ETHOS AT THE INTERSECTION: CLASSICAL INSIGHTS FOR CONTEMPORARY APPLICATION

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"[W]e seem able to approach ethos *only within a set of paradoxes and . . . contradictions."*[1]

Much has been written about ethos, or character, in rhetoric. Ethos as one of the artistic proofs is an important consideration for persuasion and therefore important for evaluating and crafting persuasive legal texts. By comparing and synthesizing classical and contemporary notions of ethos, this Article will craft a framework, or template, for examining ethos-based rhetorical strategies employed in persuasive documents. It will do so by first examining the classical rhetorical views of ethos from Isocrates, Aristotle, and Cicero. It will then compare and contrast classical views with those of contemporary scholars to situate ethotic appeal in written communication.

Two questions will guide the effort to locate ethotic appeal in persuasive texts. The first is a longstanding debate about whether a speaker or writer must possess ethos or good character, or whether ethotic appeal might be based upon an appearance of ethos. The second, related question is another debatable concept within considerations of ethos—that of its dwelling. Does ethos dwell in the speaker/writer? In the speech/text? Or in the exchange that takes place between speaker/writer and the audience? A careful consideration of classical and contemporary notions of ethos reveals that it dwells in all of these places. Thus, armed with an array of possible dwellings for ethotic appeal, and after considering modern conceptions of audience for written communication, this Article will engage in a practical application: using a framework that emerges from the consideration of these questions to examine ethos-based rhetorical strategies in a legal text.

"Ethos . . . shifts and changes over time, across texts, and around competing spaces."[2]

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[1] ETHOS: NEW ESSAYS IN RHETORICAL AND CRITICAL THEORY xxvi (James S. Baumlin & Tita French Baumlin eds., 1994).

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[2] Nedra Reynolds, Ethos *as Location: New Sites for Understanding Discursive Authority*, 11 RHETORIC REV. 325, 326 (1993).

INTRODUCTION

Classical rhetoricians such as Isocrates, Aristotle, and Cicero addressed the notion of ethos in persuasion.[3] Their focus was on ethotic appeal in spoken communication.[4] Modern rhetorical theories often turn the lens to written communication.[5] The focus of this Article is to use the advice of classical and contemporary scholars of ethos to craft a template for examining ethotic appeal in a legal text. That will (eventually) be this Article's goal as it considers ethotic appeal in Chief Justice Roberts's dissent from the denial of certiorari in *Pennsylvania v. Dunlap*.[6]

Such an endeavor raises two initial, intertwined questions about the advice from the classics—ones that have also been examined by modern scholars. First, is ethos something that is possessed by the speaker/writer, or is it something that the speaker/writer merely projects? This Article will address the possession/appearance debate first, but it will not resolve it, as this question is likely compounded by the second question: Where does ethos dwell? Maddeningly, or perhaps wisely,[7] this Article will also address but not resolve this question, as to resolve either question prioritizes one theory at the expense of others, potentially depriving scholars of potential dwellings for ethos and potential considerations for ethotic appeal. Thus, this Article will address both questions, attempting not to resolve them definitively, but to explore the theory underlying posited answers, which will then be used to craft a framework, or template, for examining ethotic appeal in a text.

In Part I, this Article will examine the question of ethotic possession or appearance, considering classical and contemporary positions.[8] Then, in Part II, this Article will consider the question of where ethos dwells.[9] This question will also be examined from classical and contemporary positions, with speaker/writer, speech/text, and the exchange between speaker/writer and audience as potential ethotic dwellings.[10] Turning the attention to an application of persuasive ethotic appeal in written communication, Part III will address modern

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[3] *See infra* Parts I, II.

[4] *See infra* Part I.

[5] *See generally* James S. Baumlin & Craig A. Meyer, *Positioning Ethos in/for the Twenty-First Century: An Introduction to* Histories of Ethos, 7, 78 Human. 1 (2018).

[6] *See* Pennsylvania v. Dunlap, 555 U.S. 964, 964–67 (2008) (Roberts, C.J., dissenting).

[7] I am not the first to choose an approach that refuses to prioritize one theory or conclusion over another. *See, e.g.*, Andrea A. Lunsford & Lisa S. Ede, *Classical Rhetoric, Modern Rhetoric, and Contemporary Discourse Studies*, 1 Written Comm. 78, 79 (1984) [hereinafter Lunsford & Ede, *Classical Rhetoric*]. The authors acknowledge, "[v]aluable time and scholarly energies are often wasted as champions of different methodologies within a single discipline try to convince one another that theirs is the only acceptable approach." *Id.*

[8] *See infra* Part I.

[9] *See infra* Part II.

[10] *See infra* Part II.

notions of audience.[11] Finally, in Part IV, this Article will present a novel template for evaluating ethos-based rhetorical strategies in the posited loci from Part II, and then use that template to evaluate ethotic appeal in a legal text.[12]

I.   Ethos in the Classical View: Possession or Appearance?

Isocrates, Aristotle, and Cicero each addressed the concept of ethos in persuasion.[13] Their viewpoints and corresponding advice differ, however, in whether a speaker must possess good character, or whether ethotic persuasion may rest on projecting an appearance of good character.[14] The question of possession or appearance, and the advice offered by classical rhetoricians on how to evince ethos, will provide the foundation for the subsequent consideration of where ethos dwells.[15] The theories underlying posited answers to these questions will undergird the suggested framework for examining a text for ethotic appeal.[16]

For Isocrates, ethos was the actual character of the rhetor, and ethotic appeal was therefore dependent on prior reputation.[17] Thus, in Isocrates's view, ethos was possessed. Aristotle's position was that ethos existed in the speaking event, and was therefore projected during the event rather than dependent on some prior notion of the speaker.[18] For Aristotle, the appearance of ethos in the speaking event was a mark of persuasion.[19] Finally, for Cicero, while his advice on ethos would suggest a view akin to that of Aristotle, the Roman notion of character as an inherent and immutable characteristic suggests that, for Cicero, ethos was both possession and appearance.[20] In this Part, this Article examines the advice of the classic rhetoricians for evincing ethos so as to further our understanding of this artistic proof of persuasion.

A.   *Isocrates: Possession*

Isocrates was one of the Ten Attic Orators, whose status in Athenian culture was well recognized.[21] In Isocrates's view, possession of ethos was essential to persuasion.[22] In fact, according to Isocrates, it was a man's prior reputa-

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[11] *See infra* Part III.

[12] *See infra* Part IV.

[13] *See infra* Sections I.A–C, II.A.1, II.B.1, II.C.1.

[14] *See infra* Part I.

[15] *See infra* Part II.

[16] *See generally infra* Section III.B and accompanying notes.

[17] *See infra* Section I.A and accompanying notes.

[18] *See infra* Section I.B.

[19] *See infra* Section I.B.

[20] *See infra* Section I.C and accompanying notes.

[21] *Attic Orators*, Oxford Dictionary of the Classical World (John Roberts ed., 2007); *see also* George Kennedy, The Art of Persuasion in Greece 125 (1963).

[22] Isocrates advises:

tion that established his ethos.[23] Isocrates distinguished the persuasive appeal of words spoken by an "honorable" man, one "of good repute," from the inferior speech of "men who live under a cloud."[24] And, in Isocrates's view, possession of ethos—being an honorable man rather than merely projecting the appearance of honor—was essential for ethotic appeal.

Isocrates emphasized that "the argument which is made by a man's life is of more weight than that which is furnished by words[.]"[25] He stressed that:

> [P]robabilities and proofs and all forms of persuasion support only the points in a case to which they are severally applied, whereas an honorable reputation not only lends greater persuasiveness to the words of the man who possesses it, but adds greater lustre to his deeds, and is, therefore, more zealously to be sought after by men of intelligence than anything else in the world.[26]

Isocrates also situated character in the man, developed prior to the speech.[27] Ethos was therefore necessarily prediscursive.[28] "[F]or 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."[29]

Grounding his theory of ethos as possession as opposed to appearance was consistent with Isocrates's disdain for the Sophists, a group of traveling teachers whose work received both positive and negative reactions.[30] While Isocra-

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> [T]he man who wishes to persuade people will not be negligent as to the matter of character; no, on the contrary, he will apply himself above all to establish a most honorable name among his fellow-citizens; for who does not know that words carry greater conviction when spoken by men of good repute than when spoken by men who live under a cloud . . . .

ISOCRATES, ANTIDOSIS § 15, 278, *reprinted in* PERSEUS DIGITAL LIBRARY (George Nolin ed., 1980), http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0144%3Aspeech%3D15%3Asection%3D278 [https://perma.cc/5A9Z-9SM2] (last visited Mar. 5, 2020).

[23] *See id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at § 15, 280, http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0144%3Aspeech%3D15%3Asection%3D280 [https://perma.cc/3XHJ-QZK7] (last visited Mar. 5, 2020).

[27] *See* William Benoit, *Isocrates and Aristotle on Rhetoric*, 20 RHETORIC SOC. Q. 251, 257 (1990) (emphasizing how Isocrates "juxtaposes the 'argument which is made by a man's life' with 'that which is furnished by words' ").

[28] Modern scholars have referred to this prior reputation ethos as "prediscursive ethos[,]" or that which precedes discourse. *See, e.g.*, Ruth Amossy, Ethos *at the Crossroads of Disciplines: Rhetoric, Pragmatics, Sociology*, 22 POETICS TODAY 1, 7 (2001) (explaining "prediscursive ethos").

[29] J. Christopher Rideout, Ethos*, Character, and Discoursal Self in Persuasive Legal Writing*, 21 J. LEGAL WRITING INST. 19, 29 (2016) [hereinafter Rideout, *Discoursal Self*].

[30] *Sophists*, THE OXFORD COMPANION TO CLASSICAL CIVILIZATION 669, 673 (Simon Hornblower et al. eds., 2d ed. 2014). The text explains that positive views of the Sophists can be demonstrated by their successful careers and "considerable demand for their services, especially in providing rhetorical training for aspiring politicians." *Id.* In contrast, conservatives viewed the Sophists "as subversive of morality and tradition, in view both of their natural-

tes did study under the Sophist Gorgias,[31] he was critical of the manipulative tactics of the Sophists,[32] believing that his approach to rhetoric was more a program of character development and an endeavor of political discourse.[33] It is therefore consistent with Isocrates's disdain for the artifice of the Sophists that he would insist on ethos in the actual character of the speaker, rather than in the speaker's ability to merely present himself as a man of good repute.[34]

B. *Aristotle: Appearance*

While Aristotle was also critical of the Sophists,[35] in *The Rhetoric* he moved away from the possession view of Isocrates and toward a view of ethos that allows for the projection of good character. As one scholar observes:

> If Isocratean tradition asserts the speaker's need *to be* good, Aristotelian tradition asserts the sufficiency of *seeming* good. For the former, discourse becomes

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istic outlook on morality and religion, and of their teaching (especially to the young) of techniques of argument." *Id.* Isocrates himself contrasted his view of character with that held by the Sophists in the following passage:

> And yet those who desire to follow the true precepts of this discipline may, if they will, be helped more speedily towards honesty of character than towards facility in oratory. And let no one suppose that I claim that just living can be taught; for, in a word, I hold that there does not exist an art of the kind which can implant sobriety and justice in depraved natures. Nevertheless, I do think that the study of political discourse can help more than any other thing to stimulate and form such qualities of character.

Isocrates, Against the Sophists § 13, 21, *reprinted in* Perseus Digital Library (George Nolin ed., 1980), http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A 1999.01.0144%3Aspeech%3D13%3Asection%3D21 [https://perma.cc/GYF2-F3LQ] (last visited Mar. 5, 2020).

[31] Rideout, *Discoursal Self*, *supra* note 29, at 27 (noting that "Isocrates lived from 436 to 338 B.C., which allowed him to study under the great Sophist Gorgias.").

[32] *Id.* (explaining that in Isocrates's speech, *Against the Sophists*, Isocrates "attack[ed] the pretensions of the Sophists . . . .").

[33] *Id.* (referring to Isocrates's view of his own system as one of the development of "civic knowledge and the art of political discourse, as a way of improving the welfare of the Greek state.").

[34] *Id.* at 27–28. Rideout explains Isocrates's disregard for the character of the Sophists, noting that

> 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 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.

Id. This then led to Isocrates's own straightforward view of ethos: "[F]or Isocrates, good character was an uncomplicated matter of possession—the good orator and writer quite simply possessed good character." *Id.* at 30.

[35] *See, e.g.*, Martin D. Carcieri, *A Progressive Reply to the ACLU on Proposition 209*, 39 Santa Clara L. Rev. 141, 161 n.79 (1998) (noting that "much of Plato and Aristotle's intellectual project was to expose the flaws in the work of the Sophists, those colorful itinerant teachers of manners and oratory whose educational revolution both advanced and undermined classical Athenian democracy" and that "Aristotle's basic response to the Sophists was that they abused logic by failing to make appropriate distinctions of kind and degree with respect to the subject matter under discussion.").

a revelation of character; for the latter, discourse becomes an active construction of character—or, rather, of an image, a representation of character—and Aristotelian theory seeks to outline the means whereby such image-making is achieved.[36]

In Aristotle's view, ethos was discursive.[37] He stressed that:

> The character [*ethos*] of the speaker is a cause of persuasion when the speech is so uttered as to make him worthy of belief; for as a rule we trust men of probity more, and more quickly, about things in general, while on points outside the realm of exact knowledge, where opinion is divided, we trust them absolutely.[38]

Because Aristotle did not insist on the possession of good character, but emphasized how to project good character, it was essential that ethos be situated in the speech, rather than in some prior reputation of the speaker. Aristotle advised:

> This trust, however, should be created by the speech itself, and not left to depend upon an antecedent impression that the speaker is this or that kind of man. It is not true, as some writers on the art maintain, that the probity of the speaker contributes nothing to his persuasiveness; on the contrary, we might almost affirm that his character [*ethos*] is the most potent of all the means to persuasion.[39]

Aristotle's position thereby rejects the notion of Isocrates, that ethos is a pre-existing character or reputation, and rather situates the character of the speaker in the speech itself, as an element of the discourse.[40] To the extent that *The Rhetoric* was an attempt to systematize persuasion, ethos had to be addressed as something the speaker constructs in the speech, rather than some prior reputation:[41]

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[36] ETHOS: NEW ESSAYS IN RHETORICAL AND CRITICAL THEORY, *supra* note 1, at xv.

[37] *See* Amossy, *supra* note 28, at 2 n.3 (emphasizing Aristotle's discursive ethos).

[38] ARISTOTLE, RHETORIC (1356a), *in* THE RHETORIC OF ARISTOTLE: AN EXPANDED TRANSLATION WITH SUPPLEMENTARY EXAMPLES FOR STUDENTS OF COMPOSITION AND PUBLIC SPEAKING 8 (Lane Cooper trans., 1960) [hereinafter THE RHETORIC OF ARISTOTLE] (alteration in original).

[39] *Id.* at 8–9.

[40] *See* Perry S. Bechky, *Lemkin's Situation: Toward a Rhetorical Understanding of* Genocide, 77 BROOK. L. REV. 551, 600 n.283 (2012) ("Kennedy explains: Aristotle thus does not include in rhetorical *ethos* the authority that a speaker may possess due to his position in government or society, previous actions, reputation for wisdom, or anything except what is actually contained in the speech and the character it reveals. Presumably, he would regard all other factors, sometimes highly important in the success of rhetoric, as inartistic; but he never says so."); Rideout, *Discoursal Self*, *supra* note 29, at 30 (explaining that 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.' In doing so, he points the way to a more modern view of *ethos*.").

[41] Rideout explains that Aristotle

> [D]oes 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. Also, if Greek litigants represented themselves, they would often lack external authority; hence the importance of establishing character in the speech itself.

Rideout, *Discoursal Self*, *supra* note 29, at 32; *see also* Craig R. Smith, Ethos *Dwells Pervasively: A Hermeneutic Reading of Aristotle on Credibility*, *in* THE *ETHOS* OF RHETORIC 1, 5

> [T]he speaker must not merely see to it that his speech [as an argument] shall be convincing and persuasive, but he must [in and by the speech] give the right impression of himself, and get his judge [audience] into the right state of mind. . . . [F]or in conducing to persuasion it is highly important that the speaker should evince a certain character, and that the judges should conceive him to be disposed towards them in a certain way, and further, if possible, that the judges themselves should have a certain attitude towards him.[42]

When addressing the qualities that instill ethos, Aristotle couched advice in terms of appearance,[43] recommending that the orator evince "intelligence, character, and goodwill"[44] and emphasizing that "[t]hat is a complete list of the possibilities. It necessarily follows that the speaker who is thought to have all these qualities [intelligence, character, and good will] has the confidence of his hearers."[45]

Because, in Aristotle's view, ethos is situated in the speech, his advice on style emphasizes ethotic appeal.[46] In addressing lexis, or style, Aristotle "affirms character as a rhetorical construct."[47] He emphasizes that, with regard to propriety, "[y]our language will be appropriate, if it expresses (1) emotion and (2) character, and if it is (3) in proportion with the subject."[48] With regard to the presentation of character through emotion and fact, he advises, "this display of the facts through these external signs will make your style appropriate to character [to the persons of your story], since each class of men, each type of disposition, has a language suited to it."[49]

With regard to style, Aristotle counseled:

> There is an opportune use, and an inopportune, for all these rules of style. A corrective for every excess is the time-worn trick of self-criticism while you are speaking; the audience thinks that the style is right since the speaker evidently knows what he is doing. Further, it is best not to keep all the proportions going at once, or the hearer will not be deceived. [—He will see your artfulness, and be on his guard.][50]

Aristotle's rejection of the artifice of the Sophists is reflected in his advice on presentation, noting that a speaker should "[p]resent yourself from the outset

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(Michael J. Hyde ed., 2004) [hereinafter Smith, Ethos *Dwells Pervasively*] ("[*E*]*thos* was about building the credibility of a speaker before an audience, not about the speaker's inherent worth.").

[42] THE RHETORIC OF ARISTOTLE, *supra* note 38, at 91 (1378a).

[43] *See* Rideout, *Discoursal Self*, *supra* note 29, at 32 ("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.' ").

[44] THE RHETORIC OF ARISTOTLE, *supra* note 38, at 92 (1378a).

[45] *Id.*

[46] *See* Rideout, *Discoursal Self*, *supra* note 29, at 33.

[47] *Id.*

[48] THE RHETORIC OF ARISTOTLE, *supra* note 38, at 197 (1408a1).

[49] *Id.* at 198 (1408a3).

[50] *Id.* at 198 (1408b).

in a distinctive light, so that the audience may regard you as a person of this sort, your opponent as of that; only do not betray your design. It is easy to give the right impression."[51] So, ethos, in Aristotle's rendering in *The Rhetoric*, is appearance, situated in the speech, rather than possession.[52]

C. *Cicero: Appearance and Possession*

Cicero expounded on the work of Aristotle, emphasizing the importance of projecting ethos. He advised that advocates should adopt "a mild tone, a countenance expressive of modesty, [and] gentle language . . . ."[53] Like Aristotle, Cicero warned advocates against revealing their artifice, cautioning them against disclosing their true motives and advising them to project an image of "seeming to be dealing reluctantly and under compulsion with something you are really anxious to prove."[54] He provided advice on evincing ethos in speech, noting that:

> [M]uch is done by good taste and style in speaking, [so] that the speech *seems to depict* the speaker's character. For by means of particular types of thought and diction, and the employment besides of a delivery that is unruffled and eloquent of good-nature, the *speakers are made to appear* upright, well-bred and virtuous men.[55]

Notwithstanding this advice, which suggests ethos as appearance rather than possession, the Roman view of character presentation also had an element of possession for rhetorical ethos.[56] As James May explains, Cicero's view of

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[51] *Id.* at 231 (1417b); *see also* Michael H. Frost, *With* Amici *Like These: Cicero, Quintilian and the Importance of Stylistic Demeanor*, 3 J. Ass'n Legal Writing Directors 5, 13 (2006) (emphasizing, with respect to the quoted passage, "at the risk of appearing to encourage duplicity and trickery, Aristotle warned advocates against inadvertently betraying their manipulative intentions . . . .").

[52] Rideout, *Discoursal Self*, *supra* note 29, at 34 ("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."); *see also* Janja Žmavc, *The* Ethos *of Classical Rhetoric: From* Epieikeia *to* Auctoritas, *in* Topical Themes in Argumentation Theory: Twenty Exploratory Studies 181, 184 (Frans. H. van Eemeren & Bart Garssen eds., 2012) ("What is significant in Aristotle's conceptualization of *phronesis*, *arête* and *eunoia* as a part of *rhetorical ethos* is the function that he assigns to this persuasion strategy—when the speech is *spoken* in such way, a speaker *becomes* trustworthy.").

[53] 2 Cicero, De Oratore 182–83, *in* Cicero De Oratore 327, 329 (E.W. Sutton trans., 1959).

[54] *Id.* at 329 (182).

[55] *Id.* at 329 (184) (emphasis added).

[56] Žmavc, *supra* note 52, at 186. Žmavc emphasizes the difference between Greek and Roman orators. The author notes that "[t]he goal of a Greek speaker was more or less to construct a credible self image within the speech and/or at the same time gain the goodwill of the audience. However, his preexisting image generally did not interfere with argumentation . . . ." *Id.* In contrast,

ethos was necessarily and "radically influenced and conditioned by the idio-syncrasies of the sociopolitical environment of Republican Rome as well as by the demands of the Roman judicial system."[57] In Rome, character was an important and essential element of the social and political structure and was an inherent characteristic.[58] Therefore, notwithstanding Cicero's advice on evincing ethos, in the Roman view ethos was, in part, an immutable characteristic of a person.[59] As a result, "[a]long with the adopted Greek ethotic elements, a character presentation of a Roman speaker is always a preexisting social category that consists of entirely Roman elements as well."[60]

May addresses the specific way in which Cicero diverges from Aristotle vis-à-vis ethos:

> The ethos defined by Aristotle as an entechnic source of proof demands explication only within the context of the speech; it is neither the speaker's authority nor his previous reputation, but the impression he makes during his speech, that inspires trust in his listeners. Such restrictions upon ethos would have been incomprehensible to a Roman steeped in the tradition of the *mos maiorum*, surrounded by a nobility of rank, and influenced by the culture's general assumptions concerning human nature and character. The Roman view is succinctly, if somewhat obliquely expressed by Cicero in *De Oratore*: "Feelings are won over by a man's dignity (*dignitas*), achievements (*res gestae*), and reputation (*existimatio*)" (2.182). Aristotle's conception of an ethos portrayed only through the medium of a speech was, for the Roman orator, neither acceptable nor adequate.[61]

In addition to the impact of Roman social and political construct on the ethos of Cicero, differences in the Roman and Greek advocacy practices also impacted the Ciceronian view of ethos. In Greece, litigants often represented themselves, occasionally hiring a logographer or speechwriter to prepare the

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[s]omething completely different is true for the so called Roman *rhetorical ethos*: as a rhetorical strategy it almost entirely consists of the speaker's preexisting reputation and the authority that comes from it. In Roman judicial oratory this kind of *rhetorical ethos* was not only a part of argumentation, but often presented its main feature; in funeral oratory *ethos* presented the central and crucial element that substantiated the purpose of a funeral speech . . . .

Id.

[57] JAMES M. MAY, TRIALS OF CHARACTER: THE ELOQUENCE OF CICERONIAN ETHOS 6 (1988).

[58] *Id.* (emphasizing that "[c]haracter was an extraordinarily important element in the social and political milieu of Republican Rome" and that "[t]he Romans believed that character remains essentially constant in man and therefore demands or determines his actions.").

[59] *Id.* (stressing that "[s]ince character does not evolve or develop, but rather is bestowed or inherited by nature, an individual cannot suddenly, or at will, change or disguise for any lengthy period his ethos or his way of life; nor is it wise to attempt such alteration.").

[60] Žmavc, *supra* note 52, at 187.

[61] MAY, *supra* note 57, at 9.

speech.[62] In contrast, in Rome, litigants were more likely to be represented by an advocate.[63]

As a result of this aspect of Greek advocacy practice, it is not surprising that Aristotle does not distinguish between speaker and client when addressing ethotic appeal.[64] Cicero on the other hand does address such a distinction in the following passage, which is important in the consideration of ethos as either possessed or projected:

> A potent factor in success, then, is for the characters, principles, conduct and course of life, both of those who are to plead cases and of their clients, to be approved, and conversely those of their opponents condemned; and for the feelings of the tribunal to be won over, as far as possible, to goodwill towards the advocate and the advocate's client as well.[65]

Cicero goes on in this passage to instruct the advocate in crafting the ethos of client, advocate, and opponent, emphasizing an intersection of ethotic possession and appearance: "Now feelings are won over by a man's merit, achievements or reputable life, qualifications easier to embellish, if only they are real, than to fabricate where nonexistent."[66] Notwithstanding this emphasis on possession, he provides instruction on the presentation of ethotic appeal:

> But attributes useful in an advocate are a mild tone, a countenance expressive of modesty, gentle language, and the faculty of seeming to be dealing reluctantly and under compulsion with something you are really anxious to prove. It is very helpful to display the tokens of good-nature, kindness, calmness, loyalty and a disposition that is pleasing and not grasping or covetous, and all the qualities belonging to men who are upright, unassuming and not given to haste, stubbornness, strife or harshness, are powerful in winning goodwill, while the want of them estranges it from such as do not possess them; accordingly the very opposites of these qualities must be ascribed to our opponents.[67]

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[62] *Id.* at 9–10 (noting that such a practice posed challenges including that of "composing a speech that would prove not only persuasive in its argument but also appropriate and consistent with the litigant's character.").

[63] *Id.* at 10 (explaining that, in Rome, "a more common practice was to enlist one or several *patroni* to plead the case.").

[64] *See* Jakob Wisse, Ethos and Pathos: From Aristotle to Cicero 32 (1989). Wisse asserts that "Aristotle supposes the speaker to be the litigant himself, and never mentions (ethos of) clients. This reflects the basic situation in Athenian court practice, where one was supposed to speak for oneself, even if there were many situations in which the use of an advocate was permitted." *Id.*

[65] 2 Cicero, *supra* note 53, at 327 (182); *see also* Wisse, *supra* note 64, at 229. Wisse translates the same passage as follows:

> Well then, it is a very important contribution to winning a case that approval should be given to the character, the habits, the deeds and the life, both of those who plead the case and of those on whose behalf they plead, and that these characteristics of the opponents are likewise disapproved of; and that the minds of the audience are, as much as possible, won over to feel sympathy towards the orator as well as towards the person the orator is speaking for.

[66] 2 Cicero, *supra* note 53, at 327 (182).

[67] *Id.* at 327, 329 (182–83). Wisse offers a similar translation:

May explains how such Roman oratory customs, coupled with the Roman emphasis on both appearance and possession of ethos, resulted in a dizzying array of points for ethotic emphasis.[68] Noting that, within this passage, "the extension of the sphere of ethos is . . . striking," May explains how the "realm of ethos" extends to "the characters of the *patronus*, the client, the adversary, his *patronus*, and the judges as well."[69] By way of this extension, "[a]ctors and opportunities for artistic variation have multiplied."[70]

Cicero thus "present[s] *rhetorical ethos* as a 'confluence of notions of a speaker's social role' and as a 'synthesis of' several Greek and traditional Roman 'concepts that interact in different ways.'"[71] This observation, that rhetorical ethos can be viewed from the perspective of a variety of personas and from the interaction between those personas, leads to our next inquiry which is, where does ethos dwell?

II. ETHOS IN THE CLASSICAL VIEW: DWELLING PLACE?

An examination of the location of ethos, or the inquiry into where ethos lives or dwells, seems reasonable, as German philosopher Martin Heidegger asserted that the Aristotelian notion of ethos as character had a more primal ancestry in ethos as haunt, or dwelling place.[72] While a philosophical considera-

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[T]he effect of these things is enhanced by a mild tone of voice on the part of the orator, the intimation of restraint by the expression on his face, and kindliness in the use of his words: and, if you press some point somewhat vigorously, by seeming to act against your inclination, because you are forced to do so. It is very useful that signs should be given of flexibility, magnanimity, mildness, respectfulness, gratefulness, of not being desirous or greedy; and all these things typical of people decent and unassuming, not severe, not obstinate, not litigious, not harsh, really win sympathy, and alienate the audience from such as do not possess them. And these same considerations must likewise be employed to ascribe the opposite qualities to the opponents.

WISSE, *supra* note 64, at 229–30. Wisse acknowledges but disputes competing interpretations. *Id.* at 232 (describing one approach as "implausible from the start."); *see also* MAY, *supra* note 57, at 10. May's interpretation of this passage includes the following advice:

A potent factor in success, then, is for the characters, principles, deeds and course of life, both of those who are to plead cases and of their clients, to be approved, and conversely those of their opponents condemned; and for the feelings of the judges to be won over, as far as possible, to goodwill towards the advocate and the advocate's client as well.

[68] *See* MAY, *supra* note 57, at 10.

[69] *Id.*

[70] *Id.*

[71] Žmavc, *supra* note 52, at 189 (citation omitted) (asserting further that "such an interaction of concepts, which extends from different social roles to diverse discursive practices and theoretical models of ancient rhetoricians and philosophers, is perhaps the best way to understand *rhetorical ethos*.").

[72] Baumlin & Meyer, *supra* note 5, at 12. The authors explain, "From the Homeric 'habitats of horses,' Heidegger carries ethos into the 'abodes of men,' where Being is revealed, known, cared for, and preserved." *See* Smith, Ethos *Dwells Pervasively*, *supra* note 41, at 2. Smith asserts that:

For Aristotle, it is a given: everyone has *ethos* whether it be noble or ignoble. Before one even speaks, that *ethos* has an ontological dimension because it emerges from the way one makes decisions, the way one lives on a day-to-day basis, the way one dwells. . . . Thus, Aristotle *assumes*

tion of ethos as being is beyond the scope of this Article, this Article's interest in developing ethos in written communication does warrant a consideration of the location or dwelling place of ethos. This raises the following questions: Does ethos reside in the speaker/writer? In the speech/text? Or in the exchange between speaker/writer and audience?

Similarly exploring these questions, in "Positioning Ethos in/for the Twenty-First Century: An Introduction to *Histories of* Ethos," James Baumlin and Craig Meyer raise the following inquiries:

> [C]ontemporary theory—as reflected in textual criticism, media and communication studies, gender studies, law, theology, anthropology, sociology, psychology, ethics, politics, economics, even ecology—continues the fight over meanings and applications. Is ethos a verbal behavior or the "dwelling place" that contains such behavior? Does it belong to the speaker or to the audience (or to both, or to neither)? Does it dwell in the space "between" rhetor and audience? Is it a directed, symbolic action or a dialogic transaction? Is it revealed or constructed by means of speech? (Does it pre-exist speech? Does it "exist" at all?)[73]

Baumlin and Meyer point to the troublesome issue of language and translation, noting that, as with many Greek terms, there is no definitive translation for ethos.[74] Consequent ambiguity has given rise to myriad interpretations, ranging from "rational ethos,"[75] "ethos of sympathy,"[76] "generative ethos,"[77]

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the knowledge of the Athenian fore-structure of *ethos* as a dwelling place and then reformulates the notion of dwelling place to present a rhetorical understanding of *ethos*.

[73] Baumlin & Meyer, *supra* note 5, at 4.

[74] *Id.* ("Like many terms from Greek philosophy (logos, *pistis*, *kairos*, to give a few) ethos remains untranslatable in any word-for-word correspondence.") (The authors note, "Numerous terms gesture in its direction, though no one word or phrase captures its nuances in English. Character, authority, charisma, credence, credibility, trust, trustworthiness, sincerity, 'good sense,' goodwill, expertise, reliability, authenticity, subjectivity, 'the subject,' self, selfhood, self-identity, image, reputation, cultural identity, habit, habitus, habituation, person, persona, impersonation, performance, self-fashioning, voice, personal style: these make for a sampling of stand-in terms."); *see also* WISSE, *supra* note 64, at 6. Wisse addressed possible connections between logos, ethos, and pathos, initially asserting that logos connects with the message, pathos connects with the effect of the message on the audience, and ethos connecting with the speaker. *Id.* Nonetheless, he found such lines difficult to maintain. Thus, reflecting on the proposed differentiations, Wisse then posed the following questions, which align well with those this Article considers:

> (i) Is ethos concerned with the character of the speaker only (whether he is speaking for himself or on behalf of someone else), or is it extended to cover the client's character also for cases where the speaker is an advocate?
> (ii) What qualities of the speaker (and client) fall under the scope of ethos?
> (iii) Is there any connection between ethos and pathos?
> (iv) Besides positive character-drawing regarding speaker (and client), does ethos comprise its negative counterpart regarding the opponent(s)?

Id. at 7.

[75] Baumlin & Meyer, *supra* note 5, at 4 (citing WISSE, *supra* note 64).

[76] *Id.* (citing WISSE, *supra* note 64).

[77] *Id.* (citing Jim W. Corder, *Varieties of Ethical Argument, With Some Account of the Significance of Ethos in the Teaching of Composition*, 6 FRESHMAN ENG. NEWS 1 (1978)).

"ethos of citizenship,"[78] "scientific ethos,"[79] "cyborg ethos,"[80] "narrative ethos,"[81] "intertextual ethos,"[82] "photographic ethos,"[83] "feminist ethos,"[84] "queer ethos,"[85] and "ethos of the subaltern."[86]

Notwithstanding this array of ethotic possibility, Baumlin and Meyer acknowledge that, in connection with the listed concepts above, there are "patterns" to these varied inquiries: "Some terms point to the existential components of ethos; some to its sociological/cultural expressions; some to its linguistic/discursive praxis."[87] The authors point out that:

> [A]ny adequate "map" or model of ethos will include *a version of self* and of its relation to culture and language. Equally important is the insight that each theory *orients itself from* (and, in so doing, privileges) one of three perspectives: that of self, or of culture, or of language.[88]

The range of these conceptualizations suggests that one cannot—and likely should not—situate ethos definitively.

This Article therefore will not ultimately land on a definitive "place" for ethos to dwell or to be situated, but, again, the inquiry is not for naught. Because, after all, "[t]he question to be answered is not 'how do we get beyond these theories to the truth they aspire to . . . ?' but 'what do the debates and theories themselves tell us about where we are placed in the history of culture and meaning-making?' "[89] With that flexibility (and freedom) in mind, this Article will consider what both classic and modern scholars have to say about the potential dwelling places of ethos, including the ethos in the speaker/writer, in the speech/document, and in the exchange between speaker/writer and the audience.

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[78] *Id.* (citing STEPHEN K. WHITE, THE ETHOS OF A LATE-MODERN CITIZEN (2009)).

[79] *Id.* (citing ROBERT K. MERTON, THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS (1973)).

[80] *Id.* (citing Michael W. DeLashmutt, *Posthumanism*, *in* ENCYCLOPEDIA OF RELIGION AND FILM 354–61 (2011)).

[81] *Id.* (citing LIESBETH KOTHALS ALTES, ETHOS AND NARRATIVE INTERPRETATION: THE NEGOTIATION OF VALUES IN FICTION (2014)).

[82] *Id.* (citing John Oddo, *The Chief Prosecutor and the Iraqi Regime: Intertextual Ethos and Transitive Chains of Authority*, *in* INTERTEXTUALITY AND THE 24-HOUR NEWS CYCLE: A DAY IN THE RHETORICAL LIFE OF COLIN POWELL'S U.N. ADDRESS 45–76 (2014)).

[83] *Id.* (citing Kristie S. Fleckenstein, *A Reformer Rides: Radical Photographic Ethos in Frances E. Willard's A Wheel within a Wheel*, *in* RETHINKING ETHOS: A FEMINIST ECOLOGICAL APPROACH TO RHETORIC 26–49 (Kathleen J. Ryan et al. eds., 2016)).

[84] *Id.* (citing Valerie Palmer-Mehta, *Andrea Dworkin's Radical Ethos*, *in* RETHINKING ETHOS: A FEMINIST ECOLOGICAL APPROACH TO RHETORIC 50–70 (Kathleen J. Ryan et al. eds., 2016)).

[85] *Id.* (citing STACEY WAITE, THE UNAVAILABLE MEANS OF PERSUASION: A QUEER ETHOS FOR FEMINIST WRITERS AND TEACHERS 71–88 (Kathleen J. Ryan et al. eds., 2016)).

[86] *Id.* (citing Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271–313 (Cary Nelson & Lawrence Grossberg eds., 1988)).

[87] *Id.*

[88] *Id.*

[89] *Id.* at 3.

A. *Ethos in the Speaker*

As noted in the initial inquiry, modern and classical rhetoricians considered ethos as either possessed within or projected by the speaker. Here, this Article will further explore classical and contemporary notions of ethos as an aspect of the speaker/writer, as an aspect of the speech/text, and as an aspect or product of the exchange between speaker/writer and audience. The reader will see, however, that clear demarcations between these posited loci are difficult to maintain.

1. *Classical Notions of Ethos in the Speaker*

To trace a component of ethos in the actual character of the speaker, this Article must return to Isocrates, for whom ethos was prediscursive and was a person's character, rather than something a person projected during the speech.[90] In Isocrates's view, "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."[91] And, while Cicero clearly allows for the appearance of ethos rather than possession, suggesting his target for the location of ethos would be more squarely in the speech, Roman culture and its emphasis on the credibility and immutability of reputation would suggest that ethos also dwells in the speaker.[92]

2. *Contemporary Notions of Ethos in the Speaker/Writer*

Modern commentators have also examined prediscursive ethos in the character of the speaker, or self, in the context of ethos.[93] These contemporary views, however, further cloud the distinction between speaker/writer and speech/text.

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[90] Michael J. Hyde, *Introduction* to THE *ETHOS* OF RHETORIC xv (Michael J. Hyde ed., 2004). Hyde explains, "For Isocrates, rhetorical *paideia*, education and socialization, serves the process of character development, but it is *a person's character itself*, his stellar reputation, that anchors the persuasive capacity of rhetoric." *Id.* (emphasis added).

[91] ETHOS: NEW ESSAYS IN RHETORICAL AND CRITICAL THEORY, *supra* note 1, at xv.

[92] *See* WISSE, *supra* note 64, at 245 ("[E]specially for a Roman, authority is part of most of the attributes enumerated in the [*De Oratore*]: 'character, habits, deeds and life,' [and] 'a man's worth, the things he has done, and an evaluation of his life.' "); *supra* Section I.C. Wisse explains, "Of course, social authority played a much more important part in Roman culture and society, where personal relations were often decisive factors in the course of events, than in the democratic state of Athens, where such relations, if too openly used, were often regarded with suspicion." WISSE, *supra* note 64, at 245. Nonetheless, "[s]ince rhetorical theory, however, is in principle meant for all kinds of speakers, it is natural that the stress should lie upon the means to apply ethos that are afforded by the speech itself, as, indeed, it does in the last part of Cicero's treatment . . . ." *Id.* Wisse therefore concludes that "[a]uthority that is already present should therefore be regarded as a part of Cicero's concept of ethos." *Id.* at 245–46.

[93] *See* Baumlin & Meyer, *supra* note 5, at 3–7, 10–12, 22.

a. Institutional Authority

Scholars have situated prediscursive ethos in the institutional authority of the speaker/writer.[94] In other words, in the character of the writer as derived from the writer's institutional position and the stereotype the audience associates with that authority.[95]

Ruth Amossy considers ethos through the lens of "rhetoric, pragmatics, and sociology."[96] Drawing on notions of stereotype,[97] Amossy argues that the ethotic appeal of the speaker is constructed by the speaker who evinces an authoritative self and who also adapts her persona to the values and expectations of the audience.[98] In this way, Amossy does not limit ethos to the projected authority of the speaker—for our purposes, she does not limit ethotic appeal only to the speaker. Rather, she finds ethotic appeal in the "crossroads," both in the authority constructed by the speaker and in the active processing of information by the audience, which uses stereotype to call upon the ethos that exists within those stereotypes.[99] This results in what Amossy refers to as both discursive authority and prediscursive institutional ethos.[100]

The institutional ethos derives from the institutional position of the speaker and the authority associated with that position—in her view, the person author-

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[94] *See, e.g.*, Amossy, *supra* note 28, at 9 (emphasizing that "[i]t is thus important to see how the prior ethos, and the discursive ethos that integrates and reworks it, are related to the authority derived from an exterior institutional status.").

[95] *Id.* at 7–9.

[96] *Id.* at 2 ("[T]he theory linking the efficacy of speech to the authority and credibility of the orator traverses disciplines: it is to be found at the crossroads of rhetoric, pragmatics, and sociology.").

[97] *See id.* at 7 ("Stereotyp[e] consists of perceiving and understanding the real through a preexistent cultural representation, a fixed collective schema.").

[98] *Id.* at 8. Amossy explains, "the construction of the image of self which confers on the discourse a considerable part of its authority [is based on] [t]he orator adapt[ing] his or her self-presentation to collective schemas which he or she believes are ratified and valued by the target public." *Id.*

[99] *Id.* at 4–7 (explaining that "the institutional position of the orator and the degree of authority which this confers upon him contribute to the eliciting of a prior ethos. This prior ethos, as part of the audience's encyclopedic knowledge, is mobilized by the oral or written speech in a specific situation of utterance."). *Id.* at 19. Amossy's model of ethos in the crossroads thus synthesizes pragmatic and sociological theories of ethos:

> Within this framework, a rhetorical analysis that examines the ethos as a discursive, interactional construction hinges on both pragmatics and sociology. Pragmatics allows the analysis to work within discourse and to analyze the construction of ethos in terms of enunciation, of genre, and of verbal strategies. Sociology allows the analysis to underscore not only the social dimension of the discursive ethos (the collective representation), but also its relation to external institutional positions. A continuum is established, with the inevitable breaks in level, between the speaker inside the discourse and the prior image of the speaker linked with his name and his position in a particular field. The discursive construction, the social imaginary, and the institutional authority contribute, then, to construct a suitable ethos.

Id. at 20–21.

[100] *See id.* at 9, 19.

ized to hold the skeptron.[101] In this way, Amossy is able to synthesize and extend the notions of prior reputational, prediscursive ethos espoused by Isocrates and implied by Cicero with the Aristotelian notion of discursive ethos.

b. Historical Author

Related to the authority a speaker/writer enjoys as a result of his or her institutional position, and the audience's recognition of that institutional authority, modern theorists also consider the ethotic appeal of a known, actual author.[102] Referencing the work of Amossy, Carmen Marimón Llorca discusses ethotic appeal in a particular form of journalism—columns on language.[103] Llorca differentiates between the prediscursive ethotic appeal associated with the known reputation of the author, and the discursive resources employed by the authors to substantiate their opinions in the columns.[104] Llorca refers to the prediscursive ethos as the "empirical subject," or the "personal and curricular values owned by the speaker before the discourse that should help him before the defense of a specific matter."[105]

Jim Corder has written extensively on ethos,[106] seeking to situate ethotic appeal in the character of the writer.[107] Differentiating his position on ethos from that of the post-structuralists and deconstructionists who argued that text has no meaning until such is made by the reader,[108] Corder reminds scholars

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[101] *Id.* at 3. Amossy explains, "Within this framework ethos occupies a determinate place, but it no longer qualifies as a discursive construction. It merges with the *skeptron* held out in Homer to the one who is to speak next." *Id.*

[102] *See, e.g.*, Carmen Marimón Llorca, *Rhetorical Strategies in Discourses about Language: The Persuasive Resources of Ethos*, 2016 RES RHETORICA 68, 68 (explaining that columnists, or historical authors, may have credibility as experts).

[103] *See generally id.* Llorca explains that columns on language are "texts published on a regular basis and signed by the same author where a variety of issues related to language are presented with an informative approach." *Id.* at 68.

[104] *See id.* at 74–77.

[105] *Id.* at 75.

[106] *See, e.g.*, Jim W. Corder, *Hunting for* Ethos *Where They Say It Can't Be Found*, 7 RHETORIC REV. 299, 299–300 (1989).

[107] *See id.* at 300–02, 307–10, 313–14.

[108] *Id.* at 301. Corder explains that authors

> have been, whether knowingly or not, whether directly or not, part of a 2500-year-old tradition that allowed and encouraged us to believe that *ethos* is in the text, that authors do exist, that they can be in their words and own them even in the act of giving them away.

Id. In contrast,

> [n]ow literary theorists both compelling and influential tell us that it is not so, that *ethos* exists if at all only in the perceiving minds of readers, that authors, if they exist, do so somewhere else, not in their words, which have already been interpreted by their new owners. Language is orphaned from its speaker; what we once thought was happening has been disrupted. Authors, first distanced, now fade away into nothing. Not even ghosts, they are projections cast by readers.

Id.

that someone had to "f[ind] the words."[109] Repositioning the importance of writer for the dwelling place of ethotic appeal, Corder therefore asserts:

> *Ethos* as we once thought we knew it is lost, and not. We're all word-finders. We make *ethos* from the words we find, and some word-finder is always leaving words for us to find, telling an *ethos* toward us, crowding living time into composing time into our reading time, trying to become somebody in the midst of a crowd, trying to get caught in language in front of others.[110]

Similarly examining self-representation of the author in writing, Roger Cherry posits a distinction between ethos and persona.[111] Cherry acknowledges the historical author and maintains that "[t]he question of *ethos* in the literary text should focus on the image of the historical author that emerges from the text itself."[112] Thus, Cherry's position, like that of Amossy, Llorca, and Corder, blends prediscursive and discursive notions of ethos, blurring the line between speaker/author and speech/text.

B. *Ethos in the Speech/Text*

Because the dwelling of ethos cannot be neatly cabined in the speaker/writer, it must also be considered a part of the speech/text. Here, this Article will consider what classical rhetoricians advise with respect to projecting ethos in the speech and how modern rhetoricians envision ethos within a text.

1. *Classical Notions of Ethos in the Speech*

While Isocrates emphasized prediscursive ethos—that possessing good character was essential to ethos—his rhetorical instruction did focus on both developing good character and essential oratory skills.[113] As Christopher Rideout explains, "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?'"[114]

Aristotle, in contrast, emphasized discursive ethos—that aspect of persuasion that exists when the audience understands the character of the speaker through the speech.[115] He therefore emphasized the importance of projecting

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[109] *See id.* at 309–10. He explains, "[b]efore and after the interpretive community has done its work, before and after we have socially constructed, before and after we have intertextualized, before and after readers have responded, someone has found the words." *Id.*

[110] *Id.* at 312.

[111] *See, e.g.*, Roger D. Cherry, *Ethos Versus Persona: Self-Representation in Written Discourse*, 15 WRITTEN COMM. 384, 385 (1998).

[112] *Id.* at 396.

[113] *See* Rideout, *Discoursal Self*, *supra* note 29, at 26–30.

[114] *Id.* at 27 (quoting James J. Murphy, *The Origins and Early Development of Rhetoric*, *in* A SYNOPTIC HISTORY OF CLASSICAL RHETORIC 12 (James J. Murphy ed., 1983)).

[115] THE RHETORIC OF ARISTOTLE, *supra* note 38, at 8 (1356a1) ("The character [*ethos*] of the speaker is a cause of persuasion when the speech is so uttered as to make him worthy of belief[.]") (first alteration in original). In Ethos *Dwells Pervasively: A Hermeneutic Reading of*

"intelligence, [moral] character, and good will."[116] Cicero also emphasized the importance of the speech, noting that "much is done by good taste and style in speaking, [so] that the speech *seems* to depict the speaker's character."[117]

2. *Contemporary Notions of Ethos in the Speech/Text*

Here, again, it is difficult to clearly differentiate between speech/text and speaker/writer. Nonetheless, examining ethotic appeal in the speech/text provides insight for crafting the framework or template for ethos-based rhetorical strategy.

a. *Discoursal Self*

Considering voice or self in legal texts, Rideout explores ethos and the complexity of differentiating between speaker/writer and speech.[118]

> *Ethos* was originally a feature of spoken rhetorics, and part of the *ethos* of the spoken word would literally be the actual voice of the speaker. But *ethos* also included a sense of a figurative, or constructed, voice—closely tied to the literal voice, but not quite the same—because of the need for the orator to manipulate the actual speaking voice. Thus, the classical concept of *ethos* helped to open the way for a dual concept of voice and of the self that lay behind it.[119]

Rideout posits that both voice and ethos in legal writing should be understood in a discoursal context considering the self as constructed through the text.[120] While Rideout acknowledges the historical author as the " 'real' person who lies behind the writing,"[121] he asserts that ethos emerges from the discoursal representation of the historical author, existing "within the words."[122]

Aristotle on Credibility, Craig R. Smith explains that a reading of *The Rhetoric*, informed by a consideration of *Nicomachean Ethics*, "leads to the conclusion that *ethos* is pervasive in the speaking event. The *Rhetoric* advises speakers to establish character in the proem, epilogue, and narrative of a speech liberating it from the limits placed on it in other handbooks." Smith, Ethos *Dwells Pervasively*, *supra* note 41, at 13–14. Smith explains that "Aristotle's treatment of the narrative was a major advancement for the theory of *ethos* because he recommends that speakers utilize the narrative to 'mention whatever bears on your own virtue . . . or bears on the opponent's wickedness.' " *Id.* at 14.

[116] The Rhetoric of Aristotle, *supra* note 38, at 92 (1378a).

[117] Michael Frost, *Ethos, Pathos & Legal Audience*, 99 Dick. L. Rev. 85, 101 (1994) [hereinafter Frost, *Legal Audience*] (emphasis added).

[118] *See* J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 J. Legal Writing Inst. 67, 76 (2009).

[119] *Id.* (citation omitted).

[120] Rideout, *Discoursal Self*, *supra* note 29, at 42 (considering the self "constructed through the discourse characteristics of a text.") (citation omitted).

[121] *Id.* at 41.

[122] *Id.* at 42 (explaining that "[a]lthough 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 discoursal self.").

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b. Persona/Mask

As noted, this interplay between writer, text, and audience reveals that, in contemporary thought, situating the dwelling of ethos exclusively in the writer, or in the character of writer revealed in text, is a difficult line to draw. Using a definition of self as "character as it emerges in language,"[123] Baumlin and Meyer posit an existential ethos[124] explaining, "[b]y 'character,' we assume both personhood and persona—that is, the self's expressive self-identity as well as its social presentation or mask."[125] The authors assert that such a conceptualization involves a "double movement, . . . which introjects how one 'sees' oneself, as well as projects how one 'is seen' by others."[126] And where the speaker or writer is acting on behalf of another—a client, for example, in the Ciceronian context—one might consider a triple movement of projecting for oneself in both an inward and outward manner while also projecting on behalf of another.[127]

Cherry similarly considers the notion of persona, or mask, in the context of ethos. He differentiates between ethos, which is connected to but distinguishable from the historical author, and persona.[128] Persona, in Cherry's view, is a "stylized mask."[129] Cherry explains that when writers craft persona in the text, they "exercise their ability to portray the elements of a rhetorical situation to their advantage by fulfilling or creating a certain role (or roles) in the discourse community in which they are operating."[130]

Similarly blurring the line between author and text, Corder addresses ethos as dwelling in the text, examining the text for traces of the author.[131] Corder asserts that he wants to "believe that *ethos* is in the text, . . . to believe that [he]

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[123] Baumlin & Meyer, *supra* note 5, at 6 (citation omitted).

[124] *Id.* at 4. Baumlin and Meyer consider:

[A]n existentialist presumption of an ontology of self, which "expresses" or *reveals itself* by language. Within this model, the self is real—a being-in-the-world. *It may need language* to reveal itself, but its existence precedes discourse. Giving the "essential nature" of the self, an existentialist model seeks an ethos of "authenticity."

Id. at 4–5 (citations omitted).

[125] *Id.* at 6.

[126] *Id.* The authors explain:

One hopes for sincerity, authenticity, and self-consistency in this doubled, inside/outside "showing-forth" of character. When inside and outside match, one can speak of ethos as self-revelation: "what you see is what you get." But there can be a slippage or disjunction between the person and persona—again, between the inner and the outer versions of self. In that case, one can speak of ethos as performance.

Id.

[127] Complicating this a bit further and as discussed, Cicero also acknowledged the concept of developing the ethos of both the speaker and, where the speaker represents a client, the ethos of the client. *See generally supra* Section I.C.

[128] *See generally* Cherry, *supra* note 111.

[129] *Id.* at 396.

[130] *Id.* at 399.

[131] *See* Corder, *supra* note 106, at 301.

could find others in their texts so that [he] might hope to exist for others in [his] text so that [he] might turn [him]self over to them and thereby survive in the text [he] leave[s]."[132]

Modern commentators also consider the notion of ethos being constructed through both the speech and its impact on the audience.[133] So, for example, a social-constructionist perspective on ethos "privileges culture over self"[134] and examines the speaker as "*constructed* by language," but also by "other modes of cultural-symbolic communication/participation."[135] This socially constructed self is a performance, a "mask," and in this perspective, "ethos gives the 'roles' and 'rules' of the socially-constructed self."[136]

The idea of a socially constructed self, one that exists through language (speech), but also through dialogue with audience,[137] reminds us that the cultural context is essential to a consideration of the dwelling of ethos.[138] This Article must therefore turn to an examination of ethos in the space between the speaker and the speech—ethos in the exchange between speaker/speech and audience.

C. *Ethos in the Exchange*

Both classical and contemporary notions of ethos contribute to views of ethos in the "exchange." Those sources may also yield some insight into this posited location or dwelling, but in using these theories in a practical application, the notion of audience becomes a bit more comprehensive in contemporary rhetorical analysis.[139] While this complicates things a bit, this Article will

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[132] *Id.* at 314. With regard to his own character in text, Corder boldly announces, "I'm in here. Shall I provide documentation? Are telephone numbers needed? Letters of reference? Will the testimony of wife, librarian, and bartender suffice?" *Id.*

[133] *See, e.g.*, Baumlin & Meyer, *supra* note 5, at 5.

[134] *Id.*

[135] *Id.*

[136] *Id.* (citations omitted). Baumlin and Meyer explain, "Here the self has no meaning—no 'being'—outside of its cultural container; and, since the self 'enacts itself' within specific roles and behaviors, its 'nature' (if such a term applies here) arises in *performance*. The self, in this sense, is a mode of personation—a mask." *Id.*

[137] *See* Reynolds, *supra* note 2, at 328. Reynolds argues that the socially constructed self "shifts its implications of responsibility from the individual to a negotiation or mediation between the rhetor and the community." She further asserts that such a shift is consistent with the etymology of ethos, which, "in addition to its meaning as character," is "'*an accustomed place*' and in the plural may refer to the '*haunts or abodes* of animals'; it also may refer to '*the abodes of men*.'" *Id.* at 327–28 (citing Arthur B. Miller, *Aristotle on Habit (nOos) and Character (eOos): Implications for the Rhetoric?*, 41 SPEECH MONOGRAPHS 309, 309–16 (1974)).

[138] *See id.* at 329 ("One identifies an individual's character, then, by looking to the community.").

[139] *See infra* Section III.A.

ultimately use the foundation of potential loci for ethos, together with a broader conception of audience, to examine ethotic appeal in a modern text.[140]

1. *Classical Notions of Ethos in the Exchange*

Isocrates, Aristotle, and Cicero all must have acknowledged some aspect of ethos in the exchange between audience and speaker. For Isocrates, even though the concept of ethos was situated in the prior reputation of the speaker,[141] the audience clearly must have had some awareness of this prior reputation and must have used that awareness to invoke the ethos of the speaker for this aspect of ethos to have been effective. Aristotle also acknowledged the two-dimensional or discoursal nature of persuasion, emphasizing that " '[p]ersuasive' means persuasive *to a person*."[142]

Indeed, Aristotle recognized this discoursal element of attending to the character of the audience and addressing ethos in the exchange as he describes character and audience in Book 3, emphasizing that style should be "appropriate to character [to the persons of your story], since each class of men, each type of disposition, has a language suited to it."[143] He advised speakers to be familiar with different audiences so as to adapt to their peculiarities:

> Under 'class' I distinguish differences of age, as boy, man, or old man; of sex, as man or woman; of nationality, as Spartan or Thessalian. Under 'dispositions' I refer to those habits only which determine the character of a man's life—for not every habit does this. Accordingly, if the speaker uses the words which belong to a type of life, he will reproduce its character; for a rustic will not say the same things as an educated man, nor talk in the same way. (To a certain extent an audience will be impressed by a device which speech-writers use to nauseous excess: 'Who does not know . . . ?' 'We all know . . . ' [t]he hearer, ashamed to be ignorant, agrees to the fact, so as to have his part in the common knowledge)[.][144]

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[140] *See infra* Section III.B.

[141] *See supra* Section I.A.

[142] THE RHETORIC OF ARISTOTLE, *supra* note 38, at 11 (1356b) (emphasis added); *see also* KAREN BURKE LEFEVRE, INVENTION AS A SOCIAL ACT 45 (1987) (explaining that "Aristotle defines rhetoric as the art of finding the available means of persuasion, which means that it must involve others who are to be persuaded."). Arguing that "Aristotle's *Rhetoric* presupposes a social context," LeFevre further notes that:

> The three kinds of proofs—ethos, logos, pathos—by which the rhetor persuades similarly presuppose the existence of others who may or may not accept certain proofs. The audience is actively involved in building the argument in that the rhetor must look to the audience to supply the premises of the enthymemes on which the argument rests.

Id.

[143] THE RHETORIC OF ARISTOTLE, *supra* note 38, at 198 (1408a3) (alteration in original).

[144] *Id.*; *see also* Smith, Ethos *Dwells Pervasively, supra* note 41, at 13. Smith emphasizes,

> Thus, an audience has character or characters; it has an *ethos* of its own to which speakers must attend. In adapting, they enhance their own *ethos*; if they fail to adapt, their *ethos* will be diminished. Beyond that, however, speakers can move the audience to conform to the speaker's *ethos*

Cicero too attended to the audience reception as related to ethotic appeal, advising advocates to calibrate their emotions to those they seek to invoke in their audience.[145]

2. *Contemporary Notions of Ethos in the Exchange*

Modern scholars questioning the loci of ethos have similarly considered ethos in the discourse or exchange.[146] Considering the social, interactive nature of ethos, Nedra Reynolds emphasizes the role of community in developing ethos.[147] Reynolds notes that "the concept of ethos was developed in a culture which engaged in spoken discourse, where the actual presence of an audience was assumed."[148] Suggesting that credibility is constructed in the "betweens,"[149] Quoting LeFevre, Reynolds explains "[i]n written composition, the social matrix of necessary others who form community and audience are less obvious, but nevertheless present. *Ethos*, we might say, appears in that socially created space, in the 'between,' the point of intersection between speaker or writer and listener or reader."[150] Examining the contours of the "between" space reveals content for the framework of ethotic appeal.

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and modify the audience's habits and values. Such identification with a leader is difficult to achieve, but when accomplished, is the most powerful kind of persuasion.

Id.

[145] 2 CICERO, *supra* note 53, at 331 (185) (advising that "closely associated with this is that dissimilar style of speaking which, in quite another way, excites and urges the feelings of the tribunal towards hatred or love, ill-will or well-wishing, fear or hope, desire or aversion, joy or sorrow, compassion or the wish to punish . . . ."); *see also* Frost, *Legal Audience*, *supra* note 117, at 101. Frost explains, "ever mindful of the need to vary delivery depending on audience and purpose, Cicero also stressed that, in order to be convincing, advocates must sometimes abandon the restrained or temperate *ethos* and adopt instead the passionate emotions they are trying to instill in their audience[.]"

[146] *See, e.g.*, Reynolds, *supra* note 2, at 326–27 (suggesting "places where responsible writers negotiate and construct *ethos*—sites both on the margins and from the 'betweens.'").

[147] *Id.* at 329 (stressing that an "individual's *ethos* cannot be determined outside of the space in which it was created or without a sense of the cultural context.").

[148] *Id.* at 333.

[149] *Id.*

[150] *Id.* (citing LeFevre, *supra* note 142, at 45–46). Reynolds emphasizes that "[l]ocating *ethos* in written texts requires attention to the mediation or negotiation that goes on in the spaces between writers and their locations, in 'the tension between the speaker's private and public self.'" *Id.* (citation omitted). Reynolds therefore seeks to explore the analysis of ethos in the betweens, questioning:

> How might this idea of "the betweens" work in practice? I think it means attending to the rhetorical strategies writers use to locate themselves, their texts, and the particular discursive communities they are mediating within and between. How do writers identify themselves, claim authority, and position their projects? Are these self-identifications explicit, and if so, what is their effect? In the spirit of *ethos* as a negotiated space where authority is established within and between communities, I want to suggest that being explicit is also being responsible.

Id. at 333–34.

  a. *Filters*

  In the "exchange" space, the audience is making meaning of the ethos of the speaker/writer.[151] Modern theorists have explained the various ways in which this construction of ethos in the between space is accomplished.[152]

  Asserting that the term ethos "embraces three components: the speaker or person to whom ethos and its qualities are assigned; the audience who perceives or projects these qualities onto the speaker; and the 'rhetorical scene,' where the speaker (and, occasionally, audience) is situated in time and space[,]"[153] Craig Meyer posits ethos in the exchange by exploring the relationship between "an authentic, core self that abides beyond culture and its influences," and the mask of cultural influences necessarily cloaking that self.[154] Meyer explains that these cultural masks operate as filters and influence how ethos is constructed between speaker/writer and audience.[155] Asserting, therefore, that ethos exists in the conceptual "between" space, Meyer similarly emphasizes the social context of ethos.

  Baumlin and Meyer also consider post-structuralist notions of ethos situated between speaker and audience.[156] Baumlin and Meyer note that "[i]n contemporary poststructuralist terms, the Aristotelian rhetor is reduced to an effect of language: exactly 'who' the speaker 'is' depends on how the audience 'reads' him."[157] The authors thus explain the importance of audience and ex-

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[151] *See, e.g.*, *id.* at 333. Reynolds explains:

> Locating *ethos* in written texts requires attention to the mediation or negotiation that goes on in the spaces between writers and their locations, in "the tension between the speaker's private and public self." *Ethos*, in fact, occurs in the "between" as writers struggle to identify their own positions at the intersections of various communities and attempt to establish authority for themselves and their claims.

Id. (citations omitted).

[152] *See supra* Section II.C.2.

[153] Craig A. Meyer, *From Wounded Knee to Sacred Circles: Oglala Lakota Ethos as "Haunt" and "Wound"*, 8, 36 HUMAN. 1, 5 (2019). Despite these categorizations, Meyer nonetheless questions a clear demarcation between these loci for ethos, recognizing that, "[a]s an analytic method, the classical-Aristotelian model seeks to pin these components and categories down, as if ethos were reducible to the contents of a text." *Id.* Notwithstanding, such an approach "takes Aristotle's logocentric system as a recipe book complete in itself, neglecting the fact that his *Rhetoric* must itself be contextualized and historicized—that is, *situated within its own time and place*." *Id.* at 6.

[154] *Id.* at 5. Meyer does acknowledge that the authentic self "*wears culture* as a mask of sorts." *Id.*

[155] *Id.* Meyer explains, "[t]hrough the shutters of such masks, we see and are seen: they provide filters through which we comprehend the cultures we interact with and our respective roles therein. These masks—our personas—are means by which we present ourselves in the places where we situate ourselves." *Id.*

[156] *See* Baumlin & Meyer, *supra* note 5, at 10 ("[E]thos 'lies between' the speaker and audience: belonging to neither wholly . . . .").

[157] *Id.* The authors further explain, "Whether the rhetor *deserves* that trust remains an ethical question lying outside the text. And, within this radically textualized model, the ethics of ethos *must* 'lie outside,' since Aristotle's *Rhetoric* undergirds an ethos of appearances." *Id.*

change with regard to ethos existing within the rhetorical community, noting that "the rhetor's ethos is built out of a speaker-audience interaction."[158]

b. Shared Knowledge

Similar to filters, the concept of shared knowledge as discussed by Amossy suggests that meaning-making is often facilitated by knowledge that the speaker/writer and audience share.[159] As noted, Amossy uses rhetorical, sociological, and pragmatic lenses to examine both discursive and authoritative aspects of ethos.[160] From the sociological position of Pierre Bourdieu that "the power of words derives from the connection between the social function of the speaker and his or her discourse[,]"[161] Amossy asserts that the ethotic appeal of speech is not situated in its content, but in the authority bestowed upon the speaker by the audience.[162] In contrast to this social-function consideration of ethos, Amossy presents the pragmatists's view of ethos as located "within verbal interaction and . . . purely internal to discourse . . . ."[163]

Amossy is nonetheless able to reconcile these seemingly conflicting views by incorporating rhetorical theory, which considers persuasion in the exchange between speaker and audience.[164] Amossy, like the classical rhetoricians, acknowledges that argumentation (and persuasion) is a function of the orator calibrating her image to that of the audience, and vice versa.[165] For Amossy, "the interaction between the orator and [her] audience is necessarily effected

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[158] *Id.* at 10. The authors note:

> Those who dwell within a rhetorical community acquire their character as rhetorical participants from it, as it educates and socializes them. The community does this at least in part by supplying the Aristotelian components of *ethos*—the judgment (*phronesis*), values (*arete*), and feelings (*eunoia*) that make a rhetor persuasive to other members of the community.

Id. at 11.

[159] Amossy, *supra* note 28, at 7 (explaining the importance of shared representations for ethotic appeal).

[160] *Id.* at 5.

[161] *Id.* at 3.

[162] *Id.* ("[T]he efficacy of speech does not depend on what it utters but on who is uttering it and on the power with which he or she is endowed by the public."). Amossy explains that, in Bourdieu's construction:

> [T]he saying can be a doing only within the logic of social interaction—a shift from speech acts to symbolic exchanges between participants who are social agents. An interactional perspective is thus adopted. An institutional perspective is adopted as well: the verbal exchange cannot be dissociated from the positions occupied by the participants in the field (religious, political, intellectual, literary) within which they act.

Id.

[163] *Id.* at 5. She explains, "[c]ontemporary pragmatics diverges from the sociologist's perspective insofar as it researches the efficacy of speech *inside* verbal exchange. Its various trends are concerned not with social rituals outside of language practice but with enunciation frameworks." *Id.* at 3.

[164] *Id.* at 5 (citing CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (John Wilkinson & Purcell Weaver trans., 1969)).

[165] *Id.*

through the image they form of each other [and] . . . proper functioning of the exchange demands that to the image of the audience, there corresponds an image of the orator."[166]

Using stereotype theory to explain that "verbal construction ethos has an intrinsic social dimension,"[167] Amossy asserts that speakers and their audiences construct images of one another based upon "perceiving and understanding the real through a preexistent cultural representation, a fixed collective schema."[168] Thus, reconciling the interplay between the speaker's choice of rhetorical devices to construct a self in the speech and the prior authority of the speaker as constituting ethos, Amossy asserts, "[t]he question of whether it is the institutional authority or the discursive construction that defines ethos is thus to be understood in terms of reciprocity and complementarity."[169] Ethos is therefore constructed in the exchange between the authoritative nature of the writer, the writer's ability to project that ethos to the audience, and the audience's ability to situate the construction of that ethos in a stock structure supported by stereotype.[170]

In an attempt to reconcile classical with modern views on rhetoric, Andrea Lunsford and Lisa Ede posit what they refer to as a flawed distinction regarding the rhetor-audience relationship.[171] Focusing primarily on what they view as contemporary misapprehensions of Aristotle's work,[172] the authors challenge a modern interpretation of the artistic pisteis (ethos, pathos, and logos) as independent means of persuasion.[173] The authors assert that the pisteis are better understood as "inseparable strands that link people engaged in discourse."[174] By uniting ethos, pathos, and logos in the enthymeme, the authors similarly reimagine the relationship between rhetor and audience as a "dynamic" one,

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[166] *Id.* at 6. Amossy explains, "[t]he importance accorded to the audience naturally entails an emphasis on the values and norms outside of which any dialogue proves to be impossible. It is by drawing on common knowledge and beliefs that the orator attempts to make an interlocutor share his or her views." *Id.* 5–6.

[167] *Id.* at 8–9.

[168] *Id.* at 7. Amossy explains, "[t]he conception that a speaker forms of the audience, whether correct or erroneous, regulates his or her endeavor to adapt to them[,] . . . [and] [t]he same applies to the construction of the image of self which confers on the discourse a considerable part of its authority." *Id.* at 8.

[169] *Id.* at 12.

[170] *Id.* at 6–7.

[171] Lunsford & Ede, *Classical Rhetoric*, *supra* note 7, at 84.

[172] *Id.* at 86 (noting that "many current misconceptions grow out of a limited reading of Aristotle's *Rhetoric*.").

[173] *Id.* at 88 (challenging a modern scholar's assertion that "in classical rhetorical theory the pisteis 'were viewed as autonomous. Each was considered as complete in itself, and as entirely capable of effecting conviction without the aid of the others.'" (citation omitted)).

[174] *Id.* The authors rely on the work of W.M.A. Grimaldi in rejecting a conceptualization of the pisteis "as elements that can be added to discourse—rather like the ingredients in a recipe." *Id.* (citing W.M.A. GRIMALDI, ARISTOTLE, RHETORIC I, A COMMENTARY (1980); W.M.A. GRIMALDI, STUDIES IN THE PHILOSOPHY OF ARISTOTLE'S RHETORIC (1972)).

explaining that "the goal of rhetoric is as an interactive means of discovering meaning through language."[175] They thus dispel a conceptualization of the relationship between rhetor and audience as "antagonistic and unidirectional," asserting, in contrast, "enthymemes occur only when speaker and audience jointly produce them . . . []they[] intimately unite speaker and audience and provide the strongest possible proofs."[176] They therefore conclude that both Aristotelian and modern theories view rhetoric "as providing a method by which rhetor and audience, a self and an other [sic], together create knowledge, most often by building on shared or prior knowledge."[177]

c.   *Source Relational Characteristics*

Elsewhere I have argued that ethos is a relationship of trust between audience and writer (or speaker), and that this necessarily involves an exchange between reader and writer.[178] In many analyses of ethos in legal writing, the focus is on characteristics of the source that evince ethos.[179] Source characteristics associated with ethos include "intelligence, character, and good will."[180] "[W]riter[s] can demonstrate intelligence . . . by showing that [they are] informed, adept at legal research, organized, analytical, deliberate, empathetic, practical, articulate, eloquent, precise, innovative."[181] Writers reveal character when they demonstrate "truthfulness, candor, zeal, respect, and professionalism."[182] Because good will is associated with the apparent motivation of the advocate, writers can evince good will by demonstrating "authority; consistency; fairness; and concern for, or similarity with, the audience."[183]

I have attempted to differentiate between attributes of ethos that reflect characteristics of the source, what I have labeled source-characteristic attributes, and aspects of ethos that reflect the relationship the author fosters with the audience, what I have labeled source-relational attributes.[184] Both source-

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[175] *Id.* at 90–91.

[176] *Id.* at 91 (citing Lloyd F. Bitzer, *Aristotle's Enthymeme Revisited*, 45 Q.J. SPEECH 399, 408 (1959)).

[177] *Id.* at 95 (emphasis omitted).

[178] Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMM. & RHETORIC 229, 231 (2012); *see also* Anne E. Mullins, *Source-Relational Ethos in Judicial Opinions*, 54 WAKE FOREST L. REV. 1089, 1109 (2019) (exploring how judges evince source-relational attributes of ethos by using emotional intelligence).

[179] *See, e.g.*, MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 125–26 (2d ed., 2008) [hereinafter SMITH, ADVANCED LEGAL WRITING].

[180] THE RHETORIC OF ARISTOTLE, *supra* note 38, at 92 (1378a).

[181] Weresh, *supra* note 178, at 233 (citing SMITH, ADVANCED LEGAL WRITING, *supra* note 179, at 148).

[182] *Id.* (citing SMITH, ADVANCED LEGAL WRITING, *supra* note 179, at 125–26).

[183] *Id.*

[184] *Id.* at 234 (asserting that "[t]hese source-relational attributes implicate the source's ability to connect with the audience in some manner, by creating a bond based on shared information or by reinforcing a bond established between the source and the audience.").

characteristic and source-relational attributes are evinced in the text. In my view, therefore, ethos dwells both in the text, in the source, and in the exchange.

Llorca also examines discursive ethos as a product of the exchange, or relationship between speaker/author and audience.[185] Llorca explains that ethotic argumentation exists within a social and verbal space.[186] Ethotic appeal "is expressed through words backed by the echo of a real individual, but transmitted by a strictly discursive self. It builds a discursive instance that supports the enunciation and, in turn, produces an alocutary, an 'intralocutor' with whom a communication space can be established."[187] Evidence of this ethotic appeal, in Llorca's view, can be found in the prediscursive ethos of the empirical subject and in the rhetorical strategies writers employ to reveal their attitudes about their own roles and identities.[188] Ethotic rhetorical strategies include personal deixis,[189] sources cited by the writer, speech acts that reinforce the relationship between reader and writer, and evaluative judgments the writer makes regarding content.[190] To the extent that many of these strategies foster a relationship between the writer and the audience, they fall within what I refer to as source-relational characteristics.

As the foregoing examination suggests, ethos likely dwells in the speaker, the speech, and in the exchange between speaker and audience. The posited framework for ethotic appeal will consider all haunts to better understand how to evince ethos in order to enhance persuasion. But first, because the intended target is written communication, this Article must explore an additional, potential wrinkle in the use of classical rhetoric to examine contemporary legal writing: the concept of audience.

III. CONTEMPORARY ETHOS IN WRITTEN COMMUNICATION

Because this Article seeks to synthesize classical and modern notions of ethos to craft a framework for examining ethos-based rhetorical strategies in persuasive documents, it must consider the mobility of modern texts, as contrasted with the temporality of speech in classical times, and the corresponding

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[185] *See* Llorca, *supra* note 102, at 77.

[186] *Id.*

[187] *Id.*

[188] *See id.* at 79–85.

[189] "Deixis is reference by means of an expression whose interpretation is relative to the (usually) extralinguistic context of the utterance, such as: who is speaking[,] the time or place of speaking[,] the gestures of the speaker[, and] the current location in the discourse[.]" *Deixis*, SIL GLOSSARY OF LINGUISTIC TERMS, https://glossary.sil.org/term/deixis [https://perma.cc/8LKV-ENJD] (last visited Jan. 28, 2020). Person deixis is exhibited by the pronouns used to refer to the speaker, addressee, and other referents. *Person Deixis*, SIL GLOSSARY OF LINGUISTIC TERMS, https://glossary.sil.org/term/person-deixis [https://perma.cc/4V2P-44AF] (last visited Jan. 28, 2020).

[190] *See* Llorca, *supra* note 102, at 81–85.

array of audience members given such mobility, in contrast with an actual and identifiable audience in classical times. Thus, further shrouding (or illuminating) the concept of ethos is the degree to which modern rhetoricians have considered the interplay between writer and audience.

A. The Modern and Myriad Notions of Audience

The concept of audience requires an initial disclaimer—the term itself has many meanings. As one scholar has recognized, this formally "stable referent . . . has become fractured into *audiences*, into a not-always-peaceable and too-often-fragmented kingdom of terms, complete with colorful relatives, feuding rivals, strange bedfellows, and new arrivals turning up each month."[191] At the core of these consideration lies the distinction between real and fictional audiences.[192] These varied views also consider audience outside the text as well as inside the text.[193]

Lisa Ede and Andrea Lunsford differentiate between the audience "addressed" and the audience "invoked."[194] With regard to the addressed audience, Ede and Lunsford point to "the concrete reality of the writer's audience" and the ability of the writer to envision the "attitudes, beliefs, and expectations" of the audience.[195] Thus, the concept of audience addressed correlates with the Aristotelian and Ciceronian notion of an actual, literal audience.

The invoked audience, in contrast, is viewed as more of "a construction of the writer, a 'created fiction.' "[196] Thus, differentiating the invoked audience of the writer from the literal audience of a speaker, Ede and Lunsford explain that

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[191] Jack Selzer, *More Meanings of* Audience, *in* A Rhetoric of Doing: Essays on Written Discourse in Honor of James L. Kinneavy 161 (Stephen P. Witte et al. eds., 1992). The overall complexity and resulting ambiguity surrounding the concept of audience can be illustrated by the following questions posed by Selzer:

> What exactly are the differences and relationships between "evoked" and "invoked" audiences? Or between "narratees" and "implied readers"? Or between "demographic" and "fictionalized" audiences? Or between "fictionalized," "intended," "ideal," "inscribed," and "universal" audiences? What is the difference between "audience" and "discourse community"? What do technical writing textbooks mean by "multiple audiences"? Is it useful to conceive of audiences and readers as distinct entities? How do texts signal the differences among all of these characters? And how does one devise a pedagogy for "audience" that would improve reading and writing?

Id. While Selzer offers his essay as an endeavor to address these questions and to "straighten out some of the current confusion that has converged about the term *audience*," he acknowledges his inability "to succeed completely in that endeavor," emphasizing that "the issues are complex and slippery." *Id.*

[192] *See, e.g.*, Lisa Ede & Andrea Lunsford, *Audience Addressed/Audience Invoked: The Role of Audience in Composition Theory and Pedagogy*, 35 C. Composition & Comm. 155, 156 (1984) [hereinafter Ede & Lunsford, *Audience Addressed*] (distinguishing between actual and imagined audiences).

[193] *See Introduction* to A Rhetoric of Doing, *supra* note 191, at 13.

[194] *See generally* Ede & Lunsford, *Audience Addressed*, *supra* note 192.

[195] *Id.* at 156 (emphasizing that gaining this knowledge about the audience "is not only possible (via observation and analysis) but [is] essential.").

[196] *Id.* at 160.

the concept of an invoked audience does "not, of course, deny the physical re-
ality of readers, but [underscores] that writers simply cannot know this reality
in the way that speakers can."[197] In considering the readers in the invoked audi-
ence, Ede and Lunsford explain how the writer uses rhetorical strategies in the
text to construct the role of the audience and its relationship to both writer and
text.[198]

Citing Walter Ong's compelling essay "The Writer's Audience is Always a
Fiction," Ede and Lunsford assert that, in Ong's view and related to the in-
voked audience, "the writer must construct in his imagination, clearly or vague-
ly, an audience cast in some sort of role . . . [and] the audience must corre-
spondingly fictionalize itself."[199] Thus, while the invoked audience for writing
deviates from the traditional rhetorical view of a literal audience in an oratory
setting,[200] it nonetheless is based upon the writer's imagination of the audience
and her attempts to connect with it through the text.[201]

Building upon the work of Ede and Lunsford, Jack Selzer identifies three
categories of audience as follows: "reader in the writer," "reader in the text,"
and "real readers."[202] The "reader in the writer" category includes both the "in-
tended audience" and the "universal audience."[203] The intended audience is the
audience the writer envisions as he writes, and the one that therefore impacts
the production of text.[204] Selzer's notion of universal audience is a broader
construct, but also influential on the writer's process. He describes the univer-

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[197] *Id.*

[198] *Id.* (explaining how the writer uses "semantic and syntactic resources of language to pro-
vide cues for the reader—cues which help to define the role or roles the writer wishes the
reader to adopt in responding to the text.").

[199] *Id.* (citation omitted).

[200] *Id.* at 161 (emphasizing that "the audience [of a writer] is not *there* in the sense that the
speaker's audience, whether a single person or a large group, is present.").

[201] *Id.* at 167. Ede and Lunsford assert:

   [I]t is only through the text, through language, that writers embody or give life to their concep-
   tion of the reader. In so doing, they do not so much create a role for the reader—a phrase which
   implies that the writer somehow creates a mold to which the reader adapts—as invoke it.

The authors explain:

   Rather than relying on incantations, however, writers conjure their vision—a vision which they
   hope readers will actively come to share as they read the text—by using all the resources of lan-
   guage available to them to establish a broad, and ideally coherent, range of cues for the reader.
   Technical writing conventions, for instance, quickly formalize any of several writer-reader rela-
   tionships, such as colleague to colleague or expert to lay reader.

Id.

[202] Selzer, *supra* note 191, at 163.

[203] *Id.*

[204] *Id.* at 164 (explaining that the intended audience is "the more or less concrete representa-
tion of readers that the writer conceives during composition and then uses to condition his or
her developing work."). Selzer acknowledges that the intended audience may never read the
text, but that it nonetheless informs the work of the writer. *Id.* (emphasizing that writers con-
ceive of an audience and that conception "influence[s] the creative process"). Moreover,
there may be readers who are not members of the intended audience. *Id.* ("[S]ome of those
who do see the document . . . may not be intended readers.").

sal audience as "a theoretical collection of rational people whose values and beliefs are grounded on rational thought [and an entity that functions as] 'an active participant in the argumentation process . . . .'"[205] Selzer's notion of reader in the writer thus envisions audience in a manner loosely consistent with Cicero's advice about imagining different types of people in the audience and calibrating speech to meet their peculiar expectations.[206]

Selzer's reader in the text category is similarly synthesized from a variety of sources.[207] Selzer acknowledges that "the presence of the intended reader is ultimately manifested in the text itself[,]"[208] but that, for a writer, as opposed to a speaker whose audience is real,[209] "audiences are textual *presences* as well as intended or real ones."[210] So, this concept of reader in the text pivots from the idea that the writer has a conception of the audience in mind when drafting (reader in the writer) to the idea that this conception of audience should be manifested in the text itself (reader in the text).

One subcategory of reader in the text is the "the implied reader" who "is known through the background knowledge and assumptions and values and other human characteristics implied by the language of that text."[211] Using Martin Luther King's "Letter from Birmingham Jail" as an example, Selzer asserts that "King creates an implied reader in his text with the values of justice and tolerance, a knowledge of biblical and theological and political texts, and the attitudes of sympathy and generosity; it is this implied reader that King invites his real readers to identify with."[212] Selzer observes that King also created other implied readers who stand in contrast to those with whom he wants his real readers to identify.[213] These Selzer characterizes as "the 'white moderates' referred to late in the essay that King hopes his real readers will *not* identify themselves with."[214]

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[205] *Id.* at 165 (citations omitted) (noting that his construction of universal audience is based on the writings of Chaim Perelman).

[206] *See supra* Section II.C.1.

[207] *See* Selzer, *supra* note 191, at 166–69. The array of sources cited to and synthesized by Selzer—and their implications for a theory of audience—is beyond the scope of this Article.

[208] *Id.* at 166.

[209] *Id.* (identifying the audience for a speech as "real people on hand for the occasion of the speech.").

[210] *Id.* (emphasis added). Selzer's conception of reader in the text is expansive and addresses various distinctions between reader and audience which fall along the following dimensions:

> (a) how abstract the audience or reader is made out to be, (b) how involved or active the audience or reader is in the text itself, (c) how extensively the reader or audience influences invention, and (d) the extent to which the concept reflects a structuralist or poststructuralist view of language and text.

Introduction to A Rhetoric of Doing, *supra* note 191, at 13–14.

[211] Selzer, *supra* note 191, at 166.

[212] *Id.* at 167.

[213] *Id.*

[214] *Id.*

Also falling within the category of reader in the text is the "informed" reader, who is "something of a textual ideal that presupposes a general competence . . . [i]n the language of the text," and also someone who is "actively engaged in understanding a particular text."[215]

Selzer's final category is "real readers," or actual readers who truly exist. Here, again, Selzer's work draws on a variety of sources.[216] Recognizing that real readers may or may not be intended or invoked readers, Selzer distinguishes between single audiences, who "come to a text for the same reason," and multiple audiences who "have to do with the multiple *tasks*—or *multiple reading behaviors*—that various readers may require of a text, whether those behaviors are implied in texts or assumed in fact by real, empirical readers."[217] Selzer also distinguishes between real readers who are passive receivers, "uncritical receptacles for taking in messages,"[218] and readers who are more active. More active readers may include those who are resistant, who therefore "resist the roles set out for them [and also] resist the entire ideology of a text."[219] These resisting readers are important for this Article's consideration of ethos and persuasion, as "the notion of the resisting reader may be implicit in the very notion of persuasion in our culture, a notion that assumes readers who carefully guard—resist—ideological positions that are under siege by a rhetor."[220]

Having considered modern notions of writer and audience, this Article will turn to consider how ethos may be manifested in a text. But we, reader and I,

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[215] *Id.* at 168–69. Selzer explains:

> The informed reader is at once a communal reader predisposed by the linguistic codes and conventions agreed on by an interpretive community and an individual reader in the world who is seeking to understand those codes completely. Or to put it in the terms of linguistic theory, the informed reader is a real reader striving to bring performance into conformity with competence.

Id.

[216] *Id.* ("[U]nderstanding the nature of real readers is by no means uncomplicated.").

[217] *Id.* at 170.

[218] *Id.*

[219] *Id.* at 171.

[220] *Id.* Selzer explains that "[r]esisting readers resist every kind of textual move; they move through discourse with a kind of skepticism or suspicion, implicitly counter the text at every opportunity, and finally may subjugate it to personal proclivities or counterideologies." *Id.* Selzer's thorough examination of the many meanings of audience provides a rich array of practical application. As Witte et al. observe:

> Selzer's treatment of audience demonstrates—in a way and to an extent not found elsewhere—how extremely rich and dynamic is audience as a theoretical construct. Not only does Selzer suggest that audience must be conceptualized in terms of interactions that obtain across his major categories, but he also suggests that any theoretical accommodation of audience will have to treat both the interactions that may obtain within a given class and the multidimensional nature of consequent interactions in relation to, for example, invention. By bringing some semblance of order to an area that on first glance seems to defy order, Selzer has made simpler the tasks of the discourse or rhetorical theorist, the discourse analyst, and the classroom teacher by representing clearly and comprehensively the complex nature of the problems with which each must deal.

Introduction to A RHETORIC OF DOING, *supra* note 191, at 14.

have now moved beyond looking only for Aristotelian notions regarding source characteristics of ethos, including how the writer's intelligence, character, and good will are evinced in the text. We are also now able to examine how a text might manifest notions of both possession and appearance of the character of both the writer and the client (or claim). Further, we can explore how ethos is manifested in the text, and in the exchange between writer and varying notions of audience.

B. Examining Ethos in Modern Text

1. Framework for Ethotic Analysis

A synthesis of the foregoing classical and contemporary views on ethotic location yields the following framework:

Ethos in the Speaker/Writer

- Prior Reputation (Isocrates, Cicero)
- Institutional Authority (Amossy)
- Historical Author/Empirical Subject (Corder, Cherry, Llorca)

Ethos in the Speech/Text

- Intelligence, Moral Character, Goodwill (Aristotle)
- Discursive Ethos (Aristotle, Cicero, Rideout)
- Persona/Mask
  - Of Author (Aristotle, Cicero, Baumlin and Meyer, Cherry, Corder)
  - Of Client (Cicero)

Ethos in the Exchange

- Audience Awareness of Prior Character (Isocrates, Aristotle, Cicero)
- Filters (Baumlin and Meyer)
- Shared Knowledge (Amossy, Lunsford, and Ede)
- Source Relational Characteristics (Weresh, Llorca)

Notwithstanding this effort to identify potential ethotic locations, one must keep in mind that the lines differentiating between writer, text, audience, and exchange are blurred at best. Nonetheless, armed with these potential considerations, this Article will now consider ethos in one piece of modern advocacy—Chief Justice Roberts's dissent from the denial of certiorari in *Pennsylvania v. Dunlap*,[221] which is reproduced below.

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[221] Pennsylvania v. Dunlap, 555 U.S. 964, 964–67 (2008) (Roberts, C.J., dissenting).

2. *Ethotic Target: Dunlap*

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555 U.S. 964

October 14, 2008

No. 07–1486.   PENNSYLVANIA v. DUNLAP.   Sup. Ct. Pa. Certiorari denied. Reported below: 596 Pa. 147, 941 A.2d 671.

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY joins, dissenting.

North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighborhood.

Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office.

*   *   *

That was not good enough for the Pennsylvania Supreme Court, which held in a divided decision that the police lacked probable cause to arrest the defendant. The court concluded that a "single, isolated transaction" in a high-crime area was insufficient to justify the arrest, given that the officer did not actually see the drugs, there was no tip from an informant, and the defendant did not attempt to flee. 596 Pa. 147, 159, 941 A.2d 671, 679 (2007). I disagree with that conclusion, and dissent from the denial of certiorari. A drug purchase was not the only possible explanation for the defendant's conduct, but it was certainly likely enough to give rise to probable cause.

The probable-cause standard is a "nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (internal quotation marks omitted). What is required is simply "a reasonable ground for belief of guilt," *id.*, at 371, (same)—a "probability, and not a prima facie showing, of criminal activity," *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (same). "[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists," *Ornelas v. United States*, 517 U.S. 690, 700 (1996), including inferences "that might well elude an untrained person," *United States v. Cortez*, 449 U.S. 411, 418 (1981).

On the facts of this case, I think the police clearly had probable cause to arrest the defendant. An officer with drug interdiction experience in the neighborhood saw two men on a street corner—with no apparent familiarity or prior interaction—make a quick hand-to-hand exchange of cash for " 'small objects.' " 596 Pa., at 150, 941 A.2d, at 673. This exchange took place in a high-crime neighborhood, known for drug activity, far from any legitimate businesses. Per-

haps it is possible to imagine innocent explanations for this conduct, but I cannot come up with any remotely as likely as the drug transaction Devlin believed he had witnessed. In any event, an officer is not required to eliminate all innocent explanations for a suspicious set of facts to have probable cause to make an arrest. As we explained in *Gates*, "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." 462 U.S., at 244, n. 13.

The Pennsylvania Supreme Court emphasized that the police did not actually see any drugs. 596 Pa., at 159, 941 A.2d, at 679. But Officer Devlin and his partner were conducting undercover surveillance. From a distance, it would be difficult to have a clear view of the small objects that changed hands. As the Commonwealth explains in its petition for certiorari, the "classic" drug transaction is a hand-to-hand exchange, on the street, of cash for small objects. Pet. for Cert. 5–8. The Pennsylvania Supreme Court's decision will make it more difficult for the police to conduct drug interdiction in high-crime areas, unless they employ the riskier practice of having undercover officers actually make a purchase or sale of drugs.

The Pennsylvania court also noted that the defendant did not flee. 596 Pa., at 159, 941 A.2d, at 679. Flight is hardly a prerequisite to a finding of probable cause. A defendant may well decide that the odds of escape do not justify adding another charge to that of drug possession. And of course there is no suggestion in the record that the defendant had any chance to flee—he was caught redhanded.

Aside from its importance for law enforcement, this question has divided state courts, a traditional ground warranting review on certiorari. This Court's Rule 10(b). The New Jersey Supreme Court has held that an "experienced narcotics officer" had probable cause to make an arrest when—in a vacant lot in a high-drug neighborhood—he "saw defendant and his companion give money to [a] third person in exchange for small unknown objects." *State v. Moore*, 181 N.J. 40, 46–47, 853 A.2d 903, 907 (2004). The Rhode Island Supreme Court reached the same conclusion in a case where the defendants—through their car windows—exchanged cash for a small "bag of suspected narcotics." *State v. Castro*, 891 A.2d 848, 851–854 (2006). In contrast, the Colorado Supreme Court held that a hand-to-hand exchange of unknown objects did not give the police probable cause to make an arrest, even where one of the men was a known drug dealer. *People v. Ratcliff*, 778 P.2d 1371, 1377–1378 (1989). All these cases have unique factual wrinkles, as any probable-cause case would, but the core fact pattern is the same: experienced police officers observing hand-to-hand exchanges of cash for small, unknown objects in high-crime neighborhoods.

The Pennsylvania Supreme Court speculated that such an exchange could have been perfectly innocent. But as Judge Friendly has pointed out, "[j]udges are not required to exhibit a naiveté from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (CA2 1977). Based not only on common sense but also his experience as a narcotics officer and his previous work in the neighborhood, Officer Devlin concluded that what happened on that street corner was probably a drug transaction. That is by far the *most* reasonable conclusion, even though our cases only require it to be *a* reasonable conclusion.

I would grant certiorari and reverse the judgment of the Pennsylvania Supreme Court.

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3. Ethotic Analysis

This Article will now consider the development of ethos in the foregoing text. With such limited text, our dive will not necessarily be deep, but will illustrate the plausibility of the posited loci for ethotic appeal: ethos of the writer, ethos of the client, ethos of the text, and ethos within the exchange.

a. Ethos in the Writer

We turn first to ethos of the writer—Chief Justice Roberts. Roberts has a prior reputation as a longstanding judicial officer and author of important legal texts. The Chief Justice of the Supreme Court, writing as an officer of the Court, possesses the type of institutional, authoritative appeal imagined in the classical view by Isocrates and Cicero and in the modern view by Amossy and Llorca.[222] But, along the lines of Amossy's and Llorca's notions of ethos in the exchange, Roberts is also able to project an authoritative construct of the ethotic appeal of judges in general, and himself in particular, through the text. For example, he substantiates the authority of the judicial position in his use of the following quote: "Judges are not required to exhibit a naiveté from which ordinary citizens are free."[223]

In keeping with the notion of the historical author or empirical subject of Corder, Cherry, and Llorca, Roberts's authorial presence is evident in the text: "*I* disagree with that conclusion, and dissent from the denial of certiorari."[224] "On the facts of this case, *I* think the police clearly had probable cause to arrest the defendant."[225] Perhaps revealing his attitude toward his role as an officer of the Court along the lines of Llorca's ethos-based rhetorical strategies, Roberts writes, "[p]erhaps it is possible to imagine innocent explanations for this conduct, but I cannot come up with any remotely as likely as the drug transaction Devlin believed he had witnessed."[226] He also exhibits attributes of ethos by carefully organizing and substantiating his assertions.

b. Ethos in the Text

Roberts, while writing as a judicial officer, employs the persona or mask of a hardboiled crime fiction piece: "The neighborhood? Tough as a three-dollar

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[222] *See supra* Section II.A.

[223] *Dunlap*, 555 U.S. at 967 (Roberts, C.J., dissenting) (citing United States v. Stanchich, 550 F.2d 1294, 1300 (CA2 1977)).

[224] *Id.* at 965 (emphasis added).

[225] *Id.* (emphasis added).

[226] *Id.*

steak."[227] While this technique prompts ethotic appeal in the exchange as discussed below, it also evinces the discursive ethotic appeal of a persona. It is one that has been crafted to comport with Roberts's legal conclusion—that the arresting officer had probable cause to make the stop, just as seasoned detectives in hardboiled crime novels predictably solve the crime. Of course, that persona will resonate with individuals who agree with the conclusion. It will not with those who view it as disrespectful of the defendant, state courts, and crime-ridden neighborhoods.

Roberts employs several other devices to evince ethos in the text. Setting up his discoursal self, he begins by framing the law in a manner that supports his ultimate position. Then, after laying out the test for probable cause, Roberts emphasizes: "What is required is simply 'a reasonable ground for belief of guilt.'"[228] His assertions are well supported by authority evincing the Aristotelean notion of intelligence, and he artfully discredits the opposing position with the following counterarguments:

> The Pennsylvania Supreme Court's decision will make it more difficult for the police to conduct drug interdiction in high-crime areas, unless they employ the riskier practice of having undercover officers actually make a purchase or sale of drugs. The Pennsylvania court also noted that the defendant did not flee. Flight is hardly a prerequisite to a finding of probable cause. . . . And of course there is no suggestion in the record that the defendant had any chance to flee— he was caught redhanded.[229]

With respect to the ethos of the client, we must recognize that Roberts's dissent rules in favor of the State. We can therefore look to Roberts's characterization of Officer Devlin, an agent of the State, and his construction of Devlin's character for evidence of the ethos of the client. Roberts's dissent highlights the credibility of Officer Devlin's intuition and judgment as sufficient for probable cause: "Devlin knew."[230] Supporting his belief that "the police clearly had probable cause to arrest the defendant,"[231] Roberts characterizes Devlin as "[a]n officer with drug interdiction experience in the neighborhood"[232] who witnessed the interaction "in a high-crime neighborhood known for drug activity, far from any legitimate businesses,"[233] lending credibility and ethos to the government's position. The credibility of Devlin is further supported in Justice Roberts's conclusion on probable cause, where Roberts tethers his own legal conclusion to Devlin's credibility:

> Based not only on common sense but also his experience as a narcotics officer and his previous work in the neighborhood, Officer Devlin concluded that what

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[227] *Id.* at 964.

[228] *Id.* at 965 (citation omitted).

[229] *Id.* at 966 (citation omitted).

[230] *Id.* at 964.

[231] *Id.* at 965.

[232] *Id.*

[233] *Id.*

happened on that street corner was probably a drug transaction. That is by far the *most* reasonable conclusion, even though our cases only require it to be *a* reasonable conclusion.[234]

c.   *Ethos in the Exchange*

Regarding ethos in the exchange, we must first consider the audience for the opinion. Note that this is a dissent from a denial of certiorari. The intended/addressed audience of Ede and Lunsford, and the "informed" audience of Selzer,[235] consists of both the general legal public, including state courts that routinely rule on *Dunlap*-style probable cause issues and the lawyers who represent clients in this area, as well as the Pennsylvania Supreme Court from which the petition for certiorari arose. In Selzer's categorization, *implied* readers include those who share Roberts's view of the Fourth Amendment and with whom assertions such as the following likely resonate: "Perhaps it is possible to imagine innocent explanations for this conduct, but I cannot come up with any remotely as likely as the drug transaction Devlin believed he had witnessed."[236] Implied readers are also likely favorably influenced by the hardboiled crime persona that substantiates Roberts's conviction on the issue of probable cause.

Implied readers also most certainly include *resistant* readers whose views on the Fourth Amendment stand in contrast with Roberts's position, and for whom Roberts may have had the following passages in mind: "In any event, an officer is not required to eliminate all innocent explanations for a suspicious set of facts to have probable cause to make an arrest."[237] "That is by far the *most* reasonable conclusion, even though our cases only require it to be *a* reasonable conclusion."[238]

With respect to all types of audience, Roberts must have had an intention of developing a connection with the audience by employing the crime-genre-style introduction. This stylistic device evokes Amossy's notion of stereotype and shared knowledge and Baumlin and Meyer's notion of filters. The stylistic device prompts the use of stereotyping, both of the narrator who, in this type of genre, solves the crime with ease, and of the opposing party, or defendant. Situated in this unusual genre, at least in judicial opinion writing, the audience filters information, reading the narrator in a manner that may therefore comport with the historical author's conclusion.

The use of humor, literary references, and tropes establish both source-characteristic and source-relational ethos.[239] Roberts's use of a fairly well-

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[234]   *Id.* at 967.

[235]   *See supra* Section III.A.

[236]   *Dunlap*, 555 U.S. at 965 (Roberts, C.J., dissenting).

[237]   *Id.* at 965–66.

[238]   *Id.* at 967.

[239]   *See generally* Weresh, *supra* note 178.

known literary genre evinces cleverness, a source-characteristic example of ethos, and establishes a relationship based on shared knowledge between writer and reader, a source-relational characteristic.[240] The use of this technique also resonates with Baumlin's theory of character emerging in text, and the previously discussed triple movement of projecting for oneself in both an inward and outward manner, while also projecting on behalf of another. That is because Roberts has employed ethos-based strategies to build the character of the judicial writer, the crime-genre narrator, and also the voice, and ethos, of the arresting officer.[241]

Of course, the novel, crime-genre technique does not evince ethos for all audiences. It likely does not resonate with the resistant readers who view the case quite differently. In fact, for those readers, such a technique may undermine the ethotic appeal of the author as it suggests he has not taken the case, or the rights of criminal defendants, seriously.

CONCLUSION

Both classical rhetoricians and modern scholars agree that effective legal persuasion depends on developing ethotic appeal. While the foregoing has been a limited evaluation of the potential loci for ethos in a written text, it does reveal a promising framework for future evaluation of ethos-based rhetorical strategies as they may be situated in the writer, text, and exchange. The template further provides an author with a framework for considering posited loci to reinforce the impact of the ethotic appeal of the writer, of the text, and in the exchange taking place between author and audience.

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[240] Helen A. Anderson, *Police Stories*, 111 Nw. U. L. Rev. Online 19, 20 (2016). Anderson notes that "[t]he *Dunlap* dissent is perhaps the most obvious expression of the link between popular culture and the narratives in judicial opinions." *Id.* I have asserted that literary references and inside jokes are a form of gesture from the writer to the reader, a source relational form of ethos that establishes connection and trust. *See* Weresh, *supra* note 178, at 260–65. Anderson similarly observes that "the less literary police narratives found in appellate opinions also *tap into* prevalent cultural stories about the police—stories of hardworking, embattled officers." Anderson, *supra* at 20. (emphasis added).

[241] Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 Drexel L. Rev. 417, 445 (2012). Osbeck notes that a writer "may make effective use of a voice that is not the writer's own, but rather a character the writer wants the reader to identify with." *Id.* In the introductory scene Roberts set in *Dunlap*, "he cleverly employs the point of view as well as the voice of the arresting officer in order to help the reader appreciate the officer's perspective on whether there was probable cause to make an arrest . . . ." *Id.*

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