SOURCE-RELATIONAL ETHOS IN JUDICIAL OPINIONS

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There is more to written persuasion through ethos—that is, credibility—than the characteristics of a competent professional. Credibility does not exist in a vacuum; it exists only to the extent that the reader perceives it. The relationship between writer and reader is where credibility comes to life. A successful persuasive writer is credible; that writer intentionally and artfully demonstrates credibility by connecting with the reader. Therefore, persuasion through ethos requires the writer to be both composer and conductor. A masterful performance creates positive ethos; a crude one falls flat.

Judges are in a unique position when it comes to persuasion through ethos. Where the lawyer can focus written persuasion directly on the judge, the judge must reach a much larger and less determinate audience. In this Article, I argue that judges can use relationship-building tools from cognitive theory to connect with the audience through their writing. But simply using the tools does not guarantee positive ethos. To create positive ethos, the judge must exercise emotional intelligence when using the tools of cognitive theory to connect with the audience in a role-appropriate and effective way.

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I. INTRODUCTION

A. Classical Foundations of Rhetoric

Aristotle characterized rhetoric as the "art" of persuasion.[1] Specifically, he defined it as "the faculty of observing in any given case the available means of persuasion."[2] Aristotle was careful to note that rhetoric is not limited to a specific subject; instead, it applies broadly to any subject.[3] That broad application breaks down into three modes of persuasion: ethos, pathos, and logos.[4] Ethos persuades through the character of the speaker.[5] Pathos persuades through emotional appeal to the listener.[6] Logos persuades through the content of the argument.[7]

Though classical rhetoric divides the three modes of persuasion neatly, the divisions are not quite as neat as they initially appear.[8]

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1. Aristotle, *Rhetorica*, *in* THE WORKS OF ARISTOTLE 1354a, 1355b (W.D. Ross ed., Encyclopædia Britannica 1952).
2. *Id.*
3. *Id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. Indeed, this overlap is what inspired the symposium thanks to Harold Anthony Lloyd's *Cognitive Emotion and the Law*, 41 LAW & PSYCHOL. REV. 53 (2017); *see also* Keith Frankish & Jonathan St. B. T. Evans, *The Duality of Mind: An Historical Perspective*, *in* IN TWO MINDS: DUAL PROCESSES AND BEYOND

As Aristotle himself acknowledges, the listener's emotions inform the listener's judgment of the source's credibility.[9] The emotions also interact with and shape the logical processes the listener's brain employs to evaluate substantive content.[10] The listener's perception of the speaker and the feelings sparked by the argument color the argument's substance.[11] Though the modes of persuasion overlap and feed each other, ethos is the foundation of persuasion.[12] To this end, Eugene Garver explains that "ethos is the most authoritative source of belief."[13] Without ethos, a speaker's appeals to emotion or reason risk falling flat, regardless of their actual strength or substance.[14]

(Jonathan St. B. T. Evans & Keith Frankish eds., 2009) 1, 2, 7; EUGENE GARVER, FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF 7 (2004) ("The more rational and ethical a speaker, the friendlier the relations between speaker and hearer. Conversely, the friendlier we are, the more we understand emotional appeals as rational."); DANIEL KAHNEMAN, THINKING FAST AND SLOW 10 (2011) (presenting the unconscious mind—pathos—as framing the content of the argument and assisting in decision-making); Kristen Konrad Tiscione, *Feelthinking Like a Lawyer: The Role of Emotion in Legal Reasoning and Decision-Making*, 54 WAKE FOREST L. REV. 1159, 1169 (2019).

9. Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 100–01 (1994) (explaining Aristotle's teaching that ethos and pathos are interconnected); *see also* Anne Mullins, *Jedi or Judge: How the Human Mind Refines Judicial Opinions*, 16 WYO. L. REV. 325, 326 (2016) [hereinafter Mullins, *Jedi or Judge*]; Anne Mullins, *Subtly Selling the System: Where Psychological Influence Tactics Lurk in Judicial Writing*, 48 U. RICH. L. REV. 1111, 1111–12 (2014) [hereinafter Mullins, *Subtly Selling*]; Melissa Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMM. & RHETORIC: JALWD 229, 234–35 (2012).

10. *See, e.g.*, Lloyd, *supra* note 8, at 59; Carlton J. Patrick, *A New Synthesis for Law and Emotions: Insights from the Behavioral Sciences*, 47 ARIZ. ST. L.J. 1239, 1240 (2015); Tiscione, *supra* note 8, at 1172; Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2392 (2014) ("Scientific evidence indicates that emotion and rationality are not opposed, as the law often presumes, but rather inextricably linked. There is no judgment, whether moral or otherwise, without emotions to guide our choices. Judicial failure to grapple with this reality has produced some puzzles in the law.").

11. *See supra* notes 9–10.

12. Aristotle, *supra* note 1, at 1356a (arguing that a speaker's "character may almost be called the most effective means of persuasion he possesses"); ISOCRATES, Volume 1, at 78–81 (George Norlin trans., G. P. Putnam's Sons 1928); MICHAEL SMITH, ADVANCE LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 125 (3d ed., 2013) ("A strong argument can be made that ethos is more important to persuasive legal writing than either logical argument (logos) or appeals to emotion (pathos). In fact, the effectiveness of both emotional and logical arguments depends in large part on the perceptions of the advocate's credibility."); William Benoit, *Isocrates and Aristotle on Rhetoric*, 20 RHETORIC SOC'Y Q. 251, 257 (1990); Frost, *supra* note 9, at 104; J. Christopher Rideout, *Ethos, Character, and Discoursal Self In Persuasive Legal Writing*, 21 J. LEGAL WRITING INST. 19, 19–20 (2016).

13. GARVER, *supra* note 8.

14. Aristotle, *supra* note 1, at 1356a; SMITH, *supra* note 12, at 125; Frost, *supra* note 9, at 104.

Most scholarship examining ethos in legal argument does so from the perspective of lawyers' oral advocacy.[15] Scholars have typically not focused on ethos in persuasive writing.[16] While there is significant overlap between the function of ethos in oral and written advocacy, there are also significant differences between the two forms of communication.[17] Moreover, only a handful of scholars have deeply examined persuasion in judicial writing, though scholars of legal rhetoric harvest examples from judicial opinions to illustrate effective use of rhetorical devices.[18] In this Article, I examine ethos in judicial opinions and the tools judges can use to effectively persuade through ethos.

B. Modern Ethos in Legal Writing

Michael Smith, a leading scholar of legal writing and rhetoric, identified the primary characteristics of ethos in legal writing: character, goodwill, and intelligence.[19] To evince character, Smith instructs writers to project truthfulness, candor, zeal, respect, and professionalism.[20] A writer demonstrates truthfulness by representing the facts and the law accurately.[21] A writer displays candor by including all pertinent information.[22] A zealous writer shows passion, conviction, and confidence in her writing by doing

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15. Weresh, *supra* note 9, at 232.

16. Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS'N LEGAL WRITING DIRECTORS 129, 132–33 (2006) (identifying sources addressing ethos in legal writing); Weresh, *supra* note 9, at 232. *See* SMITH, *supra* note 12. Indeed, Michael Frost contends that modern scholarship on ethos is "sketchy and disorganized." MICHAEL FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 70 (2016).

17. SMITH, *supra* note 12, at 126.

18. *See, e.g.*, LINDA BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE 44–46 (2018); FROST, *supra* note 16, at 135–36 (giving examples of Scalia analysis); SMITH, *supra* note 12, at 217–339; Michael J. Higdon, *Something Judicious This Way Comes . . . the Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICH. L. REV. 1213, 1244 (2010); Mullins, *Subtly Selling*, *supra* note 9, at 1119–20; Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 193–94 (2002) (sharing examples of four famous justices' use of rhetoric in their opinions); Rideout, *supra* note 12, at 50–54; Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 432–34 (2006). For an engaging and well-curated collection of judges' use of rhetorical devices, see ROSS GUBERMAN, POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES (2015).

19. SMITH, *supra* note 12, at 127. Aristotle identified the three with respect to oral advocacy. Aristotle, *supra* note 1, at 1378a (calling the three "good sense, good moral character, and good will"). Smith's work "explores in perhaps the greatest detail the techniques for evincing ethos in written, as opposed to oral, advocacy." Weresh, *supra* note 9, at 232 n.14; *see also* Rideout, *supra* note 12, at 54–55.

20. SMITH, *supra* note 12, at 128.

21. *Id.* at 128–32.

22. *Id.* at 132–36.

thorough work and writing in a confident style.[23] A writer evinces respect by being mindful of her tone towards the judge, opposing counsel, and the legal system in general. She also evinces respect by following formatting rules and submitting polished documents free of errors.[24] While all of the preceding traits are aspects of professionalism, professionalism itself is broader and captures "conduct . . . that is inconsistent with high ethical, moral, and professional standards."[25]

Goodwill goes to the writer's underlying motivation.[26] Specifically, a writer with goodwill appears to act reasonably towards other parties of the dispute.[27] A writer who projects negative emotions onto other parties or engages in ad hominem attacks does not evince goodwill, giving the audience reason to doubt her credibility.[28]

An intelligent writer "is a trustworthy source of information in terms of *ability*."[29] That writer is informed, adept at research, organized, analytical, deliberate, empathetic, practical, articulate, eloquent, diligent, and innovative.[30]

C. *Where Ethos Resides*

These characteristics of ethos suggest that ethos resides within the writer herself. In fact, however, scholars have a variety of perspectives on where ethos resides. As explained further below, Plato, Michael Smith, and Kristen Tiscione emphasize the actual writer herself. Aristotle and Christopher Rideout focus on the writing itself. Isocrates, Kirsten Davis, and Melissa Weresh focus on the relationship between writer and reader. Almost all modern scholars would acknowledge that ethos resides in all of these areas to some degree, but scholars' differing emphases provide useful lenses through which to view the underexamined ethos.

1. *Ethos in the Writer's Self*

For Plato, Smith, and Tiscione, you can't sell what you don't have. Plato's "philosophical epistemology could virtually guarantee [a]

23. *Id.* at 136–38. Legal writers, and particularly novice legal writers, frequently struggle with how to write with a confident tone. For exceptional instruction and examples on how to do this, see MEGAN MCALPIN, BEYOND THE FIRST DRAFT: EDITING STRATEGIES FOR POWERFUL LEGAL WRITING (2014).

24. SMITH, *supra* note 12, at 138–39.

25. *Id.* at 139–44.

26. *Id.* at 144–47.

27. *Id.* at 145.

28. *Id.* at 145–47.

29. *Id.* at 150 (emphasis in original).

30. *Id.* at 150, 188–89 (summarizing ways that writers can actively demonstrate intelligence). Many of these traits overlap with and contribute to effective persuasion through logos. *Id.* at 28–29.

direct relationship between the self, language, and truth."[31] Tiscione agrees, arguing that "to 'be worthy of belief,' legal writers must *be* credible and honest."[32] Smith acknowledges a difference between actual credibility and the appearance of it; however, Smith explicitly connects ethos to the actual character of the writer when he argues that "in many instances, an advocate can only evince a trait of credibility if he or she actually possesses it."[33] When ethos springs from the writer as a person, ethos is understood as a set of characteristics that the writer has; the writer can then live out those characteristics in her writing.[34]

Actually possessing particular characteristics likely makes expressing them in writing easier and more powerful. As Rideout notes, however, requiring the writer to actually possess these characteristics to persuade effectively through ethos "risk[s] blurring the line between rhetorical advice and something more akin to moral or ethical advice."[35] The risk might be worth taking. Modeling and encouraging good character are core to faithfully executing a law professor's duty to her students and to the profession.[36] Smith and Tiscione are no doubt keenly aware of this commitment. Nevertheless, the actual-possession perspective does not account for traits to be developed during the learning-to-write and writing processes.[37] As a result, emphasizing the actual possession of the traits may hinder a novice legal writer's development unnecessarily, particularly when the writer is struggling to reconcile who she is as a person with who she is becoming as a lawyer. These obstacles may become even more difficult to surmount when the novice writer suffers from imposter syndrome.

2. *Ethos through the Writing*

For Aristotle, ethos lives wholly within the speech itself.[38] "Persuasion is achieved by the speaker's personal character when the

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31. Rideout, *supra* note 12, at 36.

32. KRISTEN KONRAD ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION 203 (2009) (quoting Aristotle) (emphasis added).

33. SMITH, *supra* note 12, at 126.

34. Weresh, *supra* note 9, at 233–34.

35. Rideout, *supra* note 12, at 21.

36. A legal writing professor's positive ethos promotes student learning and models the professional norms for which lawyers should strive. Kirsten K. Davis, *Building Credibility in the Margins: An Ethos-Based Perspective for Commenting on Student Papers*, 12 LEGAL WRITING: J. LEGAL WRITING INST. 73, 76 (2006).

37. *See* Rideout, *supra* note 12, at 40–45.

38. Aristotle, *supra* note 1, at 1356a; Rideout, *supra* note 12, at 30, 34. Rideout explains that "the actual qualities of the speaker matter less for Aristotle (and in his view, for the listener) than how the speech represents the character of the speaker. The character of the speaker is consequently more of an artifice, more linguistic, more representational." *Id.* at 23.

speech is so spoken as to make us think him credible."[39] Specifically, persuasion through ethos "should be achieved by what the speaker says, not by what people think of his character before he begins to speak."[40] Aristotle's view differs from scholars who ground ethos in the actual advocate. When limited to the speech alone, ethos "emerges less from the qualities of the actual speaker and more from the self that is a construct of the speech or writing."[41]

Initially, Aristotle's view may appear stunted and therefore a poor fit for modern life. From the first day of law school on, aspiring lawyers are taught that what they do in class, outside of school, and online impacts their credibility as practicing lawyers.[42] But before dismissing it out of hand, the Aristotelian view offers some valuable insight for modern legal writers. From an advocate's perspective, maintaining focus on the writing alone makes it more likely that a decision will spring from the underlying issues and analysis in the case. The decision, then, will not be inflated or tainted by arguably non-substantive, irrelevant considerations, like whether the writer made an online faux pas in law school or failed to follow formatting instructions in an earlier submission to the court. In this sense, the Aristotelian view is more forgiving to the advocate, and, as such, it promotes justice for the client.

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39. Aristotle, *supra* note 1, at 1356a.

40. *Id.*

41. Rideout, *supra* note 12, at 23.

42. Larry M. Boyle, *From the Shoulders of Giants*, 46 ADVOC. 12, 15 (2003) ("[L]egal educators should start the process [of teaching professionalism] early. Law professor Neil Franklin had this concept in mind when he told me, '*First year law students are really part of the legal profession. They are in the process of earning their professional reputations—it starts the first day of law school.*'"); Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. REV. 229, 248 (2004) ("Some say that you start to build your reputation as soon as you are admitted to the bar. In reality, you started building your reputation, positive or negative, when you entered law school. Your classmates—the people scrutinizing you—are some of the same people with and against whom you will practice law."); John Lande, *My Last Lecture: More Unsolicited Advice for Future and Current Lawyers*, 2015 J. DISP. RESOL. 317, 324 (2015) ("Don't do or say anything that might come back to haunt you. Lawyers' reputations are invaluable. Once you develop a bad reputation, you will have a hard time rehabilitating it. Your legal reputation starts in law school. Your professors may not give you good references and your classmates may not give you referrals or say good things about you based on how you acted in law school. In addition to the intrinsic value of treating others well and obeying the rules, you have a very practical self-interest in having others think highly of you."); Dylan T. Thriffiley, *New Bar Members: Meet the New Code of Professionalism*, 66 LA. B.J. 224, 224 (2018) ("I will never forget my law school orientation when a professor took the stage and said, 'Your legal career started yesterday.' That statement had a profound impact on our class, as it was a stark reminder that your reputation is bigger than the four corners of your diploma."); *Legal Roundup*, FLA. B. NEWS (Dec. 15, 2008), https://www.floridabar.org/the-florida-bar-news/legal-roundup-44 ("Your reputation for professionalism starts on your first day of law school.").

Furthermore, from any legal writer's perspective, a credibility determination from the writing alone is desirable in that it insulates the reader from implicit biases that may shade the reader's perceptions. The risk of implicit bias impacting a writer's credibility is more than hypothetical. One study revealed that a memo purportedly written by a black lawyer was perceived to have more spelling, technical, factual, and formatting errors than the same memo purportedly written by a white lawyer.[43] The white lawyer's memo was generally perceived to be more analytically sound.[44] As noted above, editing, polishing, accurately portraying the facts and the law, and conducting sound analysis are key tools for persuasion through ethos. Looking beyond the document alone results in cognitive distortions that have a disproportionately negative impact on historically marginalized groups.

3. Ethos in the Discoursal Self

Rideout takes a more postmodern approach and places ethos somewhere between where Plato, Aristotle, Smith, and Tiscione would. He "argue[s] that the *ethos* of a legal writer is best understood discoursally."[45] In Rideout's view, the real self of the writer simply is not knowable from the writing.[46] The knowable self is the one that emerges as a construct of the writing process and the writing.[47] "Modern *ethos* is a matter of organizing and structuring the components of the self discoursally. We construct a self within the text, and that constructed self can project an *ethos*."[48] Like other scholars, Rideout centers persuasion through ethos on the traits of the writer—but to Rideout, those traits are derived from the self of the writer constructed through the writing.[49]

Though Rideout contends that the real self is not knowable from the writing, he also acknowledges that an author can convey the appearance of her real self as a construct of her writing.[50] Rideout suggests that when the real voice is a construction of the text, its appearance of being "real" may make it all the more compelling.[51] "[W]e may feel like we are hearing the true character of the writer,

43. Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS YELLOW PAPER SERIES (2014), https://nextions.com/portfolio-posts/written-in-black-and-white-yellow-paper-series/.

44. *Id.*

45. Rideout, *supra* note 12, at 23.

46. *Id.* at 41.

47. Rideout's approach is similar to Nedra Reynolds' in *Ethos as Location: New Sites for Understanding Discursive Authority*, 11 RHETORIC REV. 325, 326 (1993) ("*Ethos*, like postmodern subjectivity, shifts and changes over time, across texts, and across competing spaces.").

48. Rideout, *supra* note 12, at 40.

49. *Id.* at 60.

50. *Id.* at 44.

51. *Id.*

someone who cares enough about an issue to come forward, break through the normal conventions, and 'speak' directly to the reader."[52] In so doing, the writer strengthens her authority on the subject.[53] Rideout cautions, however, that to persuade effectively in this manner likely requires advanced skill.[54]

Rideout's multidimensional discoursal self acknowledges the complexity of the modern self where the Aristotelian self is one-dimensional.[55] Moreover, the discoursal self is consistent with the reality that parts of the self are in different stages of development. As a result, conceptualizing ethos as communicated through the discoursal self can empower legal writers to persuade through ethos authentically as they develop their competence in analysis and writing.[56]

4. Ethos in the Writer-Audience Relationship

The scholars discussed to this point emphasize the writer or the writing as the locus of ethos. As a result, their examination of ethos centers primarily on the writer and the writer's demonstrated characteristics, like diligence, respectfulness, and candor.[57] The scholars who locate ethos within the writer and writer-through-writing have thoughtfully and closely examined what Weresh calls "source-characteristic attributes."[58] To be clear, all of the scholars discussed above certainly recognize that the writer does not exist in a vacuum: the audience's perception of credibility is necessary for

52. *Id.*
53. *Id.*
54. *Id.*
55. *See id.* at 37 (noting the "flatness" of self in classical rhetoric).
56. *See id.* at 45 ("When we introduce law students to legal writing, we are also guiding them in the construction of a new writerly self—the discoursal self of a legal writer. And in doing so, we are also guiding them in the construction of the persona that will become a primary part of their *ethos* as a legal writer—whether or not we choose to explicitly discuss *ethos* as a component of legal persuasion.").
57. Rideout engages briefly with the relational aspect of ethos when he suggests that the appearance of the real writer within the writing can strengthen persuasive impact. *Id.* at 44.
58. Weresh, *supra* note 9, at 233.

persuasion through source-characteristic ethos.[59] Their main focus, however, has been on the writer side of the equation.[60]

There is, of course, another side to the equation: the reader. "For Isocrates, ethos is the speaker's prior reputation, developed during life."[61] "Isocrates posits a largely unmediated relationship between the character of the speaker and his or her audience."[62] In Isocrates's world, if an advocate wants to persuade through ethos, that advocate would carefully tend to her reputation with fellow citizens to establish credibility[63]—plain and simple.[64] Unlike Aristotle, Isocrates would posit ethos as the most important means of persuasion, without qualification.[65] Existing reputation is more important than the actual speech itself.[66]

But there is more to ethos through relationship. As Kirsten Davis explains, "*ethos* is not a static concept comprising only qualities intrinsic to the speaker or writer; rather, *ethos* is constructed through exchanges between reader and writer."[67] Davis is right. Davis and Weresh take a more dynamic and sophisticated approach to ethos through relationship in what Weresh terms "source-relational attributes of ethos."[68] Davis examines source-relational ethos in the

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59. *See, e.g.*, FROST, *supra* note 16, at 73 ("[P]ossessing the proper ethos or character is not sufficient. The advocate must also take steps to insure that the audience perceives or appreciates the fact that the advocate possesses it."); SMITH, *supra* note 12, at 125 ("An advocate who lacks credibility in the eyes of a decision-maker will have very little chance of persuading that decision-maker to adopt the advocate's position."); Frost, *supra* note 9, at 109 (arguing that "merely possessing the proper *ethos* or character is not sufficient. The advocate must also take steps to ensure that the audience perceives or appreciates the fact that the advocate possesses it.").

60. Nedra Reynolds indicates that source-characteristic ethos alone is "an insufficient category to account for the social production of discourse because it emphasizes individuals as they act in isolation, simply reproducing what the community would approve." Reynolds, *supra* note 47, at 328.

61. Benoit, *supra* note 12, at 258.

62. Rideout, *supra* note 12, at 23.

63. *Id.* (characterizing Isocrates's approach as grounded in a "largely unmediated relationship between the character of the speaker and his or her audience").

64. *Id.* at 30 (explaining that "for Isocrates, good character was an uncomplicated matter of possession—the good orator and writer quite simply possessed good character").

65. ISOCRATES, *supra* note 12; Benoit, *supra* note 12, at 257.

66. Benoit, *supra* note 12, at 257.

67. Davis, *supra* note 36, at 78.

68. Weresh, *supra* note 9, at 234. James Boyd White in a somewhat similar vein acknowledges that rhetoric creates and is created by community. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 702 (1985). White posits that rhetoric should facilitate questions like: "What place is there for me, and for others, in the universe defined by this discourse, in the community created by this text? What world does it assume? What world does it create?" *Id.* Similarly, composition theorist Karen LeFevre recognizes the existence of ethos in relationships. She explains that "the social matrix of necessary others who form community and

context of the professor-student relationship as a way to promote more effective student learning.[69] Weresh examines source-relational ethos in the context of building relationships between professional legal writers and their audiences.[70] This Article shares the professional legal writer-audience context, but with a more specific focus on the relationship between judges as professional writers and their multilayered audience.

Davis and Weresh implicitly use Rideout's concept of the discoursal self to examine ethos within the relationship developed between writer and audience.[71] The roots of the source-relational approach are apparent in James Boyd White's suggestion that there is a "communal character" of ethos.[72] White argues that "Every time one speaks as a lawyer, one establishes for the moment a character—an ethical identity[—]for oneself, for one's audience, and for those one talks about, and in addition one proposes a relation among the characters one defines."[73] Weresh relies on cognitive theory to inform her examination.[74] To this end, she notes that scientific studies, while not indisputable, provide compelling support for "the notion that a positive ethos is based not only on the positive characteristics of the source, but on the relationship the source is able to foster with her audience."[75] Therefore, to persuade through ethos, the writer must create a positive relationship with the reader.[76] Weresh examines

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audience is less obvious, but nevertheless present. Ethos, we might say, appears in that socially created space, in the 'between,' the point of intersection between speaker or writer and listener or reader." KAREN BURKE LEFEVRE, INVENTION AS A SOCIAL ACT: STUDIES IN WRITING AND RHETORIC 45–46 (1st ed. 1987).

69. Davis, *supra* note 36, at 74–75.

70. Weresh, *supra* note 9, at 234.

71. I say implicitly because Rideout's ethos through the discoursal self approach postdates Davis's and Weresh's scholarship on ethos.

72. White, *supra* note 68, at 690.

73. *Id.*; *see* Scott Fraley, *A Primer on Essential Classical Rhetoric for Practicing Attorneys*, 14 LEGAL COMM. & RHETORIC: JAWLD 99, 106–07 (2017).

74. Weresh, *supra* note 9, at 234–35.

75. *Id.*; *cf.* BERGER & STANCHI, *supra* note 18, at 21–23; Mullins, *Jedi or Judge*, *supra* note 9, at 339–41 (explaining that appealing to the reader's mind through knowledge and use of cognitive theory is necessary for understanding persuasion in judicial opinions); Mullins, *Subtly Selling*, *supra* note 9, at 1113–55 (highlighting techniques legal writers can use to persuade through cognitive theory and their presence in judicial opinions).

76. Weresh, *supra* note 9, at 234; *see also* SMITH, *supra* note 12, at 125 (noting that the "bond of kindred spirits" between writer and reader enhances persuasion). Davis has made a similar argument with respect to the relationship constructed in writing between law professor and student in the process of commenting on a student's written work:

> Constructing the legal writing professor's identity as an ethical (or unethical) actor is not a solitary process; rather, it is a collaborative process that happens through the interaction between teacher and student. One of the places where this interaction between student and teacher takes place is in the recursive writing process: the student completes a writing assignment, the teacher provides written

source-relational ethos through the framework of classical rhetoric's Canons II (organizational strategies) and III (stylistic strategies).[77]

The purpose of this Article is to further explore ethos in the writer-reader relationship. But this relationship is not just any relationship. It is the relationship between judge and audience. An examination of this relationship requires a discoursal concept of both the judge-writer and audience-readership. Using those concepts, this Article will show how judges can use cognitive theory to build relationships with their audience and how they can effectively do so by exercising emotional intelligence.

II. SOURCE-RELATIONAL ETHOS IN JUDICIAL WRITING

The stronger the relationship—the connection, the bond—between judge and audience, the more credible the judge will appear and the more persuasive the judge's writing is likely to be. I will start with the preliminary question that you have probably already silently asked—which audience do you mean exactly? From there, this Part will explore where and how judges build source-relational ethos and how judges can do so effectively.

A. The Parties to the Relationship

In the specific circumstance of the judge and audience, the parties to the relationship are complex. To begin, the parties on both sides are layered. On the writer side, there is the judge as a person, the judge as a writer, the judge as a representative for the jurisdiction, and the judge as a representative of the judiciary itself—a branch of government that serves the people.

The reader side of the relationship is likewise layered and complex. It starts with the parties and their counsel and may extend to reviewing courts, panelists on the reviewing courts, the legal community, other branches of government, and to the broader citizenry—directly and secondhand through media. Indeed, the judge-citizenry relationship, once vague and largely static, is currently dynamic and changing. People do not rely solely on traditional newspapers and Nina Totenberg for information about court opinions anymore. For one thing, people can more easily access opinions for themselves online. Perhaps more importantly, social media and the blogosphere are bringing judicial writing to more and

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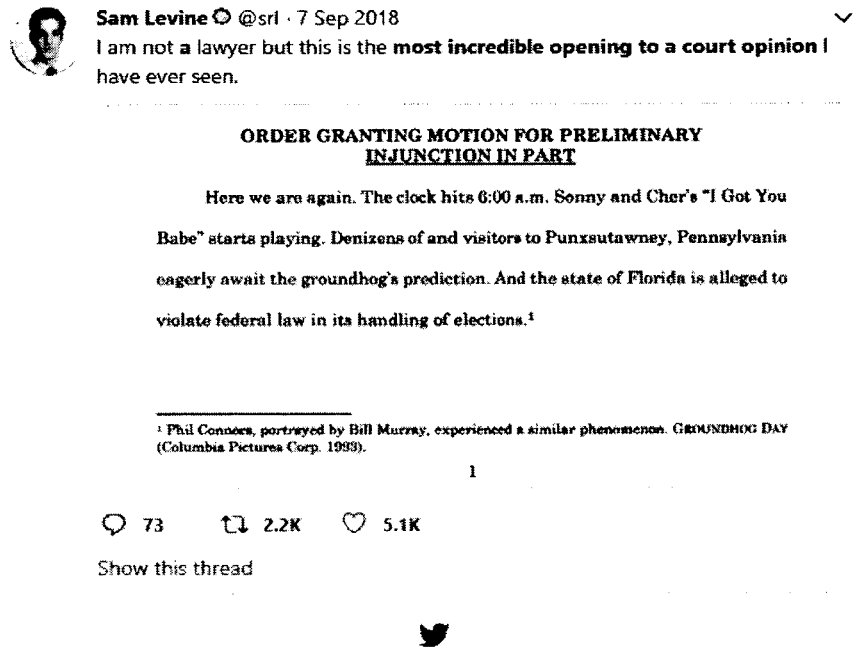
comments on that assignment, and the student responds to those comments by making revisions.

Davis, *supra* note 36, at 75. Some describe ethos as "a relationship between speaker and listener akin to friendship." Francis J. Mootz III & Leticia M. Saucedo, *The "Ethical" Surplus of the War on Illegal Immigration*, 15 J. GENDER, RACE & JUST. 257, 262 (2012).

77. Weresh, *supra* note 9, at 237–69.

more people—and people are paying attention. For example, consider the following tweet[78]:



This tweet illustrates the complexity and indeterminacy of the judge-citizenry relationship. The tweeter, Sam Levine, is a journalist, not a lawyer.[79] He shared a snippet of a district court order—judicial writing that one would expect to have the most limited readership. The tweet likely reached tens of thousands of people given that Levine had 17,000 followers at the time the tweet was published, and the tweet got over 2000 retweets (which, of course, doesn't include "virtual" retweets, like this one).[80] The tweet also got over 5000 likes and generated over seventy comments.[81]

Simply put, it is impossible to pinpoint exactly, on a large-scale and consistent basis, the audience of a judicial opinion. This is precisely what differentiates today's judges from lawyers. Modern

78. Sam Levine (@srl), TWITTER (Sept. 7, 2018, 10:01 AM), https://twitter.com/srl/status/1038109978182209539 (quoting Madera v. Detzner, 325 F. Supp. 3d 1269, 1273 (N.D. Fla. 2018)).

79. *Sam Levine*, HUFFINGTON POST, https://www.huffpost.com/author/sam-levine (last visited Nov. 13, 2019).

80. Levine, *supra* note 78.

81. *Id.*

scholars of rhetoric acknowledge the more difficult task of today's lawyers vis-à-vis their classical counterparts in appealing to their audience—the judge or the jury—and recommend research into each to better connect with their audience.[82] Judges largely do not have that luxury. Significantly, however, it's not impossible to examine the judge-audience relationship because human beings share fundamental ways of thinking and reacting to stimuli.[83] This, of course, is the premise of scholars who study persuasion through the lens of cognitive theory.[84] As Steven Winter explains, "reason, language, and knowledge can be understood only in terms of the cognitive process. . . . [The process] is grounded in a reality that to a very large degree is shared by all human beings."[85] As a result, the cognitive theoretical framework is widely applicable.[86] Readers' diversity of experience or perspective does not change the framework; however, as discussed below, it can change the impact and efficacy of certain approaches.

B. Relationship Status?

It's complicated. Just as the parties to the relationship are layered, the relationship is too. The relationship is crucial because judicial opinions are the means through which system legitimacy is built.[87] As Alexander Hamilton observed, the courts have "neither Force nor Will, but merely judgement."[88] The sum of each individual

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82. *See* Frost, *supra* note 9, at 105–07.

83. BERGER & STANCHI, *supra* note 18, at 45.

84. *See id.*

85. Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1130–31 (1989).

86. To this end, Professor Winter explains that our commonality of biology and basic experience shape how we perceive and communicate about the world. *Id.* at 1140. In other words, "Cognitive science indicates that language is not a mysterious, autonomous 'creature,' but is rather a product of a human cognition that arises from having real bodies and real experiences in real social and physical environments." *Id.* at 1157–58. To substantiate his claim, Winter shows how categories that humans use are systematically organized and applied and extended in consistent ways. *Id.* at 1141 n.118; *see also* BERGER & STANCHI, *supra* note 18, at 18.

87. RICHARD KUGLER, SIMPLE JUSTICE 706 (1976) (sharing Justice Tom Clark's observation that "[w]e have to convince the nation by the force of our opinions"); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1333–39 (2008) (acknowledging that written opinions contribute to the legitimacy of the judicial system); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) (explaining that writing opinions "reinforce[s] our oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do").

88. THE FEDERALIST No. 78, at 378 (Alexander Hamilton) (Terence Bell ed., 2003). Scholars have echoed this sentiment ever since. *See, e.g.*, Robert J. Cordy, *The Interdependent Relationship of a Free Press and an Independent Judiciary in a Constitutional Democracy*, 60 B.C. L. REV. SUPP. I.-1, I.-5 (2019) ("The power of the courts depends on the confidence and trust of the people.").

judge-audience relationship is the basis of continued legitimacy of the system.

The first relationship is between the judge and the parties. The parties have a deep interest in the outcome of the matter. The presiding judge or judges have a responsibility to the parties to resolve the dispute objectively and in accordance with the law. Moreover, they should do so in a way that demonstrates the parties were treated fairly by the process. Judges must convince each other of the soundness of their decisions and (ideally) should be mindful of reversing or expressing disagreement with each other given their status as components of a single cohesive branch. Judges should also show other branches of government that they, the judiciary, are mindful of the separation of powers and the equal status of each branch while maintaining the authority to override or change decisions of other branches. The most complex judge-audience relationship of all is the judge-citizenry audience. Sometimes people experience this relationship directly and other times they engage with it secondhand through the media (a relationship within a relationship). The judge has authority to tell the citizenry what to do. But the judge works for the people, and in this sense, the judge is accountable to the citizenry.

The complexity of the judge-audience relationship should not deter examination of it, especially given its importance. Indeed, recent commentary suggests that the relationship between the judiciary and the people has been deteriorating.[89] Therefore, close examination of the relationship is pressing at this particular moment in time. Source-relational ethos provides a functional frame within which to examine and strengthen the complex judge-audience relationship.

C. The Opportunity to Build Relationships in Judicial Writing

Relationships are the foundation of credibility.[90] People typically develop relationships through interaction. Judges are unique in that their primary opportunity to interact with others in their judicial role is through their writing. There are other forms of interaction, but the opportunities are increasingly limited farther up the chain we go.

Like other forms of legal writing, judicial opinions are functional documents that serve multiple purposes at once.[91] The impetus for

89. Amelia Thomson-DeVeaux & Oliver Roeder, *Is The Supreme Court Facing A Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018, 6:00 AM), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/ ("[C]onfidence in the [Supreme Court] has been declining over the past 30 years."); *see also* Megan Brenan, *Confidence in Supreme Court Modest, but Steady*, GALLUP (July 2, 2018), https://news.gallup.com/poll/236408/confidence-supreme-court-modest-steady.aspx (discussing the survey referenced in the FiveThirtyEight post).

90. *See* Weresh, *supra* note 9, at 233–35.

91. Mullins, *Jedi or Judge*, *supra* note 9, at 327.

opinions is, of course, to resolve disputes and communicate the reasoning behind the resolution.[92] The dispute-resolution purpose serves the parties and their counsel and informs these readers of the disposition and the reasons for it.[93] "Judges must demonstrate consistent application of the law in the case before them, and they must also facilitate the consistent application of the law in the future."[94] Finally, judges write opinions to persuade all of their audiences that the decision rendered is correct.[95]

Persuasion is where we meld the art of rhetoric with the science of cognitive psychology; persuasion is where the judge builds relationships with the audience.[96] As a result, persuasion is the vehicle through which the judge can establish source-relational ethos.

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92. *See, e.g.*, MARY L. DUNNEWOLD ET AL., JUDICIAL CLERKSHIPS: A PRACTICAL GUIDE 223 (2010) (explaining that a narrow purpose of the opinion is to inform the reader of basis for judgment); ELIZABETH FAJANS ET AL., WRITING FOR LAW PRACTICE: ADVANCED LEGAL WRITING 356 (2d ed. 2010) (noting that opinions, among other things, resolve disputes and communicate the disposition and the reasons for it); JOYCE J. GEORGE, THE OPINION WRITING HANDBOOK 3 (5th ed. 2007) (noting that one purpose of the opinion is to resolve disputes); WILLIAM D. POPKIN, EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES 1 (2007) (one of the reasons judges write is to decide cases); JENNIFER L. SHEPPARD, IN CHAMBERS: A GUIDE FOR JUDICIAL CLERKS AND EXTERNS 113 (2012); Elizabeth Ahlgren Francis, *The Elements of Ordered Opinion Writing*, 38 JUDGES' J. 8, 8 (1999) (stating that informing and explaining are two of the purposes of the judicial opinion); Gerald Lebovits & Lucero Ramirez Hidalgo, *Advice to Law Clerks: How to Draft Your First Judicial Opinion*, 36 WESTCHESTER B.J. 29, 29 (2009) (explaining that the primary purpose of the opinion is to give reasons); Mullins, *Jedi or Judge*, *supra* note 9, at 327.

93. *See supra* note 92.

94. Mullins, *Jedi or Judge*, *supra* note 9, at 327; *see* DUNNEWOLD ET AL., *supra* note 92, at 223 (stating one of the broad purposes of the opinion is to "create consistency in the law"); SHEPPARD, *supra* note 92, at 113 (emphasizing that opinions provide guidance to future courts); Wald, *supra* note 87, at 1372; *see also* Hart v. Massanari, 266 F.3d 1155, 1176–77 (9th Cir. 2001) (explaining that "[w]riting an opinion is not simply a matter of laying out the facts and announcing a rule of decision. Precedential opinions are meant to govern not merely the cases for which they are written, but future cases as well. . . . It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. . . .").

95. *See* DUNNEWOLD ET AL., *supra* note 92, at 223 ("Another purpose of an opinion is to persuade. An appellate opinion should persuade readers that the court's reasoning and ultimate decision are correct."); FAJANS ET AL., *supra* note 92, at 355 ("[T]he opinion endeavors to convince its readers that the matter was properly decided."); GEORGE, *supra* note 92, at 3 (finding that the purpose is to "persuade any concerned audience of the reasonableness of the disposition"); Lebovits & Hidalgo, *supra* note 92, at 29 (stating that judicial opinions are persuasive writing designed to convince possibly unfavorable audiences); Mullins, *Jedi or Judge*, *supra* note 9, at 328–29.

96. Mullins, *Jedi or Judge*, *supra* note 9, at 328–29.

D. Relationship-Building Tools for Judicial Writing

1. A Brief Background on Persuasion through Cognitive Theory[97]

How can judges use the opportunity that their writing creates to build relationships? They must intentionally approach the reader, and how the reader engages with judicial writing, through a cognitive theoretical framework.[98] The reader engages with judicial opinions on a conscious level.[99] Significantly, however, the reader's unconscious is always operating alongside the conscious.[100] The concept of the dual nature of the human mind dates back to antiquity,[101] but it has attracted considerable attention with recent and highly accessible works by people like Nobel Prize winning

97. A note: Persuasion through cognitive theory has been the subject of scientific inquiry and interdisciplinary study for decades. The entire scope of persuasion through cognitive theory is beyond the scope of this Article (and this author).

98. *See* Mullins, *Jedi or Judge*, *supra* note 9, at 335–39.

99. *Id.* at 333.

100. *Id.* at 334; Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & POL'Y 147, 160–62 (2013) (differentiating between the conscious and the unconscious mind).

101. *See* Frankish & Evans, *supra* note 8, at 2; Jonathan St. B. T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 PERSP. ON PSYCHOL. SCI. 223, 223 (2013). These theories, however, are not without critique. For discussion of the primary criticisms, and responses to them, see *id.* at 223–37.

behavioral economists Dan Kahneman[102] and Richard Thaler,[103] psychologist Robert Cialdini,[104] and legal scholar Cass Sunstein.[105]

The unconscious is the quick thinker, frequently relying on decision-making shortcuts called judgmental heuristics that have most often led us in the right (or right enough) direction.[106] Without our quick-thinking unconscious and the heuristics it uses, we would be stymied by the most basic of daily tasks.[107] For example, when navigating an unfamiliar public transit system, most people instinctively follow the crowd to figure out everything from which direction to walk to how to pay for the ride.[108] Following the crowd is a common judgmental heuristic called "social proof."[109]

The unconscious is more active than most people realize.[110] Indeed, according to Kahneman, "In the picture that emerges from recent research, the [unconscious] is more influential than your

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102. *See generally* THOMAS GILOVICH ET AL., HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGEMENT (2002) (exploring, among other things, what intuitive judgment is and how it impacts everyday decisions); KAHNEMAN, *supra* note 8, at 10–11 (explaining the unconscious "fast" mind and how it relies on heuristics and the conscious "slow" mind that relies on analytical engagement); Daniel Kahneman, et al., *Reducing Noise in Decision Making*, 94 HARV. BUS. REV. 18, 18 (2016) (arguing, among other things, that algorithms are better decision-makers than humans because, unlike humans, they do not overestimate the reliability of their own decisions).

103. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (Yale University Press 2008) (discussing subtle incentive systems that can be used to promote pro-social choices); Richard Thaler, *From Cashews to Nudges: The Evolution of Behavioral Economics*, 108 AM. ECON. REV. 1265 (2018).

104. *See generally* ROBERT CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION (2007) [hereinafter CIALDINI, INFLUENCE] (explaining how heuristics work and categorizing heuristic-based persuasive strategies); ROBERT CIALDINI, PRE-SUASION: A REVOLUTIONARY WAY TO INFLUENCE AND PERSUADE (2016) [hereinafter CIALDINI, PRE-SUASION] (highlighting how to be successful in persuasion by setting yourself up to succeed before the interaction even begins); NOAH GOLDSTEIN ET AL., YES! 50 SCIENTIFICALLY PROVEN WAYS TO BE PERSUASIVE (2008).

105. *See* THALER & SUNSTEIN, *supra* note 103; CASS R. SUNSTEIN, HUMAN AGENCY AND BEHAVIORAL ECONOMICS: NUDGING FAST AND SLOW (2017) (examining different types of "nudges" and exploring the fundamental questions about human freedom in a society that uses "nudges").

106. *See* Berger, *supra* note 100, at 161 (explaining that "fast" thinking "serves us well," and so we continue to use it as we navigate life).

107. *Id.* (explaining that "fast" thinking is essential to get through life).

108. Mullins, *Jedi or Judge*, *supra* note 9, at 337.

109. *Id.*

110. *Id.*; KAHNEMAN, *supra* note 8, at 13 (explaining that "[i]n the picture that emerges from recent research, the [unconscious mind] is more influential than your experience tells you, and it is the secret author of many of the choices and judgments you make"); Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 277 (2011) (explaining that "much research indicates that because of the way the mind works and the culture is constructed, images and stories unavoidably shape our perceptions and reasoning processes, often unconsciously").

experience tells you, and it is the secret author of many of the choices and judgments you make."[111] Scientists agree on the dual nature of our minds, but they have yet to reach a broad consensus on exactly when we use our unconscious and to what degree.[112] Significantly, however, some research suggests that the operation of the unconscious has to do with our degree of emotional involvement.[113] Specifically, our unconscious minds exercise greater influence over our perceptions and decision-making as our emotional involvement in the subject rises.[114]

The operation of the unconscious mind, and its role in how readers perceive, process, and respond to information, creates powerful opportunities for persuasion in judicial writing.[115] Cialdini, dubbed "the great guru of social influence" by Sunstein and Thaler,[116] organized the modern cognitive theory-based persuasive heuristics into seven broad themes[117]: We believe people with authority, or at least the appearance of it.[118] We believe people we like (what Cialdini calls "liking"),[119] particularly when we share a core aspect of identity with them (the "unity principle").[120] We follow the crowd ("social

111. KAHNEMAN, *supra* note 8, at 13; *see also* Mullins, *Jedi or Judge*, *supra* note 9, at 332–39; Winter, *supra* note 85, at 1108 (observing that the paradigm of human thought as conscious and rational does not accurately reflect human rationality).

112. *See* Evans & Stanovich, *supra* note 101, at 223, 237; Mullins, *Jedi or Judge*, *supra* note 9, at 341.

113. *See* Berger, *supra* note 100, at 161; Veronika Denes-Raj & Seymour Epstein, *Conflict Between Intuitive and Rational Processing: When People Behave Against Their Better Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 819, 819 (1994).

114. Berger, *supra* note 100, at 161; Denes-Raj & Epstein, *supra* note 113, at 819.

115. *See* Mullins, *Jedi or Judge*, *supra* note 9; Mullins, *Subtly Selling*, *supra* note 9. Berger makes the same argument with respect to lawyers, specifically that lawyers should know something about how judges' and juries' minds work in order to make "more informed and deliberate choices about persuasion." Berger, *supra* note 100, at 153, 192–93; *see also* Berger, *supra* note 110, at 317 (arguing the same); *cf.* Winter, *supra* note 85, at 1130 n.86 (arguing that once we grasp the cognitive structures that shape our legal reasoning, "we are empowered to reconstruct our legal concepts in ways that are more useful").

116. THALER & SUNSTEIN, *supra* note 103, at 68; *see also The Uses (and Abuses) of Influence*, HARV. BUS. REV. (2013), https://hbr.org/2013/07/the-uses-and-abuses-of-influence (noting that Cialdini is "considered the leading social scientist in the field of influence").

117. CIALDINI, INFLUENCE, *supra* note 104, at ix.

118. *See id.* at 208–36.

119. *Id.* at 167–207.

120. CIALDINI, PRE-SUASION, *supra* note 104, at 173–208. In a similar vein, some scholars who study risk perception and resulting impact on policy choices argue that we are influenced by "cultural cognition." Cultural cognition "causes people to interpret new evidence in a biased way that reinforces their predispositions." Dan Kahan, *Fixing the Communication Failure*, 463 NATURE 296, 297 (2010). Cultural cognition is what makes people believe experts who share their values over those who do not. *Id.* Cultural cognition scholars argue

proof").[121] We feel compelled to remain consistent to our prior commitments ("commitment and consistency"),[122] and when someone scratches our backs, we scratch theirs (the "rule of reciprocation").[123] Finally, we act fast when supplies are running out ("scarcity").[124]

While Cialdini approaches persuasion from a psychology/marketing perspective, the principles can be applied generally, and they have been applied to legal writing.[125] This Article focuses on authority and liking. Authority and liking are the most fundamental heuristics to judges' ethos in their roles as judges and as writers.

2. Authority

Cialdini does not prescribe a hierarchy in which the principles do or should operate. As he explains and illustrates them in the marketing context, the principles seem to operate independently sometimes, others alongside each other, and other times together. There is no clear hierarchy likely because what will persuade in a given situation will change based on the particulars of the situation.[126]

There is a notable difference between marketing and legal writing: a clear hierarchy is applied in the legal context, specifically with respect to judges. Authority is synonymous with legitimacy. Therefore, authority is the foundation of persuasion, whether through source-characteristic ethos or source-relational ethos (both understood in the multilayered ways they operate). Indeed, this is likely why some legal scholars argue that "*[e]thos*, properly understood in rhetoric, *is* authority."[127] Cialdini's own explanation of the power of authority highlights its foundational place in the legal setting. "[W]e are trained from birth to believe that obedience to

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that people have a strong emotional predisposition to accept data that aligns them with those in their group and reject data that would distance them from their group. *Id.* For more on cultural cognition, see the Cultural Cognition Project's website at http://www.culturalcognition.net/. For background on cultural cognition and some critique of the theory, see Sander van der Linden, *A Conceptual Critique of the Cultural Cognition Thesis*, 38 SCI. COMM. 1, 2 (2015).

121. CIALDINI, INFLUENCE, *supra* note 104, at 114–66.

122. *Id.* at 57–113.

123. *Id.* at 17–56.

124. *Id.* at 237–71.

125. *See* Anne E. Mullins, *Opportunity in the Age of Alternative Facts*, 58 WASHBURN L.J. (forthcoming 2019); Mullins, *Jedi or Judge*, *supra* note 9; Mullins, *Subtly Selling*, *supra* note 9; Peter Reilly, *Resistance is Not Futile: Harnessing the Power of Counter-Offensive Tactics in Legal Persuasion*, 64 HASTINGS L.J. 1171, 1190–1202 (2013); Stanchi, *supra* note 18.

126. *See The Uses (and Abuses) of Influence*, *supra* note 116 (providing advice from Cialdini using different principles based on the circumstances that the interviewer presented to him).

127. Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1365 (2016).

proper authority is right and disobedience is wrong. This message fills the parental lessons, the schoolhouse rhymes, stories and songs of our childhood and is carried forward in the legal, military, and political systems we encounter as adults."[128]

Source-characteristic ethos connects directly to authority. The source-characteristic ethos strategies are all components of professionalism.[129] Demonstrating positive source-characteristic ethos is a way for the source to show that she is what she purports to be—a competent and ethical lawyer or judge. Or, in Cialdini's words, "a proper authority."[130] As such, source-characteristic ethos is a direct path to authority.

Source-relational ethos has a more complicated connection to authority. Ultimately, the relationship that the judge must develop with the audience is one in which the judge maintains authority. But effective relationship building requires more than displays of authority (like solid analysis or confident writing) or proxies for authority (like following formatting requirements). Relationships are personal, nuanced, delicate, and fluid. As Garver puts it, "Legal *ethos* is unique in its need to combine trust and authority."[131] Using relationship-building techniques to inspire trust requires the judge to exercise emotional intelligence. Emotional intelligence will help the judge determine what techniques to use and how to use them so that the judge maintains the authority with which the judge writes and does so while creating a bond with the multilayered audience.

3. Liking

"Liking acts as an emotional bond that nurtures trust."[132] Researchers have identified several predictors of the people and things we are likely to like. Those predictors include similarity/unity, familiarity, admitting weakness, positive association, humor, and

128. CIALDINI, INFLUENCE, *supra* note 104, at 216.
129. SMITH, *supra* note 12, at 139–44.
130. CIALDINI, INFLUENCE, *supra* note 104, at 216.
131. Eugene Garver, *The Circumstances of Friendship: A Reply to Francis Mootz, Eileen Scallen, Paul Kahn, and Richard Sherwin*, 110 PA. ST. L. REV. 955, 957 (2006); *see also* Kathleen Dillon Narko, *Persuasion: Aristotle Still Works for Webb, Wood, and Kocoras*, 19 CBA REC. 54, 54 (2005) (advising trial lawyers that to be successful, the jury must respect you and then like you).
132. Carolyn Y. Nicholson et al., *The Role of Interpersonal Liking in Building Trust in Long-Term Channel Relationships*, 29 J. ACAD. MARKETING SCI. 3, 3, 5 (2001) (examining the role of liking in buyer and sales representative interactions).

cooperation.[133] The following Subparts will very briefly describe these predictors.[134]

a. Similarity/Unity and Familiarity

Similarity is a powerful relationship builder.[135] Researchers have yet to reach a consensus on why similarity leads to relationships: Some researchers argue that the link is grounded in our inherent self-centeredness.[136] Others tie similarity and relationships to our natural need to belong and to feel accepted.[137] Regardless of the reason that similarity is so compelling, emphasizing similarities is a highly effective way to bond with another person.[138]

Some psychologists call similarity-based liking "in-group favoritism."[139] The term makes sense. People tend to like others with whom they share an identity marker in common, like being alums of the same school or cheering for the same sports team.[140] Indeed, neuroscience research shows that the use of pronouns like "we" and "us" activate our brains' pleasure centers.[141] Those pronouns indicate membership in the same group.[142]

Notably, the purported similarity need not reflect similarity in a meaningful sense to create a bond; even similarity that is substantively irrelevant to anything at all influences us. This is why companies like Disney identify employee hometowns on their name badges.[143] Most of us have positive feelings when we encounter a stranger from a familiar place while traveling in a strange land (or,

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133. In addition to the listed predictors, we are also likely to like those we find physically attractive. *See* CIALDINI, INFLUENCE, *supra* note 104, at 171; Ingrid R. Olson & Christy Marshuetz, *Facial Attractiveness Is Appraised in a Glance*, 5 EMOTION 498, 498 (2005).

134. Notably, background on each of these predictors has filled the pages of countless journals. The goal of this section is to give sufficient background for the reader to understand how these predictors might work in a judicial writing setting.

135. CIALDINI, INFLUENCE, *supra* note 104, at 140; *see also* Jerry M. Burger et al., *What a Coincidence! The Effects of Incidental Similarity on Compliance*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 35, 41–42 (2004) (noting that perceived incidental similarity with a requester can lead to increased compliance).

136. Brett W. Pelham et al., *Implicit Egotism*, 14 CURRENT DIRECTIONS PSYCHOL. SCI. 106, 106 (2005).

137. *See* Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 497–529 (1995).

138. *See* CIALDINI, PRE-SUASION *supra* note 104, at 173–208.

139. *See id.* at 97.

140. *See id.* at 378–80.

141. Charles W. Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. PERSONALITY & SOC. PSYCHOL. 475, 475 (1990).

142. *Id.*

143. Lan Jiang et al., *The Persuasive Role of Incidental Similarity on Attitudes and Purchase Intentions in a Sale Context*, 36 J. CONSUMER RES. 778, 778–89 (2010) (showing that "a shared birthday or birthplace" between a salesperson and purchaser can lead to a greater "intention to purchase" the product).

in Disney's case, a magical one). We tend to prefer products and brands with the same letters as our names.[144] Happily chatting with someone from your hometown or selecting a brand of chips for lunch are small potatoes (so to speak) decisions, but similarity can nudge us in much larger-stakes decisions. These larger-stakes decisions include who we decide to help, what career we choose, where we live, and who we select as a long-term partner.[145] For example, we are more likely to provide significant aid to strangers with whom we share a birthday.[146] Dennis is much more likely to become a dentist than Walter or Roy, even though the three names are equally prevalent among men.[147] Phillip lives in Philly; Mercedes in Milwaukee.[148] Jenny and Jamaal are more likely to be married than Jenny and Calvin.[149]

Those who are similar to us are more likely to shape our thoughts and attitudes than those who are not.[150] For example, in one study, researchers told some participants that their brain waves were the same as the lab assistant's.[151] Study participants then saw the lab assistant in a video helping the homeless.[152] Those who were told that their brain waves were similar to the lab assistant's later rated themselves as more self-sacrificing than the control group.[153] What's more, they subsequently acted accordingly. When researchers asked

144. GOLDSTEIN ET AL., *supra* note 104, at 240 n.55; C. Miguel Brendl et al., *Name Letter Branding: Valence Transfers When Product Specific Needs Are Active*, 32 J. CONSUMER RES. 405, 405 (2005). In another study, researchers convinced some study participants that their brain waves were similar to the lab assistants. The participants with the similar waves tended to perceive themselves as sharing traits in common with the lab assistant and to adopt the attitudes of the lab assistant in follow up questioning. Noah J. Goldstein & Robert B. Cialdini, *The Spyglass Self: A Model of Vicarious Self-Perception*, 92 J. PERSONALITY & SOC. PSYCHOL. 402 (2007); *see* Burger et al., *supra* note 135, at 35–42 (discussing findings that "[u]ndergraduates who believed they shared a birthday (Study 1), a first name (Study 2), or fingerprint similarities (Study 3) with a requester were more likely to comply with a request than participants who did not perceive an incidental similarity").

145. Brett W. Pelham et al., *Why Susie Sells Seashells by the Seashore: Implicit Egotism and Major Life Decisions*, 82 J. PERSONALITY & SOC. PSYCHOL. 469, 469 (2002).

146. A study was done involving a purported astrology experiment where half of the study participants learned that they shared the same birthday with the other participant, who happened to be an undercover lab assistant. Burger et al., *supra* note 135, at 37–38. After the experiment was purportedly over, the lab assistant told the study participant that she needed someone to review an eight-page English paper and draft a one-page critique. *Id.* People with the same birthday were much more likely to help. *Id.*

147. Pelham et al., *supra* note 145, at 469.

148. *Id.*

149. GOLDSTEIN ET AL., *supra* note 104, at 239 n.54.

150. Goldstein & Cialdini, *supra* note 144, at 402.

151. *Id.*

152. *Id.* at 405–07.

153. *Id.*

participants if they would be willing to help in an additional study, those who rated themselves more self-sacrificing were more willing to help.[154]

While similarity is a powerful relationship builder, not all similarities are equally powerful. Both rare similarity and similarity that goes to our core identities appear to have the most impact. First, some research shows that the more rare we perceive the similarity to be, the more compelling it is.[155] For example, in one study, researchers tested the effect of telling test subjects that they had the same fingerprint as the lab assistant.[156] In the control group, which wasn't told anything about fingerprint similarity, forty-eight percent of subjects agreed to a request from the lab assistant.[157] In the group that was told they had the same fingerprint and that the print was fairly common, fifty-five percent of subjects agreed to the same request from the lab assistant.[158] In the group that was told that the print was rare, eighty-two percent of subjects agreed to the same request from the lab assistant.[159] Common similarity gave the requester a slight edge; rare similarity gave the requester a significant edge.[160]

Similarity that goes to our core identity is probably the most compelling—it's what Cialdini calls the unity principle.[161] I have described the unity principle as "liking on steroids."[162] Unity goes beyond basic similarity, which emphasizes who is like us. Instead, as Cialdini explains, unity is about "shared identities."[163] "It's about the categories individuals use to define themselves and their groups, such as race, ethnicity, nationality, and family, as well as political and religious affiliations."[164] "A key characteristic of these categories is that their members tend to feel at one with, merged with, the others."[165] With unity, "*we* is the shared *me*."[166] "We are heavily

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154. *Id.* at 407.

155. Burger et al., *supra* note 135, at 35; *see* Jiang et al., *supra* note 143, at 778–89 (showing that a shared birthday or birthplace between a salesperson and purchaser can lead to a greater intention to purchase the product).

156. Burger et al., *supra* note 135, at 35.

157. *Id.* at 40.

158. *Id.*

159. *Id.*

160. *Id.*

161. Indeed, the power of deeply meaningful similarity prompted Cialdini in 2016 to add another principle of influence to his list for the first time—the unity principle. CIALDINI, PRE-SUASION, *supra* note 104, at 173–208.

162. Mullins, *supra* note 125, at 592 n.135.

163. CIALDINI, PRE-SUASION, *supra* note 104, at 175.

164. Mullins, *supra* note 125, at 592.

165. *Id.*

166. *Id.* (quoting CIALDINI, PRE-SUASION, *supra* note 104, at 175). "Neuroscientists have suggested this feeling of oneness with others is because 'mental representations of the concepts of *self* and of *close others* emerge from the same brain circuitry. Activating either of those concepts can lead to neuronal

influenced by the groups to which we belong, and the more that group is part of our core identity, the stronger the group's pull."[167]

Just as we tend to like, and therefore be persuaded and shaped by, those we perceive to be similar to ourselves, we also tend to be dissuaded by and disassociate from those we perceive to be different from ourselves—members of "out-groups."[168] Researchers examined this "out-group" effect in a purported taste test.[169] Participants were allowed unlimited portions from a buffet.[170] An undercover lab assistant went to the buffet first.[171] When the assistant wore a fat suit, those following her took the opposite portion size.[172] For example, if the assistant took a sparing amount, the next person in line took a heaping plate; if the assistant took a large portion, the next participant took much less.[173] When the assistant did not wear the fat suit, the next in line matched her portion size.[174]

Ultimately, we associate with those who we are like or want to be like; we disassociate from those who are part of an out-group or those we perceive to be different from us. Through the lens of the unity principle, the current fractured state of our current political discourse is not entirely surprising.[175]

In addition to people similar to ourselves, we also tend to like people who are familiar to us. While researchers have yet to reach a consensus on why similarity is so compelling, they appear to have reached a consensus on at least one reason familiarity is so compelling: "processing fluency."[176] Processing fluency is the ease and speed with which our brains process information.[177] We tend to like the familiar because it has high processing fluency. In other words, the familiar is easier for our brains to process, and as a result,

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cross-excitation of the other concept and the consequent blurring of identities.'" *Id.* at 592 n.138 (quoting CIALDINI, PRE-SUASION, *supra* note 104, at 175).

167. *Id.* at 592.

168. See Brent McFerran et al., *I'll Have What She's Having: Effects of Social Influence and Body Type on Food Choices of Others*, 36 J. CONSUMER RES. 915, 917 (2010) [hereinafter McFerran et al., *Effects of Social Influence*]; Brent McFerran et al., *Might an Overweight Waitress Make You Eat More? How the Body Type of Others is Sufficient to Alter Our Food Consumption*, 20 J. CONSUMER PSYCHOL. 146, 147 (2010).

169. McFerran et al., *Effects of Social Influence*, *supra* note 168, at 918.

170. *Id.*

171. *Id.*

172. *Id.* at 920, 922.

173. *Id.* at 926.

174. *Id.* at 926–27.

175. *See* Mullins, *supra* note 125, at 592.

176. *See* GOLDSTEIN ET AL., *supra* note 104, at 159–62; Adam L. Alter & Daniel M. Oppenheimer, *Predicting Short-Term Stock Fluctuations By Using Processing Fluency*, 103 PROC. NAT'L ASS'N SCI. 9369, 9369 (2006); Jennifer Monahan et al., *Subliminal Mere Exposure: Specific, General, and Diffuse Effects*, 11 PSYCHOL. SCI. 462, 462 (2000).

177. *See* GOLDSTEIN ET AL., *supra* note 104, at 159–62; Alter & Oppenheimer, *supra* note 176, at 9369.

we instinctively like it.[178] As a reader, familiarity creates flow in the reader's experience—a gift when the reader is encountering new and substantively complex materials.

As with similarity, familiarity generates liking without our awareness and regardless of whether that familiarity is a rational reason to like someone or something.[179] Messages that are easier to understand are more persuasive.[180] Messages that are difficult to understand, communicated in overly-complicated, jargon-packed language, are less compelling.[181] For example, test subjects liked stocks with easy-to-read symbols more than those with hard-to-read symbols—they perceived the companies with easy-to-read symbols as stronger financially than those with hard-to-read symbols.[182] Another way to increase processing fluency and capitalize on familiarity is by using "you" instead of neutral or impersonal identifiers.[183] "You" invites the reader to relate the message to the reader, a very familiar context.[184] Used well, this familiar context can create a friendly tone. Neutral statements, on the other hand, can create a depersonalized tone.[185] We feel greater trust in those who explain by making comparisons to things with which we are familiar, putting new ideas into a familiar context.

One of the most thoroughly examined rhetorical devices in legal writing is the metaphor. Metaphors capitalize on, among other things, similarity and familiarity. A metaphor is a word or phrase used in a nonliteral sense to refer to something else.[186] More

178. Alter & Oppenheimer, *supra* note 176, at 9369; Monahan et al., *supra* note 176, at 462; *see* GOLDSTEIN ET AL., *supra* note 104, at 159–62.

179. *See, e.g.*, Robert Bornstein et al., *The Generalizability of Subliminal Mere Exposure Effects: Influence of Stimuli Perceived Without Awareness on Social Behavior*, 53 J. PERSONALITY & SOC. PSYCHOL. 1070, 1076 (1987) (finding that people were significantly more likely to agree with a person whose face they had been shown subliminally than someone who they had never seen before); Monahan et al., *supra* note 176, at 464 (finding that people subliminally exposed to five Chinese characters repeatedly were in a better mood afterwards than those exposed to twenty-five different Chinese characters repeatedly); Prakash Nedungadi, *Recall and Consumer Consideration Sets: Influencing Choice without Altering Brand Evaluations*, 17 J. CONSUMER RES. 263, 263 (1990) (finding that when people are evenly split between two products, they choose the one that comes to their minds more easily).

180. GOLDSTEIN ET AL., *supra* note 104, at 162.

181. *Id.*

182. *Id.* at 159–61; Alter & Oppenheimer, *supra* note 176, at 9371.

183. Robert Burnkrant & H. Rao Unnava, *Effects of Self-Referencing on Persuasion*, 22 J. CONSUMER RES. 17, 17 (1995).

184. *Id.*

185. There may, of course, be situations in which a depersonalized tone is the more persuasive choice, e.g., the defense lawyer referring to an injured plaintiff as Plaintiff instead of by name.

186. Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 405 (1986).

specifically, metaphors express abstract ideas in concrete terms,[187] allowing us to place new information into existing categories.[188] The unconscious mind is a metaphor's preferred arena;[189] it is there that a metaphor does its most powerful work attempting to persuade the reader to see the world through the writer's eyes.[190]

Smith has divided legal metaphors into three types[191]: The first is the "doctrinal metaphor," which expresses substantive law in metaphoric terms.[192] For example, fruit of the poisonous tree, the corporation as a person, and the chilling effect are all doctrinal metaphors.[193] The second are "legal method metaphors," which refer to the analytical tools we use to interpret the law.[194] For example, balancing tests, the spirit of the rule, elements tests, and broad versus narrow construction are all legal method metaphors.[195] The third are "stylistic metaphors."[196] These are essentially nonsubstantive word or phrase choices that communicate a discrete point to weave a broader theme throughout written advocacy.[197] For example, single words can communicate a discrete point in metaphoric terms—devour, ignite, corrode.[198] Whole metaphoric phrases can communicate discrete points or broader themes; for example, conspiracy is the darling of the prosecutor's nursery.[199]

Within the cognitive theoretical framework, metaphor builds relationships in at least two ways. At the most basic level, legal method and stylistic metaphor reveal similarity between writer and reader.[200] When judges use a metaphor in this way, they invoke shared experience;[201] in other words, they draw from similarity

187. *Id.*; Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919, 922 (2007); Jonathan K. Van Patten, *Metaphors and Persuasion*, 58 S.D. L. REV. 295, 295 (2013).

188. Berger, *supra* note 100, at 149.

189. Berger, *supra* note 110, at 279–80; *see* Boudin, *supra* note 186, at 419.

190. Berger, *supra* note 110, at 278; Boudin, *supra* note 186, at 404, 409 (noting that a metaphor is most persuasive when it is "felt rather than understood"); Van Patten, *supra* note 187, at 295–96 (explaining that a well-done metaphor "doesn't feel like argument. . . .It reaches down to the subconscious without seeming to lecture or demand").

191. Smith, *supra* note 187, at 921.

192. *Id.*

193. *See id.* at 922.

194. *Id.* at 928–29.

195. *Id.* at 929.

196. *Id.* at 932.

197. *Id.* at 932–42.

198. *Id.* at 937.

199. *Id.* at 938.

200. *See* Berger, *supra* note 110, at 278 (noting that metaphor "unconsciously transmit[s] traditions, cultural values, and ideologies").

201. *See, e.g.*, Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 956 (2007) ("[M]etaphor is a pervasive and powerful cognitive mechanism because it is absorbed through long, constant, and unconscious experience."); Linda L. Berger, *Studying and Teaching "Law as*

between writer and reader "unconsciously transmit[ting] traditions, cultural values, and ideologies."[202] On a deeper level, all three types of metaphors harness the power of familiarity. A well-chosen metaphor explains difficult concepts in a clear, intuitive, and memorable way.[203]

b. Interpersonal Style

In addition to similarity and familiarity, certain interpersonal characteristics enhance the bond between writer and reader. Some of these characteristics overlap with similarity and familiarity. For example, we typically like people who make mistakes and admit weakness.[204] Why? Because it makes them seem more human.[205] Interestingly, some research suggests that the status of the person making the error impacts liking. People like a high status and low status person who makes a mistake but not an equal status person who makes a mistake.[206] As a result, when we like someone who admits weakness, we like that person in part because it reveals that the person is human and therefore similar to us. But admitting weakness tends to be most effective when we perceive the admitter to be different from ourselves.[207]

Rhetoric": A Place to Stand, 16 J. LEGAL WRITING INST. 3, 40 (2010) (explaining that "conceptual metaphors grow out of our bodily experiences, the images we see in the world, and the stories we are told," which accounts for their persuasive power); J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ASS'N LEGAL WRITING DIRECTORS 155, 169 (2010) ("[M]etaphors . . . derive in part from our shared experience of the world.").

202. Berger, *supra* note 110, at 278.

203. *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 558 (2d. ed. 1995) (explaining that the purpose of the metaphor is to fix an image in the reader's mind); Boudin, *supra* note 186, at 405 (noting that a metaphor can make an overall idea more memorable); Van Patten, *supra* note 187, at 348–49.

204. *See* Donal E. Carlston & Nicolette Shovar, *Effects of Performance Attributions on Others' Perceptions of the Attributor*, 44 J. PERSONALITY & SOC. PSYCH. 515, 515–25 (1983); Michael D. Robinson et al., *On the Advantages of Modesty: The Benefits of a Balanced Self-Presentation*, 22 COMM. RES. 575, 575 (1995).

205. Elliot Aronson et al., *The Effect of a Pratfall on Increasing Interpersonal Appeal*, 4 PSYCHONOMIC SCI. 227, 227 (1966). The status of the person making the error impacted liking in that people liked a high status and low status person who made a mistake but not an equal status person who made a mistake. Charles A. Kiesler & Gordon N. Goldberg, *Multi-Dimensional Approach to the Experimental Study of Interpersonal Attraction: Effect of a Blunder on the Attractiveness of a Competent Other*, 22 PSYCHOL. REP. 693, 704 (1968). However, the self-esteem of the onlooker may impact whether and to what extent a blunder increases liking. Robert Helmreich et al., *To Err is Humanizing—Sometimes: Effects of Self-Esteem, Competence, and a Pratfall on Interpersonal Attraction*, 16 J. PERSONALITY & SOC. PSYCHOL. 259, 259 (1970).

206. *See* Aronson et al., *supra* note 205, at 228.

207. *See* Helmreich et al. *supra* note 205, at 260.

Not surprisingly, we like people who make us experience positive feelings, like happiness and amusement.[208] In a similar vein, we like people who show their connection to positive things, concepts, and other people.[209] We also like people who have a cooperative approach to problem-solving.[210]

4. Great Power and Great Responsibility

Cognitive theory provides powerful tools for relationship building. Using those tools responsibly and to their best effect requires the writer to have emotional intelligence.[211] In general, emotional intelligence is the ability "to recognize and evaluate [one's] own emotions in the moment, gauge emotional responses in other human beings during a social interaction, and channel one's own emotions and those of others in a constructive way."[212]

Daniel Goleman conducted the seminal research on emotional intelligence in the context of studying leadership and job

208. *See, e.g.*, Madelijn Strick et al., *Humor in Advertisements Enhances Product Liking by Mere Association*, 15 J. EXPERIMENTAL PSYCHOL.: APPLIED 35, 35 (2009) ("Humor is one of the most extensively used methods of evoking positive responses to advertisements."); *cf.* Justin Driver, *Judicial Inconsistency as a Virtue: The Case of Justice Stevens*, 99 GEO. L.J. 1263, 1275 (2011) (suggesting that judges who depart from a position they previously took are more likely to cite for support Supreme Court justices with excellent reputations who did the same instead of justices with middling ones).

209. CIALDINI, INFLUENCE, *supra* note 104, at 188–204; *see* Albert J. Lott & Bernice E. Lott, *Group Cohesiveness and Interpersonal Attraction: A Review of Relationships with Antecedent and Consequent Variables*, 64 PSYCHOL. BULL. 259, 259 (1965). One interesting example shows how far-reaching the unconscious impact of positive association can be. After the United States landed the first Mars Rover, not only did sales of toy Mars Rovers spike, but also sales of Mars candy bars did too—but they are named for their company's founder, not the planet. Michael White, *Toy Rover Sales Soar into Orbit*, ARIZ. REPUBLIC, July 12, 1997, at E1; *see* CIALDINI, INFLUENCE, *supra* note 104, at 188–204.

210. CIALDINI, INFLUENCE, *supra* note 104, at 176–87.

211. There are several different models of emotional intelligence. The models do not agree on everything, but they all include awareness of emotions in one's self and in others, ability to understand what those emotions are, and ability to use information about emotions to guide behavior and achieve goals. In the absence of consensus of experts in the field, I will use Goleman's formulation for the purposes of this Article.

212. Heidi K. Brown, *The Emotionally Intelligent Law Professor: A Lesson from the Breakfast Club*, 36 U. ARK. LITTLE ROCK L. REV. 273, 280 (2014); *see also* Christine C. Kelton, *Clients Want Results, Lawyers Need Emotional Intelligence*, 63 CLEV. ST. L. REV. 459, 467 (2015) ("Emotional intelligence includes the ability to engage in sophisticated information processing about one's own and other's emotions and to use this information as a guide to thinking and behavior."); John E. Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 344 (2008) ("Central to these competencies is empathetic ability, which facilitates understanding and influencing the actions of others.").

performance.[213] Goleman splits the skills that comprise emotional intelligence into self-management skills and relationship-management skills; when put together, those skill sets result in strong social skills.[214]

The self-management skills are self-awareness, self-regulation, and motivation.[215] Self-awareness includes both candor and the ability to realistically assess one's emotions, thoughts, and performance.[216] The most basic definition of self-regulation, also called emotion regulation, is the ability to manage emotions in an intentional and constructive way.[217] Self-regulation is like "an ongoing inner conversation . . . that frees us from being prisoners of our feelings."[218] Self-aware people who practice effective self-management create stronger relationships because they "are able to create an environment of trust and fairness."[219]

The other component of emotional intelligence is relationship management. Good relationship managers are empathetic.[220] They thoughtfully consider the feelings of others while making an intelligent decision.[221] "Empathy is an antidote" to "miscues and misunderstandings" that happen in a diverse environment.[222]

The culmination of all of the characteristics of emotionally intelligent people results in what Goleman calls "social skill."[223] "Social skill" is the ability to manage relationships to produce a desired outcome.[224] Socially skilled people pay attention to what's going on around them (in other words, they get what the vibe is), listen carefully, and successfully read cues from others.[225] They have a "knack for building rapport," and they are "expert persuaders."[226] Indeed, a socially-skilled leader knows when to appeal to emotion and when to appeal to reason.[227]

Higher emotional intelligence is positively correlated with more successful work relationships: better job performance and more

213. *See* Daniel Goleman, *What Makes a Leader?*, HARV. BUS. REV. 1998, at 83.
214. *See id.* at 90.
215. *Id.* at 84, 90.
216. *Id.* at 84.
217. *See Emotion Regulation*, AM. PSYCHOL. ASS'N, https://dictionary.apa.org/emotion-regulation (last visited Nov. 13, 2019).
218. Goleman, *supra* note 213, at 85.
219. *Id.* at 86.
220. *See id.* at 89.
221. *Id.*
222. *Id.* at 90.
223. *Id.*
224. *Id.*
225. *See id.*
226. *Id.*
227. *Id.*

effective negotiations.[228] Interestingly, when Goleman compared "star performers" with average performers in companies' senior leadership, "nearly 90% of the difference in their profiles was attributable to emotional intelligence factors rather than cognitive abilities."[229] The same might hold true for judges, arguably the "senior leadership" of the legal profession.

Emotional intelligence is what judges use (or should use) to exercise judgement of what relationship building tools to use and when and how to use them to develop the audience relationship. I am not the first to suggest making emotionally intelligent choices in selecting rhetorical strategy—Aristotle encouraged speakers to make intentional choices with their specific audience in mind.[230] Significantly, however, judges are special because they must maintain authority and generate liking while remaining mindful of their roles and using their ever-shifting discoursal selves to reach the complex multilayered audiences they serve. Judges must read and respond appropriately to cues from the parties, other judges, the media, and the citizenry. The judge who performs this balancing act well will develop a strong relationship with the audience, i.e., positive source-relational ethos. The flipside is also true. Poor judgment using relationship-building tools can damage the relationship, thereby undermining the judge's credibility.

E. Relationship Building in Action

I advance a broad-based explanation for why certain rhetorical strategies work in judicial opinions and others do not.[231] The difference comes down to exercising emotional intelligence. Effective use of emotional intelligence helps judges thread the needle of authority and liking to develop positive source-relational ethos. Here, I examine what might be the most difficult challenge for a judge in maintaining authority and building relationships with the audience at the same time: dealing with mistakes and doubt.

One of the hardest things to do is admit when we are unsure or wrong. As noted above, however, we tend to like high status people who admit to mistakes.[232] But not all admissions are created equal.

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228. John D. Mayer et al., *Human Abilities: Emotional Intelligence*, 59 ANN. REV. PSYCHOL. 507, 525 (2008).

229. Goleman, *supra* note 213, at 84.

230. Aristotle, *supra* note 1, at 1391b.

231. The underlying reasons why certain relationship-building strategies work well in some judicial opinions and not in others have been explored with respect to some specific strategies (such as sports metaphors and humor, to name just two).

232. Relatedly, Gregory Johnson argues the foundation of persuasion by lawyers:

> Humble lawyers possess a quiet confidence that enables learning and reassessment, because humble lawyers are not defensive or insecure. Humility means admitting you do not have all the answers. So do not

An emotionally intelligent admission generates liking; a half-baked or insincere one does not. Self-awareness is foundational to an emotionally intelligent admission in the judicial writing context.[233] Self-awareness includes both candor and the ability to realistically assess one's emotions, thoughts, and performance.[234] Self-aware people create an atmosphere of trust[235]—in other words, positive source-relational ethos.

1. People Make Mistakes, and Judges are People

Judge Andrew Hurwitz observes that few judges admit to mistakes, and of those that do, even fewer actually own the mistakes and transparently correct them.[236] Judge Hurwitz argues that "we all would be better off if judges freely acknowledged and transparently corrected the occasional 'goof.' Confession is not only good for the soul, it also buttresses respect for the law and increases the public's understanding of the human limitation of the judicial system."[237]

Judge Hurwitz credits former Chief Judge Mary Schroeder of the Ninth Circuit with doing it right.[238] In *United States v. Board of Directors of Truckee-Carson Irrigation District*,[239] the Ninth Circuit's opinion determined that an error in the district court resulted in a miscalculation of damages for all years at issue in the case—but the order mistakenly limited recalculation on remand to only four of the years at issue.[240] On remand, the district court recalculated the damages exactly how the Ninth Circuit instructed.[241] When the case inevitably appeared before the Ninth Circuit again, Judge Schroeder fixed the error the right way: "We cannot fault the district court in any way, for it correctly followed our 2010 mandate. It was the

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be afraid to acknowledge the weaknesses of your case. Have doubt. It will make you a more persuasive lawyer.

Gregory Johnson, *Credibility in Advocacy: Humility is the First Step*, 39 VT. B.J. 22 (2013).

233. *Cf.* Jonathan Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1020 (1999) (arguing that client apology can take the insult out of the injury to the other party); Catherine Gage O'Grady, *A Behavioral Approach to Lawyer Mistake and Apology*, 51 NEW ENG. L. REV. 7, 46 (2016) (noting in the lawyer-client context that apologizing can "preserv[e] an ongoing relationship").

234. Goleman, *supra* note 213, at 84.

235. *See id.*

236. Andrew D. Hurwitz, *When Judges Err: Is Confession Good for the Soul?*, 56 ARIZ. L. REV. 343, 346 (2014).

237. *Id.* at 344.

238. *Id.* at 349.

239. 723 F.3d 1029, 1033–34 (9th Cir. 2013).

240. *Id.* at 1033–34; Hurwitz, *supra* note 236, at 349.

241. *Truckee-Carson Irrigation Dist.*, 723 F.3d at 1033.

mandate that was in error, and that only we can correct."[242] The panel withdrew its original mandate and amended it.[243]

Judge Schroeder's admission was emotionally intelligent. First, Judge Schroeder practiced effective self-management. She demonstrated self-awareness with her candor in making it clear who was not at fault and then acknowledging who was—her court. Her assessment of her court's performance was substantively correct—in emotional intelligence terms, realistic. After that, she identified and fixed the mistake transparently—an empathetic, intelligent decision. The party who was initially and inexplicably denied relief likely did not feel treated fairly by the process; the district judge was placed in an impossible position. However, Judge Schroeder's course of action likely created goodwill and an atmosphere of trust with not only the parties but also the district court and other readers.

Judge William Young of the United States District Court of the District of Massachusetts offers another example of how to do it right in an order from *Suboh v. Borgioli*.[244] Judge Young began the order in a section he called "Some Preliminary Thoughts."[245]

> There is a derisive ditty going around the courthouse as this opinion is being written. Set to the music of "Happy Together" by The Turtles, in relevant part it goes:
>
> Imagine me as God. I do.
>
> I think about it day and night.
>
> It feels so right
>
> To be a federal district judge and know that I'm
>
> Appointed forever.
>
> I was anointed by the President,
>
> And revelation told him I was heaven-sent.
>
> And Congress in their wisdom granted their consent.
>
> Appointed forever.
>
> I'm a federal judge
>
> And I'm smarter than you

242. *Id.* at 1035.
243. *Id.*
244. 298 F. Supp. 2d 192, 194 (D. Mass. 2004).
245. *Id.*

> For all my life.
>
> I can do whatever I want to do
>
> For all my life.
>
> * * * * * *
>
> Even at the very worst,
>
> If you take me up to get reversed,
>
> You'll have to get the circuit court to hear you first,
>
> And that takes forever.[246]

Judge Young then explained that "[t]he reality is more prosaic, yet far more enduring" and quoted a passage from Ronald A. Cass's *The Rule of Law in America* that essentially argues that judges apply the law and reach the results the law requires, regardless of the judge's personal preference.[247]

After his preliminary thoughts, Judge Young turned to the case at issue, and he began the substance of his order with a candid admission.

> Here, despite case-specific guidance from the court of appeals, I botched the instructions to the jury. Neither side objected and, as it turns out, the error made no difference to the jury whatsoever. I know this latter fact, however, from sources I am duty-bound not to consider. What to do?[248]

Those sources were jury notes taped to the wall of the deliberation room that indicated the case's result would have been the same regardless of the erroneous instruction.[249]

Judge Young then tells the reader what he has decided to do. He frames his decision with, "Upon reflection," and he then announces his determination "that there was plain error in the jury instructions."[250] As a result, Judge Young ordered a new trial.[251] As noted above, the case presented an odd twist: Judge Young saw notes from the jury in the deliberation room after the trial that indicated that even if the instructions had been correct, the case would nevertheless have come out the same way.[252] This, however, was not

246. *Id.* at 194–95 (quoting BAR & GRILL SINGERS, *Appointed Forever, on* LICENSED TO GRILL (1997)).
247. *Id.* at 195.
248. *Id.*
249. *Id.* at 204–05.
250. *Id.* at 196.
251. *Id.*
252. *See id.* at 204–05.

information that Judge Young could use to inform his decision—and if he could, it is clear from his order that he would not have ordered a new trial.[253] But the law required a new trial, and Judge Young ordered it. The first sentence of the concluding paragraph of his order says, "I deeply regret that my own error has so compounded the expense and delay visited on the litigants in this action."[254]

Judge Young's admission was emotionally intelligent. He demonstrated self-awareness, self-regulation, and empathy while making an intelligent (and clearly difficult) decision. A credit to his candor, Judge Young did not distance himself from the error. When referring to an action or position he is taking in his role as judge, Judge Young typically uses "this Court" or "the Court."[255] Not so here. In owning the mistake, Judge Young departed from his usual practice and used the personal pronouns "I" and "my" in taking responsibility.[256] Generally not one to mince words, Judge Young did not as it applied to himself. He used the active voice and a powerful verb: "I botched."[257] He could have just as easily written that "an error was made in the jury instructions." Moreover, he told the whole story: Judge Young probably could have left out the information he learned in the jury room; after all, it only complicated matters. But he did not.[258]

Judge Young demonstrated empathy for both sides. He explicitly communicated the attention and care he gave to the matter by writing that his decision was made "[u]pon reflection."[259] Other parts of his order reveal that the decision was no easy task for him. He concluded the order with an apology that expressed sincere remorse alongside an open acknowledgment of the consequences of his error: "I deeply regret that my own error has so compounded the expense and delay visited on the litigants in this action."[260] In all of these passages, Judge Young demonstrates empathy to both sides—particularly to the party who won the first time and for whom the decision was a bitter pill to swallow.

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253. *See id.* at 205.

254. *Id.* at 206.

255. *See, e.g.*, Flinn v. Santander Bank, N.A., 359 F. Supp. 3d 128, 130 (D. Mass. 2019); Cellinfo, LLC v. Am. Tower Corp., 352 F. Supp. 3d 127, 129, 130 (D. Mass. 2018); United States v. Richmond, 218 F. Supp. 3d 130, 131 (D. Mass. 2016).

256. *Suboh*, 298 F. Supp. 2d at 206. This use of the personal pronoun versus "the Court" is a poignant example of Rideout's discoursal self. *See supra* notes 45–56 and accompanying text. Judge Young writes as the Court, but he also writes as an individual judge.

257. *Suboh*, 298 F. Supp. 2d at 195.

258. Of course, including this information could have also served the purpose of sending the parties a message to settle the case before incurring the expenses of a new trial.

259. *Suboh*, 298 F. Supp. 2d at 196.

260. *Id.* at 206.

All in all, Judge Young's order likely created goodwill and an atmosphere of trust with the parties and the First Circuit were the case to go up on appeal.

Judge Young's admission went beyond the immediately identifiable readership because it drew attention from the blogosphere. Andrew McClurg reported on the order on his national blog, Lawhaha.[261] Here is McClurg's immediate reaction: "How can you not love U.S. District Judge William G. Young, chief judge for the District of Massachusetts, for his candor and willingness to come clean on an error he made in a case?"[262] The University of Houston Law Center's library also reported on the case in a section on judges using music from the 1960s.[263] Though music was the theme, the library also "loved" Judge Young for his candor in admitting and fixing his error.[264]

Judge Young's order likely created goodwill and an atmosphere of trust with the audience beyond the parties and the appellate court if McClurg's blog post and the University of Houston law library newsletter are any indication. Moreover, I was unable to find any sources criticizing Judge Young's order.[265]

But Judge Young did something greater with his order than admit, apologize, and fix. He exhibited humility and social skill by attempting to use his own error as an opportunity to build credibility for the judicial system as a whole. As noted above, Judge Young opened the order with an excerpt from a song that made light of federal judicial power in the context of lifetime appointment—an attention getter that blended humor with pop culture. The song was almost certainly tongue-in-cheek (like most lawyer jokes told by lawyers), but it is a bit discomforting because it reflects the views of at least some of the people judges serve.

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261. Andrew McClurg, *Federal Judge and the Turtles are Happy Together*, LAWHAHA (Nov. 24, 2011), https://lawhaha.com/federal-judge-and-the-turtles-are-happy-together/.

262. *Id.*

263. Harriet Richman, *Still More Legal Fun With '60's Music: Judge Young & the Turtles – Happy Together*, O'QUINN LAW LIBR. NEWSL. (Aug. 2006), http://www.law.uh.edu/libraries/publications/Lnewsletter/0306/page3.htm.

264. *Id.*

265. In a similar vein, Justin Driver examined famous instances of Supreme Court justices who changed their minds, and he, too, was unable to find evidence of popular disapproval or reputational harm to the justices. In fact, Driver suggests that the justices experienced a reputational boost for the thoughtful way they acknowledged their prior positions and explained why they changed course. Driver, *supra* note 208, at 1276.

Judge Young follows the excerpt of the "derisive ditty" with a serious and far more noble depiction of the federal judiciary.[266]

> The reality is more prosaic, yet far more enduring.
>
> > [L]awyers who become judges . . . seek to operate as if bound by rules not because they will be punished if they do not but because they believe it is the right thing for a judge to do. They begin to think about cases not from their intuition about the just outcome but from the dictates of authoritative sources of law. The question that judges ask is . . . "What is the law, and what does it mean for this case?" Those may be difficult questions in themselves, but they significantly narrow the ambit of admissible considerations.
> >
> > . . . [T]he orientation of judges to applying law does not do away with the problems inherent in that task. The process of interpreting legal authority and of applying it to new cases often requires highly contextual judgments respecting the nature of the principles embodied in governing law and the circumstances relevant to the application of a given principle. Legislators and constitution framers cannot foresee all relevant circumstances, nor can they specify with clarity all applications of the principles they adopt; they cannot, in other words, always fashion meaningful rules that fully give effect to the law framers' general design. Indeed, it would be wasteful to try.[267]

Whether or not you agree with Cass's model of decision-making, we can all probably agree it provides a positive aspirational goal. And Judge Young publicly modeled what it means to meet this goal with his candid order, in which he lays bare the entire story—jury notes and all.

Both Judge Schroeder's opinion and Judge Young's order reveal self-awareness, role awareness, and empathy. In admitting their mistakes, both judges also maintained a professional—in other words, authoritative—tone throughout. Based on these incidents alone—ones in which the judges got it wrong—what client would not want Judge Schroeder on a panel or Judge Young to hear the case? And who would not feel a bit of pride or increased faith in the judiciary upon reading about or hearing these stories?

Judge Hurwitz would call Judges Schroeder and Young the exception rather than the rule. Judge Hurwitz observes that "even when an appellate court acknowledges a putative mistake, it often

266. Suboh v. Borgioli, 298 F. Supp. 2d 192, 194–95 (D. Mass. 2004).

267. *Id.* at 195 (quoting RONALD A. CASS, THE RULE OF LAW IN AMERICA 69, 72–73 (2001)).

does so grudgingly."[268] Judge Hurwitz points to the Supreme Court's decision in *Kennedy v. Louisiana*[269] as an example.[270] The majority opinion declared that there was a "national consensus" against the death penalty in child rape cases; for support, the majority opinion pointed to Congress's amendment of the Federal Death Penalty Act of 1994 in which Congress expanded crimes to which the death penalty applied but did not include child rape.[271] While the Court read correctly the amendments to the 1994 Act, it was wrong to declare a national consensus because Congress had added child rape to the list of death penalty offenses in the Uniform Code of Military Justice ("UCMJ").[272]

The government petitioned for rehearing, and the Court issued an amended opinion.[273] The opinion, however, did not directly acknowledge the mistake, take responsibility for it, or address it in a transparent way. "[R]ather than acknowledging that it had missed something, the majority simply issued an order amending one of the footnotes to the original opinion, stating only that the opinion 'neither noted nor discussed the military penalty for rape.'"[274] Therefore, the Court denied rehearing, simply "explaining why that penalty didn't make any difference."[275] In Judge Hurwitz's words, the Court's response essentially amounted to "so what?"[276] And Justice Scalia made it worse when he wrote separately apparently to, at least in part, insist that the Court was not really wrong and deflect blame onto the parties for failing to cite the UCMJ.[277]

Judges Schroeder and Young demonstrated candor and the ability to realistically evaluate their performance. They also fixed their errors in a transparent way. The Supreme Court, on the other hand, did not appear entirely candid in acknowledging its omission—and Justice Scalia even laid blame elsewhere. Moreover, even if the error did not require a fix in the same way that Judges Schroeder's and Young's did, the Court could have engaged with the omission more deeply on a substantive level, so that the lasting impression was not "so what?" but rather one in which the moving party's concern appeared to be heard and taken seriously.

When judges admit mistakes, they are communicating through different facets of their roles, particularly as both flawed human beings and as components of the branch of government charged with administering justice. These examples show that the writer side of

268. Hurwitz, *supra* note 236, at 346.
269. 554 U.S. 407 (2008), *modified on denial of reh'g*, 554 U.S. 945.
270. Hurwitz, *supra* note 236, at 346.
271. *Kennedy*, 554 U.S. at 422–23; Hurwitz, *supra* note 236, at 346–47.
272. Hurwitz, *supra* note 236, at 347.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at 348.
277. *Id.* at 347–48.

the relationship truly is discoursal and shifts as the circumstances demand.

2. Governments, Systems, and People Are Not Perfect, Either

Emotionally intelligent judges acknowledge not only their own mistakes; they also recognize and candidly address system weaknesses, failures, and doubt. In the example below, then-Justice Don Willett of the Texas Supreme Court (now a judge on the United States Court of Appeals for the Fifth Circuit[278]) must acknowledge grave moral shortcomings of his state as he prepares to rely on a case about loss of use of a slave.[279] In so doing, we see Judge Willett writing as a person, a panel judge, a citizen of Texas, and as a representative of the judiciary [280]:

> The caselaw of this Court bears the indelible mark of the story of Texas. It is a story of grit and perseverance. A courageous but ill-fated stand at the Alamo, a Palm Sunday massacre at Goliad, and finally, a decisive defeat of Santa Anna at San Jacinto—all monumental moments that culminated in our triumphant birth as a young republic. But our story is not unblemished, for our early triumphs were overshadowed by the then-pervasive stain of slavery. Indeed, it was in part Texas's status as a slave state that complicated its annexation into the Union, and it was slavery that eventually prompted Texas to secede from the Union.
>
> It is understandable then that, in a pre-Emancipation era when slavery was permitted and slaves were considered personal property, one of this Court's earliest decisions on the availability of loss-of-use damages concerned a slave. In the 1852 case *Pridgin v. Strickland*[281], the Court considered whether an amended petition that reframed the relief sought tainted a judgment for the plaintiff and compelled reversal. The plaintiff owned a slave named Ben and alleged that the defendant converted—that is, wrongfully possessed—Ben. The plaintiff initially requested damages for conversion of Ben, then three years later, amended his petition to demand possession of Ben and the loss of use of Ben's labor. A jury awarded the plaintiff $800 for the value of Ben and $450 in specific damages for the loss of use of his labor. Before this Court, the defendant

278. Jimmy Hoover, *5th Cir. Judge Willett on Textualism and Giving Up Twitter*, LAW360 (Sept. 11, 2019, 8:04 PM), https://www.law360.com/articles/1197928/5th-circ-judge-willett-on-textualism-and-giving-up-twitter.

279. J & D Towing, LLC v. Am. Alt. Ins. Corp., 478 S.W.3d 649, 652, 657–58 (Tex. 2016).

280. *See id.* at 657–58.

281. 8 Tex. 427 (1852).

> argued that the amendment introduced a new cause of action barred by a statute of limitations.[282]

The use of precedent that features a human being held as property on the basis of race is challenging, to say the least. On the one hand, we live in a stare decisis world; on the other, writing about a case that centers on one of the greatest moral outrages in our history risks alienating readers or at least having readers subconsciously push away from the writing. Judge Willett juxtaposes his description of the proud history of Texas with the powerful assertion that "our early triumphs were overshadowed by the then-pervasive stain of slavery."[283] None of the Texas history or the discussion of slavery was substantively necessary to the legal analysis; Judge Willett put it there for another reason, and that was to manage his relationship with the audience. Moreover, Judge Willett is speaking not only as a panel judge delivering the panel's decision; he is a representative of the judiciary to the citizenry it serves. In all of these roles, or discoursal selves, Judge Willet acknowledges the stain and says directly that the magnitude of the stain overshadows the greatest moments in Texas history. Only then does he hesitantly delve into the case.

Notably, Judge Willett does not hide from the issue of slavery with legalistic euphemism or distancing language. Judge Willett made plain what converted meant: wrongfully possessed.[284] And he set out the plain definition with dashes[285]—visual rhetoric that draws reader attention. He uses the pronoun "our" where he could have pawned off responsibility on the state or his forebears.[286] But he did not. He used a pronoun that included himself and the rest of the country, past and present.

The extent to which Judge Willett's writing is relationship building or preserving is not yet clear to me given the host of complex moral issues it touches on; as a reader, however, I at least see a self- and role-aware writer who understands that he is treading upon delicate ground and attempts to navigate that ground thoughtfully. Like the other emotionally intelligent admissions, I could find no criticism of then-Justice Willett for this one—and people were looking. When President Trump nominated Justice Willett to the Fifth Circuit, his record was thoroughly examined. A letter from The Leadership Conference on Civil and Human Rights marshalled extensive data regarding what it considered public statements and

282. *Id.*
283. *Id.* at 657.
284. *Id.* at 658.
285. *Id.*
286. *Id.* at 657–58.

judicial decisions reflecting discrimination—this opinion was not among them.[287]

Judge O. Rogeriee Thompson of the United States Court of Appeals for the First Circuit gives another powerful example of emotional intelligence in her concurring opinion in *Sanchez v. Roden*,[288] a decision denying habeas corpus relief sought on the basis of a *Batson* challenge.[289] Judge Thompson displayed self-awareness through her candor in her assessment of the outcome of the case—one in which she openly admitted doubt. Like Judge Young, she explicitly practiced self-regulation in acknowledging that the law required an outcome that was not her preferred outcome. She displayed empathy and social skill with her explanation of why she harbored doubt. The emotional intelligence of her concurrence makes the lack of it in the majority opinion stand out in bold relief.

First, some background. The case arose from a crime that took place in 2005.[290] At trial, the state court improperly applied the *Batson* protocol and failed to conduct an evidentiary hearing on why the prosecutor struck a young black male juror.[291] The case made it to the First Circuit on a writ of habeas corpus in 2014 (*Sanchez I*) and was remanded for an evidentiary hearing on the *Batson* challenge.[292] Judge Thompson wrote the *Sanchez I* opinion.[293] The case came back to the First Circuit on appeal of the district court's determination on remand that the prosecution's reason for striking the juror was age (a permissible ground under *Batson*) and that the prosecutor was credible in advancing this reason (*Sanchez II*).[294]

Judge Thompson's concurrence displays masterful emotional intelligence as she deftly demonstrates candor, the ability to realistically assess her own emotions, and the judicial system's performance, empathy, and careful attention to detail—both explicit detail and details lurking beneath the surface.

Judge Thompson begins her concurrence:

> The majority opinion accurately sets forth the applicable law and cogently explains why, given our standard of review, we cannot reverse the district court's rejection of Dagoberto Sanchez's *Batson* challenge. Therefore, I reluctantly concur in the majority's result and reasoning. I write separately to point

287. Letter from Vanita Gupta, President & CEO, Leadership Conference on Civil & Human Rights, to United States Senators (Nov. 14, 2017), https://civilrights.org/resource/oppose-confirmation-don-willett-u-s-court-appeals-fifth-circuit/.

288. 808 F.3d 85 (1st Cir. 2015).

289. Sanchez v. Roden, 808 F.3d 85, 97 (1st Cir. 2015) (Thompson, J., concurring) (*Sanchez II*).

290. *Id.* at 86.

291. *See id.* at 87.

292. Sanchez v. Roden, 753 F.3d 279, 290, 309 (1st Cir. 2014) (*Sanchez I*).

293. *Id.* at 284.

294. *Sanchez II*, 808 F.3d at 87–88.

> out that Sanchez's *Batson* challenge has traveled an arduous route through the state and federal courts and because of that historical journey, I am left with a queasy confidence in the decision we reach today. Let me explain.[295]

Judge Thompson first affirms the correctness of the majority opinion's result and legal reasoning given the standard of review.[296] Therefore, she starts by reinforcing the authority of the opinion. She then candidly shares her reluctance in joining the opinion and realistically assesses her overriding emotions of reluctance and "queasy confidence."[297] And she signals the shift from panel judge to individual with the use of personal pronouns. She closes the paragraph with a conversational invitation to the reader,[298] capitalizing on simulated dialogue that suggests she and the reader are on the same level—in other words, similar.

Judge Thompson then methodically recounts and dismantles the government's defense with detailed accounts from the record[299]—in other words, Judge Thompson is "listening" closely, a hallmark of social skill. She quotes directly the trial judge's improper commentary when the prosecution struck the juror at issue.[300] Without asking for the prosecution's justification, the judge gratuitously said the following in reference to the just-struck nineteen-year-old African American (Juror No. 261): "'I think his youth and the fact that he's a full-time college student could be a problem.'"[301] Judge Thompson very frankly reports the potential result: "And it should come as no surprise that nearly eight years later, when finally called upon to explain why he struck this particular juror, the prosecutor seized upon the juror's 'youth.' In doing so, the prosecutor did nothing more than parrot back the trial judge's unprompted suggestion."[302] For Judge Thompson, this fumble alone means that "there will always be a nagging question in my mind as to whether structural error occurred at Sanchez's trial which has not been detected or corrected."[303] Judge Thompson then examines and credits Sanchez's arguments that the prosecution's story had major defects[304]—treating him with empathy and dignity, while nevertheless making the decision that was required given the standard of review.

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295. *Id.* at 93 (Thompson, J., concurring).
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.* at 93–94 (quoting the trial judge's suggested race-neutral justification for the preemptory strike and the trial judge's later determination that the prosecutor was credible).
300. *Id.* at 93.
301. *Id.*
302. *Id.*
303. *Id.* at 94.
304. *Id.* at 94–95.

She also candidly and publicly fulfills the *Batson* requirement that the courts look at the totality of the circumstances:

> Finally, because a trial judge faced with a *Batson* challenge must consider the totality of the circumstances, it is appropriate for us to acknowledge them here. Although we are unable to say the district judge clearly erred in finding that the prosecutor's strike was not motivated by Juror No. 261's race, the end result is that all young, black men and young men of color in the venire—indeed all those who resembled Dagoberto Sanchez—found themselves dismissed at the behest of their own government. No other group of prospective jurors received such treatment.
>
> The facts in this record certainly raise the judicial antennae. But given the standard of review, I can do no more than register my discomfort at having to affirm the denial of habeas relief even though the best evidence as to whether or not a *Batson* violation occurred—the prosecutor's contemporaneous explanation—has been irretrievably lost to us. [305]

In the first paragraph of the conclusion, Judge Thompson powerfully bears witness to Sanchez's reality. Both paragraphs are direct and easy to follow, capitalizing on the processing fluency of familiarity. The final paragraph opens with a stylistic metaphor—"raise the judicial antennae."[306] The metaphor is successful on multiple levels. First, it effectively paints a picture and communicates a feeling that creates immediate, intuitive knowing. It is almost certainly accessible to broad swaths of the audience. Many are likely familiar with the metaphorical phrase itself; others, who are not, can likely easily grasp its meaning through basic knowledge of insects or (old school) electronics. The metaphor communicates a feeling effectively and includes the readership writ large; it does not confuse or exclude readers. Moreover, the metaphor appears to contain a special message to fellow members of the system. Judge Thompson wrote "the judicial antennae" instead of "my antennae"[307]—a change from her first-person approach in the rest of the opinion. This switch signals that she is writing in her role as representative of the judiciary, and her message is this: We are watching.

The *Sanchez II* majority opinion is dramatically different from Judge Thompson's concurrence. While both agree on the result, the majority opinion seems to go to extraordinary lengths to keep up the appearance that the underlying facts of the case and arguments advanced pose absolutely no reason for pause. It reads like a straightforward case in which the prosecution credibly advanced the legally defensible position that it struck the juror because of his age,

305. *Id.* at 96–97.
306. *Id.* at 97.
307. *Id.*

not his race, and the defense raised tenuous arguments that the court was duty-bound to entertain.[308] Given the underlying facts of the case and the reality of pervasive racial prejudice in our society, the majority's well-written and cogently reasoned opinion appears ham-fisted at best.

The majority's summative response to all of Sanchez's arguments was: "None of the arguments have merit."[309] One line of argument in particular "lacks merit for a number of reasons."[310] "Given the highly deferential standard of review on questions of credibility, *we have no trouble affirming* the district court's finding" that the prosecution's proffered nondiscriminatory justification was credible.[311]

One particular vignette from the majority opinion stands out. Sanchez argued that the *Sanchez I* opinion precluded any argument that the prosecution struck the juror because of his age. The *Sanchez II* majority tersely acknowledges and disposes of this argument in a footnote, calling it "meritless, and it misses the point and purpose of the remand."[312] The *Sanchez II* court does not share the portion of *Sanchez I* upon which Sanchez relied—if the reader wants to know what it is, she has to look it up. So I did. In that decision, the court stated, "The simple fact is the state court record discloses that the Commonwealth did not exercise its peremptory challenges based on age. Had it done so, it would have eliminated Juror No. 243, the white college student born in Russia."[313] The *Sanchez II* court is substantively correct that Sanchez's argument is irrelevant, but its handling of the argument is less than transparent and, given the actual language in *Sanchez I*, flippant.

In the last paragraph, the majority almost (almost!) appears to throw some empathy Sanchez's way, but any goodwill evaporates with the four-word drop-the-mic conclusion:

> We acknowledge both the difficulties in making a *Batson* determination on a cold record many years following the original jury selection and also the importance of protecting the right of every juror to serve and of every defendant to have a trial free of the taint of racial discrimination. But here the district court did not abuse its broad discretion as factfinder on matters of credibility in concluding that Sanchez has not proven that there was racial discrimination. That ends the matter.[314]

But it doesn't. The standard of review prevented any other decision than an affirmance, but Sanchez's case was not completely without merit. There is a chance Sanchez got dealt a bad hand. At a

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308. *Id.* at 86–93.
309. *Id.* at 91.
310. *Id.* at 92.
311. *Id.* (emphasis added).
312. *Id.* at 90 n.3.
313. Sanchez v. Roden, 753 F.3d 279, 306 (1st Cir. 2014) (*Sanchez I*).
314. *Sanchez II*, 808 F.3d at 93 (internal citation omitted).

minimum, Judge Thompson's opinion communicates to the readership—which includes Sanchez—the very important message that many of those who administer the judicial system are not wholly ignorant to racial injustice or systematic flaws.

Judge Thompson's opinion, perhaps oddly, inspires faith in the system because it reveals that some of the decision-makers know the system's imperfections, have the courage to identify them in writing, and treat parties potentially impacted by those imperfections with dignity. And it shows that the judge is aware of her accountability in the determinations rendered by the system she serves.

F. Source-Relational Ethos: Where We Are and Where to Go Next

All legal writers create source-relational ethos—positive or negative—whether they mean to or not. But judges are unique. They write while simultaneously playing a multitude of roles—among them are person, judge, colleague, representative of the judiciary, and servant to the citizenry. As a result, their writing reaches a multilayered audience and therefore impacts several different relationships at once. Cognitive theory offers several tools through which judges can create that bond of trust; effectively using those tools requires emotional intelligence, particularly given the complex nature of the judge-audience relationship. Admitting mistakes in an emotionally intelligent way both creates bonds of trust and reinforces authority; ducking responsibility or being less than transparent diminishes trust and therefore undermines authority. There are other tools that judges can use to build relationships, and those tools likewise require examination—both theoretically and empirically.

Of course, with great power comes great responsibility (even if you are appointed forever). To make emotionally intelligent use of cognitive theory, judges need foundation in both. My own recent research suggests that judges do not have widespread training in cognitive theory.[315] That research also suggests that judges do not receive widespread training in emotional intelligence, though that conclusion needs further investigation because emotional intelligence was not the primary focus of my research. Nevertheless, even if there are few opportunities, the good news is that emotional intelligence is a skill; like other skills, emotional intelligence can be learned with hard work, practice, and feedback.[316] The question would then become how to structure and test any program of education intended to build emotional intelligence.

In addition, a pressing concern raised by the examination of judicial writing through a cognitive theoretical framework is the extent to which judges have and should capitalize on the unity principle. Today's fractured political climate seems to stem from a

315. *See generally* Mullins, *supra* note 125 (discussing my recent research).
316. Goleman, *supra* note 213, at 86–87, 91.

clash of core identities playing out online, in print, on television, and within communities. How much does the unity principle create bonds while also reinforcing authority? If it is as compelling as Cialdini indicates, sharing core identity is likely very compelling to fellow group members; it is also probably distancing, at least in some cases, to those who are different.[317] Given the judge's role vis-à-vis the audience, judicial use of the unity principle requires examination.

To end on a positive note, a relational approach makes teaching persuasion through ethos far more accessible and engaging to law students. Focusing exclusively on traits of professionalism puts many of the least palatable tasks of lawyering into one bucket that is tedious (did you italicize the period after *id*?), vague (be professional!), and anxiety inducing (you should *already* be professional, and oh by the way, every choice you make during law school orientation and every second of every day after matters!). Building relationships, on the other hand, engages students in a proactive, concrete, human experience. They can simultaneously use and grow their writing and problem-solving skills to reach another person. All of a sudden, coming up with just the right word or metaphor is a puzzle to be solved instead of a burden undertaken with minimal interest or intentionality.

Ultimately, whenever we write, we are building relationships with readers—whether we mean to or not. Emotionally intelligent, intentional use of cognitive theory produces positive source-relational ethos. Source-relational ethos is a powerful vehicle of persuasion when used effectively; it is also an understudied one. Judicial writing provides rich ground to explore positive and negative source-relational ethos because of the many roles judges play and audiences they reach.

317. *See supra* notes 161–75 and accompanying text.