367.

25 See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 519–40 (1991), and more recently, PHILIP N. MEYER, STORYTELLING FOR LAWYERS 1–2 (2014).

26 ROBIN SLOCUM, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT 462 (2d ed. 2006). *See generally id.*, ch. 28.

27 KRIEGER & NEUMANN, *supra* note 3, at 195–96 (emphasis added).

28 *See* HUGH SELBY, ADVOCACY: PREPARATION AND PERFORMANCE 6 (2009).

29 Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 LEGAL WRITING 163, 166 (2010).

30 STEVEN LUBET, NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON'T, CAN'T, AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH 11–26 (2001).

saying, "Hold on a minute, mister." Biff says, "Don't piss me off" in an angry tone and with a clenched fist, leaving the client in no doubt that Biff would use physical force if the client did not move off quickly enough. The lawyer, talking with the client to analyze the legal possibilities, asks the client why Biff would have reacted so forcefully. Having met the client, the lawyer considers the role that the client's manner may have played in making Biff angry, although expressed in an unacceptable and illegal way; the client is somewhat superior, and the language he reported using ("mister") would be derogatory in that context. This client portrayal is primarily positive, but it acknowledges negative information to provide a more realistic explanation of what occurred in a way that makes the client's reasonable fear of attack credible.

The persuasive use of storytelling by lawyers has been extensively analyzed in the subfield of applied legal storytelling,[31] and this scholarship also implicitly assumes or explicitly advises a positive client presentation. An early example of the preference for persuasive legal narratives with positive client portrayals is Brian J. Foley and Ruth Anne Robbins's "Fiction 101: A Primer For Lawyers On How To Use Fiction Writing Techniques To Write Persuasive Facts Sections."[32] This groundbreaking article introduced lawyers to storytelling principles for use in persuasive argument, covering topics such as character, conflict, resolution, organization, and point of view.[33] In reviewing these techniques, the authors identified the need to make the client likeable,[34] noting that though lawyers routinely dig up dirt on the opposition, "they should be mindful of planting flowers about their own clients."[35] Although other forms of fiction, such as satire, do not use this formula, "the lawyer telling a story should aim for judges and juries to like the client."[36] The authors also provide an appendix entitled "Developing Your Client's Character," a list of questions prompting the user to determine "[w]hat makes your client likeable?"[37] They suggest that if "the lawyer has done a good job in making the client 'likeable' and in defining the conflict, the judge may even nod as

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31 *See* Ruth Anne Robbins, *An Introduction to Applied Legal Storytelling*, 14 LEGAL WRITING 1 (2008); Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMM. & RHETORIC: JALWD 81 (2012); J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015).

32 Foley & Robbins, *supra* note 4.

33 *Id.* at 467–80.

34 *Id.* at 468, 473–75, 477.

35 *Id.* at 469.

36 *Id.* at 468.

37 *Id.* at 481, app. A (*Developing Your Client's Character* (including the question "What makes your client likeable?")); *see also id*. at 483, app. C (*Developing Your Corporate Client's Character* (same)).

she reads the proposed resolution, *wanting* to deliver it, because it is fair, because it 'fits.'"[38]

A subsequent article by Robbins rightfully prompts lawyers to consider the client as a kind of hero with archetypal status in a recognizable story structure, one who is heroic in the face of life's struggles but who is also a flawed individual.[39] Heroes "start out as somehow flawed at a fundamental level that affects their daily life and/or prevents them from living up to their potential."[40] Portraying the client as a hero therefore "gives the client permission to be imperfect in order to have the audience identify with them and with their need to embark on or continue on their transformative journeys."[41] Because it incorporates flaws, the hero paradigm is an ingenious suggestion in the trial context. Disputes do not normally reach the trial stage if one side is a clear winner, and parties in most cases need to accommodate flaws or other kinds of bad facts. However, the hero paradigm, like other literature that admonishes lawyers to consider whether bad facts are actually bad,[42] assumes an essentially positive client portrayal. What if the evidence and law are such that a positive portrayal is just not possible? Even if there is a choice, are there cases in which a positive client portrayal is not the most persuasive approach?

Portions of applied-legal-storytelling literature do consider how to present problematic clients who cannot be made likeable, although this discussion is limited. Two potentially problematic clients are the criminal defendant and the corporation.[43] The criminal defendant is unsavory, and it is unlikely that the judge can be made to like such clients.[44] There are two sample strategies available. The first, making the client a proxy for an ideal such as constitutional protection,[45] eschews persuasive factual narrative and substitutes a legal argument. This strategy can be considered a narrative in which the lawyer argues that the story is about the law, not the client, but it purposively avoids negative facts and asserts a positive portrayal of the case.[46] The second strategy, a theme of man against self,

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38 *Id.* at 477 (emphasis in original).

39 Ruth Anne Robbins, *Harry Potter, Ruby Slippers, and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE L. REV. 767, 776 (2006).

40 *Id.*

41 *Id.*

42 *See* Cathren Koehlert-Page, *Breaking Bad Facts: How Intriguing Contradictions in Fiction Can Teach Lawyers to Re-Envision Harmful Evidence*, 13 LEGAL COMM. & RHETORIC: JALWD 1 (2016); Jennifer Sheppard, *What If the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories that Are Harmful to Your Client's Case*, 34 HASTINGS COMM. & ENT. L. J. 187, 216–28 (2012).

43 *See* Foley & Robbins, *supra* note 4, at 473–75.

44 *Id.* at 473.

45 *Id.*

46 *See* RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING 131 (2d ed. 2019).

e.g., a client who struggles with a nemesis such as drugs,[47] is essentially a hero narrative. The hero *mythos* allows the client to be imperfect, because it is the imperfections which the hero must overcome.[48] This second strategy for criminal defendants uses a narrative with a primarily positive client portrayal. If this narrative is in fact supported by the evidence and relevant law, then it could be successful. Overall, the strategies suggested for criminal defendants are potentially helpful in some cases, but there are cases in which they would not apply.

The second potentially problematic client is the corporate client.[49] Although corporations may not be likeable at first blush and do not inspire empathy, they can be portrayed positively, e.g., by identifying the corporation's goals and socially beneficial functions.[50] The lawyer can also represent the corporation through people, corporate managers who are likeable.[51] These clients are in fact not special at all, and the same guidelines apply,[52] i.e., the guideline to present a narrative incorporating a primarily positive client portrayal.

The degree to which negative client portrayals are absent from active consideration in advocacy literature is perhaps illustrated by Kenneth Chestek's article investigating the negativity bias, "the brain's natural inclination to attend to and process negative stimuli."[53] Chestek noted that in citations to literature that "could go on indefinitely,"[54] judges frequently admonish counsel not to go negative, but if negative information stimuli is much stronger than positive stimuli, "wouldn't advocates be better served by choosing negative themes and attacking the other side?"[55] Chestek's empirical research on how judges evaluated the use of negative and positive themes in arguments about facts and law led to two main conclusions. First, a negative theme appeared to focus judicial attention on the facts, while a positive theme tended to focus judicial attention on the law.[56] Second, a negative theme deployed against the opposing party could help a weaker party attack a stronger party, but the use of a negative theme

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47 *See* Foley & Robbins, *supra* note 4, at 474.

48 Robbins, *supra* note 39, at 776.

49 Foley & Robbins, *supra* note 4, at 475–76; *see also* Ruth Anne Robbins, *Finding Perspective in the Institution*, 28 SECOND DRAFT 20, 20–23 (2015).

50 Foley & Robbins, *supra* note 4, at 474.

51 *Id.* at 474–75.

52 *Id.* at 473.

53 Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effect of Negativity Bias*, 14 LEGAL COMM. & RHETORIC: JALWD 1, 2 (2017).

54 *Id.* at 5 n.20.

55 *Id.* at 5–6.

56 *Id.* at 2–3.

by a stronger party might prompt the judge to protect the weaker party.[57] For purposes of this article, what is notable is the assumption that negative themes would be used against the opposing side, not on behalf of the client. In an earlier article, Chestek asked whether advocates should "choose a negative theme, attacking their opponents, rather than a positive theme showing the court why their client is deserving of relief."[58] A positive client portrayal is so prevalent that it is hard to imagine a theme that puts the client in a negative light.[59]

Why does this literature uniformly prefer a persuasive narrative with a positive client portrayal, to the virtual exclusion of negative portrayals? There are likely a number of explanations. A systemic explanation would highlight the adversarial dynamic in common-law systems,[60] and a positive client portrayal makes intuitive sense in this context. The client's lawyer, as the client's agent, highlights the positive aspects of the client's case and the bad aspects of the opponent's case; it is the job of opposing counsel to point out the negative aspects of the client's case, not the client's lawyer.

Another reason for the strong preference for narratives with positive client portrayals lies in what is assumed to be persuasive. The persuasive focus is normally on the decisionmaker, and although the literature does not speak in one voice, it reflects two strategies to reach the decisionmaker. First, some literature states that the decisionmaker should know[61] or understand the client. These goals focus on information about the client and emphasize the role of the decisionmaker's cognitive processes. Second, some literature suggests that the goal is to create empathy[62] or sympathy[63] for the client.[64] A subset of this category comprises texts that urge the lawyer to point out similarities between the client and the decisionmaker so the decisionmaker identifies with the client.[65] These goals focus on the emotional aspect of decisionmaking. "Fiction 101" can be understood as encompassing both sets of goals, in

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57 *Id.* at 3.

58 Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain's Negativity Bias and Persuasion,* 15 Nev. L.J. 605, 617 (2015).

59 Chestek, *supra* note 53, at 6 (noting that there are many different ways of using negative argument and that it was not possible to test them all).

60 For a brief comparison of the impact of adversarial and inquisitorial procedure on construction of legal narrative in the context of wrongful convictions, see Ralph Grunewald, *The Narrative of Innocence, or, Lost Stories*, 25 Law & Literature 366 (2013).

61 *See* Foley & Robbins, *supra* note 4, at 470.

62 *Id.* at 474.

63 *See* Meyer, *supra* note 25, at 2; Glaser et al., *supra* note 24, at 356; Foley & Robbins, *supra* note 4, at 475, 476 n.53.

64 Empathy is shared feeling and perspective; sympathy is emotion felt for another that relates to the other but does not match the other's feelings. Suzanne Keen, *Narrative Empathy*, Living Handbook of Narratology (rev. Sept. 14, 2013), https://www.lhn.uni-hamburg.de/node/42.html.

65 *See* Robbins, *supra* note 39, at 776.

view of the statement that "[i]n general, the reader must like the character and agree with, or at least understand, the character's goal."[66] The interplay of cognition and emotion in decisionmaking is resisted in some quarters of the legal world, but the role of emotions in decisions of all kinds,[67] including legal proceedings and judgments,[68] is too well established to ignore, and it assists in understanding the preference for positive client portrayals, as well as why narratives with negative client portrayals are persuasive in some cases.

B. Narrative Client Portrayals and Emotion

Stories explore the emotional states their characters experience,[69] and they elicit emotional responses in audiences.[70] Literature makes special claims upon us "precisely because it nourishes the kinds of human understanding not achievable through reason alone but involving intuition and feeling as well."[71] Emotion also appears to be implicated in the experience of hearing and understanding any narrative, quite apart from the emotions that a particular story might invoke. A full understanding of narrative would include "the temporal dynamics that shape narratives in our reading of them, the play of desire in time that makes us turn pages and strive toward narrative ends."[72]

Law may in the large part be reasoned judgment, but "it also engages forces beyond reason, like most other things in life."[73] Using Aeschylus' trilogy of plays *Oresteia* to chart the emergence of law in western civilization, Paul Gewirtz observed that though law was made possible by a shift from personal violence and revenge to decisions influenced by reason, the foundation of the legal order is partially fear of punishment, with law "an instrument of violence[—]not its replacement."[74] Emotions are therefore an inherent, and important, part of the law. And although emotions can admittedly "distort," they can also "open, clarify, and enrich understanding."[75]

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66 Foley & Robbins, *supra* note 4, at 468.

67 ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994).

68 *See, e.g.*, Terry A. Maroney, *Emotion in the Behavior and Decision Making of Jurors and Judges*, EMOTION RESEARCHER (2016); Leif Dahlberg, *Emotional Tropes in the Courtroom: On Representation of Affect and Emotion in Legal Court Proceedings*, 3 LAW & HUMAN. 175 (2009).

69 Martha Nussbaum, *Narrative Emotions: Beckett's Genealogy of Love*, 98 ETHICS 225 (1988).

70 Jeffrey Pence, *Narrative Emotion: Feeling, Form and Function*, 34 J. NARRATIVE THEORY 273–76 (2004).

71 Paul Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043, 1050 (1988).

72 PETER BROOKS, READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE xiii (1984).

73 Gewirtz, *supra* note 71, at 1049.

74 *Id.* at 1048.

75 *Id.* at 1050.

In legal argument, the role of emotion is reflected in such august traditions as Aristotle's persuasive schema of logos, pathos, and ethos,[76] or logic, emotion, and the credibility of the speaker. Emotion has obvious relevance to legal stories, in particular the persuasive legal narrative used by lawyers to portray the facts and the client. Here, persuasive legal narrative develops party likeability to motivate the decisionmaker to rule in the party's favor, because "[t]he more the reader understands and likes a character, the more the reader will root for him."[77]

Making a connection between positive client information and positive emotion has support in scholarship on law and emotion. Emotions signal changes in the environment and help individuals choose among competing goals and values, and the empathy and sympathy identified in the advocacy literature has been connected to case outcomes.[78] Research on narrative empathy, defined as "the sharing of feeling and perspective-taking induced by reading . . . hearing, viewing or imagining narratives of another's situation and condition,"[79] suggests that positive emotions in the decisionmaker should help motivate the decisionmaker to find for the client. One set of experiments showed scenarios to different groups of judges, who then made a ruling for either a sympathetic party or a nonsympathetic party.[80] Results indicated that judges made more favorable rulings for the more sympathetic party.[81] The "likeability" of the party was technically irrelevant to the legal ruling, but it influenced judicial decisions.[82] Overall, this research indicates that narratives with positive client portrayals fare better than negative client portrayals, but the research did not include scenarios of negative client portrayals coherently integrated into a strong case theory. Conclusions from this research are also limited because the process of evaluating and deciding real cases is more complex in real life.[83]

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76 *See* ARISTOTLE, RHETORIC 6–7 (W. Rhys Roberts, trans., Dover Thrift ed. 2004). See also the discussion of these ideas in MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 77–79, 81–99 (2002); Steven J. Johansen, *This is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961, 980–81 (2006).

77 *See* Foley & Robbins, *supra* note 4, at 468.

78 Neal Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997). See also Peter Brooks's queries about sympathy in Peter Brooks, *Narrativity of the Law*, 14 LAW & LITERATURE 1, 1, 5 (2002).

79 Keen, *supra* note 64.

80 For example, in an immigration case raising issues regarding the pasting of a false U.S. entry visa into a passport, judges ruled on proceedings involving either a father trying to " earn more money so that he could pay for a liver transplant needed to save the life of his critically ill nine-year-old daughter," or someone "hired to sneak into the United States illegally to track down someone who had stolen drug proceeds from the cartel." Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015).

81 *Id.* at 878.

82 *Id.* at 879–80.

83 Terry A. Maroney, *Why Choose? A Response to Rachlinski, Wistrich, & Guthrie's "Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?,"* 93 TEX. L. REV. 317, 318, 325–30 (2015).

Other scholarship, particularly research reviews of emotions and attributions of legal responsibility conducted in 2006[84] and 2016,[85] suggests that both positive and negative emotion, as well as moods—understood as more diffuse and longer lasting than emotions and not tied to discrete triggers[86]—have different kinds of impacts on decisionmaking. Especially relevant to cases with negative client facts is the observation that emotions affect decisionmaker receptivity to persuasive messages in different ways.[87] Many studies have shown that people in moderately positive moods tend to think more creatively and are better at drawing associations and inductive reasoning than people in neutral moods, while people in negative moods tend to be better at analytical and deductive reasoning.[88] Happy moods also tend to increase reliance on heuristics, while negative moods tend to produce more deliberate, bottom-up information processing.[89] This finding supports the intuition in advocacy literature that a positive client portrayal, which brings about a more positive mood in a decisionmaker, creates receptivity to narrative structures. However, the finding that negative emotions tend to produce more analytical reasoning also supports the use of a narrative that uses a negative client portrayal. Advocacy literature has suggested that a decisionmaker who does not like the client will reject the client's case, but research suggests that a narrative with a negative client portrayal may prompt the decisionmaker to think more carefully about the evidence, which may increase the likelihood of a finding for the negative client.

Considering the particular emotions evoked in the decisionmaker in more detail may also help generate an understanding of what the goal of persuasive legal narrative should be. For example, an evidentiary record that supports a positive client portrayal could seek to evoke emotions of satisfaction, relief, or even happiness. A mixed evidentiary record may produce a client portrayal that evokes emotions of pity or regret. A negative client portrayal may evoke emotions including disgust or revulsion. Depending on the case, it is also likely that the facts will evoke more than one related emotion, or perhaps a mixture of different kinds of emotions. Lawyers cannot assume that particular target emotions will invariably be called up, and they should appreciate the protean nature of

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84 Neal Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 LAW & HUM. BEHAV. 143 (2016).

85 Neal Feigenson, *Jurors' Emotions and Judgments of Legal Responsibility and Blame: What Does the Experimental Research Tell Us?*, 8 EMOTION REV. 26 (2016).

86 Terry A. Maroney, *supra* note 83, at 326 n.44.

87 Feigenson & Park, *supra* note 84, at 147.

88 *Id.*

89 *Id.*

emotions,[90] but acknowledging the role of the different emotions elicited by persuasive legal narratives, positive and negative, better supports an expanded repertoire of possibilities.

C. Discouraging Unethical Narrative

Advocacy literature assumes or advises lawyers to employ a persuasive narrative with a primarily positive client portrayal, but there are good reasons to question this overall approach, including the need to discourage unethical narrative. The ethics of legal narrative is a complex subject[91] that this article cannot tackle in detail, but some limited points can be made. The power of narrative to persuade, when combined with the partiality endemic to the common-law adversarial system, raises issues of ethics. Lawyers are prohibited from lying to the court or allowing the client to commit perjury,[92] but aside from these extremes, there is little in the way of ethical guidelines for persuasive legal narrative.[93] In this context, encouraging a positive client portrayal in a case with insufficient supporting evidence can invite unethical practices. Lawyers attempting to make unlikeable clients likeable have two main options: (1) ignore awful facts, or (2) shade or manipulate facts to produce a story beyond what can reasonably be asserted. Advocacy-advice texts regularly discourage the first option. Not acknowledging "bad facts" by leaving facts out of the client narrative may allow a more pleasing story and more likeable client to emerge, but the resulting narrative does not do justice to the facts. This strategy is also likely to fail when the fact finder is made aware of bad facts, which the party has not acknowledged or explained. Ignoring bad facts is also questionable in view of a lawyer's responsibility to bring all material facts to the fact finder's attention and not actively misrepresent matters to the court.[94] The second option, which misrepresents details in a deceptive manner, is likely to be unethical.[95] In some cases, trying to achieve a positive client portrayal will cause lawyers to stray further from the

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90 *See* BARBARA H. ROSENWEIN, EMOTIONAL COMMUNITIES IN THE EARLY MIDDLE AGES 17–19 (2007).

91 Helena Whalen-Bridge, *Persuasive Legal Narrative: Articulating Ethical Standards*, _ LEGAL ETHICS 1 (2019); Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010); Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ALWD 229 (2010); Kaiser, *supra* note 29; Johansen, *supra* note 76; Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000).

92 *See* MODEL R. PROF'L CONDUCT 3.3 (AM. BAR ASS'N 2018) (Candor Toward the Tribunal), http://www.americanbar.org/ groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribun al/comment_on_rule_3_3.html.

93 For a comparative overview of professional rules regarding factual presentations and narrative license in commonwealth jurisdictions, see Whalen-Bridge, *supra* note 91, at 235–37.

94 *See* MODEL R. PROF'L CONDUCT 3.3 cmt., http://www.americanbar.org/groups/professional_responsibility/publi-cations/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/comment_on_rule_3_3.html.

95 *See* Helena Whalen-Bridge, *Persuasive Legal Narrative: Articulating Ethical Standards, supra* note 91.

evidence than they should or need to go. Articulating the goal of persuasive legal narrative in a way that allows for negative client portrayals would better support ethical presentations of fact.

III. What Do Lawyers Do? Two Narrative Case Studies using Negative Client Portrayals

The literature of advocacy, legal writing, and applied legal storytelling uniformly recommend persuasive narratives with a primarily positive client portrayal. What do lawyers do in practice? Sometimes lawyers use narrative to tell a story critical of their own client. Examining cases that do so is especially important in narrative research because of the nature of narrative, which does not exist outside of its particulars.[96] Summarizing a story, for example, will not have the impact or significance that characterizes narrative, so testing a theory about narrative requires wrestling with its detail.

This article is a preliminary study which offers two examples of persuasive narratives with negative client portrayals in criminal cases. The article does not seek to establish the narrative practices of all lawyers as an empirical matter, but to consider some examples of negative client portrayals in order to extrapolate to larger problems.[97] These examples, from a jury trial and a judge trial, arise in two different common-law jurisdictions—the U.S. and Singapore. The cases are intentionally drawn from different countries to illustrate the use of narratives with negative client portrayals in different common-law systems, under different laws, for different kinds of decisionmakers. Although Singapore's colonial history with England has produced practices more in line with English than American models, these jurisdictions are less different than alike—in language, in adversarial orientation, and in fundamental concepts such as burden of proof. In the U.S. case, a lying husband who cheated on his wife was accused of murdering her and her unborn child. In the Singapore case, a defendant posted material regarding assassination on the internet to get attention and was charged with intent to incite violence.

A. U.S. Case Study: North Carolina v. Jason Lynn Young

In 2006 the defendant's wife, Michelle, was found dead in the couple's bedroom with their unharmed daughter. The victim was five months

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96 *See* MOSHE SIMON-SHOSHAN, STORIES OF THE LAW: NARRATIVE DISCOURSE AND THE CONSTRUCTION OF AUTHORITY IN THE MISHNAH 16 (2012) *("Stories, Narratives, and Narrativity")*.

97 *See* BROOKS, *supra* note 72, at xv (using a similar technique).

pregnant and had been beaten to death.[98] The prosecution argued that the defendant, Young, was stuck in a marriage that he couldn't afford to extract himself from, and that he had had multiple relationships with other women during the marriage. The prosecution alleged that Young had secretly returned from a business trip to Virginia to kill his wife, disabled a surveillance camera to sneak out of his hotel room, and disposed of his clothes after the murder, which were never found. The defense attacked the case as circumstantial and argued that key pieces of evidence were missing, such as the defendant's fingerprints in the blood at the scene.

Young was tried for first-degree murder.[99] The case involved two trials and three appeals. The first jury deadlocked eight to four for acquittal, and a mistrial was declared.[100] At Young's second trial, the jury found him guilty of first-degree murder, and he was sentenced to life imprisonment without parole. On appeal, Young's conviction was overturned, primarily on the basis that the trial judge should not have admitted evidence of two civil proceedings—a wrongful-death lawsuit against the defendant, and a child-custody complaint filed by the deceased wife's parents.[101] The court vacated the conviction and ordered a new trial, in what would have been the third jury trial in the case.[102]

The matter was then appealed to the North Carolina Supreme Court. That court held that Young had not been prejudiced by the introduction of the contested evidence; it reversed the appellate court's vacation of the conviction and remanded the case to the appellate court for consideration of Young's other challenges to the conviction.[103] On remand, the Court of Appeals rejected Young's remaining objections to the second trial, affirmed his conviction, and confirmed the sentence of life imprisonment without parole.[104]

In addition to the case's procedural complexity, the case presented evidentiary challenges for both parties. The prosecution introduced evidence of motive and opportunity but lacked direct evidence against

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98 *North Carolina Supreme Court Weighs Third Trial for Jason Young*, ABC11 Eyewitness News (May 19, 2015), http://abc11.com/news/nc-supreme-court-weighs-third-trial-for-jason-young/730262/.

99 State v. Young, 756 S.E.2d 768 (N.C. Ct. App. 2014), *rev'd*, 775 S.E.2d 291 (N.C. 2015).

100 *Id.*

101 The child-custody complaint alleged that the defendant had killed the daughter's mother, that the mother had been pregnant with the defendant's child at the time, and that the daughter was in the house at the time of the murder. The suit requested a psychological evaluation of the defendant as well as discovery and depositions. The defendant ultimately agreed to transfer primary physical custody of the daughter to the grandmother under a consent order stating that no discovery or depositions would be taken. *See id.*

102 *Id.*

103 State v. Young, 775 S.E.2d 291 (N.C. 2015).

104 State v. Young, 821 S.E. 2d 313 (N.C. Ct. App. 2018).

Young. The prosecution focused on Young's increasing hostility toward his wife and his motivation to get out of the marriage, as well as on strong circumstantial evidence: a camera pointing toward an emergency exit in Young's hotel had been unplugged and later pointed toward the ceiling, and the door to the hotel emergency exit had been propped open with a rock.

The defense had its own challenges. It focused on the prosecution's burden of proof and argued that the evidence was insufficient, but it had to accommodate an admittedly obnoxious defendant. Young had cheated on his wife, the two argued often and publicly, and the communication between them had broken down to such an extent that they could communicate effectively only over e-mail. The advice to find likeable aspects of the defendant's character, and use positive emotions to persuade the jury, would not have worked in this case, and that is not what the defense did. The defense strategy was two-fold: argue the law by focusing on procedural shortcomings in police investigation, and use a narrative with a negative client portrayal to argue that Young's crass, unthinking character was inconsistent with the extensive planning required by the prosecution's case theory.

The defense narrative at trial reflected a negative client portrayal in considerable detail. At the first trial, Young took the witness stand, not required in a U.S. criminal case and a riskier if calculated trial strategy.[105] Young admitted that he was a less-than-perfect husband, but he also said he was working on his marriage and hadn't killed his wife.[106] He did acknowledge that he had used physical force on his former fiancée, Genevieve Cargol; Cargol testified to an incident when Young, drunk, got angry with her and pried an engagement ring off her finger. "What I did was wrong," admitted Young. "I did pin her down and I took the ring . . . . I was very intoxicated but I don't feel that's an excuse for what I did."[107] At the second trial, Young did not testify,[108] but a recording of his testimony at the first trial was replayed for the jury.[109]

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105 Regarding the *Young* trial, see Kelly Gardner, *Jason Young's Testimony Presented As Evidence in Trial,* WRAL.COM (Feb. 21, 2012), http://www.wral.com/specialreports/michelleyoung/story/10761325/.

106 *North Carolina Supreme Court Weighs Third Trial for Jason Young, supra* note 98; Louise Boyle, *Salesman Sentenced to Life Without Parole at Retrial after Beating Pregnant Wife to Death in Front of Daughter*, DAILY MAIL ONLINE 2 (Mar. 6, 2012), http://www.dailymail.co.uk/news/article-2110752/Jason-Young-Man-guilty-retrial-beating-pregnant-wife-death-pretending-away-business-trip.html#ixzz3fe4ixXff.

107 *Dateline Extra*, MSNBC (Mar. 16, 2019), https://archive.org/details/MSNBCW_20190317_050000_Dateline_Extra.

108 Anne Blythe, *N.C. Appeals Court Throws out Jason Young Murder Conviction, Orders New Trial*, CHARLOTTE OBSERVER (Apr. 1, 2014), http://www.charlotteobserver.com/news/local/crime/article9108731.html#storylink=cpy.

109 Gardner, *supra* note 105.

The negative client portrayal is also reflected in the defense's opening and closing arguments. In opening argument, one of the defense attorneys conceded that the Youngs were having problems in their marriage, but argued that these problems did not make Jason Young a killer. Counsel said, "I am not here to tell you that he was a good husband. He was far from it. He's acted like an obnoxious, juvenile jerk. But what you've got to remember ladies and gentlemen, is that we don't convict people of murder, just because they act like jerks."[110] The negative defense strategy emerges even more strongly in the closing argument.[111] Defense counsel first noted at least ten points of confused, partial, or missing evidence that constituted a basis for acquittal.[112] The defense also argued for a different version of the facts, asserting that Young had been on a business trip while the murders occurred. In this narrative, the defense conceded Young's bad character and used it in two ways. First, counsel argued about the relevance of this evidence. Noting that this point had already been raised in the opening argument, defense counsel stated, "He's been a jerk. He's a philanderer. He's a womanizer. He says grossly inappropriate things and does grossly inappropriate things, but that doesn't make him a murderer."[113] Video images of the closing argument underscore this list of Young's bad traits, reflected in the attorney's counting off Young's negative character traits on his fingers as he mentions them.

The second use of negativity arises in the defense narrative of how the murder occurred. The defense attorney stated that Young's sending his wife an anniversary card while he was actively sleeping with another woman was "just wrong . . . it's just awful, it's awful."[114] The incident was potentially harmful to Young because it implied a certain comfort with deception, but defense counsel used it in Young's favor, arguing that Young did not think far enough ahead to consider that the mail stamp on the envelope would reflect a different place from where he told his wife he would be. Young's bad character and behavior therefore demonstrated that he was not calculating enough to have killed his wife in the way alleged by the prosecution, at least without leaving some evidence of himself behind.[115] Counsel in this case was able to integrate Young's bad character,

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110 Boyle, *supra* note 106.

111 Opening and closing arguments were recorded and made available, along with most trial proceedings in the case, by a local television station, WRAL, and are available at https://www.wral.com/specialreports/michelleyoung/asset_gallery/10684977/.

112 Michelle Young: Defense's closing arguments (pt. 1), 02:25–02:40, http://www.wral.com/specialreports/michelleyoung/video/10800240/#/vid10800240.

113 *Id.* at 54:54–55:13.

114 *Id.* at 55:37–55:44, and in general 55:22–55:44.

115 *Id.* at 55:37–58:04.

which produced selfish, short-sighted behavior, to directly contest an element of the crime, his ability to carry out the offense.

This case illustrates that persuasive legal narratives can incorporate negative client portrayals. Is it possible to evaluate how successful that approach was? Figuring out the answer to this question in the *Young* case is not straightforward. First, and most importantly, a loss at trial or on appeal does not mean that a persuasive legal narrative was weak, or that it was not the best narrative that could have been devised; assessments of narrative quality should be based primarily on narrative criteria as opposed to the ultimate win or loss.[116] Second, because the *Young* case was a jury trial and jurors do not provide the reasons for their verdicts, the degree to which the defense's negative client portrayal succeeded with them cannot be accurately assessed. The first and second juries were also made up of different persons, further complicating comparisons. Nonetheless, although the second jury convicted the defendant and the first jury could not reach a unanimous decision, eight of the twelve jurors in the first trial voted for acquittal, which means that a majority of those jurors were not persuaded there was sufficient evidence of guilt. It seems reasonable to attribute some role in the first jury verdict to the defense, although how much of that success was due to a narrative incorporating a negative client portrayal is not possible to say.

B. Singapore Case Study: Public Prosecutor v. Yue Mun Yew Gary

The second example arises from Singapore, a common-law jurisdiction in Asia. *Public Prosecutor v. Yue Mun Yew Gary*[117] was a criminal case tried in the first instance in the Singapore District Court. Yue posted material on the internet, and he was charged with inciting violence on two occasions in violation of Singapore Penal Code section 267C.[118]

For the first charge, Yue had posted a link to a doctored video of the Anwar al-Sadat assassination with the comment, "We should re-enact a

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116 For a review of criteria indicating the quality of persuasive narrative in the legal context, see J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53 (2008).

117 Public Prosecutor v. Yue Mun Yew Gary [2012] SGDC 115 (district court opinion).

118 At the time of the offense, the Singapore High Court observed that Singapore Penal Code (Cap 224, 1985 Rev Ed) section 267C provided:

Making, printing, etc., document containing incitement to violence, etc.

267C. Whoever —

    (a) makes, prints, possesses, posts, distributes or has under his control any document; or

    (b) makes or communicates any electronic record,

containing any incitement to violence or counselling disobedience to the law or to any lawful order of a public servant or likely to lead to any breach of the peace shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.

Public Prosecutor v. Yue Mun Yew Gary [2012] SGHC 188, [2012] 1 SLR 39, ¶ 1.

live version of this on our own grand-stand during our national's parade!"[119] The post was made on Singapore's National Day 2010, a day widely associated with an official event and parade celebrating Singapore's independence. For the second charge, Yue had uploaded a doctored version of a well-known picture of Nguyễn Ngọc Loan, a South Vietnamese National Police Chief, executing a handcuffed prisoner, Nguyễn Văn Lém, a suspected Việt Cộng member, during the Tet Offensive in Vietnam in 1968. Yue had changed the photo to make it appear that Nguyễn Ngọc Loan was executing a former Singapore Deputy Prime Minister and Minister of Home Affairs, Mr. Wong Kan Seng.[120]

At trial, the defense argued that section 267C of the Penal Code was "not a strict liability offence, and the ingredients of the offence have not been made out."[121] In order to prove lack of intent, defense counsel elicited testimony from Yue that he was aware of the unhappiness in Singapore over matters such as development projects involving casinos and pro-foreigner policies.[122] Yue testified that he was frustrated and wanted to be expressive, and that he was not thinking any violent thoughts at all.[123] Regarding the posting of the doctored picture of a Singapore official, he testified that he was amused by another satirical picture that he had seen and he wanted to do something similar.[124]

The defense also submitted a psychiatric report, which noted in part that Yue

> 1) . . . has an introverted, poorly socialised personality with a previous psychiatric treatment as a child; it is therefore not surprising that he finds the internet a fertile ground for his imaginative play and creative re-enactments of his "angst" against his perceived ills in society; such internet forays like the netizens forum afforded him great relief and provided an outlet for the discharge of his "angst" and "tensions." If his postings attract many "hits" and "likes," it will enhance his self-esteem and social standing among netizens, something he will not be able to achieve in real life.
>
> 2) He has stopped posting on Temasek Review since September 2010 and has deactivated his personal Facebook on 14 July 2011. He is very remorseful over his actions and has promised never to repeat such "foolish acts" again. His main regrets are to have caused such prolonged mental distress to his "frail" father and to lose a "sole-breadwinner job."

. . . .

119 *Yue*, [2012] SGDC 115, ¶ 3.

120 *Id.*

121 *Id.* ¶ 7.

122 *Id.* ¶ 10.

123 *Id.*

124 *Id.* ¶ 11.

3) Gary has a psychological problem which needs psychotherapy instead
of incarceration; I am confident that with therapy, he is very unlikely to
repeat such an offence in future.[125]

In arguing for a conviction, the prosecutor asserted that section 267C
of the Penal Code created a strict-liability offense and that the accused's
intentions when he made the two postings were therefore irrelevant to the
two charges.[126]

The trial court found that although the postings expressed
incitements to violence, Yue had not intended to actually incite violence.[127]
Regarding Yue's intention, the court was persuaded that posting the video
was motivated instead by Yue's personality—he was "socially immature
and awkward, prone to attention-seeking through the social media."[128]
Regarding the doctored photo, the court found that Yue's intention was to
be humorous rather than incite violence, although what was essentially a
political cartoon was "done in very bad taste."[129] Ultimately, however, the
trial court agreed with the prosecution regarding the mens rea
requirements of the statute and determined that section 267C of the Penal
Code had created a strict-liability offense. Yue's intention, whatever it had
been, was therefore irrelevant to both charges and he was convicted.[130]

The defense counsel's argument as reflected in the trial-court opinion
indicates that the defense portrayed Yue negatively, with unlikeable
qualities. If Yue did not intend to incite violence, his counsel needed to
demonstrate what intention he did have, and the two related themes
arising from the testimony were that Yue posted the material because he
was attention-seeking and immature. The immaturity theme focused on
Yue's flawed character in a way directly related to proof of intention, in
that his immaturity prompted the attention-seeking behavior that lead
him to post the objectional material. This theme was also supported by
the Defense Submissions to the trial court, which emphasized Yue's
testimony that the postings were done in a moment of "folly."[131]
Newspaper reports of the trial provide further evidence that the defense
strategy was distinctly negative. At the mitigation stage of the trial, defense
counsel noted that Yue was paying a "huge price for his stupidity."[132] The
strategy focuses attention not on Yue's positive aspects, but on weaknesses
that could generate decisionmaker emotions of irritation and pity.

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125 *Id.* ¶ 47.

126 *Id.* ¶ 13.

127 *Id.* ¶¶ 41–42, 44.

128 *Id.* ¶ 50.

129 *Id.* ¶ 54.

130 *Id.* ¶ 21.

131 Defense Submissions, *Yue*, ¶¶ 40, 43 (on file with
author).

132 Elena Chong, *Man Fined for Online Postings in
Landmark* Case, STRAITS TIMES (Mar. 13, 2012).

It could be argued that defense counsel in fact used a primarily positive portrayal, of the defendant as a hero, with immaturity and the need for approval as the flaws he struggles with. However, the record and counsel argument do not portray a struggle, and a positive hero characterization does not do justice to the way in which the defense prioritized negative aspects of Yue's character. The defense could have constructed a more positive portrayal, by highlighting the remorse that Yue felt and subordinating his stupidity and folly, but the defense did not go in that direction.

The trial-court opinion suggests that the narrative focus on Yue's negative character was a successful strategy in terms of factual findings. The trial court found that Yue did not have the intent to incite violence, but rather the intent to gain attention, and to that extent the inclusion of a negative narrative of the client's character should be considered successful. The trial court ultimately convicted the defendant because, it held, the offense was one of strict liability, so the prosecution was not required to prove intent. However, the trial court did ultimately impose a fine for the convictions, not a custodial sentence as requested by the prosecution,[133] which suggests that the court viewed the defendant's actions less seriously.

Later proceedings in the case also suggest that the negative defense strategy continued to play a role in argument and analysis, although the defense had less success with the facts at this level. The prosecution appealed the lighter sentence imposed by the trial court to the Singapore High Court.[134] The High Court reversed the trial court's finding on mens rea and held that the relevant section did require intent, but found that Yue had intended to incite violence and had therefore been properly convicted.[135] The High Court noted the District Court's agreement with the testimony that Yue had acted out of angst and the expert psychiatrist's testimony that Yue desired to get attention and enhance his self-esteem.[136] But the High Court saw no difference between the trial court's finding that Yue intended to post material that contained incitements to violence and a finding that he had an intention to incite violence.[137] The High Court was persuaded that Yue had intended to incite violence, in part due to his online comment regarding the doctored picture that "[i]f their political downfall is not within grasp, we should know what and how next to escalate it."[138] The High Court rejected Yue's description of his intent as

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133 *Yue*, [2012] SGDC 115, ¶¶ 28–31.

134 *See Yue*, [2012] SGHC 188, [2012] 1 SLR 39, ¶ 2.

135 *Id.* ¶¶ 39–41.

136 *Id.* ¶ 8.

137 *Id.* ¶ 39.

138 *Id.* ¶ 40.

well as the defense assertion that he did not intend the natural conse-
quences of his actions.[139]

Yue thus lost the appeal at the High Court, but even at this level the
analysis of the law referenced his negative character and used it as a
touchstone for the relevant legal principle. In interpreting the statutory
language, the appellate judge discussed the balance of freedom of
expression and protection of the public from violence. The judge stated,

> While the personal and public benefits of free expression would suffi-
> ciently recompense for inevitable encounters with *the rude, the obstinate,*
> *the obtuse and even the offensive*, it is no part of the constitutional
> bargain that citizens must bear violence or disobedience to law and
> order—or the threat thereof—as the price of free expression.[140]

The defense's introduction of Yue's negative, attention-seeking
character was an integral part of the testimony. The strategy persuaded
the trial court and affected development of the law at the appellate level,
even though Yue's conviction was ultimately affirmed. This case study
demonstrates that negative client portrayal can be used by lawyers with at
least some degree of success, and in terms of results it arguably comprises
stronger proof of persuasiveness than the U.S. case of *Young*.

C. Case Study Comparison & Theoretical Ramifications

These two cases from different common-law jurisdictions, involving a
jury trial and a judge trial, offer examples of how lawyers can make
negative aspects of the client a primary plank in the client's story. In both
cases, the defense acknowledged the client's negative characteristics and
even joined the decisionmaker in criticizing them. Neither defense
strategy attempted to make the defendant likeable or subordinate the
defendant's negative aspects to a positive portrayal. In fact, the dynamic
worked in exactly the opposite manner: counsel used the strength of the
negative client portrayal to bolster the client narrative and the position
taken on the legal issue.

In these persuasive legal narratives, lawyers are proving not that the
client is unlikeable generally, but that the client is unlikeable in a very
particular way, intimately tied to the elements of the party's claim or
defense. In the Singapore case, the *actus reus* was conceded but counsel
asserted that the client's bad character demonstrated an intent different
from what the law required; the client had a negative intention but not the
alleged illegal intention. In the U.S. case, counsel disputed the *actus reus*

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139 *Id.*   **140** *Id.* ¶ 38.

and argued that the bad character demonstrated a lack of the intelligence and organization that the prosecution said was necessary for the commission of the murder. Here, the negative client portrayal negated the prosecution's required aspects of proof, but instead of proving a different parallel intention, the defendant asserted a character at odds with what the *actus reus* required.

Narratives with negative client portrayals may work in part because they increase client or even lawyer credibility. Because negative qualities reflect badly on the client, they would not usually be highlighted, so focusing on these qualities contrary to expectation may suggest authenticity or believability. Another way to theorize the persuasiveness of these narratives would be to invert the notion of fidelity.[141] Comprising more than one notion, fidelity can be understood in part as good reasons for action and belief, consistent with or faithful to experienced reality. In the case of narratives with negative client portrayals, instead of good reasons for action and belief, the narrative displays negative fidelity, bad but not illegal reasons for action and belief, which are believable because they are consistent with experienced reality.

These examples illustrate the use of narratives incorporating negative client portrayals in order to address an absence in advocacy literature, but they should not be taken to mean that persuasive legal narrative should now be understood as a duality, a choice between positive and negative. The best approach to client portrayal is arguably not the one-trick pony of positive client portrayal, or the duality of positive or negative portrayals, but a continuum of portrayals. Even the *Young* and *Yue* cases, both on the negative end of the continuum, differ from one another. The U.S. example of disgust and anger for a lying husband who murdered his pregnant wife is further along the negative end of the continuum, while the Singapore example of criticism and pity for the attention-seeking defendant is closer to the center.

Both examples are criminal cases, which raises the question of whether certain areas of law or legal issues are conducive to negative client narratives. In general, criminal law prohibits behavior which is more harmful than the behavior prohibited by civil law. The mens rea of criminal law are also distinctly different, and more negative, than the level of intent required for civil-law liability, so criminal defendants may present greater potential for negative client portrayals. But this kind of narrative does not appear to be limited to defendants. For example, freedom-of-speech cases under the U.S. Constitution can produce clients with

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141 Rideout, *supra* note 116, at 55, 69–78.

messages of hate that are entitled to constitutional protection; in these cases a factual narrative with a negative client portrayal may be a requirement, not a choice.

In the 1977 case of *National Socialist Party v. Skokie*,[142] neo-Nazis applied for a permit to march in the heavily Jewish community of Skokie, Illinois, which included persons who had survived the holocaust.[143] The party leader of the National Socialist Party of America (NSPA) described the party as being a Nazi organization and proposed to publicly protest against regulations regarding the use of the village's public parks for political assemblies.[144] Demonstrators planned to wear the uniform of the party, which included a swastika, and hold banners with variations on the statement, "Free Speech for the White Man."[145] The NSPA was a group devoted to inciting racial and religious hatred, primarily against people of the Jewish faith and non-Caucasians.[146] The Skokie Board of Commissioners passed an ordinance requiring marchers to post a $350,000 insurance bond, and another ordinance prohibiting them from "performing any of the following actions within the village of Skokie, Illinois:"

> [M]arching, walking or parading in the uniform of the National Socialist Party of America; [m]arching, walking or parading or otherwise displaying the swastika on or off their person; [d]istributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion.[147]

The county court issued an injunction against the group's intended march; the party applied for a stay to the Illinois Court of Appeals, which denied it. The party then petitioned to the Illinois Supreme Court, which denied the stay as well. The U.S. Supreme Court accepted certiorari and agreed with the Nazi group that these restrictions violated its right to freedom of speech under the First Amendment to the U.S. Constitution.[148] The Court stated that if "a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards . . . including immediate appellate review," and that absent such review, the State was required to allow a stay of the lower court's refusal to allow the protest.[149] The Court's holding established that the Nazi Party could not be prohibited from marching peacefully because of the content of their message. In the

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142 432 U.S. 43 (1977).

143 Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978).

144 Vill. of Skokie v. Nat'l Socialist Party of Am., 366 N.E.2d 347 (Ill. App. Ct. 1977).

145 *Skokie*, 373 N.E.2d 21.

146 *Id.*

147 432 U.S. 43 (1977).

148 *Id.* at 43–44.

149 *Id.* at 44.

context of freedom of speech law, the heart of the legal issue may present a narrative of an extremely negative client, and portraying such a client more positively in those cases would not properly frame the legal issue or be based on the evidence in the case.

Yue is a criminal case, but it can also be understood in the general context of freedom of speech. In assessing the defendant's behavior, the court discussed the balance of freedom of expression and protection of the public from violence, and noted,

> While the personal and public benefits of free expression would suffi-ciently recompense for inevitable encounters with *the rude, the obstinate, the obtuse and even the offensive*, it is no part of the constitutional bargain that citizens must bear violence or disobedience to law and order—or the threat thereof—as the price of free expression.[150]

The *Young* and *Yue* case studies offer practical examples of how some lawyers do in fact use persuasive legal narratives with negative client portrayals. These examples could be characterized as aberrations or outliers, if negative client portrayals were not so consistent with theories of persuasion and the concept of case theory in particular. Lawyers present their cases using a theory of the case, which represents their persuasive position on the law and the facts.[151] How a lawyer conducts the trial is governed by the case theory,[152] including the use of persuasive legal narrative. But persuasive legal narrative is subordinate to the overall theory of the case, once it is established,[153] and case theory has no inherent requirement that the client be portrayed positively. Narrative presentation of fact allows the audience to understand and believe the party's moti-vations in a manner that resolves legal issues in the party's favor. The goal of persuasive legal narrative is to portray the party's challenges, conflicts, and choices, in an authentic manner that supports the case theory.[154] Narrative must work in that context, and can be based on positive or negative elements in the client's case. A theory of the case may use distinctly unlikeable aspects of parties in order to persuade, for example, to ask the fact finder to pity but not necessarily like the client. Or the context may call for the fact finder to be disgusted by the client, in a way

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150 *Yue*, [2012] SGHC 188, [2012] 1 SLR 39, ¶ 38 (emphasis added).

151 *See* Mauet, *supra* note 11 at 8–9, 60–61, 250.

152 *Id.* at 8–9; s*ee also* Marilyn J. Berger, John B. Mitchell & Ronald H. Clark, Trial Advocacy: Planning, Analysis, and Strategy (4th ed. 2015).

153 The case theory should be developed with the client and reflect the client story to the degree possible. *See* Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485 (1995).

154 *See* Steven Lubet, *The Trial as Persuasive Story*, 14 Am. J. Trial Advoc. 77, 78 (1990).

that proves the client would never have done the alleged acts, as the defense in *Young* demonstrates. The appropriate reactions to a party's narrative may be pity, shock, or even disgust—but if the narrative supports the case theory and carries its argumentative weight, then the persuasive legal narrative is successful.

Actually, case theory does not require a narrative version of the facts at all. In practice, lawyers distinguish between the larger-scale goals of trial, reflected in the case theory, and the smaller-scale goals of persuasive legal narrative. If the evidence is so against a party that it offers no acceptable narrative to tell, then as a matter of trial strategy a lawyer and client may decide not to put forth their own version of the facts. When criminal-defense attorneys do not present an alternative version of the facts but instead use procedural devices to prevail—such as arguing that the prosecution has not met its burden of proof, or challenging the evidence supporting certain facts[155]—they are not using persuasive legal narrative to present a version of events. As a matter of case theory, then, there will be instances when persuasive legal narrative is simply not employed. When a case is truly without narrative recourse, the most persuasive and ethical strategy may be to challenge the opposing party's evidence and not provide a counter narrative at all.

The choice of whether to use persuasive legal narrative as a part of the case theory, and the appropriate goal once narrative is adopted, are two separate questions. When persuasive legal narrative is adopted as a plank in trial strategy, the goal should be to convey that knowledge of the client which allows the fact finder to accept the case theory. The narrative needs to be appropriately nuanced to fit the facts of the case and the quirks of the party, and though the evidence in many cases may allow for a primarily positive client portrayal, the process of identifying the most persuasive client narrative should be understood as a continuum of different kinds of client characteristics, including the possibility of a primarily negative client portrayal.

IV. Conclusion

Persuasive legal narrative is a complex argumentative tool. Some clients can and perhaps should be made more likeable, but the semi-automatic nature of the preference for positive client portrayals needs reconsideration and adjustment. The use of positive client portrayals is not preordained; to borrow Robbins's admonition regarding narrative

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155 See the challenge strategy identified in Bennett & Feldman, *supra* note 3, at 98.

point of view, positive client portrayals are "a concept to be used, not a rule to be followed."[156] Recognizing narratives with a primarily negative client portrayal, as explored in this article, better accounts for the full range of what lawyers do in practice. It also lessens the likelihood that adversarial pressure to win will lead lawyers to fashion unethical persuasive narratives, and that in turn better serves the truth-finding function of the dispute-resolution process. Incorporating negative client portrayals also provides an opportunity to generate a more nuanced theory of persuasive legal narrative in common-law trials. Every case presents potentially different dynamics, and analysis of lawyerly argument should therefore allow for a balance of positive and negative client portrayals.

This study is preliminary and offers some first steps about how to advance this portion of applied legal storytelling. The examples presented here suggest that persuasive legal narratives can include negative client portrayals, but further study can consider additional cases in greater detail. Primarily negative client portrayals can also be better distinguished from each other, and the advantages and limits of negative client portrayals can be explored. Comparisons of persuasive legal narratives from different countries are more challenging but could produce insight into how the context for lawyer argument affects client portrayal. Lawyers can disagree about what is most persuasive, but such jurisdictional differences may illuminate currents relevant to matters beyond individual cases or advocacy.

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156 Foley & Robbins, *supra* note 4, at 480.