

# Legal Communication & Rhetoric: JALWD

Fall 2012 / Volume 9

.....

## ARTICLES & ESSAYS

**The Count's Dilemma:  
Or, Harmony and Dissonance in Legal Language**

Ian Gallacher

# The Count's Dilemma:

## Or, Harmony and Dissonance in Legal Language

Ian Gallacher\*

In the castle of Aguas Frescas, Count Almaviva is raging. He is homicidally furious because he believes his wife is having an affair with one of his young pages. He was talking to his wife in her bedroom when he heard the unmistakable sounds of someone knocking over furniture in her closet. He demands the key to the locked room, thundering out his demand twice: "*Qua la Chiave?*" he says—"Where is the key?"<sup>1</sup>

And in that dramatic moment, we who are watching the confrontation know that the Count has an insoluble dilemma, for he has the key all along and lacks the ability to recognize it.<sup>2</sup> The Count's lack of self-awareness will lead inevitably to the failure of his scheme to sleep with Susanna, his wife's maid, who is due to be married to Figaro, his manservant, and the day will end in humiliation for him. The moment is a dramatic one, in which a lot of information is encoded and transmitted in a short burst of time, and it comes at the start of the finale to Act II of Mozart's *Le Nozze di Figaro*.

The nature of the Count's dilemma, and in particular the power of the key the Count possesses but of which he is unaware, forms the core of this critique of one small byway of legal rhetoric: the use, or more accurately,

.....

\* ©Professor of Law and Director, Legal Communication and Research Program, Syracuse University College of Law. Thanks to Dean Hannah Arterian for her continued support of my work, no matter what strange turns it might take; Elton Fukumoto, who made some helpful suggestions and who listened patiently as I began groping my way through this; and to the organizers of the 2011 Southeastern Legal Writing Conference, who invited me to present an earlier version of this paper. An especial thanks to Melissa Weresh and Jason Cohen, two very busy and skilful people, who took the time to edit this article and make it better than it was before. Any remaining faults or errors are my fault, not theirs. Thanks also to Robert Page for the chance to conduct *Le Nozze di Figaro* at Carnegie-Mellon University in 1979, and to the cast and orchestra of that production for suffering through my learning how to conduct opera. As always, this is for Julia McKinstry: to my admittedly biased eyes and ears, the finest Susanna to ever sing the role.

<sup>1</sup> Wolfgang Amadeus Mozart, *Le Nozze di Figaro*, in *Opera Guide Series* 17, 81 (Nicholas John ed., Riverrun Press 1983). The *libretto* for *Le Nozze di Figaro* was written in 1786 by Lorenzo da Ponte, working from the play by Pierre Auguste de Beaumarchais.

<sup>2</sup> We also know that the page, Cherubino, was indeed in the closet when the Duke heard the crashing furniture (and that he was there as the result of a plot to thwart the Count's designs on Susanna, not as a result of an illicit relationship with the Countess), but we have seen him escape and Susanna, the Countess' maid, has taken his place in the closet.

the misuse of musical metaphors by lawyers and judges. In particular, this article will look closely at the familiar “harmony” metaphor, often used to explain a relationship between one thing and another.<sup>3</sup> The article will conclude that this is an inaccurate and unhelpful method of conveying the apparently intended meaning from writer to reader for two reasons: although musicians study harmony as a technical exercise, most Western classical music is not composed as a harmonic entity; and—perhaps even more disturbing for “harmony” as a metaphor—a harmonic moment, viewed in isolation, is often not a sweet-sounding, euphonious, or even pleasing sound when heard apart from the more important tonal context. In fact, harmony in music does not operate as an organizing principle, but is rather a secondary concept to tonality, which—for much of Western classical music, at least—does provide the structural principles within which the music is organized.

And it is this conflict between the technical and common understanding of a term that forms the crux of this article. Is it better, or even proper, for legal writers to use a technically inaccurate metaphor that has gained widespread acceptance, or should legal writers, who strive for clarity and accuracy of communication, limit themselves to metaphors that are technically accurate, even where the metaphors themselves might be obscure?

3 See e.g. *McDonald v. Chicago*, 130 S. Ct. 3020, 3095 n. 13 (2010) (Stevens, J., dissenting) (“If federal and state courts must harmonize their review of gun-control laws under the Second Amendment, the jurisprudence may prove significantly more deferential to those laws than the *status quo ante*.”); *New Process Steel, LP v. Nat’l Labor Relations Bd.*, 130 S. Ct. 2635, 2640 (2010) (“[R]eading the delegation clause to require that the Board’s delegated power be vested continuously in a group of three members is the only way to harmonize and give meaningful effect to all of the provisions in § 3(b).”); *Christian Legal Society Chapter of the University of California, Hastings College of the Law, v. Martinez*, 130 S. Ct. 2971, 2992 (2010) (“RSOs, moreover, in harmony with the all-comers policy, may condition eligibility for membership and leadership on attendance . . . .”); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2482–83 (2009) (“The Act can be home to both provisions, with no words added or omitted, so long as the category of ‘dredged or fill material’ eligible for a § 404 permit is read in harmony with § 306.”).

4 Lincoln’s reference to “harmony” in his first inaugural speech and, later and even more famously in the same speech, his reference to “the mystic chords of memory” that will “swell the chorus of the Union” suggests that musical metaphor is deeply ingrained in our public language. The *Oxford English Dictionary* gives the primary meaning of “harmony” as a “[c]ombination or adaptation of parts, elements, or related things, so as to form a consistent and orderly whole; agreement, accord, congruity[.]” and lists the first nonmusical usage as coming from approximately 1532: “Others have sayd that it [the operation of God] is a maner of armonie.” *Oxford English Dictionary* vol. V, 98 (Oxford U. Press 1961) [hereinafter *OED*].

The musical definitions of “harmony” in the *OED* start with the fourth definitions: “The combination of musical notes, either simultaneous or successive, so as to produce a pleasing effect; melody; music, tuneful sound” *OED* vol. V, 98 (Oxford U. Press 1961). And the meaning of harmony most familiar to contemporary musicians is given in the fifth position: “The combination of (simultaneous) tones so as to form chords; that part of musical art or science which deals with the formation and relations of chords; the structure of a piece of music in relation to the chords of which it consists.” *Id.*

A popular blending of actual and metaphorical meanings of “harmony” can be found in the Coca Cola jingle that has the chorus “I’d like to teach the world to sing/in perfect harmony.” Lyric found at The Coca-Cola Co., *Coke Lore*, [http://www.thecoca-colacompany.com/heritage/cokelore\\_hilltop.html](http://www.thecoca-colacompany.com/heritage/cokelore_hilltop.html) (accessed March 14, 2011). This merging of meanings produces a potentially odd result, to a literal-minded musician, at least, creating the image of a large group of people on a hilltop singing medieval polyphony, since that is the type of music most commonly associated with the “perfect harmony” of the fourth and fifth intervals of the scale, the “perfect” intervals. See *infra* text accompanying n. 44. But that is probably taking all of this at least one step too far.

At the start, it is worth acknowledging that many will consider this an entirely Quixotic exercise: the “harmony” metaphor is deeply ingrained in our public<sup>4</sup> as well as legal rhetoric<sup>5</sup> and nothing said here will shake its place in the legal vocabulary. Even worse, it is possible that harmony has become so embedded in the language that it can be considered to be what Derrida would call an “effaced” metaphor<sup>6</sup> or what Orwell, in his typically blunt way, would call a “dead” metaphor.<sup>7</sup> If that is so, then what follows is truly a sterile exercise: if the metaphorical use of “harmony” has been worn away by use and has, for practical purposes, died, then we all know what is meant by the nontechnical use of the term and it is not in any meaningful sense a metaphor at all.

But death in writing need not necessarily be the absolute state that biology leads us to believe:

“You see,” Max explained as he pumped, “there’s different kinds of dead: there’s sort of dead, mostly dead, and all dead. This fella here, he’s only sort of dead, which means there’s still a memory inside, there’s still bits of brain. You apply a little pressure here, a little more there, sometimes you get results.”<sup>8</sup>

Miracle Max’s parsing of “dead” suggests some hope for the notion of “harmony” as a metaphor. So, while I am willing to concede the first charge of a Quixotic tilting against windmills, I am unpersuaded by the notion that “harmony” no longer functions as a metaphor. Just as with Wesley, the character in *The Princess Bride* on whom the Miracle Max is operating so pneumatically, the “harmony” metaphor might be sort of dead, but it still has some vitality left in it.

5 In writing to Thomas Jefferson about the removal of executive officers, James Madison noted that the view “most consonant to the text of the Constitution [and] to the requisite responsibility and harmony in the Executive Department” was that the executive power included a power to oversee executive officers through removal, because that traditional executive power was not “expressly taken away, it remained with the President.” Ltr. from James Madison to Thomas Jefferson (June 30, 1789) in 16 *Documentary History of the First Federal Congress* 893 (2004), (quoted in *Free Enterprise Fund v. Public Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151–52 (2010)). *Black’s Law Dictionary* even offers a definition of the legal “harmony”: “Agreement or accord; conformity” *Black’s Law Dictionary* 734 (Bryan A. Garner ed., 9th ed., West 2009) (“[T] he decision in *Jones* is in harmony with earlier Supreme Court precedent.”).

6 Jacques Derrida, *White Mythology: Metaphor in the Text of Philosophy*, in *Margins of Philosophy* 207, 211 (trans. Alan Bass, U. Chi. Press 1982) (discussing Anatole France’s dialog *The Garden of Epicurus* and noting that “it examines, precisely, the possibility of restoring or reactivating, beneath the metaphor which simultaneously hides and is hidden, the ‘original figure’ of the coin which has been worn away[.] . . . effaced, and polished in the circulation of the philosophical concept.”).

7 George Orwell, *Politics and the English Language*, in *Why I Write*, 102, 105–06 (Penguin Group 1984) (originally published 1946) (“A newly invented metaphor assists thought by evoking a visual image, while on the other hand a metaphor which is technically ‘dead’ . . . has in effect reverted to being an ordinary word and can generally be used without loss of vividness. But in between these two classes there is a huge dump of worn-out metaphors which have lost all evocative power and are merely used because they save people the trouble of inventing phrases for themselves.”). My thanks to Professor Elton Fukumoto for pointing me to both this and Derrida’s concept of metaphorical effacement.

8 William Goldman, *The Princess Bride* 248 (Ballantine Books 1973).

One reason to believe in this vitality is the frequency with which it, and other musical terms, appear in the law; “harmony” is only one of a bundle of musical expressions that have worked their way into everyday legal usage. Courts<sup>9</sup> frequently write of “crescendos,”<sup>10</sup> “counterpoint,”<sup>11</sup> “orchestration,”<sup>12</sup> and “striking a chord.”<sup>13</sup> In a discussion of meaning that likely would find little favor in today’s textualist courts,<sup>14</sup> Judge Learned Hand observed that “[t]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.”<sup>15</sup> And Judge Posner has noted that “[t]he voices of the quasi-sovereigns that are the states of the United States sing

<sup>9</sup> Although my emphasis here is with the legal language of practitioners—judges and practicing lawyers—and although my examples will come from judicial opinions, legal academics have also been drawn to musical metaphors. See e.g. Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. Penn. L. Rev. 1597, 1609 (1991) (“The texts we call law are not law-in-action, but only sources of law—they require the interpretation and application of lawyers, judges, and other legal officials to become law, in the sense of a practice of social regulation. Just as the music of the *Eroica* is not identical to its score, but needs a performer to realize it, so too the social practice of law is not fully identical with its written texts, but needs the activity of those entrusted with its performance to be realized.”). Others have found music and musical concepts to be helpful when speaking about the law. See generally Jerome Frank, *Say It With Music*, 61 Harvard L. Rev. 921 (1948); Daniel Kornstein, *Music of the Laws* (Everest House Pub. 1982); Timothy Hall, *The Score as Contract: Probate Law and the Historically Informed Performance Movement*, 20 Cardozo L. Rev. 1589 (1999); Desmond Anderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (U. Cal. Press 2000); Ian Gallacher, *Conducting the Constitution: Justice Scalia, Textualism, and the Eroica Symphony*, 9 Vand. J. Ent. & Tech. L. 301 (2006).

<sup>10</sup> Compare, e.g., Justice Scalia’s apparently correct use of the term in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995), prompted by the crescendo of legislative interference with private judgments of the courts . . . with the more-typical incorrect usage found in *United States v. Kinsella*, 622 F.3d 75, 80 (1st Cir. 2010): “Building to a crescendo, the prosecutor later stressed that a person who shows up to a hearing ‘two hours’ or even ‘two days late’ may ‘not be willful . . . .’” The problem with the latter is that a crescendo is the increase in volume as a musical moment builds to a point, not the point itself.

<sup>11</sup> E.g. *Plaut*, 514 U.S. at 266 (Stevens, J., dissenting) (“In an ironic counterpoint, the Court today places a higher priority on protecting the Republic from the restoration to a large class of litigants of the opportunity to have Article III courts resolve the merits of their cases.”); *Wong v. Belmontes*, 130 S. Ct. 383, 389 (2009) (“But the cold, calculated nature of the Howard murder and Belmontes’ subsequent bragging about it would have served as a powerful counterpoint.”).

<sup>12</sup> E.g. *Carter v. United States*, 530 U.S. 255, 284 (2000) (Ginsberg, J., dissenting) (“Moreover, unlike a John Dillinger who foils state enforcers by robbing banks in Chicago and lying low in South Bend, the thief who orchestrates his own capture at the hands of the local constable hardly poses the kind of problem that one would normally expect to trigger a federal statutory response.”); *California Medical Assoc. v. Federal Election Comm’n*, 453 U.S. 182, 192 (1981) (“In sum, although Congress might have been wiser to orchestrate § 437g and § 437h in the manner proposed by the Commission, the statutory language and history belie any such intention.”).

<sup>13</sup> E.g. *Barr v. Galvin*, 626 F.3d 99, 107 (2010) (“Viewed against this backdrop, the appellees’ complaint that the procedures governing substitution of candidates for president and vice-president are unclear strikes a responsive chord.”); *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (“The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror.”); *Vera-Lozano v. Int’l Broadcasting*, 50 F.3d 67, 71 (1st Cir. 1995) (“We will not disturb an award of damages for economic loss provided it does not violate the conscience of the court or strike such a dissonant chord that justice would be denied were the judgment permitted to stand.”).

<sup>14</sup> According to Justice Scalia, a self-proclaimed textualist, the term (and its companion “originalist”) refers to one who “gives the text the meaning that it had when it was adopted—which is what we usually do with statutes, but for some reason some people think we should not do that with a constitutional text.” Bryan A. Garner, *Interviews with Supreme Court Justices: Justice Scalia*, 13 *Scribes J. Leg. Writing* 56 (2010). What a textualist does with metaphor, in which words carry meaning, but not the meaning for which they are being used in a piece of text, is a question beyond the scope of this essay.

<sup>15</sup> *Helvering v. Gregory*, 69 F.2d 809, 810–11 (2d Cir. 1934).

negligence with a different pitch.”<sup>16</sup> These are all surely meant as metaphors, importing their technical meanings into a legal context because they convey something that cannot be fully expressed by the use of nonmetaphorical language.<sup>17</sup> My discussion of the “harmony” metaphor here can stand as a proxy for an analysis of all these metaphors, for they are all similarly flawed in that they suggest a lack of appreciation for what the terms actually mean.

But even were “harmony” to stand alone as a musical term in the legal lexicon, I believe it is would still be intended as a metaphor by those who used it. By writing that two concepts “harmonize,” a legal writer might be seeking to convey the idea of two disparate elements “sounding” together to produce a euphonious result.<sup>18</sup> The problem is that this is not what musicians mean by “harmony,” at least not today. This semi-understanding of a concept—apparently importing meaning from another field by use of a metaphor that does not, in fact, mean what the writer intends it to mean—can lead to misinterpretation, confusion, and a lack of clarity; it is a dangerous ploy for a legal writer to use a metaphor in the hope that a reader will not know what it really means, but rather will share the writer’s confusion as to what is being said.

In order to fully understand the problem, it is necessary to understand what harmony is and what it is not. And that requires a brief, and hopefully not too technical, exploration of some basics of music theory. With that foundation in place, we can move on to a discussion of why “harmony” is not the appropriate metaphor for the meanings apparently being loaded onto it and instead consider another, stronger, alternative musical metaphor that is available to legal writers. Before all of that,

<sup>16</sup> *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1301 (7th Cir. 1995). The context of Judge Posner’s opinion suggests that he is invoking this metaphor to suggest a cacophonous discord of conflicting negligence laws, but since a euphonious concord could also be produced by singers singing different pitches, the meaning here is blurry at best. Perhaps Judge Posner was inspired to use a musical metaphor here because one of the industrialists who helped develop Rhone-Poulenc Rorer into a large chemical and pharmaceutical manufacturer was Emile Poulenc, father of the French composer Francis Poulenc. <http://en.wikipedia.org/wiki/Rhône-Poulenc> (accessed March 15, 2012). If so, maybe he also had in mind some of the astringent harmony that composer would write on occasion.

<sup>17</sup> Sometimes the attempt to transport meaning by use of musical metaphor goes disastrously awry, as it did in *Milene Music, Inc. v. Gotauco*, 551 F. Supp. 1288 (D.R.I. 1982), a music copyright infringement case in which the court structured the various parts of its discussion as “Overture,” “First Movement,” “Second Movement,” “Third Movement,” “Fourth Movement,” and—incomprehensibly—“The Crescendo and Curtain Call.” *Gotauco*, 551 F. Supp. at 1296–97. The court’s use of quasi-classical musical terminology was presumably an attempt to evoke one of the typical four movement structures, like a symphony (although the inclusion of an “Overture” and what the court presumably intended to be an encore confuses even this message), but the purpose of this is hard to discern when one realizes that the musical compositions under consideration in the case were all popular standards such as “Me and You and a Dog Named Boo,” “Orange Blossom Special,” and “Bad, Bad Leroy Brown.” *Id.* at 1297.

<sup>18</sup> See e.g. Norman J. Singer and J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction Database* § 46:5 (West 2007) (“A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole.”).

though, it might be helpful to review quickly the relationship between metaphor and the law.

## I. Metaphor and the Law

Metaphor<sup>19</sup> enjoys an ambivalent place in human communication.<sup>20</sup> On the one hand, it is recognized as a “common feature of language;”<sup>21</sup> without it “our perceptions would remain as scattered as marbles thrown on the ground.”<sup>22</sup> And, though metaphor is a rhetorical device, Mark Johnson argues that “we must not think of metaphor, in the old way, as a mere figure of speech. It is a figure of life. It is a figure of thought. It is a figure of value. We live, love, fight, and die by metaphors.”<sup>23</sup>

On the other hand, though, metaphor has long been viewed as a “mere literary device[,] [a] language trick[] that put[s] a gloss on legal reasoning, but add[s] little of substance to an argument.”<sup>24</sup> Neatly encapsulating this ambivalence in one sentence, Justice Cardozo wrote that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”<sup>25</sup>

19 Lawyers are fond of defining terms, but the ubiquity of metaphors in the English language might be thought to make such a definition unnecessary when it comes to the term “metaphor.” As it turns out, though, “metaphor” is a slippery concept that is not as easily pinned down as one might think. Michael Smith observes that “metaphor is difficult to define with much specificity” because of its “versatile nature.” Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 199 (2d ed. 2008). He considers Aristotle’s definition (metaphors are devices “by which we give names to nameless things”) to be not especially helpful and that of Theodore M. Bernstein’s (a metaphor is “a figure of speech in which a word or phrase implies a comparison or identity”) to be better, although that definition could also work for simile, and some might argue that the connection is more than merely “implied.” *Id.*, quoting Aristotle, *The Rhetoric of Aristotle* 188 (Lane Cooper, trans. 1932), and Theodore M. Bernstein, *The Careful Writer: A Modern Guide to English Usage* 275 (Free Press 1982). Smith’s suggested definition is by Robert Frost, who said that a metaphor is “saying one thing and meaning another,” a witty definition that could equally apply to a lie. *Id.* (citing James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* 57 (1973) (quoting Robert Frost)). A more workable definition is offered by Christopher Rideout who, in noting that “the word ‘metaphor’ is itself a metaphor . . . taken from the Greek verb ‘metapherein,’ meaning ‘to transfer’” suggests that this transference “involves giving one thing a name that belongs to something else.” J. Christopher Rideout, *Penumbra Thinking Revisited: Metaphor in Legal Argumentation* 7 J. ALWD 157, 159 (2010).

20 Christopher Rideout, making the same point, employs the more effective metaphor “double-edged” to describe metaphor’s place in human language. Rideout, *supra* n. 19, at 157.

21 Rideout, *supra* n. 19, at 157, citing Aristotle, *On Rhetoric: A Theory of Civic Discourse* 222 (George A. Kennedy trans., Oxford U. Press 1991).

22 Linda L. Berger, *Preface*, 7 J. ALWD, at vii. (2010).

23 Mark L. Johnson, *Mind, Metaphor, Law* 58 Mercer L. Rev. 845, 868 (2007). For an introduction to the ways in which the cognitive theory of metaphor can form the way we view the law, see Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004). Johnson, together with George Lakoff proposed the “cognitive or conceptual metaphor theory.” David T. Ritchie, *The Centrality of Metaphor in Legal Analysis and Communication: An Introduction*, 58 Mercer L. Rev. 839, 840 (2007).

24 Berger, *supra* n. 22, at vii. For a discussion of the mistrust with which metaphorical expression is sometimes viewed, see Rideout, *supra* n. 19, at 160–64.

25 *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

The law and metaphor have a long relationship. Cicero and Quintilian, two of the foremost classical commentators on metaphor's "use in forensic persuasion,"<sup>26</sup> were both lawyers. Both argued cases on behalf of clients in the Roman courts,<sup>27</sup> and the role of metaphor in the law can be traced through them to Jefferson's famous "wall of separation between Church and State"<sup>28</sup> and Justice Douglas's location of a right to privacy in the "penumbra" of the Bill of Rights,<sup>29</sup> to many, if not most, contemporary court decisions as well as numerous lawyer-written documents.

But even if Mark Johnson's advice is ignored and metaphors are considered as only rhetorical devices, metaphors in legal writing are still properly viewed as more than "mere stylistic adornment."<sup>30</sup> Rather, metaphors "serve a number of very important rhetorical functions in persuasive discourse,"<sup>31</sup> in particular providing *logos*—"helping to communicate an argument's substance through relevant analogies";<sup>32</sup> *pathos*—"the process of persuading through emotion";<sup>33</sup> and *ethos*—enhancing "a writer's credibility as an eloquent and intelligent source of information."<sup>34</sup>

Professor Michael Smith cautions against some problems associated with metaphoric use, including overuse, mixing metaphors, insulting or offensive metaphors, arcane metaphors, forced metaphors, overly grand or trivializing metaphors, thematically inconsistent metaphors, inappropriate tone, and extended metaphors.<sup>35</sup> Of course, there is also the problem of using metaphors that are inaccurate or incorrect. The dangers of such usage are readily apparent; if the reader perceives the falseness of the metaphor, not only will the *logos* of the argument be damaged, but the *ethos* the writer intended to generate will be shredded. No writer appears credible as an "eloquent and intelligent source of information" when making such a fundamental mistake as using a metaphor that does not

---

<sup>26</sup> Rideout, *supra* n. 19, at 160.

<sup>27</sup> Both Cicero and Quintilian have something still to teach contemporary lawyers. See Michael H. Frost, *With Amici Like These: Cicero, Quintilian and the Importance of Stylistic Demeanor*, 3 J. ALWD 5 (2006).

<sup>28</sup> Letter from Thomas Jefferson to the Danbury Baptist Association, Jan. 1, 1802, available as Appendix 1 to Julie A. Oseid, *The Power of Metaphor: Thomas Jefferson's "Wall of Separation between Church & State"*, 7 J. ALWD 123 (2010).

<sup>29</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>30</sup> Smith, *supra*, n. 19, at 233.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 205.

<sup>34</sup> *Id.* at 234.

<sup>35</sup> *Id.* at 235.



work. And that is the danger lawyers face when they use musical metaphors like “harmony”: as Aaron Copland famously (almost) said “if a literary man puts together two words about music, one of them will be wrong.”<sup>36</sup>

## II. Music Theory

In order to understand what harmony is not, though, we must understand what it is. And that brings us to music theory, because an at least cursory understanding of some aspects of music theory is necessary to appreciate the relative unimportance of harmony in musical composition and the much greater importance of tonality, the concept that will emerge as the more appropriate metaphor for legal writers to use.

As a threshold matter, I should note that this is, at best, a swift canter through some of the fundamentals of music theory, yet it might still be too technical for some and too simple for others. I have attempted to avoid overburdening this discussion with exhaustive bibliographical references, preferring to present this information in as uninterrupted a form as possible. It is also narrowed and simplified, for present purposes; interesting—even crucial—areas are completely omitted in an attempt to present only that information necessary to understand the musical nature of harmony in Western art music,<sup>37</sup> and as many rough spots as possible are simply smoothed over. Those with a strong understanding of music theory will doubtless find things here that will set their ears on edge, for which I apologize in advance. For those without a strong music-theory background, my only suggestion is to hold on and treat this as a roller-coaster ride; there might be short-term panic, but it will be over soon with no harm done. And it might even be enjoyable.

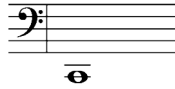
With these cautions in mind, the most important thing anyone should know about Western musical theory is that every note—every tone—carries within it the DNA of its harmony. It can do so because every note consists of a fundamental tone and a series of overtones that give musical

---

<sup>36</sup> Aaron Copland (found at [http://www.famousquotesandauthors.com/authors/aaron\\_copland\\_quotes.html](http://www.famousquotesandauthors.com/authors/aaron_copland_quotes.html) (accessed, March 14, 2012)). The quote is “almost” correct, because what Copland in fact wrote was when “the literary man . . . puts two words together to characterize a musical experience, one of them is almost certain to be wrong.” Aaron Copland *Copland on Music* 132 (1963). That is almost—but not the same—thing. But why spoil a good quasi-quote?

<sup>37</sup> By Western “art” music, I mean music often of European tradition if not pedigree, such as opera, symphony, art song. As for “harmony,” this cultural distinction is important. “Harmony” is not a universal concept, and has a different meaning when different scales, tones (such as quarter tones), and structures are introduced. Indian, Japanese, Native American, and African musics (the plural is intentional), to name just a few, all introduce their own concepts of harmony that are entirely outside of our consideration here.

notes a complex, rich sound. This phenomenon is not notated musically; to do so would render musical notation impossibly difficult to decipher. But when we write, for example, the note “C” that sounds two octaves<sup>38</sup> below middle C, it looks like this:



**Figure 1**

But that single note has packed within it a series of other tones that, when written down, look almost<sup>39</sup> like this:



**Figure 2**

A single musical tone, then, is in fact a complex organism—more like an entire ecosystem than a single entity—even though most of the overtones lie close to, or outside, the hearing threshold.<sup>40</sup> The notes in this overtone series change with every fundamental note, but the order is always the same: first the octave, then the fifth, and so on.

In the Western notational system, there are twelve available fundamental tones before the sequence begins to repeat. Each tone is separated by a semi-tone—a half step, or one key on the piano<sup>41</sup>—either white to black, black to white, or white to white. These twelve so-called chromatic

<sup>38</sup> An octave is one of the fundamental groupings of tones in Western art music, and represents the ordering of the notes that form the major or minor scale. It is so called because the scale consists of eight notes. The scale can begin on any of the chromatic tones, but choosing C, the octave would consist of C, D, E, F, G, A, B, and C, this latter one an octave higher than the initial C.

<sup>39</sup> “Almost” because the music-notation program I used could not generate the in-between nature of some of the overtones. The Bb (the seventh note) is actually an in-between note that falls somewhere between the written note and the A that lies a semitone lower, as are the F#, A, and Bb that appear towards the end of the overtone series. That acoustical phenomenon causes a great many problems for musicians, but none that I need to cover for present purposes.

<sup>40</sup> One can make these overtones more audible (or, at least, simulate them) by a simple experiment using a real, not an electric, piano. Taking any tone, but for present purposes the “C” written above, one depresses, but does not strike or sound, the note one octave above it. With that key soundlessly depressed, strike the lower octave C briefly and then release it, leaving the higher key still depressed. One should first hear the lower note played staccato, and then, as the sound of that note fades, a ghostly higher C should be audible. The higher sound is that of the first overtone in the series. This experiment can be reproduced to render successively higher notes in the overtone scale audible, although they quickly become inaudible even using this technique.

<sup>41</sup> The piano provides a useful visual reference, but this is one of those points that would trouble a trained musician since the piano’s half-steps are only approximations of the numerous pitches that lie between one half-step and the next. A *glissando*, or continuous sliding, on the violin or trombone, for example, gives a sense for the number of these intermediate pitches.

intervals are written this way when ascending (representing C, C sharp, shown by the “#” symbol, D, D#, E, F, F#, G, G#, A, A#, B, and C):



**Figure 3**

The chromatic intervals are written this way when descending, representing C, B, B flat, shown by the “b” symbol, A, Ab, G, Gb, F, E, Eb, D, Db, and C:



**Figure 4**

When played on a piano, the notes themselves are the same, and the notational differences—known as “enharmonic” differences by musicians—are conveniences for ease of reading and playing.<sup>42</sup>

The major scale—the only scale we will consider here—is made up of notes from the chromatic scales represented in figures 3 and 4. The pattern for all major scales is the same, regardless of the starting note: starting note, whole tone (two semi-tones or half-tones) higher, whole tone higher, semi-tone higher, whole tone higher, whole tone higher, whole tone higher, and semi-tone higher. For the C major scale, the first note is C, and the remaining notes are D, E, F, G, A, B, C. The ascending major scale based on C, and starting on middle C, looks like this:



**Figure 5**

.....

<sup>42</sup> This is certainly one of those places where trained musicians are gritting their teeth. While I say these tones are the same whether ascending or descending, and are only notated differently, in fact that is only half true. To a pianist, Bb and A# are the same notes and are played by depressing the same key on the piano. To any musician who plays an instrument without fixed pitches, or who sings, there can be a big difference between an A# and a Bb, and even some pianists will claim that the sound worlds of, for example, Db and C#, while being played by the same piano keys, are completely different. For simplicity's sake, though, I will continue to pretend that there is no functional difference between one note and its enharmonic equivalent.

In addition to their note names, the notes in the scale are also described by reference to their distance from the home, or tonic, note—C, in this case. So in this scale, D is also known as the second, E as the third, F as the fourth, G as the fifth, A as the sixth, and B as the seventh.

Western musical language is as hierarchical as many other aspects of society, and while the tonic, or home, note is clearly the most important note in any overtone series, other notes are only slightly less important. Looking back to the overtone series in Figure 2, one striking feature is the predominance of Gs, or fifths. The first six notes of the overtone series have three tonic notes and two fifths—C, C, G, C, E, G—and the series has one more fifth—the twelfth tone—as well. And because of this predominance of fifths, it is, after the octave, the most important interval for harmonic purposes. The ascending fifth—C up to G in this example—and its inverted relative—C down to F—are known as the “perfect” intervals,<sup>43</sup> and much of the earlier music in the Western tradition is founded on the importance of the fourth and the fifth. Over time, though, the third—the next interval in the overtone series after the fifth, once octave doublings are accounted for—began to assert itself, and when combined with the fundamental note and the fifth, the resulting three-note chord—or triad—it became the basis of Western harmonic structure.<sup>44</sup>

Musicians learn this theory of triadic organization as they begin the study of harmony. Rather than name the triads as tonic, second, third, and so on, the triads are assigned Roman numerals—I, II, III, IV, V, VI, and VII—and familiar cadential formulae like I–IV–V–I become as familiar to them as letter combinations spelling words become to language readers. Later, musicians—especially keyboard players playing the music of the seventeenth and eighteenth centuries—learn the more flexible system of figured bass, which uses a bass line and the harmonies above that line to construct a multi-voiced accompaniment.

Whereas harmonic theory is an important feature of every musician's education, though, there are two important aspects of harmony that make it ill-suited to the metaphorical role it has taken in legal communication: put simply, music is not written harmonically and, even more crucially, harmony often is not “harmonious.”

---

<sup>43</sup> If further proof of their importance is sought, the interval between the two “perfect” intervals—the augmented fourth or diminished fifth—also known as the tri-tone because there are three whole tones between it and the tonic note—is known as the “devil in music” because of the difficulties involved in harmonizing it and because of the uncomfortable sound it produces, at least in music before the twentieth century.

<sup>44</sup> Most Western harmony is in fact based on a four voiced, rather than three voiced, chord, but the fourth voice is usually added by doubling the fundamental tone or the fifth—never the third, the doubling of which would make the chord sound unbalanced to our ears.

### III. Music Is Not Written as Harmony

It might seem contradictory to have spent so much time emphasizing harmony's importance in musical education and then to deny that music is written harmonically, but the comparison—albeit a loose one—is to spelling and composition in literature. Just as words are letter combinations, so harmonies are note combinations; words could be called “chords” of letters, and chords could be called “words” of notes.<sup>45</sup> And as in literature, the ability to form note combinations, while a fundamental skill, is more properly thought of as technique than as composition: form, not substance.

Harmony is, in fact, a very limited way of looking at music. Arnold Schoenberg observed that “[a] triad standing alone is entirely indefinite in its harmonic meaning; it may be the tonic of one tonality or one degree of several others.”<sup>46</sup> In other words, harmony does not provide its own context, but it requires context for intelligibility. Schoenberg went on to note that “[t]he addition of one or more triads can restrict its meaning to a lesser number of tonalities. A certain order promotes such a *succession* of chords to the function of a *progression*[.] . . . [and a] *progression* has the function of establishing or contradicting a tonality.”<sup>47</sup> Thus it is tonality that provides the context, within which the harmonic implications of a chord can be understood, and harmony, without tonality, is a tool that has distinct limitations as way of understanding and appreciating musical composition.

As the *OED* correctly describes it, harmony is “[t]he combination of (simultaneous) tones so as to form chords.”<sup>48</sup> The rules of harmony govern, to an extent at least, the nature of that combination. But typically, it is the individual, or contrapuntal, lines that hold our attention as listeners. Harmony is arguably best thought of as the vertical simultaneity of individual horizontal, or contrapuntal, lines of music; a harmonic analysis of a moment in musical time is more a description of the various musical elements that cause the moment rather than a revelation of the compositional impulse that led to the moment. Sometimes—particularly in liturgical music, like hymns, or music intended to evoke a liturgical-like

45 By extension, a phrase would compare to a sentence, a theme with a paragraph, a theme group with a section, and a movement with a chapter. The comparison is, of necessity, inexact; musical rhetoric, for example, usually requires repetition (in sonata form, the “A” section returns, with some modifications, after the “B” section, and in rondo form the “A” section returns many times) whereas literature, legal or otherwise, is more linear in form. Nonetheless, when viewed from a distance, the analogy holds up.

46 Arnold Schoenberg, *Structural Functions of Harmony* 1 (Leonard Stein ed., Ernest Benn Ltd. 1969).

47 *Id.*

48 *OED*, *supra*, n. 4.

response in the listener—those contrapuntal lines all move at the same pace, in which case the ear can be deceived into thinking that the vertical simultaneity is the important feature, but more often, each contrapuntal line moves with regard to its own linear logic, with each segment of time capable of cross-sectioning by its harmonic implications but without being created to satisfy those implications.

The notion that music is more appropriately thought of as vertical rather than horizontal poses some real problems for the “harmony” metaphor in the law. In particular, it dooms the idea of disparate elements of a larger whole sounding together in euphony into incoherence. Put simply, the concept of harmony, taken alone, provides no temporal relationship between one harmonic cross-section of a piece of music and another. To speak of one moment “harmonizing” with another gives no insight; it might be true, but the relationship is coincidental. In much the same way, two different parts of a statute might end in words that rhyme,<sup>49</sup> but that simple fact, on its own, carries no particular meaning or significance.

#### IV. Harmony Need Not Be Harmonious

If the first problem with “harmony” as a metaphor in legal contexts is troublesome, though, the second is fatal. Once harmony can be seen for what it really is, it is readily apparent that harmony need not be “harmonious”—in the sense of pleasant or sweet-sounding—in order to be harmony.

If harmony is the vertical cross-sectioning of a moment in time, then that particular moment might not sound particularly pleasant or euphonious when extracted and taken alone.<sup>50</sup> This is true even of a work that is, as a whole, extremely familiar and comfortable; it is the rare work that has no momentary dissonances. And, in fact, one of the fundamental skills the student of harmony will learn is the ability to create and resolve dissonance within the context of a euphonious and tonal piece of music.

<sup>49</sup> Compare e.g. 26 U.S.C. § 4945(b) (1) (“In any case in which an initial tax is imposed by subsection (a) (1) as a taxable expenditure and such expenditure is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount of the expenditure. The tax imposed by this paragraph shall be paid by the private foundation.”) with 26 U.S.C. § 4948(c) (3) (A) (“Except as provided in subparagraph (B), a foreign organization described in subparagraph (b) shall be denied exemption from taxation under section 501(a) by reason or paragraph (1) for all taxable years beginning with the taxable year during which it is notified by the Secretary that it has engaged in a prohibited transaction. The Secretary shall publish such notice in the Federal Register on the day on which he so notifies such foreign organization.”).

<sup>50</sup> This is so, even though the notion of “sweet” harmony has been with us at least since Shakespeare:

“How sweet the moonlight sleeps upon this bank!  
Here will we sit, and let the sounds of music  
Creep in our ears; soft stillness and the night  
Become the touches of sweet harmony.”

William Shakespeare, *The Merchant of Venice* Act V, Scene I.

Temporary dissonance, and its skillful resolution, has been a feature of music from the sometimes acrid tang of Renaissance choral music to the lush eroticism of Strauss's writing in *Der Rosenkavalier*. Moments like the openings of Mozart's *Dissonance* quartet, Haydn's *Creation*, and the last movement of Beethoven's Ninth Symphony rely on the ugliness (to the ears of eighteenth- and nineteenth-century audiences, at least) of the harmony and the subsequent relief when the dissonances are resolved. The resolution of these dissonances, of course, is only possible with relation to the work's tonality; without a tonal grounding—as listeners to the Prelude to Wagner's *Tristan und Isolde* were disturbed to discover<sup>51</sup>—Schoenberg's observation that a lone chord is indefinite in its harmonic meaning<sup>52</sup> is precisely correct.

And here, finally, is the clue to the musical metaphor legal writers have been striving for when they use the “harmony” metaphor. If what they seek is a way to describe the notion that individual elements of a larger structure can be melded into a logical and pleasing relationship, then the metaphorical key they seek is tonality.

## V. The Possible Role of Tonality in Lieu of the Harmony Metaphor

The notion of tonality as a substitute for harmony as a metaphor will take some further explanation. It will also, finally, take us back to Count Almaviva and his quest for a key when he had the key all along. In fact, Mozart and his librettist Lorenzo da Ponte contrived one of the worst puns in the musical literature at the point in *Le Nozze di Figaro* where the Count is looking for his key. To understand the joke, and to see the possibilities offered to lawyers by the “tonality” metaphor, it is necessary to understand a little—but only a little—more about music theory.

The interval of the fifth in music<sup>53</sup> is crucial, not just in the creation of triads but also when the single notes are thought of as tonal centers, each with its own triad. When C is thought of as a tonal center, or key, the two possibilities are C major or minor, with the difference being determined by the nature of the E that forms the second note in the triad; when the note is Eb, the span between C and the Eb is a minor third, and the tonal center based on the C/Eb/G triad is called C minor. When, by contrast, the

51 This Prelude begins with a short phrase that concludes in a tonally ambiguous chord; the phrase is then repeated, beginning on a higher starting note, several times. For a disturbing length of time, the listener has no idea what key the piece is in, creating a squirming sense of unease that was precisely the subversive effect Wagner was seeking to create.

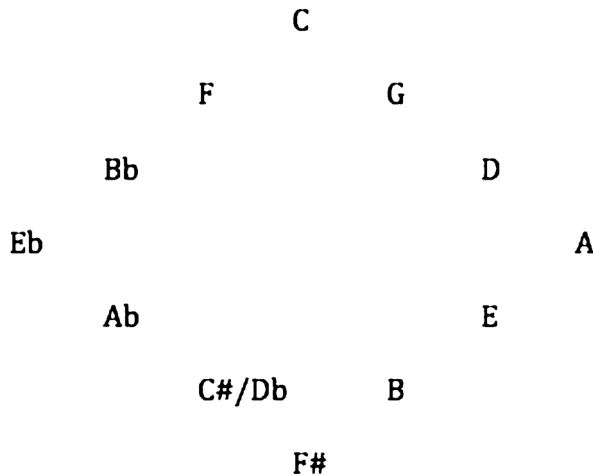
52 See n. 47, *supra*.

53 See discussion, *supra* n. 40 and accompanying text.

second note of the triad is E natural (or simply E), the span between the two notes is a major third, and the tonal center based on the C/E/G/ triad is C major. Similarly, the tonal center based on the G major triad—G/B/D—is known as G major.

When tonal music moves away from its home tonality, the most obvious secondary key center for it to move to is that of the fifth interval. This relationship is so important in music that it is known as the tonic–dominant relationship. Thus in C major, the dominant key is G major, just as in Bb major, the dominant key is F, a fifth away from the tonic, in A, the dominant key is E, and so on.

Recognizing the powerful connection between tonic and dominant key centers allows us to fix tonal relationships in a satisfying and elegant way. Starting with C, and making a dominant (clockwise) shift with each successive transition, one moves first to G, then to D, then to A, and so on. When one reaches C#, it becomes simpler to continue in the enharmonic equivalent of Db, and the cycle continues until reaching F major, the dominant of which brings us back to C. The entire cycle looks like this:



**Figure 6**

This cyclical progression—by which tonality departs and returns to the home key by means of successive dominant shifts and is known, predictably enough, as the circle (or cycle) of fifths—allows us to visit each of the chromatic tones before returning to the home tonality and allows music theorists to peg tonal relationships as close or distant. Most importantly, the sense of returning to the home key after spending time away in closely or distantly related tonalities is a phenomenon readily heard and appreciated by even untrained ears.



It is this phenomenon of home-key recognition that allows music to be organized over time. When a composer writes a symphony “in” D major, for example, D major is the home tonality to which the composer refers. The symphony might not spend much time in that key—significant parts of the first movement (which would likely be in sonata form<sup>54</sup>) will be written in other keys, the second and third movements might be in completely different keys, and the fourth movement will, like the first, spend considerable time in keys other than the home tonality. But other than, perhaps, an introductory section, the typical symphony will emphatically begin and end in the home tonality, and the return to that tonality will be a central goal throughout the piece.<sup>55</sup>

This is true of other musical works as well. And although musicians do not refer to operas as being “in” a particular key, operas are often organized around a loose but related series of keys with one principal, or “home,” tonality. So it is with many Mozart operas, with the important twist being that Mozart tends to associate certain keys with different characters in the plot. This is not a hard-and-fast mapping of key with character,<sup>56</sup> but rather an associational reference that allows for some identification between music and plot. So it is with *Le Nozze di Figaro*; the opera, which is sufficiently “about” the character Figaro for his name to appear in the title, begins and ends in D major, and when people sing about Figaro they often do so in D major. Similarly, when people sing about Susanna, Figaro’s fiancée, they often sing in G major—not in D’s dominant key of A major, but rather in a *tonality* associated with the subdominant, or fourth, key of G major.<sup>57</sup> And when the Count sings, or people sing about him, the tonality is often Eb major, the note directly next to D on the keyboard but, as a glance at the circle of fifths in Figure 6 will show, a key that is a very distant tonality from D major.

These key–character relationships are not unusual in Mozart’s mature operas,<sup>58</sup> and there are often other music–character relationships as well: Figaro is often associated with the bassoon,<sup>59</sup> for example, Susanna with the oboe, and the Count with the horns.<sup>60</sup> Mozart often uses musical

---

<sup>54</sup> For more about this most ubiquitous of musical forms see for example Charles Rosen, *Sonata Forms* (W.W. Norton & Co. 1980). The plural is intentional; Rosen eschews the traditional rigid encapsulation of sonata form and instead considers many manifestations of this structural device.

<sup>55</sup> This is another of those moments that will concern musicologists and music theorists. It is unwise to speak of a “typical” symphony, since each symphony is unique and the number of variations in the “typical” form is limited only by the creativity of the composer. But this is not intended for a musicological audience, and I apologize to any whose aesthetic sensibilities were disturbed by my gross oversimplification of musical form.

<sup>56</sup> It is not, for example, as tight a tonal organization as one will find in a symphony, nor is the relationship between key and character as significant to the plot as Wagner’s *leitmotif* technique.

<sup>57</sup> Referring back to fig. 6, the chart of the cycle of fifths, one can see that the subdominant position is a fifth away from a given key when one travels counterclockwise, instead of the more-standard clockwise motion.

quotation as a way to comment on plot turns,<sup>61</sup> and the plot associations of various dance rhythms in Mozart's operas have been the subject of a brilliant study.<sup>62</sup> But an illustration of the way in which tonality and plot are related will finally explain the Count's dilemma.

The finale to Act II of the opera begins as a duet<sup>63</sup> between the raging Count Almaviva and Rosina, his Countess. The finale begins in Eb major, the key often associated with the Count, and therein lies the pun because he demands the key—*la chiave*—yet he already has his key because he is singing in Eb major; his demand, in fact, outlines an Eb arpeggio.<sup>64</sup> Over the course of the next twenty minutes, the situation goes from one in which the Count is very much in control—in his home key of Eb major—to one in which he is completely out of control, then gradually moves back to a situation in which the Count appears to be in complete control again.

This is reflected in the tonalities Mozart uses in the finale. The key moves from Eb major to Bb major, a tonic–dominant progression; then, in

58 Leonard Ratner, speaking of another Mozart–da Ponte opera—*Don Giovanni*—has noted that “the association of certain keys with plot situations is so consistent as to suggest that they were part of Mozart's grand plan.” Leonard G. Ratner, *Classic Music: Expression, Form, and Style*, 398 (Schirmer Books 1980). But not all musicologists agree. See e.g. Sigmund Levarie, *Mozart's Le Nozze di Figaro: A Critical Analysis* 247 (Da Capo Press 1977) (originally published by U. Chi. Press 1952) (rejecting “[a] simple equation of a key with a definite character or mood or situation . . .”).

59 For more on the ways in which Mozart uses orchestration to reflect and comment on the dramatic action in his operas, see Frits Noske, *Semantics of Orchestration*, in *The Signifier and the Signified: Studies in the Operas of Mozart and Verdi*, 121 (Oxford U. Press 1990). It is easy to overstate this, and all other extra-musical associations in Mozart. The relationship between character and instrument is sufficiently strong to be identifiable, but Mozart never allows an extra-musical plan to interfere with the musical expression.

60 This is another of Mozart's puns, with the musical horns creating an immediate and obvious allusion to the cuckold's horns that Figaro at one point in the opera believes the Count will make him wear. “The prominence of the horns in the opening and closing of the minuet (during the Finale to Act II) evokes the same association with marital infidelity and dupery that one experiences throughout the opera. The deliberate absence of the horns in the middle section, where sarcasm is momentarily replaced by stagnant surprise, drives the pun home all the more strongly.” Levarie, *supra* n. 58, at 112. The most striking example of this horn pun is in Figaro's last aria, “*Aprite un po' quegli occhi*,” in which Figaro rails at the deceit of women, believing Susanna to have slept with Count Almaviva. At the end of the aria he says, “*Il resto nol dico/Gia ognuno lo sa*.” (“The rest we'll pass over in silence/What happens you all of you know.”) *Figaro*, *supra* n. 1, at 115. But whenever Figaro passes in silence, the horns let out a whooping *arpeggio* which, for good measure, is repeated several times. There can be little doubt that everyone in the audience at *Figaro's* premiere knew exactly what this substitution was meant to indicate.

61 For a discussion of this practice, see Frits Noske, *Le Nozze di Figaro: Musical Quotation as a Dramatic Device*, in *The Signifier and the Signified*, *supra* n. 59, at 3.

62 Wye Allanbrook, *Rhythmic Gesture in Mozart: Le Nozze di Figaro and Don Giovanni* (U. Chi. Press 1983). For example, Allanbrook's explanation of the finale to Act I of *Don Giovanni*, with the different dance forms for each of the three social classes happening simultaneously, unlocks much of the dramaturgy inherent in the music. *Id.* at 280–84.

63 For those familiar with Peter Schaffer's play *Amadeus*, or the movie made of it, this is the scene in which Mozart, boasting about his new opera, says he wants to write “a finale lasting half an hour! A quartet becoming a quintet, becoming a sextet. On and on, wider and wider—all sounds multiplying and rising together—and the together making a sound entirely new.” Peter Schaffer, *Amadeus*, Act II, Scene 4 (1980). Schaffer did not exaggerate; this is one of the most astounding twenty to thirty minutes of music ever written. See e.g. Levarie, *supra* n. 58, at 107 (describing the sheer length of the finale as “staggering,” and comparing its 939 measures to the 1,699 measures in the entire “third act of Wagner's *Tristan und Isolde*”).

64 See David Lewin, *Some Musical Jokes in Mozart's Le Nozze di Figaro*, in *Studies in Music History: Essays for Oliver Strunk* 444 (Harold Powers, ed. 1968). Lewin notes that “[c]hiave” no longer signifies “key” in this sense; the latter is currently translated by ‘tonalità.’ ‘Tonalità,’ however, was only introduced into Italian in 1838 . . . . [P]rior to that date, ‘chiave’ was in fact employed . . . .” *Id.*

a grating change of gears, the music lurches directly into G major as Figaro appears and tries to wrench situational and tonal control away from the Count onto the sharp side of the tonal cycle and his own, D major, tonality. But things slowly slip from Figaro's control as the tonality moves along the cycle of fifths from G to C, then to F, then to Bb, and finally back to Eb major at the end of the finale, when the Count seems to be in control and the plans of Figaro, Susanna, and the Countess are in confusion.

But because the Count is unaware of the tonal power he wields, we in the audience know that his apparent triumph is chimerical, and so it proves. In the finale of the entire opera (in Act IV), the tonality begins in D major—Figaro's key—to G and from there to the Count's key of Eb (at the point where Figaro mistakenly believes the Count has seduced Susanna), to Bb, and from there to G: the same grinding transition experienced in the Act II finale and the only other time in the opera when these two keys are juxtaposed. In contrast to Act II, though, the tonality then slides up, not down, the cycle of fifths and returns to D major for the end of the opera and Figaro's (and Susanna's) triumph.

Although all of this could be described in terms of "harmony," with each chord spelled out perfectly, it would be a sterile and ultimately pointless exercise. Nowhere in that long list of spelled chords would there be the slightest indication of relationship: how one chord or group of chords relates to another group of chords. We would understand how each individual moment of the *Figaro* finales is constructed, but would know nothing about how these moments are connected to make a musical and dramatic whole. To borrow a metaphor from an area I know nothing about, we would understand the anatomy of the opera's corpse, but would understand nothing about what makes it a living entity.

In order to understand the relationships between isolated moments of music, we need to understand the long-term organizational principle of "tonality." And it is tonality's ability to draw far-flung moments of long musical compositions together and to relate those moments for the listener's ear, that should make the concept a much more appropriate metaphor for the legal writer.

## Conclusion

The point of this brief exploration of music theory—and, in particular, the tonal organization of portions of *Le Nozze di Figaro*—is to illustrate the true nature of harmony and the reality that tonality, not harmony, is the more accurate way to show a meaningful relationship between disparate textual elements. Unlike "harmony," "tonality" allows the writer to draw a

relationship between two sections of text that is more important and identifiable than an incidental, vertical cross-sectioning, but that is, instead, significant and structural. And because the D major of now is the same as the D major of two hours ago,<sup>65</sup> the various recurrences of D major will resonate in our ears; they will relate to each other in a meaningful way, rather than by the accidental coincidence of harmonic identity.

“Tonality,” then, is an appropriate replacement for “harmony” in the legal lexicon. It has a pleasing precision about it and allows for no ambiguity; as opposed to “harmony,” “tonality” permits a writer to compare one apple with another, and it does so in a way that is technically accurate. It is also, sadly, an utter failure as a metaphor in written legal discourse.

The reason, of course, is its relative obscurity. Music theory was never a commonly taught subject in schools, and today it is taught less than ever. Yet successful metaphors must be readily—intuitively—understood by both parties to a communication. As Michael Smith observes, “[l]egal writers should . . . avoid using arcane or esoteric metaphoric references. For a metaphor to be effective, it must be based on well-known concepts easily evoked in the mind of the reader.”<sup>66</sup> But if the discussion of music theory in this article does nothing else, it surely establishes that concepts such as the true nature of harmony and the importance of tonality in music are not easily evoked. Put simply, tonality fails as a legal metaphor because very few people know what it means and why it is important.<sup>67</sup>

And perhaps that does not matter. Perhaps “harmony” truly *is* an effaced metaphor, so dead that not even one of Miracle Max’s resurrection pills will revive it. If that is so, then the word transmits its meaning cleanly and effectively from writer to reader, without the possibility of metaphorical confusion.

But I don’t believe it. I believe that the metaphorical meaning of harmony is still discernible and that lawyers use “harmony” because they think it transports Shakespeare’s familiar, yet equally incorrect, “sweet harmony,” or some other similar and equally familiar reference, into their writing. By alluding to a musical concept, they think they enhance the *ethos* of their work by showing themselves to be well-rounded, educated people who can import meaning into the law from such an esoteric area as

---

<sup>65</sup> It is assuredly not the same as the D major of Mozart’s time, but that is a discussion for a different day. See e.g. Gallacher, *supra* n. 9.

<sup>66</sup> Smith, *supra* n. 19, at 239.

<sup>67</sup> For the same reason, it is worthwhile considering how much longer metaphors derived from the Bible or from Shakespeare will remain viable in an increasingly secularized society in which Shakespeare is becoming as inaccessible as music theory.

classical music. For those who understand what the word really means, though, the use of “harmony” as a metaphor has the opposite effect of that which was intended; the writer’s credibility is eroded, rather than enhanced, and an ambiguous meaning is introduced to a text where clarity was sought. Such usage is, at best, careless.

Perhaps it is also a fair question to ask if there really is any point to all this. So maybe lawyers and judges use “harmony” incorrectly in its metaphorical sense. So what? Does this really matter? Well, yes, arguably it really does. When words are all we have, it matters.<sup>68</sup> As Justice Scalia has observed, “[l]awyers possess only one tool to convey their thoughts: language. They must acquire and hone the finest, most effective version of that tool available. They must love words and use them exactly.”<sup>69</sup>

Exactly. When we let our writing control meaning, rather than the other way around, we are more like Count Almaviva than we would like: we believe we are in control of the situation but our audience knows we are not. And as Count Almaviva learns to his cost, understanding how to control all aspects of our communication is something of key importance to us all.

---

**68** This is an inelegant paraphrasing of an infinitely more elegant and profound original:

“Prince Geoffrey: Why you chivalric fool—as if the way one fell down mattered.

Prince Richard: When the fall is all there is, it matters.”

James Goldman, *The Lion in Winter*, Act II, Scene 3 (1966). James Goldman, the writer of *The Lion in Winter* (both the original play and the screenplay), the book of the musical *Follies*, and much more, was the older brother of William Goldman, the writer of *The Princess Bride* (both the original book and the screenplay), the screenplay of *Butch Cassidy and the Sundance Kid*, and much more. Tom Vallance, *Obituary: James Goldman*, <http://www.independent.co.uk/arts-entertainment/obituary-james-goldman-1182403.html> (accessed March 14, 2012). When those two were growing up, the conversation around the dinner table must really have been something.

**69** Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 61 (Thomson West 2008).