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ETHOS, CHARACTER, AND DISCOURSAL SELF IN PERSUASIVE LEGAL WRITING

J. Christopher Rideout*

“[The speaker] who wishes to persuade people will not be negligent as to the matter of character; . . . words carry greater conviction when spoken by [those] of good repute.”
Isocrates¹

“[Persuasion occurs] through character whenever the speech is spoken in such a way as to make the speaker worthy of credence; for we do believe fair-minded people to a greater extent and more quickly.”
Aristotle²

“We improve ourselves by improving the words we write.”
Walker Gibson³

If rhetoric is commonly defined as the art of persuasion,⁴ then persuasion itself may be seen as the art of convincing through character. Indeed, for many rhetoricians, the role of character in persuasion is primary. Rhetoricians have offered this advice from the beginning, starting with pre-Socratic rhetoricians such as Isocrates, and the advice extends through Aristotle to prominent modern theorists like Kenneth Burke.⁵ Aristotle notably advised that

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1. ISOCRATES, *ANTIDOSIS* 276 (George Norlin trans., 1968). I have changed the “man/men” of the original to “speaker/those.”

2. ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE* 1356a4, at 38 (George A. Kennedy ed. & trans., 1991).

3. WALKER GIBSON, *TOUGH, SWEET, AND STUFFY: AN ESSAY ON MODERN AMERICAN PROSE STYLES* 110 (1966).

4. Starting with Aristotle. See ARISTOTLE, *supra* note 2, at 36.

5. “Although our understanding of *ethos* has changed over the years, thinkers as diverse as Aristotle and Kenneth Burke agree that often it is not a person’s *ideas* but a person’s

“character is almost, so to speak, the controlling factor in persuasion.”⁶ The question is how. How does a writer or speaker evince, or create, a convincing character? For to do so is to persuade by means of *ethos*.⁷

The importance of *ethos* and character is not lost on those who teach modern legal persuasion, and contemporary legal writing textbooks regularly mention its value. Michael Smith, one current writer on legal rhetoric, is representative in his recommendation about the importance of character, and like many others, he ties *ethos* to the credibility of that character: “the reader must have specific knowledge of the aspects of an advocate’s character that indicate credibility.”⁸ To be persuasive, a legal advocate must reveal to the reader a character that is credible enough to be worthy of the reader’s trust, a character that has sufficient credibility to be authoritative and thus convincing. An advocate will, by evincing the traits of a credible character, maintain an *ethos* that is convincing and moves others. Such character traits are an important component of persuasion. Smith, like many others, also emphasizes the importance to *ethos* of actually possessing those traits of a credible character. He continues, “This is not to say, however, that it is enough for a writer to *appear* credible, regardless of whether he or she actually is. As we will see, in many incidences, an advocate can only evince a trait of credibility if he or she actually possesses it.”⁹

Often, rhetorical handbooks offer recommendations about the individual character traits that someone must possess to best evince credibility. In Book 2 of his *Rhetoric*, Aristotle mentions, generally, practical wisdom, virtue, and good will.¹⁰ Michael Frost,

character that changes people.” Marshall W. Alcorn, Jr., *Self-Structure as a Rhetorical Device: Modern Ethos and the Divisiveness of the Self*, in *ETHOS: NEW ESSAYS IN RHETORICAL AND CRITICAL THEORY* 3, 3 (James S. Baumlin & Tita French Baumlin eds., 1994) [hereinafter *ETHOS: NEW ESSAYS*] (emphasis in original).

6. ARISTOTLE, *supra* note 2, at bk. 1.2.4, at p. 38.

7. “Ethos is character.” Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 *LEGAL COMM. & RHETORIC* 229, 229 (2012).

8. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 126 (3d ed. 2013).

9. *Id.*

10. Often referred to even in modern discussions as *phronesis*, *arête*, and *eunoia*. See ARISTOTLE, *supra* note 2, at 121. Later in Book 2, Aristotle discusses adapting the character traits of the speaker to the character of the audience. As Kennedy notes in his commentary, the status of this section is the subject of some debate among scholars and may have been added later, without being fully integrated into the treatise. See *id.* at 163–64. Melissa Weresh, in a modernized and more psychological vein, also suggests the value of looking not only at the character traits of the writer alone (the “source”), but also at the traits that

in reminding lawyers of their roots in classical rhetoric, turns to contemporary trial practice manuals for a modern update and arrives at traits for legal advocates such as the following: established expertise; trustworthiness and impartiality; and intelligence, knowledgeability, honesty, and fairness.¹¹ Smith proposes truthfulness, candor, zeal, respect, professionalism, good will, and intelligence.¹²

However, the question still remains of how to evince these character traits. For a classical rhetorician like Isocrates, who openly advised that the speaker work to develop an honorable character, the way to best evince a credible character was to possess it. No tangible distinction existed between becoming a good person and becoming a good orator.¹³ Isocrates is generally acknowledged as one of the earliest to point out that in order to be persuasive, a person must be honorable and good and possess a good reputation.¹⁴ But Isocrates was only the first, and the advice runs through Roman rhetoric as well, echoed for example in Quintilian's often-quoted description of the ideal orator as "the good man skilled in speaking."¹⁵

As seen above, most modern commentators follow their classical forebears in extolling the importance of actually possessing character traits that evince credibility. But in doing so, they risk blurring the line between rhetorical advice and something more akin to moral or ethical advice—a linkage that would have been less of a problem for classical rhetoricians.¹⁶ Smith, quoted above, is only one among many who, in echoing his classical forebears,

establish a relationship with the reader—"source-relational attributes such as familiarity, trust, and attraction." See Weresh, *supra* note 7, at 233.

11. MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 72–73 (2005).

12. SMITH, *supra* note 8, at 125–91. Smith breaks down the final trait, "intelligence," into eleven sub-characteristics: "informed, adept at legal research, organized, analytical, deliberate, empathetic toward the reader, practical, articulate, eloquent, detail oriented, and innovative." *Id.* at 150.

13. See Michael J. Hyde, *Introduction: Rhetorically, We Dwell*, in THE ETHOS OF RHETORIC xiii, xv (Michael J. Hyde ed., 2004) [hereinafter ETHOS OF RHETORIC].

14. GEORGE A. KENNEDY, A NEW HISTORY OF CLASSICAL RHETORIC 47 (1994).

15. James S. Baumlin, *Introduction: Positioning Ethos in Historical and Contemporary Theory*, in ETHOS: NEW ESSAYS, *supra* note 5, at xv (quoting QUINTILIAN, THE INSTITUTIO ORATORIA OF QUINTILIAN 12.1.1 (H.E. Butler trans., 1920–1922)).

16. See Hyde, *supra* note 13, at xv.

must negotiate this boundary.¹⁷ Another legal rhetorician, Robbins-Tiscione, agrees with the need to actually possess certain traits: “[t]o ‘be worthy of belief,’ legal writers must be credible and honest.”¹⁸ Frost agrees as well and, like Smith, recommends the next step beyond merely possessing convincing character traits. He notes that “merely possessing the proper *ethos* or character is not sufficient. The advocate must also take steps to insure that the audience perceives or appreciates the fact that the advocate possesses it.”¹⁹ It would seem, then, that possessing good character is standard advice for the advocate—whether classical or modern. But if so, then rhetoric should, at least in part, be an ethical discipline, and effective teachers of rhetoric should, among other things, offer moral advice on the development of good character.²⁰

And yet most contemporary rhetoricians, including those who teach legal persuasion, undoubtedly do not regard themselves as moral instructors. Even if they did, they surely would not believe that it would suffice to simply tell their students (or law firm associates) to cultivate a trustworthy character, or to be an honest person, or to possess virtue. The complexity of modern legal persuasion goes far beyond the dispensing of moral axioms. If the importance of character persists, even among modern and psychologically astute commentators like Kenneth Burke, then a potential problem arises. How to evince, or create, character without straying into ethical education or maxims on morality, territory into which advice on possessing good character inevitably points?²¹

17. “There are several traits or characteristics that legal writers should project through their writing to demonstrate that they are of good moral character.” SMITH, *supra* note 8, at 128. Smith steps away from moral advice by attempting to focus on the written document itself, *see id.* at 126, a move that this Article will discuss further in part III.

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

19. FROST, *supra* note 11, at 73.

20. As did Isocrates, who included moral improvement as a key part of a rhetorical education, one that included reading and writing about virtue. *See* KENNEDY, *supra* note 14, at 48.

21. I should also hasten to add that each of the modern commentators I have mentioned, and many others, also acknowledge that *ethos* could be a matter of the appearance of good character. *See, e.g.,* Michael H Frost, *With Amici Like These: Cicero, Quintilian, and the Importance of Stylistic Demeanor*, 3 J. ALWD 5, 9 (2006) (discussing an advocate’s credibility). But therein lies a contradiction, between possessing good character and appearing to possess good character. Which is it? The inherent contradiction of this double advice remains largely unexplored and is a problem for both classical and modern commentators. The primary purpose of this Article is to address this contradiction.

A hint lies in the advice of Aristotle, who recommended that the speech be “spoken in such a way as to make the speaker worthy of credence.”²² Aristotle makes a critical distinction here, one based on location and representation. Whereas Isocrates located character in the person of the speaker, Aristotle locates character more in the speech itself. The actual qualities of the speaker matter less for Aristotle (and in his view, for the listener) than how the speech represents the character of the speaker. The character of the speaker is consequently more of an artifice, more linguistic, more representational. Isocrates posits a largely unmediated relationship between the character of the speaker and his or her audience. Aristotle implies a more complex structure for *ethos*, one that relies on the language of the speech to mediate, through the artifice of rhetoric, between the speaker and the audience. The character that persuades emerges less from the qualities of the actual speaker and more from the self that is a construct of the speech or writing.

Elsewhere, I have referred to that self as a discoursal self, and I have previously argued that both the identity and the voice of a legal writer are best understood discoursally.²³ In this Article, I argue that the *ethos* of a legal writer is best understood discoursally as well. This, I believe, is one response to the apparent contradiction between possessing good character and simply appearing to possess good character.

In order to better understand *ethos* discoursally, we will start by looking more closely at classical understandings of *ethos* and character, examining in particular the apparent split between Isocrates and Aristotle. This historical split is paradigmatic of the contradiction in discussions of *ethos* that persists to the present, between possession and appearance. We will also examine some of the historical reasons for the classical view of character, and especially for the seeming shift in view with Aristotle. Also implied in classical models of *ethos* and character are classical models of the self, different from modern models of the self and its relationship to discourse. In examining those classical and modern models, we can then arrive at a conceptual framework that goes beyond character as either possession or mere appearance—to a discoursal

22. ARISTOTLE, *supra* note 2, at 38.

23. See J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 LEGAL WRITING 67, 93–94 (2009); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: The View from Within*, 61 MERCER L. REV. 705, 736–38 (2010).

view of *ethos* in contemporary legal writing.

I. CLASSICAL MODELS FOR ETHOS

Ethos—persuasion by virtue of one’s character—is commonly known as one of the three artistic (or technical) means of persuasion, the *pisteis*, introduced by Aristotle in Book 1 of his *Rhetoric*.²⁴ The two other means are *logos*—persuasion through an appeal to reason—and *pathos*—persuasion through an appeal to the emotions.²⁵ Although Aristotle’s term *pisteis* is commonly translated as “proof,” Aristotle’s usage was broader and also encompassed qualities of “trust, trustworthiness, credence and credibility.”²⁶ In other words, although modern readers would associate “proof” with mathematical or logical reasoning, for Aristotle the term “*pisteis*” embodied properties that we would also associate with *ethos*. This accords with Aristotle’s statement that of the three *pisteis*, character is largely the controlling factor.²⁷

Although most people know *ethos* as one of Aristotle’s three artistic proofs, the importance of *ethos* and character was well-established in the Greek rhetorical tradition by the time Aristotle wrote his treatise.²⁸ And traditionally, Greek orators attached *ethos* to moral character and its importance for the civic good, a cause in which orators and speech writers played a key role.²⁹

A. The Emergence of *Ethos*

Greek orators employed *ethos* in their practical usage well before the Greek rhetoricians began to discuss it theoretically. Early evidence exists as far back as Book 1 of the *Iliad*, where Nestor explicitly relies on his age, wisdom, and authority in advising the

24. ARISTOTLE, *supra* note 2, at 37–38.

25. *Id.* at 37–39. John W. Cooley offers a convenient summary discussion for legal readers of all three means of persuasion in *A Classical Approach to Mediation—Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83 (1993). See also Eileen Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995).

26. Christopher Carey, *Rhetorical Means of Persuasion*, in *PERSUASION: GREEK RHETORIC IN ACTION* 26, 26 (Ian Worthington ed., 1994).

27. ARISTOTLE, *supra* note 2, at bk. 1.2.4, at pg. 38.

28. See Carey, *supra* note 26, at 34–35; Craig R. Smith, *Ethos Dwells Pervasively: A Hermeneutic Reading of Aristotle on Credibility*, in *ETHOS OF RHETORIC*, *supra* note 13, at 1–2, 5.

29. Hyde, *supra* note 13, at xvii.

Achaean about military strategy.³⁰ Demosthenes, well-known for his eloquent speeches, made it a common practice to weave into his speeches a number of themes to which the speech would return. Among these were themes regarding the moral character of the speaker—or the lack of moral character in the opponent.³¹

In the early Greek law courts, the litigants often spoke on their own behalf. Thus, the moral character and trustworthiness of the speakers would be an important part of their persuasiveness—they had to be believable.³² Additionally, the Athenians regarded the trial as closely connected to civic life more broadly, and they gauged the argumentative probability of an individual's case in part on how well it presented a credible example of life in the polis.³³ A speaker who was credible could more ably tie arguments about the facts of a specific case to the life of the city. And a credible speaker, in the course of arguing a case, could tell a more convincing broader cultural story.

While the practice of *ethos* was closely tied to moral character for the early Greeks, an interesting twist did arise. Although by tradition, most litigants represented themselves in the law courts, as time went on and rhetoric became a more sophisticated practice, they could rely on help in preparing their speeches. At the least, they could turn to the rhetoricians for commonplaces—stock argumentative forms—to incorporate into their own speeches, and beyond that, they could turn to logographers who would write the entire speech for them.³⁴ This twist raised an issue of the fit between the speech and the speaker. Given the importance of character and credibility, the speechwriter (whether the litigant or a hired logographer) had to make sure that no dissonance existed between the words of the speech and the character of the speaker.³⁵

The Greek who seemed most aware of this need for artifice was the speechwriter Lysias.³⁶ Lysias occupies an established place in rhetorical history largely because many of his speeches have survived, and they stand out for their eloquence.³⁷ But in addition to

30. See Carey, *supra* note 26, at 35.

31. KENNEDY, *supra* note 14, at 72.

32. *Id.* at 103.

33. Carey, *supra* note 26, at 36.

34. *Id.* at 39.

35. *Id.*

36. *Id.* at 40.

37. At least thirty-four speeches, plus some fragments. See KENNEDY, *supra* note 14, at

his mastery of style, Lysias also apparently grasped the idea that, in writing speeches for others, he not only had to pay attention to the fit between the speech and the speaker, but in doing so, he had to create the illusion of depth of character.³⁸ By providing just the right amount of detail, he could write a speech that seemed not only to fit the speaker but also to construct the speaker—in a sense, as a dramatic characterization.³⁹ And by dramatically constructing the character, he could also present that character as someone who would never behave in the manner accused.

This use of artifice to construct character came to be called *ethopoeia*,⁴⁰ a practice that anticipates a more modern sense of the self in discourse. But Plato objected to *ethopoeia*, and in general, the early Greek rhetoricians and practitioners were either unaware of it or grasped its uses imperfectly.⁴¹ Aristotle may have been referring to it directly, but briefly, in Book 3 when he discusses character in judicial narratives.⁴² For the most part, however, character for the early Greeks meant moral character, as a feature of the actual speaker.

B. Isocrates and the Development of Good Character

Isocrates, not Aristotle, was the earliest recorded Greek writer to overtly discuss persuasion by virtue of one's character.⁴³ Like Aristotle, Isocrates viewed character as the anchor for persuasion,⁴⁴ and he regarded its value as a matter of common wisdom—"who does not know that words carry greater conviction when spoken by men of good repute."⁴⁵ Isocrates clearly held the traditional Greek view, that *ethos* was a matter of moral character and that its importance had to do, in part, with its role in civic life. In support of his view, he developed an educational system for improving one's character, as a part of becoming a successful writer and orator and a contributing member of the polis.

65.

38. Carey, *supra* note 26, at 41.

39. *Id.* at 41–42.

40. KENNEDY, *supra* note 14, at 66.

41. Carey, *supra* note 26, at 39–40.

42. ARISTOTLE, *supra* note 2, at 271; *see also* Carey, *supra* note 26, at 39–40.

43. KENNEDY, *supra* note 14, at 47 (citing ISOCRATES, *supra* note 1).

44. Hyde, *supra* note 13, at xv.

45. ISOCRATES, *supra* note 1, at 278.

Isocrates lived from 436 to 338 B.C.,⁴⁶ which allowed him to study under the great Sophist Gorgias. He initially was a logographer, writing speeches for others to deliver in the law courts, but in 390 B.C., he opened a school devoted to training the young in the skills necessary for public life.⁴⁷ Paramount among these skills was the ability to speak and persuade: “The gods have given us speech—the power which has civilized human life; shall we not strive to make the best use of it?”⁴⁸ Because he made his living, first by writing speeches for others, then by offering rhetorical instruction and accepting payment for it, he is sometimes thought of as one of the Sophists—a group who made a living in a similar fashion.⁴⁹ But Isocrates was at pains to distinguish himself from the Sophists. When he opened his school, he wrote a speech, “Against the Sophists,” attacking the pretensions of the Sophists and claiming that he was teaching something different, which he at times called either “philosophy”⁵⁰ or “logos.”⁵¹ Essentially, he believed that he was educating his students in civic knowledge and the art of political discourse,⁵² as a way of improving the welfare of the Greek state. He regarded his educational program as substantive and believed that, in teaching issues important to Greek society, he was responding to the need for the Greek city-states to unite against their common threat from Persia.⁵³

Nevertheless, Isocrates’ curriculum contained, at its core, an education in essential Greek rhetorical principles of the time.⁵⁴ His reluctance to use the term “rhetoric” to describe the education he offered probably reflects his awareness of Plato’s critique of the Greek rhetoricians—in particular the Sophist Gorgias—in Plato’s dialogue of the same name.⁵⁵ Isocrates distanced himself from the Sophists by attacking them as pretentious and arrogant in their claim to know all that is necessary for happiness, prosperity, and

46. James J. Murphy, *The Origins and Early Development of Rhetoric*, in *A SYNOPSIS HISTORY OF CLASSICAL RHETORIC* 13 (James J. Murphy ed., 1983).

47. KENNEDY, *supra* note 14, at 43.

48. Murphy, *supra* note 46, at 12.

49. KENNEDY, *supra* note 14, at 43.

50. Murphy, *supra* note 46, at 13.

51. KENNEDY, *supra* note 14, at 43.

52. *Id.*

53. ARISTOTLE, *supra* note 2, at 11 (Kennedy, “Introduction”).

54. KENNEDY, *supra* note 14, at 45.

55. See generally PLATO, *THE DIALOGUES OF PLATO, VOLUME ONE: EUTHYPHRO, APOLOGY, CRITO, MENO, GORGAS, MENEXENUS* (R. Allen trans., 1989).

success; as eager for money at the expense of their students; and as teaching persuasion as a set of inflexible rules, without regard for the way that experience must further guide the appropriate uses of persuasion.⁵⁶ Essentially, he disliked their character. In his own school, he taught the acquisition of that knowledge which would serve the public good and the body politic⁵⁷ and tried to steer his students away from rhetorical hair-splitting, such as Gorgias's famous attempt to prove that nothing exists.⁵⁸ For these reasons, he was probably also critical of the technical philosophical issues that preoccupied the members of Plato's Academy.⁵⁹ Rather, he advocated a broader form of studies that trained the mind and attempted to inculcate virtue. In so doing, he is sometimes regarded as the father of liberal education.⁶⁰

For Isocrates, inculcating virtue in his students and instructing his students in public oratory went hand in hand because both involved the development of character—the “good repute” that he thought was so important in a speaker.⁶¹ Perhaps responding indirectly to Plato, Isocrates admitted that people of a depraved nature were probably not susceptible to efforts to instill virtue and justice.⁶² But beyond that narrow exception, he thought that “people can become better and worthier if they are ambitious about speaking well, and if they are enamored with being able to persuade their hearers, and if, in addition, they set their hearts on the gain to be had.”⁶³ The way to this moral improvement, becoming “better and worthier,” lay in studying virtuous and honorable subjects; learning, practicing, and rehearsing speeches about patriotism, virtue, justice, courage, and wisdom; and then emulating those models in one's own life.⁶⁴ Such efforts would lead to moral improvement, to the molding of his students' own characters. And molding character served the ends of persuasion, as he advised,

56. KENNEDY, *supra* note 14, at 44.

57. Murphy, *supra* note 46, at 13.

58. KENNEDY, *supra* note 14, at 47.

59. *Id.*

60. *Id.* “[Isocrates's] educational program had enormous influence on Roman rhetorical schools, which in turn affected European and American education. This influence is still felt today.” Murphy, *supra* note 46, at 14.

61. Hyde, *supra* note 13, at xv.

62. KENNEDY, *supra* note 14, at 47; *see also* Baumlin, *supra* note 15, at xiv.

63. KENNEDY, *supra* note 14, at 47.

64. *See id.* at 48; Baumlin, *supra* note 15, at xiv.

“Who does not know that words seem more true when spoken by those who lead good lives than by those whose lives have been criticized and that proofs based on a person’s life have greater power than those provided by speech? Thus, the stronger a person desires to persuade hearers, the more he will work to be honorable and good and to have a good reputation among the citizens.”⁶⁵

Note that proofs based on one’s life exceed in their power those based on words alone.

Hyde suggests that Isocrates tied character to persuasion and civic virtue because, although not a Sophist himself, Isocrates nevertheless subscribed to a world view that was sophistic and anti-Platonic.⁶⁶ For Isocrates, “owing to the contingency of human existence, ‘truth’ is at best grasped in terms of ‘probabilities’; uncertainty is always a given.”⁶⁷ In Isocrates’ view, Platonic certainty about the true nature of things, based on a reliable philosophical epistemology, was either unattainable or unreliable. Thus, it was important to arrive at the best course for the body politic through rhetorical competence, and that competence was guided by “an *ethos*, a principled self, that instructs the moral consciousness and actions of others.”⁶⁸ Hence, for Isocrates, the power of character preceded and underlay the power of speech. Nothing mediated between them, and, for philosophical and political reasons as well as for rhetorical reasons, effective persuasion relied on good character. In his words, “discourse which is true and lawful and just is the outward image of a good and faithful soul.”⁶⁹ Or restated more recently, “discourse becomes entirely an index of the individual’s moral health and is gauged not simply by the way one speaks but by the way one lives.”⁷⁰

By writing about them, Isocrates established *ethos* and character as a key theoretical element of rhetoric, perhaps the most important element, and he lay the groundwork for Aristotle and the

65. KENNEDY, *supra* note 14, at 47 (quoting ISOCRATES, *supra* note 1).

66. Hyde, *supra* note 13, at xv.

67. *Id.*

68. *Id.*

69. ISOCRATES, *supra* note 1, at 327.

70. Baumlín, *supra* note 15, at xv.

later Roman rhetoricians to elaborate further on the role of character in persuasion.⁷¹ And for Isocrates, good character was an uncomplicated matter of possession—the good orator and writer quite simply possessed good character. That possession could occur partly through natural ability,⁷² but Isocrates had no doubt that an educational curriculum could also foster moral improvement.

The question of how to inculcate moral improvement, however, as straightforward as it was for Isocrates and as central as it has been in the western educational tradition, remains open.⁷³ And as appealing as good character—however defined—seems to be for effective persuasion, the dynamics of *ethos*, character, and discourse are more nuanced.

C. Aristotle and the Representation of Good Character

In his treatise on *Rhetoric*, Aristotle both affirms the traditional Greek sense of *ethos* as moral character, an important element of the civic good, and also extends it, by presenting it as a component of rhetorical argument—a matter of artifice.⁷⁴ Aristotle in effect re-locates the character of the speaker inside the speech, rendering the speaker “an element of the discourse itself, no longer simply its origin.”⁷⁵ In doing so, he points the way to a more modern view of *ethos*.

Aristotle’s treatise most likely began as a series of lectures that he first delivered at the Academy in Athens in the mid-350s B.C. and then later reworked in the mid-330s B.C., once he had returned to Athens to open his own school.⁷⁶ The compositional history of the treatise is important to note, because the treatise contains inconsistencies that reflect the fact that different parts were composed at different times and that it was never revised into a consistent whole. For the same reason, some key terms are used inconsistently, including the term *ethos*.⁷⁷

In Book 1 (1.2.2), when introducing the *pisteis*, Aristotle defines *ethos* as an attribute of the character of the speaker; in fact,

71. Most notably, Cicero and Quintilian. See KENNEDY, *supra* note 14, at 48.

72. Murphy, *supra* note 46, at 13.

73. KENNEDY, *supra* note 14, at 48.

74. Hyde, *supra* note 13, at xvii.

75. Baumlín, *supra* note 15, at xvi.

76. KENNEDY, *supra* note 14, at 54.

77. *Id.* at 55.

Aristotle uses the word "*ethos*" as synonymous with "character."⁷⁸ Two sections later (1.2.4), he elaborates,

[There is persuasion] through character whenever the speech is spoken in such a way as to make the speaker worthy of credence; for we believe fair-minded people to a greater extent and more quickly [than we do others] on all subjects in general and completely so in cases where there is not exact knowledge but room for doubt. And this should result from the speech, not from a previous opinion that the speaker is a certain kind of person; for it is not the case, as some of the technical writers propose in their treatment of the art, that fair-mindedness on the part of the speaker makes no contribution to persuasiveness; rather, character is almost, so to speak, the controlling factor in persuasion.⁷⁹

In this passage, Aristotle offers three things. First, he attaches *ethos* to credibility ("credence"), the initial step in developing trust.⁸⁰ If we believe someone, we are much more willing to trust them. He also hints at a discussion (to come in Book 2) of the character traits that contribute to credibility and trust. In this early passage, he lists "fair-mindedness."⁸¹ Second, he refers to character as something presented through the manner of the speech, rather than character as a pre-existing, substantive trait of the speaker—"whenever the speech is spoken in such a way as to make

78. ARISTOTLE, *supra* note 2, at 37–38. Kennedy mentions that in this initial statement Aristotle probably means something akin to "moral character," perhaps following the usage of the rhetorical tradition that preceded his treatise. *Id.* at 37. But Kennedy later explains that although "*ethos*" as "moral character" was Aristotle's common usage in his writings generally, in Book 1, Aristotle was beginning to use "*ethos*" in the sense of character as artificially created in a speech. *Id.* at 163. Most contemporary commentators agree that Aristotle quickly modifies his usage more in the direction of "character as an attribute of the speech." See, e.g., Smith, *supra* note 28, at 1–20.

79. ARISTOTLE, *supra* note 2, at 38–39.

80. See Kennedy's brief commentary on trustworthiness, in ARISTOTLE, *supra* note 2, at 38.

81. "Fair-mindedness" is a quality of restraint. Carey explains that [p]articularly important in [early Greek] lawsuits is the quality of restraint. The speaker should in general avoid appearing weak. But in the context of a society which believed that the courts should be a last rather than a first resort, a readiness to tolerate a degree of discomfort or disadvantage rather than sue both establishes a commendable disposition and emphasizes the magnitude of the injuries suffered.

Carey, *supra* note 26, at 37.

the speaker worthy of credence.”⁸² Aristotle then reasserts this emphasis on the speech itself—“and this should result from the speech, not from a previous opinion that the speaker is a certain kind of person.”⁸³ He does so partly because prior reputation (“previous opinion”) would be implied, but also because he wanted to emphasize what was in the speech, rather than what was external to it.⁸⁴ Also, if Greek litigants represented themselves, they would often lack external authority; hence the importance of establishing character in the speech itself.⁸⁵ And third, as mentioned earlier in this Article, Aristotle joins others in regarding *ethos* as the primary factor in persuasion.

Aristotle discusses *ethos* twice again in Book 2. Early on (2.1.2-3), he resumes the discussion that he began in Book 1.

[I]t is necessary not only to look to the argument, that it may be demonstrative and persuasive but also [for the speaker] to construct a view of himself as a certain kind of person and to prepare the judge; for it makes much difference in regard to persuasion (especially in deliberations but also in trials) that the speaker seem to be a certain kind of person and that his hearers suppose him to be disposed toward them in a certain way⁸⁶

Here Aristotle continues to step away from the tradition established by Isocrates—away from the speaker’s need to be good and toward the sufficiency of seeming to be good. And here again, Aristotle presents *ethos* as the product of rhetorical artifice, one where the speaker must “construct a view of himself.”⁸⁷ Next, in section 2.1.5, he presents the three general character traits that instill trust in an audience: practical wisdom, virtue, and good

82. ARISTOTLE, *supra* note 2, at 38.

83. *Id.*

84. Smith, *supra* note 28, at 12. Kennedy notes that Aristotle may have regarded external reputation as an “inartistic” form of persuasion, not belonging with the artistic modes of the *pisteis*; see ARISTOTLE, *supra* note 2, at 38.

85. See Kennedy’s note 43 in ARISTOTLE, *supra* note 2, at 38.

86. *Id.* at 120.

87. *Id.*

will.⁸⁸ And he again recommends these traits in terms of appearance: “a person seeming to have all these qualities is necessarily persuasive to the hearers.”⁸⁹

Later in Book 2 (2.12–17), Aristotle returns to *ethos*, but this time discusses it in terms of adapting the character of the speaker to the audience.⁹⁰ In confronting different audiences—for example, the wealthy, the powerful, the old, the young—Aristotle recommends adjusting the character that the speaker presents, although he spends most of his time in this section outlining the characteristics of the different types of audiences. Most commenters believe that this section of the *Rhetoric*, however, although ostensibly also about *ethos*, really discusses something different.⁹¹ Nevertheless, adjusting the character of the speaker to the audience points again in the direction of *ethos* as artifice.

Aristotle returns to *ethos* briefly again in Book 3. He makes an allusion to it in Chapter 7 (3.7.1–6), where he discusses *lexis*—style.⁹² Here he recommends a kind of proportion or appropriateness between style and the subject matter being discussed. But he also notes that style can express character, and he advises that if the speaker uses words appropriate to the desired moral state, that speaker will “create a sense of character.”⁹³ That is, he again affirms character as a rhetorical construct. And he does this again in chapter 16 when he discusses judicial narrative, recommending that the narrative “ought to be indicative of character” and then offering advice on how to create that character.⁹⁴ Here, he comes the closest to acknowledging *echopoiea*, the construction of dramatic character in a speech.⁹⁵

88. *Id.* at 121. Carey reminds us that Aristotle is probably discussing these character traits in terms of deliberative (political) rhetoric, which may partly explain why they are so general. See Carey, *supra* note 26, at 36. But Carey further explains that Aristotle’s list would be incomplete and reflects his tendency to schematize in his writings. See *id.*

89. ARISTOTLE, *supra* note 2, at 121. Smith notes that in addition to practical wisdom, virtue, and good will, Aristotle would have presumed prior reputation—outside the speech—as a fourth trait, part of the “Athenian fore-structure” that Aristotle would have inherited from earlier rhetoricians. See Smith, *supra* note 28, at 16.

90. ARISTOTLE, *supra* note 2, at 164–72.

91. Kennedy calls this discussion “nonrhetorical” and notes that it was probably written for some other purpose, but then later added to the *Rhetoric* without being fully integrated into it. See, e.g., ARISTOTLE, *supra* note 2, at 163–64.

92. *Id.* at 235–36.

93. *Id.* at 236.

94. *Id.* at 271.

95. See KENNEDY, *supra* note 14, at 66.

As presented in the *Rhetoric*, Aristotle's notion of *ethos* is much more of a constructed or dramatic concept than for his predecessors, one attached to a rhetorical sense of the speaker as an apparent character rather than as a real one. The traits that would make that character credible or trustworthy are ones that the character should *seem* to possess. And by Book 3, Aristotle offers further hints that this character can be constructed, perhaps as the "creation of a surface style" or "a personality understood as a mask."⁹⁶ If *ethos* originally denoted "moral character," then Aristotle reconfigured it as rhetorical *ethos*.

Modern commentators almost wholly agree that Aristotle moved his view of *ethos* beyond the traditional sense—of *ethos* as a quality of the speaker's actual character, something that would attach to reputation—to something that is much more a matter of rhetorical competence, established not through reputation but rather within the speech itself.⁹⁷ For Aristotle, "the practice of rhetoric constitutes an active construction of character; *ethos* takes form as a result of the orator's abilities to argue and to deliberate and thereby to inspire trust in an audience. Aristotle thus directs our attention away from an understanding of *ethos* as a person's well-lived existence and toward an understanding of *ethos* as an artistic accomplishment."⁹⁸

As mentioned earlier, this shift entails a shift of location—character moves from the person to the speech. Craig Smith refers to the pre-Socratic notion of *ethos* as a "dwelling place," something Aristotle would have presupposed.⁹⁹ But Aristotle reformulates this, so that *ethos* now dwells within the speech, rather than within the actual character. The speaker now exists as an element of the speech, "no longer simply its origin . . . but rather a signifier standing *inside* an expanded text."¹⁰⁰ The relationship between *ethos*, discourse, and self has changed. Aristotle's reformulation of *ethos* also entails a change in the status of the speaker. Our understanding of the credibility of the speaker rests, not only upon reputation,

96. C. Jan Swearingen, *Ethos: Imitation, Impersonation, and Voice*, in *ETHOS: NEW ESSAYS*, *supra* note 5, at 120.

97. See, e.g., Hyde, *supra* note 13, at xvii. See also Smith, *supra* note 28, at 5. Eugene Garver notes that "[t]he *ethos* which the audience trusts . . . is the artificial *ethos* identified with argument. It is not some real *ethos* the speaker may or may not possess." EUGENE GARVER, *ARISTOTLE'S RHETORIC: AN ART OF CHARACTER* 196 (1994).

98. Hyde, *supra* note 13, at xvi.

99. Smith, *supra* note 28, at 2.

100. Baumlin, *supra* note 15, at xvi (emphasis in original).

but also upon representation—on the appearance of the speaker's character in the speech itself, as constructed through words.

II. ETHOS AND MODELS OF THE SELF— CLASSICAL AND MODERN

Perhaps Aristotle did not intend to reconfigure the formulation of *ethos*; rather, it may have been a by-product of his approach to rhetoric. Although Aristotle was Plato's pupil, Aristotle's writings were less idealistic, more pragmatic and empirical.¹⁰¹ Aristotle not only learned from the Sophists who preceded him—themselves “empirical pragmatists”—but he also “studied speakers and their audiences, observed what proved to be effective, and systematized it.”¹⁰² He focused on what he heard the speakers saying. Aristotle's approach may also be a consequence of his effort to discuss rhetoric as an art,¹⁰³ a focus that would necessarily lead him to the qualities of the speech itself and away from anything external to it, such as prior reputation. Given the strong consensus about *ethos* as moral character that had preceded him, he could presume reputation as a “potent part” of *ethos* without having to mention it.¹⁰⁴ Nevertheless, by discussing *ethos* as a rhetorical artifice, a construction of character within the speech, he also pointed rhetoric in the direction of a very different view of discourse and the self.

When Plato objected to rhetoric in his dialogues, he was objecting to what he saw as a split in Sophistic rhetoric between truth and the character of the speaker.¹⁰⁵ The Sophists, who saw the world as uncertain and who distrusted philosophical or theological systems of knowledge, did not feel compelled to anchor persuasion in truth. Within their world view, this would not even be possible. Isocrates, answering Plato's objection to the Sophists in his late apology the *Antidosis*, anchored persuasion in moral character.¹⁰⁶ But Isocrates's scheme could not guarantee a relationship between moral character and philosophical truth, and this would have

101. Smith, *supra* note 28, at 4.

102. *Id.*

103. He announces that the *pisteis* are artistic near the very beginning of Book 1. See ARISTOTLE, *supra* note 2, at 30.

104. Smith, *supra* note 28, at 5.

105. Not only in the *Gorgias*, but also the *Phaedrus* and *Protagoras*. See Baumlin, *supra* note 15, at xiv.

106. “[D]iscourse which is true and lawful and just is the outward image of a good and faithful soul.” ISOCRATES, *supra* note 1, at 327.

fallen far short of Plato's demand for an ethical rhetoric. "Plato [was] uncompromising in asserting this equation: truth must be incarnate within the individual [self], and a person's language must express . . . this truth."¹⁰⁷ For Plato, his philosophical epistemology could virtually guarantee this direct relationship between the self, language, and truth. Not surprisingly, then, Plato objected to *echopoeia* in the *Phaedrus*.¹⁰⁸ If the speaker was a dramatic construction, then the speaker could not truthfully appear in the words spoken, and the link between self, language, and truth would be broken.¹⁰⁹

Aristotle breaks with the philosophical demands of his teacher. In presenting character as an active construction of the speech—character as a representation—Aristotle finds rhetorical *ethos* to be sufficient.¹¹⁰ Aristotle implicitly thus admits the role of appearances in persuasion.¹¹¹ And he must re-configure the relationship between self, language, and truth rhetorically, as a relationship between a rhetorical self, language, and rhetorical truths. For the latter, probabilities and enthymemes replace philosophical truths.¹¹² And for the self, the role of the audience becomes more critical, for it is the audience that ultimately determines whether "the speech is spoken in such a way as to make the speaker worthy of credence."¹¹³ The speaker has become a rhetorical self, and the effectiveness of that speaker's rhetorical character becomes part of an aesthetic judgment on the part of the audience. In the Platonic/Aristotelian split between ethical models of the self, *homo serius* is replaced by *homo rhetoricus*.¹¹⁴

Aristotle's move toward a rhetorical self does not, however, make him a modern. Like other classical rhetoricians, he would have linked his notion of the self primarily to roles.¹¹⁵ Quintilian

107. Baumlin, *supra* note 15, at xiii.

108. *Id.*

109. *Id.*

110. As opposed to actual character, made truthful and moral through a Platonic awakening of the soul.

111. *Id.* at xv.

112. See, e.g., ARISTOTLE, *supra* note 2, at 40–47.

113. *Id.* at 38.

114. Baumlin, *supra* note 15, at xvii–xviii. They borrow the terms from RICHARD A. LANHAM, *THE MOTIVES OF ELOQUENCE: LITERARY RHETORIC IN THE RENAISSANCE* 6 (1976).

115. Alcorn, *supra* note 5, at 4. A vast literature exists on models of the self, both classical and modern. I choose to rely on Alcorn because he ties his argument explicitly to *ethos*. For models of the self, Alcorn in turn relies heavily on the work of the philosopher Amélie O. Rorty, *A Literary Postscript: Characters, Persons, Selves, Individuals*, in *THE IDENTITIES*

offers a good example of this when he argues that a good orator should not only possess gifts of speech, but also be of good character. When Quintilian asserts this, he sees his advice as a matter of striving to be good by filling a public role of ethical goodness.¹¹⁶ Quintilian, like Aristotle, does not need to spend very much time inquiring as to what good character is or what might constitute ethical goodness; both are part of the civic vision. As general as they are, the traits of practical wisdom, virtue, and good will made sense in the context of public roles and civic life. The idea of the self as a matter of roles results in a kind of flatness to classical notions of the self, a matter more of disposition contained within socially-established roles, but without the psychological inwardness of the modern self.¹¹⁷ Embracing Quintilian's model of ethical goodness would be a matter of fitting into a social model of established behavior and would not entail overcoming the inward division of the modern self. Thus, we should be careful about embracing wholesale Aristotle's notion of character and the rhetorical self. Lacking the understood inwardness of the modern self, the self-model of the classical world that Aristotle lived in was more limited.¹¹⁸

Much has been written about the modern self and its complexities¹¹⁹ (a fact that in itself makes a statement about those complexities). As mentioned above, compared to classical models of the self, the modern self possesses an acknowledged interiority and inwardness. This inwardness creates possibilities for self-division¹²⁰ and for an individuality and privateness to the self.¹²¹ Thus, because the modern self is partially inward and private, less wholly a matter of public roles, it is also more difficult for the rhetorical

OF PERSONS 301–24 (Amélie Oksenberg Rorty ed., 1976).

116. Alcorn, *supra* note 5, at 4–5.

117. *Id.* at 7–9.

118. *Id.* at 9; see also Amélie Oksenberg Rorty, *Structuring Rhetoric*, in *ESSAYS ON ARISTOTLE'S RHETORIC* 12 (Amélie Oksenberg Rorty ed., 1996) ("Putting words in his mouth, we can now present a rough first approximation of Aristotle's account of character. A person's character consists of those long-standing actively dispositional qualities and traits—his natural capacities and habits—that (by setting the general direction of his desires and the range of his passions) direct his choices.").

119. For a well-informed guide to this vast topic, one that is both historical and philosophical in its approach, see CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1992).

120. Alcorn, *supra* note 5, at 26–27.

121. *Id.* at 9–10.

self to acquire authority in modern society.¹²² Public roles exist in tension with the more private parts of the self, a tension captured regularly in cultural conversations about who we are.¹²³ All of these features of the modern self make it far removed from the classical concept of self as a matter of moral character and public role. It is more unstable, less coherent, more challenging to construct.

However, the modern self could also be said to be more fully discursal.¹²⁴ To the extent that the divisions of the self, the private-public dichotomies, and the individuality and freedom of the modern self can be captured and expressed, they are in many ways captured discursively. Our means of expression and self-definition, our social language, our genres, our media and technology, all provide forms for construction and representation of the modern self. We even construct a self on our smartphones.¹²⁵ These discursal constructions and representations open up possibilities for more stability and coherence to the self, at least as rhetorically understood. And in this way they also open up possibilities for a modern theory of *ethos* and its persuasive power.

Marshall Alcorn, upon whom I have relied for this micro-sketch of the modern self, sees the modern self as language-based, referring to it as a self-structure that can be described in linguistic terms.¹²⁶ Alcorn is not the only contemporary theorist to view the self in linguistic terms, but he is among those who view it rhetorically, rather than post-structurally, and his rhetorical view allows him to construct a modern role for *ethos*.¹²⁷ I agree with Alcorn's view, although I would elaborate on his model for rhetorical self-structure¹²⁸ and call it a discursal self.

122. *Id.* at 18.

123. *Id.* at 17–20.

124. Although I have used the term “discursal” throughout the Article, I should explain at this point that the usage is my own, an effort to merge a rhetorical understanding of the self with a socio-linguistic model of the self.

125. When we pursue the various forms of social media.

126. *Id.* at 12–15.

127. *Id.* at 12–13. Alcorn rejects the post-structuralist model as over-emphasizing the divided nature of the self. *See id.* at 12. For an excellent guide to the post-structuralist model and its linguistic origins, see Jonathan Culler's two overviews: *STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS, AND THE STUDY OF LITERATURE* (2d ed. 2002), and *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (25th ed. 2008). For a modern psychoanalytic model that is linguistically-based and related to the post-structuralist model, see JACQUES LACAN, *THE LANGUAGE OF THE SELF: THE FUNCTION OF LANGUAGE IN PSYCHOANALYSIS* (Anthony Wilden trans. 1997).

128. Alcorn, *supra* note 5, at 14.

Alcorn views the modern rhetorical self-structure, in practical terms, as a matter of style and voice: “Because the self has a relatively stable self-structure, the self has a recognizable style.”¹²⁹ Although most rhetoricians would describe style in linguistic, or textual, terms, Alcorn points out that style is also a “distinctive property of selves” and regards style as “a linguistic site where self-structure, engaging social discourse, produces rhetoric”—including an *ethos*.¹³⁰ He links style to self. Alcorn can make this connection because style results in a voice—or, rather, “a relatively stable *organization* of voices”—that composes a self-structure.¹³¹

This modern model of the self differs from the Aristotelian self and hence results in a different model of *ethos*. As discussed above, Aristotle pointed in the direction of a discoursal model of *ethos*, but his model was too restrictive for the modern self.¹³² Aristotle had formulated his model in a different historical, psychological, and social moment. In particular, Aristotle “embodied” the credibility lent by *ethos* inside a unitary, authoritative voice.¹³³ Although the classical, role-based model of the self may have been flatter, it allowed the speaker to construct an *ethos* that possessed a clear voice of authority, one that could interact in uncomplicated ways with the audience.¹³⁴ The construction of *ethos* is more complicated for the modern self, divided as it can be by “different styles of authority and styles of personality.”¹³⁵ Nevertheless, as a “relatively stable *organization* of voices,” the text can provide a sense of a self and of its *ethos*.

[W]e will always be able to see something in a text—and in most cases we will be able to imagine the ‘real’ voice of an author, in relation to the rhetorical effects a text produces. When we feel rhetorical effects, we tend to attribute them to the agency of another personality, outside us, working the

129. *Id.* at 15.

130. *Id.*

131. *Id.* at 12 (emphasis in original).

132. *Id.* at 17.

133. *Id.* at 18.

134. *Id.* at 18–20.

135. *Id.* at 19.

rhetorical effects of language on us.¹³⁶

Modern *ethos* is a matter of organizing and structuring the components of the self discursively. We construct a self within the text, and that constructed self can project an *ethos*.

Can Alcorn's model inform our understanding of *ethos* in legal discourse? In two earlier articles, I have written about discursive identities, voice, and self in legal writing.¹³⁷ The discursive model of those articles both echoes and elaborates on Alcorn's model and offers a way of understanding *ethos* in modern legal texts.

III. MODERN ETHOS, THE DISCURSAL SELF, AND CONTEMPORARY LEGAL WRITING

The writer's self in modern legal writing is best viewed discursively because, like the self of any modern writer, the legal self is divided—a matter of competing voices, styles, and discourse conventions.¹³⁸ When our students first walk into the legal writing classroom, they have already spent many years writing, and they have managed to construct discursive selves for themselves from among the components mentioned above.¹³⁹ Those earlier writers' selves, however, are different from the writerly identity that they will need to construct for themselves as lawyers. In teaching our students to write like lawyers, then, we are teaching them to manage these components into a legal writer's self.¹⁴⁰ And as a part of this, we are also guiding them in the construction of a lawyerly *ethos*.

A model of the writer's self exists that articulates more fully the components of that self to which Alcorn alludes and that can inform our discussion of *ethos* in contemporary legal writing.¹⁴¹

136. *Id.* at 12, 21–22 (emphasis in original).

137. See Rideout, *supra* note 23; Rideout & Ramsfield, *supra* note 23.

138. "*Ethos*, in fact, is best understood as an interplay of two features: an author's voice in a text, and that voice rhetorically manipulated by the plural nature of both self and text." Alcorn, *supra* note 5, at 21.

139. Rideout & Ramsfield, *supra* note 23, at 744. Usually, as student writers, some of them will have mastered other voices and styles, primarily within professional contexts, and a few of them will have explored their voice and style more self-consciously in literary forms.

140. See *id.* at 740–43.

141. See ROZ IVANIČ, WRITING AND IDENTITY: THE DISCURSAL CONSTRUCTION OF IDENTITY IN ACADEMIC WRITING 19–23, 98–105 (1998). I adapt this model to legal writing in Rideout & Ramsfield, *supra* note 23, at 730–32, and Rideout, *supra* note 23, at 91–96.

This model, partly sociolinguistic, offers a way of talking about the writer's self as a constructed "self-representation," as distinct from a writer's "real" self.¹⁴² The model divides the writer's self into three aspects: the autobiographical self, the discoursal self, and the self-as-author.¹⁴³ In addition, there is a fourth aspect, the available positions and possibilities for the writer's self. This aspect is external to the writer—part of the discourse and the context within which the writer is writing—but interacts with and shapes the writer's identity.¹⁴⁴

These aspects of a writer's identity lend themselves well to a discoursal model of *ethos*. The first component, the autobiographical self, is what a writer would refer to as his or her "real" self and what readers would regard as the "real" person who lies behind the writing.¹⁴⁵ In terms of classical models for *ethos*, the autobiographical self would include the writer's real character, the basis for Isocrates's model of *ethos*. But within a discoursal model, the autobiographical self, although closely tied to a writer's own sense of self, does not manifest itself directly within the written text. It bears an important relationship to the discoursal self-representation of the writer within the text, but it is different from the self that the text portrays. And it has no direct voice in the text.¹⁴⁶ If modern legal *ethos* is discoursal, then, the real character of the writer, although perhaps a factor in the construction of a writer's *ethos*, is nevertheless not directly part of that *ethos*. When readers respond to the *ethos* of a writer, established within a written text, they are not responding directly to the real writer, the autobiographical self; they are responding to a discoursal representation of it.¹⁴⁷ This difference poses a challenge for our students, who view themselves in

142. Rideout, *supra* note 23, at 92.

143. *Id.* at 92–95; Rideout & Ramsfield, *supra* note 23, at 728–36. To repeat what I point out in Rideout & Ramsfield, *supra* note 23, at 732, this is a sociolinguistic model, and the division into aspects is not literal.

144. Rideout & Ramsfield, *supra* note 23, at 732, 734–36.

145. Rideout, *supra* note 23, at 93.

146. *Id.*

147. Some might argue that an exception exists in situations where the reader knows the writer—for example, when a well-known appellate lawyer appears before a state appellate judge, that lawyer has appeared before the court many times, and both have been professional colleagues within that legal community. Without question, that lawyer's personal reputation is something the judge knows, and it may influence the judge's initial disposition toward that lawyer's argument. But in a professional setting, the judge must still pay attention to the argument itself—whether delivered orally or in writing—including the self-as-constructed within that argument, its *ethos*.

terms of an autobiographical self, but must somehow learn that in order to write like a lawyer, they cannot give direct expression to that self.

The discorsal self, the second component in this model, is the writer's self as represented in the text.¹⁴⁸ The discorsal self is the central self of the writer in the text, and the text "contains" it, directly. This self can be said to form and represent the character of a modern legal *ethos*. As a self-representation within the text, the discorsal self is in some ways the modern counterpart to the character that Aristotle would have the speaker "construct a view of" within the speech.¹⁴⁹ It is the self-representation engaged in by the autobiographical self, a kind of portrayal of that aspect of the self. But the two selves are not the same, a distinction that Aristotle fell short of making.

Although readers commonly believe that the self that emerges from the words in the text is the real self of the author, within this model, that self that emerges is the discorsal self.¹⁵⁰ The real self is not directly knowable. Similarly, when readers hear a voice within the text, they commonly regard it as being the voice of the real author. But, as Alcorn noted, they are actually referring to an imagined voice, the product of the rhetorical effects of the discourse.¹⁵¹ And it lies, not behind the words, but within the words.

I would call the discorsal self the first, and primary, aspect of *ethos* for a legal writer: "discorsal" because it is "constructed through the discourse characteristics of a text."¹⁵² This feature is particularly important for *ethos* in legal discourse because legal writing is so highly conventionalized.¹⁵³ In order to achieve a credible and authoritative *ethos* as a legal writer, that writer must employ the conventions and formats that lawyers employ. The writer

148. Rideout, *supra* note 23, at 93.

149. But they are not quite the same. As mentioned above, the modern sense of a discorsal self involves the organizing of a more split self, with inward and private components, into a more unitary discorsal self. Aristotle would not have so readily acknowledged those splits, and the construction would have been a simpler, more conscious act, a construction along the line of roles.

150. *Id.*

151. Alcorn, *supra* note 5, at 21–22.

152. See Rideout & Ramsfield, *supra* note 23, at 733 (quoting IVANIČ, *supra* note 141, at 25).

153. For more on the conventions of legal rhetoric, see J. Christopher Rideout, *Knowing What We Already Know: On the Doctrine of Legal Writing*, 1 SAVANNAH L. REV. 103, 109–13 (2014).

must not only think like a lawyer; to be credible, he or she must sound like a lawyer.

This is part of where the external component of the writer's identity, the available positions and possibilities, influences the writer's self and its credibility. Writing takes place within contexts, and those contexts are both rhetorical and social.¹⁵⁴ The argument patterns, the repeated references to existing legal authority, the more formal style, all the distinctive features of legal prose enscribe it as being "legal." Those discourse features are external to the writer, part of the positions available to a lawyer, and to the extent that a legal writer incorporates them into the text, making them part of his or her discoursal self, that writer will gain authority and credibility. The discoursal features of legal prose enscribe not only the text, but also its author. Contemporary lawyers may race bicycles or play soccer on the weekends; but to the extent that they can adopt the more formal features of legal prose during the week, their *ethos* will be more persuasive and effective. This is especially true if they can do so deftly through a voice and style that are authoritative, clear, and convincing. In an earlier article, I wrote that "the successful construction of a convincing discoursal self is . . . one of the great challenges for emerging legal writers."¹⁵⁵ In fact, the construction of a convincing discoursal self—a persuasive *ethos*—is a continuing challenge for every lawyer, whether novice or seasoned.

The third component of the writer's self is the "self-as-author."¹⁵⁶ The self-as-author is a direct assertion in the text of the writer as an author. Whereas the discoursal self is a "self" in the writing, this third component is more directly a "self-as-author" in the writing. The self-as-author is, however, still a self-representation. And although it may sound like a direct expression of the autobiographical self, it is nevertheless a construction, although a construction that can be in part a product of the autobiographical self.¹⁵⁷

154. Rideout & Ramsfield, *supra* note 23, at 734–35. The contexts are social in that particular discourse conventions carry with them references to writing as a social practice, a practice that is socially situated and that is embedded with certain values and epistemologies.

155. *Id.* at 734.

156. Rideout, *supra* note 23, at 94–95; Rideout & Ramsfield, *supra* note 23, at 734.

157. Rideout, *supra* note 23, at 95.

Every piece of writing will have a discursial self, but the extent to which a piece of writing contains a conscious assertion of authorial presence—the self-as-author—will vary.¹⁵⁸ In legal writing, the self-as-author is less common than in some other forms of writing because legal writers acquire authority in other ways: by relying on and referencing external legal authority and by following fairly closely the conventions of legal prose that lend it a professional tone and voice.¹⁵⁹ Legal prose can efface somewhat this third aspect of a writer's identity, although not entirely.

Nevertheless, the presence of the self-as-author in a piece of writing can be a strategy for lending that writing a sense of authoritativeness.¹⁶⁰ The self-as-author can sound to a reader like an even more direct expression of the writer. So if an author is willing to take a strong authorial stance, that stance can make the force of the argument more compelling. The presence of the purportedly “real” voice of the author in a text may be one way of lending credibility to the argument. Of course, this “real” voice is a construction, but its potential effectiveness may hark back to Isocrates: we may feel like we are hearing the true character of the writer, someone who cares enough about an issue to come forward, break through the normal conventions, and “speak” directly to the reader.

On those occasions when legal writers employ the self-as-author adeptly, it has a valuable place as a way of establishing credibility and authority. Perhaps because it relies on a strong voice and a sense of coming directly from the author and because it can represent a departure from the more impersonal or professional voice common to legal writing, it has the potential to be effective.¹⁶¹ I consider it a second important component of a writer's *ethos*, although one that—for lawyers—perhaps requires more skill in its use.

In sum, the *ethos* of a modern legal writer is best regarded as discursial. Classical notions of *ethos* as a component of the writer's character—or as *the* writer's character—emerge from a different historical and cultural moment and fail to account for the complexity of the modern self. It is not enough for a modern legal writer to possess certain character traits or even to project those given traits. The writer's self must be represented in the writing itself in

158. *Id.* at 94.

159. *See, e.g., id.* at 81.

160. IVANIĆ, *supra* note 141, at 26.

161. Or not, when not employed adeptly.

manner that makes that writer authoritative and credible. But this representation is also not a matter of mere appearances, or of simply appearing to be credible; the representation of the writer in the writing *is* the writer. A discoursal view of modern legal *ethos* erases the possession/appearance dichotomy, a holdover from classical discussions of *ethos*.

When we introduce law students to legal writing, we are also guiding them in the construction of a new writerly self—the discoursal self of a legal writer. And in doing so, we are also guiding them in the construction of the persona that will become a primary part of their *ethos* as a legal writer—whether or not we choose to explicitly discuss *ethos* as a component of legal persuasion. In my view, this construction of a discoursal self is a crucial aspect of law students' education in legal writing and legal persuasion, although seldom discussed or even acknowledged. To that end, this Article will now turn to two contemporary treatises on the topic of *ethos* and legal persuasion.

IV. ETHOS IN CONTEMPORARY ADVICE ON LEGAL RHETORIC

Given the close relationship between classical rhetoric and modern legal persuasion, it comes as no surprise that a number of contemporary writers have written about this relationship for the legal writing community.¹⁶² Two of the writers mentioned in the introduction to this Article, Michael Frost and Michael Smith, have written repeatedly about this relationship and produced treatises with extensive commentary on the uses of classical rhetoric in modern legal persuasion.¹⁶³ Both treatises contain chapters on the uses of *ethos* in modern legal persuasion, with useful advice for the modern legal advocate. Neither, however, fully unravels the possession/appearance dichotomy inherent in the discussions of *ethos* that follow Isocrates, referring, in the first instance, to a modern lawyer's self still understood largely in classical terms and, in the second, to the textual features that construct the *ethos* of a discoursal self while still wavering somewhat between the poles of the dichotomy.

162. For a compendium, see the section on "Classical Rhetoric" in Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ALWD 129, 130–38 (2006).

163. See generally FROST, *supra* note 11; SMITH, *supra* note 8.

A. Modern *Ethos* Through a Classical Lens

Since 1990, Michael Frost has written a series of articles and, finally, a treatise, all applying classical principles of rhetoric to modern legal writing and advocacy.¹⁶⁴ His repeated reading and application of classical rhetorical texts to legal advocacy has defined his publishing career, and he has consistently—and rightly—strived to remind legal writers of their heritage in classical rhetoric. As he writes in the Preface to his book, “[a]nyone who studies the classical treatises soon discovers that, with some adaptations for modern taste and modern legal practice, the classical rhetorical principles are as applicable today as they were 2500 years ago.”¹⁶⁵ An open question on *ethos*, however, is the degree of adaptation necessary.

1. Classical Ethos and the Character of a Modern Lawyer

Echoing Aristotle, as well as Cicero and Quintilian, Frost repeats their assertions that *ethos* is as important to effective argument as *logos* or *pathos*. “Under classical theory, effective legal arguments depend almost as much on the advocate’s character and credibility, or *ethos*, as they do on logical integrity (*logos*) or emotional content (*pathos*).”¹⁶⁶ He immediately follows this statement on the importance of *ethos* with another on the dynamics of *ethos*, stating that, for Aristotle, Cicero, and Quintilian “*projecting* the proper *ethos* is as important as actually possessing it.”¹⁶⁷ In doing so, he immediately characterizes *ethos* in terms of the appearance/possession dichotomy. Without disclaiming the need to actually possess good character, he equally stresses the importance of projecting that good character.

Because Frost is following Aristotle so closely, this characterization should be no surprise. In fact, Frost is correctly tracking

164. See, e.g., FROST, *supra* note 11; Michael Frost, *Brief Rhetoric: A Note on Classical and Modern Theories of Forensic Discourse*, 38 U. KAN. L. REV. 411 (1990); Michael Frost, *Ethos, Pathos, and Legal Audience*, 99 DICKINSON L. REV. 85 (1994); Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 LEGAL WRITING 113 (1996); Michael Frost, *Greco-Roman Legal Analysis: The Topics of Invention*, 66 ST. JOHN’S L. REV. 107 (1992); Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613 (1999); Michael Frost, *Justice Scalia’s Rhetoric of Dissent: A Greco-Roman Analysis of Scalia’s Advocacy in the VMI Case*, 91 KY. L.J. 167 (2002–2003).

165. FROST, *supra* note 11, at vii.

166. *Id.* at 67.

167. *Id.* (emphasis added to the first word).

Aristotle's attempt in the *Rhetoric* to turn rhetorical persuasion, and *ethos*, in the direction of art and artifice, away from moral character and more in the direction of rhetorical competence.¹⁶⁸ And Frost notes the importance of audience in this turn toward artifice, not only for Aristotle but for later Roman rhetoricians like Cicero and Quintilian.¹⁶⁹ Aristotle, he writes, believed that the advocate could control the court's perception of character in the same manner that an advocate could shape the logical construction of an argument or manage the court's emotional response.¹⁷⁰ "In Aristotle's view, *ethos*-control is as much an acquired skill as it is an inherent characteristic of the advocate."¹⁷¹ Cicero and Quintilian, he notes, followed suit, not only accepting but also elaborating on Aristotle's basic premise.¹⁷² Cicero, well-known for his stress on proper diction, directly links *ethos* and style: "much is done by good taste and style in speaking, [so] that the speech seems to depict the speaker's character."¹⁷³ The choice of an appropriate style can give the perception of an appropriate character.

In turning to *ethos* for the modern lawyer, Frost reiterates the classical rhetoricians' stress on audience awareness and its role in the perception of a lawyer's credibility.¹⁷⁴ On audience awareness, he advises that modern lawyers brush up on the characteristics of the judge assigned to their case—the judge's background and record of decisions.¹⁷⁵ For juries, he emphasizes the importance of modern jury selection, selecting jurors whose personal and professional background can make them sympathetic, or at least neutral—a "tailoring function."¹⁷⁶ This is important because modern law, he observes, is more juror-centered than judge-centered.¹⁷⁷ (Note, however, that here his discussion strays into construction of the audience rather than perception of the lawyer.)

On credibility, Frost notes that it is as important in modern advocacy as it was for the classical rhetoricians, as evidenced by the way that contemporary trial manuals stress the importance of

168. See *supra* pt. I(C).

169. FROST, *supra* note 11, at 68.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* (quoting 3 CICERO, DE ORATORE 329 (E.W. Sutton & H.M. Hubbell trans., 1942)).

174. *Id.* at 70.

175. *Id.* at 71.

176. *Id.* at 71–72.

177. *Id.*

credibility.¹⁷⁸ He modernizes character traits as “credibility factors,” equating them to the virtues that the classical rhetoricians advised.¹⁷⁹ And as mentioned in the introduction to this Article, he turns to contemporary trial manuals for a modernized list of the character traits that lend credibility: for example, modern lawyers should establish their “expertise, trustworthiness, impartiality, dynamism, similarity to jurors, and personal attractiveness.”¹⁸⁰ And they should project an image of “fairness, honesty, sincerity, courteousness, and desire for justice.”¹⁸¹

Some of these traits are ones that we would regard as professional characteristics of a lawyer and would expect any lawyer to exhibit—for example, expertise, impartiality, or fairness. These characteristics are role-based, and an advocate who did not seem to possess them would no doubt be less effective. Other characteristics would also be effective, although modern judges and juries may be wary of a lawyer who tries, or over-tries, to project them—trustworthiness, honesty, sincerity.¹⁸² The complexity of the modern self and its divided nature might make such attributes more problematic for an audience, at least if presented as a core attribute of the advocate.¹⁸³ In addition, the fact that the advocate must somehow attempt to project these characteristics may undercut the appearance that that advocate actually possesses them. Finally, some characteristics are simply personal—for example, personal attractiveness. And although this characteristic could probably use some further definition, a more specific sense of it would still not solve the problem that it shares with all the others. Must an advocate possess a character trait to project it? Or not? And either way, how does the modern advocate go about projecting character traits?

Frost largely approaches this problem by sticking to the province of the classical rhetoricians—oral rhetoric. In this way, the

178. *Id.* at 72.

179. *Id.*

180. *Id.* (quoting THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 379 (3d ed. 1992)).

181. *Id.* (quoting LAWRENCE A. DUBIN & THOMAS F. GUERNSEY, TRIAL PRACTICE 20 (1991)) (establishing certain traits (possession) and having an image of certain traits in the minds of the jurors (appearance) are probably two different things).

182. Frost acknowledges the problem of projecting sincerity without actually possessing it. *See id.* at 72–73. Within a model of the self that does not account for its dividedness, these splits would be difficult to advise about.

183. I do not deny, by the way, that legal advocates can be trustworthy, honest, or sincere by nature, but examples exist of the opposite. Lawyers are like all other moderns, situated in the same possibilities and constraints for the self.

advocate literally appears before the audience—a character in the flesh—and Frost can update the classical emphasis on delivery of the speech by turning to its modern equivalent, non-verbal communication, for advice.¹⁸⁴ Whereas the classical rhetorician advised attention to “voice [literal and physical], eye contact, mannerisms, gestures, and stance,”¹⁸⁵ the modern advocate must turn to his or her contemporary equivalents, as advised by current psychology and sociology, even down to small details like kinesics (personal movement within the space of the courtroom) or use of a smile.¹⁸⁶ Frost acknowledges, however, that a focus on non-verbal factors lacks the emphasis of the classical rhetoricians on character and personal integrity and, at its best, could be reduced to simple professionalism.¹⁸⁷

In his treatise, Frost displays his well-honed grasp of classical rhetorical advice on *ethos* and does an admirable job of attempting to turn it into advice for the modern advocate. But a focus on non-verbal factors sidesteps the great insight of the classical rhetoricians, that words, through appropriate artifice, can at least give the appearance of underlying character.¹⁸⁸ In oral rhetoric, the advocate indeed should rely on delivery and on non-verbal factors to project a credible persona. But written persuasion is at least equally important for modern advocates. And there, the problem of constructing the advocate’s character traits and the ambiguity inherent in the appearance/possession dichotomy remains. Perception or projection of character and construction of character are not the same thing.

2. *Judicial Dissent and Ethos: An Example*

Very briefly, in one short chapter of his treatise, Frost mentions the role of style, opening up possibilities for *ethos* in the written text.¹⁸⁹ He turns to Book 3 of the *Rhetoric*, where Aristotle also took up the topic of style and noted that style can offer insights into

184. *Id.* at 73.

185. *Id.*

186. *Id.* at 74.

187. *Id.*

188. Frost implicitly acknowledges this insight when he quotes a trial manual that advises how “little communication is grounded on bare word content.” See *id.* (quoting MAUET, *supra* note 180, at 379).

189. *Id.* at 109–16.

character.¹⁹⁰ Frost also points to the authors of a modern treatise who similarly link style and character, quoting their statement that writing can exhibit “an *image of your character* that affects the audience’s response.”¹⁹¹ But the chapter skirts the question of possession, and the bulk of the chapter primarily focuses on parallelism and antithesis as figures of speech rather than on the role of style in constructing an *ethos*.¹⁹²

In a subsequent chapter on Justice Scalia’s judicial dissents, however, Frost comes the closest to linking the written features of the text to a constructed persona.¹⁹³ Here Frost notes how Justice Scalia uses style to enhance credibility, calling him an “intelligent, resourceful, but frequently heavy-handed stylist [who] supports his arguments using a full complement of rhetorical tools.”¹⁹⁴ Although he does not explicitly mention voice or use the framework of the discursial self, Frost offers a full exposition of the *ethos* that Justice Scalia presents through a persona constructed of style and voice. He does so through a fairly thorough analysis of the textual features that Justice Scalia employs in an equal protection case regarding the admission of women into the Virginia Military Institute.¹⁹⁵ He finds that Justice Scalia’s writing mainly offers a negative example of *ethos*, however, and that Justice Scalia damages his credibility through “an over-artful writing style, hyperbolic legal and factual claims, and ill-advised sarcasm.”¹⁹⁶

Of the three, Frost singles out sarcasm, or irony, as the most damaging—“the most corrosive rhetorical device Scalia employs.”¹⁹⁷ Frost points out that irony violates the classical dictum of propriety of style by conveying Justice Scalia’s contempt for the Court as an institution and for his colleagues and their motives and reasoning.¹⁹⁸ I would add that irony is also especially corrosive because it expresses a self divided—in Justice Scalia’s case, between the institutional voice of the Court and a voice that attacks that

190. *Id.* at 109–10; *see also supra* pt. I(C) (discussing Book 3).

191. FROST, *supra* note 11, at 114 (emphasis added) (quoting STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A WRITER: A LAWYER’S GUIDE TO EFFECTIVE WRITING AND EDITING 8-5 (1992)).

192. *Id.* at 109–14.

193. *Id.* at 119–40.

194. *Id.* at 123.

195. *See United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting).

196. FROST, *supra* note 11, at 135.

197. *Id.* at 137.

198. *Id.* at 137–38.

institutional authority, thus disrupting the “stable organization of voices”¹⁹⁹ important to a modern *ethos*. In the end, Frost concludes that Justice Scalia fails to project a positive *ethos* and, instead, “ignores or misuses one of the most potent rhetorical tools available to an advocate—his credibility, or *ethos*.”²⁰⁰

Justice Scalia’s writing style and the problematic *ethos* that it presents did not change over the remaining years of his career. In one of his last dissents,²⁰¹ he continued to employ sarcasm,²⁰² a biting tone,²⁰³ and condescension toward his colleagues,²⁰⁴ sufficiently so that even lay readers commented on his tone and the way in which it lay outside the conventional judicial tone of the Court.²⁰⁵ The sarcasm of the dissent—labelling the majority’s holding “absurd”²⁰⁶—is no doubt intended to shock the reader by stepping outside that conventional judicial tone. But in doing so, the discoursal self that results possesses less authority and credibility. Even worse, it is a discoursal self that reveals considerable division, within the voice itself. By stepping outside the conventions here, the author of the opinion raises questions about the self-representation of the voice in the dissent. Is this a “self-representation” of Justice Scalia as a justice—which the reader would expect, although the tone seems out of place? Or is this a “self-representation” of Justice Scalia in some role other than a professional one—

199. Alcorn, *supra* note 5, at 12 (emphasis omitted).

200. FROST, *supra* note 11, at 139.

201. *King v. Burwell*, 135 S. Ct. 2480, 2496–2507 (2015) (Scalia, Thomas, and Alito, JJ., dissenting).

202. “The Court holds that when the Patient Protection and Affordable Care Act says ‘Exchange established by the State’ it means ‘Exchange established by the State or Federal Government.’ That is of course quite absurd, and the Court’s 21 pages of explanation make it no less so.” *Id.* at 2496 (Scalia, Thomas, and Alito, JJ., dissenting).

203. He accuses the majority of “interpretive jiggery-pokery,” *id.* at 2500 (Scalia, Thomas, and Alito, JJ., dissenting), and of drafting a “defense of the indefensible,” *id.* at 2502 (Scalia, Thomas, and Alito, JJ., dissenting).

204. “This case requires us to decide whether someone who buys insurance on an Exchange established by the Secretary gets tax credits. You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it.” *Id.* at 2496 (Scalia, Thomas, and Alito, JJ., dissenting).

205. See, e.g., Editorial Bd., *The Supreme Court Saves Obamacare, Again*, N.Y. Times, June 25, 2015, available at <http://www.nytimes.com/2015/06/26/opinion/the-supreme-court-saves-obamacare-again.html>; Linda Greenhouse, *The Roberts Court’s Reality Check*, N.Y. Times, June 25, 2015, available at http://www.nytimes.com/2015/06/26/opinion/the-roberts-courts-reality-check.html?_r=0; Adam Liptak, *Supreme Court Allows Nationwide Health Care Subsidies*, N.Y. Times, June 25, 2015, available at <http://www.nytimes.com/2015/06/26/us/obamacare-supreme-court.html>.

206. *King*, 135 S. Ct. at 2496 (Scalia, Thomas, and Alito, JJ., dissenting).

something the reader would not expect, although perhaps more appropriate for the tone of the dissent? Who is the “imagined author” here?²⁰⁷ These implicit questions weaken the *ethos* of the passage.

3. *Judicial Writing and Authoritative Ethos: An Example*

Frost does not offer an example of a more positive *ethos*, but the case that I discuss above, *King v. Burwell*, can serve as a judicial example of one.²⁰⁸ Like any other writer, Supreme Court justices must create an *ethos*, as a part of convincing their audience that their opinion has been correctly decided. Without going into the merits of the case, I turn briefly to Chief Justice Roberts’s majority opinion upholding for a second time the Affordable Care Act.²⁰⁹

In the opening of his opinion, Justice Roberts provides the standard opening move of a Supreme Court opinion.

The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market. . . . This case is about whether the Act’s interlocking reforms apply equally in each State no matter who establishes the State’s Exchange. Specifically, the question presented is whether the Act’s tax credits are available in States that have a Federal Exchange.²¹⁰

In employing this standard opening, Justice Roberts implicitly identifies this as a judicial opinion and signals that it thus deserves the authority and respect accorded to opinions of the Court. He reinforces this by employing the conventional tone and voice of the Court. The passage is objective and professional, not written with a personal voice in any way.²¹¹ It implies a self behind the words, but that self is the institutional self of the Court, not of any individual justice. Either way, that self is a discorsal self, and it establishes the Court’s authority—its *ethos*—by employing discourse conventions standard to the Court.

207. *See supra* pt. II.

208. In my view, court opinions—especially from the highest Court—can (or should) offer a model of a positive *ethos* because they fully embody the authority of the law; it is encribed onto the voice of their opinions, both institutionally and textually.

209. *King*, 135 S. Ct. 2480.

210. *Id.* at 2485.

211. *See Rideout, supra* note 23, at 81.

At times, however, as Justice Roberts continues in his opinion, the self of the writing asserts itself, discursively, as a self-as-author—the second means of establishing an *ethos*.

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*, 467 U.S. 837 Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable.²¹²

Here the author directly addresses the reader as “we,” although the self of that author is still a collective self, the self of the Court, rather than of the individual writer Justice Roberts. This collective self-as-author is an important part of the *ethos* of the Court, for it represents not just the members signing on to the majority opinion, but also the authority of the Court that rests with those members when they agree on a majority opinion. It represents the authority of the Court discursively—and powerfully. In fact, Justice Roberts uses this self strategically several times throughout the opinion. He employs it again when explaining how the Court approaches its central task of statutory interpretation in this case (in doing so, referring to an earlier opinion of the Court, a discourse strategy that effectively doubles the authority of this passage):

Anyway, we “must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”²¹³

And at the beginning of his concluding section, he again makes reference to an earlier opinion of the Court—*Marbury v. Madison*²¹⁴—and ties the authority of that landmark opinion to the self-as-author of the Court one last time, in a bid for authority and credibility in the present opinion.

In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—“to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).

212. *King*, 135 S. Ct. at 2488.

213. *Id.* at 2492 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014)).

214. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done.²¹⁵

Justice Roberts's opinion may not win an award for literary innovation, but that would not be his strategy anyway. Faced with writing an opinion in a case that was seen by many as politically-motivated, he had to defend not only the statute but also the authority and credibility of the Court.²¹⁶ He does so by writing an opinion that among other things, establishes a straightforward, carefully-reasoned *ethos*. And when the opinion speaks directly to the reader, it does so with the authority of the Court.

B. Modern *Ethos* as Written Text

Of the contemporary writers on legal rhetoric, the one who offers the most thorough advice on *ethos* in written texts may be Michael Smith, in his book *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*. In the section on *ethos*, Smith offers two chapters and 68 pages on the topic.²¹⁷ His discussion is comprehensive. Earlier I had mentioned that Smith, like most contemporary writers on legal *ethos*, wavers between possession and appearance. His notion of *ethos* is still tied to the writer's character, but he understands that the reader must understand what that character is. "It is not enough for an advocate to actually be credible; the reader must have specific knowledge of the aspects of an advocate's character that indicate credibility."²¹⁸ Smith strikes a middle ground by focusing on "how an advocate projects and evinces credibility to the reader through his or her written product."²¹⁹

Smith's view of *ethos* is not quite discursal; it still seems tied to the actual character of the advocate. But it moves in the direction of a discursal view by concentrating on the written text, even if it does not acknowledge the tension between an autobiographical self and a discursal self.²²⁰ Because of this concentration on the

215. *King*, 135 S. Ct. at 2496.

216. See, for example, Editorial Board, *supra* note 205.

217. See SMITH, *supra* note 8, at 123–91.

218. *Id.* at 126.

219. *Id.*

220. Although he does acknowledge the difficulty of a complete disconnect between the two: "[M]any dangers confront an advocate who attempts to feign credibility or who attempts to establish a trait of credibility deceitfully." *Id.* I agree with him regarding this negative extreme.

written text, his section on *ethos* offers an excellent way of examining how a discoursal view of a lawyer's written *ethos* works, even if it skirts the question of the writer's self.

1. *Discourse Conventions, Ethos, and the Discoursal Self*

As mentioned above, following discourse conventions is important in legal writing because legal discourse is so highly conventionalized, and those conventions often differ from other forms of professional writing. Sounding like a lawyer is an important way of establishing a credible legal *ethos*. In discussing the traits that are important to a legal *ethos*, Smith regularly ties them to textual features that in turn embody discourse conventions specific to the law and that conjure a persuasive *ethos*. In effect, he offers advice on how to create the discoursal self of a credible lawyer. Here are some examples.²²¹

221. See *id.* at 126–44 (analyzing character traits legal writers should project through their writing to demonstrate good moral character).

<u>character trait</u>	<u>associated discourse conventions</u>
truthfulness	explain both the law and the facts accurately and honestly
candor	include all legally significant facts (including those that are damaging) and disclose any adverse legal authority
zeal	make a substantive effort plus attend to the language or tone of the argument
respect	avoid disrespectful content or tone, or a messy and unprofessional document
professionalism	avoid behavior that is discourteous, undignified, vicious, deceitful, or otherwise inconsistent with high ethical, moral, and professional standards

My point is that, however valuable or desirable these character traits may be, what is important is how they are represented textually. For the first two, “truthfulness” and “candor,” Smith refers to discourse conventions that belong to argument strategy—for example, including the facts accurately and including all the legally significant facts.²²² For the third, “zeal,” he advises the advocate not to become so zealous as to sacrifice truthfulness or candor²²³—already defined discursively. He then advises choosing forceful and confident language—a matter of style and tone in the text—and warns against showing lack of respect or unprofessionalism,²²⁴ two traits to be defined next.

“Respect” is also defined discursively: as a matter of content (argument strategy), tone (style and tone), or “a messy and unprofessional document” (this time, a discourse convention that calls attention to the text as a text).²²⁵ “Professionalism” is more difficult. He must refer to it as conduct (“conduct that epitomizes honor

222. *Id.* at 126–36.

223. *Id.* at 135–38.

224. *Id.* at 138–43.

225. *Id.* at 138.

and nobility in the practice of law”) and mentions the importance of evincing this conduct in writing, but without the direct advice offered for the first four character traits.²²⁶ The bulk of the explanation explains what not to do. However, in turning to examples from case law, most of the examples are again discoursal: “failure to heed HRAP Rule 28(b)(7)” (argument strategy); “lengthy quotations from the hearing transcript and . . . running sarcastic commentary” (argument strategy, plus style and tone); “substitution of rancorous rhetoric for legal and factual analysis” (argument strategy, plus style and tone); or “wholesale extrapolating of arguments from briefs submitted in the trial court without editing for changes . . . , argument on issues that are not raised, and argument based on mischaracterization of the record” (argument strategy).²²⁷ All of these, including especially the last set, violate the discourse conventions of professional lawyering. And they are identifiable discoursally. We know nothing about the actual character of these lawyers, except as represented in the text. These are the discourse conventions that, among others, compose the discoursal self of a legal *ethos*, and as Smith points out, violating them damages the credibility of that writer as a lawyer.

2. *Authorial Presence, Ethos, and the Self-as-Author*

For the final character trait, “intelligence,” Smith advises that legal writers employ both substance and what he calls “highlighting.”²²⁸ On the first, creating effective substantive arguments, he points out that effective substantive arguments employ both *logos* and *ethos* simultaneously.²²⁹ In doing so, effective substantive arguments rely upon argument strategy, a discourse convention.²³⁰ In going through the subtraits of intelligence, for example the subtrait of “being informed,” he again identifies these characteristics textually: accurately stating the facts, identifying mandatory relevant legal authority, incorporating persuasive secondary sources

226. *Id.* at 139–40.

227. *Id.* at 150–54.

228. *Id.* at 148. Smith points out that Richard Posner also discussed highlighting (although Posner called it an “ethical appeal”), in which a writer should “attempt to convey a sense that he is a person you ought to believe.” Richard Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1279–88 (1986).

229. SMITH, *supra* note 8, at 151.

230. *Id.*

where appropriate, and so on.²³¹ These are discursal and, again, components of the discursal self.

The second strategy, highlighting, is a matter of demonstrating that the writer “possesses a specific characteristic of intelligence.”²³² A writer does this by “expressly telling the reader that the writer possesses a specific characteristic of intelligence,” or “overtly pointing out to the reader aspects of the writer’s document that reflect intelligence,” or “telling the reader that the writer engaged in specific conduct in preparing the written document.”²³³ In other words, highlighting is a matter of the author asserting an authorial presence; that is, the self in highlighting is the self-as-author more than it is the discursal self.

Smith offers as a well-known example of highlighting Justice Holmes’s dissent in *Lochner v. New York*.²³⁴ Holmes writes, “This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind.”²³⁵ Smith points out that Justice Holmes enhances his credibility by “expressly informing the readers of his dissent that he is the type of person who carefully deliberates over an issue before taking a position.”²³⁶ I agree and would add that Justice Holmes does this expressly, representing himself as the self-as-author. The quotation offers an example of the second form that *ethos* can take discursively.

Smith provides many examples of highlighting strategies, all of them assertions by the self-as-author in the text. Some are directly in the voice of the author: “[o]ur exhaustive research reveals,”²³⁷ “[t]his Court has searched through the Decennial Digest System and the various State Codes,”²³⁸ or “because this is a confusing area of the law, we go on to address the other rules.”²³⁹ Others are less directly in the voice of the author, but still authorial assertions, even if the agency is more oblique: “[a] thorough review

231. *Id.* at 155.

232. *Id.* at 151.

233. *Id.*

234. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

235. *Id.* (Holmes, J., dissenting).

236. SMITH, *supra* note 8, at 152.

237. *Id.* at 157.

238. *Id.* at 161.

239. *Id.* at 163.

of the record reveals,”²⁴⁰ or “[t]his complex issue requires precise analysis.”²⁴¹ No matter. All are ways of the author addressing the reader as an author, and all are intended to enhance the writer’s credibility.

Smith cautions that, although highlighting strategies “abound” in legal writing and can be “valuable” for building a lawyer’s written credibility, they can also be used inappropriately.²⁴² Thus, they should be used cautiously and, as mentioned earlier in this section, require skill. In discoursal terms, readers regard the voice of highlighting strategies as being more directly the voice of the author, and so believe that they are experiencing more closely the character of that author.²⁴³ Of course, that voice is still a representation, the self-as-author, although perhaps for a variety of reasons one that can be made either well or poorly.

3. Ethos and Good Writing

One other aspect of a lawyer’s written *ethos* deserves mention: the quality of the writing itself. In discussing the final three subtraits of “intelligence,” Smith describes the credible writer as “articulate,” “eloquent,” and “detail-oriented.”²⁴⁴ The strategies here are all textual—proper grammar, correct punctuation, a clear style, an eloquent style, a professional-looking product, etc.²⁴⁵ That is, they are all discourse conventions related to the text as text, and thus are part of the discoursal self. This is worth mentioning because writing well is a common strategy for gaining credibility. And legal writing teachers almost universally tell their students that a well-written brief will impress the judges. However, writing well is seldom explicitly described as a component of *ethos* and the discoursal self, although of course it is.

CONCLUSION

If Aristotle and others are correct that character is persuasion, then modern readers encounter that character discoursally, through the words of the text. In that encounter, they experience not only the meanings of those words and the arguments that those

240. *Id.* at 156.

241. *Id.* at 165.

242. *Id.* at 153.

243. *See supra* pt. IV(B)(2) (at the beginning of the subsection).

244. SMITH, *supra* note 8, at 182–87.

245. *Id.*

words embody. They also encounter the self of the writer that lies within the words, experienced as a constructed character or persona. And that persona—that discursal self—establishes an *ethos*, a key element of the modern writer’s persuasiveness. A discursal *ethos* seems to be more the *ethos* of our time, of our moment in history.

All of the textual characteristics of a piece of writing—its choice of discourse conventions; its way of employing them (or resisting them); its way of mustering arguments and evidence; its references to external authority; its style, tone, and voice; even its attention to grammar, punctuation, and appearance—all contribute to the writer’s self and accompanying *ethos*. The *ethos* established by a piece of writing, in a sense, is the sum total of the textual parts. For legal writers, who write in the complex discourse of the law, the sum total of those parts can be difficult to master at first. Legal discourse is highly-conventionalized, and there is much to learn.²⁴⁶ But after a few years’ experience, most legal writers have managed to master the conventions reasonably well and are able to write like a lawyer. In the process, they have also managed to sound like a lawyer. That is, they have learned to construct a lawyerly *ethos*.

That lawyerly *ethos* may only be passable, however. This is because, in adapting to the highly-conventionalized nature of legal prose, even accomplished legal writers may strike the reader as having a flat sameness to their *ethos*. They sound like lawyers (especially to non-legal readers). But a discerning legal reader—a judge, for example—may be less moved by the character that lies within the words.²⁴⁷ One set of arguments may be better than another, but both sets of arguments may be delivered by the textual equivalent of characters in indistinguishable grey flannel suits. Much written legal persuasion, and the self it embodies, sounds the same.

This does not have to be the case, however. If the *ethos* of a piece of prose emerges from the characteristics of the writing, then high-quality legal writing can construct a self and an *ethos* that stand out. Joseph Williams hinted at this in the inaugural volume

246. See, e.g., Rideout, *supra* note 153, at 109–13.

247. Except in the negative sense, that a judge would disfavor a brief written by a practitioner whose words did not project lawyerly competence.

of this Journal.²⁴⁸ There, Williams was writing about law students and their struggle to master the conventions of legal prose, their effort to mature as a legal writer. He described those writers who are not yet fully aware of the tacit conventions of a discourse as “pre-socialized” writers.²⁴⁹ This group would include novice writers in law school, who make mistakes that would seem inexcusable unless we realize that they are outsiders to the conventions of the law and its discourse.²⁵⁰ And as long as they remain outsiders, they lack the self and *ethos* of a legal writer.²⁵¹ Once they begin to master those tacit conventions, Williams calls them “socialized” writers.²⁵² Things have changed. They are now able to write like lawyers—and sound like lawyers.²⁵³ They can establish a legal *ethos*. Most practicing lawyers probably fit into this category.

But Williams also wrote about a third level of legal writing, what he called “post-socialized” writers.²⁵⁴ These writers have moved beyond mastery of the conventions and are able to write in a way that allows them to stand out. They are able to communicate in ways that evince their full mastery of the conventions.²⁵⁵ At times, they may even challenge the conventions, although still remaining sufficiently within those conventions to be credibly a member of the discourse community. That is, these writers are able to construct a legal *ethos* that attains a higher level of credibility and authoritativeness because it stands out from the grey flannel pack. Writing at this level requires skill and adeptness. Williams advises that such writing must rely on “language that is clear” and “language that is persuasive.”²⁵⁶ But he further advises that this language would “signal authority.”²⁵⁷ That is, it would be convincing and persuasive in part through its discoursal self, its *ethos*.

If Williams is correct, as I believe he is, then legal writers might take Walker Gibson’s advice literally: “We improve our *selves* by improving the words we write.”²⁵⁸ The improvement that Gibson

248. Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEGAL WRITING 1 (1991).

249. *Id.* at 24.

250. *Id.* at 24–25.

251. *See id.*

252. *Id.* at 25.

253. *See id.*

254. *Id.* at 27–30.

255. *See id.* at 29–30.

256. *Id.* at 29.

257. *Id.*

258. GIBSON, *supra* note 3, at 110.

describes here is not moral, but textual. But in that advice, for the modern legal writer, lies the way to an even more effective and persuasive *ethos*. We can do so because that *ethos* is discorsal.