The Poetry of Persuasion: Early Literary Theory and Its Advice to Legal Writers

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Whether we think of poetry as simply "literary work in metrical form,"[1] "a sort of fervid and exquisite invention, with fervid expression, in speech or writing, of that which the mind has invented,"[2] or, somewhat more opaquely, "[t]he self-organized criticality of the cry,"[3] we are unlikely to associate it with the work of the legal writer. When poetic form appears in obvious ways in a piece of legal writing, it is without question a curiosity and, perhaps, an object of ridicule.[4] A brief should rarely, if ever, be a poem.

A brief is, however, a piece of writing.[5] As such, it may have the power and even responsibility to offer the reader some sort of aesthetic pleasure:

> [T]he method of prose and verse does not differ; rather, the principles of art remain the same, whether in a composition bound by the laws of meter or in one independent of those laws . . . . In both prose and verse see that diction is controlled in such a way that words do not enter as dry things, but let their meaning confer a juicy savor upon them.[6]

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[1] *Random House Dictionary of the English Language* 1024 (college ed., Random House 1968).

[2] Giovanni Boccaccio, *Boccaccio on Poetry* 39 (Charles G. Osgood ed., 2d ed., The Liberal Arts Press 1956) (originally published 14th Century).

[3] Andrew Joron, *The Emergency*, in *Fathom* 22 (Black Square Editions 2003).

[4] *See generally* Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 Widener L.J. 597 (2003).

[5] And lawyers are, perhaps more than anything else, writers. Benjamin Opipari puts it nicely: "A big litigation firm like ours is filled with nothing but writers. One lawyer here, in fact, tells people that he is a writer when they ask his occupation . . . ." Benjamin Opipari, *Beyond the Ivory Tower: From Global Lit(erature) to Global Lit(igation)*, http://chronicle.com/jobs/news/2008/06/2008061801c.htm (June 18, 2008). If writing is so integral a part of law practice, exploring its possibilities should be a part of every lawyer's continuing education.

[6] Geoffrey of Vinsauf, *Poetria Nova* 83 (Margaret F. Nims trans., Pontifical Inst. of Mediaeval Studies 1967) (originally published 1213). Others agree. Wordsworth, in his *"Preface to Lyrical Ballads*," writes that poetry and prose:

> [b]oth speak by and to the same organs; the bodies in which both of them are clothed may be said to be of the same substance, their affections are kindred, and

Although examples from poetry itself may provide little assistance to the legal writer trying to improve a brief's persuasive effect, this passage from Geoffrey of Vinsauf demonstrates how the rich history of literary criticism provides both justifications for the pursuit of aesthetic pleasure, and suggestions for how to provide it. The poem's aim of producing aesthetic pleasure may provide an avenue to persuasion that the legal writer should consider in drafting her own persuasive pieces.

This article will address the possibility and necessity of aesthetic pleasure as a part of persuasive endeavors. It will do so through a review of early literary theorists' statements about *what* poetry does artistically, and *how* it does it. It will seek insight from these theorists by extracting from their writings those precepts that seem most useful to the legal writer. This is a selective and non-comprehensive review of the work of a variety of early theorists. It would be impossible to extract from each writer every "helpful hint" he might provide. Moreover, in assembling a variety of suggestions and commands from writers over the centuries, this article does not presume to be mining new concepts in writing practice. The ideas are not necessarily unfamiliar ones, but come from early, perhaps original sources.

The article also attempts to go from these past exhortations to some sort of present-day pertinence. How can the advice be employed in a legal writer's practice? While the aphorisms of early theorists are invaluable, situating them in practical context may be helpful.

Who are the theorists who provide their advice to legal writers? Those who address the ways of persuading, engaging, and pleasing readers. This article is interested primarily in authors who have provided poetry criticism, from Horace in the period immediately preceding the Common Era, to Ezra Pound in the early 20th Century. It focuses on writers from the Medieval period and before, because the issues these writers engage seem most pertinent to the project of legal writing. The article relies, perhaps disproportionately, on Longinus, whose *On the Sublime* should be required reading for any writer, if only for the enthusiasm he brings to the process of writing analysis.

> almost identical, not necessarily differing even in degree; Poetry sheds no tears "such as Angels weep," but natural and human tears; she can boast of no celestial ichor that distinguishes her vital juices from those of prose; the same human blood circulates through the veins of them both.

William Wordsworth, *Preface to Lyrical Ballads*, in 9 *Anglistica* 111, 120 (W.J.B. Owen ed., Rosenkilde and Bagger 1957) (originally published 1800). David Hume, too, contends that "every kind of composition, even the most poetical, is nothing but a chain of propositions and reasonings; not always, indeed, the justest and most exact, but still plausible and specious, however disguised by the colouring of the imagination." David Hume, *On the Standard of Taste*, in *Essays: Moral, Political, and Literary* 226, 240 (Eugene F. Miller ed., Liberty Classics 1985) (originally published 1757).

It is impossible to talk about stylistic issues, however, without resort to Aristotle's *Rhetoric*, and it is easier to discuss aesthetic theory by including David Hume and Immanuel Kant. Accordingly, critics addressing issues *other* than poetry are included, if not emphasized. This betrays the article's practical bent—it seeks advice for legal writers, not purity of conceit.

While this article does contain occasional references to poetry criticism from the Modernist era,[7] it does not engage more contemporary criticism, for the simple reason that the issues addressed in contemporary poetry criticism do not seem especially useful to writing in the legal context.[8]

I. Persuasion by Providing Pleasure

As every teacher of persuasion and rhetoric knows, Aristotle's modes of persuasion are the standard model for describing an advocate's arsenal.[9] Persuasion, according to Aristotle, is accomplished through *logos*, *pathos*, and *ethos*.[10] In teaching advocacy to law students, we invoke these categories to help explain what is at stake in a particular section of a brief—perhaps *pathos* evoked through effective narrative, or *logos* as rule-based argument. *Ethos*, too, comes up regularly. Students must attend to form, to grammar, and to usage, because of how their work will reflect on them—how will they be perceived by the reader of their work?

Aristotle also considers, primarily in Book III of *Rhetoric*, stylistic issues.[11] Aristotle indicates that beyond the basic means of producing persuasion, attention must also be paid to "the style, or language, to be used," and "the proper arrangement of the various parts of the speech."[12] So it is insufficient to speak solely of *logos*, *pathos*, and *ethos*; the "matter of the right management of the voice"[13] must also be considered by the would-be persuader.

While often (and appropriately) characterized as issues of "rhetorical style,"[14] questions of style, usage and the elements of good writing also implicate aesthetic concerns. Pre-modern literary criticism has taken up many of the issues initially raised by Aristotle (in both *Rhetoric* and *Poetics*) and added

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[7] Literary modernism is typically associated with the early 20th Century. J. A. Cuddon, *The Penguin Dictionary of Literary Terms and Literary Theory* 515 (4th ed., Penguin Books 1999).

[8] *See e.g. Artifice and Indeterminacy, An Anthology of New Poetics* (Christopher Beach ed., U. of Ala. Press 1998).

[9] *See e.g.* Michael R. Smith, *Advanced Legal Writing*, 22–24 (2002).

[10] *See* Aristotle, *Rhetoric*, in *Rhetoric and Poetics of Aristotle* 19, 164 (W. Rhys Roberts & Ingram Bywater trans., Modern Library 1954) (originally published 4th Century BCE).

[11] *See id.*

[12] *Id.*

[13] *Id.* at 165. In *Rhetoric*, Aristotle is advising as to the means of persuading by "the spoken word." *Id.* at 24.

[14] *See e.g.* Smith, *supra* n. 9, at 24.

both differing bases for their value, and continued explorations of the "best practices" of aesthetic accomplishment.

Rhetoric's "function is not simply to succeed in persuading, but rather to discover the means of coming as near such success as the circumstances of each particular case allow."[15] Book III teaches style as one of those means. It does not, however, explain the mechanism by which stylistic tools accomplish persuasion. By the *Rhetoric*'s own terms, style appears to be important for its emotional effect: "an emotional speaker always makes his audience feel with him, even when there is nothing in his arguments; which is why many speakers try to overwhelm their audience by mere noise."[16]

Aristotle earlier explains why emotional effect is important to the orator. He hopes his audience will

> be in just the right frame of mind . . . . When people are feeling friendly and placable, they think one sort of thing; when they are feeling angry or hostile, they think either something totally different or the same thing with a different intensity: when they feel friendly to the man who comes before them for judgment, they regard him as having done little wrong, if any; when they feel hostile, they take the opposite view.[17]

He also suggests there is a cognitive, *logos*-related if not *logos*-based, element to stylistic choices. Praising the use of metaphor and simile, Aristotle suggests that they help listeners "seize a new idea promptly."[18] Here, however, there is still a lack of clarity. Discussing the figures of metaphor and simile, he also writes that they can help make "the significance of contrasted ideas . . . easily *felt*";[19] in other words, they provide something more than pure reason—they provide some spark of engagement, perhaps originating in the emotions.

Early literary critics do not resolve the question of what sort of effect on readers is produced by the proper use of stylistic or aesthetic tools. Longinus, in his seminal work *On the Sublime*, does not commit to which human faculty is affected by a work of art, but seems to locate it as an emotional tool. He writes that the use of visual imagery in writing "seek[s] to work on the emotions."[20] "[A]n image lures us away from an argument: judgment is paralysed, matters of fact disappear from view, eclipsed by the superior

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[15] Aristotle, *supra* n. 10, at 23.

[16] *Id.* at 178.

[17] *Id.* at 91.

[18] *Id.* at 187.

[19] *Id.* at 185 (emphasis added).

[20] Longinus, *On the Sublime* 32 (H.L. Havell trans., Macmillan & Co. 1890) (originally published 3rd Century).

blaze."[21] He also seems, however, to speak of something almost spiritual, noting that images do "not merely convince the hearer, but enthrall[] him."[22]

This is also noted elsewhere in his work. "A lofty passage does not convince the reason of reader, but takes him out of himself. . . . [A] sublime thought, if happily timed, illuminates an entire subject with the vividness of a lightning-flash, and exhibits the whole power of the orator in a moment of time."[23] Again, this suggests some sort of effect upon a spiritual (or otherwise unnamable) faculty—in any event, not strictly based in reason or emotion.

Quintilian suggests an almost "Trojan Horse"-like effect provided by the use of stylistic devices: "For although it may seem that proof is infinitesimally affected by the *figures* employed, none the less those same *figures* lend credibility to our arguments and steal their way secretly into the minds of the judges."[24] Aesthetic devices, by this view, are a subliminal vehicle for delivering the conclusion we want the listener to reach.

Suggesting a *logos*-based responsiveness to aesthetic objects, Plotinus writes of art that "the stone thus brought under the artist's hand to the beauty of form is beautiful not as stone—for so the crude block would be as pleasant—but in virtue of the Form or Idea introduced by the art."[25] And what is this art? A manifestation of the intellect at play, the source of even the beauty of the gods: "[W]hat makes them so? Intellect; and especially intellect operating within them (the divine sun and stars) to visibility."[26]

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[21] *Id.* at 36.

[22] *Id.* at 35–36.

[23] *Id.* at 2–3.

[24] The passage continues:

> For just as in sword-play it is easy to see, parry, and ward off direct blows and simple and straight forward thrusts, while side-strokes and feints are less easy to observe and the task of the skilful swordsman is to give the impression that his design is quite other than it actually is, even so the oratory in which there is no guile fights by sheer weight and impetus alone; on the other hand, the fighter who feints and varies his assault is able to attack flank or back as he will, to lure his opponent's weapons from their guard and to outwit him by a slight inclination of the body. Further, there is no more effective method of exciting the emotions than an apt use of figures. For if the expression of brow, eyes, and hands has a powerful effect in stirring the passions, how much more effective must be the aspect of our style itself when composed to produce the result at which we aim?

Quintilian, *The Institutio Oratoria* vol. 3, 359 (H.E. Butler trans., William Heinemann 1921) (originally published 95).

[25] Plotinus, *The Six Enneads* 422 (Stephen MacKenna trans., U. of Chi. 1953) (originally published 270).

[26] *Id.* at 424. This accords with Aristotle's statement in *Poetics*, that "to learn gives the liveliest pleasure, not only to philosophers but to men in general." Aristotle, *The Poetics*, in *Aristotle's Theory of Poetry and Fine Art* 15 (S.H. Butcher trans., 4th ed., Macmillan & Co. 1907) (originally published 335 BCE).

Kant, millennia later, seems to locate aesthetic pleasure outside the realm of emotion *or* reason and in a category of its own—perhaps as Longinus did before. He contends that a judgment of taste evaluates "the character of the object only by holding it up to our feeling of pleasure and displeasure."[27] It is not "a cognitive judgment (whether theoretical or practical) and hence is neither *based* on concepts, nor directed to them as *purposes*."[28] He then explicitly excludes any emotional component from aesthetic pleasures—"[a]ny taste remains barbaric if its liking requires that *charms* and *emotions* be mingled in, let alone if it makes these the standard of its approval."[29] His notion of the pleasure derived from judgments of taste seems to exist in its own unique category.

Hedging his bets, Edmund Burke begins by locating the pleasures of taste in a variety of sources—sensory, imaginative, and reasoning.[30] Ultimately, however, he casts his lot with aesthetic pleasure as a function of reason: "where disposition, where decorum, where congruity are concerned, in short wherever the best Taste differs from the worst, I am convinced that the understanding operates and nothing else."[31]

Why is this important? The nature of aesthetic pleasure is not resolved by these writers, and perhaps need not be. But the attention paid by these authors in their efforts to locate the effects and benefits of style demonstrates that we ignore stylistic issues at our peril. If we dismiss aesthetics, we are leaving something out. *Some* aspect of persuasion—*logos*, *pathos*, or some other less stable category—is receiving short shrift.

Whether aesthetic pleasures arise from emotional responses, spring from the intellect's response to aesthetic stimuli, or exist in a realm of their own, the weight of early literary theory supports the proposition that pleasure is a fundamental goal of writing. There does not appear to be any reason to

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[27] Immanuel Kant, *Critique of Judgment* 51 (Werner S. Pluhar trans., Hackett Publg. Co. 1987) (originally published 1790). *See also id.* at 79 ("There can be no objective rule of taste that determines by concepts what is beautiful. For any judgment from this source [i.e., taste] is aesthetic, i.e., the basis determining it is the subject's feeling and not the concept of an object.").

[28] *Id.* at 51 (emphasis in original).

[29] *Id.* at 69 (emphasis in original).

[30] In Burke's words,

> On the whole it appears to me, that what is called Taste, in its most general acceptation, is not a simple idea, but is partly made up of a perception of the primary pleasures of sense, of the secondary pleasures of imagination, and of the conclusions of the reasoning faculty, concerning the various relations of these, and concerning the human passions, manners and actions.

Edmund Burke, *A Philosophical Enquiry into the Origin of our Ideas of the Sublime and Beautiful* 23 (J.T. Boulton ed., Columbia U. Press 1958) (originally published 1757).

[31] *Id.* at 26.

distinguish between writing that has pleasure as its specific goal, or as an ancillary goal designed to support a more fundamental goal of persuasion.[32]

There is, unsurprisingly, unanimous agreement among critics that to bring a reader pleasure is the goal of poet and persuader alike. Horace, in *Ars Poetica*, writes that "[t]he man who combines pleasure with usefulness wins every suffrage, delighting the reader and also giving him advice; this is the book that earns money for the Sosii, goes overseas and gives your celebrated writer a long lease of fame."[33] Quintilian says the same regarding the orator, who is "not merely to instruct, but also to move and delight his audience; and to succeed in doing this he needs a strength, impetuosity and grace as well."[34]

Writing, therefore, is not merely a tool for instruction, but succeeds, and gains admiration, if not adherence, through its art and artifice. "Every voice is united in applauding elegance, propriety, simplicity, spirit in writing; and in blaming fustian, affectation, coldness and a false brilliancy."[35] The persuader and the poet must both employ figures and other aesthetic strategies to accomplish their goals.

Gotthold Lessing's concept of the goal of the poet seems an equally apt description of an advocate's hopes in writing to a judge:

> The poet does not want merely to be intelligible, nor is he content—as is the prose writer—with simply presenting his image clearly and concisely. He wants rather to make the ideas he awakens

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[32] Obviously, aesthetic pleasure is not the primary goal of persuasive writing.

> The arts of language cannot help having a small but real importance, whatever it is we have to expound to others: the way in which such a thing is said does affect its intelligibility. Not, however, so much importance as people think. All such arts are fanciful and meant to charm the hearer. Nobody uses fine language when teaching geometry.

Aristotle, *supra* n. 10, at 165–66. However, if the goal of persuasion is to use whatever tools are available to reach a result, to the extent aesthetics provides such a tool, it should be utilized.

[33] Horace, *The Art of Poetry*, in *Classical Literary Criticism* 107 (D.A. Russell & Michael Winterbottom eds., D.A. Russell trans., rev. ed., Oxford U. Press 2008) (originally published 18 BCE). Similar sentiments may be found in Samuel Johnson's *Preface to Shakespeare* ("The end of writing is to instruct; the end of poetry is to instruct by pleasing."), Samuel Johnson, *Preface to Shakespeare*, in *The Yale Edition of the Works of Samuel Johnson* vol. 7, 59, 67 (Arthur Sherbo ed., Yale U. Press 1968) (originally published 1765), and Wordsworth's *Preface to Lyrical Ballads* ("The Poet writes under one restriction only, namely, the necessity of giving immediate pleasure to a human Being possessed of that information which may be expected from him, not as a lawyer, a physician, a mariner, an astronomer, or a natural philosopher, but as a Man."), Wordsworth, *supra* n. 6, at 123.

[34] Quintilian, *The Institutio Oratoria* vol. 4, 389 (H.E. Butler trans., William Heinemann 1921) (originally published 95).

[35] Hume, *supra* n. 6, at 227.

> in us so vivid that at that moment we believe that we feel the real impressions which the objects of these ideas would produce on us.[36]

So if we accept that inducing aesthetic pleasure is a goal of legal writing, what do pre-modern critics have to offer us as advice to help achieve that goal? What follows is a selection of suggestions from authors dating from BCE (before the Common Era) to the 20th Century. These are not the entireties of every useful piece of information each author might provide a legal writer—that would be impossible. They are, however, suggestions that seem particularly significant to the legal writer.

II. The Elements of Good Writing

Through the ages, critics have tried to provide roadmaps to, or perhaps cookbooks for, good[37] writing. They have been unwilling to simply throw up their hands, and leave good writing to the muses.[38] Aristotle initiates the discussion, providing very specific stylistic advice. He encourages, among other things, "the proper use of connecting words," "calling things by their own special names and not by vague general ones," and "avoid[ing] ambiguities."[39] He also describes ways to add "impressiveness" to language. He advises orators to "[d]escribe a thing instead of naming it: do not say 'circle', but 'that surface which extends equally from the middle in every way'."[40]

Longinus offers a catalog of elements which can lead to poetic sublimity. Leaving aside his (and other classical writers') interests in subject matter as a source of sublimity, he also enumerates stylistic elements he believes lead to the best writing. He requires "a certain artifice in the employment of figures [of speech and thought]," proper word choice, "the use of metaphors and other ornaments of diction," and "majesty and elevation of structure."[41]

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[36] Gotthold Ephraim Lessing, *Laocoön: An Essay on the Limits of Painting and Poetry* 85 (Edward Allen McCormick trans., Bobbs-Merrill Co. 1962) (originally published 1766).

[37] The words "beautiful" or "sublime" might also be used. The differences between them (as discussed in Kant's *Critique of Judgment*, *supra* n. 27, at 97–100) do not seem particularly pertinent here.

[38] *See* Hugh of St. Victor, *The Didascalicon* 59 (Jacques Barzun et al. eds., Jerome Taylor trans., Columbia U. Press 1961) (originally published 12th Century) ("All sciences, indeed, were matters of use before they became matters of art. But when men subsequently considered that use can be transformed into art, and what was previously vague and subject to caprice can be brought into order by definite rules and precepts, they began, we are told, to reduce to art the habits which had arisen partly by chance, partly by nature . . . .")

[39] Aristotle, *supra* n. 10, at 174–75.

[40] *Id.* at 176. This is an example of periphrasis. *See* Edward P.J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* 401 (4th ed., Oxford U. Press 1999).

[41] Longinus, *supra* n. 20, at 13.

There are a few categories in which the voices of many critics, over many centuries, have had much to say. By attending to these elements, writers should be able to increase the aesthetic appeal of their writing.[42] The sections below discuss the use of imagery, word choice, figures of speech, variety, and tone.

A. Visual Imagery

Early on, Aristotle champions the use of visual imagery. He notes that "liveliness is got by . . . being graphic (i.e., making your hearers *see* things)."[43] Aristotle's specific recommendation is that orators present things "as in a state of activity."[44] Here, he refers (as he often does) to Homer, whose poetry he praises as representing "everything as moving and living; and activity is movement."[45]

Longinus, too, emphasizes the use of imagery. "The dignity, grandeur, and energy of a style largely depend on a proper employment of images . . . by reason of the rapt and excited state of his feelings, [the speaker] imagines himself to see what he is talking about, and produces a similar illusion in his hearers."[46]

Ezra Pound, an originator of literary Modernism, if not *the* originator, describes the power of imagery—"An 'Image' is that which presents an intellectual and emotional complex in an instant of time."[47] He, and the writers before him, identify a singular power in the vivid presentation of an idea or action.

To this day, it is standard advice to legal writers to use visual images. This advice is supported not only by intuitive appeal, but also by experimental evidence. A 1980 study by three Stanford psychologists concluded that "flashy, dramatic facts can flood the mind of the decision-maker, outweighing by their insistence alone the more pallid truths of the case."[48] The writers first reviewed existing literature, noting that "[w]ords and phrases that are concrete and evoke vivid imagery are better remembered than abstract, pallid words in practically all verbal learning experiments."[49] They then set forth their

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[42] "Skill in technique is not helped by any inspiration, but only by reflection, industry, and practice." G.W.F. Hegel, *Aesthetics: Lectures on Fine Art* vol. 1, 27 (T.M. Knox trans., Oxford U. Press 1975) (originally published 1902).

[43] Aristotle, *supra* n. 10, at 190 (emphasis in original).

[44] *Id.*

[45] *Id.* at 191.

[46] Longinus, *supra* n. 20, at 31–32.

[47] Ezra Pound, *A Few Don'ts by an Imagiste*, in *Modernism, an Anthology* 95 (Lawrence Rainey ed., Blackwell Publg. 2005) (originally published 1912).

[48] Robert M. Reyes, William C. Thompson & Gordon H. Bower, *Judgmental Biases Resulting from Differing Availabilities of Arguments*, 39 J. Personality & Soc. Psychol. 2, 11 (1980).

[49] *Id.* at 3.

hypothesis: that vivid imagery is more memorable and therefore available to the hearer/reader, and as a result the material is used disproportionately by the hearer/reader in making judgments.[50]

Here is an example of the sort of "vividness adjustment" made in the study. The posited case was a trial on a drunk driving charge. The subjects were to determine whether the defendant had, indeed, been drunk. The pallid version of the driver's condition before arrest described this scene: "On his way out the door, Sanders [the defendant] staggered against a serving table, knocking a bowl to the floor."[51] The vivid version, on the other hand, revealed that: "On his way out the door, Sanders staggered against a serving table, knocking a bowl of guacamole dip to the floor and splattering guacamole on the white shag carpet."[52]

The study confirmed that "subjects disproportionately recalled the vivid arguments."[53] More important, they were not only easily recalled, but provided the "disproportionate impact on evaluative judgments" the authors hypothesized.[54]

This experiment confirms what literary theorists have long said. It also makes clear the connection between the literary and the legal. The same tools that provide the "liveliness" prescribed by Aristotle and the "raptness" sought by Longinus may also lead to a measurable effect on the decision made by a judge reviewing a brief.

Petitioners' opening brief in *Morse v. Frederick*[55] provides an example of vivid presentation. *Morse* is the notorious "Bong Hits 4 Jesus" case, in which a high school student claimed his speech rights were violated when he was suspended for displaying a banner containing those words at a civic event in Juneau, Alaska. The petitioners did not merely mention a vague "civic event," however. In an effort to emphasize the importance of the event disrupted by the student's banner, great detail is provided:

> January 24, 2002 marked the first time in Olympic history that the Olympic Torch Relay visited Alaska. In preparation, a local task force of approximately two dozen local civic leaders planned for Juneau's participation in the international event—a ten-mile relay through Juneau. Members of the city government, including the mayor's office and the Juneau Department of Parks and Recreation, lent their support. Local businesses, as well as national sponsors of

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[50] *Id.*

[51] *Id.* at 4.

[52] *Id.*

[53] *Id.* at 5. The authors noted that "vivid information might be better recalled because it is better learned initially or forgotten less rapidly." *Id.* at 8 n. 2.

[54] *Id.* at 8.

[55] *Morse v. Frederick*, 551 U.S. 393 (2007).

> the torch relay, supported the event. The torch ceremony involved a week of community festivities. Upon its arrival in Juneau, the Olympic flame was welcomed by Tlingit Clan dancers, transported in a native canoe around Gastineau Channel, and carried through several miles of Juneau's streets, including past the State Capitol and the Juneau-Douglas High School.[56]

This passage walks the reader through the labor-intensive efforts to organize the relay, notes the comprehensive scope of community involvement, and makes clear the momentousness of the occasion. It reads as though the Olympics themselves were taking place in Juneau. Providing this vivid description of the circumstances makes the student's prank all the more disruptive and far-reaching—the entire city suffered for his acts. Perhaps unsurprisingly, the Supreme Court ruled in favor of the school district, and against the student. While no calculations can assess the effectiveness of vividness in this or other particular cases, the persuasive power of detailed description cannot easily be dismissed.

B. Figures of Speech

Throughout pre-modern poetry criticism, there are exhortations to use particular formal devices, and catalogs of those available. These include presentational schemes, such as asyndeton and polysyndeton,[57] and substantive tropes, such as metaphor and metonymy.[58]

Longinus catalogs a few rhetorical figures and provides explanations for the effects they produce. These include asyndeton,[59] polysyndeton,[60] and hyperbaton.[61] While the specifics of the many available figures is beyond the scope of this article,[62] it is important to note their existence, and, I think, to celebrate Longinus's excited explanation of them. It is easy to enjoy vicariously the pleasure he takes in the power of the figures he lists. His description of asyndeton is bracing: "[t]he removal of connecting particles

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[56] Br. for Petr. at 2–3, *Morse v. Frederick*, 551 U.S. 393 (2007) (citations omitted).

[57] *See e.g.* Corbett & Connors, *supra* n. 40, at 409–10.

[58] *Id.* at 410–11.

[59] Asyndeton is "a rhetorical device where conjunctions, articles and even pronouns are omitted for the sake of speed and economy." Cuddon, *supra* n. 7, at 59. A sentence like "Caesar came, saw, conquered, celebrated" uses asyndeton.

[60] Polysyndeton is "the opposite of asyndeton and thus the repetition of conjunctions." *Id.* at 685. A polysyndetonic version of the sentence contained in the previous note might be "Caesar came, and he saw, and he conquered, and then celebrated."

[61] Hyperbaton is "[a] figure of speech in which words are transposed from their usual order." *Id.* at 405. "There, but for the grace of God, go I" is an example of hyperbaton.

[62] For excellent coverage of the use of rhetorical figures in legal writing, *see* Smith, *supra* n. 9, at 179–252. For an exhaustive list of figures, *see* Dr. Gideon Burton, *Silva Rhetoricae*, http://rhetoric.byu.edu (updated Feb. 26, 2007).

gives a quick rush and 'torrent rapture' to a passage, the writer appearing to be actually almost left behind by his own words."[63]

His explanation of the effects of asyndeton's opposite, polysyndeton, is equally affecting. When the links omitted in a passage employing asyndeton are put back in place, it is as if "you were to bind two runners together, they will forthwith be deprived of all liberty of movement, even so passion rebels against the trammels of conjunctions and other particles, because they curb its free rush and destroy the impression of mechanical impulse."[64] Hyperbaton, he writes, bears "unmistakably the characteristic stamp of violent mental agitation."[65] His descriptions have the same effect he attributes to figures themselves—they make the prose "energetic and impassioned."[66]

Similar excitement in the pleasures of figures of speech may be found in the work of Geoffrey of Vinsauf, an early Medieval English writer. In *Poetria Nova*, he provides a terrific set of writing elements for poets, describing figures and techniques to improve their writing. Some of his own writing is overwrought, but many of his points—addressing topics from organization to ornament—are nonetheless valuable. While his work is not as widely known, nor as seminal as Aristotle or Longinus, there are few early theorists whose work is as helpful to the legal writer.

Among the most useful is his suggestion for the "amplification" of verse, through use of periphrasis.[67] He advises:

> In order to amplify the poem, avoid calling things by their names; use other designations for them. Do not unveil the thing fully but suggest it by hints. Do not let your words move straight onward through the subject, but, circling it take a long and winding path around what you were going to say briefly. Retard the tempo by thus increasing the number of words.[68]

This is good direction for writing a brief's fact section. When a fact is particularly good for your case, or you suspect it might be particularly resonant with a reader, it should be lingered upon and luxuriated in. Justice O'Connor used this device well in her dissent in the eminent domain case, *Kelo v. City of New London*.[69] She could simply have written—"Petitioners are

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[63] Longinus, *supra* n. 20, at 43.

[64] *Id.* at 45.

[65] *Id.* at 46.

[66] *Id.* at 56.

[67] Geoffrey, *supra* n. 6, at 24. Periphrasis is "[a] roundabout way of speaking or writing . . . using many or very long words where a few or simple words will do." Cuddon, *supra* n. 7, at 659.

[68] Geoffrey, *supra* n. 6, at 24.

[69] *Kelo v. City of New London*, 545 U.S. 469 (2005).

long-time owners of property in New London." Instead, she amplified the point, lingering on the petitioners' status:

> Petitioners are nine resident or investment owners of 15 homes in the Fort Trumbull neighborhood of New London, Connecticut. Petitioner Wilhelmina Dery, for example, lives in a house on Walbach Street that has been in her family for over 100 years. She was born in the house in 1918; her husband, petitioner Charles Dery, moved into the house when they married in 1946. Their son lives next door with his family in the house he received as a wedding gift, and joins his parents in this suit. Two petitioners keep rental properties in the neighborhood.[70]

She gives the petitioners names and their homes specific locations. She describes a history tied to the houses subject to eminent domain. She does not *say* "the relationship between these people and their homes is important," she *demonstrates* it.

Geoffrey also provides a useful list of tropes and figures with illustrations. He demonstrates the use of metaphor, metonymy, hyperbole, synecdoche, catachresis, and hyperbaton. While a legal writer need not know these by name, nor hatch a plan to use hyperbaton here and metonymy there, review of these figures (again, with examples) may serve to spark the writer's imagination and encourage variety and "liveliness" in writing.

Geoffrey's demonstration of metonymy[71] may itself provide such a spark:

> Consider a statement of this kind: *The sick man seeks a physician; the grieving man, solace; the poor man, aid.* Expression attains a fuller flowering in this trope: *Illness is in need of a physician; grief is in need of solace; poverty is in need of aid.* There is a natural charm in this use of the abstract for the concrete, and so in the change of *sick man* to *sickness*, *grieving man* to *grief*, *poor man* to *poverty*.[72]

It may seem as though there is little place for colorful figures in the matter-of-fact world of legal writing, but their use can be engaging and emphatic, without being distracting. An example is provided by a recent amicus brief to the United States Supreme Court.[73] Here, the authors use two

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[70] *Id.* at 494–95 (O'Connor, J., dissenting). This may be a technically imperfect example of periphrasis, perhaps a periphrasis of periphrasis. Nonetheless, it seems an apt example of the direction offered by Geoffrey, *supra* n. 6, at 24.

[71] Metonymy is "[a] figure of speech in which the name of an attribute o[f] a thing is substituted for the thing itself." Cuddon, *supra* n. 7, at 510. If someone praises an automobile with the words "nice ride," she is employing metonymy.

[72] Geoffrey, *supra* n. 6, at 51 (emphasis in original).

[73] Br. of the Intell. Prop. L. Assn. of Chi. as Amicus Curiae in Support of Respt., *KSR*

familiar devices, isocolon[74] and antithesis,[75] to emphasize policy concerns arising in patent law. The authors note that "[a]s a practical matter, objective standards such as those defined by the TSM requirement promote the goals of certainty over uncertainty, and predictability over unpredictability."[76] Antithesis, of course, is found in the adjective opposites of certainty and uncertainty, and of predictability and unpredictability. Isocolon is found in the parallel form of "X over Y, and X1 over Y2."

Shortly thereafter, the authors use the same devices again: "The patent system rewards those who can *and do*, not those who can but don't."[77] Using these figures draws the reader's attention to the policy benefits the authors suggest. They do this by essentially doubling the idea, and, perhaps, by creating a rhythmic pleasure in the words. The figures provide persuasive assistance and readability, without becoming overwrought.

It can only help a persuasive writer to employ devices to improve "natural charm," and the "full flowering of expression." A review of the advice offered by Longinus and Geoffrey of Vinsauf may inspire the legal writer to make some effort to use figures of speech to amplify the persuasive power of a brief.

C. Word Choice—le Mot Juste

In poetry criticism, there is a long history of attention to word choice. Longinus proclaimed that "we may say with strict truth that beautiful words are the very light of thought."[78] And Flaubert is famous for his search for *le mot juste*—the one right or apt word.[79] The attention to word choice in poetry is suited to the legal writer, as well.

Aristotle addressed the orator's choice of words in ways particularly pertinent to the legal writer. In Book III, he writes: "We can thus call a crime a mistake, or a mistake a crime. We can say that a thief 'took' a thing, or that

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Intern. Co. v. Teleflex Inc., 550 U.S. 398 (2007).

[74] Isocolon is "[a] sequence of clauses or sentences of identical length." Cuddon, *supra* n. 7, at 432.

[75] Antithesis is a method of "contrasting ideas sharpened by the use of opposite or noticeably different meanings." Cuddon, *supra* n. 7, at 46.

[76] Br. of the Intell. Prop. L. Assn. of Chi. at 4, *KSR Intern. Co.*, 550 U.S. 398.

[77] *Id.* at 11.

[78] Longinus, *supra* n. 20, at 57.

[79] *See e.g.* Charles Carlut, *La Correspondance de Flaubert* 173 (Ohio State U. Press 1968) (quoting Flaubert correspondence with George Sand). This was later addressed by critic Walter Pater, who placed *le mot juste* as a crux of poetic invention: "The one word for the one thing, the one thought, amid the multitude of words, terms, that might just do: the problem of style was there!—the unique word, phrase, sentence, paragraph, essay, or song, absolutely proper to the single mental presentation or vision within." Walter Pater, *Appreciations, with an Essay on Style*, in *The Works of Walter Pater in Eight Volumes* vol. 5, 29 (Macmillan & Co. 1901) (originally published 1889).

he 'plundered' his victim."[80] This sort of careful characterization to convey motive or effect is a basic tool of legal writer and poet. Was a plaintiff "advised" of something by the defendant, or was he, more ominously, "warned"? Was plaintiff "offered a choice"? Or did defendant "issue an ultimatum"?

This is an issue of reasoning, in a concrete sense—a reason for every word.[81] In drafting transaction documents, a lawyer has to keep an eye on ambiguities, and on completeness. What sort of eventualities may arise? How are they to be resolved? In litigation materials, what do the cases really say, and how does the matter one is working on find support in or distinction from those cases? Every word counts, every modifier, every verb, every denotation.

Another important aspect of word choice is achieving clarity. "Clearness is secured by using the words (nouns and verbs alike) that are current and ordinary."[82] Experienced lawyers and students alike need frequent reminders of this mandate. Judicial opinions regularly contain language seemingly designed more to demonstrate the judge's erudition than to explain the law. Students often produce memoranda containing words in contexts that don't even make sense, because of misuse of the thesaurus.

It seems reasonably clear why students use the thesaurus as they prepare their memos or briefs for class. It is an urge to make their writing more "interesting" or "sophisticated." This is related to a lack of confidence in their easily accessed vocabulary, and a fear that their fellow students possess a better-developed lexicon. Despite the years the legal writing community has invested in encouraging "plain English," students remain suspicious. When I suggested a simple word choice to a student in conference, he objected with "but don't I want to appear educated?" Well, yes, you do, but misusing a word you don't fully understand is a singularly unhelpful way to do so.

A writing teacher bored with seeing the words "said" or "indicated" throughout a fact section may wish a student had used a thesaurus. But the alternatives to these and other words are available to almost any student who gives the topic some thought. Thoughtful word choice should be a part of any writer's process, and should be encouraged, if not demanded.

But these are substantive issues, again, the right word for the right reason. What about aesthetic word choice? What about choices that *need* not be made, but perhaps *should*? There is a danger in legal writing of using language too flowery for the task of explanation and persuasion.[83]

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[80] Aristotle, *supra* n. 10, at 169.

[81] *See* Pound, *supra* n. 47, at 95 ("Use no superfluous word, no adjective, which does not reveal something.")

[82] Aristotle, *supra* n. 10, at 167.

[83] *See infra* section E.

Nonetheless, there are almost always choices to be made in the selection of words, and some of the alternatives may be more engaging than others.

Justice Cardozo provides an example. In this passage, it is plain that choices were made. Many different sentences, and many different words, could have conveyed the same meaning. But these sentences, and these words, engage the reader in a way the other choices might not have:

> In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overlept the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state Legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a co-operative endeavor to avert a common evil.[84]

From the interior rhyme of "remedial expedient," to the unusual usage of "overlept," through the frightening vision of "assailants," and the metaphoric "whip," culminating in the selection of the quasi-alliterative words "constraint," "creation," "co-operative" and "common," this is unmistakably aesthetically motivated—an effort not only to report, but to provide pleasure.

Evocative word choice need not be limited to judicial writing. The briefs in *Jespersen v. Harrah's* [85] bear witness to the possibilities available to the legal writer. The *Jespersen* plaintiff sued her employer after she was terminated for refusing to wear makeup on the job. In one of plaintiff's briefs to the Ninth Circuit, she asserted that "notwithstanding her twenty-one years of loyal, 'outstanding' service, Harrah's terminated Jespersen's employment. Nothing else mattered if she declined to paint her face."[86] The choice of "paint her face," rather than, say, "wear makeup" suggests something almost grotesque and cartoonish—hardly something an employer should want, let alone require, from an employee. It also sounds singularly unrelated to the performance of work duties.

An amicus brief counters that an employer should be able to maintain appearance standards of its choosing, lest it find itself represented by "employees who sport jewelry like Mr. T, wear makeup like Gene Simmons of Kiss, dress like Dennis Rodman, have hair like Fabio or beards like a member of ZZ Top."[87] Here, rather than a coolly rational explanation of makeup and

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[84] *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 587 (1937).

[85] *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006).

[86] Reply Br. of Appellant Darlene Jespersen, *Jespersen*, 444 F.3d 1104 (no pagination available).

[87] Br. of Amici Curiae Council for Empl. Law Eq. et al., *Jespersen*, 444 F.3d 1104 (no pagination available).

its benefits to the employer, a parade of comic horribles sets forth and drives home the dangers of unregulated employee appearance.

Other examples of word choice in the *Jespersen* briefs are less dramatic but equally important. The defendant characterizes plaintiff's interpretation of Title VII as an "all-encompassing law that eradicates sex-based stereotypes, and, thus, prohibits all gender-based appearance standards."[88] There is drama to the scope of the proposed interpretation described by the defendant. "All-encompassing" sounds dangerously broad and lacks subtle, considerate responsiveness from the law. "Eradicate," as well, has a draconian, severe tone. This presentation of extremity may raise the hackles of a moderate reader. Perhaps sensing this, the plaintiff replies with a dismissive, hyperbolic restatement of defendant's characterization, calling it "a hypothetical mandate of universal androgyny."[89] Something "hypothetical," of course, is non-existent. And it is hard to imagine anyone positing something so inconceivable to us as a "mandate of universal androgyny." Through careful word choice, defendant makes plaintiff's argument sound unreasonable and ham-fisted. Plaintiff then undermines that strategy by making defendant sound shrill.

Not every writer can be Justice Cardozo. Not every writer should invoke Mr. T in a brief. But because "the choice of appropriate and striking words has a marvellous power and an enthralling charm for the reader,"[90] the fitting word choice should be an ongoing challenge addressed by the legal writer, both for substantive reasons, and for the degree to which words can provide aesthetic pleasure and engage the reader.

D. Stylistic Variety

To keep a judge's attention through the course of a long brief, the tools used and strategies employed must be varied. No one wants to read a brief in which every sentence is structured as dependent clause followed by independent clause. Nor should every sentence be the same number of words. Just as in music, where a song typically has verses, choruses, and a bridge to add a twist, a new element, legal writing and poetry must carefully mix the elements available to them.

Aristotle addresses this in his *Poetics*: "A certain infusion, therefore, of these elements is necessary to style; for the strange (or rare) word, the metaphorical, the ornamental, and the other kinds above mentioned, will raise it above the commonplace and mean, while the use of proper words will make it perspicuous."[91]

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[88] Appellee's Answering Br. at 8, *Jespersen*, 444 F.3d 1104.

[89] Reply Br. of Appellant Darlene Jespersen, *Jespersen*, 444 F.3d 1104.

[90] Longinus, *supra* n. 20, at 56.

[91] Aristotle, *supra* n. 26, at 83. *Rhetoric* also takes up the topic: "The form of a prose composition should neither be metrical nor destitute of rhythm." Aristotle, *supra* n. 10, at 180.

Quintilian is perhaps more direct: "[W]hen a student tends to continuous or at any rate excessive use of the same cases, tenses, rhythms or even feet, we are in the habit of instructing him to vary his *figures* with a view to the avoidance of monotony"[92]

Samuel Johnson, in his "Preface to Shakespeare," situates the bard's talent precisely in his varied presentation:

> Shakespeare's plays are not in the rigorous and critical sense either tragedies or comedies, but compositions of a distinct kind; exhibiting the real state of sublunary nature, which partakes of good and evil, joy and sorrow, mingled with endless variety of proportion and innumerable modes of combination.[93]

Although good legal writing should not have to compete with the work of Shakespeare, it should take to heart this lesson of these theorists and employ a style with varied elements. A good recent example of such variety—within a very few words—is contained in Justice Breyer's partial dissent in *Exxon v. Baker*.[94] He writes:

> In my view, a limited exception to the Court's 1:1 ratio is warranted here. As the facts set forth in Part I of the Court's opinion make clear, this was no mine-run case of reckless behavior. The jury could reasonably have believed that Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for the many plaintiffs in this case. Given that conduct, it was only a matter of time before a crash and spill like this occurred. And as Justice Ginsburg points out, the damage easily could have been much worse. The jury thought that the facts here justified punitive damages of $5 billion. The District Court agreed.[95]

Justice Breyer begins with a reasonably short declarative sentence. He then writes a somewhat longer two-clause sentence, containing a metaphor ("mine-run," a variant of "run of the mine," or the more common "run of the mill"). The next sentence not only provides a vivid description of the scene and its attendant risks, but uses subtle initial alliteration ("reasonably," "relapsed," "repeatedly"). The passage ends with two short declarative sentences, each buttressing the other.

The rhythm of prose must be considered, with figures of speech used to provide varying and engaging cadences. *Id.* at 181–86.

[92] Quintilian, *supra* n. 24, at 353, 355.

[93] Johnson, *supra* n. 33, at 66.

[94] *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2640 (2008) (Breyer, J., concurring in part and dissenting in part).

[95] *Id.* at 2640 (citations omitted).

This short paragraph does not, of course, provide a blueprint for legal writing. But it does demonstrate the ways in which attention to variety can create an interesting, and perhaps pleasing experience for the reader.

E. The Measured Use of Stylistic Strategies

There is, of course, the danger that a legal writer may move too far in the direction of using figures and stylistic strategies.[96] The pursuit of art should never contravene the appearance of candor, clarity, and care.[97]

Aristotle addressed this issue in *Rhetoric*, noting that "a writer must disguise his art and give the impression of speaking naturally and not artificially."[98] He believed it applied, too, to those working in verse form, writing in *Poetics* that "[c]haracter and thought are merely obscured by a diction that is over brilliant."[99] "To employ such license at all obtrusively is, no doubt, grotesque; but in any mode of poetic diction there must be moderation."[100]

Later poetry commentators have reiterated this directive. Longinus is particularly sensitive to the overuse of artificial devices. He opines that "[f]or an exhibition of feeling has then most effect on an audience when it appears

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[96] Longinus cautions that:

> [T]he use of figures has a peculiar tendency to rouse a suspicion of dishonesty, and to create an impression of treachery, scheming, and false reasoning; especially if the person addressed be a judge, who is master of the situation, and still more in the case of a despot, a king, a military potentate, or any of those who sit in high places. If a man feels that this artful speaker is treating him like a silly boy and trying to throw dust in his eyes, he at once grows irritated, and thinking that such false reasoning implies a contempt of his understanding, he perhaps flies into a rage and will not hear another word; or even if he masters his resentment, still he is utterly indisposed to yield to the persuasive power of eloquence. Hence it follows that a figure is then most effectual when it appears in disguise.

Longinus, *supra* n. 20, at 40–41. Indeed, "[m]any of the beauties of poetry and even of eloquence are founded on falsehood and fiction, on hyperboles, metaphors, and an abuse or perversion of terms from their natural meaning." Hume, *supra* n. 6, at 231. Readers, perceiving this, may approach overly artful writing with hesitation.

[97] Quintilian, for instance, cautions that overuse of metaphor runs the risk of rendering our language "allegorical and enigmatic." Quintilian, *supra* n. 24, at 309.

[98] Aristotle, *supra* n. 10, at 167. Aristotle condemns a variety of stylistic choices made by orators, including the use of "strange words," inappropriate use of metaphor, and overuse of qualifiers ("epithets"). Regarding qualifiers, he singles out Alcidamas, whom he contends uses them not "as the seasoning of the meat, but as the meat itself, so numerous and swollen and aggressive are they." *Id.* at 172. "Plainly, the middle way suits best. Again, style will be made agreeable by the elements mentioned, namely by a good blending of ordinary and unusual words, by the rhythm, and by the persuasiveness that springs from appropriateness." *Id.* at 199.

[99] Aristotle, *supra* n. 26, at 97.

[100] *Id.* at 85.

to flow naturally from the occasion, not to have been laboured by the art of the speaker . . . ."[101]

Observing that "bombast is one of the hardest things to avoid in writing,"[102] he cautions the writer to avoid "false sentiment, meaning by that an ill-timed and empty display of emotion, where no emotion is called for, or of greater emotion than the situation warrants"[103] and laments overly dramatic imagery that "produce[s] an effect of confusion and obscurity, not of energy; and if each separately be examined under the light of criticism, what seemed terrible gradually sinks into absurdity."[104] Ultimately, however, he may succumb to the very illness he tries to cure, perhaps overstating the case with this sentence: "A trifling subject tricked out in grand and stately words would have the same effect as a huge tragic mask placed on the head of a little child."[105]

III. Conclusion

Legal writing that attends to issues of aesthetic pleasure may be more persuasive. While no one will ever suggest that clarity and sense should be sacrificed in favor of clever artifice, the proper use of art should nonetheless be part of the writer's toolbox. To keep writing interesting and enjoyable can only help a client's case.

When writing, it is difficult to remember to use various stylistic elements that can elevate and energize prose. But by paying attention to the dictates of poetry critics throughout the ages, it may be possible to pay that little bit of extra attention to style—to use a vivid image, to think that extra moment about word choice. There is no formula. An asyndeton a day does not keep the unfavorable judgment away. It can never hurt, however, to be attentive to the many possibilities, and to try to take advantage of every opportunity to persuade our readers.

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[101] Longinus, *supra* n. 20, at 42.

[102] *Id.* at 6.

[103] *Id.* at 7.

[104] *Id.* at 5.

[105] *Id.* at 57.