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The Propriety of Poetry in Judicial Opinions

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THE PROPRIETY OF POETRY IN JUDICIAL OPINIONS

Mary Kate Kearney*

Conrad Busch filed a timely appeal,
Trying to avoid a pre-marital deal
Which says appellee need not pay him support,
He brings his case, properly, before this Court.

...

They wanted to marry, their lives to enhance,
Not for the dollars—it was for romance.
When they said "I do," had their wedding day kiss,
It was not about money—only marital bliss.

...

But a deal's a deal, if fairly undertaken,
And we find disclosure was fair and unshaken.
Appellant may shun that made once upon a time,
But his appeal must fail, lacking reason (if not rhyme).¹

Judge Michael Eakin, then a member of the Superior Court of Pennsylvania, wrote this verse about a premarital contract gone awry. Since then, he has become an associate justice on the Supreme Court of Pennsylvania and has continued to pen opinions

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¹ Busch v. Busch, 732 A.2d 1274, 1275, 1278 (Pa. Super. Ct. 1999).

in the form of poems.² Justice Eakin has been criticized for the propriety of using verse in his opinions,³ but certainly, he is in good company with judges from other jurisdictions and other times.⁴ In fact, judges' use of rhymed verses in their opinions and the broader issue of judicial humor in opinions has been a source of debate and controversy for a number of years.⁵

The purpose of this Essay is to explore how and why judges use verse in their opinions and to evaluate the advantages and disadvantages of this form.⁶ The Essay will draw primarily on the

² *Porreco v. Porreco*, 811 A.2d 566, 575 (Pa. 2002) (Eakin, J., dissenting).

³ *See id.* at 572 (Zappala, C.J., concurring) (stating that "an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania"); *id.* at 573 (Cappy, J., concurring) (concerned with "the perception that litigants and the public at large might form when an opinion of [the Supreme Court of Pennsylvania] is reduced to rhyme."). *See also* Adam Liptak, *Justices Call on Bench's Bard to Limit his Lyricism*, N.Y. TIMES, Dec. 15, 2002, at § 1 (discussing the controversy surrounding poetry in judicial opinions).

⁴ *See, e.g.*, *United States v. Syufy Enters.*, 903 F.2d 659, 661-63 (9th Cir. 1990) (rhyming the summary of the facts of the case); *United States v. Batson*, 782 F.2d 1307 (5th Cir. 1986); *United States v. Ven-Fuel, Inc.*, 602 F.2d 747 (5th Cir. 1979) (starting the opinion by rhyming "[t]his case presents a vicious duel, [b]etween the U.S. of A. and defendant Ven-Fuel"); *Mackensworth v. Am. Trading Transp. Co.*, 367 F. Supp. 373 (E.D. Pa. 1973); *People v. Sergio*, (Crim. Ct., Queens Co.) (Flug, J.), *reprinted in "And to all a 'Play Ball,'"* N.Y. TIMES, Dec. 20, 1986, at 1; *Van Kleeck v. Ramer*, 156 P. 1108, 1121 (Colo. 1916). For example, Judge Irving Goldberg wrote:

Some farmers from Gaines had a plan.
It amounted to quite a big scam.
But the payments for cotton
began to smell rotten.
Twas a mugging of poor Uncle Sam.

Batson, 782 F.2d at 1309.

⁵ Often the debate about the use of verse takes place as part of a discussion about the use of judicial humor. *See, e.g.*, Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH L. REV. 869 (1993); Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693 (1987); Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175 (1989); Susan K. Rushing, Student Essay, *Is Judicial Humor Judicious?*, 1 SCRIBES J. LEGAL WRITING 125 (1990).

⁶ For a compilation of "clever and amusing" law review articles, including the use of poetry, see generally Thomas E. Baker, *A Compendium of Clever and Amusing Law Review Writings*, 51 DRAKE L. REV. 105 (2002).

opinions of Justice Eakin to illustrate its points. The Essay concludes that under certain circumstances, rhymed opinions are an appropriate form of judicial expression.

I. THE PURPOSE AND AUDIENCE OF JUDICIAL OPINIONS

The effectiveness of a judicial opinion depends on its "purpose and audience."⁷ The purposes of a judicial opinion are numerous.⁸ Judges write opinions to explain their resolution of a case, to place that case in the context of past decisions, and to offer precedent for future decisions.⁹ The act of writing an opinion forces a judge to clarify his thoughts as he reduces them to paper. Often, this process of reducing one's ideas to writing enables the judge to determine whether his reasoning is flawed.¹⁰

The purposes of majority and dissenting opinions differ. A majority opinion carries the weight of authority with it and stands as precedent for future decisions. As one appellate judge noted, the hallmark of a judicial opinion is its objectivity.¹¹ The elements of a judicial opinion include "facts, law, logic, and policy," which must

⁷ Rushing, *supra* note 5, at 128.

⁸ "A judicial opinion tells many stories and speaks with many voices." John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 447 (2001).

⁹ Baker, *supra* note 5, at 872-73. Professor Baker discussed the three essential functions of judicial opinions. These functions are to insure litigants and the public that decisions are the product of reasoned judgment, not whim; to reinforce the decisionmaking process; and to create written precedent. *Id.*

¹⁰ FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 57 (1980).

Somehow, a decision mulled over in one's head or talked about in conference looks different when dressed up in written words and sent out into the sunlight. Sometimes the passage of time or a new way of looking at the issue makes us realize that an opinion will simply not do, and back we go to the drawing board. Or we may be in the very middle of an opinion, struggling to reflect the reasoning all judges have agreed on, only to realize that it simply "won't write." The act of writing tells us what was wrong with the act of thinking.

Id.

¹¹ *Id.* at 52.

be discussed in light of relevant precedent.¹² Authors of majority opinions are likely to follow the conventions of opinion writing.

In contrast, the author of a dissent may set forth rationale which she hopes will be used as the basis for a future majority opinion.¹³ Moreover, a dissenting judge may be prompted by a strong conviction that the majority reached the wrong result and want to address the majority's interpretation of the law.¹⁴ Often, authors of dissenting opinions feel less constrained by the conventions of opinion writing and feel freer to express emotions such as anger or outrage with a decision.¹⁵

The audience may vary as well.¹⁶ In writing their opinions, judges first address the litigants and attorneys in the case before them. This is so because those parties have the most at stake in the immediate outcome of the decision. In addition, judges write to other members of the legal community: their fellow judges in that court, judges in courts below and above them, lawyers interested in the decision for a variety of reasons, and sometimes, future members of the profession—law students.¹⁷ Occasionally, the impact of the decision is so great or some aspect of the decision invites media attention, and the general public is made aware of it. These instances, however, represent the exception rather than the

¹² *Id.* at 57.

¹³ Rushing, *supra* note 5, at 139.

¹⁴ COFFIN, *supra* note 10, at 186. Dissents also serve to "reflect the closeness of the issue, to advance reasoned analysis, and . . . to stimulate the Supreme Court [of the United States] to accept the case for review." *Id.*

¹⁵ Rushing, *supra* note 5, at 139. An example would be Justice Blackmun's famous dissent in *DeShaney v. Winnebago County Department of Social Services*, in which he takes issue with the majority's decision not to hold a state agency liable for failing to protect an abused child. The opinion begins, "Poor Joshua! Victim of repeated attacks . . ." and castigates the majority for its deliberate indifference to the child's plight. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

¹⁶ "[W]hile the major purpose of an opinion in a case dealing with a new issue may be to provide precedent for lawyers and judges, the opinion in a common case may aim only to explain the decision to the litigants." Rushing, *supra* note 5, at 128.

¹⁷ Walker Gibson, *Literary Minds and Judicial Style*, 6 SCRIBES J. LEGAL WRITING 115, 124 (1998).

rule.¹⁸ Nevertheless, while the typical audience for a judicial opinion is primarily other members of the legal community, it has the potential to reach a wide audience.¹⁹

II. REASONS FOR USING POETRY IN JUDICIAL OPINIONS

Judges write opinions in a variety of styles,²⁰ and judicial opinions have been criticized for being dull²¹ and poorly written.²² The language is often overblown; the reasoning may be convoluted; and the meaning may be impenetrable. In these instances, readers of such opinions may be left with the justifiable impression that the purpose of the prose was to communicate mystery, inaccessibility, and pretension.

Judges have experimented with different forms of expression in their opinions, including parables²³ and fables.²⁴ One variation

¹⁸ Judge Coffin wrote about the end result of the painstaking process of writing an opinion: "Finally, the opinion meets its public—and a deafening silence ensues." COFFIN, *supra* note 10, at 161.

¹⁹ "Judges do not have clients; their audience is the legal profession and, in a larger sense, the public." Jordan, *supra* note 5, at 698.

²⁰ See Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1426-32 (1995) (contrasting the pure and formalist writing style with the pragmatic writing style of judges).

²¹ Jordan, *supra* note 5, at 700 (discussing the "lack of color" in opinion writing).

²² See generally Posner, *supra* note 20. One essay noted that the principles of good writing and good judicial writing are synonymous. Rushing, *supra* note 5, at 134-35 ("There is no reason why almost any piece of legal writing—and certainly judicial writing—may not move us with its sensitive and wise and gracious handling of language."). See also James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669 (1984) (pointing out connections between poetry and judicial opinions); James P. Madigan & Laura Y. Tartakoff, *Doing Justice to the Potential Contribution of Lyric Poems*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 27, 27 (2000) (stating as a thesis that "lawyers can become more compelling advocates by reading poetry").

²³ See *United States v. Batson*, 782 F.2d 1307 (5th Cir. 1986) (opinion of Judge Goldberg written in parable); Baker, *supra* note 5, at 884.

²⁴ See *Hatfield v. Bishop Clarkson Mem'l Hosp.*, 701 F.2d 1266 (8th Cir. 1983) (en banc); Jordan, *supra* note 5.

on the format of a traditional opinion is rhymed verse.²⁵ Judges may write a majority, dissenting, or concurring opinion in verse for a variety of reasons.²⁶

²⁵ See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 263 n.4, 264 n.5 (1972) (quoting poems by Grantland Rice and Franklin Pierce Adams); *Selig v. United States*, 740 F.2d 572, 580 (7th Cir. 1984) (quoting Ernest L. Thayer's *Casey at the Bat*); *Makensworth v. Am. Trading Transp.*, 367 F. Supp. 373 (E.D. Pa. 1973) (entire opinion written in verse); *Jenkins v. Comm'r*, 47 T.C.M. (CCH) 238 (1983). In *Jenkins*, the tax court wrote the following poem entitled "Ode to Conway Twitty" at the close of its opinion:

Twitty Burger went belly up
But Conway remained true
He repaid his investors, one and all
It was the moral thing to do.
His fans would not have liked it
It could have hurt his fame
Had any investors sued him
Like Merle Haggard or Sonny James.
When it was time to file taxes
Conway thought what he would do
Was deduct those payments as a business expense
Under section one-sixty-two.
In order to allow these deductions
Goes the argument of the Commissioner
The payments must be ordinary and necessary
To a business of the petitioner.
Had Conway not repaid the investors
His career would have been under cloud,
Under the unique facts of this case
Held: The deductions are allowed.

Jenkins, 47 T.C.M. (CCH) 238 n.14. Attorneys for the tax litigation department of the Internal Revenue Service responded with the following poem entitled "Ode to Conway Twitty: A Reprise" and decided not to appeal:

Harold Jenkins and Conway Twitty
They are both the same
But one was born
The other achieved fame.
The man is talented
And has many a friend
They opened a restaurant
His name he did lend.
They are two different things
Making burgers and song
The business went sour

One possible reason is to capture the reader's attention. Readers accustomed to a dry recitation of facts, holding, and reasoning will take note and perhaps read an opinion more closely when it is written in a nontraditional format. Furthermore, the subject of the opinion may lend itself to a light touch. For example, Judge Eakin used rhyme in a contract case involving the sale of emus.²⁷ He began the opinion:

The emu's a bird quite large and stately,
Whose market potential was valued so greatly
That a decade ago, it was thought to be
The boom crop of the 21st century.

It didn't take long.
He repaid his friends
Why did he act
Was it business or friendship
Which is fact?
Business the court held
It's deductible they feel
We disagree with the answer
But let's not appeal.

Jenkins v. Comm'r, 1984 WL 270668 (I.R.S. Action on Decision, Mar. 23, 1984). Another example is *Fisher v. Lowe*, 333 N.W.2d 67 (Mich. Ct. App. 1983). In *Fisher*, Judge Gillis wrote,

We thought that we would never see
A suit to compensate a tree.
A suit whose claim in tort is prest
Upon a mangled tree's behest;
A tree whose battered trunk was prest
Against a Chevy's crumpled crest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care.
Flora lovers though we three,
We must uphold the court's decree.
Affirmed.

Id. at 67 (footnote omitted).

²⁶ See Rushing, *supra* note 5, at 139 (noting that "[d]issenters may have a freer hand with humor than writers of majority opinions.").

²⁷ *Liddle v. Scholze*, 768 A.2d 1183 (Pa. Super. Ct. 2001).

Our appellant decided she ought to invest
In two breeding emus, but their conjugal nest
Produced no chicks, so she tried to regain
Her purchase money, but alas in vain.

Appellant then filed a contract suit,
But the verdict gave her claim the boot;
Thus she was left with no resort
But this appeal to the Superior Court.²⁸

The reader is drawn into the opinion written in prose that follows these opening lines.

A second and related reason for writing in rhymed verse may be to make the law more accessible to the general public.²⁹ Assuming that the judge is writing for a wider audience than the legal community, a person without any legal training should easily be able to read and understand a poem as opposed to the analysis contained in a formal legal opinion.³⁰

A third reason is that an appellate judge is seeking to break the monotony of opinion writing and write creatively.³¹ As "professional writers," judges are attentive to the nuances of language and may want to experiment with different styles of expression.³² A less flattering perspective on this issue is that judges who pen opinions in verse are engaging in a form of verbal narcissism: they are writing to show off their cleverness at the expense of the litigants and their case.³³

²⁸ *Id.* at 1184.

²⁹ One commentator cautioned appellate judges against "adopting too lofty a tone, [and thereby] removing themselves from their readers." Rushing, *supra* note 5, at 127.

³⁰ "Imagery and humor can reshape the dispute into the story that it originally was, help bring the dispute back 'down to earth,' and dispel some of the notions held by those affected by the legal system." Jordan, *supra* note 5, at 700.

³¹ *Id.* at 701.

³² *Id.* at 695. It has been pointed out that a "smile and a chuckle will rejuvenate an audience's desire to read and to listen." Madigan & Tartakoff, *supra* note 22, at 46.

³³ See *infra* notes 43-58 and accompanying text.

A fourth motivation is that a poem requires economy of expression. Instead of a potentially rambling discussion of the legal principles in a case, a poem forces a judge to distill his analysis and make pointed observations.³⁴ The direct, succinct approach should prompt the judicial author to select his words deliberately and write carefully. These attributes of clarity and succinctness in judicial opinions are the same whether written in verse or prose. It is easier, however, to stray from these goals when the medium is prose rather than poetry. Poetry is less forgiving of digressions.

A judicial opinion in verse enables its author to strip a case down to its essentials and expose the rationale for what it is. A good example of this can be found in Judge Eakin's analysis of the premarital contract in *Busch v. Busch*.³⁵ In upholding the agreement, he distinguished *Busch* from *Ebersole v. Ebersole*,³⁶ where the Supreme Court of Pennsylvania struck down a prenuptial agreement:

This contrasts with the *Ebersole* facts
As our case has something that *Ebersole* lacks.
There, a catch-all phrase lumped all the many
"Financial assets" of the marriage, "if any."
This aggregation was too vague to be fair,
As one couldn't tell what assets were there.

No matter how much Mr. Busch may implore us
This isn't the same as the contract before us.³⁷

Judge Eakin went to the heart of the difference between *Busch* and *Ebersole*. The issue in both cases was whether the requirements of a prenuptial agreement had been satisfied by full

³⁴ Jordan, *supra* note 5, at 700. "'Good legal writing is short, as short as possible consistent with clarity and completeness.' The same could be said of a lyric poem." Madigan & Tartakoff, *supra* note 22, at 50 (quoting *LUCY V. KATZ*, WINNING WORDS: A GUIDE TO PERSUASIVE WRITING FOR LAWYERS 3 (1985)).

³⁵ 732 A.2d 1274 (Pa. Super. Ct. 1999).

³⁶ 713 A.2d 103 (Pa. Super. Ct. 1998).

³⁷ *Id.* at 1278 (footnote omitted).

and fair disclosure of both parties' financial assets.³⁸ In *Ebersole*, the Supreme Court of Pennsylvania determined that the disclosure of premarital assets did not constitute full and fair disclosure because it was too vague.³⁹ In contrast, the disclosure in *Busch* was comprehensive and specific.⁴⁰ The fiancée of *Busch* had listed all of her stocks and other assets and estimated their value.⁴¹ Judge Eakin explained that her fiancée could not claim later that those estimates were too low when he had the opportunity to ascertain their worth by looking in the newspaper but had declined to do so.⁴² In a few stanzas, Judge Eakin pinpointed his reasons for upholding the prenuptial agreement.

Finally, a poem can humanize the litigants and their predicament. There is less potential of reducing the parties to abstract and sometimes even unnamed participants labeled appellant and appellee than there is in a prose opinion.⁴³ The parties come alive in the poem, and their situation is more real to the reader because it is described in ordinary language.⁴⁴ In very human terms, Justice Eakin described the respective positions of Mr. and Mrs. Busch.⁴⁵ The reader understands what they agreed to before they were married and why they disagree about its terms in their divorce.

III. CRITICISMS OF POETRY IN JUDICIAL OPINIONS

Those who object to rhymed verse opinions offer similar criticisms. First, and foremost, they maintain that rhymed verse trivializes the seriousness of the matter before the court and

³⁸ Compare *Ebersole*, 713 A.2d at 104 with *Busch*, 732 A.2d at 1278.

³⁹ *Ebersole*, 713 A.2d at 104.

⁴⁰ *Busch*, 732 A.2d at 1278.

⁴¹ *Id.* at 1277.

⁴² *Id.* at 1277-78.

⁴³ This is not to say that the humanity of the parties to the case necessarily is lost in a good prose opinion; however, it is often overlooked.

⁴⁴ Jordan, *supra* note 5, at 700. See also Leubsdorf, *supra* note 8, at 450 ("Although judges may hope to issue unanswerable opinions, who today would espouse a stylistic ideal of impassive impersonality, when we all know that opinions are written by human judges about human problems[.]").

⁴⁵ For a discussion of the poem Judge Eakin wrote in *Busch*, see *supra* notes 35-42 and accompanying text.

demeans the litigants.⁴⁶ Often times, the opinion poems are entertaining, but critics caution that the entertainment comes at the expense of the litigants.⁴⁷ The parties who are seeking justice from the court become pawns at the hands of a judge who points out their foibles for the amusement of himself and his reader.

To illustrate this point, these critics often cite to *In re Inquiry Relating to Rome*.⁴⁸ Rome, a Kansas trial court judge, had written a memorandum opinion in verse to explain his decision to place a prostitute on probation for soliciting an undercover police officer. He wrote:

This is the saga of ____
Whose ancient profession brings her before us.
On January 30th, 1974,
This lass agreed to work as a whore.
Her great mistake, as was to unfold,
Was the enticing of a cop named Harold.

.....

So under advisement, ____'s freedom was taken,
And in the bastille this lady did waken.
The judge showed mercy and ____ was free,
But back to the street she could not flee.
The fine she'd pay while out on parole,
But not from men she used to cajole.
From her ancient profession she'd been busted,
And to society's rules she must be adjusted.
If from all of this a moral doth unfurl.
It is that Pimps do not protect the working girl!⁴⁹

⁴⁶ Rudolph, *supra* note 5, at 192; Jordan, *supra* note 5, at 702-03 (both discussing use of judicial humor in opinions). "The bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig." W. PROSSER, *THE JUDICIAL HUMORIST* vii (1952).

⁴⁷ PROSSER, *supra* note 46; Rudolph, *supra* note 5, at 179 ("A judicial humorist may not intend to ridicule litigants, but if humor has that effect, then intent is irrelevant.").

⁴⁸ 542 P.2d 676 (Kan. 1975).

⁴⁹ *Id.* at 680-81.

The judge faced disciplinary proceedings as a result of this opinion, and the Supreme Court of Kansas determined whether Judge Rome had violated the judicial code of conduct. The court concluded that although the judge had the discretion to write an opinion in verse, he did not have the discretion to "hold[] out a litigant to public ridicule or scorn."⁵⁰ In explaining the purposes of a judicial opinion, the court quoted a justice of the Supreme Court of Arkansas:

Judicial humor is neither judicial nor humorous. A lawsuit is a serious matter to those concerned in it. For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he's down.⁵¹

The state supreme court censured Judge Rome for not displaying the proper judicial courtesy to the litigant.⁵² The court reached this conclusion despite the fact that the litigant had not been a party to the complaint filed against the judge.⁵³

Next, critics assert that this genre simultaneously produces bad law and bad poetry.⁵⁴ They explain that legal analysis is shortchanged in the writer's efforts at cleverness and that he risks failure on both fronts.⁵⁵ While the poems may be entertaining, the reasoning and explanation of the law is often deficient.⁵⁶ For these

⁵⁰ *Id.* at 684.

⁵¹ *Id.* at 685 (quoting George Rose Smith, *A Primer of Opinion Writing For Four New Judges*, 21 ARK. L. REV. 197, 210 (1967)). *But see* George Rose Smith, *A Critique of Judicial Humor*, 43 ARK. L. REV. 1, 25 n.60 (1990) (stating that "that part of the Primer disapproving judicial humor is hereby overruled, set aside, held for naught, and stomped on!").

⁵² *Rome*, 542 P.2d at 686. The commission, however, did not take issue with the judge's writing the memorandum as a poem. They criticized him for the way in which he characterized the defendant. *Id.* at 685-86.

⁵³ *Id.* at 686.

⁵⁴ Baker, *supra* note 5, at 885 ("Most opinion poems manage to be not terribly clever and, at the same time, terrible poetry.").

⁵⁵ Gerald Lebovits, *Poetic Justice: From Bad to Verse*, 74 N.Y. ST. B.J. 48, 48 (2002).

⁵⁶ *Id.* ("Missing from verse is the key to a reasoned judicial opinion: a clearly articulated holding supported by precedent.").

critics, the opinions may succeed at a superficial level but fail in their primary purpose.⁵⁷ When their primary purpose is to entertain, poems undermine the seriousness of the judicial process.⁵⁸ Additionally, they are often poorly written and therefore not creative successes.

Finally, critics single out these endeavors as examples of judges with too much time on their hands who are indulging themselves and wasting taxpayer money.⁵⁹ One writer stated that readers of these opinions are likely to conclude that the judicial author was more concerned about his rhymes than reaching the correct result.⁶⁰ According to these critics, the appearance of impropriety makes it inappropriate for judges to use verse in their opinions.

IV. EVALUATING THE CRITICISMS IN LIGHT OF *PORRECO v. PORRECO*

It is useful to evaluate these criticisms in light of Justice Eakin's most recent foray into rhyme. In *Porreco v. Porreco*,⁶¹ the Supreme Court of Pennsylvania considered the validity of a prenuptial agreement.⁶² The ex-husband had supplied the financial information contained in the prenuptial agreement and had listed the value of the engagement ring at \$21,000.00.⁶³ When the couple divorced, Mrs. Porreco had the ring appraised and learned that the stone was a cubic zirconium worth far less than the stated amount.⁶⁴ She sued to have the prenuptial agreement set aside, and the state supreme court considered whether her ex-husband had

⁵⁷ "[H]umor in the format of doggerel verse . . . can undermine judicial opinions as sources of law." Rushing, *supra* note 5, at 129.

⁵⁸ "What about judges who fancy themselves as poets and write opinions in verse? That practice, still alive, should be buried without eulogy." Lebovits, *supra* note 55.

⁵⁹ *Id.* See also Rudolph, *supra* note 5, at 186-87.

⁶⁰ Lebovits, *supra* note 55.

⁶¹ 811 A.2d 566 (Pa. 2002).

⁶² *Id.* at 567.

⁶³ *Id.* at 568.

⁶⁴ *Id.* at 567.

fraudulently induced her to enter the prenuptial agreement by misrepresenting the ring's value.⁶⁵

The court concluded that Mrs. Porreco had not established a fraud claim because her reliance on her ex-husband's statement about the value of the ring was not justifiable.⁶⁶ Writing for the majority, Justice Newman explained that a justifiable reliance must be reasonable.⁶⁷ In turn, reasonableness depended on "whether the recipient [of that information] knew or should have known that the information supplied was false."⁶⁸ Although the relationship between the parties could affect the reasonableness of the reliance, the ability of the person claiming the reliance to determine whether the information was false was dispositive of the issue.⁶⁹ Justice Newman determined that the fact that Mrs. Porreco possessed the ring gave her the ability to have it appraised and to know whether it was worth the amount that Mr. Porreco had stated. The court concluded that her failure to do "this simple investigation" was unreasonable.⁷⁰

Justice Eakin, writing in dissent, disagreed with the majority's conclusions about the reasonableness of Mrs. Porreco's reliance on her ex-husband's statement about the ring's value.⁷¹ He placed more emphasis than Justice Newman on the nature of the parties' relationship and its effect on the reasonableness of Mrs. Porreco's reliance. First, he noted the thirty-year disparity in the couple's ages when they entered into the prenuptial agreement:

The realities of the parties control the equation,
And here they're not comparable in sophistication;
The reasonableness of her reliance we just cannot gauge
With a yardstick of equal experience and age.

This must be remembered when applying the test

⁶⁵ *Id.* at 570.

⁶⁶ *Id.* at 571-72.

⁶⁷ *Id.* at 571.

⁶⁸ *Id.* (quoting *Scaife Co. v. Rockwell-Standard Corp.*, 285 A.2d 451 (Pa. 1971)) (internal citations omitted).

⁶⁹ *Id.*

⁷⁰ *Id.* at 572.

⁷¹ *Id.* at 575 (Eakin, J., dissenting).

By which the "reasonable fiancée" is assessed.
She was 19, he was nearly 30 years older;
Was it unreasonable for her to believe what he told her?

Given their history and Pygmalion relation,
I find her reliance was with justification.⁷²

For Justice Eakin, Mrs. Porreco's youth equated with a lack of experience and sophistication.⁷³ Mr. Porreco's age and experience made it more likely that his teen-age fiancée would rely on his representations.

In addition to the age differences between husband and wife, Justice Eakin asserted that trust should be the hallmark of a marriage.⁷⁴ As such, he explained that Mrs. Porreco should have been able to rely on her fiancée's representations:

Or for every prenuptial, is it now a must
That you treat your betrothed with a presumptive mistrust?
Do we mean reliance on your beloved's representation
Is not justifiable, absent third party verification?

Love, not suspicion, is the underlying foundation
Of parties entering the marital relation;
Mistrust is not required, and should not be made a priority.
Accordingly, I must depart from the reasoning of the
majority.⁷⁵

Unlike the majority, which treated the Porreco's as it would any other parties to a contract, Justice Eakin differentiated between an engaged couple entering into a contract and two people entering into a purely business relationship. Most contracts assume that the parties are dealing at arms' length from each other while nothing could be further from the truth when the parties are engaged to be married. Because marriage is based on closeness and trust, Justice

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

Eakin concluded that Mrs. Porreco's failure to ascertain independently the value of her engagement ring and her reliance on Mr. Porreco's representations were reasonable and amounted to justifiable reliance.⁷⁶

Chief Justice Zappala and Justice Cappy, writing separate concurring opinions, took Justice Eakin to task for his use of rhymed verse in his dissent. Echoing some of the criticisms discussed above, Justice Zappala expressed concern that the use of rhyme "reflect[ed] poorly on the Supreme Court of Pennsylvania."⁷⁷ Both he and Justice Cappy cautioned that the use of rhyme could give the public appearance that the judiciary did not take the litigants' concerns seriously.⁷⁸ While acknowledging a judge's right to express himself, Justice Cappy agreed with Justice Zappala's observation that "the expression of opinions issued by the highest court in the Commonwealth of Pennsylvania should reflect the gravity of our constitutional responsibility to our citizens."⁷⁹ Both justices concluded that Justice Eakin's opinion did not meet this standard.

V. ANSWERING THE CRITICS

These specific criticisms along with the general criticisms associated with using verse in judicial opinions should be evaluated in light of Justice Eakin's dissenting opinion.⁸⁰ The first objection is that rhymed opinions demean the litigants and make the subject of the litigation frivolous. Certainly, verse which holds either the parties or their dispute up to ridicule constitutes an abuse

⁷⁶ *Id.*

⁷⁷ *Id.* at 572 (Zappala, J., concurring). Justice Zappala stated: I believe the integrity of this institution depends in great part upon the understanding that we engage in careful, deliberate and serious analysis of the legal issues that we undertake to examine. The integrity of the Supreme Court of Pennsylvania should never be placed in jeopardy by actions that would alter the perception of those whose lives and interests are affected by the decisions of the Court.

Id.

⁷⁸ *Id.*

⁷⁹ *Id.* at 572-73 (Cappy, C.J., concurring).

⁸⁰ *See supra* notes 71-76 and accompanying text.

of judicial discretion. A judge should show respect for the case and people before him as long as they merit it.⁸¹

Justice Eakin's dissent in verse undermined neither the litigants nor their case. His description of the litigants was appropriate when he referred to them as the bride, groom, and spouse. The one instance in which he referred to Mr. Porreco as "[o]ur deceiver" was consistent with his legal conclusion that Mr. Porreco did commit fraud against Mrs. Porreco.⁸² Justice Eakin stated his position clearly and succinctly at the beginning of his dissent: "A groom must expect matrimonial pandemonium when his spouse finds he's given her a cubic zirconium."⁸³ A certain level of judicial disdain for Mr. Porreco's actions was appropriate in light of Justice Eakin's conclusions on the issue.

There is a danger, of course, of the verse form trivializing the subject matter of the case.⁸⁴ This may be true especially when the case involves a domestic dispute, an area of law which historically has received second-class status.⁸⁵ An opinion in verse might perpetuate the stereotype that these issues do not merit the same serious judicial consideration afforded to other matters. The impetus for *Porreco* was the dissolution of a marriage, and the immediate issue before the Court involved the betrayal of marital

⁸¹ One law review writer has proposed a test "to cull out those opinions most prone to ridicule litigants." Rudolph, *supra* note 5, at 195. The purpose of the test is to eliminate the inappropriate use of judicial humor in opinions. The writer has suggested that the test would be included as an amendment to the ABA Code of Judicial Conduct. *Id.* at 194. The test would be added on to Canon 2, which is titled, "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities." Under the test, judicial humor is inappropriate if "(A) a reasonable litigant would feel that he or she had been made the subject of amusement, or (B) opinion utility would be compromised by the humor." *Id.*

⁸² *Porreco*, 811 A.2d at 575 (Eakin, J., dissenting).

⁸³ *Id.*

⁸⁴ In support of this point, it would appear that certain categories of cases are never appropriate subjects for rhymed verse. For example, the nature of a capital murder case would make it an unlikely subject for a nontraditional opinion.

⁸⁵ See, e.g., Susan Frelich Appleton, *From the Lemma Barkeloo and Phoebe Couzins Era to the New Millennium: 130 Years of Family Law*, 6 WASH. U.J.L. & POL'Y 189 (2001).

trust. Both are deeply important matters. The parties to the litigation could have interpreted Justice Eakin's rhymed opinion as not giving proper deference to the seriousness of their case.

One response to this concern is that a rhymed opinion is more likely to capture its audience's attention and thereby increase the importance of the case. Without Justice Eakin's opinion, this case would not have received the public attention that it did.⁸⁶ Like many appellate opinions, it would have been consigned to obscurity.⁸⁷ Admittedly, the attention that the opinion has received has centered around the controversy over Justice Eakin's use of rhymed verse rather than its substance.⁸⁸ However, one of Justice Eakin's purposes in using the form that he did may have been to draw readers into his analysis. Instead of analyzing the issue through a conventional opinion, he may have chosen to use poetry as a hook to secure a broader audience for this issue. The medium may have been his way of calling attention to the message. In so doing, the subject matter was elevated and not trivialized.

The second criticism, rhymed verses make bad law and bad poetry,⁸⁹ assumes that in a misguided attempt to be clever or witty, a judge who writes in verse fails at both his primary task of sound legal analysis and his secondary goal of writing poetry.⁹⁰ While this may be true in some instances, it is not the case in Justice Eakin's dissent in *Porreco v. Porreco*. The legal analysis is well-developed and well-supported. As discussed above, Justice Eakin offered reasons why Mrs. Porreco's reliance on Mr. Porreco's representations were reasonable.⁹¹ First, the differences in their age, experience, and sophistication explained her reliance on his valuation of the engagement ring. Second, the trust that rightly

⁸⁶ Justice Eakin's opinion and the surrounding controversy were the subjects of national and local media attention. See Liptak, *supra* note 3, at § 1; John Baer, *Court Sees no Reason for Rhyme*, PHILA. DAILY NEWS, Dec. 9, 2002, at 5.

⁸⁷ For a discussion of Justice Eakin's opinions being met with silence, see *supra* note 18 and accompanying text.

⁸⁸ Liptak, *supra* note 3; Baer, *supra* note 86.

⁸⁹ See *supra* notes 54-58 and accompanying text.

⁹⁰ Some critics might argue that even good poetry results in a bad judicial opinion.

⁹¹ See *supra* notes 71-76 and accompanying text.

exists between husband and wife contributed to her failure to get an independent assessment of the ring's worth. Only when that trust had dissolved in light of the couple's divorce did Mrs. Porreco feel the need to verify her husband's representations.

Furthermore, Justice Eakin supported these reasons in footnotes with extensive quotations from and citations to relevant authority. One case to which he did not refer was his opinion in *Busch v. Busch*. In that case, as a superior court judge, he had upheld a prenuptial agreement in which the man accused the woman of not meeting her burden of full and fair disclosure of marital assets because she had estimated the value of her stocks at a lower amount than they were actually worth.⁹² Judge Eakin had determined that the full disclosure requirement was met because the man could have checked the newspaper to verify the stocks' worth. Similarly, as the majority posited, full disclosure arguably was met in *Porreco* because the wife could have checked with a jeweler to verify the worth of her engagement ring. However, the age discrepancy between the couple and the husband's intentional misrepresentation of the value of the ring contributed to Justice Eakin's different conclusion in *Porreco*.

Finally, while Justice Eakin's verse might not be on the literary level of Wallace Stevens, he does not claim to be a great poet. The opinion, however, does meet many of the requirements of a good poem. A good poem says something worth knowing in a way that people understand and will remember. No writing can be better than the quality of the ideas that it communicates. In his dissent in *Porreco*, Justice Eakin communicated his position clearly and memorably.⁹³

⁹² See *supra* notes 35-42 and accompanying text.

⁹³ In my Torts class, I gave first year students the option to brief a case in rhyme. In that case, *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971), the Supreme Court of Iowa determined whether a spring gun trap was reasonable force in the defense of property. The students rose to the occasion with creative and sound discussions of the case. They captured the characters of the litigants as described in the appellate opinion and accurately pinpointed the Court's reasoning about why a spring gun was unreasonable force. In reading the poems, I was struck by how carefully students had read the opinion. Perhaps the novelty of the exercise invigorated them to do some of their best work of the semester, and they had fun in the process. The idea for this exercise came from a professor's essay in *The*

The final criticisms are that writing opinions in verse gives an appearance of judicial impropriety and wastes two resources: judges' time and taxpayers' money. The concern about judicial impropriety, as expressed by Chief Justice Zappala's statement about the integrity of the institution, is particularly striking in light of the Pennsylvania Supreme Court's recent history.⁹⁴ Further, Justice Eakin is in good company with other state and federal court judges, and even an occasional Supreme Court Justice, with using poetry in his opinions.⁹⁵

Moreover, Justice Eakin uses the form sparingly. Of the almost one hundred opinions that he has written as either a superior court judge or a supreme court justice, only five are in rhyme.⁹⁶ Judges, particularly appellate judges such as Justice Eakin, are paid to think and write. A well-crafted opinion usually is the product of painstaking research and writing. When Justice Eakin spends the time analyzing the law of reasonable reliance in depth and produces a concise, coherent analysis of why the legal standard is met in a particular case, the rhymed format of that

Law Teacher. See Andrew J. McClurg, *Poetry in Commotion: Katko v. Briney and the Bards of First-Year Torts*, 74 OR. L. REV. 823, 834-36 (1995). For a collection of poems regarding twenty-nine well-known contracts cases, see Douglass G. Boshkoff, *Selected Poems on the Law of Contracts*, 66 N.Y.U. L. REV. 1533 (1991).

⁹⁴ For example, one of its members, Justice Rolf Larson, was impeached in the 1990's. Baer, *supra* note 86, at 5.

⁹⁵ See, e.g., *Great-West Life & Annuity Ins. Co. v. Knudson*, 532 U.S. 204, 222 (2002) (Stevens, J., dissenting). Justice Stevens counters the majority's contention that it is not the Court's job to find reasons for what Congress has done by comparing that statement to Tennyson's poem about the Light Brigade, which reads "Theirs not to reason why, Theirs but to do and die." *Id.* n.3 (Stevens, J., dissenting).

⁹⁶ The two already discussed, *Porreco* and *Busch*, involved family law issues. *Porreco v. Porreco*, 811 A.2d 566, 575 (Pa. 2002) (Eakin, J., dissenting); *Busch v. Busch*, 732 A.2d 1274 (Pa. Super. Ct. 1999). The third arose when a dog owner sued a driver to recover veterinary fees after the driver hit his dog. *Zangrando v. Sipula*, 756 A.2d 73 (Pa. Super. Ct. 2000). Another arose in the context of a trade name violation when two auto body shops both wanted to use the word Limerick in their name. *Limerick Auto Body, Inc. v. Limerick Collision Center, Inc.*, 769 A.2d 1175 (Pa. Super. Ct. 2001). The fifth was a breach of contract claim involving emus that did not propagate. *Liddle v. Scholze*, 768 A.2d 1183 (Pa. Super. Ct. 2001).

opinion does not detract from the substance. It may in fact have enhanced the analysis by communicating it in an understandable fashion to a wide audience. In that respect, Justice Eakin's time was well spent, and the public was well served.