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## ARTICLES & ESSAYS

**Morality, Trust, and Illusion:  
Ethos as Relationship**

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# Morality, Trust, and Illusion:

## Ethos as Relationship

Melissa H. Weresh\*

Ethos is character. Character implicates trust. Trust is based on relationship. Relationship persuades. Consider the following:

*Abraham Lincoln: Second Inaugural Address:*<sup>1</sup>

At this second appearing to take the oath of the presidential office, there is less occasion for an extended address than there was at the first. Then a statement, somewhat in detail, of a course to be pursued, seemed fitting and proper. Now, at the expiration of four years, during which public declarations have been constantly called forth on every point and phase of the great contest which still absorbs the attention, and engrosses the energies of the nation, little that is new could be presented. The progress of our arms, upon which all else chiefly depends, is as well known to the public as to myself; and it is, I trust, reasonably satisfactory and encouraging to all. With high hope for the future, no prediction in regard to it is ventured.

On the occasion corresponding to this four years ago, all thoughts were anxiously directed to an impending civil-war. All dreaded it—all sought to avert it. While the inaugural address was being delivered from this place, devoted altogether to saving the Union without war, insurgent agents were in the city seeking to destroy it without war—seeking to dissolve the Union, and divide effects, by negotiation. Both parties deprecated war; but one of them would make war rather than let the nation survive; and the other would accept war rather than let it perish. And the war came.

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<sup>1</sup> The Library of Congress, *Abraham Lincoln's Second Inaugural Address, Virtual Services, Digital Reference Section*, <http://www.loc.gov/rr/program/bib/ourdocs/Lincoln2nd.html> (last updated July 30, 2010).

*Jan Schlichtmann—A Civil Action:*<sup>2</sup>

It's like this. A dead plaintiff is rarely worth more than a living severely[] maimed plaintiff. However, if it's a long slow agonizing death as opposed to a quick drowning or car wreck, the value can rise considerably. A dead adult in his 20s is generally worth less than one who is middle aged. A dead woman less than a dead man. A single adult less than one who's married. Black less than white. Poor less than rich. The perfect victim is a white male professional, 40 years old, at the height of his earning power, struck down at his prime. And the most imperfect, well in the calculus of personal injury law, a dead child is worth the least of all.

*The Incredibles:*<sup>3</sup>

**Lucius:** [*Bob and Lucius are sitting in a parked car, reminiscing*] So now I'm in deep trouble. I mean, one more jolt of this death ray and I'm an epitaph. Somehow I manage to find cover and what does Baron von Ruthless do?

**Bob:** [*laughing*] He starts monologuing.

**Lucius:** He starts monologuing! He starts like, this prepared speech about how \*feeble\* I am compared to him, how \*inevitable\* my defeat is, how \*the world\* \*will soon\* \*be his\*, yadda yadda yadda.

[Later on . . .]

**Mr. Incredible:** I was wrong to treat you that way. I'm sorry . . .

**Syndrome:** See? Now you respect me, because I'm a threat. That's the way it works. Turns out there are lots of people, whole countries, that want respect, and will pay through the nose to get it. How do you think I got rich? I invented weapons, and now I have a weapon that only I can defeat, and when I unleash it . . .

[*Mr. Incredible throws a log at Syndrome, who dodges it and traps Mr. Incredible with his zero-point energy ray*]

**Syndrome:** Oh, ho ho! You sly dog! You got me monologuing! I can't believe it. . . .

Abraham Lincoln's Second Inaugural Address persuades on a variety of levels. Lincoln demonstrates that he is knowledgeable, and therefore credible, when he sets context for his remarks. He establishes a connection of trust with the listener and therefore reinforces his character and good will when he acknowledges shared knowledge and motive: "The progress of our arms, upon which all else chiefly depends, is as well known to the public as to myself." And he effectively distances himself from unpleasant

2 *A Civil Action*, Motion Picture (Touchstone Pictures 1998) (quote available at <http://www.imdb.com/title/tt0120633/>).

3 *The Incredibles*, Motion Picture (Walt Disney Pictures 2004) (quote available at <http://www.imdb.com/title/tt0317705/>).

matters and therefore maintains credibility, character, and good will: “And war came.” While his presentation contains other hallmarks of persuasion, it is a study in the impact of ethos.

In contrast, Schlichtmann and Syndrome lack credibility, character, and ethos. For Schlichtmann, much is lost in the content of his communication. His motive, articulated through the content of the message, is offensive. But also, his organization and style undermine credibility. He begins bluntly, and with superiority, with no regard for establishing a relationship with his audience: “It’s like this.” Similarly, Syndrome’s monologue establishes his ill motive largely in terms of content, but also by the organization of material and the style of his language. Indeed, his ill motive and lack of character are foreshadowed by the remarks of Lucius and Bob. He uses self-serving, ego-focused, and condescending prose: “That’s the way it works.” This distances him from his audience, undermines his likeability and trustworthiness and therefore undermines his ability to persuade.

This article will explore how to establish or maintain ethos in legal writing. Specifically, the article explores how organizational and stylistic aspects of a document establish both the credibility of the advocate and the relationship between the advocate and the reader. It further posits that this relationship is a manifestation of ethos.<sup>4</sup> In section I, I briefly explore the foundations of persuasion and the attributes of ethos in legal writing. In section II, I address organizational attributes of a document that establish, reinforce, or detract from ethos. In section III, I address stylistic attributes of a document that similarly influence ethos. Finally, in section IV, I explore some concerns and criticisms regarding the use of these devices in the context of legal dialogue.

## I. Introduction

### A. The foundations of persuasion

Aristotle is credited with developing the three technical<sup>5</sup> means of persuasion. Because a speech involves three elements—the content of

<sup>4</sup> The focus, therefore, is primarily on ethos communicated through organization and style, rather than content. The distinction I attempt to draw here is on the manner in which an advocate communicates the content of legal advocacy, rather than the substance of the argument itself.

<sup>5</sup> Technical can be further explained as follows:

The attribute “technical” implies two characteristics: (i) Technical persuasion must rest on a method, and this, in turn, is to say that we must know the reason why some things are persuasive and some are not. Further, methodical persuasion must rest on a complete analysis of what it means to be persuasive. (ii) Technical means of persuasion must be provided by the speaker himself, whereas preexisting facts, such as oaths, witnesses, testimonies, etc. are non-technical, since they cannot be prepared by the speaker.

Stanford Encyclopedia of Philosophy, *Aristotle’s Rhetoric*, <http://plato.stanford.edu/entries/aristotle-rhetoric/> (last updated 2010) [hereinafter Stanford Encyclopedia].

speech, the listener, and the speaker<sup>6</sup>—the three technical means of persuasion mirror those elements. The content-of-speech element is *logos*.<sup>7</sup> “We persuade by the argument itself when we demonstrate or seem to demonstrate that something is the case.”<sup>8</sup> The listener element is *pathos*.<sup>9</sup> *Pathos* refers to persuasion based on an emotional appeal to the audience.

“The success of the persuasive efforts depends on the emotional dispositions of the audience; for we do not judge in the same way when we grieve and rejoice or when we are friendly and hostile. Thus, the orator has to arouse emotions exactly, because emotions have the power to modify our judgments . . . .”<sup>10</sup> Persuasion based on *ethos* relates to the character of the speaker—is the speaker regarded as intelligent, having a virtuous character, and displaying good will?<sup>11</sup> *Logos*, *pathos*, and *ethos* all contribute to persuasion in legal argument.

The use of *logos* in legal writing is relatively straightforward. A typical legal argument is deductive in nature, applying a legal rule to a set of facts to compel a particular result.<sup>12</sup> This is the approach that is described and illustrated in many texts and articles on legal argument.<sup>13</sup> However, much—but not all—material addressing the use of *pathos* and *ethos* in legal argument examines these concepts in terms of oral, rather than written advocacy.<sup>14</sup> In this article I attempt to further explore how to evince *ethos* in legal writing.<sup>15</sup>

6 Lane Cooper, *The Rhetoric of Aristotle* 16 (Lane Cooper trans., Prentiss-Hall 1932). “The kinds of Rhetoric are three in number, corresponding to the three kinds of hearers to which speeches are addressed; for a speech being the joint result of three things—the speaker, his subject, and the person addressed . . . .” *Id.*

7 *Id.* at 9 (“[P]ersuasion is effected by the arguments, when we demonstrate the truth, real or apparent, by such means as inhere in particular cases.”).

8 Stanford Encyclopedia, *supra* n. 5.

9 Cooper, *supra* n. 6, at 9 (“[P]ersuasion is effected through the audience, when they are brought by the speech into a state of emotion . . . .”).

<sup>10</sup> Stanford Encyclopedia, *supra* n. 5.

<sup>11</sup> Edward P.J. Corbett, *Classical Rhetoric for the Modern Student* 80 (3d ed., Oxford U. Press 1990). Corbett explains, “The ethical appeal is exerted, according to Aristotle, when the speech itself impresses the audience that the speaker is a person of sound sense (*phronesis*), high moral character (*arête*), and benevolence (*eunoia*). Notice that it is the speech itself that must create this impression.” *Id.* (emphasis in original).

<sup>12</sup> See e.g. Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483, 492 (2003). Robbins notes that

[t]he bulk of written legal argument takes the form of deductive reasoning, moving from general to specific concepts. Most often, deductive reasoning applies a general rule to a specific set of facts. The application of the rule arguably leads to the stated conclusion, but as we in the legal profession know, a different articulation of the same rule can easily lead to the opposite result.

*Id.*

<sup>13</sup> Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ALWD 129, 131–32 (2006) (identifying works that explore the development of *logos* in legal writing).

<sup>14</sup> *Id.* at 132–33. Notably, it is Smith’s own work that explores in perhaps greatest detail the techniques for evincing *ethos* in written, as opposed to oral, advocacy. See generally Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*, (2d ed., Aspen Publishers 2008).

<sup>15</sup> I invite another author to explore *pathos* in legal writing in greater detail.

## B. The persuasive appeal of ethos

Aristotle established the importance of ethos in persuasion, and that importance has been further investigated—and supported—by modern scholars of rhetoric. Legal scholars and cognitive psychologists have also explored the role of ethos in persuasion. While many examinations of ethos focus on characteristics of the source, there is also a relational quality of ethos. In other words, it is important to consider not only source-characteristic attributes such as intelligence and trustworthiness, but also source-relational attributes such as familiarity, trust, and attraction.

The primary qualities of ethos in legal writing have been deftly identified by Michael Smith in his text, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*.<sup>16</sup> Smith identified three features of ethos, including intelligence, character, and good will.<sup>17</sup> A writer can demonstrate intelligence and competence by showing that she is informed, adept at legal research, organized, analytical, deliberate, empathetic, practical, articulate, eloquent, precise, innovative.<sup>18</sup> A writer's character is revealed when she demonstrates truthfulness, candor, zeal, respect, and professionalism.<sup>19</sup> Finally, good will refers to the apparent motivation of the advocate. "According to classical rhetoricians, a decision-maker will doubt the veracity of what an advocate has to say if the advocate does not appear to be well-disposed toward the decision-maker or toward another party that may be affected by the decision."<sup>20</sup> Good will can be established or reinforced when the writer demonstrates authority; consistency; fairness; and concern for, or similarity with, the audience.<sup>21</sup>

Social psychologists have also studied persuasion and, specifically, the role of source credibility on persuasion.<sup>22</sup> In psychological-research

16 Smith, *supra* n. 14 at 121–93.

17 *Id.* at 125.

18 *Id.* at 147–93.

19 *Id.* at 125–46.

20 *Id.* at 143.

21 See generally Jerry Frug, *Argument as Character*, 40 Stan. L. Rev. 869 (1988).

22 Admittedly, the information that follows in this section represents a gross simplification of a vast number of resources. Whereas a comprehensive overview of social psychological approaches to persuasion is beyond the scope of this piece, the reader should be aware that a number of identified theories of attitude change have developed over the years, which have been tested under multiple experiments. See e.g. Richard E. Petty & John T. Cacioppo, *Attitudes and Persuasion: Classic and Contemporary Approaches* (Wm. C. Brown Comp. Publ'rs 1983) (evaluating seven main approaches to attitude change). The varied approaches, however, do share some focus on how persuasion is impacted by source credibility. *Id.* at 36. So, for example, "while different approaches may emphasize different variables and different processes . . . there are only two fundamentally different 'routes' to changing a person's attitude." *Id.* Both routes investigate, to a degree, the source. "One route, which [is] call[ed] the *central route*, emphasizes the information that a person has about the person, object, or issue under consideration; and the other route, . . . call[ed] the *peripheral route*, emphasizes just about everything else (e.g., information about the communicator or about the immediate consequences of adopting a certain attitude)." *Id.* (emphasis in original).

studies, source-credibility attributes include “competence, familiarity, attraction, hostility, and power.”<sup>23</sup> Some of these attributes, such as competence, relate solely to characteristics of the source. “[W]e show respect toward people who have knowledge, ability, and skill, that is, people who are *competent* or *expert*.”<sup>24</sup>

However, the attributes of source credibility identified by Smith and cognitive psychologists are also a reflection of the relationship the source fosters with the audience, what I refer to as source relational attributes. When an advocate can establish familiarity, similarity, and attraction with her audience, she enhances her ability to persuade.<sup>25</sup> These source-relational attributes implicate the source’s ability to connect with the audience in some manner, by creating a bond based on shared information or by reinforcing a bond established between the source and the audience. So, for example, “credibility effects [can be] due to internalization, which entail[s] *acceptance* of information and integration of that information into one’s existing cognitive system, [and] attractiveness effects [can be] due to *identification*, which relie[s] on salience of one’s bond to or relationship with the message source.”<sup>26</sup> When source-relational attributes enhance the audience’s acceptance of or identification with the source, or with the material presented by the source, those attributes similarly enhance persuasion.

Moreover, because “attitudinal similarity leads to frequent interactions and to interpersonal attraction,”<sup>27</sup> similarity is influential in terms of persuasion. “There is much evidence that supports the proposition that the greater the perceived similarity between the source and the audience, the greater the effectiveness of the source of attitude change.”<sup>28</sup> Further, there is a circular relationship between the concepts of source similarity, familiarity, and liking, so that if one variable begins to increase, the others increase as well, and this leads to enhanced persuasion.<sup>29</sup>

Trust also influences attitude change.<sup>30</sup> Indeed, as one author has noted, “trust is the foundation of belief.”<sup>31</sup> We tend to trust people whom we like and whom we perceive to be similar to us—source-relational attributes of ethos. We also tend to trust people whom we deem to be

23 Harry C. Triandis, *Attitude and Attitude Change* 168 (John Wiley & Sons, Inc. 1971).

24 *Id.* (emphasis in original).

25 “There are people toward whom we feel close, intimate, and with whom we are *familiar*. We usually show friendship toward people we like, because they are rather similar to us . . . , that is, they are *attractive* to us.” *Id.* (emphasis in original).

26 Richard E. Petty, & Duane T. Wegener, *Attitude Change: Multiple Roles for Persuasion Variables*, in *The Handbook of Social Psychology* 323–90 (Daniel T. Gilbert et al. eds., McGraw-Hill 1988).

27 Triandis, *supra* n. 23 at 176.

28 *Id.*

29 “[O]nce this circular process starts it is likely to increase or decrease all three variables. Sources who are high in perceived similarity become familiar and are liked; they also tend to be more effective in changing attitudes.” *Id.*

knowledgeable and reliable—source-characteristic attributes of ethos. In fact, “[e]xperimental studies of ethos and factor-analytic studies of source credibility support the hypothesis that interpersonal trust is based upon a listener’s perceptions of a speaker’s expertness, reliability, intentions, activeness, personal attractiveness, and the majority opinion of the listener’s associates.”<sup>32</sup> Trust can be established or reinforced by showing similarity, creating a bond, and by maintaining good will (lack of ill motive). Trust and credibility are undermined when the audience perceived the advocate to be motivated by ill will, or personal gain, or when the attempt to persuade is overt and therefore appears manipulative.

To be fair, studies by social psychologists on the impact of source credibility are not indisputable.<sup>33</sup> However, they do seem to support the general notion first advanced by Aristotle and which remains intuitively reasonable today: a source with positive characteristics such as intelligence persuades on an ethos level. Moreover, the studies tease out 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. Thus, an advocate should strive not only to manifest identified characteristics of ethos, but also to establish positive source-relational attributes.

Whereas relational attributes may be influenced by the advocate’s use of all the components of persuasion (ethos, pathos, and logos),<sup>34</sup> the relationship itself is a manifestation of the advocate’s ethos. Ethos is based on

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**30** Trust has been defined as “reliance on the characteristics of an object, or the occurrence of an event, or the behavior of a person in order to achieve a desired but uncertain objective in a risky situation.” Kim Giffin, *The Contribution of Studies of Source Credibility to a Theory of Interpersonal Trust in the Communication Process*, 68 *Psychological Bulletin* 104, 105 (1967). To put the concept of risk into greater context, Giffin notes that risk is “‘motivational relevance’ (something invested)” and that “an individual may be said to have trust in the occurrence of an event if he expects its occurrence and if his expectation leads to behavior which he perceives to have greater negative motivational consequences if the expectation is not confirmed than positive motivational consequences if it is confirmed.” *Id.* at 104 (citing M.A. Deutsch, *Trust and Suspicion*, 2 *J. Conflict Res.* 265, 265–66 (1958). citations omitted).

**31** Delia B. Conti, Student Author, *Narrative Theory and the Law: A Rhetorician’s Invitation to the Legal Academy*, 39 *Duq. L. Rev.* 457, 472 (2001).

**32** Giffin, *supra* n. 30 at 104.

**33** So, for example, although certain studies have shown that “[s]ources who are high in perceived similarity become familiar and are liked[,] . . . there are also studies that predicted and found quite the opposite results.” Triandis, *supra* n. 23 at 176. See also Zakary L. Tormala, Pablo Briñol, and Richard E. Petty, *When Credibility Attacks: The Reverse Impact of Source Credibility on Persuasion*, 42 *J. of Experimental Social Psychol.* 684 (2006). The Tormala *et al.* study demonstrated that when people generate primarily positive thoughts in response to a message (e.g., because the message contains strong arguments) and then learn of the source, high source credibility leads to more favorable attitudes than does low source credibility. When people have primarily negative thoughts in response to a message (e.g., because it contains weak arguments), however, this effect is reversed—that is, high source credibility leads to less favorable results than does low source credibility. *Id.*

**34** Ethos, pathos, and logos are intertwined. When an advocate crafts a logical argument, she employs logos, but she also establishes ethos by appearing intelligent to the audience. When she invokes some emotion from her audience, she employs pathos, but also reinforces a relational component with her audience, reinforcing her good will (e.g., sympathy evoked), or likeability (e.g., humor evoked), or compassion (e.g., sadness evoked). So the audience’s perception of the source, and of the relationship between the source and the audience, is influenced by logic and emotion.



audience trust, and trust is established “by creating a psychological connection with the audience.”<sup>35</sup> “If the audience perceives the speaker to have practical wisdom, virtue, and goodwill, then the trustful connection is made.”<sup>36</sup> Logos is important,<sup>37</sup> but “logical arguments are persuasive not because of something inherently true about logic, but rather because the audience values and responds to logical arguments. That is, logic is not outside human experience, but of it.”<sup>38</sup> Persuasion is based upon an audience’s evaluation of, and identification with, the advocate.<sup>39</sup> “When we advance arguments, we say, ‘[B]e like me’ (or, at least, be like the character I am presenting myself to be in this argument).”<sup>40</sup> When the audience responds, “[Y]es, that’s what I think[,]’ after listening to another’s arguments, we expose and foster an aspect of our own character, advancing a conception of who we consider ourselves to be.”<sup>41</sup>

35 Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 *Scribes J. Leg. Writing* 61, 73 (2002).

36 *Id.* Aristotle explained how the advocate establishes ethos, subtly demonstrating the relationship between ethos, pathos, and logos:

There are three reasons why speakers themselves are persuasive; for there are three things we trust other than logical demonstration. These are practical wisdom [*phronesis*] and virtue [*arete*] and good will [*eunoia*]; for speakers make mistakes in what they say or advise through [failure to exhibit] either all or one of these; . . . for either through lack of practical sense they do not form opinions rightly; or though forming opinions rightly they do not say what they think because of a bad character; or they are prudent and fair-minded but lack good will, so that it is possible for people not to give the best advice although they know [what] it [is]. These are the only possibilities. Therefore, a person seeming to have all these qualities is necessarily persuasive to the hearers.

*Id.* (quoting Aristotle, *On Rhetoric* (George A. Kennedy trans., Oxford U. Press 1991)). See also Brett G. Scharffs, *The Character of Legal Reasoning*, 61 *Wash. & Lee L. Rev.* 733, 748–49 (2004). Scharff explains that “[p]ractical wisdom is . . . composed of both virtue of intellect and virtue of character.” “The person of practical wisdom is adept at deliberating well, both in figuring out the best means to a given end and in discerning the appropriate end that should be pursued.” *Id.* He argues that “the primary traits of character that the person of practical wisdom will possess are justice, mercy, and humility.” *Id.*

37 Jamar, *supra* n. 35 at 73 (“[L]ogical argument [is still necessary] to carry the day.”).

38 *Id.* at 62. “The character or nature of the audience relates not just to *ethos*, but also to *logos*. One should choose premises for enthymemes that will appeal most strongly to the particular group” *Id.* at 74.

39 Frug *supra* n. 21 at 872–73 (examining “legal argument in terms of how in making arguments the speaker or writer ‘shows himself to be of a certain character’ and seeks to have his listeners (or readers) identify with that kind of character”).

40 *Id.* at 873.

41 *Id.* “People often say that arguments appeal to values, but values are not ‘things’ that people ‘have’ on which they ‘base’ their decisions. Values are defined, modified, rejected, nurtured, suppressed and clarified in the process of forming one’s character.” *Id.* at 873. Frug’s “claim is that [the reader] will be persuaded by what [he has] had to say to the extent that these kinds of evangelical appeals find a place in [the reader’s] own character, to the extent that they appeal to an aspect of [the reader] and to a way in which [the reader] experience[s] the world that [the reader] recognize[s] and want[s] to nurture.” *Id.* at 926. Frug concludes that “[a]rguments soothe, nurture, move people toward a conception of themselves. They also offend, disturb or repel us. In both these ways, they help create the character of those who respond to them.” *Id.* at 926. He even evaluates his own argument in terms of relationship. Frug asks the reader to

[c]onsider how you read this article—what parts you skimmed, where you got bored, what parts (if any) seemed right to you. Ask yourself why you had these reactions. Was it because my arguments were “based” on something that you “know” to be “true” or “false”? Or was it because we had, or failed to have, some intersubjective connection—because you either identified or failed to identify with the view of world to which I have been appealing?

*Id.* at 926.

An argument's persuasive appeal, then, is based not only on the characteristics of ethos evinced by the advocate, but on the relationship she fosters with the reader. Certain rhetorical devices, including those of organization and style, can establish or reinforce that relationship or bond and therefore reinforce the ethos of the advocate. In a similar vein, an advocate can preserve her ethos when confronting negative, offensive, or counter information by employing strategies that distance her from certain material.

### C. The canons of rhetoric

Classic rhetoricians divided legal rhetoric into five parts, or canons: invention, arrangement, style, memory, and delivery.<sup>42</sup> Within the invention canon, the advocate must discover, or invent, arguments related to the issue at hand. The arrangement canon involves a consideration of how to best organize the material related to the argument. The style canon involves a consideration of how to most artfully and persuasively present ideas. The memory and delivery canons inform oral presentation. The memory canon refers to the orator's ability to recite from memory, and the delivery canon refers to effects of oral presentation, including voice and gesture.

The goal of this article is to explore how ethos is manifested in legal writing. To that end, the article proceeds with a presumption that the categories of argument an advocate would consider within the invention canon are accessible to the reader.<sup>43</sup> In other words, I do not intend to evaluate a distinct ethos function related to the selection of types of arguments, per se. Moreover, because memory and delivery pertain to oral advocacy, as opposed to written,<sup>44</sup> this article does address the fourth and fifth canons.

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<sup>42</sup> Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. Cal. Interdisc. L.J. 613, 617 (1999).

<sup>43</sup> *Id.* In terms of the invention canon, Frost explains,

[C]lassical rhetoricians focused first on systematic methods for discovering or "inventing" all the available legal arguments in a given case. To aid in the factual analysis of the case, they provided detailed checklists and inventories of common types of legally significant facts. Following this they listed and analyzed dozens of commonly used lines of argument called *topoi* or topics of invention. Their classification system was based on the "characteristic ways in which the human mind reasons or thinks . . . [They were a] codification of the various ways in which the human mind probes a subject to discover something significant or cogent that can be said about that subject." As they discussed arguments from definition, precedent, ambiguity, legislative intent, etc., they frequently provided numerous illustrations drawn from real and hypothetical cases. They also described rebuttal techniques, logical fallacies, common counterarguments, and various problems frequently associated with particular types of argument.

At the invention stage of the rhetorical process, they simply wanted to ensure that important facts and arguments were not overlooked. Nevertheless, comprehensive as their analysis was, Greco-Roman rhetoricians never regarded their suggestions as anything more than starting points for discovering the available arguments in a given case. Based on their own practical experience, they were acutely aware, and repeatedly reminded their readers, that advocates must be creative, resourceful, and flexible in devising arguments.

*Id.* at 617–18.

<sup>44</sup> *Id.*

Rather, the article explores primarily the second and third canons of legal argument—arrangement and style. I explore how the organization or arrangement of material can influence the relationship between the writer and reader and therefore affect the ethos of the argument and the advocate. I also consider how select stylistic devices evince the character of the advocate and establish or reinforce the relationship between the advocate and the reader.

## II. Canon II: Arrangement—Organizational Strategies to Communicate Ethos

Arrangement (*dispositio* or *taxis*), the second canon of rhetoric, concerns how an advocate orders speech or writing. In terms of arrangement, classic rhetoricians addressed *dispositio* “to determine how the argument, once developed, should be organized for maximum effect.”<sup>45</sup> Classic rhetoricians divided argument into five components including the Introduction, Statement of Facts, Division, Proof, and Conclusion.<sup>46</sup> These components are mirrored in many forms of legal discourse, most notably the appellate brief.<sup>47</sup> Once a work was divided, rhetoricians emphasized the use of particular persuasive techniques for each section. For example, Cicero suggested that an advocate employ ethos-based appeals in the introduction section so as to establish credibility.<sup>48</sup> However, the organi-

45 Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 St. John's J. Leg. Comment. 649, 691 (2010). Inniss characterizes critical legal rhetoric as “a way of understanding not only why law performs its work, but how. Critical legal rhetoric is an analytical approach that concerns itself with both the structural and material aspects of a text in order to trace the recurring forms that inhabit both the legal and the public sphere.” *Id.* at 649.

46 Michael H. Frost, *With Amici Like These: Cicero, Quintilian and Importance of Stylistic Demeanor*, 3 J. ALWD 5, 9 (2006) [hereinafter Frost, *With Amici Like These*]. These five components can be collapsed to reflect the conventional presentation of legal documents, with an Introduction, Statement of Facts, Argument, and Conclusion. See e.g. Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 Washburn L.J. 319, 334 (2011) (“Aristotle said that once a speaker invents his argument, he must arrange it. He identified traditional speech as having an introduction, statement of facts, argument, and conclusion.”). “[T]hese organizational requirements are the same as those first formulated in the fifth century B.C. by Corax of Syracuse, who divided forensic discourse into the ‘Introduction,’ the ‘Narration,’ the ‘Argument,’ and the ‘Peroration.’” Michael Frost, *Brief Rhetoric—A Note on Classical and Modern Theories of Forensic Discourse*, 38 U. Kan. L. Rev. 411 (1989) [hereinafter Frost, *Brief Rhetoric*].

47 See generally Frost, *Brief Rhetoric* *supra* n. 46.

Although Aristotle maintained that an argument actually contains only two essential parts, the “Statement of the Case” and the “Proof,” he conceded that in practice orators usually added two more parts, the “Introduction” and the “Conclusion.” Romans like Cicero, Quintilian, and the anonymous author of the *Rhetorica ad Herennium* developed and refined the divisions first described by Corax. They added an argument summary section thus creating a five part division—“Introduction” (*exordium*), “Statement of the Case” (*narratio*), “Argument Summary” (*partitio*), “Proof of the Case” (*confirmatio*), and “Conclusion,” (*peroratio*)—which survived virtually intact throughout the classical period. This five-part organization of the substantive part of a legal argument is the same as that required by the United States Supreme Court Rules.

*Id.* at 413.

zation of material in the argument section can also be used to evince ethos.

Most notably, the division section, or summary, can be organized in a manner that reinforces source credibility. So, in part II (A), organizational strategies that deal with the division section of a legal document, such as the summary or table of contents, will be explored from an ethos perspective. In addition, the organization of material within the argument section can establish source characteristic and source relational attributes and therefore impact ethos-based persuasion. In part II (B), a variety of such organizational strategies will be explored, including the use of sequential request strategies, argument structures such as syllogism and enthymeme, and organizational frameworks such as narrative and storytelling.

### A. Infrastructure with integrity: organizational signposts

The “Division” (*partitio*) component of legal discourse is essentially an outline of the argument that will follow. In modern legal discourse this can take the form of the Summary of the Argument or the Table of Contents. “Sometimes called an ‘exposition,’ at other times a ‘partition,’ its purpose is to ‘set[] forth, briefly and completely, the points we intend to discuss.’”<sup>49</sup> “Modern analysts . . . stress that the summary ‘permits the court to see the interrelationship of one point to the other, and to the entire argument.’”<sup>50</sup> By “plac[ing] each point in its proper perspective,”<sup>51</sup> the division, in either summary or heading form, effectively and concisely guides the reader through the argument’s primary points. A well-designed division, then, communicates the knowledge and intelligence of the advocate.

In terms of organizing material, classic rhetoricians identified myriad Figures of Order. These figures were based on the relationship between parts of an argument and were developed to help advocates organize material most effectively for persuasive import. Many of these figures inform the organization of the division. While these concepts undoubtedly

48 Cicero further advised to employ logos-based appeals in the statement of fact and argument sections, and pathos-based appeals in the conclusion section. Gideon O. Burton, *Silva Rhetorica*, <http://rhetoric.byu.edu/canons/Arrangement.htm> (accessed April 3, 2012).

49 Frost, *With Amici Like These*, *supra*, n. 46 at 10. According to Quintilian, the *partitio* “adds ‘to the lucidity and grace of [the] speech.’” *Id.* at 10 (quoting 2 Marcus Fabius Quintilianus, *Institutio Oratoria* 63, 149 (Loeb Classical Library) (H. E. Butler trans., Harv. U. Press 1921)).

50 Frost, *Brief Rhetoric*, *supra* n. 46 at 420.

51 *Id.*

relate to the logical organization of material and therefore serve the logos function, they also demonstrate the ethos of the advocate.<sup>52</sup>

For example, the concept of *eutrepismus* advises that various parts of an argument under consideration should be numbered.<sup>53</sup> Such a figure of order underscores the logical progression of the material, but also serves as a visual, apparent illustration of the knowledge and analytical skill of the advocate. Similarly, advocates were advised to use *enumeratio* to divide a subject into its adjuncts, a cause into its effects, or an antecedent into its consequents.<sup>54</sup> *Taxis* is used to divide a subject up into its various components or attributes.<sup>55</sup> Figures of parallelism<sup>56</sup> can be used to reinforce relationships between words or concepts, and figures of balance can be used to juxtapose contrasting ideas,<sup>57</sup> or to argue both sides of an issue.<sup>58</sup>

These figures of order clearly reinforce logic, and make the material more accessible to the reader.<sup>59</sup> But arrangement also demonstrates the ethos of the advocate, even in contemporary writings: “Arguably, visual effects also influence the writer’s *ethos*, the credibility of the writer and the writer’s argument.”<sup>60</sup> With regard to usefulness of the *partitio* (summary or headings), in contemporary educational psychological studies, “headings are also called ‘signaling topic structures’ and summaries or

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52 See Frost, *With Amici Like These*, *supra* n. 46 at 9. “[S]uccessful arguments depend as much on appeals to emotion (*pathos*) and the advocate’s credibility (*ethos*) as they do on logic (*logos*). Moreover, both *pathos* and *ethos* help determine an advocate’s organizational strategies and exercise a considerable influence on a judge’s decisions. Classical rhetoricians understood and repeatedly stressed that all three modes of argument—*logos*, *ethos*, and *pathos*—were connected and inter-dependent.” *Id.* (emphasis in original).

53 Burton, *supra* n. 48, at <http://rhetoric.byu.edu/figures/E/eutrepismus.htm>.

54 *Id.* at <http://rhetoric.byu.edu/figures/E/enumeratio.htm>.

55 *Id.* at <http://rhetoric.byu.edu/canons/arrangement.htm>.

56 Isocolon, for example, is type of parallelism, or “[a] series of similarly structured elements having the same length.” *Id.* at <http://rhetoric.byu.edu/figures/I/isocolon.htm>. An example of such parallelism is “[v]eni, vidi, vici (I came, I saw, I conquered).” *Id.*

57 Antithesis, for example, is a figure of balance, and is “[j]uxtaposition of contrasting words or ideas (often, although not always, in parallel structure).” *Id.* at <http://rhetoric.byu.edu/figures/A/antithesis.htm>. An example of antithesis is “One small leap for man, one giant leap for mankind.” *Id.*

58 *Utrumque partes* is the Latin term. Burton notes that

Aristotle explains that doing so is necessary to be sure one is arriving at the true state of the case (see *stasis*) and to anticipate counterarguments (see *procatlepsis*).

As such, this term names not so much a figure of speech as a general approach to rhetoric, or an overall argumentative strategy. However, it could be manifest within a speech on a local level as well, especially for the purposes of exhibiting fairness (establishing *ethos*).

*Id.* at <http://rhetoric.byu.edu/Figures/I/in%20Utrumque%20partes.htm>.

59 Indeed, “regular, repeating patterns established through carefully organized pages of text and graphics help the reader to establish the location and organization of [] information and increase legibility.” Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108, 112 (2004) (citing Patrick J. Lynch & Sarah Horton, *Web Style Guide 2d ed.*, <http://www.webstyleguide.com/type/legible.html> (last updated Mar. 5, 2004)).

60 *Id.* at 111 (emphasis in original).

roadmaps are called ‘advance organizers.’ Both signals and advance organizers help provide the reader with the hierarchical structure of the material.”<sup>61</sup> By making the organization apparent to the reader with these signposts or signals, the advocate will present material to the audience in a manner that is clear, logical, and accessible. She will thereby demonstrate positive source-characteristic attributes including knowledge, intelligence, and ethos.

Organizing material in an accessible manner and in a manner consistent with applicable procedural rules also meets basic expectations of the audience and therefore demonstrates fairness and respect, arguably source-relational attributes. One court explains, “Procedural rules are important for two overarching reasons. One reason is that rules ensure fairness and orderliness. They ensure fairness by providing litigants with a level playing field. They ensure orderliness by providing courts with a means for the efficient administration of crowded dockets.”<sup>62</sup> Thus, to the extent procedural rules that dictate content and organization “facilitate the tri-cornered communications that link the opposing parties with each other and with the court,”<sup>63</sup> an advocate who has conscientiously and effectively organized material has reinforced the expectations of her reader and so preserved her relationship with the reader. She is persuasive because she has manifested ethos.

## B. Stage whispers and subtle hints: organizational cues

Confirmation or proof (*confirmatio*) and refutation (*refutatio*) fall within the arrangement canon and generally represent the argument section of legal documents.<sup>64</sup> In the confirmation or proof section, the advocate sets forth her position, typically relying on logical arguments as proof of her position.<sup>65</sup> The refutation section follows, in which the advocate answers the counterarguments of her opponent.<sup>66</sup>

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<sup>61</sup> *Id.* at 124. “Ultimately, this contributes to better recall because the reader better understands the relationships among subtopics.” Ruth Anne Robbins advises to “[v]ary the size of the headings to show hierarchy, moving from larger to smaller” and to “make all hierarchies consistent throughout.” *Id.* at 133–34.

<sup>62</sup> *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 14 (1st Cir. 1996).

<sup>63</sup> *Id.*

[R]ules establish a framework that helps courts to assemble the raw material that is essential for forging enlightened decisions. In an appellate venue, for example, rules provide the mechanism by which the court, removed from the battlefield where the trial has been fought, gains the information that it requires to set the issues in context and pass upon them. When a party seeking appellate review fails to comply with the rules in one or more substantial respects, its failure thwarts this effort and deprives the appellate court of the basic tools that the judges of the court need to carry out this task.

*Id.*

<sup>64</sup> Corbett, *supra* n. 11, at 300–07.

<sup>65</sup> *Id.* at 300–01.

Classic rhetoricians provided ample guidance on arrangement and on the relationship of arrangement to the other parts of legal discourse.<sup>67</sup> Modern scholars, drawing on interdisciplinary research, have also articulated sequential-request strategies<sup>68</sup> that influence the reader in subtle ways and that therefore can be employed for persuasive impact. A sequential-request strategy refers to the deliberate placement and order of requests to the reader (or listener) to accept or reject initial premises. These initial requests are related to the ultimate conclusion the advocate seeks, known as the ultimate request. The initial requests are often referred to as primes, because their objective is to prime, cue, or condition the reader to accept the ultimate request.

So, as described below, an advocate can prime a reader to be predisposed to a conclusion by exposing the reader initially to a conclusion she is likely to accept.<sup>69</sup> Primes rely on ethos-based persuasion because they typically depend upon an advocate establishing a relationship with the reader by strategic placement of material.

In addition to sequential request strategies, some scholars have studied the persuasive appeal of standard deductive organizational frameworks of legal reasoning, including the syllogism<sup>70</sup> and the enthymeme.<sup>71</sup> Others have focused on how storytelling and narrative

66 *Id.* at 302–07 (noting that refutation can be accomplished by appeal to reason, emotional appeals, ethical appeals, or by wit). In developing the argument section, confirmation and refutation, the advocate would first have done her background work at the invention stage, identifying the topics of invention—or appropriate relationship among her ideas—to best express the argument. Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 Washburn L.J. 319, 324 (2011).

Invention is the most time-consuming and difficult part of the process. At this stage, the writer invents supporting arguments known as artistic appeals. A writer may rely on inartistic appeals as well, such as confessions, oaths, or contracts, but she does not invent these in any creative sense. Aristotle further divided artistic appeals into appeals to reason (logos), emotion (pathos), and credibility (ethos). Next, the writer must arrange or organize her arguments, and Aristotle's idea of arrangement was simple and straightforward: first, a statement of the relevant facts and then the argument.

*Id.* In terms, then, of arranging the argument, the writer would typically first present her position and then refute that of her opponent. *Id.*

67 See e.g. Frost, *supra* n. 42 at 618–20.

[Rhetorical] treatises offered detailed explanations regarding the function of each part and the relationships among the parts . . . . For nearly 1,000 years, Greek and Roman rhetoricians refined and extended their examination of legal discourse. The analytical techniques, classification systems, psychological assumptions, stylistic concerns, terminology, and purposes they described or created are both comprehensive and coherent. They are also the starting point of all subsequent approaches to analysis and creation of legal discourse.

*Id.*

68 See generally Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 Mich. St. L. Rev. 411 (2006).

69 This is a form of *sorites*, a figure of reasoning in which a chain of claims or arguments builds upon one another.

70 [I]n a formal syllogism, the major premise is a general statement that is universally true about some set or some condition (within the set of all humans, all are mortal); the minor premise is a specific statement about a specific thing within the universal set (Socrates is a member of the set of humans); the conclusion necessarily follows if both the major premise and the minor premise are true.

Jamar, *supra* n. 35 at 82.

frameworks impact persuasion. These organizational frameworks similarly persuade on an ethos level because they depend upon the reader's ability to infer information that has been prompted by the advocate, and this depends upon the relationship the advocate has established with the reader.

To the extent each of these techniques influence organization, they fall, in part,<sup>72</sup> within the arrangement canon. And the persuasive appeal of an organizational framework can influence the reader on an ethos level<sup>73</sup> by establishing or reinforcing a relationship with the reader.

## 1. Priming

### *a. Organizational, as opposed to stylistic, priming*

A full discussion of priming is beyond the scope of this article, and has been artfully and effectively addressed by others.<sup>74</sup> Nonetheless, with regard to the ethos function of priming, one distinction is in order: priming from an organizational, rather than semantic perspective. By that I mean to explore how an advocate can organize material in a manner that establishes or maintains ethos. These organizational techniques are contrasted with rhetorical techniques that influence audience emotion and therefore prime the reader to certain affective or emotional responses.<sup>75</sup>

The difference can be likened to that between affective and cognitive priming.

Affective priming is based on the premise that, when confronted with a stimulus, people unconsciously generate affective reactions to the

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<sup>71</sup> The enthymeme is contrasted with the syllogism in that one or more of the premises leading to the conclusion is not stated. Jamar notes that this is, in Aristotelian terminology, a rhetorical syllogism, and is quite common in legal discourse:

In a rhetorical syllogism or enthymeme, frequently a premise is unstated because "if one of [the premises] is known, it does not have to be stated, since the hearer supplies it." That is, there are often many premises on which a conclusion rests, and to state them all would be nearly impossible or even actually impossible . . . . In an enthymeme, the statements, premises, and conclusions are not usually absolute. Instead, they tend to be couched in terms of probabilities . . . . This is the true dwelling of the enthymeme—drawing a conclusion that may be true based on the strongest, most likely generalities that one can bring forth to interpret the situation.

*Id.* at 83.

<sup>72</sup> Some techniques, notably storytelling and narrative, also have a stylistic dimension. However, the focus in here is on their organizational dimension.

<sup>73</sup> These techniques also persuade on a logos and pathos level. *See infra* sec. II.B.1.b . Examined strictly from an organizational, rather than stylistic perspective, though, they create or reinforce bonds with the reader, affecting her from a relational, ethos-based perspective.

<sup>74</sup> *See e.g. id.*; 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 (2010); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 Or. L. Rev. 305 (2010).

<sup>75</sup> So, for example, metaphor, which as a matter of style, can prime the reader on an affective level. This may serve a pathos function, but such an affective priming strategy can also influence ethos. Notwithstanding, such a technique falls within the style, rather than arrangement, canon, and is therefore discussed *infra* in sec. III.A.1.



context . . . [which in turn] may influence subsequent judgments . . . . In this context, affect refers to “expressions of preference” or, more specifically, the audience member’s “feelings and attitudes” towards the message.”<sup>76</sup>

Affective priming might be best categorized as a pathos-function organizational or rhetorical strategy. Cognitive priming, in contrast, relates to cognitive skills such as “recognition memory, feature identification, categorization, and psychophysical judgments that deal with estimates of sensory and perceptual qualities.”<sup>77</sup> Cognitive, organizational priming serves an ethos function when the organizational strategy establishes a bond between advocate and reader, an ethos-building function.<sup>78</sup>

### *b. Sequential request-strategy primes*

“Priming refers to a process in which a person’s response to later information is influenced by exposure to prior information.”<sup>79</sup> As such, priming is an organizational device a writer uses to select initial material in order to influence the audience’s response to the ultimate, or critical, request.<sup>80</sup> In other words, “the advocate has consciously constructed a series of overlapping propositions together in a chain, so that the acceptance of one proposition leads inexorably to the next.”<sup>81</sup>

There has been considerable research on how sequential request strategies influence persuasion. Cognitive psychological studies explore why particular organizational techniques influence an audience to accept an ultimate conclusion.<sup>82</sup> Kathryn Stanchi reviewed “stud[ies] of persuasion and human decisionmaking [across] . . . a number of fields, including communications, philosophy, rhetoric, and social psychology”<sup>83</sup> and introduced legal writers to a number of strategies designed to persuade. Stanchi’s work focused on the persuasive appeal of material based upon how it is organized, or presented, to the reader.<sup>84</sup> As Stanchi and others have observed,<sup>85</sup> organizational strategies can be employed to facilitate the relationship between writer and audience. This section will

76 Higdon, *supra* n. 74, at 1228–29 (quoting Sheila T. Murphy & R.B. Zajonc, *Affect, Cognition, and Awareness: Affective Priming with Optimal and Suboptimal Stimulus Exposures*, 64 J. Personality & Soc. Psychol. 723, 723 (1993).

77 *Id.* at 1230.

78 For further reading on affective priming, see Stanchi, *supra* n. 74.

79 *Id.* at 306.

80 Stanchi, *supra* n. 68, at 415 (noting that the goal is to “influence the recipient’s decision about the critical request

by ‘priming’ the recipient with a certain kind of prior request”).

81 *Id.*

82 See generally Stanchi, *supra* n. 68.

83 *Id.* at 414.

84 *Id.* at 413 (stressing that “now that there is social-science data about human responses to persuasive tactics, lawyers have an obligation to use it to test and reexamine the validity of the conventional wisdom.”).

85 See e.g. *id.*; Higdon, *supra* n. 74.

first explain four particular types of organizational primes: 1) “foot-in-the-door;” 2) “door-in-the-face;” 3) foreshadowing; and 4) inoculation. It will then explore how these organizational techniques persuade on an ethos level.

Stanchi has extensively evaluated two types of primes, characterized as “foot-in-the-door” and “door-in-the-face.”<sup>86</sup> Foot-in-the-door priming involves using initial premises that are likely to be accepted by the reader.<sup>87</sup> “Empirical research on human behavior and decisionmaking provides some evidence that argument chains are more likely to persuade readers if the first links of the chain are well-settled or widely accepted premises.”<sup>88</sup> Acceptance of the ultimate conclusion is facilitated by the initial prime. In contrast, “door-in-the-face” priming involves initially presenting the reader with information the reader is likely to reject.<sup>89</sup> “The research shows that the recipient, having rejected the first larger request, is thereafter somewhat more inclined to acquiesce to a second, smaller request.”<sup>90</sup>

Foreshadowing is another organizational prime, “effective . . . primarily due to the way it serves to manipulate memory.”<sup>91</sup> Foreshadowing “‘indicates backward causality’ as it is ‘a shadow cast in advance of an object.’ . . . By casting these shadows, foreshadowing operates to ‘acti[]vat[e] an intended target by presenting an earlier hint.’”<sup>92</sup>

Finally, a fourth persuasive, cognitive prime is “inoculation theory.”<sup>93</sup> “In an inoculation message, the message recipient is exposed to a weakened version of arguments against the persuasive message, coupled with appropriate refutation of those opposing arguments.”<sup>94</sup>

Inoculation works because the introduction of a small dose of the opposing argument induces the message recipient to generate arguments

<sup>86</sup> See generally Stanchi, *supra* n. 68.

<sup>87</sup> *Id.* at 418–26.

<sup>88</sup> *Id.* at 418.

<sup>89</sup> See generally *id.* at 426–34, 427 (“The strategy of beginning a persuasive message with a more contentious proposition that the reader is likely to reject is called the ‘door in the face’ strategy.”).

<sup>90</sup> *Id.* at 426–27.

<sup>91</sup> Higdon, *supra* n. 74, at 1232.

<sup>92</sup> *Id.* at 1226 (quoting Gary Saul Morson, *Narrative and Freedom: The Shadows of Time* 48 (1994) (“indicates . . .,” “backward . . .”) Jeffrey K. Zeig, *Seeding*, in *Brief Therapy: Myths, Methods, and Metaphors* 221, 222 (Jeffrey K. Zeig & Stephen G. Gilligan eds., 1990) (“activate . . .”).

<sup>93</sup> See Higdon, *supra* n. 74 at 1237 and Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse*

*Material in Legal Advocacy*, 60 Rutgers L. Rev. 381, 399–400 (2008); see also e.g. Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 Harv. J.L. & Pub. Policy 195, 208–09 (1993). Wangerin explains the persuasive role of inoculation in the context of rebuttals in legal argument: “[A]udiences pre-exposed to weakened counter-arguments will tend to be less persuaded by those counter-arguments when they are subsequently presented. Pre-exposure to weakened counter-arguments, like pre-exposure to weakened forms of disease, causes recipients to build up defenses to the full fledged counter-arguments.” *Id.* See also Quentin Brogdon, *Inoculating against Bad Facts: Brilliant Trial Strategy of Misguided Dogma?*, 63 Tex. B.J. 443 (2000).

<sup>94</sup> Stanchi, *supra* n. 93, at 399–400. “The theory is that introducing a ‘small dose’ of a message contrary to the persuader’s position makes the message recipient immune to attacks from the opposing side.” *Id.*

that refute the opposing argument, the intellectual equivalent of producing antibodies. Once the message recipient generates refutational arguments, she will be less likely to accept the opposing argument when it is presented to her by the opposing side because she will already have a cache of ammunition with which to resist the opposing argument.<sup>95</sup>

One superficial (and not surprising) reason that sequential request strategies persuade is simply because they make the ultimate conclusion appear logical to the reader. To be sure, at first glance, cognitive priming as an organizational device appears to work *primarily* on a logos level. The prime sets up the writer's ultimate conclusions to be consistent with, and therefore logical to, the prime. This is consistent with research on human decisionmaking because individuals tend to seek consistency with prior decisions, or "self-affirmation."<sup>96</sup> Foreshadowing is similarly persuasive from a logos function, making material persuasive because the organizational structure of the foreshadowed material—the prime—makes later conclusions appear logical.

[T]he human brain, when confronted with a new stimulus, goes in search of previously stored data to aid in interpretation of that stimulus. Cognitive priming operates to limit the available data from which the brain will select given that the brain is more likely to immediately consult and rely on previously primed data."<sup>97</sup>

However, logic, and the logos function, cannot be divorced from ethos. So when a reader comes to a conclusion that has been suggested by prior material and the conclusion therefore appears logical to and consistent with prior material, the presentation appears not only logical, but also artful and credible. These are ethos appeals based on source characteristic attributes.

These sequential request strategies—or primes—also establish and reinforce a relationship between advocate and reader, a source-relational, ethos-based function. Some sequential request strategies invoke schema<sup>98</sup> shared by the advocate and reader. They therefore gesture at a conclusion suggested by the advocate, requiring the reader to fill in a gap. In so doing,

95 *Id.* at 399-400).

96 Stanchi, *supra* n. 68, at 420-21. ("People will make decisions that protect and affirm their positive images of themselves . . . . [T]he recipient's agreement to the first request leads her to a certain generalization about what kind of person she is. The recipient will then make future decisions in a way that affirms this generalization").

97 Higdon, *supra* n. 74, at 1232.

98 Primes are effective because they set up a schema in which the reader is able to make predictable, consistent, coherent decisions. As Stanchi notes, "The priming science demonstrates that the first impression that the advocate gives the judge is absolutely critical. Once a reader is primed, information that follows the prime is viewed through the lens of the impression

the conclusion appears to occur as a result of a collaborative, rather than manipulative process. The writer's choice of when to introduce certain information can establish or reinforce a bond with the reader. This then encourages the reader to ultimately trust in, and agree with, the advocate.

As a bonding strategy, organizational priming works because it is subtle, and the audience therefore does not feel manipulated by the writer, which would undermine the good will of the advocate and therefore the persuasive appeal of ethos.<sup>99</sup> As Stanchi explains, foot-in-the-door strategy "affects the reader's desire for consistency and self-affirmation, but does so in a somewhat indirect and non-obvious way."<sup>100</sup> The reader has the "impression that she has independently arrived at the decision, when in fact the decision has been influenced by the advocate."<sup>101</sup>

Door-in-the-face strategy is also effective, in part, because the reader does not feel overtly manipulated by the advocate, and the advocate therefore maintains credibility and good will.<sup>102</sup> This type of prime seems to work because arriving at the conclusion ultimately appears to be a mutual process between advocate and reader and therefore reflects an implicit bond between the two.<sup>103</sup> As a bonding strategy, door-in-the-face establishes a collaborative enterprise between advocate and reader: "Door-in-the-face seems to work by changing the recipient's perception of her role in the dialogue from the more coercive 'worked on' to the more cooperative 'worked with.'"<sup>104</sup>

created by the prime." Stanchi, *supra* n. 74, at 333. This is because "[h]uman communication is tested against the principles of probability (coherence) and fidelity (truthfulness and reliability)." Conti, *supra* n. 31, at 471. Conti asserts, that

[p]robability, whether a story "hangs together," is assessed in three ways: by its argumentative or structural coherence; by its material coherence, that is, by comparing and contrasting stories told in other discourses (a story may be internally consistent, but important facts may be omitted, counterarguments ignored, and relevant issues overlooked); and by characterological coherence.

*Id.* at 471–72.

<sup>99</sup> "[R]esearch has revealed 'that an influence agent is more persuasive if the intent to persuade is not obvious.'" Higdon, *supra* n. 74, at 1224 (quoting Frank R. Kardes, *Spontaneous Inference Processes in Advertising: The Effects of Conclusion Omission and Involvement on Persuasion*, 15 J. Consumer Res. 225, 225 (1988)). Moreover, "a participant's awareness of the intent to persuade on the part of the influencing agent will result in less message acceptance." *Id.* (quoting Michael Burgoon et al., *Revisiting the Theory of Psychological Resistance: Communicating Threats to Attitudinal Freedom*, in Gerald R. Miller, *On Being Persuaded: Some Basic Distinctions*, in *The Persuasion Handbook: Developments in Theory and Practice* 3, 213, 224–25 (James Price Dillard & Michael Pfau eds., 2002)).

<sup>100</sup> Stanchi, *supra* n. 68, at 422.

<sup>101</sup> *Id.* "[P]reserving the appearance of audience autonomy lessens the likelihood that the audience will feel coerced and angry." *Id.*

<sup>102</sup> Stanchi notes that research suggests a variety of explanations for why door-in-the-face chains or primes work, including the reader's "feelings of obligation," or guilt associated with "refusal to accept the initial request," or acquiescence with the lesser request because the reader "perceives the smaller request as less burdensome." *Id.* at 428–29.

<sup>103</sup> "[T]his strategy changes the appearance of the persuasive process so that it looks less coercive and more like a dialogue." *Id.*

<sup>104</sup> *Id.* at 428–29. This is contrasted with a more typical view of advocacy, in which "the persuader uses certain techniques to gain something from the recipient, whose role is to 'receive' the message and make a decision; the persuader is 'working on' the recipient." *Id.*

Moreover, Higdon similarly notes how foreshadowing, as a subtle device, “implicitly alludes to a future event in a manner that makes it difficult . . . to recognize its meaning until the event actually happens.”<sup>105</sup> Because foreshadowing material is “positioned unobtrusively,” the reader does not “feel manipulated, which, again, can undermine the ability to persuade.”<sup>106</sup> Thus, foreshadowing as a prime preserves the reader’s impression of the good will of the advocate.

An exploration of inoculation as a persuasive, cognitive prime further reveals how inoculation serves a bonding ethos function. Inoculation strategy, as explained, involves exposing the reader to weakened versions of the opposing arguments, together with refutation of those opposing arguments.<sup>107</sup> “The refutation portion of the inoculation message serves a more cognitive, as opposed to emotional, purpose [by] giv[ing] the message recipient an example of how to resist the attack.”<sup>108</sup> The refutation portion enables the “the audience [] to ‘experience’ the reasoning . . . .”<sup>109</sup> In terms of an ethos-based, bonding strategy, inoculation “presents to the mind the semblance of an exchange into which the audience enters.’ In so doing, the device creates a sense of collaboration between the author and the receiver.”<sup>110</sup>

Finally, as a two-sided message that acknowledges opposing views (as opposed to a one-sided message that does not),<sup>111</sup> an inoculation message appears to come from a credible, knowledgeable, trustworthy source, and therefore utilizes the source characteristic attributes of ethos.<sup>112</sup> The persuasive appeal of a two-sided argument is also a reflection of a source

105 Higdon, *supra* n. 74, at 1227.

106 *Id.*

107 Stanchi, *supra* n. 94, at 399–400.

108 *Id.* at 407.

109 Higdon, *supra* n. 74, at 1240 (quoting Christopher W. Tindale, *Rhetorical Argumentation: Principles of Theory and Practice* 84 (2004)). Prolepsis is a term from classical rhetoric “for messages that are designed to inoculate audience members from anticipated counterarguments.” *Id.* “Using prolepsis, an agent can use advance strategy to deal with objections he reasonably expects to be felt by his respondent or audience, even before the respondent has voiced that objection.” *Id.* (quoting Douglas Walton, *Media Argumentation: Dialectic, Persuasion, and Rhetoric* 141 (2007)).

110 *Id.*

111 See generally Stanchi, *supra* n. 94, at 393–99 (“Message sidedness refers to whether a persuasive message contains only positive (or bolstering) information, or whether it acknowledges or addresses contrary information.” *Id.* at 393.) See also Wangerin, *supra* n. 93, at 202 (“[I]n two-sided arguments, proponents put forward their own points and then also describe some of their opponents’ points. Most researchers in this field believe that highly educated people tend to be persuaded more by two-sided arguments than by one-sided arguments.”).

112 “Most people expect issues to have two sides and expect persuaders to address both sides. This theory is borne out in the studies, which find overall that both refutational and nonrefutational, two-sided messages lead the audience to perceive the message source as more credible and knowledgeable than one-sided messages.” Stanchi, *supra* n. 94, at 397. Stanchi further asserts that refutational two-sided messages may be best at conveying credibility and ethos:

Credibility also explains the advantage of refutational two-sided messages over nonrefutational. The theory is that if the persuader raises, but does not rebut, opposing arguments, message recipients tend to discount the persuader’s credibility and expertise. In other words, message recipients confronted with an unrebutted opposing view will assume that the persuader, while perhaps more knowledgeable than someone who seems to know only the supporting view,

relational attribute, insofar as the belief of the audience is based on its perception of the motivation of the advocate:

[A]udiences . . . tend to think that people who make two-sided arguments are more likely to believe in the arguments that they make than people who make one-sided arguments. Furthermore, . . . audiences are more likely to be persuaded by arguments that they think “correspond” to the persuader’s true feelings or disposition than they are to be persuaded by arguments that they think reflect situational constraints on the person making the argument.<sup>113</sup>

Thus, the audience’s perception of the motivation of the advocate—its trust in the good will of the advocate’s—and the audience’s assessment of the advocate’s own conviction in the argument presented, represent ethos-based persuasion.

## 2. Syllogism and enthymeme

Like sequential-request strategies, syllogism and enthymeme are organizational frameworks for legal argument, and ones that can persuade on an ethos level. A syllogism is a three-part deductive framework in which the conclusion proceeds from the first two premises. Enthymeme is a similar pattern, but differs from a formal syllogism because one of the two premises is inferred rather than explicitly stated.

Legal writers typically strive to organize the content of material in legal writing primarily in terms of its logos effect, or the logical presentation of the material.<sup>114</sup> The syllogism is a classic example of an argument organized to reflect the logos function. However, many legal arguments subtly deviate from the true syllogistic model and can be described as “quasi-logical” arguments. “In contrast to the formally valid syllogism, the forward chain in legal writing is usually a form of ‘quasi-logical argumentation,’ in which the advocate presents elements or premises in such a way as to give the target audience the impression that the elements or premises are logically connected.”<sup>115</sup> In this form of argument, “the advocate creates

does not have the requisite expertise to adequately address the opposing view. The audience may view the speaker who raises opposing views without rebuttal as less knowledgeable, less fair, and less honest than one who has addressed opposing viewpoints.

*Id.* at 397–98.

**113** Wangerin, *supra* n. 93, at 209.

**114** Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483, 492 (2003) (“According to Aristotle, people use three modes of persuasion: they appeal to reason (logos); they appeal to emotions (pathos); and they appeal by way of their credibility and character (ethos). Although a good lawyer takes advantage of all three modes of persuasion, she must appeal primarily to reason that is grounded in the law and concepts of stare decisis. As long as the lawyer’s logic does not yield seemingly unfair results, an appeal to reason is likely to be her strongest tool.”).

**115** Stanchi, *supra* n. 68, at 417.

the illusion that the link between the premises and ultimate conclusion is as unassailable as a formal syllogism” when it is not “provably valid in the formal sense.”<sup>116</sup> “Rather, the advocate seeks to influence the audience by making the argument look like a mathematical or logical proof. To make the chain appear strong and solid, advocates manipulate language to make the premises look homogenous, congruent, and unambiguous to the audience.”<sup>117</sup>

This concept is reflected in the enthymeme.<sup>118</sup> An enthymeme is an informal syllogism because one of the premises is inferred rather than stated. “The enthymeme typically occurs as a conclusion coupled with a reason.”<sup>119</sup> A scientific or logical syllogism is distinguished from enthymeme by the absolute or probable nature of its terms: “In math and science, the syllogism deals in absolutes with necessary, universally true conclusions. In rhetoric and in the fields in which rhetoric applies, such as law and politics, arguments are based on likelihoods and probabilities, not certainties.”<sup>120</sup> In contrast to syllogism, “the statements, premises, and conclusions [in an enthymeme] are not usually absolute.”<sup>121</sup> The persuasive appeal of the enthymeme looks like logos, but is based in part on the relationship the advocate establishes with her audience: “Because enthymemes deal mainly in probabilities rather than certainties, what people will find most persuasive is an explanation that comports most strongly with their own understanding and experience. That is how the connection is made.”<sup>122</sup>

Persuasion, while rooted in reason,<sup>123</sup> requires that the audience connect with the speaker. “[M]erely using the forms of reasoning is not enough. The persuasiveness of your argument depends in large measure on how well your reasoning corresponds to what the audience values. What matters most is the connection between the values of the audience and the speaker’s rhetoric.”<sup>124</sup> So the enthymeme as an organizational strategy persuades by introducing a stated premise and relying on the

116 *Id.*

117 *Id.*

118 See generally Jamar, *supra* n. 35.

119 Burton, *supra* n. 65, at <http://rhetoric.byu.edu/figures/e/enthymeme.htm>.

120 Jamar, *supra* n. 35, at 82.

121 *Id.* at 83.

122 *Id.* at 84 (“An enthymeme that relies on premises, beliefs, or experiences not shared by the audience, regardless of how convincing or strong or apt it might be to another audience, simply will not persuade.”). Steven Jamar recommends examining legal documents for the presence of enthymeme, noting that “[r]ecognizing enthymemes and

then trying to construct unstated premises that support them helps you understand the argument better, helps you see strengths and weaknesses in your position and the other side’s, and helps you connect to the audience more effectively.” *Id.* at 94. The connection that Jamar highlights, I argue, is ethos.

123 “One of Aristotle’s most profound insights—one easily forgotten or missed or misunderstood or misapplied—is that people are persuaded by reason because people value reason. Reason can be clouded, manipulated, subverted, and overcome, but the truth remains: people value reason and find reasoned arguments persuasive.” *Id.* at 102.

124 *Id.*

audience to infer the unstated premise. In so doing, the advocate relies on the stated premise to prompt the reader to infer the unstated premise. This inference depends on logic, but also on relationship, and therefore persuades because of its appeal to both *logos* and *ethos*.

### 3. Narrative and storytelling

Narrative can also be viewed as an organizational framework, and narrative techniques can implicate source-characteristic and source-relational attributes of *ethos*. In fact, narrative frameworks rely in large part on establishing a bond or relationship with the reader. This can be done by, for example, by ensuring that a story comports with the reader's expectations and therefore maintains the reader's trust in the advocate. Or an advocate can prompt the reader with schema or shared knowledge structures and therefore reinforce a relationship of familiarity and collaboration.

Persuasive narrative relies on three psychological properties: coherence, correspondence, and fidelity.<sup>125</sup> Coherence and correspondence are "formal" properties, meaning "the structural properties of narratives—the internal characteristics of the structure of a given narrative and the way in which those structural parts interact to tell a story persuasively."<sup>126</sup> In contrast, fidelity is a substantive property. Fidelity "persuades, not as a matter of the structure of the narrative, but rather as a matter of its content and the particular substantive appeal that the content makes."<sup>127</sup> Formal or structural features of narrative—coherence and correspondence—influence persuasion based upon how well the elements of the narrative come together, or how effectively they are organized.

Coherence refers to the consistency and completeness of the story—how accurately it comports with logic and audience expectation.<sup>128</sup> Consistency relates not only to whether the story itself is organized in a consistent manner,<sup>129</sup> but also whether the framework of the story

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<sup>125</sup> J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Leg. Writing 53 (2008).

<sup>126</sup> *Id.* at 56.

<sup>127</sup> *Id.* Fidelity implicates the audience and relies on "communal validity," "a validity within the public horizon of the community with which the judging subject identifies." *Id.* at 75. The appeal of fidelity, "however, is not a simple matter of the narrative's accuracy or realism, but rather is mediated through the judgment of the audience." *Id.* at 67. Fidelity, like coherence or correspondence, persuades at some level through the relationship and trust the advocate establishes with her audience. Fidelity is based upon "shared norms, and . . . the kind of ideals that characterize . . . the universal audience—ideals that are grounded in historical and social particulars, rather than in abstract universals." *Id.* at 76. However, whereas fidelity is an *ethos*-based persuasive technique, it is not an organizational technique falling within the arrangement canon.

<sup>128</sup> *Id.* at 63–66 ("[N]arrative coherence can be best understood when it is further broken down into two parts: internal consistency, how well the parts of the story fit together, and completeness, how adequate the sum total of the parts of the story seems").

<sup>129</sup> *Id.* at 65. "Internal narrative coherence can be conceived primarily in quasi-logical terms. Are the various parts of the story consistent with one another, or do they manifest contradiction?" *Id.* (quoting Bernard Jackson, *Law, Fact and Narrative Coherence* 58 (Deborah Charles Publishing 1988)).



comports with other material the reader is exposed to in building the story.<sup>130</sup> Completeness, the other quality of coherence, refers to “the extent to which the structure of the story contains all of its expected parts.”<sup>131</sup> Consistency and completeness are essential to persuasion because the full story is rarely presented.<sup>132</sup> “Rather, judges and juries construct stories based on the evidence presented, the fragments of the potential story, perhaps attaching those fragments to a story framework suggested by a strong opening statement.”<sup>133</sup> Constructing the story requires the audience to fill in some gaps, making inferences, “and adjudicators can only make those inferences in light of an underlying story structure that seems internally consistent.”<sup>134</sup>

Coherence is essential for persuasion.<sup>135</sup> “Coherence . . . requires that characters behave characteristically. Without this kind of predictability, there is no trust . . . .”<sup>136</sup> Trust is a persuasive, source-relational attribute of ethos. Moreover, to the extent that consistency and completeness assume that the reader will make certain inferences, the advocate’s organizational decisions must be guided by and, to some extent reflect, the relationship the advocate establishes with her audience, a source relational aspect of ethos.

Correspondence is the other formal, structural feature of narrative. “Correspondence is a matter of the story corresponding to what a judge or jury knows about what typically happens in the world and not contradicting that knowledge.”<sup>137</sup> As a structural feature, correspondence requires the advocate to organize the story in a manner that comports with what is plausible, or what could happen, rather than what actually took place.<sup>138</sup> Because “correspondence relies on relationships with

130 *Id.* (noting that internal consistency is extended “beyond the story framework itself; the framework must also be consistent with the credible evidence that is being presented and around which the juror is building the story.”).

131 *Id.* (The “need for completeness extends to the inferences that a jury is willing to make . . . a jury, in making inferential steps in the construction of a story, will refer to other cognitive models—narrative scripts—for guidance.”).

132 Coherence or “[i]nternal consistency is important to legal storytelling because the full story, the ‘real’ story, is seldom told at trial.” *Id.* at 64.

133 *Id.*

134 *Id.*

135 “[T]he more coherent the story a party presents at trial, the more likely it is that jurors will accept that party’s story independent of the informational content of the evidence.” *Id.* at 66 (quoting Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 Cardozo L. Rev. 559, 562 (1991)). This is an organizational strategy: “A trier presented with a jumble of facts is, in other words, less likely to find for the party presenting those facts than a trier who receives the same factual information presented not as a jumble but as a coherent story.” *Id.*

136 Conti, *supra* n. 31, at 472 (“Applying this consideration of coherence is an inquiry into motivation. Its importance in deciding whether to accept a message cannot be overestimated.”).

137 Rideout, *supra* n. 125 at 66.

138 “What ‘could’ happen is determined, not by the decision makers’ undertaking an empirical assessment of actual events, but rather by their looking to a store of background knowledge about these kinds of narratives—to a set of stock stories.” *Id.* at 67. Rideout emphasizes that “[t]he narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories, not to the extent that it ‘really happened.’” *Id.*

something outside the trial story itself . . . '[a] story will appear plausible to the extent that it manifests similarity with some model of narrative which exists within the stock of social knowledge of the jury.'<sup>139</sup> Therefore, because both coherence and correspondence depend on certain inferences the audience must make, and which must be prompted by the advocate, these organizational strategies rely, in part, on some implicit relationship the advocate is able to foster with the audience.<sup>140</sup>

And this relationship, in turn, can be established or reinforced by an advocate's use of these narrative devices. Indeed, when an advocate uses a narrative organizational feature such as a stock structure, she does so to establish a connection with the reader and to capitalize on the persuasive value of that shared experience. The organizational framework is a scaffold, and the subtle prompts offered by the framework rely on relationship to provide the full breadth of the story and, importantly, its conclusion or resolution.<sup>141</sup>

The successful use of stories and schemas relies upon an advocate's sense of, and connection with, her reader. When employed effectively, these organizational strategies help readers organize material into familiar patterns and therefore connect with the advocate.<sup>142</sup> The persuasive impact goes beyond mere logos or pathos,<sup>143</sup> influencing the audience, in part, on a relational level.<sup>144</sup> "[T]he same process that an individual uses to comprehend new experiences also shapes that individual's view of the lawyer–writer's credibility. If the story the lawyer tells does not comport

139 *Id.* at 67 (quoting Jackson, *Law, Fact and Narrative Coherence* 57–58 (Deborah Charles Publishing 1988)).

140 *Id.* at 64–69. Correspondence “relies on relationships with something outside the trial story itself” including “stored social knowledge” or “stock stories.” *Id.* at 67.

141 “[H]uman perception and cognition require some interpretive framework with which to construct meaning and reality. Consequently, humans make sense of new experiences by fitting them into “cognitive structures or . . . schemas.” Jennifer Sheppard, *Once upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 Willamette L. Rev. 255, 259 (2009) (“Narrative reasoning, however, goes deeper than simply appealing to logic and reason.”).

142 “[J]urors use schemas—i.e., standard mental categories—as filters, directing their attention to specific items within the potentially overwhelming flow of trial data. Having organized the information by use of a familiar pattern, jurors can then make sense of it.” Paul Holland, *Sharing Stories, Narrative Lawyering in Bench Trials*, 16 Clin. L. Rev. 195, 199 (2009). “Psychological research has demonstrated that jurors process and interpret trial information through the unconscious use of constructs such as schemas and ‘stock scripts.’ . . . A script is a dynamic schema, one in which individuals play customary roles in a conventional setting.” *Id.* Similarly, “people respond—instinctively and intuitively—to certain recurring story patterns.” Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767, 768 (2006).

143 Legal writing storytelling and narrative examinations imply a relationship between priming and the pathos function. See e.g. Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ALWD 1 (2010) (“One form of a pathos-based appeal is storytelling.”);

“Emotions can also be primed, particularly by stories. Priming emotions is particularly powerful because emotions are so connected to decision making.” Stanchi, *supra* n. 74, at 310. This pathos function relates to affective priming, discussed *supra* at section II.B.1.a.

144 Robbins, *supra* n. 142, at 769 (“This strategy is not merely a device to make the story more interesting, but provides a scaffold to influence the judge at the unconscious level.”).

with the court's understanding of the world, the lawyer's credibility suffers."<sup>145</sup>

Narrative organizational techniques require the advocate to create a bond with the reader by identifying and integrating shared knowledge. Within this construct, the reader is able to make the inferences prompted by the advocate. "[W]hen you tell a story, you are asking the listener to see a series of things as related events governed by a particular narrative arc or a plot."<sup>146</sup> When the story is told effectively, the reader "will expect certain characters and plot developments even though other storylines might also explain the same events."<sup>147</sup> Further, "if the story you are telling is one that already is embedded in tradition and culture, you need not fill in all the details; you can simply name the characters, and the plot will spring to life in the listener's mind."<sup>148</sup>

Organizational strategies therefore manifest ethos. Organizational signposts such as summaries reinforce the intelligence of the reader and foster relationship between advocate and reader by satisfying reader expectations. Organizational strategies within the argument also establish ethos. Sequential-request strategies gesture to the audience, leading them subtly to the advocate's conclusion. Conventional organizational structures such as syllogism and enthymeme demonstrate logic, but also intelligence, and may rely on shared knowledge. They therefore persuade on an ethos level. Similarly, narrative structure as a persuasive tool depends in part on the relationship the advocate has established with her reader and upon the framework she constructs as a prompt for audience inference.

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<sup>145</sup> Sheppard, *supra* n. 141, at 264. "The court will view the story, and the outcome suggested by the lawyer, with skepticism." *Id.*

<sup>146</sup> Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 Washburn L.J. 275, 278 (2011). Delia B. Conti similarly asserts, "Stories are controlling because humans influence each other through symbols to create a shared past and present, and to imagine a better future." Conti, *supra* n. 31, at 459. Conti explores the relationship between logos, pathos, and ethos in the context of narrative reasoning. She notes,

People persuade each other through stories because emotions rule over strict logical precepts. Logic is not irrelevant, but it takes the form of coherence and fidelity. Stories have to make sense and ring true with experience. And to judge the truth of stories, the character of the teller comes to the fore:

"Human communication is tested against the principles of probability (coherence) and fidelity (truthfulness and reliability). Probability, whether a story 'hangs together,' is assessed in three ways: by its argumentative or structural coherence; by its material coherence, that is, by comparing and contrasting stories told in other discourses (a story may be internally consistent, but important facts may be omitted, counterarguments ignored, and relevant issues overlooked); and by characterological coherence."

*Id.* at 471–72 (quoting Walter R. Fisher, *Human Communication as Narration* 47 (1987)).

<sup>147</sup> Berger, *supra* n. 146, at 278.

<sup>148</sup> *Id.*

### III. Canon III: Style—Select Stylistic Devices to Communicate Ethos

Style is the third canon of rhetoric. “Once arguments ha[ve] been discovered, selected, and arranged, they had to be put into words [which] serve as the medium of communication between . . . writers and their audience.”<sup>149</sup> Far from being mere embellishment, or the “dress of thought,”<sup>150</sup> style is integrally related to content and communication. To the extent that “[t]hought and speech are inseparable from each other, style is another of the ‘available means of persuasion,’ another of the means of arousing the appropriate emotional response in the audience, and of the means of establishing the proper ethical image.”<sup>151</sup> Indeed, “[p]ersuasion is not just the use of words; it is style itself, it is form—‘[i]n its simplest manifestation, style is ingratiating.”<sup>152</sup> The appeal of style, or form, is rooted in shared expectation, and the relationship the advocate fosters with her audience:

Once you grasp the trend of the form, it invites participation regardless of the subject matter . . . . Thus, you are drawn to the form, not in your capacity as a partisan, but because of some “universal” appeal in it. And this attitude of assent may then be transferred to the matter which happens to be associated with the form.<sup>153</sup>

Style also influences the tone of legal writing and therefore fosters the relationship between advocate and reader. “Too strident a tone and the reader will feel bludgeoned and may become angry; too colloquial and the reader will not believe the writer or take the matter seriously . . . the writer must find the use of words and phrases that fosters the reader’s trust in the writer.”<sup>154</sup>

Style considerations include both the choice of the words themselves and arrangement of words in phrases or clauses.<sup>155</sup> Classical rhetoricians

149 Corbett, *supra* n. 11, at 380.

150 *Id.* at 381.

151 *Id.*

152 Conti, *supra* n. 31, at 460 (quoting Kenneth Burke, *Permanence and Change* 50 (1935)).

153 *Id.* at 460 (noting that “[f]orm itself leads to persuasion” and quoting Kenneth Burke, *A Rhetoric of Motives* 58 (1950)).

154 Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 Leg. Writing 65, 100 (2010).

155 Corbett, *supra* n. 11, at 26–27.

All rhetorical considerations of style involved some discussion of *choice of words*, usually under such headings as correctness, purity (for instance, the choice of native words rather than foreign words), simplicity, clearness, appropriateness, ornateness.

Another subject of consideration was the composition or arrangement of words in phrases or clauses (or, to use the rhetorical term, *periods*). Involved here were discussions of correct syntax or collocation of words; patterns of sentences (e.g. parallelism, antithesis); proper use of conjunctions and other correlating devices both within the

gave careful consideration to figures of speech,<sup>156</sup> examining how their use enhances persuasion. In Quintilian's view, a figure of speech (*figura*) was "any deviation, either in thought or expression, from the ordinary and simple method of speaking . . . . Let the definition of a figure, therefore, be *a form of speech artfully varied from the common usage*."<sup>157</sup> Figures of speech were often categorized as schemes and tropes. "A scheme is a deviation from the ordinary pattern or arrangement of words" and a trope is "a deviation from the ordinary and principal signification of a word."<sup>158</sup> Because figures are a "means of lending 'credibility to our arguments,'" and "because they elicit admiration for the eloquence of the speaker or writer, they can exert a powerful ethical appeal."<sup>159</sup>

### A. A hand outstretched: stylistic gestures

Advocates can use stylistic features to evince characteristics of ethos, including intelligence and creativity. They can also use style to establish and reinforce a relationship with the audience. So, for example, an advocate can use a trope such as metaphor to appear knowledgeable and to establish a connection of shared information with the reader. Humor as a stylistic device similarly makes the advocate appear clever and may so establish a bond with the reader. An advocate's use of literary references establishes her intellect and may ingratiate herself to the audience sharing knowledge of those sources. Each of these devices, therefore, operates to

sentence and between sentences; the euphony of sentences secured through the artful juxtaposition of pleasing vowels and consonant combinations and through the use of appropriate rhythmical patterns.

*Id.* (emphasis in original). Others have referred to the Virtues of Style outlined by classic rhetoricians. These include Correctness, Clarity, Evidence, Propriety, and Ornateness. See generally Burton, *supra* n. 65, at <http://rhetoric.byu.edu/Canons/Style/Style-Virtues.htm>. Burton explains that while

they are not as consistently carried forward in the rhetorical tradition as other major categories . . . [the virtues] are useful in organizing the various concerns taken up under the heading of style; in illustrating the relationship of rhetoric to grammar; and especially in setting positive terms against which to understand the many varieties of rhetorical vices.

*Id.*

<sup>156</sup> Some modern rhetoricians have distinguished between "figures of speech" and "figures of thought," with the latter more indicative of the topics of invention in the first canon of rhetoric. See generally Burton, *supra* n. 65, at <http://rhetoric.byu.edu/Figures/Figures-Overview.htm>. Corbett and Connors set forth the common topics of invention, including Definition, Comparison, Relationship, Circumstance, and Testimony. Corbett *supra* n. 11 at 97. The relationship between the two "is something of a micro/macro relationship: what occurs on a local level with language to express an idea can in fact occur at a larger level, in an heuristic method, to discover ways of constructing arguments." Burton, *supra* n. 65 at <http://rhetoric.byu.edu/Figures/Figures-Overview.htm>. So, for example, metaphor is a figure of speech that relies on comparison, which is a topic of invention. Comparison asks the reader to consider how something compares or contrasts with something else. "[S]ince a metaphor is based on an implied comparison, it is most closely related to this topic of invention," and because "this topic of invention often takes the form of arguing by analogy, it is related to the figure metaphor since a metaphor is a kind of analogy." *Id.* at <http://rhetoric.byu.edu/Figures/M/metaphor.htm>. Notwithstanding, for purposes of this section, metaphor will be treated as a trope within the style canon.

<sup>157</sup> Corbett, *supra* n. 11, at 425 (emphasis in original). "A figure of speech is a linguistic device that achieves eloquence by intentionally deviating from the normal or literal use of language." Smith, *supra* n. 3, at 133.

<sup>158</sup> Corbett, *supra* n. 11, at 425–26.

<sup>159</sup> *Id.* at 424 (quoting Quintilian, *Institutio Oratoria* IX, i, (H.E. Butler trans. Harvard Univ. Press 1920-22)).

establish characteristics of ethos as well as relational attributes insofar as they subtly facilitate the bond between advocate and audience.

### 1. Wink, wink; nod, nod: tropes that beckon

Tropes, figures of speech, rely on “the deviation from the ordinary and principal signification of a word.”<sup>160</sup> Tropes can involve comparison between the ordinary use of a word and a figurative use. Some tropes of comparison include metaphor, synecdoche, metonymy, and euphemism. Metaphor is “an implied comparison between two things of unlike nature that yet have something in common[,] . . . [e.g.,] David was a lion in battle.”<sup>161</sup> Synecdoche is “a figure of speech in which a part stands for the whole[,] . . . [e.g.,] [a]ll hands were summoned to the quarter-deck.”<sup>162</sup> Metonymy is the “substitution of some attributive or suggestive word for what is actually meant[,] . . . [e.g.,] *crown* for *royalty*.”<sup>163</sup> “A euphemism is used as an alternative to a dispreferred expression, in order to avoid possible loss of face either one’s own face or, through giving offense, that of the audience, or of some third party.”<sup>164</sup> “The business of euphemism is ‘to praise qualities and gloss over faults.’ Dysphemism works inversely—typically by accentuating negative qualities, using epithets, or depersonalizing the object of discourse.”<sup>165</sup>

Tropes are persuasive because of their ethos appeal. Metaphor, for example, can be a mark of cleverness, a source-characteristic attribute. “Aristotle pointed out that anyone who achieved the appropriate use of metaphors might be a ‘master of metaphor’ and, hence, exhibit the signs of genius. Why? ‘[A] good metaphor implies an intuitive perception of the similarity in dissimilars.’”<sup>166</sup> Other tropes rely on association and, to the

<sup>160</sup> Corbett, *supra* n. 11, at 426.

<sup>161</sup> *Id.* at 444.

<sup>162</sup> *Id.* at 445.

<sup>163</sup> *Id.* at 446 (emphasis in original).

<sup>164</sup> Javier Herrero Ruiz, *Understanding Tropes: At the Crossroads Between Pragmatics and Cognition*, 56 (Peter Lang 2009) (quoting Keith Allan and Kate Burridge, *Euphemism & Dysphemism* 26 (Oxford U. Press 1991). Ruiz explains that dysphemism, in contrast, “is an expression with connotations that are offensive either about the *denotatum* or to the audience, or both, and it is substituted for a neutral or euphemistic expression for just that reason.” *Id.*

<sup>165</sup> Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. Rev. 75 (1998).

<sup>166</sup> J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ALWD 155, 155–56 (2010) (quoting Aristotle, *The Poetics* 255 (Ingram Bywater trans., The Modern Lib. 1954)). Rideout cautions, however, that metaphor’s “use is controversial and at times criticized.” *Id.* at 156. In fact, there is a “a dual nature to metaphors: they are something to be mastered and used well—to good or even brilliant effect—but with caution and with an understanding of their peculiar nature.” *Id.* Metaphor “‘is, in itself, a *sign of genius*. For the ability to construct good metaphors implies the ability to see essential similarities.” Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 Leg. Writing 113, 127 (1996) (emphasis in original) (quoting Cicero, *De Oratore* at 125, (E. Sutton trans. 1942)). “‘It is a matter of great importance to use each of the [stylistic] forms . . . in a fitting way, . . . but by far the most important matter is to have skill in the use of metaphor. This skill alone it is not possible to obtain from another . . .’” *Id.* (quoting Aristotle, *Aristotle’s Poetics: A translation and Commentary for Students of Literature* 41 (Leon Golden, trans. 1968)).

extent they represent a prompt from the advocate to the reader, rely on relationship. For example, the use of the term “sprawl” to refer to suburbanization is an adept dysphemism to conjure an image of excess.<sup>167</sup> Referring to the United States financial and banking industry as Wall Street (metonymy), or referring to the Bible as the Good Book (synecdoche) can be perceived as similarly clever.

In addition to evincing cleverness, the use of tropes can be ornamental, and can therefore be an indication of eloquence, another source characteristic attribute. For example, Quintilian observed that metaphor was “the most beautiful of tropes.”<sup>168</sup> “Because metaphor carries over attributes, inferences, frameworks, reasoning methods, and evaluation standards from one source to another, its use can help the writer persuade the reader to make the leap and to do it ‘in such a way as to make it seem *graceful*, compelling, even obvious.”<sup>169</sup>

From a cognitive perspective, tropes are also effective on an ethos level because they reinforce a relationship, or bond, between the writer and audience, manifesting source-relational attributes. In asking the reader to deviate in some manner from the literal meaning, tropes require a “mapping”<sup>170</sup> of thought. This mapping is an implicit attribute of reasoning because “human rationality is not linear and criterial . . . but [rather] imaginative and adaptive.”<sup>171</sup>

Tropes require the reader to fill in a blank, or make a connection, that the writer has implicitly suggested.<sup>172</sup> Metaphor may be the most evident example of source-relational attributes of ethos because its effectiveness depends entirely on the bond between advocate and reader. “Metaphor is

<sup>167</sup> See e.g. Clint Bolick, *Subverting the American Dream: Government Dictated “Smart Growth” is Unwise and Unconstitutional*, 148 U. Pa. L. Rev. 859 (2000) (noting that the term “sprawl” conjures “images of some unshaven guy with a massive beer-gut in a T-shirt spread out over a ratty sofa in front of a television set droning endless football games”).

<sup>168</sup> Frost, *supra* n. 166, at 116–17 (quoting Marius Fabius Quintilianus, *Institutio Oratoria*, at 303 (H.E. Butler trans., 1954)).

<sup>169</sup> Berger, *supra* n. 146, at 278 (2011) (quoting Donald A. Schön, *Generative Metaphor: A Perspective on Problem-setting in Social Policy*, in *Metaphor and Thought* 137, 147 (Andrew Ortony ed., 2d ed. 1993) (emphasis added)). Although tropes can be ornamental and therefore an indication of eloquence, they are not merely ornamental. Indeed, the “cognitive theory of metaphor . . . reconstructs the foundation in which metaphor was seen as merely literary or rhetorical in contrast with the ‘real’ literal and scientific world. In cognitive theory, metaphor is not only a way of seeing or saying; it is a way of thinking and knowing, the method by which we structure and reason, and it is fundamental, not ornamental.” Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169, 170 (2004).

<sup>170</sup> See *id.* at 171.

<sup>171</sup> Steven L. Winter, *Re-Embodying Law*, 58 Mercer L. Rev. 869, 872 (2007). The author concludes, “[S]uccessful legal metaphor derives its force from the very discipline of constraint that defines its conditions of possibility.” *Id.* This is true because human rationality is imaginative and adaptive, and because “imaginative thought (including metaphor) is systematic and regular rather than arbitrary and unconstrained . . . [and] innovation (whether via metaphor or otherwise) is itself a contingent and, therefore, highly constrained phenomenon.” *Id.*

<sup>172</sup> “Growing out of our physical and mental experience, grounded in a cultural and social context, metaphor shapes thought by mapping onto the new experience the structures, inferences, and reasoning methods of the old.” Berger, *supra* n. 169, at 171.

conversation. Its meaning comes from an interaction between the target—an abstract or unfamiliar concept—and the source—something concrete and already known—and between the qualities and properties that each of these entails.”<sup>173</sup> Although metaphor’s reliance on implicit dialogue is clear, all tropes require a tacit conversation between advocate and reader. “Within these rhetorical structures, movement constitutes meaning.”<sup>174</sup> And this movement—this tacit conversation—is a manifestation of source relational attributes of ethos.

Moreover, tropes exist within a community’s shared knowledge and expectations, and therefore their use also relies on source relational attributes.<sup>175</sup> “[C]ultural limits make the particular realities of our metaphors more shared than individual in nature.”<sup>176</sup> Metonymy, too, as a trope, operates as “a shared human perceptive mode that can serve to structure and simplify.”<sup>177</sup> “[T]roping . . . is so complex and agile, exactly because it involves the apprehension and joining of energy and motion in its very structure, that it must grow out of a public and civic intelligence.”<sup>178</sup> The bond created when the reader engages enhances the persuasive appeal:

The argument being offered makes sense only when the audience fills in what is missing from it. Having induced the audience to participate in this way, the arguer has brought them closer to his side. For they now find themselves actively supplying, out of their own world knowledge, the very thing that makes the argument make sense. And since the premise comes from them, not the arguer, shouldn’t they believe it to be so?<sup>179</sup>

173 *Id.* Berger explains that “[m]etaphor is persuasive because it draws on tacit knowledge that has been embedded through unavoidable and repeated experience.” *Id.*

174 Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 Yale J.L. & Humanites 31, 40 (1996). “Metaphor, it is said, is condensation, while metonymy is displacement.” *Id.* at 39. “A condensation of shared meaning is the basis of . . . linguistic linkage [for metaphor].” *Id.* In contrast, “[m]etonymy is ‘word-to-word connexion,’ the displacement of meaning, not its condensation.” *Id.* (quoting Jacques Lacan, *The Freudian Thing, or the Meaning of the Return to Freud in Psychoanalysis*, in *Ecrits: A Selection* 114, 156 (Alan Sheridan trans., 1977)). In terms of movement, “metaphor is horizontal and exogenous, as meaning is continually transferred from sign to sign, from ship to plough. The movement of metonymy is vertical and endogenous; that is, meaning is never transferred outside the sign, for the displacement of one sign by another rests upon association, rather than meaning.” *Id.* at 40.

175 So, for example, “Metaphor is grounded. It grows out of our physical beings, our neural networks, and our experiences in the world.” Berger, *supra* n. 169, at 170. See also August W. Staub, *Rhetoric and Poetic: Aristotle, The Enthymeme, and the Discovery of Dramatic Troping in Contemporary Theatre*, Vol. 4, No. 2 Didaskalia, <http://www.didaskalia.net/issues/vol4no2/staub.html> (1994–2011) (“In the twining or braiding together of the existing assumptions of a given cultural group the suasion of the *enthymeme* occurs.”).

176 Thomas Ross, *Metaphor and Paradox*, 23 Ga. L. Rev. 1053, 1069 (1989) (“[E]ven acknowledging the role of individual imagination, the particular reality of the poisonous tree metaphor is not something each of us autonomously imposes on the metaphor. The culture in which we live imposes limits on the particular realities we can see through our metaphors.”).

177 Judith A. Harris, *Recognizing Legal Tropes: Metonymy as Manipulative Mode*, 34 Am. U. L. Rev. 1215, 1227 (1985).

178 Staub, *supra* n. 175.

179 Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 6 J. ALWD 88, 106 (2009).



The connection formed when troping is successful is also persuasive because it is subtle, and persuasion therefore appears to be a collaborative process. “[M]etaphor derives much of its persuasive power from the quietness of its presence.”<sup>180</sup> As an unannounced position, metaphor is “[b]arely noticed [and] . . . rarely questioned.”<sup>181</sup> Similarly, “synecdoche and metonymy—express concepts obliquely by using words that merely gesture at the concept represented.”<sup>182</sup> Tropes, then, rely on community of thought, and can be employed successfully only when the advocate has a sense of, and appreciation for, her audience.<sup>183</sup> By merely gesturing to a conclusion but relying on the audience to employ shared but unsupplied information, the advocate subtly and deftly engages in a quiet conversation with her reader, creating a bond and establishing ethos.

## 2. Inside jokes: refutation by wit or humor

Humor is another stylistic technique that can be used to evince source-characteristic and source-relational attributes of ethos.<sup>184</sup> Some scholars distinguish wit from humor: “Wit was associated with intelligence, involving cleverness, ideas, and wordplay, while humor was associated with the human character, often invoking sympathy and benevolence.”<sup>185</sup> This distinction reveals the source characteristic appeal of wit, and the source relational appeal of humor.

Other scholars have distinguished between categories or theories of humor and have analyzed whether these categories can be employed for

180 Berger, *supra* n. 169 at 177.

181 *Id.* at 177.

[U]nlike an announced position, it is hard to question a position based on assumptions that are rooted in entrenched, but unnoticed metaphors. We understand and reason by drawing on an inventory of structures such as schemas and metaphors. These structures work well because they operate “constantly, unconsciously, and automatically.” To the extent that we use a conceptual schema or a conceptual metaphor, we have already accepted its validity. When someone else uses it, we are predisposed to accept its validity.

*Id.* (quoting George Lakoff & Mark Turner, *More than Cool Reason: A Field Guide to Poetic Metaphor* 63 (U. of Chicago Press 1989)).

182 Little, *supra* n. 165, at 106. “Metaphor looks outside the realm of the referent to substitute it for a similar entity. Metonymy, rather, focuses on the contiguous entities and seeks to reduce them to the status of their corresponding functions . . . metaphor relies on replacement, while metonymy relies on reduction or displacement.” *Id.* at 1218.

183 “In the *Rhetoric*, Aristotle makes clear immediately that rhetoric is a type of thinking—the counterpart of dialectic (Book 1,1)—but it is not concerned with what seems logical to an individual but what seems logical to a given class (Book 1,2). That is, rhetoric is concerned with public thinking, *phronesis*, or the practical thought processes common to a given civic order.” Staub, *supra* n. 175.

184 Indeed, “Jest, sarcasm, and irony can be effective tools for refutation, but they must be used with utmost discretion. The Greek rhetorician Gorgias advised that we should “kill our opponent’s seriousness with our ridicule and his ridicule with our seriousness.” Corbett, *supra* n. 11, at 305.

185 Laura E. Little, *Regulating Funny: Humor and the Law*, 94 Cornell L. Rev. 1235, 1242. (2009). “Wit was also viewed as socially constructed and allied with the intellectual thought, while humor was regarded as more natural and allied with the imagination. . . . [T]he two categories had social connotations, with wit associated with upper classes and humor being ‘a more bourgeois, middle-class concept, associated with universality and democracy.’” *Id.* at 1242–43 (quoting Rod A. Martin, *The Psychology of Humor: An Integrative Approach* 23 (2007)).

persuasive appeal.<sup>186</sup> Three categories, or theories, of humor have been studied: superiority, incongruity, and release. The superiority theory “is identified with ancient thinkers (Aristotle, Plato, Socrates, and Cicero) who . . . associated humor with aggression and described it as a mechanism of disparaging others to enhance one’s own sense of well-being.”<sup>187</sup> Superiority theory therefore has a negative connotation. Incongruity theory, in contrast, “suggests that humor arises from the juxtaposition of two incongruous or inconsistent phenomena. Viewed in this way, humor takes on the air of accomplishment, joining company with unlikely turns of mind such as artistic creativity and scientific discovery.”<sup>188</sup> Finally, release theory suggests “humor taps into repressed sources of pleasure, pressure, or anxiety. Thus, a communication’s funny quality arises because it induces laughter and, with it, a release of repressions.”<sup>189</sup>

Although classic rhetoricians cautioned against the use of humor for superiority, refutation by wit or humor can be employed effectively if introduced in a subtle manner and for proper purpose. Self-deprecating humor—if employed appropriately—is most likely to reinforce the character of the advocate:<sup>190</sup> “One of the most effective kinds of sophis-

186 *Id.* at 1244–52.

187 *Id.* at 1245. “Plato, for example, argued that weak individuals deploy humor only where they are unlikely to face counter-attack. Echoing this disdainful tone, Socrates admonished that society must tightly control laughter, particularly laughter that mocks authority as well as ‘philosophical notions of truth and beauty.’” *Id.* (quoting Michael Billig, *Laughter and Ridicule: Towards a Social Critique of Humour* 41–42 (2005)).

188 *Id.* at 1245–46.

189 *Id.* at 1249. Release or relief theory “is most often identified with Sigmund Freud and English philosophers Alexander Bain and Herbert Spencer. Bain and Spencer focused on the quality of humor provoking a ‘release of nervous energy.’ As Bain explained, humor’s embrace of ‘degradation’ or its celebration of mischief prompted this release.” *Id.* (quoting Michael Billig, *Laughter and Ridicule: Towards a Social Critique of Humour* 95–98 (2005)).

190 Self-deprecating humor can be employed as an ethos strategy by a judge who renders an opinion inconsistent with his earlier pronouncement. Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. Miami L. Rev. 693, 707 (1987). Justice Robert Jackson used this technique in *McGrath v. Kristensen*, 340 U.S. 162 (1950), an opinion he authored that was inconsistent with one of his earlier decisions. He included the following language, using self-deprecating humor to address the apparent inconsistency:

I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation. I am entitled to say of that opinion what any discriminating reader must think of it—that it was as foggy as the statute the Attorney General was asked to interpret. It left the difficult borderline questions posed by the Secretary of War unanswered, covering its lack of precision with generalities . . .

\* \* \* \* \*

Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. . . . Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, “The matter does not appear to me now as it appears to have appeared to me then.” *Andrew v. Styrup*, 26 L.T.R.(N.S.) 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: “My own error, however, can furnish no ground for its being adopted by this Court . . .” *United States v. Gooding*, 12 Wheat. 460, 478, 6 L. Ed. 693. (Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—“Ignorance, sir, ignorance.” But an escape less self-deprecating was taken by Lord Westbury, who, it is said, rebuffed a barrister’s reliance upon an earlier opinion of his Lordship: “I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.” If there are other ways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all.

*McGrath v. Kristensen*, 340 U.S. 162, 176–78 (1950) (Jackson, J. concurring).

ticated humor, especially for the purpose of disarming an audience, is the good-humored bantering in which speakers or writers make depreciatory remarks about themselves.”<sup>191</sup> Self-deprecating humor as an incongruity strategy works because it employs an interpersonal dynamic: “Almost everyone responds favorably to those who take themselves down a peg or two, mainly because everyone likes to feel that a person, however exalted, is human after all and does not exaggerate his or her own achievements.”<sup>192</sup> Thus, self-deprecating humor stands in contrast with superiority humor: “Although depreciation of others may sometimes backfire on us, belittling ourselves will never arouse anyone’s resentment and rarely undercuts anyone’s confidence in us.”<sup>193</sup> In this respect self-deprecating humor works on an ethos level because it reassures the reader that the advocate is not motivated by ill will.<sup>194</sup> Humor, if employed effectively, also works on an ethos level because of the relationship established between advocate and reader. It thus activates and relies on shared knowledge.<sup>195</sup> Humor reinforces an implicit bond between advocate and reader because it makes readers feel “as though we part of the [humorist’s] intellectual in-crowd, and generally [puts] us in a good mood, . . . make[s] us feel good about ourselves . . . [and mitigates] our defenses.”<sup>196</sup> Shared knowledge is a key to the persuasive effect of humor.<sup>197</sup> Noting the particularly collaborative impact of incongruity humor, one author explains that “[i]n order for parties to a joke to appreciate the incongruity emerging from the joke’s juxtaposition of two phenomena, the parties need shared knowledge of what likely pairings the phenomena usually enjoy. Thus, incongruity humor builds on and reinforces the parties’ connection to each other by acknowledging their shared understanding.”<sup>198</sup> Humor persuades, then, on an ethos level.

### 3. Book club buddies: literary reference

Reference to literary sources is another stylistic device that may convey ethos by demonstrating that the advocate is knowledgeable, clever, and intelligent—source-characteristic attributes of ethos. Literary references,

191 Corbett, *supra* n. 11, at 305–06.

192 *Id.* at 305–06.

193 *Id.* at 305–06.

194 Moreover, self-deprecating humor invokes the rhetorical trope *litotes*, a “deliberate use of understatement, not to deceive someone but to enhance the impressiveness of what we say.” *Id.* at 452. “[L]itotes [is] a means of expressing modesty (downplaying one’s accomplishments) in order to gain the audience’s favor (establishing ethos).” Burton, *supra* n. 65, at <http://rhetoric.byu.edu/figures/L/litotes.htm>.

195 “A large measure of humor’s positive consequences is thought to derive from its social nature.” Little, *supra* n. 185, at 1253.

196 *Id.*

197 “Interestingly, humor is most effective where parties share the background for a joke. The shared knowledge creates intimacy between the joke teller and the listener, thereby enhancing the humor.” *Id.* (“For this reason, analysts posit that preexisting shared knowledge of the object of parody is necessary for true parody to succeed.”).

198 *Id.* at 1253–54.

insofar as they are successful only if based upon shared knowledge, also implicate source relational attributes.

In *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*, Michael Smith outlines five types of literary references that can be employed by persuasive legal writers.<sup>199</sup> The first two are literary references used for “nonthematic comparison.”<sup>200</sup> “In these types of literary references, a legal writer makes a reference to a literary work in an effort to draw a comparison between some person or event in his or her legal case and a character or scene in the literary work.”<sup>201</sup> The reference is “not made to evoke the general theme of the literary work,”<sup>202</sup> but may be made for “metaphoric comparison”<sup>203</sup> or for “nonthematic hyperbole.”<sup>204</sup> The third and fourth types of literary references used in persuasive writing are literary references used for “borrowed eloquence.”<sup>205</sup> These can be used for “direct borrowed eloquence,”<sup>206</sup> or “creative variation.”<sup>207</sup> Finally, a legal writer can use a literary reference for thematic comparison.<sup>208</sup>

As a rhetorical figure of speech, the use of literary reference for persuasion relates to *anamnesis*, defined as “[c]alling to memory past matters. More specifically, citing a past author from memory.”<sup>209</sup> Anamnesis helps to establish source credibility attributes, “since it conveys

199 See generally Smith, *supra* n. 14, at 249–307.

200 *Id.* at 253–73.

201 *Id.* at 253.

202 *Id.*

203 *Id.* at 253–66. Smith explains that literary reference for nonthematic metaphoric comparison is nonthematic because

either (1) the aspect of the literary work being alluded to is a minor or incidental aspect of the work, not a major theme of the work, or (2) the literary allusion is being used by the legal writer to support a minor or incidental point in the writer’s document, not a major theme of the document.

*Id.* at 253.

204 *Id.* at 267–73. This category differs from literary reference for nonthematic metaphoric comparison in that “the comparison at issue here are not metaphoric, symbolic, or figurative; rather, they are made to express an exaggeration.” *Id.* at 267. “That is, they involve instances where a legal writer likens the attributes of a person from his or her real case to those of a comparable literary character, or where a legal writer likens a real-life situation to a comparable yet exaggerated literary scene.” *Id.*

205 *Id.* at 275–85.

206 *Id.* at 275–80. Smith notes that literary references for direct borrowed eloquence are “much less involved and much less complicated” than references for nonthematic

comparison, and involve “a legal writer directly quoting a an eloquent phrase or passage from a literary work such as a poem, essay, short story, play, or novel.” *Id.* at 275.

207 *Id.* at 280–85. These vary from direct borrowed eloquence literary references because the writer, rather than directly quoting from the source, “adapt[s] or alter[s] the quotation to better suit their own contexts. That is, rather than making a faithful quotation to the original material, the legal writer creatively alters a well-known literary passage to support his or her particular argument.” *Id.* at 281.

208 *Id.* at 287–302. “This type of reference involves referring to a literary work for the purpose of evoking its theme.” *Id.* at 287.

209 Burton, *supra* n. 65, at <http://rhetoric.byu.edu/figures/A/anamnesis.htm>. “This figure is related to the topic of invention, authorities, since it invokes an authority, usually by explicit allusion.” *Id.* at <http://rhetoric.byu.edu/figures/A/anamnesis.htm>. The use of literary reference is also apparent in Aristotelian rhetoric’s nonartistic proof of ancient witnesses. Cooper, *supra* n. 6, at 80–82. “As for witnesses, they fall into two classes (1) ancient [time-honored, venerable], and (2) recent [viva voce] . . . By ancient witnesses are meant the poets and other men of note whose judgments are on record.” *Id.* at 82. See also John M. DeStefano III, *On Literature as Legal Authority*, 49 *Ariz. L. Rev.* 521, 529 (2007) (“Aristotle himself places literary figures in the significant (if enigmatic) category of ‘ancient witnesses.’”).

the idea that the speaker is knowledgeable of the received wisdom from the past.”<sup>210</sup>

In addition, “[L]iterary metaphors help establish a writer’s credibility by demonstrating his or her creativity and resourcefulness.”<sup>211</sup> Literary metaphors “demonstrate that the writer is educated and well-read.”<sup>212</sup> A reference to a distinguished source may also imply the credibility of the source to the advocate.<sup>213</sup> “[T]he name of a classic author or work changes the attitude of some readers, slowing the eye or opening the mind. Robert Frost, Amy Lowell, or William Butler Yeats carry ethos if we believe they joined their literary talent with good sense and moral character.”<sup>214</sup> Literary references can also reinforce the creativity and cleverness of the writer. Because “encoded literary references” require creativity, they can “seem particularly impressive to readers,” and “their use can affect positively the reader’s impression of the writer.”<sup>215</sup>

Literary references evoke ethos at a deeper level as well, creating a bond between advocate and reader. Smith explains this phenomenon in terms of the discursive-psychology theory known as Shared Knowledge Theory,<sup>216</sup> according to which “communication between people commonly involves brief allusion and references to concepts previously known to both parties. . . . [C]ommunication [thus] often involves a kind of shorthand whereby people in a conversation briefly refer to concepts of shared knowledge.”<sup>217</sup> The use of literary devices can “operate as inside jokes to which both the writer and reader are privileged.”<sup>218</sup> Further, for particularly creative literary references, “the reference may require a bit of work on the part of the reader.”<sup>219</sup> “Not only must readers mentally conjure up the source quotation, they must also decode the writer’s hidden message. Not surprisingly, then, readers who make the connection will often feel a sense of kinship with the writer.”<sup>220</sup> This kinship—this relationship—is ethos.<sup>221</sup>

210 Burton, *supra* n. 65, at <http://rhetoric.byu.edu/figures/A/anamnesis.htm>.

211 Smith, *supra* n. 14, at 261.

212 *Id.*

213 DeStefano, *supra* n. 209, at 528 (“The citation of literature . . . invokes the authority of the author of the cited literature . . .”).

214 *Id.*

215 Smith, *supra* n. 14, at 284.

216 See e.g. *id.* at 258–59.

217 *Id.* at 258.

218 *Id.* at 272.

219 *Id.* at 284.

220 *Id.*

221 “Because the reader can appreciate the shorthand represented by the literary reference, the literary allusion helps to create a positive bond that will often encourage the reader to trust the writer.” *Id.* at 261.

## B. The stiff arm: stylistic shields

Stylistic techniques may influence ethos by either evincing positive source-characteristic attributes or by establishing a connection between advocate and audience, positive source-relational attributes. When an advocate cites a literary source or uses a metaphor, she aligns herself with information that is not only shared with, but also appealing to, the audience. In so doing she gestures to the audience, and the shared but unstated material helps to establish the bond or connection. In legal writing, however, an advocate often has to grapple with material that may be unpleasant or unappealing to the audience. In order to preserve ethos under these circumstances, the advocate can use distancing techniques, or stylistic shields, such as passive voice and nominalization.

Laura E. Little examined federal court jurisdiction cases<sup>222</sup> in terms of their reliance on grammatical structures that critical linguists identify as “obfuscating the meaning of written communications.”<sup>223</sup> Little studied the cases specifically for the presence of a variety of obfuscatory linguistic and rhetorical devices, including passive voice, nominalization, naming or relexicalization, and abdication to other authority.<sup>224</sup>

In explaining how she selected the specific devices for her study, Little asserts that the use of these devices reveals the intention of the writer to shield herself from responsibility for actions taken.<sup>225</sup> So, for example, when a judge employs the passive structure, she “often removes, reduces, or at least downplays her responsibility for a decision.”<sup>226</sup> Similarly, in using nominalization—a specific passive use—the writer can “can mystify a particular topic, obscure [the] writer’s attitude, and conceal the agent responsible for an action or process.”<sup>227</sup> Euphemism is another technique

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<sup>222</sup> Little, *supra* n. 165, at 75. Little begins with the observation that “federal jurisdiction finds few boundaries in physical realities” so that “jurisdiction law concerns institutions and rules that are largely socially constructed.” *Id.* at 76–77. Moreover, the fact that “federal jurisdiction decisions are sufficiently technical and confusing so as to require translation . . . insulat[es] [the decisions] from daily life and from the constraints of clarity.” *Id.* at 77. With isolation comes freedom in fashioning federal courts doctrine because “[n]ot only are courts more likely to escape detection when tinkering with the doctrine, but the courts also can be less fretful about the social consequence of frequent doctrinal shifts.” *Id.* at 77–78.

<sup>223</sup> *Id.* at 75.

<sup>224</sup> See *id.* at 96–108. Little also coded the following linguistic devices: subject complements, role reversal, verb form as a distancing device, tropes (including metaphor, synecdoche, and metonymy), and euphemisms and dysphemisms. *Id.*

<sup>225</sup> Little’s intent was to select devices that “suggest a writer’s intent to obfuscate, to detach words from precise meaning, or to enjoy the greatest possible leeway for exercising power within the present text as well as future texts.” *Id.* at 96. Her findings were revealing. “Comparison studies showed a statistically significant difference between federal jurisdiction cases and cases from other subject areas, suggesting that at least the most common obfuscatory device—the passive voice—performs more service in jurisdiction cases.” *Id.* at 81. She concluded that “[a] relationship does exist between federal jurisdiction cases and obfuscatory grammar.” *Id.* She cautioned that “[t]he difference between the two classes of decisions is small enough, however, to counsel against sweeping conclusions about stealth and deceit in the jurisprudence of federal jurisdiction.” *Id.*

<sup>226</sup> *Id.* at 96.

<sup>227</sup> *Id.* at 98–99.

that can be employed to distance the writer from unpleasant or unappealing information. The use of the term “relocation centers” to refer to prisoner camps, for example, glosses over a more unpleasant reality.<sup>228</sup>

Abdication to other authority is another technique a writer can use to distance herself from the text. Abdication to another authority can defer personal responsibility for the content of material to another source.<sup>229</sup> “After all, a writer who relies heavily on citation or quotation of other authority successfully removes her personal identity from the give-and-take of discourse.”<sup>230</sup> This then serves a distancing function, preserving the ethos of the advocate.<sup>231</sup>

Naming is another distancing technique. With naming or relexicalization, the writer “creates a nounlike compound such as the term ‘in custody determination,’ which refers to a legal finding in criminal or habeas corpus proceedings.”<sup>232</sup> As a form of nominalization, naming distances the advocate from the reader because the advocate exerts full authority over the creation of the new terminology—there is no collaborative process. Naming therefore stands in stark contrast to linguistic devices that establish bonds through their reliance on shared knowledge.<sup>233</sup> “[T]he naming process can also exert subtle power ‘through the one-way flow of knowledge.’ Without explicitly acknowledging assertion of power, the creator of the new terminology controls the conceptual system for categorizing and describing phenomenon. The reader is left with little choice but to accept the new terminology.”<sup>234</sup>

228 See Philip Tajitsu Nash, *Moving for Redress and Justice for All: An Oral History of the Japanese American Detention Camps*. By John Tateishi, 94 Yale L.J. 743, n. 2.

Euphemisms used by some wartime officials obscured what was done to Japanese Americans. “Incarceration,” a term that includes “forced removal” and subsequent “detention,” provides a more accurate description than the neutral, even beneficent, “relocation.”

Similarly, it is time to stop calling the barbed-wire enclosures “assembly centers” or “relocation centers.” They were concentration camps.

*Id.*

229 “Within judicial decisions, excessive use of this practice of abdicating authority raises questions about whether the judge is seeking to avoid personal responsibility for the result.” Little, *supra* n. 165, at 102–03 (“[O]ne may conclude that the substance of the decision [or argument] or its likely consequences make the court [or advocate] uncomfortable.”).

230 *Id.*

231 A different ethos-based reason that an advocate may abdicate to other authority is to *enhance* her credibility. Like references to literary sources, citation to authority cloaks material in power, and demonstrates that the advocate is knowledgeable and intelligent. This suggests a bonding function such that, by abdicating to legal authority, the advocate or writer assumes the authority associated with the law itself. In his examination of *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), Jerry Frug notes that “[b]oth [Justices Rehnquist’s and White’s opinions] appeal, as do most judicial opinions, to the authority of an important character in our society, that of the judge. The arguments they are making, both [J]ustices suggest, are not *their* arguments; they are expressing not their own views on the issues concerned but the state of the law.” Frug, *supra* n. 21, at 898 (emphasis in original). Moreover, citation to authority is a type of Aristotelian nonartistic proof—that of the ancient witness whose testimony lends credibility to the argument. Cooper, *supra* n. 6, at 82 (“[A]ncient witness are meant the poets and other men of note whose judgments are on record.”).

232 Little, *supra* n. 165, at 102.

233 See *infra* sec. III.A and accompanying notes.

These distancing devices can be used by the advocate to dissociate her from material or details that might be unpleasant, unpersuasive, or otherwise objectionable. While these devices can suggest a negative motivation to deceive which, if made apparent, would undermine ethos, Little cautions against assuming that federal court judges use the devices deliberately to confuse or mislead. For example, she notes that while “the desire to obfuscate is one reason for using the passive voice, a writer may use the passive voice for other, nonobfuscatory reasons. In particular, writers may use the syntactical form to avoid awkward or wordy constructions, to improve the flow of a sentence, or to eliminate unessential words cluttering the key thought communicated.”<sup>235</sup>

Although Little does not assert that judges use obfuscatory devices in order to be deliberately deceptive, she does “submit that Justices and their law clerks participate in a tradition of concealment.”<sup>236</sup> She offers some theories as to why judges, in particular, might employ these techniques. Obfuscatory devices might be prevalent in federal court jurisdiction cases because these decisions employ a specialized discourse that precludes judges from being clearer.<sup>237</sup> Alternatively, judges might use these distancing techniques simply as a consequence of the adversary system: “Repeated exposure to adversaries’ arguments, set up as opposing poles, establish a habit of mind for judges[,] who in turn write opinions as though they present a preordained correct answer, which embraces by necessity only one position or viewpoint.”<sup>238</sup> Or perhaps judges employ these strategies to protect themselves from responsibility or controversy.<sup>239</sup>

Judges may have particular reasons for employing obfuscatory devices, but these can also be used by advocates to distance themselves from material. By distancing the writer from material that might

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<sup>234</sup> Little, *supra* n. 165, at 102.

<sup>235</sup> *Id.* at 130 (admonishing that “[i]nfluential linguistic theory suggests that analysis should begin with the presumption that writers use the passive voice to further such uncontroversial ends.”).

<sup>236</sup> *Id.* at 131.

<sup>237</sup> *Id.* at 83–84. Little posits that perhaps the specialized discourse of federal jurisdiction jurisprudence “simply does not equip [judges] with the tools for being absolutely clear.” *Id.* However, she concludes that this cannot be a valid justification because “[l]anguage’s greatest benefit is its sovereignty, its ability to invent and describe phenomena that could not exist outside the imagination.” *Id.*

<sup>238</sup> *Id.* at 85–86 (“Opinions are frequently unequivocal, ignoring ambiguities in the law and the presence of compelling arguments against the court’s decision.”).

<sup>239</sup> *Id.* at 86 (noting that these techniques enable judges to “avoid resolving cases on the basis of general, possibly controversial, moral and political theories”).

<sup>240</sup> Frost, *With Amici Like These*, *supra* n. 46, at 12 (“[F]or Aristotle, and for Cicero and Quintilian after him, projecting the proper *ethos* is just as important as actually possessing it.”).



otherwise undermine the persuasive appeal, distancing devices preserve the credibility of the writer.

#### IV. Morality and Ethos—Illusion, Authenticity, and Ethics

While I have endeavored to identify some strategies and techniques to evince or preserve ethos, I should make clear that many of these strategies can easily backfire. These strategies are admittedly deliberate attempts to manipulate ethos. Rhetoricians agreed that projecting the appearance of good character was as important as actually possessing good character.<sup>240</sup> But insincerity, if revealed, has disastrous consequences. “The difficulty in maintaining a consistently admirable and attractive persona makes exploitation of ethos difficult. Inauthenticity can be revealed by a single lapse, jeopardizing the entire effect of the ethical appeal. Hidden agendas, biases, unfounded assumptions, elitism have a way of rising to the surface.”<sup>241</sup> In considering the implications of organizational or stylistic techniques to enhance ethos, the advocate should be aware of potential areas of misuse that can ultimately undermine the credibility of the advocate.

For example, there has been considerable debate about the role of narrative, discussed here as an organizational strategy, in legal discourse. One commentator frames three potential concerns associated with the use of narrative in the law: “(1) whether it is valid or truthful; (2) whether it is typical of real world experiences; and (3) whether it discourages debate and reply because it is emotive.”<sup>242</sup> These issues are of particular concern because narrative has a degree of authoritative power that makes it difficult to question or challenge assertions.<sup>243</sup> Thus, “narrative is compelling because of its peculiar capacity to appropriate reality.”<sup>244</sup> However, and “[u]nfortunately, in addition to assisting an audience to understand that one version of events is more accurate than another, narrative can also validate a version of events that does not exist.”<sup>245</sup>

241 Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip: United States v. Dickerson, Role [Im]mortality, and the Ethics of Legal Rhetoric*, 23 U. Haw. L. Rev. 1, 20–21 (2000). See also Frost, *With Amici Like These*, *supra* n. 46, at 15 (characterizing credibility as “a fragile commodity that can simply disappear if the judge suspects that an advocate is being deceptive or insincere”).

242 Jean C. Love, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. Gender, Race & Just. 87, 89 (1998).

243 Helena Whalen-Bridge, *The Lost Narrative: The Connection between Legal Narrative and Legal Ethics*, 7 J. ALWD 229, 234 (2010) (“When an academic author shares an experience of rape, we are unable to challenge her assertions because the experience relayed appears to be true.”).

244 *Id.* at 234–35.

245 *Id.* at 235.

Similar concerns apply to applied legal storytelling.<sup>246</sup> With respect to truth, “stories do not have to be true to be credible. Narrative coherence and fidelity, not truth, is what makes a story believable.”<sup>247</sup> With regard to bias inherent in story, “stories are always told from a particular point of view. That necessarily means other points of view are slighted or not told at all.”<sup>248</sup> Finally, that story relies on emotion in addition to logic “seems at odds with our traditional concepts of objective, impartial justice.”<sup>249</sup>

The potential for perpetuating biases is another concern regarding attempts to manipulate ethos by reference to stock structures or other shared knowledge structures as primes:

Metonymy in its more sophisticated legal forms, however, proves more dangerously subtle and puissant, partly because lawyers entwine it in a kind of reasoning and not the knee jerk responses of street metonymy . . . . [R]eduction or categorization through the use of metonymy tends to take on a life of its own. There exists no ‘pure’ mode of thought that allows us to avoid the problems of reduction or categorization. Rather, metonymies need to be exposed to a constant and endless liberation. Our failure to set free these concepts will sustain a world inhabited by ‘skirts’ and ‘muscles,’ and regulated by ‘contracts.’ Categories should not control those who created them.<sup>250</sup>

Story has a similar potential for perpetuating bias: “Story, like any persuasive tool, becomes far more powerful, with a greater likelihood of being abused, when only one party has access to that tool.”<sup>251</sup>

Stylistic techniques to enhance ethos can be similarly misused. Metaphor, for example, can undermine credibility if used ambiguously or overused. Overuse in particular “dilutes the rhetorical effectiveness of each individual metaphor” and can “complicate the presentation of the argument’s substance.”<sup>252</sup> These effects undermine the logos of the argument, but also affect the advocate’s credibility by “undermining the writer’s appearance of intelligence.”<sup>253</sup> Beyond its effect on the perceived

<sup>246</sup> See generally Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010).

<sup>247</sup> *Id.* at 64.

<sup>248</sup> *Id.* (“What we leave untold may often be as powerful as the story we tell. If we leave out too much, our story becomes misleading.”).

<sup>249</sup> *Id.* (“Indeed, it is perhaps this aspect of story—that it allows our emotions to override our objectivity—that creates the most strident objections to its ‘manipulative’ power.”).

<sup>250</sup> Harris, *supra* n. 177, at 1227–28.

<sup>251</sup> Johansen, *supra* n. 246, at 76.

<sup>252</sup> Smith, *supra* n. 14, at 236.

<sup>253</sup> *Id.* at 236 (“[The]unrestrained use of metaphor suggests to the reader that the writer lacks discernment and judgment in the strategic use of rhetorical figures.”).

intelligence of the advocate, overuse of metaphor or other literary devices can detrimentally affect the relationship between advocate and reader. Such overuse “suggests that the writer is less interested in the reader than in amusing himself or herself. This self-indulgence—this manifested lack of interest in the reader—can frustrate and irritate the reader.”<sup>254</sup>

With regard to metaphor and literary reference, the advocate must also be wise in selecting those that facilitate communication and that are not obscure.<sup>255</sup> Quintilian cautioned, “While a temperate and timely use of metaphor is a real adornment to style . . . its frequent use serves merely to obscure our language.”<sup>256</sup> For references that are “obscure or pretentious, the writer risks confusing, alienating—or worse, offending—the reader.”<sup>257</sup> Any of these consequences would clearly call into question the good will and likeability of the advocate.

Humor, also, should be used with great caution. Humor, like literary reference for hyperbole, can potentially “mock[], belittle[], or satirize[] the target of the comparison.”<sup>258</sup> This would clearly jeopardize the good will of the advocate. Greek rhetoricians cautioned against the use of humor, associating it “with aggression and described it as a mechanism of disparaging others to enhance one’s own sense of well-being.”<sup>259</sup>

There are broader concerns with attempts to manipulate ethos by use of shared knowledge structures. They can be perceived as “contrived camaraderie,” with uneven potential consequences. Literary reference in particular, “most craftily . . . convey[s] a sense of sharing and camaraderie between relative strangers that usually . . . exists [only] among people who know each other better.”<sup>260</sup> “[T]his can have a kind of clubby, elitist, ‘we are the same kind of people’ quality to it.”<sup>261</sup> Devices that purportedly rely on shared knowledge are “troubling,” too, because “they explicitly seem to presume a universal culture and set of priorities within law.”<sup>262</sup> Experts

254 *Id.* While Smith casts this as primarily a pathos-based concern, to the extent it interferes with the relationship between advocate and reader, and to the extent the perceived “self-indulgence” might reflect a lack of good will, it is also an ethos concern.

255 *Id.* at 262.

256 *Id.* at 236.

257 *Id.* When “legal writers insert obscure literary references into their argument . . . [in order] to impress the reader and . . . to amuse themselves,” the strategy backfires because it “unwisely focuses on the needs, concerns, and desires of the writer, not those of the reader.” *Id.*

258 *Id.* at 272. With respect to humorous metaphors specifically, Smith cautions that “such a tone can undermine the writer’s credibility (ethos) by suggested he is callous toward the unfortunate . . .”

259 Little, *supra* n. 185, at 1245.

260 Kathryn M. Stanchi, *Moving Beyond Instinct: Persuasion in the Era of Legal Writing*, *Book Review of Advanced Legal Writing* by Michael R. Smith, 9 Lewis & Clark L. Rev. 935, 948 (2005).

261 *Id.* at 948 (“Somehow, we seem often to be (or wish to project that we are) the kind of people who read, for example, King Lear and Homer’s Iliad, not the kind who read pulpy romance novels or watch Fear Factor with a beer or two.”).

262 *Id.*

have cautioned that advocates be sensitive to multiculturalism, but the “problem is that[,] mostly, the audience isn’t multicultural. Within the decision about what literary references are acceptable is embedded the hierarchy that exists within the law—of culture, of race, of class, and of gender.”<sup>263</sup> That these references are not universally accessible “should trouble us. However effective it can be, playing the ‘we’re the same kind of people’ game smacks of an elitism (and worse) that is not a very attractive part of the legal profession.”<sup>264</sup>

Yet rhetorical devices that rely on shared knowledge can also be empowering and help make the law more accessible to the public. Figurative language can help “demystify law.”<sup>265</sup> To the extent that technical language removes legal writing from the public, “better use of language by judges may make law more comprehensible.” Specifically, “[f]igurative language, by deemphasizing ‘legalese,’ helps bring law back to its most elemental form, the panoply of human experiences from which it arose.”<sup>266</sup> Figurative language can “reshape the dispute into the story that it originally was, help bring the dispute back ‘down to earth,’ and dispel some of the notions held by those affected by the legal system.”<sup>267</sup> Further, notwithstanding the legitimate concern that “using metaphor and narrative to express concepts and describe events may result in unexamined assumptions and unforeseen consequences,”<sup>268</sup> there is value to using these structures that rely on shared knowledge. “[A]lthough it likely is true that unthinking adherence to a metaphor may enslave thought, it is equally true that unthinking adherence to the syllogistic form will constrain thought.”<sup>269</sup>

With respect to concerns about truth, manipulation, and bias—valid criticisms notwithstanding—advocates are largely constrained by the

263 *Id.* at 948–49.

Let’s face it: being cautious about literary references means that Shakespeare will almost always be an acceptable reference (even if judges don’t know the reference they will think, as educated people, they ought); Collette and Gloria Naylor are probably pushing it; and Ntozake Shange, Adrienne Rich and Eldridge Cleaver are, by and large, out of the question.

*Id.*

264 *Id.*

265 At its most basic level, law is simply a restatement of everyday disputes between people (or between the government and its citizens). Law aggrandizes the dispute with the use of such lifeless terms as ‘cause of action’ and ‘litigation,’ and enshrines an otherwise human problem in a formal legal setting.

Jordan, *supra* n. 190, at 727. “Law reflects society and culture. At its best, the legal system acts as a peaceful means of solving the disputes that are bound to occur in a world of ever-increasing complexity. At its worst, it discourages mediation and settlement and complexifies a problem that was not so difficult when it arose.” *Id.*

266 *Id.*

267 *Id.*

268 Berger, *supra* n. 146, at 277.

269 *Id.* at 277.

reality that “facts are stubborn things.”<sup>270</sup> “[R]eality exists and . . . law students and lawyers have an ethical obligation not to stray too far from it, particularly when engaging in narrative representations.”<sup>271</sup> Further, although “stories are normally told from a certain perspective and are therefore all deceptive to a degree, there are ethical limits on narrative that can be articulated and coherently applied.”<sup>272</sup> Similarly, though “[k]eeping the persuasive power of storytelling in proper check requires a level playing field,”<sup>273</sup> telling stories from the client’s perspective is essential, particularly for outsiders.

Storytelling may in fact be a superior vehicle for outsider voices because “improving the law through storytelling often encompasses the idea of locating the stories of ‘outsiders,’ people whose stories are otherwise not included in lawmaking and adjudication.”<sup>274</sup> “That a point of view is unsettling, or even inflammatory, is no reason to abandon it. For it is those most unsettling (and unfamiliar) points of view that the legal audience most needs to hear to assure that it understands the *whole* story.”<sup>275</sup> Moreover, set within ethical limits, savvy advocates should recognize that “[s]tories are an important persuasive tool. They can illustrate an outsider’s point of view. They can make difficult, abstract concepts concrete. They can put seemingly unsolvable conflicts into a perspective that aids resolution.”<sup>276</sup>

In sum, stories create relationships. Tropes, literary reference, and sequential request strategies operate as gestures from the advocate, creating a bond and inviting the audience to proceed to a conclusion in trust. Organizational and stylistic devices that evince source characteristic or relational attributes of ethos can be effective if used judiciously. Manipulating ethos, within ethical limits, is a powerful persuasive tool.

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<sup>270</sup> John Adams noted, “Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.” *Argument in Defense of the Soldiers in the Boston Massacre Trials*, December 1770, found at <http://www.quotationspage.com/quote/3235.html>.

<sup>271</sup> Whalen-Bridge, *supra* n. 243, at 235.

<sup>272</sup> *Id.*

<sup>273</sup> Johansen, *supra* n. 246, at 76.

<sup>274</sup> *Id.* See also Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Leg. Writing 17, 21–26 (2008) Foley writes that “improving the law through storytelling often encompasses the idea of locating the stories of ‘outsiders,’ people whose stories are otherwise not included in lawmaking and adjudication.” *Id.* at 21. Foley explains that improving the law through applied legal storytelling can political. Movements such as critical race theory and feminist legal theory “show that lawmaking reflects dominant ideologies. As part of this, they argue that adjudication and legislation must not exclude those without power, and that the law must in many instances be changed to reflect the wants, the needs, the *existence* of these less powerful groups and individuals.” *Id.* at 26 (emphasis in original).

<sup>275</sup> Johansen, *supra* n. 246, at 76 (emphasis in original).

<sup>276</sup> *Id.*