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ARTICLES

SUBTLY SELLING THE SYSTEM: WHERE PSYCHOLOGICAL INFLUENCE TACTICS LURK IN JUDICIAL WRITING

Anne E. Mullins *

*"The opinion, as an expression of judgment, is an essay in persuasion. The value of the opinion is measured by its ability to induce the audience to accept the judgment."*¹

I. INTRODUCTION

As a nation, we are deeply committed to the rule of law. Particularly with the rise of law and economics, we think of the people served by the judicial system as rational actors. And, while many of us recognize that our courts are inherently political institutions, we still think of our judges persuading us with only solid legal analysis.

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1. Justice James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 TRIAL JUDGES' J. 49, 50 (1969).

But we are not always rational actors, and judges do not persuade us with only their analysis. Judges capitalize on psychological tactics that influence us to do what they tell us to do or to conclude that their decisions are, in fact, the correct ones. These are the same tactics that market participants of all stripes, from big businesses to fundraising charities to kids selling lemonade, use to get what they want.

Think of the well-placed advertisement or the successful salesperson. They influence us with more than the content of their message. We, as rational actors, realize that we have ended up with a product we really did not need or want. But we bought them anyway, and not because we were persuaded by the bare facts that the ad or the salesperson imparted. There is more to influence in marketing than the bare information communicated. This article explores whether there is more to influence in judicial writing than the bare legal analysis provided and concludes that there is.

Specifically, this article examines the subtle psychological ways that courts and our judicial system as a whole influence us to do what courts tell us to do. In Part II, this article will review four of the six most basic psychological principles of influence identified and organized by Dr. Robert Cialdini.² As Cialdini notes, “there are thousands of different tactics that compliance practitioners employ to produce yes[;] the majority fall within six basic categories. Each of these categories is governed by a fundamental psychological principle that directs human behavior and, in so doing, gives the tactics their power.”³ These tactics include reciprocity,⁴ commitment and consistency,⁵ social proof,⁶ liking,⁷ authority,⁸ and scarcity.⁹ This article will then explore whether and how the tactics of reciprocity, commitment and consistency, social proof, and liking are either built into our judicial system or em-

2. Robert Cialdini, Ph.D., is Regents' Professor of Psychology and Marketing at Arizona State University, where he has also been named Distinguished Graduate Research Professor. He specializes in, among other things, persuasion and compliance and is recognized as a leader in the field.

3. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* xii (5th ed. 2009).

4. *See id.* at 18–49.

5. *See id.* at 51–95.

6. *See id.* at 97–139.

7. *See id.* at 141–72.

8. *See id.* at 174–96.

9. *See id.* at 193–225.

ployed by judges in their writing to effect compliance. Further, Part III will explore what benefits, concerns, and questions the use of psychological influence tactics in judicial writing raises.

II. EXAMINING THE TACTICS AND UNCOVERING THEIR HIDING PLACES

A. *Why the Tactics of Influence Work*

We are faced with thousands of decisions every day, and we live in a world saturated with information. If we weighed each piece of evidence and thought through pros and cons every time we had to make a decision, we would be paralyzed. Therefore, instead of carefully weighing each decision with which we are faced, we rely on proxies for good decision-making.¹⁰ Psychologists term these proxies “judgmental heuristics.”¹¹ These proxies are readily accessible indicators that tell us whether a particular decision is “right” (or at least “right” enough).¹² Cialdini studied these proxies by inserting himself into the world of compliance professionals (salespersons, fundraisers, etc.) because compliance professionals are aware of proxies for good decision-making and are experts at using them to get their targets to comply with their requests.¹³ So, what compliance professionals might think of as tactics of influence are what regular people might think of as decision-making short cuts (to the extent that we are aware of them at all).¹⁴

For example, social psychologists Ellen Langer, Arthur Blank, and Ben Zion Chanowitz tested the basic principle that humans in certain circumstances are more likely to comply with a request for a favor when the requester provides a reason.¹⁵ In their study, a person approached a line of people waiting to make copies in a

10. *Id.* at 6–7.

11. *Id.* at 7.

12. *See id.* at 6–7.

13. *See id.* at 10–16.

14. *Id.* at 6–7.

15. *Id.* at 3–4; Ellen Langer et al., *The Mindlessness of Ostensibly Thoughtful Action: The Role of “Placebic” Information in Interpersonal Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 635, 636–38 (1978); Anthony Bastardi & Eldar Shafir, *Nonconsequential Reasoning and Its Consequences*, 9 CURRENT DIRECTIONS IN PSYCHOL. SCI. 216, 216 (2000) (noting that people often mistake non-consequential but closely related information for consequential information when making decisions and alter their course of action based on this mistake).

library and asked to cut the line to make a relatively small number of copies giving as the reason: "Because I'm in a rush." In response, 94% of the people asked said "yes."¹⁶ In contrast, when the requester gave no reason at all, only 60% of the people asked said "yes."¹⁷ To determine whether the quality of the reason dictated whether a person in line would consent, a third group of requesters offered a redundant reason.¹⁸ This time, the requester approached the line and asked to cut the line to make copies "because I have to make copies."¹⁹ Notably, this is a non-reason. However, 93% of the people asked said "yes."²⁰ Accordingly, the study determined that when the request was small, the quality of the reason was (or was nearly) irrelevant to whether people complied with the request.²¹ People generally comply with small favors when the requester gives a reason regardless of the quality of the reason.²²

While the third group may sound foolish from our present vantage point, they are actually acting in a completely rational and efficient manner.²³ Instead of spending valuable time evaluating each request for a favor, determining both the credibility and the worthiness of the reason advanced and rendering a decision, they relied on the presence or absence of a reason as a proxy for the entire thought process. Human compliance with a favor asked

16. Langer et al., *supra* note 15, at 637 tbl.1.

17. *Id.*

18. *Id.* at 637.

19. *Id.*

20. *Id.* at 637 tbl.1.

21. *Id.* at 637 tbl.1, 638.

22. *Id.*; see also CIALDINI, *supra* note 3, at 4 (noting that it is a "well-known principle of human behavior" that people will perform a favor when the requester gives a reason).

23. See Galen V. Bodenhausen et al., *On the Dialectics of Discrimination: Dual Processes in Social Stereotyping*, in DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY 271, 272-73 (Shelly Chaiken & Yaacov Trope eds., 1999) (discussing how relying on stereotypes takes less effort and mental capacity than attending to individuality); CIALDINI, *supra* note 3, at 7; Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, in 23 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 2 (Mark P. Zanna ed., 1990) (positing that people predominantly use categorical thinking as opposed to individuated thinking because it requires less work); Gerd Gigerenzer & Daniel G. Goldstein, *Reasoning the Fast and Frugal Way: Models of Bounded Rationality*, 103 PSYCHOL. REV. 650, 652 (1996) (stating that people consider a limited amount of information when making decisions because they do not have time to consider every piece of relevant information).

alongside something that appears to be a reason is probably an efficient and effective way to respond to the request.²⁴

The Langer study not only demonstrates how decision-making shortcuts work, but it also highlights the inherent danger of decision-making shortcuts. While trustworthy proxies usually trigger appropriate responses, those who know how our triggers work can activate decision-making shortcuts to elicit the response they want, and that response may not be appropriate.²⁵ In other words, tactics of influence are not always innocuous.²⁶

The extent to which we are susceptible to tactics of influence—that is to say, the likelihood that we will use a decision-making shortcut—varies depending on the circumstances, such as whether the person is affected by the decision or cares deeply about the issue. When people evaluate information in a thoughtful manner, they are less likely to use decision-making shortcuts.²⁷ And some research bears this out.²⁸ Significantly, however, Cialdini questions whether this is always true.²⁹ For one thing, even when people may be affected by a decision or when they may care deeply about an issue, they may not have the time to carefully consider

24. See Bodenhausen et al., *supra* note 23, at 272 (“Although there may be procedures available for reaching a decision or making a judgment that are likely to maximize decision quality, they are often cumbersome. Much simpler alternative strategies [like heuristics] may be available that, although less likely to ensure a high-quality decision, nevertheless do a good enough job much of the time.”).

25. CIALDINI, *supra* note 3, at 7, 10–11.

26. This is why Cialdini dubs influence tactics “weapons of influence.” *Id.* at 1.

27. See Nicholas Epley & Thomas Gilovich, *The Anchoring-and-Adjustment Heuristic: Why the Adjustments Are Insufficient*, 17 *PSYCHOL. SCI.* 311, 315 (2006) (examining how participants who are less inclined or able to engage in effortful thought are less likely to take time to arrive at a more accurate estimate to answer a question); Richard E. Petty et al., *Personal Involvement as a Determinant of Argument-Based Persuasion*, 41 *J. PERSONALITY & SOC. PSYCHOL.* 847, 849–52 (1981). Researchers studied the effect of the heuristic that inspires us to believe someone simply because she is an expert. Petty et al., *supra*, at 849. The researchers had students at the University of Missouri listen to a speech that advocated requiring seniors to pass comprehensive examinations before graduation. *Id.* The speaker’s expertise in the field of education persuaded the non-seniors (i.e., those not personally affected by the issue). *Id.* at 851. The substance of the speaker’s message, however, persuaded the seniors (i.e., those affected personally by the issue). *Id.*

28. See, e.g., CIALDINI, *supra* note 3, at 9; Michael R. Leippe & Roger A. Elkin, *When Motives Clash: Issue Involvement and Response Involvement as Determinants of Persuasion*, 52 *J. PERSONALITY & SOC. PSYCHOL.* 269, 269 (1987) (finding that when subjects were personally affected by an issue, they were unlikely to be affected by influence tactics in messaging; but when subjects were not personally affected, they were heavily susceptible to influence tactics).

29. CIALDINI, *supra* note 3, at 9.

their response.³⁰ Further, even when they do or when they are required to carefully consider their response, research shows that people still rely on decision-making shortcuts.³¹ The example that Cialdini uses is “*Captainitis*.”³² This is when a co-pilot employs the decision-making shortcut of reliance on authority: in deferring to the pilot, the co-pilot permits the pilot to commit a fatal error.³³ The co-pilot, even though personally affected by the decision, nevertheless uses a decision-making shortcut.³⁴ At the very least, it is fair to say that people are likely affected by influence tactics to some degree in most decisions.

B. *The Rule of Reciprocation*

1. An Overview of the Rule of Reciprocation

One of the most powerful and pervasive tactics of influence is the “rule of reciprocation.”³⁵ The rule is simple: when people do something nice for us, we repay them.³⁶ For instance, if a colleague has you over to dinner, you reciprocate by inviting that colleague to dinner the next month. If a friend buys your child’s Girl Scout Cookies, you buy that friend’s child’s raffle tickets. We are brought up to follow the rule; one who does not reciprocate is known to be a “moocher, ingrate, or freeloader.”³⁷

Psychologist Dennis Regan tested the rule of reciprocation in an experiment that his test subjects thought was about art appreciation.³⁸ The subjects were seated in a room in pairs and told to

30. *Id.*

31. *Id.*

32. *Id.* (citing H. Clayton Foushee, *Dyads and Triads at 35,000 Feet: Factors Affecting Group Process and Aircrew Performance*, 29 AM. PSYCHOL. 885, 892 (1984)).

33. *Id.* at 9.

34. *See id.*

35. *Id.* at 19. All human societies ascribe to the rule. *See generally* Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161 (1960) (suggesting reciprocity as a universal building block in “moral codes” of all societies).

36. CIALDINI, *supra* note 3, at 19.

37. *Id.* at 22; *see also* Claus Wedekind & Manfred Milinski, *Cooperation Through Image Scoring in Humans*, 288 SCI. 850, 850–51 (2000) (“The idea is that helping someone, or refusing to do so, has an impact on an individual’s image score within a group. This score reflects an individual’s reputation and status, which are constantly assessed and reassessed by others and which may be taken into account by them in future social interactions.”).

38. CIALDINI, *supra* note 3, at 22; Dennis T. Regan, *Effects of a Favor and Liking on Compliance*, 7 J. EXPERIMENTAL SOC. PSYCHOL. 627, 631 (1971).

rate the paintings they observed.³⁹ One member of the pair was Regan's lab assistant.⁴⁰ Each time the experiment was conducted, the assistant would excuse himself from the room.⁴¹ Sometimes he would come back with a soda for himself and one for the other participant.⁴² Other times, he came back with nothing.⁴³ Later on, the assistant would ask his partner to buy some raffle tickets at \$0.25 each.⁴⁴ The assistant was far more successful selling tickets to participants on whom he bestowed a soda—they bought twice as many tickets as participants who did not receive a soda.⁴⁵

The rule of reciprocity is not limited to social interaction. Companies capitalize on the rule of reciprocity when they dole out “free” samples.⁴⁶ Additionally, our political system thrives on

39. Regan, *supra* note 38, at 631.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 632.

45. *Id.* at 633–35. Other researchers have consistently discovered similar results. See Jeannine M. James & Richard Bolstein, *The Effect of Monetary Incentives and Follow-up Mailings on the Response Rate and Response Quality in Mail Surveys*, 54 PUB. OPINION Q. 346, 359 (1990) (discovering that mailing monetary incentives along with surveys produced a significantly higher response rate); Eleanor Singer et al., *Experiments with Incentives in Telephone Surveys*, 64 PUB. OPINION Q. 171, 171 (2000) (sending monetary gift with survey delivered by mail greatly increased the response rate); David B. Strohmetz et al., *Sweetening the Till: The Use of Candy to Increase Restaurant Tipping*, 32 J. APPLIED SOC. PSYCHOL. 300, 306–07 (2002) (finding that giving customers a candy or mint with the bill significantly increased tip amounts); Keith Warriner et al., *Charities, No; Lotteries, No; Cash, Yes: Main Effects and Interactions in a Canadian Incentives Experiment*, 60 PUB. OPINION Q. 542, 545–46 (1996) (sending monetary gift with survey delivered by mail greatly increased the response rate); Stephanie L. Gruner, *Reward Good Customers*, INC. MAG. (Nov. 1, 1996), <http://www.inc.com/magazine/19961101/1868.html> (reporting that customers purchase goods and services they would have otherwise declined after receiving a gift).

Significantly, Regan discovered not only that the rule of reciprocity worked, but also that it worked even when the target did not like the requester—a factor that typically does not lead to compliance. Regan, *supra* note 38, at 635. As Cialdini notes, Regan's discovery has potentially far-reaching implications: “People we might ordinarily dislike—unsavory or unwelcome sales operators, disagreeable acquaintances, representatives of strange or unpopular organizations—can greatly increase the chance that we will do what they wish merely by providing us with a small favor prior to their requests.” CIALDINI, *supra* note 3, at 23. Cialdini further highlights the rise of the generally unpopular Hare Krishna Society in the 1970s. *Id.* at 23–25. Initially, their fundraising technique was for a group to appear in public together, with their customary shaved heads and robes, and bob and chant while seeking donations from passersby. *Id.* at 24 The approach did not work well. *Id.* Then the Krishnas started to capitalize on the rule of reciprocity and gave a small gift—a copy of the *Bhagavad Gita*, a Krishna magazine, or a flower—before asking for donations. *Id.* at 25. The donations skyrocketed. *Id.*

46. See CIALDINI, *supra* note 3, at 28–31.

the exchange of favors.⁴⁷ For example, two incumbent members of Congress were initially against an exemption that the insurance industry had from federal antitrust laws.⁴⁸ After the industry donated an average of more than \$56,000 to each representative, it switched sides and supported the exemption.⁴⁹ Significantly, “[t]he average industry contribution to individual committee members voting in favor of the industry was \$44,030, with those voting against the industry taking in an average of just \$16,300.”⁵⁰ Special interest groups likewise capitalize on the rule of reciprocity. Multiple studies link donations by special interest groups to the campaign of an elected official with voting patterns that are favorable to the contributing interest group.⁵¹

The rule of reciprocity also works when the gift or favor performed is a concession.⁵² The recipient of a concession frequently feels obligated to make a concession in return.⁵³ In other words, the rule of reciprocity becomes the rule of reciprocal concessions.

The rule of reciprocal concessions has been used in the “rejection-then-retreat” technique, also termed the “door-in-the-face”

47. See, e.g., *id.* 26–28. As Cialdini notes, President Lyndon Johnson was remarkably effective in getting legislation passed during his time in the White House. *Id.* at 26–27. Much of his success is credited to his long tenure in Congress, during which he performed favors for his colleagues. *Id.* As president, he made no bones about calling in return favors. As a result, he got legislation passed. *Id.*

48. JEAN COBB, THE CENTER FOR PUBLIC INTEGRITY, *SHORT CHANGED: HOW CONGRESS AND SPECIAL INTERESTS BENEFIT AT THE EXPENSE OF THE AMERICAN PEOPLE* 1 (1991).

49. *Id.*

50. *Id.*

51. See, e.g., CIALDINI, *supra* note 3, at 28; Thomas Stratmann, *The Market for Congressional Votes: Is Timing of Contributions Everything?*, 41 J.L. & ECON. 85, 109–10 (1998). Similarly, some studies have linked favorable court outcomes to judicial campaign donations. See Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL’Y Q. 281, 282 (2007); Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002); Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at 1; Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES, Jan. 29, 2008, at A14. But see Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After Republican Party of Minnesota v. White, Caperton, and Citizens United*, 64 ARK. L. REV. 1, 1–5 (2011).

52. See CIALDINI, *supra* note 3, at 35–37.

53. *Id.* at 36; Kelton V. L. Rhoads & Robert Cialdini, *The Business of Influence: Principles That Lead to Success in Commercial Settings*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 513, 514 (James Price Dillard & Michael Pfau eds., 2002) (noting that the norm of reciprocity “obligates people to return assistance they may have received from others”).

technique.⁵⁴ When the requester wants someone (“the target”) to comply with a request, she can increase the likelihood of compliance by making a larger request at the outset.⁵⁵ When the target refuses, she can then make the intended smaller request.⁵⁶ The target is likely to comply with the smaller request because, by lessening the request, the target perceives the requester as having made a concession.⁵⁷ The proper reciprocal concession is to comply with the smaller request.⁵⁸

Some research suggests that the rejection-then-retreat technique is most effective when there is no time lapse between the requests and the smaller request immediately follows the larger one.⁵⁹ Significantly, one of the by-products of concession is a greater degree of satisfaction with the final agreement.⁶⁰

Kathryn Stanchi advocates the use of the rejection-then-retreat technique by advocates in legal writing.⁶¹ Stanchi notes that the plaintiff-respondent in *Meritor Savings Bank FSB v. Vinson*⁶² used this technique, possibly to her advantage. Specifically, Mechelle Vinson’s brief began with an attack on the grant of cer-

54. CIALDINI, *supra* note 3, at 37; DANIEL J. O’KEEFE, *PERSUASION: THEORY AND RESEARCH* 230 (2d ed. 2002).

55. CIALDINI, *supra* note 3, at 37; O’KEEFE, *supra* note 54, at 232–33.

56. CIALDINI, *supra* note 3, at 37–38; O’KEEFE, *supra* note 54, at 232–33.

57. O’KEEFE, *supra* note 54, at 232–33.

58. CIALDINI, *supra* note 3, at 38; O’KEEFE, *supra* note 54, at 233. Children are masters of the rule of reciprocal concessions. Most parents have found themselves in the middle of an exchange that goes something like this:

Child: “Can I go to Busch Gardens?”

Parent: “No.”

Child: “Then can Sara come over?”

Parent: “Ok.”

59. See O’KEEFE, *supra* note 53, at 233–34 (including other techniques such as keeping the identity of the requester the same and making the requests face-to-face).

60. See Alan A. Benton et al., *Effects of Extremity of Offers and Concession Rate on the Outcomes of Bargaining*, 24 *J. PERSONALITY & SOC. PSYCHOL.* 73, 73–74, 79–80 (1972) (finding that negotiators whose opponents made concessions during the course of the negotiation were more pleased with the final agreement than their counterparts whose opponents made few or no concessions, even though the former group ended up with less money).

61. Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 *MICH. ST. L. REV.* 411, 432–34 (2006).

62. 477 U.S. 57 (1986); Brief of Respondent Mechelle Vinson, *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1986 WL 728234, at *1, *9–44 [hereinafter Respondent’s Brief]; see Reply Brief of Petitioner at 1–6, *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1986 WL 728303, at *1–7 [hereinafter Petitioner’s Reply Brief].

tiorari.⁶³ It was a major request in two ways. First, the Supreme Court rarely overturns its decisions granting certiorari.⁶⁴ Second, granting the request would have been a “slam-dunk” win for Vinson because the court of appeals’ opinion from which the appeal originated was highly favorable to Vinson.⁶⁵ Though Vinson lost the certiorari argument, she prevailed in many of the following arguments and won the case overall.⁶⁶ Use of the rejection-then-retreat technique is probably not the reason why Vinson won the appeal, but it may have increased her chances of success.

The contrast principle enhances the effectiveness of the rejection-then-retreat technique.⁶⁷ The contrast principle provides that when we encounter two items, and the second is reasonably different from the first, our minds will accentuate the difference.⁶⁸ This principle is illustrated in Vinson’s arguments, as her arguments following her aggressive opening likely seemed less far-reaching than they actually were.

2. The Rule of Reciprocation in the Judicial System

The rule of reciprocation surfaces in our judicial system in several different forms. At the most basic level, the operation of a judicial system itself is a benefit conferred on litigants and society as a whole. The American judicial system is funded by tax dollars. In reality, the system is a gift we give to ourselves rather than a gift that the judicial system has conferred upon us. But the rule

63. Stanchi, *supra* note 61, at 432; Respondent’s Brief, *supra* note 62, at *9.

64. See Stanchi, *supra* note 61, at 432–33.

65. *Id.* at 433.

66. *Id.*

67. CIALDINI, *supra* note 3, at 40. Indeed, Cialdini credits the contrast principle as “the only really plausible explanation” of the Nixon campaign’s decision to break into the Democratic National Committee’s Watergate offices. *Id.* at 41. In a nutshell, before G. Gordon Liddy proposed his \$250,000 burglary plan, he proposed two other plans that far exceeded his final, successful proposal both in terms of price and stupidity. *Id.* at 41. As Jeb Magruder testified, “after starting at the grandiose sum of \$1 million, we thought that probably \$250,000 would be an acceptable figure. . . . We were reluctant to send him away with nothing.” *Id.* at 42. Magruder summed it up, saying that “[h]e had asked for the whole loaf when he was quite content to settle for half or even a quarter.” *Id.* at 42.

68. CIALDINI, *supra* note 3, at 12. Cialdini notes that retail salespeople capitalize on the contrast principle very effectively. *Id.* at 13. For example, when a customer needs two items, one more expensive than the other, retailers instruct their salespeople to show the customer the more expensive item first. *Id.* This way, when it comes time to select the second item, the pricier options will not seem so expensive by comparison. *Id.* As a result, the customer is more likely to spend more money. *Id.*

of reciprocation does not require a true gift; it requires only that the recipient perceives the benefit conferred as a true gift.⁶⁹ Participants in the judicial system frequently perceive the operation of the system itself as a gift, and they express gratitude for it. Operation of the system includes the judge and/or jury listening to testimony about a matter of great importance to the litigant. The judge participates in the system by reading about the dispute, requesting further information about it, reflecting on the dispute and what the consequences of a decision might be, and ultimately resolving the dispute. The system also includes more peripheral aspects of a litigant's experience, such as court staff that assist litigants throughout the course of the litigation by offering helpful information, welcoming them to the courthouse, maintaining informational websites, and, in the case of pro se litigants, providing resources to guide them through the litigation. Significantly, when litigants feel that they have been heard by a judge or jury, they are more satisfied with the result, even when the result is unfavorable.⁷⁰ It stands to reason that these litigants will be more likely to comply with decisions in their own case and in other cases.

The rule of reciprocation also enhances compliance with court decisions because society has a common interest in maintaining order. One reason we have an orderly society is that we have a highly effective and functional judicial system. If we want to maintain order, we must abide by court decisions—even decisions with which we disagree. Professor David S. Law makes a similar suggestion when he theorizes that people comply with court deci-

69. See CIALDINI, *supra* note 3, at 47–49.

70. For examples of studies that underscore the concept that people feel more satisfied with a result when the other party involved makes a concession, see E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 224–25 (1993) (presenting two studies in which the decision to accept an arbitrator's award or reject it and proceed to trial was strongly correlated with perceptions of procedural justice).

A second process factor that contributes to party satisfaction with mediation is the perceived fairness of the process. Most parties believe the mediation process is fair, regardless of how they define fairness, and this perception facilitates party satisfaction with mediation. Moreover, research suggests that perceptions of fairness promote compliance with mediation agreements; compliance, in turn, may increase the likelihood of party satisfaction with the process.

Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 892–93 (1998).

sions so that we can successfully coordinate our actions.⁷¹ To this end, while parties might wish for different outcomes in litigation, they likely share the same underlying desire to reach a result without resorting to violence.⁷² Through their participation in litigation, parties set the expectation that they will abide by the court's ruling. The winning side expects to, and will be expected to, exercise its rights under the court's ruling; the losing side expects to, and will be expected to, respect that exercise of rights.⁷³ Thus, the parties coordinate their actions to reach a non-violent resolution.

3. The Rule of Reciprocation in Judicial Opinions

a. The Gift of a Reason

Many courts issue written opinions along with their orders, particularly dispositive orders. Supreme Court opinions, the most far-reaching opinions impacting public policy, are always written. In issuing a written opinion, judges give the litigants and the general public reasons supporting their decision. The opinion, which is not required in every case, could be perceived as a sort of gift or favor in itself because a judge, or group of judges, put in time to provide the written justification for a decision. Moreover, the opinion is a representation that the judge or judges learned about, reflected on, researched, and decided a case—another possible group of gifts or favors. When a judicial opinion is viewed as a gift or favor in itself and as a representative of other gifts or favors, we may be more likely to comply with its directives. Thus, even though there are many reasons that courts write opinions,⁷⁴

71. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 757–58 (2009).

72. *Id.* at 758–59.

73. *See id.* at 759–60.

74. *See, e.g.*, Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 104 (2002) (stating that “judges derive the most utility from (and thus expend the greatest effort on) deciding cases in areas in which the opinion will bring the judge prestige and other reputational benefits”); Lawrence Baum, *Motivation and Judicial Behavior: Expanding the Scope of Inquiry* 1 (Univ. of Va. Workshop on Exploring the Judicial Mind, Mar. 30–31, 2007), <http://faculty.virginia.edu/judging/Documents/motivation.lb.pdf> (stating that the most important consideration in judicial decision-making is making good legal policy). *See generally* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990) (stating that commitment to good policy is more effective in providing judges with a self-perception of very high achievement or prestige).

so long as the recipient perceives it as a favor, she will more likely comply.

Social science research bears the conclusion out. Recall the Langer study in which people in line to use a copy machine complied with a request paired with an apparent reason.⁷⁵ Even when the reason was really not a reason, but rather a repetition of the request, the perception that the requester gave a reason was powerful enough to spark compliance in the vast majority of subjects. This may suggest that even when courts give inadequate reasons for a decision, the simple fact that they give reasons at all inspires compliance. The extent to which the appearance of a reason, however inadequate, inspires compliance likely differs depending on the audience. A personally involved litigant might not comply with an order just because it has some reasoning attached to it, however poor. However, the mere presence of a written opinion likely inspires some measure of compliance among the broader public, which has little reason to parse an opinion unless the opinion has some special personal or national significance (and even then, the vast majority of people likely rely on media organizations to digest and explain the substance of the decision).

b. The Gift of Concession

Judges also make concessions in their written opinions that may predispose their audiences to be more accepting of the decisions they reach. Though a judicial opinion is not a negotiation, judges nevertheless attempt to persuade their audiences that their decision is the correct one. Making concessions is an effective technique to encourage compliance.⁷⁶ There are at least three types of concessions judges make in their written opinions: stylistic, structural, and substantive. A stylistic concession is a statement, unnecessary to the resolution of the dispute, which creates an atmosphere of conciliation.⁷⁷ A structural concession gets its force from the way different paragraphs or entire portions of an opinion build up a reserve of goodwill on the part of the reader to cushion an upcoming part of the opinion that may be controversial or uncomfortable.⁷⁸ A structural concession may or may not

75. *Supra* text accompanying notes 15–23.

76. *See supra* text accompanying notes 52–58.

77. *See, e.g.*, discussion *infra* Part II.B.3.b.i.

78. *See, e.g.*, discussion *infra* Part II.B.3.b.ii.

be related to the merits of the decision.⁷⁹ A substantive concession is a concession on the merits of a particular legal argument.⁸⁰

The Supreme Court's opinion in *National Federation of Independent Business et al. v. Sebelius*,⁸¹ reviewing the constitutionality of the Patient Protection and Affordable Care Act⁸² ("Affordable Care Act"), offers excellent examples of each type of concession. Moreover, a reason the opinion is a particularly good one to review is that Chief Justice John Roberts clearly wrote it for both legal and non-legal audiences alike. For example, the entire introduction functions as an easy-to-read civics refresher on the enumeration of powers, the difference between state and federal power, restrictions on federal power, and the provisions of the Constitution at issue.⁸³ Notably, for legal readers, the introduction is technically superfluous because the refresher is not substantively necessary to the rest of the opinion. Chief Justice Roberts could have started with Part I. But he did not. And likely his choice was based, in part, on a desire to speak to the Court's audience, which encompassed a larger portion of the general public because of the dispute at issue.

i. Stylistic Concessions

In his introduction, Chief Justice Roberts makes several stylistic concessions. The very first paragraph of the opinion announces, "We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions."⁸⁴ The statement does not explicitly suggest that the Affordable Care Act is bad policy. But a reader inclined to believe that it is bad policy can easily perceive, lingering beneath the language, the suggestion that the Affordable Care Act may not, in fact, be good policy.⁸⁵ This language is, in

79. See, e.g., discussion *infra* Part II.B.3.b.iii.

80. See, e.g., discussion *infra* Part II.B.3.b.iv.

81. 567 U.S. ___, 132 S. Ct. 2566 (2012).

82. Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat. 119 (2010) (to be codified at 42 U.S.C. § 18001).

83. 567 U.S. at ___, 132 S. Ct. at 2572-79.

84. *Id.* at ___, 132 S. Ct. at 2577.

85. Recall that the rule of reciprocity works not only when the gift or favor or concession truly is what it purports to be, but also when the recipient perceives it as such, even if that perception is incorrect. See *supra* text accompanying notes 52-58.

effect, the Court's concession to those who believe that the Affordable Care Act is not good policy. In the penultimate paragraph of the introduction, Chief Justice Roberts reiterates the concession: "Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments."⁸⁶ Again, though not explicitly stated, a reader who believes that the Affordable Care Act is a poor policy choice can certainly impute a similar belief to the Court. With these two concessions, neither of which is necessary to resolve the substantive issues, Chief Justice Roberts creates an atmosphere of conciliation with readers who are opposed to the Affordable Care Act.

Significantly, Chief Justice Roberts does not make all of his concessions to one side. Like the savvy interest group that donates to both political candidates in a race, Chief Justice Roberts appears to make a concession to those who support the Affordable Care Act as well. In the final paragraph of the introduction, he inserts a well-placed quote by former Chief Justice John Marshall: "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional."⁸⁷ A reader who believes that the Affordable Care Act is good policy can interpret the quote to suggest that the Affordable Care Act is a well-timed response to the current challenges of the healthcare system—even though it may not be constitutional. In other words, any upcoming decision by the Court that the Affordable Care Act is unconstitutional is not a slight on the value of the policy choice. Just like his two concessions to anti-Affordable Care Act readers, Chief Justice Roberts' concession to pro-Affordable Care Act readers is completely unnecessary to resolve the substantive issues. The value it adds to the opinion is solely atmospheric.

ii. Structural Concessions

Chief Justice Roberts also makes structural concessions in his introduction. For example, he starts his structural concession with four paragraphs that provide an overview of Congress's

86. 567 U.S. at ___, 132 S. Ct. at 2579.

87. *Id.* (quoting John Marshall, *A Friend of the Constitution*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 190–91 (Gerald Gunther ed., 1969)).

power under the Commerce Clause and the Tax Clause, the two constitutional provisions at issue in the case.⁸⁸ Significantly, he presents each power as broad and far-reaching:

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop.

Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. These offers may well induce the States to adopt policies that the Federal Government itself could not impose.⁸⁹

Chief Justice Roberts uses the most far-reaching decisions on the Commerce Clause to illustrate the extent of the commerce power: it "has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop."⁹⁰ The message is clear: the government's reach goes far.

Next, Chief Justice Roberts characterizes the taxing and spending powers. The taxing power "gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activ-

88. *Id.* at ___, 132 S. Ct. at 2578-79.

89. *Id.* (citations omitted).

90. *Id.* (citing *Wickard v. Filburn*, 317 U.S. 111 (1942); *Perez v. United States*, 402 U.S. 146 (1971)).

ity that it cannot authorize, forbid, or otherwise control.”⁹¹ Similarly, Congress “may condition [offers of funds to states] on compliance with specified conditions. These offers may well induce the States to adopt policies that the Federal Government itself could not impose.”⁹² Again, the message is clear: the government’s reach goes even farther.

Chief Justice Roberts does not stop there: he follows his broad characterization of the Commerce and Tax Clauses with an even more sweeping description of the Necessary and Proper Clause:

The reach of the Federal Government’s enumerated powers is broader still because the Constitution authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” We have long read this provision to give Congress great latitude in exercising its powers: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”⁹³

Chief Justice Roberts uses words like “broader still” and “great latitude” to underscore the broad reach of the government through the Necessary and Proper Clause. And again, the message is clear: the government’s reach goes farther still.

But Chief Justice Roberts does not stop there. He next explicitly characterizes the Court’s reading of these powers as “permissive.”⁹⁴ According to Chief Justice Roberts, this is because the Court is reticent to strike down laws passed by elected officials.⁹⁵ In his own words:

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation’s elected leaders. “Proper respect for a coordinate branch of the government” requires that we strike down an Act of Congress only if “the lack of constitutional authority to pass [the] act in question is clearly demonstrated.” Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people

91. *Id.* at ___, 132 S. Ct. at 2579.

92. *Id.* (citations omitted).

93. *Id.* (citations omitted).

94. *Id.*

95. *Id.*

disagree with them. It is not our job to protect the people from the consequences of their political choices.⁹⁶

It is only after Chief Justice Roberts has carefully set the stage with sweeping government power and cautious judicial restraint does he mention the Court's responsibility to ensure that the legislature acts within the limits set by the Constitution:

Our deference in matters of policy cannot, however, become abdication in matters of law. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.⁹⁷

Make no mistake: the Court's power is an awesome one. But by the time the reader gets to this part of the introduction, the reader has just worked through a several-paragraph build up of the expansive powers of the federal government. The one paragraph on the Court's power is small and unremarkable by comparison.

The structure that Chief Justice Roberts used could very well create an atmosphere of conciliation for readers who believe that the federal government has expansive power under the Commerce Clause, and therefore the individual mandate was a valid exercise of the Commerce power. By juxtaposing these several paragraphs with his single-paragraph description of the Court's power, he creates an impression that the Court's power is very limited, and the Court exercises that power only in the most limited of circumstances. Notably, Chief Justice Roberts could have trimmed down or omitted altogether the several paragraph build-up, and he could have been far more generous in his treatment of the Court's power and dedicated just as much ink to it as he did to Congress's power. But to have structured it any other way would have had a vastly different effect and would not have created an atmosphere of conciliation for the same group of readers.

96. *Id.* (citations omitted).

97. *Id.* at ___, 132 S. Ct. at 2579-80.

iii. Mixed Structural and Substantive Concessions

Chief Justice Roberts also makes mixed structural and substantive concessions. He begins the merits discussion of the opinion by issuing a win to both sides of the case and holding that the Anti-Injunction Act (“AIA”) does not apply to bar the suit.⁹⁸ This is a win for both sides because the parties agreed that the AIA did not apply to bar the suit.⁹⁹ The win is a particularly well-placed concession because it precedes major upcoming losses for both sides.

It bears noting that the AIA concession derives much of its power as a structural concession from its placement at the beginning of the merits discussion. But unlike the structural concessions in his introduction, it is less likely that Chief Justice Roberts placed the AIA concession at the beginning strategically to create an atmosphere of conciliation. The issue was jurisdictional, and the Court decides jurisdictional issues before turning to the resolution of the actual dispute before it. Nevertheless, the effect on the audience is still the same: it creates an atmosphere of conciliation. As mentioned earlier, it is the effect on the recipient that makes the rule of reciprocity work, not the donor’s intent.¹⁰⁰

iv. Substantive Concessions

Now that both sides have chalked up a win, Chief Justice Roberts turns to the merits of the individual mandate. The rule of reciprocity operates in different ways in the treatment of the individual mandate. First, Chief Justice Roberts rejects the government’s primary argument that the mandate is a valid ex-

98. *Id.* at ___, 132 S. Ct. at 2584.

99. *See id.* at ___, 132 S. Ct. at 2582. The government, however, did advance the argument that the AIA barred the suit in the district court. The government lost the argument and did not raise it on appeal. *See id.* As a strategic decision, raising the AIA argument was a risky move. It would have insulated the individual mandate from review until 2014. *See id.* This could have been beneficial to the government because the tide of public opinion could have lessened, if not reversed, by then. On the other hand, it is not clear that putting off a decision on the merits is much of a win for the government, particularly given that there is no way to predict the composition of the Court. Furthermore, the AIA argument does not appear entirely consistent with the government’s constitutional arguments. *See id.*; *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 602 (E.D. Va. 2010).

100. *See supra* text accompanying note 69.

ercise of Congress's power under the Commerce Clause.¹⁰¹ Then, he accepts the government's alternative argument that the mandate is a valid exercise of Congress's tax power.¹⁰²

On its face, it appears the government might have used the rejection-then-retreat strategy¹⁰³ in an effective way to get what it wanted from the Court. To have used the rejection-then-retreat strategy, the government would have had to advance the Commerce Clause argument first as its ideal argument, but one that the government knew was really a stretch, similar to Mechelle Vinson's opening certiorari argument.¹⁰⁴ The government would have had to follow its Commerce Clause argument with its "real," more reasonable argument under the Tax Clause, like Vinson's arguments on the merits of her case. But it is highly unlikely this was the government's intent because the government's arguments did not fit the typical rejection-then-retreat scenario. The government's Commerce Clause argument, even to those who disagree with it, is not an extreme stretch.¹⁰⁵ It certainly was not merely a ploy to set up the "real" argument under the Tax Clause. The fact that the government's arguments do not fit the traditional mold begs a closer inspection of how else the rule could be working.

Instead of the government using the rule of reciprocity on the Court to get what it wanted, perhaps Chief Justice Roberts is using the appearance of following the rule to market his opinion. Specifically, Chief Justice Roberts presents the individual mandate section of the opinion in a way that could be read to suggest that the government's Commerce Clause arguments are an extreme stretch. For example, he characterizes the attempted exercise of the commerce power as if it were a brand new exercise of power, unlike anything encountered by the Court before.¹⁰⁶ Simi-

101. 567 U.S. at ___, 132 S. Ct. at 2585–91.

102. *Id.* at ___, 132 S. Ct. at 2593–2601.

103. Recall that the rejection-then-retreat strategy is one in which the requester poses a major request likely to be denied at the outset in order to set up the intended request, which is much smaller and more reasonable. *See supra* text accompanying notes 54–58.

104. *See supra* text accompanying notes 62–68.

105. Indeed, the government persuaded at least some members of the Court to its side. *See* 567 U.S. at ___, 132 S. Ct. at 2609–10 (Ginsburg, J., concurring in part and dissenting in part).

106. *Id.* at ___, 132 S. Ct. at 2588 (stating that the government's theory "go[es] much further" than even "the most far reaching example of Commerce Clause authority over intrastate activity").

larly, the government's related Necessary and Proper Clause argument "work[s] a substantial expansion of federal authority."¹⁰⁷ Chief Justice Roberts' conclusions on the Commerce Clause—dubbed "newly minted constitutional doctrine" by Justice Ruth Bader Ginsburg¹⁰⁸—may seem a little more palatable next to his acceptance of the mandate under the tax power. By appearing to follow the rule of reciprocation and at least concede something, Chief Justice Roberts may have made certain readers feel more comfortable accepting what they perceived to be the more controversial Commerce Clause part of the opinion.

C. *Commitment and Consistency*

1. An Overview of the Consistency Principle

Another powerful psychological force that pushes us to make decisions we otherwise would not have made is the desire to maintain consistency among our thoughts and our actions.¹⁰⁹ Consistency is highly valued in our culture.¹¹⁰ We associate consistency with honesty, stability, and reliability; we associate inconsistency with erratic behavior, confusion, and instability.¹¹¹ Consistency is therefore typically an effective and efficient proxy for good decision-making.¹¹² As a result, we tend to automatically exhibit consistent behavior—even when doing so is against our best interests.¹¹³

107. *Id.* at ___, 132 S. Ct. at 2592.

108. *Id.* at ___, 132 S. Ct. at 2618 (Ginsburg, J., concurring in part and dissenting in part).

109. CIALDINI, *supra* note 3, at 53. Some forms of the theory are known as the theory of cognitive dissonance, in which "the presence of a cognitive inconsistency of sufficient magnitude will evoke an aversive motivational state—dissonance—that drives cognitive work aimed at reducing the cognitive inconsistency." Eddie Harmon-Jones, *A Cognitive Dissonance Theory Perspective on Persuasion*, in *THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE* 100 (James Price Dillard & Michael Pfau eds., 2002); *see also* RICHARD M. PERLOFF, *THE DYNAMICS OF PERSUASION: COMMUNICATION AND ATTITUDES IN THE 21ST CENTURY* 225–28 (2d ed. 2003). *See generally* G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (2d ed. 2006).

110. *See* CIALDINI, *supra* note 3, at 53.

111. *See* Kennon M. Sheldon et al., *Trait Self and True Self: Cross-Role Variation in the Big-Five Personality Traits and Its Relations with Psychological Authenticity and Subjective Well-Being*, 73 *J. PERSONALITY & SOC. PSYCHOL.* 1380, 1381 (1997).

112. CIALDINI, *supra* note 3, at 54.

113. *Id.*

Our desire to maintain consistency is particularly powerful once we have committed to a position or a course of action.¹¹⁴ Psychologist Steven J. Sherman demonstrated the power of commitment in his 1980 study of Bloomington, Indiana residents.¹¹⁵ He called residents to ask what they would say if called by a certain charity to spend a few hours fundraising on the charity's behalf.¹¹⁶ Many residents said they would.¹¹⁷ When the charity actually did call to ask the same people to fundraise a few days later, the charity experienced a 700% increase in volunteers.¹¹⁸

The consistency principle draws a significant amount of its power from our inner desire to remain consistent.¹¹⁹ Once we make a decision, we create additional reasons to justify our choice.¹²⁰ For example, some car dealerships offer customers an outstanding price on a car, sometimes several hundred dollars below competitors' prices.¹²¹ Later in the process, something happens to remove that several hundred dollar advantage from the sales price, such as the salesperson discovers an error, the supervisor says no, or they need to add air conditioning to the package at an additional price.¹²² Even though the several hundred dollar advantage may be the only reason why the customer began negotiations with the dealership, most customers will not back out at this point because they have created in their minds other reasons to pursue the deal.¹²³

114. *Id.* at 59.

115. See Steven J. Sherman, *On the Self-Erasing Nature of Errors of Prediction*, 39 J. PERSONALITY & SOC. PSYCHOL. 211, 217-19 (1980).

116. *Id.* at 217.

117. *Id.*

118. *Id.*

119. CIALDINI, *supra* note 3, at 83.

120. See *id.* at 84. See generally JOEL BROCKNER & JEFFERY Z. RUBIN, *ENTRAPMENT IN ESCALATING CONFLICTS: A SOCIAL PSYCHOLOGICAL ANALYSIS* (1985) (describing how a desire to remain consistent can entrap a person in a decision); ALLAN I. TEGER ET AL., *TOO MUCH INVESTED TO QUIT* (1980) (describing consistency as a justification for prior investments of time and money).

121. CIALDINI, *supra* note 3, at 84; RICHARD M. PERLOFF, *THE DYNAMICS OF PERSUASION: COMMUNICATION AND ATTITUDES IN THE 21ST CENTURY* 266 (4th ed. 2010).

122. CIALDINI, *supra* note 3, at 84; PERLOFF, *supra* note 121, at 266

123. CIALDINI, *supra* note 3, at 84-85; PERLOFF, *supra* note 121, at 266. Perloff refers to this technique as "low-balling," stating that it occurs when:

a persuader induces someone to comply with a request and then "ups the ante" by increasing the cost of compliance. Having made the initial decision to comply, individuals experience dissonance at the thought that they may have to back away from their commitment. Once individuals have committed

2. The Consistency Principle Forms the Foundation of our Judicial System

The consistency principle provides some of the fundamental tenets of our legal system, such as treating like cases alike.¹²⁴ Justice Stephen Breyer notes “[a] just legal system seeks not only to treat different cases differently but also to treat like cases alike.”¹²⁵ The use of precedent ensures that judges actually treat like cases alike.¹²⁶

Similarly, courts typically interpret the same statutory language to mean the same thing, even when the language is used in different schemes.¹²⁷ As then-Chief Judge Carolyn King explained, “as a matter of statutory interpretation, in determining the meaning of a particular statutory provision, it is helpful to consider the interpretation of other statutory provisions that employ the same or similar language.”¹²⁸

The doctrine of *stare decisis* is the formal constraint built into the system to ensure consistency. Treating like cases alike, and similar language similarly, is not only an accepted form of administering justice but a shortcut that saves judges from re-inventing the proverbial wheel every time they encounter a new dispute.¹²⁹ Just as the consistency principle relieves people from having to think through and evaluate each decision throughout the day, the

themselves to a decision, they are loath to change their minds, even when the cost of a decision is raised significantly and unfairly.

PERLOFF, *supra* note 121, at 266.

124. See H. L. A. HART, *THE CONCEPT OF LAW* 159 (3d ed. 2012) (“Treat[ing] like cases alike and different cases different is a central element in the idea of Justice”); ARISTOTLE, *NICOMACHEAN ETHICS* 162–63 (Sarah Broadie ed., Christopher Rowe trans., Oxford University Press 2002).

125. *Pepper v. United States*, 562 U.S. ___, ___, 131 S. Ct. 1229, 1252 (2011) (Breyer, J., concurring).

126. Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 596 (1987) (explaining that the use of precedent to treat like cases alike also ensures that courts reach fair decisions).

127. See, e.g., *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 233 (5th Cir. 2001) (interpreting language in the Americans with Disabilities Act that also appears in Title VII to mean the same thing); *Jeldness v. Pearce*, 30 F.3d 1220, 1227 (9th Cir. 1994) (interpreting identical language in Title VI and Title IX to mean the same thing).

128. *Flowers*, 247 F.3d at 233 n.4.

129. See *Conway v. Town of Wilton*, 680 A.2d 242, 246 (Conn. 1996) (discussing the doctrine of *stare decisis*).

constraints of precedent similarly free judges.¹³⁰ In other words, the consistency principle leads to “decisional efficiency.”¹³¹

3. The Consistency Principle at Oral Argument

Judges capitalize on the consistency principle in conducting oral argument. Justice Ginsburg’s academic oral argument style¹³² lends itself well to use of the consistency principle. Consider the follow excerpt from *Carey v. Musladin*:¹³³

JUSTICE GINSBURG: But in here it--you agree that the California court has as much authority to say what Federal law is as the Ninth Circuit, right? They are on a par. Ninth Circuit decisions in no way bind[] the Supreme Court of California. Isn’t that so?

MR. FERMINO: That is correct.

JUSTICE GINSBURG: So that this state court of appeals chose to be respectful to the Ninth Circuit to consider what it had said, doesn’t sound to me like a very strong argument.

MR. FERMINO: Well, Justice Ginsburg, I would respectfully disagree. . . .¹³⁴

Justice Ginsburg first states an indisputable proposition with which the attorney has to agree: the Ninth Circuit does not bind the Supreme Court of California and vice versa. As Justice Ginsburg surely expected, the attorney did agree. Once she secured his agreement, she notes that the argument that a state court chose to defer to the Ninth Circuit does not carry much weight. Although the attorney disagreed, the way that Justice Ginsburg set up the questions made it difficult for the attorney to hold his ground.

Justice Thurgood Marshall did much the same thing in *Chimel v. California*:¹³⁵

JUSTICE MARSHALL: . . . [M]ay I break in just one moment on the other point? Assuming that they know, they are confident that this man committed this robbery, and they see him in this side of town,

130. Schauer, *supra* note 126, at 599.

131. *Id.*

132. See James C. Phillips & Edward L. Carter, *Oral Arguments in the Early Roberts Court: A Qualitative and Quantitative Analysis of Individual Justice Behavior*, 11 J. APP. PRAC. & PROCESS 325, 373 (2010) (characterizing Justice Ginsburg as the “[c]onsummate [a]cademic” in oral arguments).

133. 549 U.S. 70 (2006).

134. Transcript of Oral Argument at 29–30, *Carey v. Musladin*, 549 U.S. 70 (2006) (No. 05-785).

135. 395 U.S. 752 (1969).

going toward his home. Is it possible that some detective would say, "Well, if we arrest him here, we can only search his person; but if we let him go home, and then arrest him, we can search the attic, the garage, and anything else," is that possible?

MR. GEORGE: It is possible that officers would do that and definite—

JUSTICE MARSHALL: Well, what is different about that case and this case?

MR. GEORGE: I think it's improper when officers do that. We concede that, and there are cases so holding, that it's improper.

JUSTICE MARSHALL: Well, didn't they deliberately wait at home for him? They knew where he was.¹³⁶

Unlike the attorney in *Carey*, the attorney in *Chimel* shied away from answering the question in a way that would make him look inconsistent (i.e., arguing that there is a difference between waiting at home and following the defendant there). The attorney instead provided a chronicle of the events of the officer's day in response.¹³⁷ The chronicling happened to put the officer at the defendant's house around the time the defendant got off work.¹³⁸ But still, the development of the questions made it difficult for the attorney to field Justice Marshall's critical question while maintaining consistency in his responses.

4. The Consistency Principle in Judicial Opinions

Judges also capitalize on the consistency principle when crafting their opinions. One of the most poignant examples comes from the iconic *Walker v. City of Birmingham*.¹³⁹ The petitioners in the case, civil rights leaders including Martin Luther King, Wyatt Tee Walker, Ralph Abernathy, and Raymond Shuttlesworth, appealed their convictions for criminal contempt for violating a temporary injunction prohibiting them from parading in Birmingham, Alabama without a properly issued city permit.¹⁴⁰ The case divided the Supreme Court in a 5-4 vote, with three of the four dissenters writing separately.¹⁴¹

136. Transcript of Oral Argument, *Chimel v. California*, 395 U.S. 752 (1969) (No. 770).

137. *Id.*

138. *Id.*

139. 388 U.S. 307 (1967).

140. *Id.* at 311-13.

141. See generally *id.* at 307-08, 324, 334, 338.

The injunction that the petitioners violated essentially copied the language of the Birmingham parade ordinance into a court order.¹⁴² The petitioners contended that the ordinance was unconstitutional, and as a result, the injunction was unconstitutional as well.¹⁴³ Nevertheless, the Court held that they violated the injunction.¹⁴⁴ When the court held them in contempt, it would not entertain arguments as to the constitutionality of the language of the injunction; instead, both the Alabama courts and the Supreme Court ultimately held that the petitioners should have obeyed the injunction and challenged its constitutionality in a direct proceeding instead of the collateral contempt proceeding.¹⁴⁵

The tenor of the dissenting opinions suggests that race played a part in the Alabama state courts' decisions in the case¹⁴⁶ and in the Supreme Court's decision.¹⁴⁷ In justifying its opinion, the majority brought the consistency principle to bear by noting that the Supreme Court of Alabama had not only applied the same rule of law in the past but that it had done so to a group that presumably opposed the civil rights movement:

The Alabama Supreme Court has apparently never in any criminal contempt case entertained a claim of nonjurisdictional error. In *Fields v. City of Fairfield*, decided just three years before the present case, the defendants, members of a "White Supremacy" organization who had disobeyed an injunction, sought to challenge the constitutional validity of a permit ordinance upon which the injunction was based. The Supreme Court of Alabama, finding that the trial court had jurisdiction, applied the same rule of law which was followed here¹⁴⁸

142. *Id.* at 324 (Warren, C.J., dissenting) (observing that the "ordinance was copied into an injunction").

143. *Id.* at 341 (Brennan, J., dissenting) (noting that "[s]everal of the Negro ministers issued statements that they would refuse to comply with what they believed to be, and is indeed, a blatantly unconstitutional restraining order").

144. *Id.*

145. *Id.* at 317-21.

146. *See, e.g., id.* at 338-39 (Brennan, J., dissenting) ("These were the days when Birmingham was a world symbol of implacable official hostility to Negro efforts to gain civil rights, however peacefully sought.").

147. *See, e.g., id.* at 338 (Brennan, J., dissenting) (internal quotation marks omitted) ("Under cover of exhortation that the Negro exercise 'respect for judicial process,' the Court empties the Supremacy Clause of its primacy by elevating a state rule of judicial administration above the right of free expression guaranteed by the Federal Constitution.").

148. *Id.* at 319-20 (citations omitted).

The Supreme Court's use of the consistency principle is masterful. It makes the dissenters' suggestions that racial bias tainted the judicial process appear, at the very least, questionable.

5. The Consistency Principle and Our National Identity

Finally, part of our national identity is a commitment to the rule of law. As Americans, we pride ourselves on following the rules, even when the outcome is undesired. To ignore or disregard judicial directives would seriously threaten our self-perception. As a result, to remain consistent with our own internal self-perception, we do what courts tell us to do.¹⁴⁹

D. *Social Proof*

1. An Overview of Social Proof

"[W]e determine what is correct by finding out what other people think is correct."¹⁵⁰ More specifically, we perceive behaviors as acceptable or correct based on whether and to what extent we see others engaging in those behaviors.¹⁵¹ Stanley Milgram and his fellow researchers tested their theory of social proof on a street corner in New York City.¹⁵² When one planted person stared up at a building for a minute, pedestrians just passed him by.¹⁵³ The next day, five people stood on the corner and looked up.¹⁵⁴ This time, about three times as many pedestrians stopped, and about eighty percent of the pedestrians looked up as well.¹⁵⁵ Social proof is a powerful tactic of influence. This is why television producers use laugh tracks, bartenders salt their tip jars, charities publicize

149. The desire to remain consistent with self-perception likely also incentivizes judges to behave in certain ways. For example, judges may adhere to precedent they may not like or agree with on a policy level because they perceive themselves as professionals who uphold and apply the law. See Donald P. Judges, *Who Do They Think They Are?*, 64 ARK. L. REV. 119, 170–76 (2011).

150. CIALDINI, *supra* note 3, at 99; see Janetta Lun et al., (*Why*) *Do I Think What You Think? Epistemic Social Tuning and Implicit Prejudice*, 93 J. PERSONALITY & SOC. PSYCHOL. 957, 957 (2007).

151. CIALDINI, *supra* note 3, at 99.

152. Stanley Milgram et al., *Note on the Drawing Power of Crowds of Different Size*, 13 J. PERSONALITY & SOC. PSYCHOL. 79, 80 (1969).

153. *See id.*

154. *Id.*

155. *Id.*

the names of donors, and advertisers emphasize how many people are using their products.¹⁵⁶ The poor reputation of the proverbial lemming aside, other peoples' actions are typically an effective proxy for good decision-making.¹⁵⁷ As a result, we use social proof as a shortcut in making our decisions.¹⁵⁸ Unsurprisingly, social proof is most powerful when (1) we are unsure of ourselves or uncertain of our surroundings or our current circumstances, and (2) when the others to whom we look for guidance are similar to us.¹⁵⁹

Some commentators have credited social proof as a reason that investors voluntarily sign away their rights to sue and agree to arbitration or waive their brokers' fiduciary duties when doing so is potentially against their interests: if the clause is in the broker's form contract, others must be signing it, and so it is probably okay for them to sign as well.¹⁶⁰

2. Social Proof in the Judicial System

From the social proof perspective, complying with the directives issued from the judicial system is something of a self-fulfilling prophecy. Everyone else seems to be doing it, so it must be the right thing to do. Moreover, social proof is at the core of our system in multiple ways. For example, the doctrine of *stare decisis* is foundational in legal analysis and decision-making. Relying

156. CIALDINI, *supra* note 3, at 99–100.

157. CIALDINI, *supra* note 3, at 99; *see, e.g.*, HANDBOOK OF SOCIAL PSYCHOLOGY 41 (Susan T. Fiske et al. eds., 5th ed. 2010).

158. CIALDINI, *supra* note 3, at 99; HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 157, at 41.

159. Gretchen B. Sechrist & Charles Stangor, *When Are Intergroup Attitudes Based on Perceived Consensus Information?*, 2 SOC. INFLUENCE 211, 231 (2007); David B. Wooten & Americus Reed II, *Informational Influence and the Ambiguity of Product Experience: Order Effects on the Weighting of Evidence*, 7 J. CONSUMER PSYCHOL. 79, 79–81 (1998) (noting that consumers are susceptible to normative and informational influence); Emily M. Zitek & Michelle R. Hebl, *The Role of Social Norm Clarity in the Influenced Expression of Prejudice Over Time*, 43 J. EXPERIMENTAL SOC. PSYCH. 867, 874 (2007) (noting that one person's acceptance of discrimination can influence the prejudice-related views of another).

160. *See, e.g.*, Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059, 1079 (2011) (“There are a lot of people like me investing in the stock market and they all signed this contract, too.”); G. Richard Shell, *Fair Play, Consent, and Securities Arbitration: A Comment on Speidel*, 62 BROOK. L. REV. 1365, 1368–69 (1996) (noting how consumers have many things to worry about and thus they tend to pass over boilerplate language); *cf.* Eric A. Zacks, *Unstacking the Deck? Contract Manipulation and Credit Card Accountability*, 78 U. CIN. L. REV. 1471, 1476 (2010) (suggesting that social proof spurs card holders to refrain from negotiating credit card agreements).

on precedent not only ensures that our courts are consistent but it ensures that judges use the collective decision-making of their predecessors when analyzing and applying the law. Judges cite precedent to communicate to their audience—the litigants, panel members, reviewing courts, legal readers, other judges—that they are relying on collective wisdom. As a result, a heavily cited proposition is more persuasive because it appears to be more correct to the reader.¹⁶¹

Reliance on precedent is an antidote to charges of partisan or activist decision-making.¹⁶² As a result, it is hardly surprising that the Supreme Court bolsters the appeal of disputed propositions of law with extensive citation.¹⁶³ For example, in *Walker v. City of Birmingham*,¹⁶⁴ Justice Potter Stewart, writing for a hotly divided court, insisted that all courts follow the simple rule that a litigant may not violate an injunction and collaterally attack it later.¹⁶⁵ Justice Stewart offered not less than thirteen cases to support his statement.¹⁶⁶ With so much support, the proposition seems indisputable. It is not until the reader actually reads those cases cited or reaches the various dissents that it becomes clear that Justice Stewart's articulation of the issue is not so simple or so well supported in the context of the First Amendment.

Similarly, the more subsequent courts cite a particular opinion, the more correct or important that opinion appears to be. To this end, an opinion that is cited frequently by subsequent courts is considered stronger or more important than an opinion that future courts ignore.¹⁶⁷ As a result, some commentators suggest that

161. Cf. Susan W. Fox & Wendy S. Loquasto, *The Art of Persuasion Through Legal Citations*, 84 FLA. B.J. 49, 49–50 (2010) (suggesting that the same reasoning applies in the context of writing appellate briefs).

162. Frank B. Cross & James F. Spriggs, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 418 (2010) (internal quotation marks omitted) (noting that courts rely on precedent to increase the legitimacy of their opinions: “Individuals consider Supreme Court decisions legitimate because of the perception that they are based on case-relevant information and not political pressures and public opinion.”).

163. Furthermore, research suggests that Justices write differently when they write majority opinions versus dissents. See Lance N. Long & William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court*, 91 OR. L. REV. 933, 949–50, 953–54 (2013). In the latter, for example, they use more intensifiers and stronger language. *Id.* at 949–50.

164. 388 U.S. 307 (1967).

165. See *id.* at 314.

166. See *id.* at 314 n.5.

167. See Cross & Spriggs, *supra* note 162, at 418 (“[T]he repeated use of precedents re-

judges cite to their own opinions to increase the power of their past opinions.¹⁶⁸ In addition, this has the effect of increasing the perceived power of the writing judge.

Studies also show that judges harness the power of social proof to influence fellow panel members. For example, a judge is more likely to cite to legislative history created by legislators who share her fellow panel members' political persuasion.¹⁶⁹ Such use of social proof is likely particularly persuasive because it points panel members not to legislators in general, but specifically to legislators that share similar political opinions.

Finally, our jury system is embedded with principles of social proof. Part of the reason we trust juries with complex cases is because we generally believe that twelve heads are better than one. Juries legitimize trial verdicts because we are more likely to perceive the judgment of a large group to be correct than a sole decision-maker.¹⁷⁰

E. *Liking*

1. An Overview of Liking

Similar to the rule of reciprocation and social proof, the rule of liking operates in our judicial system. The rule of liking is quite simple: we comply with people we like.¹⁷¹ Compliance professionals take advantage of this rule in a variety of ways. The Tupperware Corporation became famous for conducting all of its sales through home parties.¹⁷² Instead of an unknown salesperson making the pitch, the host, a friend to all of the attendees, encourages

inforces their own significance.”).

168. *Id.* at 419.

169. See Michael Abramowicz & Emerson H. Tiller, *Citation to Legislative History: Empirical Evidence on Positive Political and Contextual Theories of Judicial Decision Making*, 38 J. LEG. STUD. 419, 420–22 (2009) (noting that “Democrat-appointed judges favor citations of Democrat legislators and Republican-appointed judges favor Republican legislators”).

170. See *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1432–33 (1997). Though the article really focuses on the appearance of citizen participation in government and deflecting criticism away from the judge and dispersing it among a group of individuals, it is likely that the jury's most powerful legitimating force is simply one of numbers. We are more likely to comply with a decision that was made by a group of people rather than one.

171. CIALDINI, *supra* note 3, at 142.

172. *Id.*

guests to buy products (in exchange she gets a cut of the proceeds).¹⁷³ The sales experience is intertwined with feelings of friendship and obligation.¹⁷⁴ Significantly, the closeness of the friendship between the host and guest is much more likely to determine whether the guest purchases a product than preference for the product itself.¹⁷⁵ The Tupperware model has exploded, and it now reaches kitchenware (Pampered Chef), accessories (Silpada Jewelry), home décor (Southern Living), and other markets.

Although liking may appear difficult to quantify and predict because of its subjective nature, certain markers predict who we will like. Those markers include physical attractiveness, similarity, positive feedback, familiarity, cooperation, and favorable association.

First, we like physically attractive people.¹⁷⁶ We associate good-looking people with a host of favorable qualities, like kindness, honesty, and intelligence.¹⁷⁷ Well-groomed job applicants are more likely to be hired.¹⁷⁸ After attractive people are hired, they get paid more than their less attractive counterparts.¹⁷⁹ Attractive people also fare better in the legal system.¹⁸⁰ Good-looking criminal defendants are less likely to go to jail.¹⁸¹ In civil cases, plaintiffs collect more when they are more attractive than defendants; better-looking defendants pay less.¹⁸²

173. *Id.*

174. *Id.*; see Rex Taylor, *Marilyn's Friends and Rita's Customers: A Study of Party-Selling as Play and as Work*, 26 SOC. REV. 573 (1978).

175. CIALDINI, *supra* note 3, at 142.

176. *Id.* at 146; Ingrid R. Olson & Christy Marshuetz, *Facial Attractiveness Is Appraised in a Glance*, 5 EMOTION 498, 498 (2005).

177. CIALDINI, *supra* note 3, at 146; Judith H. Langlois et al., *Maxims or Myths of Beauty? A Meta-Analytic and Theoretical Review*, 126 PSYCHOL. BULL. 390, 390 (2000).

178. Denise Mack & David Rainey, *Female Applicants' Grooming and Personnel Selection*, 5 J. SOC. BEHAV. & PERSONALITY 399, 400 (1990).

179. Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1186 (1994) (describing a study that demonstrated significantly lower hourly earnings for homely men and women).

180. A. Chris Downs & Philip M. Lyons, *Natural Observations of the Links Between Attractiveness and Initial Legal Judgments*, 17 PERSONALITY & SOC. PSYCHOL. 541, 545 (1991); Karl L. Wuensch et al., *Effects of Defendant Attractiveness and Type of Crime on Juridical Judgment*, 6 J. SOC. BEHAV. & PERSONALITY 713, 714 (1991).

181. John E. Stewart II, *Appearance and Punishment: The Attraction-Leniency Effect in the Courtroom*, 125 J. SOC. PSYCHOL. 373, 374, 377 (1980); Wuensch et al., *supra* note 180, at 714.

182. See Richard A. Kulka & Joan B. Kessler, *Is Justice Really Blind?—The Influence of Litigant Physical Attractiveness on Judicial Judgment*, 8 J. APPLIED SOC. PSYCHOL. 366,

In addition to attractive people, we are also more likely to like people who are similar to us.¹⁸³ We like people who are similar to us in a variety of ways, from dress to political ideology to background.¹⁸⁴ For instance, insurance salespersons sell more insurance to customers of a similar age, religion, political ideology, and cigarette smoking status.¹⁸⁵ People are more likely to fill out and return a mailed survey when the name on the return address is similar to their own.¹⁸⁶ Given the research, it is not surprising that sales training programs frequently advise trainees to mirror their customer's posture, mood, and speaking style.¹⁸⁷

We also like things and people that are familiar to us.¹⁸⁸ We are more likely to vote for politicians whose names sound familiar¹⁸⁹ and prefer products that appear familiar.¹⁹⁰ The connection between familiarity and liking is largely unconscious.¹⁹¹ We are

374 (1978) ("Physical attractiveness of litigants did indeed have a significant impact on juristic decisions [The] effect was found for both the direction of subject verdicts . . . and the size of damages awarded to the plaintiffs.")

183. CIALDINI, *supra* note 3, at 148; *see also* Jerry M. Burger et al., *What a Coincidence! The Effects of Incidental Similarity on Compliance*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 35, 41–42 (2004) (noting that perceived incidental similarity with a requester can lead to increased compliance).

184. CIALDINI, *supra* note 3, at 148; Burger et al., *supra* note 183, at 35.

185. CIALDINI, *supra* note 3, at 149; F.B. Evans, *Selling as a Dyadic Relationship—A New Approach*, AM. BEHAV. SCIENTIST, May 1963, at 76, 79.

186. CIALDINI, *supra* note 3, at 149; Randy Garner, *What's in a Name? Persuasion Perhaps*, 15 J. CONSUMER PSYCHOL. 108, 115 (2005) (finding that changing the survey sender's name to be similar to recipient's name doubled survey compliance).

187. CIALDINI, *supra* note 3, at 149; *see also* Tanya L. Chartrand & John A. Bargh, *The Chameleon Effect: The Perception-Behavior Link and Social Interaction*, 76 J. PERSONALITY & SOC. PSYCHOL. 893, 906 (1999) (noting that the chameleon effect—nonconscious behavior mimicry—was found to increase liking); Kenneth D. Locke & Leonard M. Horowitz, *Satisfaction in Interpersonal Interactions as a Function of Similarity in Level of Dysphoria*, 58 J. PERSONALITY & SOC. PSYCHOL. 823, 829 (1990); Rick B. van Baaren et al., *Mimicry for Money: Behavioral Consequences of Imitation*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 393, 396 (2003).

188. CIALDINI, *supra* note 3, at 151.

189. CIALDINI, *supra* note 3, at 152; Joseph E. Grush et al., *Extrapolating Laboratory Exposure Research to Actual Political Elections*, 36 J. PERSONALITY & SOC. PSYCHOL. 257, 264–66 (1978); Joseph E. Grush, *Impact of Candidate Expenditures, Regionality, and Prior Outcomes on the 1976 Democratic Presidential Primaries*, 38 J. PERSONALITY & SOC. PSYCHOL. 337, 339 (1980).

190. CIALDINI, *supra* note 3, at 152; Xiang Fang et al., *An Examination of Different Explanations for the Mere Exposure Effect*, 34 J. CONSUMER RES. 97, 100 (2007); Wayne D. Hoyer & Steven P. Brown, *Effects of Brand Awareness on Choice for a Common, Repeat-Purchase Product*, 17 J. CONSUMER RES. 141, 142–45 (1990) (demonstrating that consumers who were aware of a brand purchased it over unfamiliar brands, even if they had never purchased the familiar brand before).

191. CIALDINI, *supra* note 3, at 152.

more likely to believe information that is repeated to us.¹⁹² In one study, researchers flashed faces across the screen at a rapid rate.¹⁹³ They flashed the faces so quickly that participants could not remember which faces they saw.¹⁹⁴ When participants later met the people whose faces had been flashed on-screen, they tended to like those whose pictures were flashed more frequently.¹⁹⁵

Significantly, the environment within which we become familiar with others affects whether familiarity will trigger liking.¹⁹⁶ Exposure under conditions of conflict and frustration leads to less liking.¹⁹⁷ On the other hand, we are more likely to like people who cooperate with us, work with us to overcome obstacles, and help us solve problems.¹⁹⁸ One long-term research program at boys' camps illustrates the principle.¹⁹⁹ When the researchers separated

192. *Id.*; Ian M. Begg et al., *Dissociation of Processes in Belief: Source Recollection, Statement Familiarity, and the Illusion of Truth*, 121 J. EXPERIMENTAL PSYCHOL. 446, 446 (1992); Jason P. Mitchell et al., *fMRI Evidence for the Role of Recollection in Suppressing Misattribution Errors: The Illusory Truth Effect*, 17 J. COGNITIVE NEUROSCIENCE 800, 801 (2005); see Jennifer L. Monahan et al., *Subliminal Mere Exposure: Specific, General, and Diffuse Effects*, 11 PSYCHOL. SCI. 462, 464–66 (2000) (demonstrating that individuals exposed to repeated stimuli were reported to be in a better mood than individuals exposed to new stimuli every exposure); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 832 (2008); Kimberlee Weaver et al., *Inferring the Popularity of an Opinion from Its Familiarity: A Repetitive Voice Can Sound Like a Chorus*, 92 J. PERSONALITY & SOC. PSYCHOL. 821, 827 (2007); see also Lynn Hasher et al., *Frequency and the Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAV. 107, 108 (1977).

193. Robert F. Bornstein et al., *The Generalizability of Subliminal Mere Exposure Effects: Influence of Stimuli Perceived Without Awareness on Social Behavior*, 53 J. PERSONALITY & SOC. PSYCHOL. 1070, 1073 (1987).

194. *Id.*

195. *Id.* at 1074.

196. CIALDINI, *supra* note 3, at 152–54. Cialdini reports that one of the driving forces behind school integration was the idea that increased contact with members of different races would increase liking and decrease racism. *Id.* at 152. The opposite turned out to be true: increased contact in school seemed to lead to *more* racism and *less* liking. *Id.* What researchers discovered was that familiarity in a contentious environment did not lead to liking; familiarity in a cooperative environment did. *Id.* at 154. The traditional American classroom at the time of the study was marked by competition: the teacher asks a question; a handful of students strain to answer; others try to become invisible; the teacher calls on a student who classmates resent if she's right or adjudge her stupid if she's wrong. *Id.* at 153.

197. See Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 316, 316–17 (2007).

198. CIALDINI, *supra* note 3, at 154–59.

199. *Id.* at 154–55; MUZAFER SHERIF ET AL., INTERGROUP CONFLICT AND COOPERATION: THE ROBBERS CAVE EXPERIMENT 9–10 (1961).

the boys into different cabins, the boys immediately began to like the boys in the other cabins less.²⁰⁰ Eventually, the groups were unable to get along in even the most innocuous circumstances.²⁰¹ But, when researchers presented the boys with common obstacles that required them to work together toward common goals, the boys began to like each other again.²⁰² Ultimately, we like people who cooperate with us.²⁰³

Finally, we like things and people that we associate with positive people, events, or experiences.²⁰⁴ Further, we like people who deliver good news; we dislike people who deliver bad news.²⁰⁵ We view products as more desirable when those products are associated with something we like, even when that something has zero impact on product performance.²⁰⁶ Compliance professionals are not the only ones who capitalize on the association principle; we all have a tendency to link ourselves with positive attributes. As Cialdini explains, “we purposefully manipulate the visibility of our connections with winners and losers”²⁰⁷ Cialdini tested this theory with Arizona State University (“ASU”) students in 1973.²⁰⁸ Cialdini and his team asked some students about the outcome of a football game that ASU won and then asked others

200. SHERIF ET AL., *supra* note 199, at 147–48.

201. *Id.* at 112–13.

202. *Id.* at 182–83.

203. *See id.*; see also Stefania Paolini et al., *Effects of Direct and Indirect Cross-Group Friendships on Judgments of Catholics and Protestants in Northern Ireland: The Mediating Role of an Anxiety-Reduction Mechanism*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 770, 781–82 (2004) (noting that cross-community relationships led to reduced anxiety of persons outside ones group); Stephen C. Wright et al., *The Extended Contact Effect: Knowledge of Cross-Group Friendships and Prejudice*, 73 J. PERSONALITY & SOC. PSYCHOL. 73, 87–88 (1997) (noting that cross-group friendship leads to pleasant future interactions and less prejudice).

204. CIALDINI, *supra* note 3, at 159–66.

205. *Id.* at 160.

206. *E.g.*, George H. Smith & Rayme Engel, *Influence of a Female Model on Perceived Characteristics of an Automobile*, in PROC. OF THE 76TH ANN. CONVENTION OF THE AM. PSYCHOL. ASS'N 681 (1968) (finding that men who saw a car ad starring a beautiful woman rated the car as faster and better designed than men who saw the ad without the beautiful woman); Michael White, *From Mars Bars to Hot Wheels, Pathfinder Boosts Sales*, ASSOCIATED PRESS (July 10, 1997), <http://www.apnewsarchive.com/1997/From-Mars-bars-to-Hot-Wheels-Pathfinder-boosts-sales/id-b4bfb7b78872d3f68c826d298604f615> (finding that sales of Mars candy bars jumped after the Mars Rover rocket successfully landed on the planet in 1997, even though the candy bar was named for the company's founder and not the planet).

207. CIALDINI, *supra* note 3, at 167.

208. Robert B. Cialdini et al., *Basking in Reflected Glory: Three (Football) Field Studies*, 34 J. PERSONALITY & SOC. PSYCHOL. 366, 367–68 (1976).

about a game ASU lost.²⁰⁹ The students who reported on the winning game made efforts to link themselves with the team by referring to the two as “we”: “We won.” “We beat Houston.”²¹⁰ The students who reported on the losing game distanced themselves: “They lost.” “Arizona State lost.”²¹¹

2. Attraction-Based Liking in the Judicial System

Looking to our markers of liking, do judges harness the power of liking to persuade their audiences? It is not clear how some markers of liking affect the judicial system. For example, does a judge’s physical attractiveness persuade audiences? Although there is considerable research on the effect of physical attractiveness of the parties in a court proceeding,²¹² no research seems to have considered the question with respect to judges. If the psychological literature is correct, it may be that more attractive judges appear more persuasive.

3. Similarity-Based Liking in the Judicial System and in Judicial Opinions

While it appears that emphasizing the similarity of the lawyer or client may be persuasive to other negotiating parties, juries, and judges,²¹³ empirical research has yet to focus on whether judges that are more similar to their audiences are more persuasive by virtue of that similarity. On a macro-level, the demographic make-up of the judiciary may make it more persuasive to groups who have something in common with most judges, such as advanced education, similar economic status, race, gender, age, etc.²¹⁴ On a micro-level, the judge who uses language to identify herself with her audience may be more persuasive to it.

209. *Id.* at 370–71.

210. *Id.* at 370–72.

211. *Id.* at 370–71.

212. See CIALDINI, *supra* note 3, at 146; Chris Guthrie, *Principles of Influence in Negotiation*, 87 MARQ. L. REV. 829, 831 (2004).

213. See Guthrie, *supra* note 212, at 829, 831–32.

214. Although researchers have examined public confidence in the judiciary by certain demographics, the studies do not answer whether the driving force behind confidence levels was tied solely to similarity-based liking versus other factors, such as histories of positive interaction with or discrimination in the courts. See, e.g., Arthur S. Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 L. & CONTEMP. PROBS. 69, 73 (1970).

One way that judges show their audiences that they are similar is through the use of metaphor. The use of metaphor serves the dual purpose of explaining and persuading. First, and likely the primary reason judges use metaphor, is to aid their audiences' understanding of a particular point. Metaphors "are deeply embedded into the way in which we understand the world."²¹⁵ The use of metaphor also invokes shared experience.²¹⁶ Drawing on that shared experience is part of what makes metaphor a powerful persuasive tool: "What we 'know' from [shared] experience is believed more deeply than anything we learn by listening or reading."²¹⁷ As a result, metaphor allows judges an opportunity to subtly inform or remind the audience that they are similar because they partake in the same social culture.

Justice Anthony Kennedy's opinion in *Lawrence v. Texas*²¹⁸ provides an example of an effective use of metaphor. One of the hardest questions that the Court faced in *Lawrence* was whether to overrule its precedent in *Bowers v. Hardwick*, only seventeen years old at the time, in which the Court upheld a Georgia law prohibiting sodomy.²¹⁹ Justice Kennedy carefully dismantled *Bowers*, writing, "The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*."²²⁰ As such, Justice Kennedy casts *Bowers* as a house with serious structural flaws. Implicit in the metaphor is the common sense solution: the only foolproof way to fix a house with serious structural flaws is to tear it down and start fresh. The metaphor communicates the concept that this is one of the times when the Court should overrule past precedent, even from the relatively recent past. And the use of metaphor presents what would otherwise be an incon-

215. J. Christopher Rideout, *Penumbra Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ASS'N LEGAL WRITING DIRECTORS 155, 169 (2010). It can even be argued that we think in metaphor. *Id.* at 164; see also Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 275, (2011) ("Without the metaphorical process that allows us to gather them up, group them together, and contain them, our perceptions would scatter like marbles thrown on the ground.")

216. Rideout, *supra* note 215, at 169; Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 956 (2007).

217. Berger, *supra* note 216, at 956. Use of common metaphor and idiom facilitates and masks constitutional change: "In this way, even the most significant changes to the polity are made familiar, sensible, and ultimately palatable among various constitutional constituencies." Robert L. Tsai, *Democracy's Handmaid*, 86 B.U. L. REV. 1, 41 (2006).

218. 539 U. S. 558 (2003).

219. *Id.* at 564 (citing *Bowers v. Hardwick*, 478 U. S. 186, 187–89 (1986)).

220. *Id.* at 576.

sistency in a more palatable manner than explicitly stating the point. Moreover, the metaphor is accessible. Even if a reader is not a homeowner or someone who works in construction, the metaphor creates the picture of a house and draws from common sense. Sharing this common sense instinct is a way that Justice Kennedy subtly connects with his audience.

Metaphors made up a linguistic playground for Judge Irving Goldberg of the Fifth Circuit. For example, his opinion in *Shanley v. Northeast Independent School District*, is packed with metaphors.²²¹ Towards the beginning of the opinion, Judge Goldberg announces that “[t]his case is anomalous in several respects, a sort of judicial believe-it-or-not.”²²² Judge Goldberg was not expressing a sophisticated or controversial concept; readers do not need the aid of the metaphor to understand and be persuaded by what he is writing. But the metaphor is an excellent rapport-builder because Ripley’s Believe-It-Or-Not has been a popular culture fixture since 1918.²²³ In fact, Ripley was possibly at his most popular during the 1930s and 1940s,²²⁴ when many within the original audience of Judge Goldberg’s 1972 opinion were children.

Part of what makes Justice Kennedy’s and Judge Goldberg’s metaphors so effective is that they are accessible to large segments of the audience. When a judge uses a metaphor that is inaccessible, he risks alienating his audience and hampering its understanding of his analysis. Justice William O. Douglas’s penumbra metaphor in *Griswold v. Connecticut*²²⁵ is one example. Justice Douglas wrote that the “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”²²⁶ With the aid of

221. 462 F.2d 960, 967 (5th Cir. 1972) (describing the case as a “judicial believe-it-or-not” and a “constitutional fossil, exhumed and respired to stalk the First Amendment”); *id.* at 968 (“While a school is certainly a market place for ideas, it is just as certainly not a marketplace.”); *id.* at 972 (“[O]ur Constitution is a living reality . . .”); *id.* at 973 (presenting speech as a “weapon” which may “strike at prejudices and preconceptions”); *id.* at 978 (concluding that “*Tinker*’s dam to school board absolutism does not leave dry the fields of school discipline,” and continuing the irrigation metaphor throughout the paragraph).

222. *Id.* at 967.

223. Marc Hartzman, *The Believe-It-Or-Not Life of Mister Robert L. Ripley, Millionaire Freak Fanatic*, BIZZARE MAG. (Feb. 2006), available at http://www.bizarremag.com/film-and-music/interviews/3120/robert_l_ripley.html.

224. *Id.* (noting that Ripley’s fan mail peaked in the 1930s and 1940s).

225. 381 U.S. 479 (1965).

226. *Id.* at 484.

this metaphor, he reasoned that the right to privacy was implicit in the First, Third, Fourth, Fifth, and Ninth Amendments.²²⁷ But Justice Douglas's penumbra metaphor generated a backlash amongst his colleagues²²⁸ and commentators.²²⁹ Why?²³⁰

Part of the reason that the penumbra metaphor generated a backlash is it does not actually draw from common experience. The primary definition of penumbra is "the partial or imperfect shadow outside the complete shadow of an opaque body . . . where the light from the source of illumination is only partly cut off."²³¹ Most people do not think about or have personal associations with penumbras. The suggestion alone sounds silly. Moreover, *Griswold* dealt with a politically sensitive issue that received more media coverage than the typical Supreme Court case, likely increasing its readership among lawyers and lay readers alike.²³² Because the audience was so large, a fair number of readers were probably unfamiliar with the word penumbra.²³³ Additionally, Justice Douglas's use of penumbra is contrary to its actual definition. He seems to use the image of a penumbra to analogize the right to privacy to a light emanating from a source.²³⁴ Thus, the context in which Justice Douglas uses the penumbra creates in-

227. *Id.*

228. *Id.* at 530 (Stewart, J., dissenting) ("What provision of the Constitution, then, does make this state law invalid?").

229. See, e.g., Henry T. Greely, *A Footnote to "Penumbra" in Griswold v. Connecticut*, 6 CONST. COMMENT. 251, 263–65 (1989) (criticizing Douglas's choice of "penumbra" in *Griswold*).

230. Some commentators view metaphor with suspicion. See, e.g., Rideout, *supra* note 215. Rideout suggests that the reason the penumbra metaphor generated backlash is because it was technically flawed: it violated the metaphor's "internal systematicity" and its "external coherence with another metaphor." *Id.* at 187–88.

231. WEBSTER'S COLLEGE DICTIONARY 1000 (1991).

232. Justice Douglas was not the first jurist to use the penumbra metaphor. For example, Justices Holmes, Learned Hand, and Cardozo also used the penumbra metaphor before Justice Douglas. See Greely, *supra* note 229, at 253–60. In none of those cases was the underlying issue as interesting to a wider audience as *Griswold*. Moreover, a critical difference between Holmes', Learned Hand's, and Cardozo's use of penumbra is that they used the metaphor "to highlight the difficulties of drawing distinctions or meaning." *Id.* at 260. As a result, while their use of the metaphor probably didn't draw from most readers' common experience, it did draw from the literal meaning of penumbra. For additional analysis of the "penumbra" metaphor, see Burr Henly, "Penumbra": *The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 83–90 (1987).

233. Henry T. Greely agrees, noting that "[p]enumbra is an obscure word, known to few (and fewer still before *Griswold*)." Greely, *supra* note 229, at 251.

234. See Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459, 484 (2011) (noting that the penumbra metaphor therefore lacks internal coherence).

ternal dissonance in the reader. As a result, the metaphor does not emphasize the sameness between the writer and his audience, and therefore does not create a bond of liking between the reader and writer. On the contrary, it separates them and creates an uncomfortable hierarchy between them.²³⁵ This is a critical difference between Justice Kennedy's "house" and Judge Goldberg's "judicial believe-it-or-not" on the one hand and Justice Douglas's "penumbra" on the other.

4. Creating Similarity- and Familiarity-Based Liking Through Conversational Style

Judge Richard Posner of the Seventh Circuit fosters liking by using colloquial language frequently in his opinions, which creates an impression that the writer is a regular guy, not a titan of the appellate bench. *Flomo v. Firestone Natural Rubber Co.*²³⁶ "pits" twenty-three Liberian children against Firestone.²³⁷ Posner notes in his *Flomo* opinion that "[o]ne of the amicus curiae briefs argues, seemingly not tongue in cheek, that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business."²³⁸ "Tongue in cheek" and "bad for business" lend an informal feel to his writing. In *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*,²³⁹ Judge Posner noted that the Seventh Circuit "threw out"—not dismissed—the parties' interlocutory appeal.²⁴⁰ In *Indiana Harbor*, the amici curiae "cr[ief]d wolf" with arguments exaggerating the effects of a particular ruling on the chemical industry.²⁴¹ In *Mucha v. King*,²⁴²

235. Cf. Martha Nussbaum, *The Professor of Parody*, THE NEW REPUBLIC, Feb. 22, 1994, at 37, 39 (highlighting the ability of obscure writing to create an "aura of importance" about itself). Of course, most metaphors risk creating hierarchies between the writer and reader and between different segments of the audience. See Maureen Archer & Ronnie Cohen, *Sidelined on the (Judicial) Bench: Sports Metaphors in Judicial Opinions*, 35 AM. BUS. L.J. 225, 226, 230 (1998) (noting that use of sports metaphors "creates a linguistically unlevel playing field" among the readers who get the point and those who do not). But an accessible metaphor will have a net impact of generating liking, and thus subtly encourage the readers who "get it" to conclude that the opinion is correct.

236. 643 F.3d 1013 (7th Cir. 2011).

237. *Id.*; see *id.* at 1019 (explaining why "we keep harping on" a particular issue).

238. *Id.* at 1021.

239. 916 F.2d 1174 (7th Cir. 1990).

240. *Id.* at 1175.

241. *Id.* at 1179.

242. 792 F.2d 602 (7th Cir. 1986).

the appellee "smelled a rat."²⁴³ Judge Posner's use of colloquial language makes him seem more similar to and more familiar to the reader.

In addition to colloquialisms, Judge Posner frequently inserts parenthetical asides that almost function as a private conversation between Judge Posner and the reader. These private side conversations elevate the reader from an invisible passive recipient to a confidant. At times, the asides communicate informative tidbits that are immaterial to the case, but that Judge Posner obviously found interesting. For example, in *Mucha*, the son of an artist sued to recover one of his father's paintings.²⁴⁴ In recounting the chronology of the events leading to the case, Judge Posner notes that when the elder Mucha sent a letter to art dealer Suster, his collection was on display at the Brooklyn Museum.²⁴⁵ As a parenthetical aside, Judge Posner notes that "[t]his celebrated exhibition is said to have been seen by 600,000 persons."²⁴⁶ Recounting another letter between the two, Posner notes that Suster began with "My dear Brother."²⁴⁷ He adds, by way of parenthetical, that "Suster and Mucha were not related, though Suster [, like Mucha,] was of Czech extraction; the 'My dear Brother' mode of address may reflect the fact that both were free-masons."²⁴⁸ In the same case, Judge Posner relies on *Johnson v. Weedman*,²⁴⁹ which he parenthetically informs his reader was "a case in which Abraham Lincoln represented the winning party."²⁵⁰

Other times, Judge Posner uses parentheticals to expand on or explain a statement he just made. His casual tone maintains the conversational feel of the opinion, and an aside that could have come across as slightly patronizing or pedantic simply comes across as part of the more personal side conversation that Judge Posner has struck up with the reader. For example, "[c]ustomary international legal duties are imposed by the international com-

243. *Id.* at 612.

244. *Id.* at 603.

245. *Id.* at 606.

246. *Id.*

247. *Id.*

248. *Id.*; see also *id.* at 609 (noting the effect of the Depression on the American art market and parenthetically referencing testimony by Suster that "you couldn't even sell a dollar for 75 cents").

249. 5 Ill. (4 Scam.) 495 (Ill. 1843).

250. *Mucha*, 792 F.2d at 608.

munity (ideally, though rarely—given the diversity of the world’s 194 nations—by consensus)”²⁵¹ Judge Posner later explains that “conventions that not all nations ratify can still be evidence of customary international law. Otherwise every nation (or at least every ‘civilized’ nation) would have veto power over customary international law. (It would be as if U.S. states could forbid the enforcement of federal law within their borders.)”²⁵²

In the same case, Judge Posner explains that the underlying lawsuit was initially filed in 2005: “initially in California, but it was transferred to the district court in Indiana the following year, which is why the docket number in the district court has 06 in it”²⁵³ In this parenthetical, Judge Posner not only continues his side conversation with the reader, but he also subtly pays the reader a compliment. The compliment is that he assumes his reader has paid such close attention to the details of the case that the reader noticed the case number in the caption, and he further assumes that his reader is quick enough to recognize the apparent incongruity between the number in the case caption and the commencement of the suit. Paying a compliment is another effective way to get someone to like you.²⁵⁴

Finally, Judge Posner sometimes uses parentheticals to inject humor or sarcasm into his opinions. In summarizing Firestone’s argument that corporations could not be held liable under the Alien Tort Statute because they are not real persons, Judge Posner writes: “So, according to Firestone, a pirate can be sued under the Alien Tort Statute but not a pirate corporation (Pirates of the Indian Ocean, Inc., with its headquarters and principal place of business in Somalia)”²⁵⁵ Judge Posner then observes that “[t]he issue of corporate liability under the Alien Tort Statute seems to have been left open in an enigmatic footnote” in a Supreme Court opinion—adding parenthetically “but since it’s a Supreme Court footnote, the parties haggle over its meaning, albeit to no avail.”²⁵⁶ Both parentheticals function as judicial eye rolls, shared for the amusement of the opinion’s reader but serving no substantive purpose.

251. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1016 (7th Cir. 2011).

252. *Id.* at 1021–22 (citations omitted).

253. *Id.* at 1023.

254. See CIALDINI, *supra* note 3, at 149–50.

255. *Flomo*, 643 F.3d at 1017.

256. *Id.*

Judge Posner also enhances the conversational feel of his opinion with the use of italics. He does not just use italics to emphasize a particular substantive point; he uses them to communicate directly with his reader. "And suppose no corporation *had* ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be."²⁵⁷ And, "[w]e have to consider *why* corporations have rarely been prosecuted criminally or civilly for violating customary international law; maybe there's a compelling reason."²⁵⁸ The engaged reader can hear these intonations in her head. These aural thoughts create the impression that Judge Posner is speaking directly to the reader. Both the side conversation parentheticals and the italicized conversational tone enhancers foster a personal relationship between Judge Posner and his reader. This is another subtle form of persuasion; just as the Tupperware Corporation discovered, people are more easily persuaded by those with whom they have a personal relationship.²⁵⁹

5. Cooperation-Based Liking

Judge Posner further fosters liking by frequently structuring his opinions in a non-traditional format. Under the traditional format, the writer conducts his analysis to reach his conclusion as part of the pre-writing/thought process stage.²⁶⁰ Then, when he writes his opinion, he converts the thought process leading to the conclusion into the typical written organization of issue/conclusion, rule, explanation, affirmative analysis, counter analysis, and disposition.²⁶¹ Unlike the traditional writer, Judge Posner instead often appears to write his opinions according to the thought process that led him to his ultimate conclusion. This changes the dynamic of the opinion from a pronouncement of the law delivered to the reader to an intellectual journey that the reader takes alongside Judge Posner. Organizing the opinion as a journey capitalizes on the cooperation aspect of liking. Judge Posner does not

257. *Id.*

258. *Id.* at 1018.

259. See *supra* notes 171–75 and accompanying text. And so in this analogy, Judge Posner is a theoretical judicial Tupperware party host.

260. See MARY L. DUNNEWOLD ET AL., JUDICIAL CLERKSHIPS: A PRACTICAL GUIDE 90–93 (2010).

261. See *id.* at 134–36.

simply tell us what the law is; he takes us with him and we reach the result together.

Accordingly, instead of starting with his conclusion, Judge Posner sometimes poses the issue and then gives a general tutorial on the development of the applicable law or dismisses various arguments. He also might not state the rule of the case up front. Instead, he sometimes explores the development of the law, how it got to be what it is at the time of his writing, and why the law makes sense (or not).

For example, in *Flomo*, Judge Posner first notes that the issues were whether a corporation could be held liable under the Alien Tort Statute and, if so, whether plaintiffs established a fact issue as to whether Firestone violated customary international law.²⁶² Instead of stating the rule of corporate liability or identifying the applicable customary international law, Judge Posner then asks: “And what is ‘customary international law’?”²⁶³ With this rhetorical question, the journey begins. Judge Posner gives the reader a tutorial on customary international law, which includes some history, some definition, and some critique.²⁶⁴ None of the tutorial is technically necessary to the opinion. After the tutorial has concluded, Judge Posner begins his analysis with Firestone’s argument that it cannot be held liable because it is a corporation, not a human being.²⁶⁵ Judge Posner lists the potentially applicable case law, noting the single decision that supports Firestone’s argument, and he then explains why that case was based on a factually and theoretically false premise.²⁶⁶ Now that Firestone’s key argument is mostly out of the way, Judge Posner explores common sense reasons to hold corporations liable under the Alien Tort Statute.²⁶⁷ He concludes his analysis by identifying two exemplar cases that support holding corporations liable, and he does so almost as an afterthought: “And if precedent for imposing liability for a violation of customary international law by an entity that does not breathe is wanted, we point to *in rem* judgments

262. *Flomo*, 643 F.3d at 1015.

263. *Id.*

264. *Id.* at 1015–16.

265. *Id.* at 1017 (using a humorous parenthetical to define corporations as all entities without a heartbeat).

266. *Id.*

267. *Id.* at 1018–21.

against pirate ships.”²⁶⁸ A traditional opinion format would have instead *started* with precedent and ended by dismissing Firestone’s arguments.

Judge Posner’s alternative organization lends his opinions a distinctly different feel than traditionally organized opinions and it creates a different relationship with the reader. Even though the formal dynamic of judge as decider/writer and reader as recipient remains static across opinions, Judge Posner’s organization transforms the reader’s experience into a more active one by taking the reader along his thought process. This active experience feels cooperative and participatory, which increases liking.²⁶⁹

The powerful persuasive effect of Judge Posner’s opinions poses a challenge to the traditional structure of legal analysis. Law students, lawyers, and judges alike are advised to use some variant of the Issue-Rule-Application-Conclusion (“IRAC”) form to structure their legal arguments.²⁷⁰ The traditional wisdom provides that the best-organized analyses start with the affirmative analysis and then turn to counter-arguments.²⁷¹ Posner embraces the opposite. He takes the reader through each possible answer and casts it aside until, together, they reach the correct result at the end of the journey.

Are most judges (and other legal writers) doing it wrong? There is a key difference between many of Judge Posner’s opinions and traditional judicial opinions: Judge Posner writes not simply to resolve dispute but to advance the law and shape policy.²⁷² The

268. *Id.* at 1021.

269. Another reason Judge Posner’s structure could be more persuasive than the traditional structure is that, as the reader and Judge Posner cooperate to reach the right result, the reader has more stake in the outcome because she feels more ownership in the conclusion. As a result, the conclusion has special persuasive power. Relatedly, Professor Michael Higdon suggests that judicial use of foreshadowing has the same effect. See Michael J. Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICH. L. REV. 1213, 1217 (2010). As Professor Higdon explains, “if a writer could construct a written document in such a way that the reader is quietly helped to form hypotheses that match the writer’s ultimate conclusion, then that conclusion would likely be more acceptable and thus more persuasive to the reader.” *Id.* at 1223.

270. See, e.g., CHRISTINE COUGHLIN ET AL., *A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS* 81–85 (Carolina Academic Press 2d ed. 2013); MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 75–90 (3d ed. 2010).

271. See, e.g., BEAZLEY, *supra* note 270, at 95–99.

272. Richard A. Posner, *Foreword to THE QUOTABLE JUDGE POSNER: SELECTIONS FROM TWENTY-FIVE YEARS OF JUDICIAL OPINIONS* xi (Robert F. Blomquist ed., 2010).

vast majority of judicial opinions, on the other hand, apply the law to resolve a dispute; they do not advance the law or shape policy. So, what works well for Judge Posner might not necessarily work well for other judges.

III. CONCLUSION

It comes as no surprise that salespersons and marketing departments rely on psychological influence tactics to persuade their targets. But they are not the only ones: we all use these tactics in our personal and professional relationships. Significantly—and far less intuitively—even judges use psychological influence tactics that have the effect of persuading their audience. They rely on the rule of reciprocation and make concessions to one side or the other. In so doing, they appear to bestow victories on both sides of a dispute. As a result, the parties more readily accept their losses and feel treated more fairly by the process.

Judges harness the power of commitment and consistency through the doctrine of *stare decisis*. If past courts have reached a similar decision, then it seems more acceptable for a present court to do the same. And, once we have committed to a particular path, it's far easier to comply with it than it is to deviate from it.

Judges rely on social proof and show us that other judges and courts did the same thing. If we can see that everyone else is doing it, we are less likely to question doing it. Judges also rely on our desire for consistency, and they convince us that we should accept their opinions because we have done so in the past.

Judges make us like them in a variety of ways: they draw on shared experience through metaphor; they become familiar to us through colloquialisms; they establish parenthetical dialogues with us to share interesting asides, to make a joke, or to pay a compliment. These dialogues make us feel as though we are less passive observers of and are more active participants in the decision-making process. Reading their metaphors, colloquialisms, and parenthetical asides is a transformative process. Instead of judge and reader, we become almost-friends. And we want to say "yes" to our friends because we say "yes" to people we like.

Now that we know judges use psychological influence tactics, the next step is to determine what that means. At the outset, just

being aware of the use of influence tactics makes us more savvy consumers of judicial writing. Moreover, to the extent that judges use influence tactics subconsciously, making the use of those influence tactics a fully conscious exercise could affect how and when judges use the tactics, which tactics they use, and whether they continue to use them at all.

Part of the reason that professionals use influence tactics in the marketplace is because they can use those tactics to manipulate our responses to produce the behavior they want. Viewed through this lens, judges' use of influence tactics appears less than desirable. It raises questions about the ethical limits of judges' use of persuasion in their writing.

Perhaps the most significant questions that judges' use of influence tactics raise go to the operation and legitimacy of court systems. Do judges on multi-member courts and panels use influence tactics to rally support from their colleagues? Did American judges use influence tactics in their writing when the United States was a fledgling democracy and the future position of the courts was uncertain? Could courts in emerging democracies use influence tactics to help legitimize their nation's new judicial systems?

Further examining judges' use of influence tactics and answering these questions will deepen our understanding of, and enrich the dialogue about, judicial writing and judicial decision-making. This will inform how we create, consume, and use judicial writing.