

# USING THE ELEMENTS OF RHYTHM, FLOW, AND TONE TO CREATE A MORE EFFECTIVE AND PERSUASIVE ACOUSTIC EXPERIENCE IN LEGAL WRITING

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“Yea, in my opinion no rhetoric more persuadeth or hath greater power over the mind; nay hath music her figures, the same with rhetoric?”<sup>1</sup>

Rhythm: An alternating recurrence of similar elements.

Flow: The seamless transition as the story moves along.

Tone: The author’s attitude toward the subject as expressed by word choice which, in turn, designates the mood and effect of a work.

## I. INTRODUCTION

Lawyers “tend to be wretched writers, which is odd given that the written word is their stock in trade. Perhaps the problem comes from reading principally the work of other lawyers,”<sup>2</sup> writes

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1. Gerard G. LeCoat, *Music and the Three Appeals of Classical Rhetoric*, 62 *Quarterly J. Speech* 157, 157 (Apr. 1976) (quoting Henry Peacham, who was an English author best known for his *The Compleat Gentleman* (1622), important in the tradition of courtesy books, which dealt with the education, ideals, and conduct befitting a gentleman or lady).

2. Bryan J. Paul, *Toward a More Impure Writing Style: The Opinions of Judge Posner and Chief Judge Easterbrook and What the Bar Can Learn from Them*, *Cir. Rider* (J. of 7th

Chief Judge Frank H. Easterbrook. His colleague, Judge Richard A. Posner, comments that “[l]egal writing by federal judges and the lawyers who appear before them is today generally *serviceable*, in the sense of being pretty clearly written, pretty careful, businesslike, grammatical.”<sup>3</sup>

By “serviceable,” Judge Posner means that the writing is logical, cogent, and follows some form of the basic IRAC model.<sup>4</sup> The legal profession should collectively take some credit for having come this far. In 1936, Yale Professor Fred Rodell famously wrote that “[t]here are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think about covers the ground.”<sup>5</sup> Over the decades, legal writing scholars have penned articles and books to aid attorneys and judges in overcoming these failings, particularly as to content.<sup>6</sup> But this type of functionally acceptable legal writing is “in fact mediocre or pedestrian,”<sup>7</sup> for among other reasons it is “a style self-consciously professional” rather than a more effective legal writing style that is “nontechnical, colloquial, narrative [and] essayistic.”<sup>8</sup>

Even if a functional written message is presented in a logical manner, it is not certain that the reader will grasp the message, much less be persuaded by it. The “messenger needs rhetorical knowledge to be able to catch the attention of, and convince an audience.”<sup>9</sup> In that regard, this article explores some sparsely surveyed rhetorical terrain. As with all forms of non-fiction, legal

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Cir. B. Assn.) 10, 10 (Jan. 2008); *see also* Girvan Peck, *Writing Persuasive Briefs* (Little Brown & Co. 1984) (“As a group, lawyers are not particularly skilled in the use of ordinary words.”); Irvin R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 170 (1978) (“Language is a lawyer’s scalpel. If he cannot use it skillfully, he is apt to butcher his suffering client’s case.”).

3. Richard A. Posner, *Legal Writing Today*, 8 *Scribes J. Leg. Writing* 35, 35 (2001–2002) (emphasis in original).

4. *See generally* Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 61–63 (2d ed., Aspen Publishers 2006); Charles R. Calleros, *Legal Method and Writing* 71–72 (5th ed., Aspen L. & Bus. 2006); Andrea McArdle, *Teaching Writing in Clinical, Lawyering and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 *Clin. L. Rev.* 501, 510 n. 43 (2005–2006).

5. Fred Rodell, *Goodbye to Law Reviews*, 23 *Va. L. Rev.* 38, 38 (1936–1937).

6. *See e.g.* Beazley, *supra* n. 4; Calleros, *supra* n. 4; McArdle, *supra* n. 4.

7. Posner, *supra* n. 3, at 35 (emphasis in original).

8. *Id.*

9. Mikael Assmundson, *Persuading the Public: A Linguistic Analysis of Barak Obama’s Speech on “Super Tuesday” 2008*, at 8, <http://dalea.du.se/theses/archive/4f1eb40e-7171-4ce2-970d-f09c85c6e578/255f7fda-4959-4857-8d0b-8d98c0866954.pdf> (Spring 2008).

writing<sup>10</sup> “comes burdened with various unhelpful assumptions, none more so than that it benefits from a pre-existing logical structure. This allegedly cuts out much of the agony—and the ecstasy—of writing: the author need only follow the yellow brick road from start to finish.”<sup>11</sup>

In law, that *yellow brick road* is IRAC—issue, rule, analysis, conclusion. But slavish travel down the IRAC road only leads all too often to “the tedious march of sentences across the page.”<sup>12</sup> Tedium bores. Bored readers pay little attention to text and even less to message. The reader may just stop reading. Boredom can be battled with brevity. “Let thy speech be short, comprehending much in few words.”<sup>13</sup> Lawyers can also employ a narrative to more effectively retain a reader’s interest. These persuasive legal writing techniques are explored elsewhere.<sup>14</sup> This Article instead explores, theorizes, and explains how to write more persuasively by incorporating rhythm, flow, and tone into text. As recent scholarship reveals, there is a scientific basis for why rhythm, flow, and tone attract and keep readers’ interests—the innate connection between language and music.<sup>15</sup>

While legal writers’ use of popular musical lyrics as metaphor or adjective attests to music’s superficial appeal,<sup>16</sup> this article examines a different use of music in legal writing. Here, as a predicate to theorizing how musical elements should be incorporated into legal writing, the author summarizes research establishing

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10. See Edward A. Adams, *Scalia: Legal Writing Doesn't Exist*, ABA J. Online, [http://abajournal.com/news/scalia\\_legal\\_writing\\_doesnt\\_exist/](http://abajournal.com/news/scalia_legal_writing_doesnt_exist/) (posted Aug. 9, 2008, 1:31 p.m. CST).

11. See Rebecca Adams, *Writing Non-Fiction*, in *Instead of Full Stops; A Guide to Writing and Publishing Non-Fiction* 109, 116 (Women’s Press Ltd. 1996).

12. Stephen V. Armstrong & Timothy P. Terrell, *The Subtlety of Rhythm*, 12 *Persps.* 174, 174 (Spring 2004).

13. Sirach 32:8 (King James, Aprocrypha) (available online at <http://etext.virginia.edu/toc/modeng/public/KjvSira.html>). In *Illinois Bell Telephone Co., Inc. v. Box*, 548 F.3d 607, 609 (7th Cir. 2008), Judge Posner makes a similar point by noting that “the parties did not have to assault us with 206 pages of briefs, brimming with jargon and technical detail, in order to be able to present the issues on appeal adequately. Clarity, simplicity, and brevity, are underrated qualities in legal advocacy.”

14. See generally Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 *Rutgers L.J.* 459 (2001); Donald E. Polkinghorne, *Narrative and Self Concept*, 1 *J. Narrative & Life History* 135 (1991); Kathryn M. Stanchi, *Feminist Legal Writing*, 39 *San Diego L. Rev.* 387, 405 (2002).

15. See *infra* nn. 33–34 and accompanying text.

16. Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 *Wash. & Lee L. Rev.* 531 (2007).

how music and language co-evolved. The neurological mechanisms that operate to perceive and be influenced by music are the same ones (or many of the same ones) that operate in the brain for language—first spoken and then written. We hear what we read.<sup>17</sup>

Rhythm, flow, and tone are essential components of music, and, therefore, essential components of well-written prose. Such components must be consciously incorporated by attorneys into their persuasive legal writing. By doing so, legal writers encourage readers to pay more attention to the text, facilitate a more enjoyable experience, and entice readers to ultimately agree.

Part II offers background on evolutionary psychology and explores how human and proto-human brains evolved through natural selection to house information processing traits that we moderns call “human nature.” It examines the scholarship of biomusicology and explains the neurological overlap of music and language—musilanguage. Part III examines the writings of Benjamin Cardozo, Frank H. Easterbrook, Ernest Hemingway, Robert Jackson, and others to reveal how they effectively incorporated musilanguage components of rhythm, flow, and tone into their writings. Part IV provides practical ways for instructors to teach rhythm, flow, and tone in legal writing and demonstrates how attorneys can incorporate these musical elements in their memoranda and briefs. Part V offers some concluding observations about the importance of using musically derived devices to make legal writing more persuasive and the obligation that legal writing professors have to their students and the profession to go beyond teaching unadorned IRAC.

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17. Marianne Abramson & Stephen D. Goldinger, *What the Reader's Eye Tells the Mind's Ear: Silent Reading Activates Inner Speech*, 59:7 *Perception & Psychophysics* 1059, 1059–1060, 1065–1066 (1997); Randy Bomer, *Reading with the Mind's Ear: Listening to Text as a Mental Action*, 49 *J. Adolescent & Adult Literacy* 524, 524–528 (Mar. 2006); see generally Lev S. Vygotsky, *Thought and Language* (MIT Press 1986) (establishing the connection between silent inner speech and oral language, and mental concepts and cognitive awareness).

## II. EVOLUTIONARY PSYCHOLOGY, LAWYERS, BIOMUSICOLOGY, AND READING, SPEAKING, AND SINGING

Changing environmental conditions require that species adapt (evolve) or perish. Evolution achieves this result through the combination of genetic drift (changing genes passed down to descendants), and natural selection (survival of individuals within a population because of certain advantageous genetic traits). These processes combine, over time, within a population of animals to allow that population to adapt to live and procreate in the face of changing environmental conditions.<sup>18</sup> From the pink sand-colored skin of the Grand Canyon Rattlesnake to the fuzzy ends of the scarab beetle's antenna, natural selection and genetic drift craft Nature's creatures. The human body, from toenails to eyebrows, is also the product of evolution,<sup>19</sup> as is the human mind. The founders of Evolutionary psychology observe,

Generation after generation, for 10 million years, natural selection slowly sculpted the human brain, favoring circuitry that was good at solving the day-to-day problems of our hunter-gatherer ancestors—problems of finding mates, hunting animals, gathering plant foods, negotiating with friends, defending ourselves against aggression, raising children, choosing a good habitat and so on. Those whose circuits were designed for solving these problems left more children, and we are descended from them.<sup>20</sup>

### A. Evolutionary Psychology and Lawyers

The principles of evolutionary psychology<sup>21</sup> establish that the complexity of human behavior requires attention to biology because (1) the brain directs behavior; (2) the brain is a computa-

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18. See generally U. Cal. Berkeley, *Understanding Evolution*, <http://evolution.berkeley.edu/evolibrary/home.php> (accessed Aug. 24, 2008).

19. Toenails and finger nails evolved to help humans to scratch things, peel things, open things, and pick away the outer layers of things. E.g. Christophe Soligo & Alexandra E. Müller, *Nails and Claws in Primate Evolution*, 36 *J. Human Evolution* 97 (Jan. 1999).

20. Leda Cosmides & John Tooby, *Evolutionary Psychology: A Primer*, "Principle 2," <http://www.psych.ucsb.edu/research/cep/primer.html> (updated Jan. 13, 1997).

21. *Id.*; see generally *The Handbook of Evolutionary Psychology* (David M. Buss ed., John Wiley & Sons, Inc. 2005). Evolutionary psychology is not without its critics. See e.g. David J. Buller, *Adapting Minds: Evolutionary Psychology and the Persistent Quest for Human Nature* (MIT Press 2005).

tional organ that is bound by physical principles; and (3) “the brain’s design, function, and behavioral outputs are all products of gene-environment interactions that have been shaped through time by various evolutionary and developmental processes.”<sup>22</sup>

Lawyers and legal writers should understand and take into account the principles of evolutionary psychology in their persuasive writing for several reasons. First, evolutionary psychology and an evolutionary study of literature known as Literary Darwinism (or euphemistically the “Darwinian lit-crit”) can assist lawyers to better understand how to persuade readers. Although the development, administration, and application of the law are conceived of as reason-based where notions of the unconscious and instinct are banished,<sup>23</sup> such an ideal does not exist. Humans, as humans, are affected by their emotions.<sup>24</sup> While rational, analytical arguments convince people because of their truth,<sup>25</sup> aesthetic concepts appeal to the emotional structure of the human mind. To be persuasive, a writer must utilize both,<sup>26</sup> because

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22. Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 Colum. L. Rev. 405, 422 (2005) (citation omitted).

23. Judge Posner notes,

[T]he judge’s role is conceived as identifying the applicable rule of law and applying it to the facts of the case. The task of identification may well be analytic, in the sense that the applicable rule is not given but must be derived from some higher-order principle; but the assumption is that the method of derivation is logical in the sense that syllogistic reasoning is logical. The premises are given and the conclusion follows as a matter of logic rather than of emotion, hunch, or empirical inquiry.

Richard A. Posner, *Law and Economics—Ethics, Economics, and Adjudication*, [http://ivenc.info/index.php?title=Law\\_and\\_Economics\\_-\\_Ethics,\\_Economics,\\_and\\_Adjudication](http://ivenc.info/index.php?title=Law_and_Economics_-_Ethics,_Economics,_and_Adjudication) (last updated Apr. 17, 2009).

24. See James Boyd White, *Book Review: What Can a Lawyer Learn from Literature?* 102 Harv. L. Rev. 2014, 2021 (1989) (“Obviously the law, and the lawyer, can make much use of science, both social and natural, but the image of law as science is misleading, for it erases the center of what lawyers actually do, which is to deal with the particulars of cases in light of an array of authoritative texts: the statutes, judicial opinions, regulations, constitutional provisions, contracts, and other documents that define the terms of their thought and argument. The social sciences can provide data the lawyer can use, but to use them he must translate them into terms that make sense to his audience.”) (reviewing Richard A. Posner, *Law and Literature: A Misunderstood Relation* (Harv. U. Press 1988)).

25. David Ray Papke & Kathleen H. McManus, *Narrative and the Appellate Opinion*, 23 Leg. Stud. Forum. 449, 450 (1999); Sarah Worth, Paper Submission, *Narrative Knowledge: Knowing through Storytelling 7* (Fourth Media in Transition Conference, May 6–8, 2005) (available at <http://web.mit.edu/comm-forum/mit4/papers/worth.pdf>).

26. Jansen Voss, Student Author, *The Science of Persuasion: An Exploration of Advocacy and the Science behind the Art of Persuasion in the Courtroom*, 29 L. & Psychol. Rev. 301, 301 n. 1 (2005) (citing William C. Costopoulos, *Persuasion in the Courtroom*, 10 Duq. L. Rev. 384 (1972)).

emotion and learning are correlated.<sup>27</sup> For example, thinking and feeling are evolutionarily combined in the human art of storytelling to persuade people that the story points to truth.<sup>28</sup> Looking back through evolutionary time, literary Darwinists theorize that storytelling evolved as an adaptive defense reaction to the expansion of human intelligence which occurred about 40,000 years ago. Stories help humans regulate their complex “cognitive machinery.”<sup>29</sup>

Second, evolutionary psychology helps lawyers to understand the “why” of laws. Scholars have begun to explore Darwinian Theory to understand and improve the effectiveness and efficiency of laws and legal systems.<sup>30</sup> Because laws seek to regulate and influence human behavior, and because, to a large degree, human behavior is constrained by evolved dispositions, the exploration of intersections of law and behavioral biology is a fertile and important area of study.<sup>31</sup> Scholars make a compelling point and demonstrate through concrete examples how “insights from behavioral biology into law can help discover useful patterns in some behaviors that law seeks to regulate . . . .”<sup>32</sup> Beyond storytelling and examination of the evolutionary patterns of human behavior, an emerging sub-discipline of evolutionary psychology known as biomusicology demonstrates a more subtle lesson for lawyers who

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27. Janice McDurury & Maxime Alterio, *Learning through Storytelling in Higher Education* 26 (Routledge 2002) (noting that traumatic experiences, those filled with emotion, often yield the most significant learning).

28. Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. Colo. L. Rev. 759, 780 (1998) (“A good story and a well-formed argument are different natural kinds. Both can be used as a means for convincing another. Yet what they convince us of is fundamentally different: arguments convince one of their truth, stories of their lifelikeness.” (quoting Jerome S. Bruner, *Two Modes of Thought*, in *Actual Minds, Possible Worlds* 11, 11 (1986))); see also Markus Appel & Tobias Richter, *Persuasive Effects of Fictional Narratives Increase Over Time*, 10 Media Psychol. 113, 113 (2007) (“Fact-related information contained in fictional narratives may induce substantial changes in readers’ real-world beliefs.”); D.T. Max, *The Literary Darwinists*, N.Y. Times Mag. (Nov. 6, 2006) (available at <http://www.nytimes.com/2005/11/06/magazine/06darwin.html>).

29. E.g. Denis Dutton, *The Pleasures of Fiction*, 28 Phil. & Literature 453 (2004) (available at [http://denisdutton.com/carroll\\_review.htm](http://denisdutton.com/carroll_review.htm)); Steven L. Winter, *The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning*, 87 Mich. L. Rev. 2225, 2228 (1989).

30. See generally Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 Colum. L. Rev. 405 (2005); see also Cosmides & Tooby, *supra* n. 19.

31. Jones & Goldsmith, *supra* n. 30, at 410.

32. *Id.* at 432.

want to avoid being the “wretched writers” about whom Chief Judge Easterbrook justly complains.

### B. Biomusicology and Lawyers

Every known human culture has music, and every human being is capable of creating and responding to it.<sup>33</sup> Music permeates every aspect of every human culture because music is evolutionary.<sup>34</sup> Charles Darwin recognized in *Descent of Man*:

When we treat of sexual selection we shall see that primeval man, or rather some early progenitor of man, probably first used his voice in producing true musical cadences, that is in singing, as do some of the gibbon-apes at the present day; and we may conclude from a widely-spread analogy, that this power would have been especially exerted during the courtship of the sexes,—would have expressed various emotions, such as love, jealousy, triumph,—and would have served as a challenge to rivals. It is, therefore, probable that the imitation of musical cries by articulate sounds may have given rise to words expressive of various complex emotions.<sup>35</sup>

Biomusicology, a term coined by Niles Wallin in 1991,<sup>36</sup> builds on this Darwinian foundation by scientifically analyzing the origins of music at the intersection with the origin of the human species.<sup>37</sup> The three branches of biomusicology are evolutionary musicology, neuromusicology, and comparative musicology. Through positron emission tomography (PET) scans and functional magnetic resonance imagery (fMRI) this emerging science of biomusicology shows that music and language are processed in many of the same areas of the brain.<sup>38</sup> These studies establish

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33. See Steven Brown et al., *An Introduction to Evolutionary Musicology*, in *The Origin of Music* 3, 11 (Nils L. Wallin et al. eds., MIT Press 2000) (discussing the “large diversity of functional rules [that music plays] in all cultures”); see generally Steven Mithen, *The Singing Neanderthals: The Origins of Music, Language, Mind and Body* (Harv. Press 2006); John Bispham, Book Review, “Music” Means Nothing If We Don’t Know What It Means, 50 *J. Human Evolution* 587 (2006).

34. Daniel J. Levitin, *This Is Your Brain on Music: The Science of a Human Obsession* 261 (Penguin Group Inc. 2006); Evan Serpick, *Music under a Microscope*, 1022 *Rolling Stone* 29, 29 (Mar. 22, 2007).

35. Charles Darwin, *The Descent of Man, and Selection in Relation to Sex* ch. III (2d ed., 1874) (available at <http://www.gutenberg.org/dirs/etext00/dscmn10.txt>).

36. Brown et al, *supra* n. 33, at 5.

37. *Id.*

38. Dean Falk, *Hominid Brain Evolution and the Origins of Music*, in *The Origins of*



that rhythmic ability appears to form a foundation for linguistic ability<sup>39</sup> and that reading and music are processed in both the left middle, and superior temporal brain regions.<sup>40</sup> It is no surprise, then, to discover that music causes behavioral and electrophysiological priming effects that are indistinguishable from those evoked by sentences. This observation, in turn, suggests that musical aspects of language may help convey narrative meaning.<sup>41</sup>

This finding has led to practical applications in the schoolhouse. Educators, for example, have found that music is a valuable tool used to enhance beginning reading skills.<sup>42</sup> Teachers realize that music creates a “reality construct’ for students in a unique and captivating fashion” that in turn enhances learning.<sup>43</sup> When letters of the alphabet are connected to pitch, some slow learners learn faster, just as learning new information is enhanced when presented in song.<sup>44</sup> This all starts at birth. As Professor Daniel J. Levitin points out in his recent book, *The World in Six Songs: How the Musical Brain Created Human Nature*,

The brain learns music and language because it is configured to acquire rules about how musical and linguistic ele-

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*Music*, *supra* n. 33, at 197 (stating in the abstract that “[r]ecent positron emission tomography and functional magnetic resonance imaging studies show that the cortical substrates for both language and music depend on widely distributed networks that in some cases overlap; use both sides of the brain, but are dominated by opposite hemispheres . . . .”); Isabelle Peretz, *The Nature of Music from a Biological Perspective*, 100 *Cognition* 1, 20 (2006); Iain Morley, *The Evolutionary Origins and Archaeology of Music* 106–114, 123 (Darwin College Thesis Oct. 2003) (available at <http://emma.dar.cam.ac.uk/dcrr/dcrr002.pdf>); see also Petr Janata, *When Music Tells a Story*, 7 *Nature Neuroscience* 203, 203 (Mar. 2004) (noting that in Prokofiev’s “Peter and the Wolf,” different instruments and melodic themes are used to denote the different characters in the story).

39. Morley, *supra* n. 38, at 110.

40. See generally Steven Brown et al., *Music and Language Side by Side in the Brain: A PET Study of the Generation of Melodies and Sentences*, 23 *European J. Neuroscience* 2791 (2006); C. J. Price et al., *Brain Activity During Reading: The Effects of Exposure Duration and Task*, 117 *Brain* 1255 (1994).

41. Janata, *supra* n. 38, at 204.

42. Susannah J. Lamb & Andrew H. Gregory, *The Relationship between Music and Reading in Beginning Readers*, 13 *Educ. Psychol.* 19, 19 (1993) (“Tests of phonemic awareness and of reading performance were also administered, with particular emphasis on ability at employing phonic skills in reading. The results support the hypothesis that discrimination of musical sounds is related to reading performance, but reveal that the influential factor in this relationship is a specific awareness of pitch changes.”).

43. Jesse Palmer & Susie Burroughs, *Integrating Children’s Literature and Song into Social Studies*, 93 *Soc. Stud.* 73, 73 (Mar./Apr. 2002) (citation omitted).

44. Erika Engstrom, *Cartoons as Education*, 23 *J. Popular Film & TV* 98 (Fall 1995) (citing various studies).

ments are combined; its computational circuits (in the prefrontal cortex) “know” rules about hierarchical organization and are primed to receive musical and linguistic input during the early years of development. This is why a child who is denied exposure to music or language before a certain age . . . will *never* acquire normal music or language skills—the pruning process has already begun and those neural circuits that were waiting to be activated become eliminated.<sup>45</sup>

All of which leads to the conclusion that music is innate; we hear what we read, and, like infants, we hear better with music than with mere words.<sup>46</sup>

Several theories are offered by scholars to explain how music and language co-evolved. Following Darwin’s lead, several researchers point to the evolution of music as a courtship device in the service of mate selection.<sup>47</sup> Shakespeare wrote, “If music be the food of love, play on; [g]ive me excess of it[.]”<sup>48</sup> Geoffrey Miller, evolutionary psychologist, claims proof of the point. He has studied all types of recorded music as well as the age and gender of musicians. “In every genre of music men produce 10 times as much as women and their output peaks at around age 30—near the time of their peak reproductive years.”<sup>49</sup> Miller concludes what rock stars have realized for decades that “good musicians, particularly good singers, attract sexual interest.”<sup>50</sup> *Led Zeppelin*’s Robert Plant summed up the evolutionary notion of rock music as a vehicle for sexual encounter this way: “I was always on my way to love. Always. Whatever road I took, the car was heading for one of the greatest sexual encounters I’ve ever had.”<sup>51</sup>

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45. Daniel J. Levitin, *The World in Six Songs: How the Musical Brain Created Human Nature* 239 (Dutton 2008) (emphasis in original).

46. Morley *supra* n. 38, at 137 (quoting L.J. Trainor et al., *Is Infant Directed Speech Prosody a Result of the Vocal Expression of Emotion*, 11 *Psychol. Sci.* 188, 194 (2000)).

47. Geoffrey Miller, *Evolution of Human Music through Sexual Selection*, in *The Origin of Music*, *supra* n. 33, at 329; see Morley *supra* n. 38, at 189–193.

48. William Shakespeare, *Twelfth Night* Act 1, scene 1, 1–3.

49. Josie Glausiusz, *Power Pop*, *Brain* 56, 58 (Winter 2008/2009).

50. *Id.* Singers like Elvis Presley, Frank Sinatra and David Cassidy were sex icons of the 1950s and 1960s, as were many hard rock bands of the 1970s for which the phrase “cock rock” was coined. See Steve Waksman, *Every Inch of My Love: Led Zeppelin and the Problem of Cock Rock*, 8 *J. Popular Music Stud.* 5 (1996) (examining the band’s music and image as male sexuality).

51. *Human Evolution Why Music?* Economist On-Line (Dec. 18, 2008) (available at [http://www.economist.com/printedition/displayStory.cfm?Story\\_ID=12795510](http://www.economist.com/printedition/displayStory.cfm?Story_ID=12795510)).

Some view music as an adaptive bonding mechanism for a mother and her child used as part of the nurturing process—lullabies are universal.<sup>52</sup> Music making is a successful way to manage a baby and get it to sleep, according to University of Toronto's Sandra Trehub.<sup>53</sup> An infant who sleeps well is easier to care for, more likely to survive to adulthood, and more likely to have children with a similar affinity for music.<sup>54</sup>

Others take the view that music's adaptive role is to promote cooperation and cohesion of social groups.<sup>55</sup> National anthems, military marches, and even campfire songs are all examples of group cohesion through music. "Singing together releases oxytocin, a neurochemical now known to be involved in establishing bonds of trust between people."<sup>56</sup> Groups of ancestors who sang and worked together were able to survive challenges that loners or dysfunctional groups could not. Thus, musical affinity, as an inheritable trait, was passed down to the descendants of those members of the groups that survived. Individuals in the groups that perished had no descendants.

Finally, there is the hypothesis that music is not a discrete human activity, but rather that music and language are evolutionarily connected. Steven Brown of McMaster University in Ontario coined the phrase "musilanguage" to describe how music and language co-evolved.<sup>57</sup> Brown and others argue that language and music are merely opposite ends of a spectrum from referential meaning to emotive meaning and comprised of the essential building blocks of combinatorial syntax and intonational phrasing. In this view,

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52. Ellen Dissanayake, *Antecedents of Temporal Arts in Early Mother-Infant Interaction*, in *The Origins of Music*, *supra* n. 33, at 389; Ellen Dissanayake, *If Music Is the Food of Love, What About Survival and Reproductive Success*, *Musicae Scientiae* 169, 176 (spec. issue 2008).

53. Glausiusz, *supra* n. 49, at 58; *see also* Sandra E. Trehub & Laurel Trainor, *Singing to Infants: Lullabies and Play Songs*, in *Advances in Infancy Research* vol. 12, 43, 48 (Carolyn Rovee-Collier et al. eds., Ablex Publ. Corp. 1998).

54. Dean Falk, *Prelinguistic Evolution in Early Hominins: Whence Motherese?* 27 *Behavioral & Brain Sci.* 491 (2004).

55. Thomas Geissmann, *Gibbon Songs and Human Music from an Evolutionary Perspective*, in *The Origins of Music*, *supra* n. 33, at 119.

56. Levitin, *supra* n. 45, at 50–51.

57. Steven Brown, *The "Musilanguage" Model of Music Evolution*, in *The Origins of Music*, *supra* n. 33, at 278–279; *see* Michael Vincent, *The Language of Music, the Music of Language, More Than a Metaphor* 2–4, <http://michaelvincent.ca/Design/Assets/Writing/More%20than%20metaphor.pdf> (Dec. 2, 2004).

music and language differ mainly in their emphasis rather than in their fundamental nature, such that language emphasizes sound reference while downplaying its sound emotion aspect (although it certainly makes use of sound emotion), whereas music's acoustic mode emphasizes sound emotion while downplaying its referential aspect (although it certainly makes use of referentiality).<sup>58</sup>

Brown theorizes that music and language have the phrase as their basic unit of structure and function, and that what makes singing and talking different from grunting and screaming is a limited repertoire of discrete sounds chosen from the infinite number of possible acoustic elements. "From this standpoint, both speech phrases and musical phrases are melodiorhythmic structures in which melody and rhythm are derived from" the same sources.<sup>59</sup> Brown offers a schematic to illustrate his point,<sup>60</sup> which is reprinted in the appendix to this Article.

Both music and language function on two levels (meaning and phonological), which emerge out of a common set of principles described above. The two differ more in emphasis than in kind, as represented by their placement on different ends of the spectrum.<sup>61</sup> Nearer the center are those speech-like styles of singing used in opera and oratorio, called *recitativo* and the more song-like leitmotifs (a recurring theme or motif used to illustrate a character or idea like the string instruments for Peter in *Peter and the Wolf* or the whinnying of the horses when Frau Blücher is mentioned on screen in *Young Frankenstein*).

The notion that music is adaptive is not without critics. Steven Pinker, a Harvard psychologist, traces the evolution of modern man in *How the Mind Works*.<sup>62</sup> He argues that music is not adaptive, but rather mere "auditory cheesecake—simply a byproduct of language evolution, taking advantage of our brain's pleasure centers in the same way cheesecake fulfills our innate desire for fats and sugars . . . nothing more than empty-calorie instruments of instant gratification."<sup>63</sup> Pinker states that the evolution-

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58. Brown, *supra* n. 57, at 278.

59. *Id.* at 273.

60. *Id.* at 275.

61. *Id.*

62. Steven Pinker, *How the Mind Works* (W.W. Norton 1997).

63. *Id.* at 524–525; see also Karen Schrock, *More Than Auditory Cheesecake: Daniel Levitin's New Book Explores the Science behind Humanity's Love Affair with Music*,

ist arguments regarding the adaptive nature of music are “completely bogus explanations, because they assume what they set out to prove: that hearing plinking sounds brings the group together, or that music relieves tension . . . [b]ut they don’t explain why. They assume as big a mystery as they solve.”<sup>64</sup> Music may well be innate, he argues, but it evolved as a useless byproduct of language, which he sees, unlike music, as an actual adaptation.

Pinker’s argument seems to have been undercut by some recent genetic studies and archeological evidence. For example, Dr. Levitin notes the fossil evidence, which indicates that the Brodmann area 44—part of the frontal cortex that is important for auditory motor function—may have been in place two million years ago. He points out that the gene associated with human language “existed in Neanderthals [and] a form of it is found in songbirds.”<sup>65</sup> Then, 37,000 years ago, at the time musical instruments first appeared, there was another genetic variation, all of which “primed the creation of the musical brain.”<sup>66</sup>

This theory that music and language have a common lineage is supported in practice by interesting and important advances in education. For example, French researchers have shown that humans learn new words more effectively if those words are associated with distinct pitches—a melody—as opposed to those words being spoken in monotonous fashion.<sup>67</sup> Music can be used to enhance concentration and cognitive function.<sup>68</sup> The inclusion of musical elements in writing has a similar positive effect on the reader/listener’s reception, perception, and memory of information.

Although Pinker’s argument is in the minority, and regardless of whether further research and study show that Pinker or the adaptivists are correct, the consequence for legal writers re-

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Science On Line, <http://scienceline.org/2006/11/22/bio-schrock-music/> (posted Nov. 22, 2006).

64. Drake Bennett, *Survival of the Harmonious; Mounting Evidence Suggests That Human Beings Are Hard-Wired to Appreciate Music*, Boston Globe (Sept. 3, 2006) (available at [http://www.boston.com/news/globe/ideas/articles/2006/09/03/survival\\_of\\_the\\_harmonious/](http://www.boston.com/news/globe/ideas/articles/2006/09/03/survival_of_the_harmonious/)).

65. Levitin, *supra* n. 45, at 267.

66. *Id.* at 268.

67. David Schon et al., *Songs as an Aid for Language Acquisition*, 106 *Cognition* 975 (2008).

68. Sima H. Anvari et al., *Relations Among Musical Skills, Phonological Processing, and Early Reading Ability in Preschool Children*, 8 *J. Experimental Child Psychol.* 111 (2002).

mains unchanged. Music is innate and understanding its structure and incorporating that structure into writing will enable readers to absorb the words as the reader's mind is more in tune with the writing. Lawyers can learn to better understand their craft, writing, by better understanding what goes on neurologically in the brain of those who read what they write. These readers—judges, litigants, lawyers, clients—are not just extracting words from the page but they are hearing what the lawyer has written. To be better understood, that sound should be pleasing.

### C. Reading, Speaking, Singing, and Musilanguage

The reading done by judges, litigants, lawyers, and clients, like everyone else, can be mathematically represented by " $R=D \times C$ ," where  $D$  is the mental process of decoding symbols (letters and punctuation) and  $C$  is comprehension (the use of context and inference to establish meaning).<sup>69</sup> Incorporating musical elements into written text enhances the comprehension component of this reading equation. Research by University of Massachusetts Professor Emeritus Peter Elbow demonstrates that including musical elements in writing accomplishes enhanced comprehension by pulling the reader in and pulling the reader along. Musical elements of rhythm, and to a lesser degree melody (flow), create energy to "bind written words together so as to pull us along from one part to the next and to make us feel that all parts are held together into a magnetic or centripetal whole."<sup>70</sup>

Dr. Elbow, author of the landmark *Writing without Teachers*,<sup>71</sup> was a pioneer of the process revolution in the teaching of writing. He helped free students from formal rules during the drafting stages of writing and helped them learn to explore themselves through creative uses of English.<sup>72</sup> He points out how academics (and by analogy lawyers) fail to recognize that readers hear what they read. These writers ignore the organizational les-

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69. J. F. Ehrich, *Vygotskian Inner Speech and the Reading Process*, 6 *Austr. J. Educ. & Developmental Psychol.* 12, 15 (2006).

70. Peter Elbow, *The Music of Form: Rethinking Organization in Writing*, 57 *College Composition & Commun.* 620, 625 (June 2006).

71. Peter Elbow, *Writing without Teachers* (2d ed., Oxford U. Press 1998).

72. E-mail Peter Elbow, U. Mass. Prof. Emeritus, to Bret Rappaport, Author (Apr. 11, 2009) (on file with Author); see generally *Encyclopedia of Rhetoric and Composition: Communication from Ancient Times to the Information Age* 462 (Theresa Enos ed., Garland Publ. 1996); Ken Macrorie, *Telling Writing* (Boynnton/Cook 1984).

son of music “to bind time.” Dr. Elbow cites to the evolutionary concepts explained earlier to conclude that “hearing—the modality that works in time—reaches an older, deeper, and more instinctual part of the brain than sight. Rhythm and movement reach inside us.”<sup>73</sup> Those writers who “lead us on a journey to satisfaction by way of expectations” recognize that “[s]entences are little pieces of energy or music—they have rhythm and melody—even on the page . . . .”<sup>74</sup>

Dr. Elbow’s notion of incorporating musical elements into writing to pull the reader in and along is also used by speech makers who implicitly recognize the musilanguage. Thus, from the steps of the Lincoln Memorial, Martin Luther King resorted to musical elements to pull the multitudes in and along. His *I Have a Dream* speech is punctuated by musical elements of rhythm and repetition (italicized), with its call-and-response cadences:

*I have a dream* that one day on the red hills of Georgia the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood.

*I have a dream* that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice.

*I have a dream* that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

*I have a dream* today.

*I have a dream* that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification; one day right there in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers.

*I have a dream* today . . . .<sup>75</sup>

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73. Elbow, *supra* n. 70, at 626.

74. *Id.*

75. The full text of the speech is available on line at <http://www.usconstitution>

Forty years later, President Obama's acceptance speech in Denver and his victory night speech from Chicago's Grant Park both echoed with similar musilanguage elements.<sup>76</sup> But it is his ten-minute concession speech upon losing the New Hampshire primary to Hillary Clinton that is already being called "one for the ages,"<sup>77</sup> not for what he said as much as for how he said it. These words are strong, short, upbeat, and incorporate musical elements (italicized) of rhythm and tone. At the conclusion of his remarks, Senator Obama said,

For when we have faced down impossible odds, when we've been told we're not ready or that we shouldn't try or that we can't, generations of Americans have responded with a simple creed that sums up the spirit of a people: *Yes, we can. Yes, we can. Yes, we can.*

It was a creed written into the founding documents that declared the destiny of a nation: *Yes, we can.*

It was whispered by slaves and abolitionists as they blazed a trail towards freedom through the darkest of nights: *Yes, we can.*

It was sung by immigrants as they struck out from distant shores and pioneers who pushed westward against an unfor-giving wilderness: *Yes, we can.*

It was the call of workers who organized, women who reached for the ballot, a president who chose the moon as our new frontier, and a king who took us to the mountaintop and pointed the way to the promised land: *Yes, we can*, to justice and equality.

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.net/dream.html. Dr. King used music not only for structure but as a metaphor itself as he proclaims "let freedom ring" six times in the last two paragraphs of this, most memorable of all speeches. See Mark Vail, *The "Integrative" Rhetoric of Martin Luther King Jr.'s "I Have a Dream" Speech*, 9 *Rhetoric & Pub. Affairs* 51 (Spring 2006); see also Melisa Cahnmann, *The Craft, Practice, and Possibility of Poetry in Educational Research*, 32 *Educ. Researcher* 29, 32-33 (Apr. 2003).

76. Barak Obama, Speech, *The American Promise* (Democratic Natl. Conv., Denver, Colo., Aug. 28, 2008) (available at [http://www.huffingtonpost.com/2008/08/28/barack-obama-democratic-c\\_n\\_122224.html](http://www.huffingtonpost.com/2008/08/28/barack-obama-democratic-c_n_122224.html)). James Wood, *Victory Speech*, *New Yorker* (Nov. 17, 2008) (available at [http://www.newyorker.com/talk/2009/11/17/081117ta\\_talk\\_wood](http://www.newyorker.com/talk/2009/11/17/081117ta_talk_wood)).

77. Garr Reynolds, *Representation Zen, The Art of Repetition*, <http://www.presentationzen.com/presentationzen/2008/01/obama-speech.html> (Jan. 11, 2008).



*Yes, we can*, to opportunity and prosperity. *Yes, we can* heal this nation. *Yes, we can* repair this world. *Yes, we can*.

And so tomorrow, as we take this campaign south and west; as we learn that the struggles of the textile worker in Spartanburg are not so different than the plight of the dishwasher in Las Vegas; that the hopes of the little girl who goes to a crumbling school in Dillon are the same as the dreams of the boy who learns on the streets of LA; we will remember that there is something happening in America; that we are not as divided as our politics suggests; that we are one people; we are one nation; and together, we will begin the next great chapter in America's story with three words that will ring from coast to coast; from sea to shining sea—*Yes. We. Can.*<sup>78</sup>

The repetition of “yes, we can,” and the resort to a chronological litany of ancestors who each in their own way embodied that creed, lead to the climax, a crescendo in music, that urges us—the present—to carry forth that torchlight. The building “thump thump thump” can be heard in every succeeding sentence and in the end with three single-word sentences.

Great speeches are not unique examples of how musical elements can be used to enhance memory, comprehension, and persuasiveness of words. The incorporation of musical elements like rhythm to help students understand what they read has surfaced in the recent resurgence of “read-alouds” in high schools. A “read-aloud” is a text or passage selected by a teacher to read publicly to a group of students so that they can better focus on the content of the text.<sup>79</sup> Many students who hear passages of information aloud learn better than they otherwise would. This appears to be true regardless of the subject matter.

Poetry presents perhaps the most patent use of words as lyrical art, and it is “art [that] allows [humans to] focus another's attention on aspects of feeling or perception that he might not otherwise see.”<sup>80</sup> Poetry affects our emotions because it targets the evolutionary recesses of the human brain. The necessity that

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78. *Barack Obama's New Hampshire Primary Speech*, N.Y. Times (Jan. 8, 2008) (available at <http://www.nytimes.com/2008/01/08/us/politics/08text-obama.html>).

79. See Barbara Erickson, *Read-Alouds Reluctant Readers Relish*, 40 *J. Adolescent & Adult Literacy* 212 (1996).

80. Levitin, *supra* n. 45, at 21.

good poetry, like music, include rhythm, flow, and tone is not a novel notion. The modern theory that music and its relative poetry are evolutionarily adaptive can be traced back 2000 years. Cicero wrote that the ability to understand “the rhythms and pronunciations of words” is a subconscious instinct, “a faculty” that is “rooted deep in the general sensibility.”<sup>81</sup> “Nature, [Cicero] tells us, has placed in the ears a register which tells us if rhythm is good or bad” and everyone has rhythm.<sup>82</sup> Here is how lawyers should use it.

### III. USE OF RHYTHM, FLOW, AND TONE IN WRITING

H.L. Mencken observed that “there are no dull subjects, only dull writers.”<sup>83</sup> Thus, ineffective legal writers have only themselves to blame for boring briefs—the subject matter is guiltless. Uninteresting, rote writing is helped mightily by the incorporation of rhythm, flow, and tone because, as demonstrated above, music and language are evolutionarily linked. Incorporation of these musical elements in writing is a technique traditionally used in fiction writing. “[N]on-fiction puts emphasis on the precise and skilled use of words and tone, and the assumption that the reader is as intelligent as the writer.”<sup>84</sup> As Judge Posner points out, however, “[J]udges and lawyers who are disdainful of ‘fine’ writing . . . are mistaken.”<sup>85</sup>

As writers of non-fiction prose, lawyers should use the musical tools of fiction to enhance the appeal of their writing. Professor Kathryn M. Stanchi, while expressing caution, notes that literary devices can be persuasive on a number of levels.<sup>86</sup> The “poetry of the writing” (what Stanchi calls repetition, inversion, rhythm, and emotion) catches the reader’s attention and “make[s] the reader see and hear about experiences”<sup>87</sup> beyond his expe-

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81. Steven Katz, *Style, Rhetoric and Rhythm, Essays by Morris W. Croll*, 19 *Rhetoric Socy. Q.* 381, 383 (Fall 1989) (citing Cicero, *De Oratore* bks. 1–3, 195–197 (E.W. Sutton & H Rachham, trans., Loeb-Harv. U. Press 1942)).

82. Albert C. Clark, *Prose Rhyme in English* 3 (Oxford at Clarendon Press 1913).

83. *Favorite H.L. Mencken Quotes*, <http://nickelkid.net/quotes/mencken.html> (accessed Jan. 19, 2010).

84. Sol Stein, *Stein on Writing* 223 (St. Martin’s Press 1995).

85. Richard A. Posner, *Judicial Opinion Writing: Judge’s Writing Styles (and Do They Matter?)*, 62 *U. Chi. L. Rev.* 1421, 1424 (1995).

86. Stanchi, *supra* n. 14, at 427–428.

87. *Id.*

rience. The use of “aphoristic” writing can also “serve to embed the thoughts and feelings into the reader’s consciousness.”<sup>88</sup> Rhythm, flow, and tone are innate; neglecting them is folly.

#### A. Rhythm in Writing

Welsh poet Dylan Thomas, observed that rhythm is inborn:

The first poems I knew were nursery rhymes, and before I could read them for myself I had come to love just the words of them, the words alone. What the words stood for, symbolized, or meant, was of very secondary importance; what mattered was the *sound* of them as I heard them for the first time on the lips of the remote and incompressible grown-ups who seemed, for some reason, to be living in my world. And these words were, to me, as the notes of bells, the sounds of musical instruments, the noises of wind, sea, and rain, the rattle of milk-carts, the clopping of hooves on cobbles, the fingering of branches on a window pane, might be to someone, deaf from birth, who has miraculously found his hearing. I did not care what the words said, overmuch, nor what happened to Jack & Jill & the Mother Goose rest of them; I cared for the shapes of sounds that their names, and the words describing their actions, made in my ears; I cared for colours the words cast on my eyes.<sup>89</sup>

Rhythm is recurrence, and recurrence captivates because recurrence is innate. Recurrence is seen in Nature’s rolling waves, patterns in leaves, and in the “noise of the wind.” In music, recurrence is heard as the background beat that holds the piece together. In text, recurrence is heard in the mind’s ear as it serves to move the piece along from word-to-word, sentence-to-sentence, paragraph-to-paragraph, and section-to-section, binding together a comprehensive whole. The essential elements of rhythm are balance, cycles of sound, and sentence structure and variety.

##### 1. *Balance*

Balance in music (once a button on a stereo equalizer but now an iPod setting) moderates the acoustic relationship of sound

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88. See Posner, *supra* n. 85, at 1423.

89. *The Poems of Dylan Thomas* xv (Daniel Jones ed., New Directions Publ. Corp. 2003) (preface by Dylan Tomas) (emphasis in original).

sources to one another.<sup>90</sup> Balance in writing is the relationship between, or repetition of, words or sounds within a sentence, as well as the variation of sentence length within a paragraph.

Literature offers an example. In *For Whom the Bell Tolls* protagonist Robert Jordan receives his assignment that he must blow up an enemy supply bridge. Ernest Hemingway wrote a set of lines at the story's start that parallels a paragraph at the end of the book, creating balanced rhythm. In Chapter 1, he writes,

That was not his **business**. That was Golz's **business**. He had only one thing to do and that was what he should **think** about and he must **think** it out clearly and take everything in as it came along, and not to **worry**. To **worry** was as bad as to be afraid.<sup>91</sup>

Each sentence contains a word from the previous sentence (bold) and the sentences are short-long-short. After the bridge is destroyed and Jordan lies in wait to ambush the enemy as his comrades flee, Hemingway returns the reader in the final chapter to the “thump thump thump” of Jordan's thinking:

**Think** about them being away, he said. **Think** about them going through the timber. **Think** about them crossing the creek. **Think** about them riding through the heather. **Think** about them going up the slope. **Think** about them O.K. tonight. **Think** about them traveling, all night. **Think** about them hiding up tomorrow. **Think** about them. God damn it, **think** about them. *That's just as far as I can **think** about them*, he said.<sup>92</sup>

The passage pulsates. Hemingway's use of the staccato rhythm parallels Jordan's heart beat—the pounding in his head—and draws the reader into the scene. Each sentence builds on the preceding one in Jordan's mind until the last sentence when the thinking bursts out as he speaks.

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90. William Moylan, *Understanding and Crafting the Mix* 155 (Focal Press 2007) (providing an example of musical balance graph for “Lucy in the Sky with Diamonds,” from the album, *Sgt. Pepper's Lonely Hearts Club Band*).

91. Ernest Hemingway, *For Whom the Bell Tolls* 17 (Charles Scribner's Sons 1968) (emphasis added).

92. *Id.* at 493 (emphasis added); see also Gabrielle Rico, *Writing the Natural Way: Using Right-Brain Techniques to Release Your Expressive Powers* 136–137 (J.P. Tarcher, Inc. 1983) (analyzing these passages).

Too many short sentences in a row can annoy readers, while too many long sentences in a row can bore them. “Short sentences are more dramatic; long sentences are calmer by nature and tend to be more explanatory and descriptive.”<sup>93</sup> For example, in *I Am Charlotte Simmons*, novelist Tom Wolfe varies sentence length and brackets the following passage with two crisp sentences to keep the reader’s interest:

Charlotte was astonished. The girl was reading one of the greatest of all French novels in an *English* translation—and Dr. Lewin hadn’t so much as made note of the fact. Charlotte quickly glanced at the girl on her left and the boy on her right. They were both reading the book . . . in *English translation*. It was baffling. She had read it in translation way back in the ninth grade under Miss Pennington’s tutelage, and she had spent the better part of the past three days reading it in the original, in French. Flaubert was a very clear and direct writer, but there were many subtle constructions, many colloquialisms, many names of specific objects she’d had to look up, since Flaubert put a big emphasis on precise, concrete detail. She had analyzed every line of it, practically disassembled it and put it back together—and nobody else was reading it in French, *including the professor*. How could that be?<sup>94</sup>

Just as Hemingway and Wolfe did in their novels, legal writers like Judges Learned Hand and Benjamin Cardozo employed balance in their opinions.<sup>95</sup> A good example of this effective use of balance in persuasive<sup>96</sup> legal writing is *Palsgraf v. Long Island Railroad*, in which Judge Cardozo opened his opinion this way:

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93. Ronald B. Tobias, *Theme & Strategy* 131 (Writer’s Dig. Bks. 1989).

94. Tom Wolfe, *I Am Charlotte Simmons* 100 (Farrar Strauss Giroux 2004) (emphasis in original).

95. See e.g. Jeffrey A. Van Detta, *Learned Hand’s District Court Opinions, 1916–1917: A Macrostructural Analysis Employing Cognitive Psychology Principles* 78, [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=jeffrey\\_van\\_detta](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=jeffrey_van_detta) (accessed Apr. 22, 2010); Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 *Yale L.J.* 511, 534–540 (1994).

96. There is little dispute that judicial opinions are persuasive writing. See Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 4 (Aspen 2002). Cardozo himself acknowledged this. *Id.* (citing Benjamin N. Cardozo, *Law and Literature in the Selected Writings of Benjamin Nathan Cardozo* 342 (Fallon Publication 1947)).

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.<sup>97</sup>

As pointed out by others, notice how Cardozo varies the length of the sentences and how after the word "moving" the choppiness of the sentences mirrors the chaos happening on the railroad platform.<sup>98</sup> It is the length of the sentences, individually and in connection with those that precede and come after, that creates rhythm.

## 2. *Cycles of Sound*

The term "cycles of sound"<sup>99</sup> refers to repetition of a sound, syllable, word, phrase, line, stanza, or metrical pattern in a written work. It is the basic unifying device in all poetry, which itself owes much to music. Repetition can operate on many levels within a written work.<sup>100</sup> For example, alliteration is when repetition

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97. 248 N.Y. 339 (1928).

98. Armstrong & Terrell, *supra* n. 12, at 175. For a more in depth discussion see e.g., Richard A. Posner, *Cardozo: A Study in Judicial Reputation* 39–48 (U. Chi. Press 1992) (discussing Cardozo's rhetorical manipulation of the record facts in *Palsgraf* to set up the discussion of duty on which, contrary to the trial and appeals courts, he sought to present as the pressure point of the case).

99. Jack Hart, *The Writer's Coach: An Editor's Guide to Words That Work* 134 (Pantheon Bks. 2006).

100. See Brigham Young U., *The Forest of Rhetoric silva rhetoricae*, <http://rhetoric.byu.edu/Figures/Groupings/of%20Repetition.htm> (accessed Jan. 17, 2010) (containing a full compilation of the dozens of ways of repeated sounds, words, phrases, and ideas).

of letters, syllables, or sound is found in the same sound at the beginning of two or more stressed syllables. The repetition of similar vowel sounds is called assonance.

Another oft-used and more obvious device to create a cycle of sound is an anaphora, which is the emphasis of words and phrases by repeating them throughout a sentence or paragraph. The most famous example is, perhaps, Dickens's opening lines to *A Tale of Two Cities*:

**It was** the best of times, **it was** the worst of times, **it was** the age of wisdom, **it was** the age of foolishness, **it was** the epoch of belief, **it was** the epoch of incredulity, **it was** the season of Light, **it was** the season of Darkness, **it was** the spring of hope, **it was** the winter of despair, **we had** everything before us, **we had** nothing before us, **we were** all going direct to Heaven, **we were** all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.<sup>101</sup>

Similarly, in his famous poem, concentration camp survivor Pastor Martin Neimoller uses an anaphora (bold) to make the message of the pernicious effects of apathy towards the plight of a people all the more poignant:

**When the Nazis** came for the communists  
I remained silent;  
*I was not* a communist.

**When they** locked up the social democrats,  
I remained silent;  
*I was not* a social democrat.

**When they** came for the trade unionists,  
I did not speak out;  
*I was not* a trade unionist.

**When they** came for the Jews,  
I remained silent; *I was not* a Jew.

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101. Charles Dickens, *A Tale of Two Cities* 1 (Penguin Classics 2003) (emphasis added).

**When they** came for me,  
there was no one left to speak out.<sup>102</sup>

Repetition of words and phrases (italicized), as these passages demonstrate, works as a memory tool because the repetition of sound cues mental recall.<sup>103</sup> And as Dylan Thomas lyrically attested, long before we read Dickens, nursery rhymes proved pleasurable, because as infants humans are already positively affected by sound similarities in syllables.<sup>104</sup>

These lessons of childhood are not lost on some judges. Justice William O. Douglas used repetition (bold and underscored) and alliteration (italicized) to illustrate that Jacksonville's vagrancy ordinance was not only unconstitutional but bad for our well being. He wrote of the right to wander, stroll, and loaf and that:

These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of *creativity*. These amenities have dignified the **right** of *dissent* and have honored the **right** to be non-conformists and the **right** to *defy* submissiveness. They have encouraged lives of high *spirit* rather than hushed, *suffocating silence*.<sup>105</sup>

Justice Douglas deliberately chose words with similar front end sounds, like "self-confidence" and "creatively," "dignified" and "dissent" and "defy," and "spirit" and "suffocating silence," to create that cycle of sound that strolls through this passage, like the plaintiff whose constitutional right to wander was being adjudicated.

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102. *Martin Niemoller*, [http://en.wikiquote.org/wiki/Martin\\_Niemoller](http://en.wikiquote.org/wiki/Martin_Niemoller) (accessed Jan. 19, 2010).

103. David C. Rubin, *Memory in the Oral Tradition: The Cognitive Psychology of Epic, Ballads, and Counting-out Rhymes* 305–306 (Oxford U. Press 1995); see also *The Power of Peter Piper: How Alliteration Enhances Poetry, Prose, and Memory*, Sci. Daily, <http://www.sciencedaily.com/releases/2008/07/080730140837.htm> (July 31, 2008).

104. Rachel A. Hayes & Alan Slater, *Three-Month-Olds' Detection of Alliteration in Syllables*, 31 *Infant Behavior & Dev.* 153 (Jan. 2008).

105. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (emphasis added); see generally Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 *Wash. & Lee L. Rev.* 193, 206 (2002) (for an excellent discussion of Justice Douglas and others' rhetorical styles).



Finally, the repetition of ideas is perhaps the most important repetition device for a legal brief. Repetition of the main terms of an argument is known as *epanodos* and can be used effectively by lawyers. A *trductio* is a more subtle means of repeating the same main terms of an argument by settling on a key term and repeating that term throughout the work.

In the majority opinion in *Texas v. Johnson*,<sup>106</sup> Justice William Brennan used a *trductio* (that the flag is “cherished”), several alliterations (italicized), and an anaphora (underscored) to create a masterful piece of legal writing that illustrates the importance of upholding a person’s right to burn the American flag.

We are tempted to say, in fact, that the flag’s deservedly **cherished** place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson’s is a *sign* and *source* of our *strength*. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation’s *resilience*, not its *rigidity*, that Texas sees *reflected* in the flag—and it is that resilience that we *reassert* today. . . .

The way to preserve the flag’s special role is not to *punish* those who feel differently about these matters. It is to *persuade* them that they are wrong. . . . We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag burner’s message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its *dese-cration*, for in *doing* so we *dilute* the freedom that this **cherished** emblem represents.<sup>107</sup>

Returning to the crossroads of music and persuasive writing, lawyer and writer Bill Long noted one easy way to remember the power and importance of cycles of sound like an *epanodos*. On his website, he writes: “‘Epi’ is ‘upon,’ ‘ana’ is ‘again,’ and ‘odos’ is

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106. 491 U.S. 397 (1989).

107. *Id.* at 419–420 (emphasis added).

‘road.’” I always hear Willie Nelson singing ‘On the Road Again,’ whenever I think of the word *epanodos*.”<sup>108</sup>

### 3. *Sentence Structure and Variety*

Sentence structure and variety are the last two rhythmic tools employed by writers to captivate and carry the reader. As in music, the rhythms of writing occur on multiple levels. A cycle of musical beats is known as a measure, and in writing, authors create this with sentence length, as demonstrated by the Hemingway and Wolfe passages discussed above.<sup>109</sup> An important point can be made when a short, punchy sentence follows a long, languid one. Former Professor and editor of the *Oregonian Newspaper* Jack Hart cited to the *New York Times* story in the aftermath of the 9/11 Attacks to make his point:

Many people were busy on their cell phone, trying to reach friends and relatives they knew were in the buildings to alert their own loved ones that they were all right. But circuits were overloaded. Fear mounted.<sup>110</sup>

The two-word sentence at the end provides a dramatic punch that draws the reader into the event. A long sentence would have failed.

Judges and lawyers often use sentence structure and variety to more effectively make their point. A typical IRAC-modeled paragraph generally introduces the principle first, then illustrates that principle with authorities, and finally provides some expanded conclusion.<sup>111</sup> In *Morehead v. New York ex. rel. Tipaldo*,<sup>112</sup> Chief Judge Hughes incorporated the specific rhythmic device of sentence length variation to create a more effective paragraph that transcends traditional IRAC which serves as the paragraph’s structural base:

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108. Bill Long, *Similar but Different*, <http://www.drbilllong.com/Words/Similar.html> (2004).

109. *Supra* nn. 91–92, 94, and accompanying text; Moylan, *supra* n. 90, at 17; Tobias, *supra* n. 93, at 100.

110. Hart, *supra* n. 99, at 137 (discussing this quotation); see N. R. Kleinfeld, *U.S. Attacked: Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. Times A1 (Sept. 12, 2001).

111. See Peck, *supra* n. 2, at 35.

112. *Id.* at 35–36 (providing this example).

We have repeatedly said that liberty of contract is a qualified, and not an absolute, right. “There is no absolute freedom to do as one wills or to contract as one chooses. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.” The numerous restraints that have been sustained have often been recited. Thus, we have upheld the limitation of hours of employment in mines and smelters; the requiring of redemption in cash of store orders or other evidences of indebtedness issued in payment of wages; the prohibition of contracts for options to sell or buy grain or other commodities at a future time; the forbidding of advance payments to seamen; the prohibition of contracts to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine; the regulation of the size and weight of loaves of bread; the regulation of insurance rates; the regulation of the size and character of packages in which goods are sold; the limitation of hours of employment in manufacturing establishments with a specified allowance of overtime payment; the regulation of sales of stocks and bonds to prevent fraud; the regulation of the price of milk. The test of validity is not artificial. It is whether the limitation upon the freedom of contract is arbitrary and capricious, or one reasonably required in order appropriately serving the public interest in the light of the particular conditions to which the power is addressed.<sup>113</sup>

In each sentence, Justice Hughes has purpose; each sentence leads to the next; and each sentence varies in length. The beginning starts with a long quote setting the purpose. The middle offers examples in a rapid-fire power of semi-colons (stop like a period but the with a shorter pause) and then ends with a conclusion stated in the negative and then positive. Rhythm like this alone, however, cannot create a complete acoustic experience to legal writing. Rhythm must be held together. It must be fastened, and that fastener is flow.

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113. *Morehead v. New York ex. rel. Tipaldo*, 298 U.S. 587, 628 (1936).

## B. Flow in Writing

In music, flow is called melody—the movement from one pitch seamlessly to another along with the structural principles that govern such progression.<sup>114</sup> In writing, flow is the mental linkage between sentences, paragraphs, and ideas created by words.<sup>115</sup> The mind's ear is sensitive to rhythm, whereas the mind itself is sensitive to flow.<sup>116</sup> The three elements necessary to accomplish this flow in persuasive legal writing are structure, transition, and logic.

### 1. *Structure*

Reading is a temporal exercise and a linear experience.<sup>117</sup> As a person reads, the person's eyes retrace lines. The links from word to word and line to line remain unbroken because of structure. Structure holds the experience together. Headings are an obvious structural device. But structure includes other more subtle techniques like focus, which emphasizes a word or part of a sentence with a strong adjective or emphasis with a correlative conjunction like either-or, neither-nor, or but-also.<sup>118</sup> Correlative conjunctions have power in that they change the focus of the sentence for the reader in a way that a single conjunction (like “and”) does not. Professor Kolln provides a simple example in her text book on Rhetorical Grammar:<sup>119</sup>

Individuals and nations must learn to think about the environment.

Compared with

Both individuals and nations must learn to think about the environment.

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114. Carl Dahlhaus, Grove Music Online, *Harmony* (cited in Wikipedia, <http://en.wikipedia.org/wiki/Harmony>).

115. Michael Fleming, *Rhythm, Tone, and Flow: The Three Key Elements of Writer's Style*, <http://www.dutchgirl.com/foxpaws/essays/rhythmtoneflow.html> (Mar. 1993).

116. Arthur Plotnik, *Spunk & Bite: A Writer's Guide to Punchier, More Engaging Language & Style* 188–195 (Random House Ref. 2005).

117. Philip Gerard, *Creative Non-Fiction: Researching and Crafting Stories of Real Life* 158–159 (Story Press 1996).

118. Martha Kolln, *Rhetorical Grammar: Grammatical Choices, Rhetorical Effects* 40 (5th ed., Pearson Educ. 2007).

119. *Id.*

By resort to correlative conjunctions, the emphasis shifts from the predicate “learn” in the first example, to the subject “individuals and nations” in the second example. By doing so the reader is set up to read on about the subject. This subject use of a correlative conjunction effectively changes the structure and rhythm of not only the sentence, but the expectation of what will come next.<sup>120</sup> It does so without bluster or bravado.

Perhaps the most famous and studied writing structure is Lincoln’s *Gettysburg Address*.<sup>121</sup> President Lincoln arrived on that bloodied battlefield to dedicate a national cemetery five months after General Lee and the hopes of the Confederacy were turned back. The graves spread out before Lincoln by the thousands, and the words expected from his lips by the attendant audience were those of sorrow and grief. But Lincoln created a story, structured it chronologically, and in doing so placed the battle in context of a Nation “conceived in liberty and dedicated to the proposition that all men are created equal.”<sup>122</sup> The war was ongoing, but President Lincoln structured the speech with words that manipulated time, beyond that present war, to include the past and the future—one that envisioned “a new birth of freedom” in which “this government of the people, by the people and for the people shall not perish from this earth.”<sup>123</sup>

Philip Gerard, Professor of Creative Writing at the University of North Carolina, points out how structure made the Lincoln’s Gettysburg Address so effective:

Imagine if Lincoln had begun and ended with an account of the battle, mentioning specific acts of heroism, selfless deeds, moments of courage. Most writers probably would have written it that way. A modern president would have focused on some fallen boy who exemplified the virtues of the good soldier; maybe even invited his grieving widow or mother to the reviewing stand for a photo op and a sentimental plea for patriotism and solidarity. He would have been meticulously citing the details of the battle . . . and in doing so, he would have missed the story. The story wasn’t the dead at Gettysburg, but the living. The story was their

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120. *Id.*

121. *Id.* at 164–166; see also Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (Simon & Schuster 1992).

122. Wills, *supra* n. 121, at 262.

123. *Id.*

ongoing struggle with the idea of the Union—an idea so profound men were willing to die to test it, and must always be so.<sup>124</sup>

Five score less three years later, the great trial lawyer Louis Nizer wrote about the importance of being close to your adversary lest you judge him wrongly by structuring a story where the reader becomes the story's protagonist:

[A farmer], before sunrise on a cold and misty morning, saw a huge beast on a distant hill. He seized his rifle and walked cautiously towards the ogre to head off an attack on his family. When he got nearer, he was relieved to find that the beast was only a small bear. He approached more confidently and when he was within a few hundred yards the distorting haze had lifted sufficiently so that he could recognize the figure as only that of a man. Lowering his rifle, he walked towards the stranger and discovered he was his brother.<sup>125</sup>

The parable is structured to take the reader on that walk with the farmer—seeing from his eyes as the haze lifts. The structure is that of the walk. Structure is what holds stories, as well as songs, together.<sup>126</sup> Structure carries legal arguments, too.

## 2. *Transitions.*

Flow within structure must be signaled. Transitions are this textual “attempt to persuade the readers that the reading is worth their time.”<sup>127</sup> Transitions accomplish this feat by creating bridges from paragraph to paragraph and section to section. Bridges operate best when not necessarily noticed. In that regard, sentences should do the bulk of the work of carrying the reader from section to section. Heavy reliance on transitional phases like *nonetheless*, *in addition*, and *in conclusion* can be an-

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124. Gerard, *supra* n. 117, at 165–166. Lincoln's rhetoric is oft cited as an example of excellence in non-fiction prose. See Peck, *supra* n. 2, at 46 (describing the rhythm or order of expression in Lincoln's farewell address to the people of Springfield, Illinois as he left for the White House in February 1861).

125. Louis Nizer, *My Life in Court* 443 (Doubleday & Co., Inc. 1961).

126. Fred Lerdahl, *Cognitive Constraints on Compositional Systems*, 6 *Contemporary Music Rev.* 97 (1992).

127. James B. Stewart, *Follow the Story: How to Write Successful Non-Fiction* 162 (Touchstone 1998).

noying to the reader.<sup>128</sup> Instead of resorting to such overused phrases, a more effective transition is to repeat a key word from the prior paragraph in the succeeding paragraph.<sup>129</sup> Amongst novelists this device is called a “hook.”<sup>130</sup> The goal of authorship in prose and music is coherent unity. Creativity, rather than reliance on worn-out phrases, will not only serve as the transition necessary to unite the piece, but also retain the reader’s interest.

In the first paragraph of *The Cricket Case*,<sup>131</sup> Lord Denning offers an example of the well-placed use of subtle transitions (underscored) and repetition (bold) to paint a picture. The reader can almost smell the grass and certainly taste the contempt for the plaintiff:

(1) In summertime **village** cricket is the delight of everyone. Nearly every **village** has its own cricket field where the young men **play** and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have **played** these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the **players** and seats for the onlookers. The village team **plays** there on Saturdays and Sundays. **They** belong to a league, competing with the neighbouring villages. On other evenings after work **they** practice while the light lasts. (2) Yet now after these 70 years a judge of the High Court has ordered that they must not play there anymore. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. (3) This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But **now** this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. **Now** he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at week-ends. **They** do not go into the garden when cricket is

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128. Theodore A. Rees Cheney, *Getting the Words Right* 87–88 (2d ed., Writer’s Dig. 2005); see also Peck, *supra* n. 2, at 34.

129. Peck, *supra* n. 2, at 64.

130. Hart, *supra* n. 99, at 65.

131. *Miller v. Jackson* [1977] Q.B. 966.

being played. **They** say that this is intolerable. So they asked the **judge** to stop the cricket being played. And the **judge**, much against his will, has felt that he must order the cricket to be stopped: **(4) with the consequence**, I suppose, that the Lintz Cricket Club will disappear. The **cricket** ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of **cricket**. The whole **village** will be much the poorer. And all this because of a newcomer who has just bought a house there next to the **cricket** ground.<sup>132</sup>

Lord Denning uses transitions to set off the four parts of his story each against the other shown above by alternating italics and standard type font. The first part (1) sets the scene. The second part (2) stops the action. The third part (3) is all about “them”—the bad guys—and the final part (4) is the cancerous consequence of their selfishness. The transitions are underscored. Lord Denning also uses hooks (in bold) to present the cricket field and village in a way that the reader remembers throughout the rest of the opinion as the reader turns from the facts to the legal reasoning. His conclusion becomes a foregone conclusion: the newcomers were coming to the nuisance and, therefore, had no cause of action.

### 3. *March of Logic*

The most important element of flow in legal writing is the movement of the argument from point to point logically. In musical composition there is logic to the progression. For example, the piece may start slowly and build, such as Ravel’s sensual *Bolero*<sup>133</sup> or Queen’s operatic masterwork *Bohemian Rhapsody*.<sup>134</sup>

In legal writing, there must also be a logical progression of thought, building toward a concluding point. For example, Justice Jackson’s majority decision in *West Virginia State Board of Education v. Barnette*,<sup>135</sup> striking down a state law requiring that

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132. *Id.* at 976 (emphasis added).

133. This build up of tempo and sound in this piece of music has made it a romantic favorite. See Tom Reichert & Jacqueline Lambiase, *Sex in Advertising Perspectives on the Erotic Appeal* 202 (Lawrence Erlbaum Assocs. 2003).

134. See generally Ken McLeon, *Bohemian Rhapsodies: Operatic Influences on Rock Music*, 20 *Popular Music* 189 (2001).

135. 319 U.S. 624 (1943).



public school students salute the American flag, demonstrates a seamless flow of logical progression. Justice Jackson wrote:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>136</sup>

Notice the “march of logic”<sup>137</sup> that Justice Jackson employs as he opens with a sentence of what some try to achieve and carries “us” through a history lesson. There are seven alliterations, woven together with seven variations of “unity” and a concluding sentence that leaves the reader with a hidden quandary: Does “us” refer to the Supreme Court or all Americans? It seems that

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136. *Id.* at 640–642.

137. Hart, *supra* n. 99, at 67–68; *see also* Ray, *supra* n. 105, at 208–211 (for in-depth analysis of Justice Jackson’s style).

the flow of logic leads to the climactic conclusion of alliteration; “our constitutional constellation” refers to all of us.

The logical flow of language is similarly demonstrated by now-Justice Ruth Bader Ginsburg in her appellant’s brief in *Kahn v. Shevin*,<sup>138</sup> a case challenging a \$500 tax exemption Florida provided to widows but not widowers. Ginsburg, then counsel to the American Civil Liberties Union, offered the following argument in the opening brief:<sup>139</sup>

Historically, women have been treated as subordinate and inferior to men. Although discrimination against women persists and equal opportunity has by no means been achieved, women have simultaneously been placed on a pedestal and given special benefits. Both discrimination against, and special benefits for, women stem from stereotypical notions about their proper role in society.

Special benefits for women such as the tax exemption here at issue result in discriminatory treatment of similarly situated men, themselves victims of male sex-role stereotypes. Absent firm constitutional foundation for equal treatment of men and women by the law, individuals seeking to be judged by their own merits will continue to encounter law-sanctioned obstacles.<sup>140</sup>

Ginsburg’s argument looks backward and forward, makes victims of both men and women and concludes with an inviting statement logically suggesting but not proclaiming the remedy.

Finally, the march of logic done deftly is powerfully effective. In *Empro Manufacturing v. Ball-Co. Manufacturing*,<sup>141</sup> Judge Easterbrook demonstrated this technique, reasoning that a letter of intent was not enforceable:

The shoals that wrecked this deal are common hazards in business negotiations. Letters of intent and agreements in principle often, and here, do no more than set the stage for negotiations on details. Sometimes the details can be ironed out; sometimes they can’t. Illinois, as *Chicago Investment, Interway*, and *Feldman* show, allows parties to approach

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138. 416 U.S. 351 (1973).

139. The parties’ briefs are reprinted in Peck, *supra* n. 2, at app. A.

140. *Id.* at 194.

141. 870 F.2d 423 (7th Cir. 1989).

agreement in stages, without fear that by reaching a preliminary understanding they have bargained away their privilege to disagree on the specifics. Approaching agreement by stages is a valuable method of doing business. So long as Illinois preserves the availability of this device, a federal court in a diversity case must send the disappointed party home empty-handed. Empro claims that it is entitled at least to recover its “reliance expenditures”, but the only expenditures it has identified are those normally associated with pre-contractual efforts: its complaint mentions the expenses “in negotiating with defendants, in investigating and reviewing defendants’ business, and in preparing to acquire defendants’ business.” Outlays of this sort cannot bind the other side any more than paying an expert to tell you whether the painting at the auction is a genuine Rembrandt compels the auctioneer to accept your bid.<sup>142</sup>

Judge Easterbrook starts with a common-sense metaphor, flows into alternating statements of law and business reality, and ends by contrasting the plaintiff’s words with an analogy that proves the plaintiff mistaken. Alternatively, the judge could have rested on the simple IRAC model, but instead his use of an overlap of law, fact, and his choice of sentences that are “steps”—similar to the manner in which a letter of intent operates—re-enforcing in the reader the rightness of the ruling.

### C. Tone in Writing

In music, tone is simply the quality of musical sounds. Tone in writing, often called “voice,” is the connection between the reader and the writer. Tone can be detached or personal.<sup>143</sup> Tone is set by the author’s attitude toward his characters or subjects and conveyed by the words and the literary techniques employed.<sup>144</sup> Tone modifies objective meaning<sup>145</sup> and helps establish the writer’s credibility with the reader—classically called “ethos.”<sup>146</sup>

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142. *Id.* at 426.

143. See e.g. William J. Brennan, *Reason, Passion and “The Progress of the Law”*, 10 *Cardozo L. Rev.* 3 (1988–1989) (discussing Justice Brennan’s view that judges should speak in personal tones).

144. *Writer’s Encyclopedia* 450 (3d ed., Writer’s Dig. Bks. 1996).

145. Theodore A. Rees Cheney, *Getting the Words Right* 48 (2d ed., Writer’s Dig. 2005).

146. Smith, *supra* n. 96, at 101–126 (discussing *ethos*).

Generally, tone is either subjective or objective. The writer adopts the first when trying to affect the reader in some way. He adopts the second when he wants to provide the reader with authoritative information. Legal writing is a tonal slight of hand—or slight of ear. The purpose is to affect the reader—persuade him or her to agree with the proposition, and yet the surface presentation must be objective.

We all remember Lucy, Lady Duff Gordon—from the first day of law school. What do we remember about her? Why? In *Wood v. Lucy, Lady Duff Gordon*<sup>147</sup> Judge Cardozo crafted the perfect example of tone. He opened with the following:

The defendant styles herself a “creator of fashion.” Her favor helps a sale manufacturer of dresses, millinery and like articles pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public when issued in her name. She employed the plaintiff to help turn this vogue into money.<sup>148</sup>

Cardozo’s statements are objective fact, but his tone resonates from every sentence. The reader is guided to the only possible outcome by the words; their placement—the tone. Lady lost.<sup>149</sup>

Tone in legal prose should be “measured rationality.”<sup>150</sup> Too strident a tone and the reader will feel bludgeoned and may become angry; too colloquial and the reader will not believe the writer or take the matter seriously.<sup>151</sup> So between these poles, the writer must find the use of words and phrases that fosters the reader’s trust in the writer. Such tone is achieved by a constant level of discourse and atmosphere that emerges from the entirety of the written work.<sup>152</sup> This consistent level of tone is controlled

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147. 118 N.E. 214 (N.Y. 1917).

148. *Id.* at 214.

149. Perhaps Judge Cardozo was right in his contempt for Lady Duff. Lucy and her husband, Sir Cosmo, were passengers on the Titanic. They survived—in a lifeboat filled with twelve people, seven of whom were crew. The boat had a capacity of forty. Richard Warner, Blog, <http://www.kentlaw.edu/faculty/rwarner/classes/contracts/consideration/lucy.htm> (accessed Sept. 7, 2008).

150. Pamela Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. Pitt. L. Rev. 149, 156 (1984).

151. *Id.*

152. Hart, *supra* n. 99, at 196.

by three levers: punctuation, descriptors, and the selection and presentation of the information included.

### 1. *Punctuation*

Punctuation reflects intonation in written text.<sup>153</sup> The primary purpose of punctuation is clarifying structure by separating some words from each other and from groups of words.<sup>154</sup> But it is more. Punctuation can be heard. In the 1950s, musician-turned-comedian Victor Borge demonstrated the sound punctuation makes in a skit with Dean Martin that can be seen today on *You Tube*.<sup>155</sup> Each punctuation mark has a distinct beat and serves to create cadence,<sup>156</sup> as well as help to set tone.

Punctuation marks fall into two sound categories.<sup>157</sup> Full stop punctuation marks include periods, question marks, exclamation marks, and semi-colons. For the period, the mind's ear distinctly hears a drop and stop, whereas with the question mark there is a rise in pitch. The exclamation point screams out, and the semi-colon stops like a period, but the pause is shorter.

The second group of punctuation marks is half stop marks such as a comma, dash, colon, and parenthesis. The comma is “the most ubiquitous, elusive, and discretionary of all stops, and it is the most significant.”<sup>158</sup> The “sound of a comma is the sound of the last word warning that more is coming.”<sup>159</sup> Colons sound like commas, and for brackets, parenthesis, or ellipses, the voice

153. Geoffrey Nunberg, *The Linguistics of Punctuation* 11 (Ctr. for Study Lang. & Info. 1990).

154. Joseph Gibaldi, *MLA Style Manual and Guide to Scholarly Publishing* 66 (Mod. Lang. Assn. Am. 1998).

155. Victor Borge & Dean Martin, *Musical Phonetic Punctuation*, <http://www.youtube.com/watch?v=N7L02tCNi0I&NR=1> (accessed Apr. 29, 2010); see also Victor Borge, *Phonetic Punctuation*, <http://www.youtube.com/watch?v=LF4qii8S3gw&feature=related> (accessed Apr. 29, 2010).

156. Garland H. Cannon, *Punctuation and Sentence Rhythm*, 8 *College Composition & Commun.* 16–22 (Feb. 1957).

157. Robert C. Pinckert, *The Truth about English* 56–82 (Prentice-Hall, Inc. 1981) (discussing the third category of punctuation called “spelling marks,” such as an apostrophe that has no sound).

158. Murat Bayraktar et al., *An Analysis of English Punctuation: The Special Case of the Comma*, 3, <http://www.cs.bilkent.edu.tr/~akman/jour-papers/ijcl/ijcl1998.pdf> (1998) (published in the *International Journal of Corpus Linguistics* in 1998) (quoting G. Jarvie, *Chambers Punctuation Guide* 10 (Chambers 1992)).

159. Kathryn Ann Lindskoog, *Creative Writing: For People Who Can't Not Write* 63 (Zondervan Publ. House 1989).

distinctly drops down to lessen the import of the words they embrace.<sup>160</sup>

The three varieties of dashes fall into this second group.<sup>161</sup> A hyphen is the shortest in length and divides words that break at the end of a line, or to connect parts of compound words such as *tit-for-tat*. An em-dash is the longest and is used to indicate a break in thought or to separate a thought within a sentence. Finally, an en-dash, which is shorter than an em-dash and longer than a hyphen, indicates a range of values similar to using the words “to” and “from,” such as “ages 15–30.” An em-dash is the most powerful because it harshly sets off an interrupting thought.

Punctuation is critical to setting the tone for effective legal writing. A good example of the effective deployment of punctuation is found in what has been called “the greatest single piece of legal writing”:<sup>162</sup> Justice Brandeis’s concurrence in *Whitney v. California*,<sup>163</sup> where he wrote:

**Those who won our independence** believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. **They believed** liberty to be the secret of happiness and courage to be the secret of liberty. **They believed** that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. **They recognized** the risks to which all human institutions are subject. But **they knew** that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable gov-

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160. *Id.*

161. Ilene Strizver, *Hyphens, En-dashes and Em-dashes*, Font.Com, <http://www.fonts.com/AboutFonts/Articles/fyti/Hyphensdashes.htm> (accessed Apr. 22, 2010).

162. Tom Goldstein & Jethro K. Lieberman, *The Lawyer's Guide to Writing Well* 193 (U. Cal. Press 2003).

163. 274 U.S. 357 (1927).

ernment; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, **they eschewed** silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, **they amended** the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.<sup>164</sup>

Justice Brandeis’s use of semi-colons in sets of three operates to create dramatic rhythm and tone (bold) to the list of “those who won our independence,” “believed,” “recognized,” and “knew.” The em-dash harshly sets off the principle point of the argument—that “they eschewed silence coerced by law—the argument of force in its worst form.”

## 2. *Descriptors*

Tone is helped by punctuation but set mostly by word choice—those left in and those left out. Nouns and verbs are the powerhouses of prose and in the editing process must remain so. Descriptors—adjectives and adverbs—often fall victim to brevity’s modern scissors—the delete key. But stop. Although descriptors are unnecessary to convey essential information, in some cases like Cardozo’s Lady Duff case discussed above, adjectives and adverbs are important because they often carry the load in setting tone; they add color and texture to otherwise naked text.

Gentlemen jockey Crawford Burton sold his testimonial and picture for use in a 1934 ad for Camel cigarettes. The photograph, with the legend beneath it that read, “When you feel all in—get a lift with a Camel,” was plastered on the pages of magazines across the country. It showed Mr. Burton holding his saddle

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164. *Id.* at 375–376 (emphasis added).

and girth “reproduced in such a manner that to a prurient or imaginative eye it appeared to show Mr. Burton indecently exposed as only a man could be.”<sup>165</sup> He sued for he was teased by coworkers about the penis picture. The district court dismissed the defamation action because there was no falsity. Judge Learned Hand wrote an economical but powerful opinion reversing that dismissal. His judicious use of descriptors adds to the persuasive readability of this defamation decision where truth was not a defense:

We dismiss at once so much of the complaint as alleged that the advertisement might be read to say that the plaintiff was deformed, or that he had indecently exposed himself, or was making obscene jokes by means of the legends. Nobody could be fatuous enough to believe any of these things; everybody would at once see that it was the camera, and the camera alone, that had made the unfortunate mistake. If the advertisement is a libel, it is such in spite of the fact that it asserts nothing whatever about the plaintiff, even by the remotest implications. It does not profess to depict him as he is; it does not exaggerate any part of his person so as to suggest that he is deformed; it is patently an optical illusion, and carries its correction on its face as much as though it were a verbal utterance which expressly declared that it was false. It would be hard for words so guarded to carry any sting, but the same is not true of caricatures, and this is an example; for, notwithstanding all we have just said, it exposed the plaintiff to overwhelming ridicule. The contrast between the drawn and serious face and the accompanying fantastic and lewd deformity was so extravagant that, though utterly unfair, it in fact made of the plaintiff a preposterously ridiculous spectacle; and the obvious mistake only added to the amusement. Had such a picture been deliberately produced, surely every right-minded person would agree that he would have had a genuine grievance; and the effect is the same whether it is deliberate or not. Such a caricature affects a man’s reputation, if by that is meant his position in the minds of others; the association so established may be beyond repair; he may become known indefinitely as the absurd victim of this unhappy mischance. Lit-

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165. *Camel Jockey*, Time (Jan. 18, 1937) (available at <http://www.time.com/time/magazine/article/0,9171,770495,00.html>).



erally, therefore, the injury falls within the accepted rubric; it exposes the sufferer to “ridicule” and “contempt.”<sup>166</sup>

This passage includes more than twenty descriptors including the adjective/adverb laden decisive statement “the contrast between the **drawn** and **serious** face and the accompanying **fantastic** and **lewd** deformity was so extravagant that, though **utterly** unfair, it in fact made of the plaintiff a **preposterously ridiculous** spectacle; and the **obvious** mistake only added to the amusement.” Without those descriptors, the power and effect of the paragraph would be lost. Seeing the actual photograph is unnecessary to come to agreement with Judge Hand.<sup>167</sup>

In literature, descriptors are often associated with old-fashioned writing, but “there is much to be said of the sentences of Dickens.”<sup>168</sup> For example, in the third paragraph of *Great Expectations*, Pip describes the land where he grew up:

This bleak place overgrown with nettles was the church yard . . . the dark flat wilderness beyond the church yard, intersected with dykes And mounds and gates, with scattered cattle feeding on it, was the marshes; . . . the low leaden line beyond was the river; and . . . the distant savage lair from which the wind was rushing, was the sea.<sup>169</sup>

Extract “bleak,” “dark,” “leaden,” or “savage” and tone vanishes.

Descriptors must be chosen carefully to be effective. In legal writing, avoid adjectives that tell the reader how the writer feels such as “nice” or “great.” Descriptors must be chosen carefully to paint a picture to convey the proper tone. “Mammoth,” for example, conveys a tone distinct from the word “big.”<sup>170</sup>

From the English moor let us go to the streets of North Philadelphia to see how the absence of descriptors can create tone. In *Pennsylvania v. Dunlap*,<sup>171</sup> a Fourth Amendment probable cause case, Chief Justice Roberts employed a clear type of voice (*noir*

166. *Burton v. Crowell Publg. Co.*, 82 F.2d 154 (2d Cir. 1936).

167. Modern resources make the photograph available on line at <http://shop.vendio.com/vintageads4u/item/939229160/index.html>.

168. Robin Kacel, *They Have Their Place: Adjectives and Adverbs*, 22 Writing 14 (Apr./May 2000).

169. Charles Dickens, *Great Expectations* ch. 1 (1861) (cited in Kacel, *supra* n. 167, at 14) (available at <http://www.online-literature.com/dickens/greatexpectations/>).

170. Kacel, *supra* n. 168, at 15.

171. 129 S. Ct. 448 (2008).

*fiction*)<sup>172</sup> and started his dissent from a denial of certiorari as follows:

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

Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office.<sup>173</sup>

In this opinion, the voice is set by the absence of adjectives and adverbs coupled with choppy short sentences and use of terms and metaphors, they convey a gritty hard-bitten image, like "tough as a three dollar steak." Purists can argue that such writing has no place in the writings of the Supreme Court of the United States, but it is hard to argue with the fact that the two paragraphs that start this opinion convey a message and meaning that the reader will remember. That is the first step in persuasion.

### 3. *Presentation and Selectivity of Information*

Emphasis and presentation also set tone. The placement of facts relative to each other serves to emphasize or de-emphasize them. Buried in the middle, a fact takes on little import. Presenting those facts in a heading or subheading heightens the tone, whereas avoiding headings and subheadings tends to lower the tone.<sup>174</sup> In *Painting with Print*,<sup>175</sup> Professor Ruth Anne Robbins

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172. Noir fiction was popular in the 1950s and is a sub genre of the crime novel style known as Hardboiled. See George Tuttle, *Noir Fiction*, <http://www.geocities.com/SoHoSuite/3855/> (accessed Jan. 14, 2009).

173. *Dunlap*, 129 S. Ct. at 448.

174. Posner, *supra* n. 85, at 1429.

175. Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. AWLD 108, 109 (2004).

outlines in detail the importance of typographic and layout design in setting forth the tone of a legal brief.

Beyond descriptors and presentational emphasis, information itself creates tone. Bob Seger croons of the pain of “what to leave in, what to leave out”<sup>176</sup> and that angst faces legal writers as they use the editing process to set tone. In *Palsgraf*, Cardozo made a deliberate choice on which facts to leave in and leave out to create the appropriate tone in the opinion.<sup>177</sup> In *Debs v. U.S.*,<sup>178</sup> Justice Holmes upheld the conviction of “the defendant” but in doing so he omitted any mention that Eugene Debs was a national labor leader, four-time presidential candidate, or a nominee for the Nobel Peace Prize.<sup>179</sup> Because the boundaries of legally relevant and irrelevant are not fixed, lawyers who write briefs and judges who write opinions have wide discretion on what to include (or not) when crafting tone.<sup>180</sup>

#### IV. WRITING AND TEACHING RHYTHM, FLOW, AND TONE IN LEGAL WRITING

Understanding the evolutionary foundations of music and the primacy of music as a foundation of language and writing is essential to learning how to write with rhythm, flow, and tone. Understanding how to use these elements is necessary to teach others. Below are some steps to incorporating rhythm, flow, and tone into both writing and teaching writing.

##### A. What Writers Can Do to Help Incorporate Rhythm, Flow, and Tone

Putting into practice the inclusion of rhythm, flow, and tone into legal writing first requires an awareness of these acoustic devices. Second, it is important to recognize these techniques (or the absence of them) in the writing of others—both fiction and non-fiction. That has been the aim of this article so far. There are several methods that legal writers should employ to enhance the inclusion of the musilanguage elements into legal prose: two

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176. Robert Seger, *Against the Wind* (Capitol Recs. 1980) (record).

177. See Posner, *supra* n. 85, at 1429.

178. 249 U.S. 211 (1919).

179. See Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?* 20 Const. Commentary 255, 264 n. 21 (2003–2004).

180. *Id.* at 273–280.

before the writing starts<sup>181</sup> and two after the first draft is complete.<sup>182</sup>

First the writer must write in silence—real silence: the total absence of distraction in any form. Purge the noise from the room and with it the clutter from your mind. The ears on the side of your head must sit idle for the mind's ear to truly hear. A recent study of college students proves the point.<sup>183</sup> Twentysomethings often listen to music while they use a computer. Forty-five psychology undergraduates wrote brief expository essays with music playing. Others did so in silence. The results were clear that background music significantly disrupted writing fluency (words generated per minute controlling for typing speed and including those words deleted before the final draft) even though no response to the music was required. The researchers concluded that even unattended music places heavy demands on working memory and disrupts writing. UCLA Professor Susan K. Perry writes that rhythm must come from within and “[a]ctual musical rhythms coming from outside your mind may interfere with the inner voices and cadence you're listening so intently for.”<sup>184</sup>

Once silence is secured, it is a good idea for the author to draw his or her brief—not write it—but draw it. One method of this kind of brainstorming is called “mind mapping,” which involves bubbles, lines, and sketches of ideas.<sup>185</sup> It is a sophisticated doodle. By letting the ideas flow from mind to the paper, there is an uninterrupted connection to the rhythm, flow, and tone that are at the basis of musilanguage.

Another method of brainstorming that draws, in part, on musilanguage is to engage in an essentially uncensored stream of consciousness process by writing down whatever comes to mind on a topic—a process called free writing.<sup>186</sup> The process is, unfor-

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181. See generally Ann Humes, *Research on the Composing Process*, 53 *Rev. Educ. Research* 201–216 (1983).

182. See generally Jill Fitzgerald, *Research on Revision in Writing*, 57 *Rev. Educ. Research* 481–506 (1987).

183. Sarah Ransdell & Lee Gilroy, *The Effects of Background Music on Word Processed Writing*, 17 *Computers in Human Behavior* 141–148 (Mar. 2001).

184. Susan K. Perry, *Writing in Flow: Keys to Enhanced Creativity* 171 (Writer's Dig. Bk. 1999).

185. Tony Buzan, *The Mind Map Book: How to Use Radiant Thinking to Maximize Your Brain's Untapped Potential* (Plume 1996); Diane Murley, *Mind Mapping Information*, 99 *L. Libr.* 175 (2007); Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 *Clin. L. Rev.* 835, 858 (2003).

186. See Elbow, *supra* n. 71, at 3; Elizabeth Fajans & Mary R. Falk, *Scholarly Writing*

tunately, too often ignored by lawyers in the writing process. Professor Moxley contends and this author agrees, that lawyers should free write more often because,

[t]he free writing process—opening the mind to all associations, possibilities, hunches that may occur—provides a powerful basis for exploring the factual and legal possibilities of the case. The ungrounded initial flights of fancy not only facilitate but may be essential to the development of the most grounded of plans.<sup>187</sup>

At the heart of free writing is the idea of banishing writer's block by erasing the need to address formal rules and schema in the brainstorming phase.<sup>188</sup> Humans' innate musical ability is unharnessed in a medium called spontaneous composition—a sophisticated term for a “riff.”<sup>189</sup> Similarly, since musilanguage is innate, writers can draw on their natural musical abilities by embracing free writing—a least in the first draft. Professor Elbow calls this innate writing “voice” and argues that a writer's “voice is damped out by all the interruptions, changes, and hesitations between consciousness and the page. In your natural way of producing words, there is a sound, a texture, a rhythm—a voice—which is the main source of power in your writing.”<sup>190</sup> Resorting to free writing or mind mapping forces the legal writers to be aware of the rhythm, flow, and tone in their text. “Sentences are little pieces of . . . music.”<sup>191</sup>

Once the work is written, lawyers can take two more steps to help facilitate the inclusion of rhythm, flow, and tone in their writings. First, all writers know that they must proofread their work looking for spelling, punctuation, and the like. Proofreading for musilanguage elements is different. Sentences are the key for

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for Law Students: *Seminar Papers, Law Review Notes and Law Review Competition Papers* 39–41 (3d ed., Thomson/West 2005); Kenney F. Hegland, *On Essay Exams*, 56 J. Leg. Educ. 140, 143 (2006); Charles J. Moxley, Jr., *Effective Litigative Writing*, 10 J. Bus. & Technical Commun. 143, 158 (Apr. 1996).

187. Moxley, *supra* n. 186, at 148.

188. Elbow, *supra* n. 71, at 40.

189. See David Pond, *A Composer's Study of Young Children's Innate Musicality*, 68 Bull. Council for Research in Music Educ. 1–12 (1981) (cited in A. P. Bell, *The Heart of the Matter: Composing Music with an Adolescent with Special Needs*, 9 Intl. J. Educ. & Arts 9 (2008) (available at <http://www.ijea.org/v9n9/>)).

190. Elbow, *supra* n. 71, at 6.

191. Elbow, *supra* n. 70, at 626.

“[s]entences are the arteries that bring the life’s blood of the [writing] to the surface. If the arteries clog; the patient will die.”<sup>192</sup> By working and reworking sentences, the words in them and their placement in the paragraph, with a focus on rhythm, flow, and tone, the writer is able to bring those elements to the surface. The point of editing is often lost on writers and lawyers. Editing is not throwing away, because one’s best writing is “often mixed up together with his worst.”<sup>193</sup> Therefore, as Professor Elbow counsels, “editing must be cut-throat” and “[e]very word omitted keeps another reader with you. Every word retained saps strength from the others.”<sup>194</sup>

Finally, and perhaps most importantly, the legal writer must read the brief out loud, because his outer ear will be a check on his mind’s ear.<sup>195</sup> “Hearing your own words out loud gives you a vicarious experience of being someone else [and] brings the sense of audience back into your act of writing.”<sup>196</sup> The lawyers of tomorrow can get a head start on following in the pen strokes of Cardozo and Hand (or more likely keystrokes) if law school legal writing instructors would incorporate some lessons about the innate persuasive power of musical elements in legal writing.

#### B. What Writing Instructors Can Do to Help Teach Rhythm, Flow, and Tone

Law schools, like all schools, should be dedicated to learning. Too frequently, however, “schools tend to emphasize success and thereby undermine learning not teaching. When the price of failure is very high, a learner tends to close himself off from improvement . . . [in learning a] complex, global skill” such as legal writing.<sup>197</sup> Student achievement is higher when the teaching approach emphasizes that writing is a process, not a product.<sup>198</sup>

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192. Tobias, *supra* n. 93, at 131.

193. Elbow, *supra* n. 71, at 41.

194. *Id.* Professor Karaba challenged the author in the use of this quote in an article that is so long—but by heeding Professor Elbow’s wisdom, the author shortened the paper by many a page.

195. Mauru Pilotti et al., *Effects of Hearing Words, Imaging Hearing Words, and Reading on Auditory Implicit and Explicit Memory Tests*, 28 *Memory & Cognition* 1406–1418 (2000).

196. Elbow, *supra* n. 71, at 82–83.

197. *Id.* at 136.

198. Hillocks, G., Jr., *Research on Written Composition: New Directions for Teaching* (ERIC Clearinghouse on Reading & Commun. Skills 1986).

Law schools, like most schools, tend to give students a prompt, with a topic and desired form and length. Master this, and the student earns an “A.”

Yet such a linear approach stifles learning and yields inferior writing. This traditional approach neglects the important early phase of writing (called pre-writing) that includes thinking, free writing, and discussion.<sup>199</sup> Law students start on a path to the product the instructor seeks, because that is what they have been conditioned to do. Obviously, law students need to learn IRAC, need to incorporate IRAC, need to be graded, and that grade needs to be based in large part on the final product. But the path of getting there should be laced with learning, particularly when students are being introduced to call on their innate skills to include rhythm, flow, and tone in the legal writing. Here are a few suggestions on how to do that.

First, the instructor must encourage an environment that enhances the student’s ability to draw on his or her innate musilanguage skills. This author, for example, plays a song on his iPod as students are filing in for class. It offers a nice change of pace and encourages a better appreciation of the similarities between writing, speaking, and music. Reading and writing skills are closely related, so legal writing teachers should encourage,<sup>200</sup> or assign, their students to read a novel. This author has made that argument elsewhere.<sup>201</sup>

Next, to encourage learning by making the assignment about a process and not a product, the writing instructor should allow, or require, that an ungraded draft be turned in. Research has established that comments on students’ final papers are ineffective in producing significant improvement in writing skills.<sup>202</sup> By contrast, having an early draft reviewed and returned allows students to understand and correct organizational flaws early, and for him or her to worry about mechanical flaws later. This may

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199. See generally D. Gordon Rohman, *Pre-Writing; The Stage of Discovery in the Writing Process*, 15 *College Composition & Commun.* 106 (May 1965).

200. Sandra Stotsky, *Research on Reading/Writing Relationships: A Synthesis and Suggested Directions*, 60 *Lang. Arts* 627–642 (1983).

201. Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme and Tone (CSPTT) Are as Important as IRAC*, 25 *Cooley L. Rev.* 267 (2009).

202. See Kathleen Cotton, *Teaching Composition: Research on Effective Practices* 5 (Sch. Improvement Research Ser. 1998) (available on <http://www.eric.ed.gov>).

well be a burden to already stretched teachers, but if the aim is for the student to learn to write effectively, then the alternative of an exclusively IRAC product centered result will fall short.

The final two suggestions to enhance the students' ability and comfort in incorporating musical elements in their legal writing are modeling examples and modes of instruction. By modeling effective examples of use of musical elements in legal writing, like those of Cardozo, Easterbrook, and Jackson, the teacher will help the student to "get the feel for good writing."<sup>203</sup>

Good writing is not just opinions, but also briefs. An excellent example of the patently obvious use of musilanguage in an effective brief is the pro se reply authored by jazz musician Gregory Charles Royal in his post-decree fee dispute. Mr. Royal had been sanctioned for bringing a post-decree action in federal court. In his appeal, he stated that "he respectfully submits this reply brief utilizing rap/rhyme in the argument topics to better emphasize strong concept points."<sup>204</sup> With cogent and brief explanation below, Mr. Royal's rap headings include

Regarding frivolous filings, one thing is clear.  
Notice to show cause and proper service before you appear.

\* \* \*

And if Industrial vs. Marquardt is any measure,  
It[]s the frivolous allegations, not the venue of your endeavor.

\* \* \*

A domestic relations exception, I was supposed to know.  
Appellee would know too, so why did he spend so much  
[dough]?

\* \* \*

Appellee dissed 814.04 for his 3 grand justification.

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203. *Id.* at 6.

204. App.'s Reply Br. at 3, *Royal v. Royal*, No. 08-AP-1082 (Wis. App. 4th Dist. Sept. 2008) (on file with Author); see also Ryan J. Foley, *Rap Brief Hits Right Note with Judge: Musician Wins Appeal with Rhyme*, Milwaukee J. Sentinel (Jan. 25, 2009) (available at <http://www.jsonline.com/news/wisconsin/38306479.html>).



But he forgets that 977.08 puts the brakes on his compensation.<sup>205</sup>

The appellate court did not mention this musilanguage technique in its decision, but did find that the lower court had erred.<sup>206</sup> Although the author is not advocating that lawyers become Jay-Z, Da Brat, or Kanye West, the Royal brief is a simple and straight-forward example of the use of rhythm in legal writing.

Classroom dynamics and the use of musical examples can also assist in teaching students the use of rhythm, flow, and tone in their writing. University of Chicago English and Literature Professor George Hillocks analyzed the instructional modes and their effect on students' writing achievement. His ground-breaking study demonstrated that a presentational mode of teacher-led discussion, specific assignments based on the instruction just given, and grades on a final product was significantly less effective than the alternative natural process and environmental mode of instruction.<sup>207</sup> These modes, which include free writing, an emphasis on process rather than product, and a high level of one-on-one interaction between the student and teacher, lead to a much higher and more sustained level of learning.

In this regard, exposing law students to the concepts of rhythm, flow, and tone in their writing may require a professor to depart from the traditional presentational mode in order that students may learn to be comfortable with their innate musilanguage skills in formal legal writing. For example, to demonstrate the defining qualities of literary "voice" which includes tone, University of New Hampshire English Professor Detheir cranks "Johnny B. Goode" by Chuck Berry, followed by the same song by the Beatles, the Rolling Stones, Beach Boys, Johnny Winter, the Grateful Dead, Jimi Hendrix, and Judas Priest, each distinctive yet the same.<sup>208</sup> The author resorts to Ozzy and the ramped up rock classic Crazy Train to make the same point, comparing it to

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205. App.'s Reply Br. at 3–4, *Royal v. Royal*, No. 08-AP-1082.

206. *Id.*

207. See George Hillocks, Jr., *Research on Written Composition New Directions for Teaching* (ERIC Clearinghouse on Reading & Commun. Skills Natl. Inst. Educ. 1986) (available at [http://www.ncrll.org/Hillocks\\_ResearchOnWrittenComposition.pdf](http://www.ncrll.org/Hillocks_ResearchOnWrittenComposition.pdf)); George Hillocks, Jr. *What Works in Teaching Composition: A Meta-Analysis of Experimental Treatment Studies*, 93 Am. J. Educ. 93–170 (Nov. 1984).

208. Brock Detheir, *Music as a Second Language*, 80 Eng. Teacher 72–76 (Dec. 1991).

a rendition by the Ohio State Marching Band, and another by—believe it or not, Pat Boone.<sup>209</sup> These methods have proven not only effective in making the point, but an enjoyable departure from the routine class methodology.

## V. CONCLUSION

Many lawyers, and certainly most citizens, are hard pressed to remember the Preamble to the United States Constitution. But if you are one of the millions of Americans now between the ages of 30 and 50 who watched Saturday morning cartoons on ABC, then you (like me) learned the preamble because you learned to sing this from *Schoolhouse Rock*:

We the people  
In order to form a more perfect union,  
Establish justice, insure domestic tranquility,  
Provide for the common defense,  
Promote the general welfare and  
Secure the blessings of liberty  
To ourselves and our posterity  
Do ordain and establish this Constitution  
for the United States of America.

Schoolhouse Rock's lesson is simple—music aids memory, increases enjoyment, and enhances learning.<sup>210</sup>

Humans are instinctively attuned to music. So we need to get in the “habit of listening to the words we write.”<sup>211</sup> Justice Jackson, who admittedly predated (but perhaps portended) Schoolhouse Rock, sang a similar tune. He urged us legal writers to cultivate an interest in the sound of language:

The advocate will read and reread the majestic efforts of leaders of profession on important occasions, and linger over the manner of handling challenging subjects. He will master the Short Saxon word that pierces the mind like a spear and the simple figure that lights the understanding. He will never drive the judge to his dictionary. He will rejoice in the strength of the mother tongue as found in the King James

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209. See Rappaport, *supra* n. 201, at 292.

210. Engstrom, *supra* n. 44.

211. Peck, *supra* n. 2, at 8.

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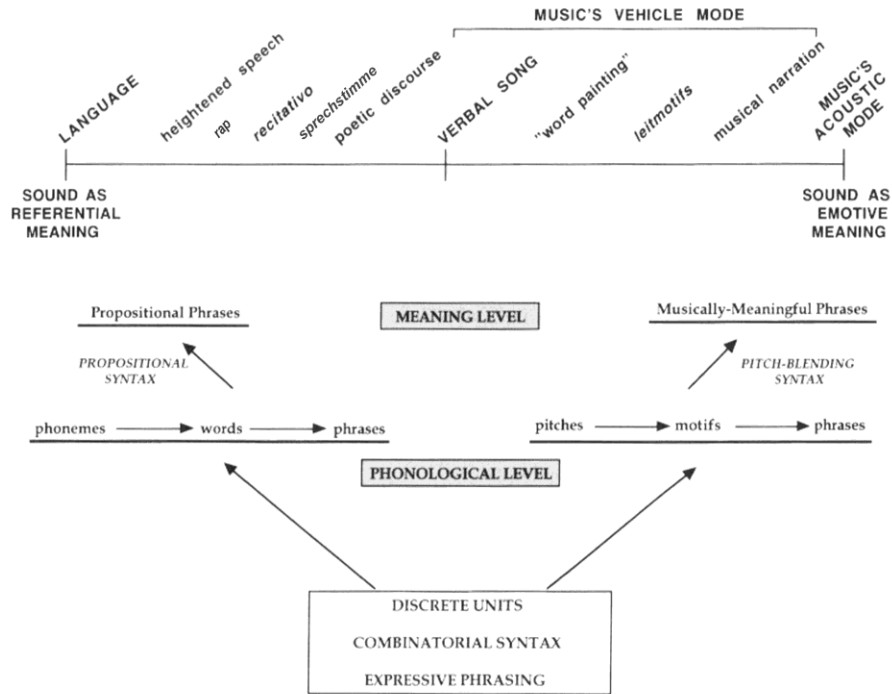
Version of the Bible, and in the power of the terse and flashing phase of a Kipling or a Churchill.<sup>212</sup>

Lawyers, as advocates for a client's cause, have an obligation to make their writing not only accessible and understandable, but interesting. This can be accomplished by including the ancient and innate musilanguage techniques of rhythm, flow, and tone.

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212. Robert Jackson, *Advocacy before the Supreme Court: Suggestions of Effective Case Presentations*, 37 ABA J. 801, 863–864 (1951) (cited in Peck *supra* n. 2, at 8).

APPENDIX<sup>213</sup>



213. Brown, *supra* n. 56, at 275.