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# To Rhyme or Not to Rhyme

## AN APPRAISAL

Robert E. Rains

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*Abstract. Milton praised “Poetic Justice, with her lifted scale,” and Pope extolled “lofty rhyme.” Yet when a new justice of the Pennsylvania Supreme Court dissented in a case in verse, some of his colleagues expressed shock and dismay. This essay explores the propriety of an appellate justice not reversing, but “versing.”*

In late 2002, a literary controversy erupted in a most unlikely venue: the Pennsylvania Supreme Court. In the *Porreco* divorce case,<sup>1</sup> involving a challenge to a prenuptial agreement, the newest member of the Court, Mike Eakin, filed a dissenting opinion entirely in verse. Cutting to the heart of the matter, he began:

A groom must expect matrimonial pandemonium  
when his spouse finds out he’s given her a cubic zirconium  
instead of a diamond in her engagement band,  
the one he said was worth twenty-one grand.<sup>2</sup>

The dissent’s design so outraged the chief justice, Stephen Zappala, that he felt compelled to file a separate concurring opinion criticizing his junior colleague’s mode of expression:

I write separately to address my grave concern that the filing of an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania.<sup>3</sup>

When I first contemplated skewering the Pennsylvania Supreme Court's decision in the *Porreco* case, I had hoped to avoid altogether a discussion of the merits, if that is the proper term, of the case. Alas, I fear it is necessary for a full appreciation of the nuances involved to delve into the "juicy bits."

The facts are classic. Susan was 17 years old, in high school, and living at home with mom and dad. One can only imagine their delight when Louis, a 45-year-old divorcé, began to woo their little girl. Lou provided Sue with the finer things of life: wheels, insurance, and credit cards. Perhaps mom and dad were relieved, at least financially, when Lou also started paying Sue a weekly allowance. Delicacy forbids a full exegesis of the legal and moral implications of the fact that Lou also ensconced the object of his affections in an apartment; one can only hope that this was intended to facilitate helping her with her homework. And then came the *pièce de résistance*. In arguably a somewhat belated attempt to "make it legal," this latter-day Pygmalion presented his Galatea with an engagement ring.

Much has been written, and quite a bit litigated, about engagement rings. But what, in fact and in law, are they? Neither the *OED* (*Oxford English Dictionary*) nor the *Britannica* is particularly edifying on the subject. Learned (i.e., legal) authorities differ as to the provenance of the traditions of giving an engagement ring and choosing a diamond as the ring's gemstone. While the tradition of the gift's being uni-directional, male to female, is understandable in light of past financial realities, why it remains so today is unclear. Some of my bejeweled female students have bridled at my suggestion of a pre-bridal gift of a similar token to the male fiancé, although perhaps it would help them to establish domiciliary, or, at least, possessory intent. [Kay Jewelers, are you taking note?]

Courts disagree as to whether an engagement ring constitutes an absolute or conditional gift and, if conditional, whether the condition is the agreement to marry or the actual marrying. The aforementioned Pennsylvania Supreme Court, in a decision penned a few years back by Madame Justice Sandra Schultz Newman, ruled that the engagement ring is a gift that is conditional on the marriage's taking place, and that if the marriage does not take place for any reason, the jilted Jill must return the rock and does not get to keep it as a consolation prize.<sup>4</sup> Apparently unmoved by the erudition (or prestige?) of the Pennsylvania Court, the Montana Supreme Court subsequently took the opposite view and held that the dismayed damsel gets to keep the keepsake without the necessity of the nuptials:

Under Montana law, no gift is revocable after acceptance except a gift in view of death. While some may find marriage to be the end of life as one knows it, we are reluctant to analogize gifts in contemplation of marriage with a gift in contemplation of death.<sup>5</sup>

Your author accordingly has started advising his female students to get engaged in Glacier National Park so they can be sure to be able to keep the ice, come what may.

Which brings us to prenuptial (aka antenuptial) agreements. The very same Pennsylvania Supreme Court has ruled that, however one-sided, prenups are binding on the parties unless (1) there is any ground for voiding a contract under the common law (such as fraud) or (2) a party fails to make a full and fair disclosure of his or her own assets prior to entering the agreement.<sup>6</sup>

Which brings us back to Lou and Sue. They had signed a prenup, prepared (of course) by Lou. Perhaps if Sue had been somewhat more mature she would have been alerted to how much Lou really valued her as a soulmate by its provision that, in the event of a divorce, she would receive only a lump sum payment of \$3,500 for each year of marriage (plus a car and insurance). Lou, apparently accurately, listed his assets at a cool \$3.3 million. He also listed *her* assets at \$46,592, specifically including \$21,000 as the value of the engagement ring. And there's the rub.

As alluded to by Justice Eakin, the token of Lou's undying devotion turned out to be not the \$21,000 sparkler that he claimed, but something called a cubic zirconium. Not being a gemologist, I must confess that I labored under some ignorance as to exactly what a cubic zirconium might be. Too lazy to go to the library, I searched the Web and found this revolting little explanation:

Cubic zirconia (CZ) is the most widespread and inexpensive diamond simulant on the market today. While it occurs naturally in small quantities as the mineral baddeleyite, all of the CZ on the market is produced in the laboratory through skull-melting techniques.<sup>7</sup>

I decided to forgo further research, as I really didn't wish to learn any lurid details regarding "skull-melting techniques."

Of course, Sue didn't know when she signed on the dotted line that Lou's valuation of the engagement ring, like his love, was false. It was only when the parties separated a decade later that Sue took the ring to a jeweler and was

given the bad news. So, Sue sued to set aside the one-sided prenup, and the *Porreco* decision ensued.

The trial court found fraud and preempted the prenup. The Pennsylvania Superior Court affirmed the fraud finding, and the Pennsylvania Supreme Court, finding there to be “special and important reasons therefor,”<sup>8</sup> agreed to review the case.

The Court was, as the pundits would say, bitterly divided on the merits as well as on writing styles. Madame Justice Newman issued the Opinion Announcing the Judgment of the Court, that judgment being to reverse the finding of fraud. Justice Ronald D. Castille and Chief Justice Zappala each concurred with the lead opinion, but each also wrote separate concurring opinions. Justice Ralph J. Cappy concurred only in the result and wrote his own concurring opinion. Justice Thomas G. Saylor wrote a dissenting opinion that was joined by Justice Russell M. Nigro. And the chastised Justice Eakin dissented separately, in verse. Final tally: seven justices, six opinions; four votes to reverse, three to affirm.

I suppose that fairness (not my primary concern here) compels me to relate the rationale in the lead opinion. Since I personally find this rationale about as persuasive as the premises of the Flat Earth Society, it seems better to quote than to paraphrase. Here goes:

In the present case, although we are bound by the factual conclusions of the trial court, we cannot agree that Susan’s alleged reliance on Louis’ misrepresentation of the value of the ring on the schedule of her assets was justifiable. Susan had possession of the ring and was not impeded from doing what she ultimately did when the parties separated: obtain an appraisal of the ring.

She had sufficient opportunity to inform herself fully of the nature and extent of her own assets, rather than rely on Louis’ statements concerning the valuation of her holdings. We find her failure to do this simple investigation to be unreasonable. Although we do not excuse Louis’ actions, we will not sanction the avoidance of an entire prenuptial agreement—the consequences of which Susan admittedly understood—on the basis of fraud in these circumstances.<sup>9</sup>

Justice Eakin, in a terse verse of fourteen couplets, essentially—but politely—said, “You’ve got to be kidding.” He concluded:

Given his accomplishment and given her youth,  
was it unjustifiable for her to think he told the truth?

Or for every prenuptial, is it now a must  
 that you treat your betrothed with 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.<sup>10</sup>

It was the form, not the substance, of Eakin's dissent that excited the disapprobation of the chief justice. Notably he did not criticize Eakin's meter (admittedly a trifle strained here and there) or a couple of near rhymes, or, significantly, the rationale of Eakin's dissent, but solely the fact that it was presented in rhyme. The chief justice's condemnation was expressed with many a high-sounding phrase: "the gravity of differing judicial views," "the integrity of this institution," "placed in jeopardy by actions that would alter the perception of those whose lives and interests are affected," "weighty consideration," "dignity of the Supreme Court of Pennsylvania," "deserved respect that has been hard-earned, should not be diminished."<sup>11</sup> Wow! And Justice Cappy added for good measure, "My concern, however, and the point on which I concur completely with the chief justice, lies with the perception that litigants and the public at large might form when an opinion of this Court is reduced to rhyme."<sup>12</sup>

But are these harsh rebukes of the newest member of our Court justified? Is an opinion in rhyme a lesser opinion than a prosaic one, and, if so, why?

The link between legal learning and a penchant for poetic patter is palpable. Maryland attorney Frank Key achieved a certain degree of immortality—and had a bridge over the Potomac named after him—by penning new words to the old British drinking song, "To Anacreon in Heaven."<sup>13</sup> The incomparable W.S. Gilbert was called to the bar.<sup>14</sup> ("The law is the true embodiment, of everything that's excellent. It has no kind of fault or flaw, and I, my Lords, embody the Law.")<sup>15</sup> The subtle and sublime Cole Porter went to Harvard Law School.<sup>16</sup> ("If you ever feel so happy you land in jail, I'm your bail.")<sup>17</sup> Okay, he dropped out of HLS,<sup>18</sup> but he went; that's the point.

And well before Eakin, judges—both state and federal—have ruled in rhyme. There was U.S. District Court Judge Edward R. Becker's admiralty decision, beginning:

The motion before us  
has stirred up a terrible fuss,  
And what is considerably worse,  
it has spawned some preposterous doggerel verse.<sup>19</sup>

This doggerel, despite its mangled meter, cannot have tarnished Judge Becker's reputation too much, as he was ultimately elevated to become chief judge of the United States Court of Appeals for the Third Circuit.<sup>20</sup>

Two of the best-known verse opinions are *Fisher v. Lowe* ("We thought that we would never see a suit to compensate a tree")<sup>21</sup> and *In re Love* ("Once upon a midnight dreary, while I pondered weak and weary over many quaint and curious files of chapter seven lore").<sup>22</sup> The latter has the distinction of having been cited in two consecutive volumes of the *Yale Law Journal*,<sup>23</sup> a feat not known to be equaled by any opinion of the Pennsylvania Supreme Court.

For that matter, before his election to the Pennsylvania Supreme Court, Mike Eakin had sat on the Pennsylvania Superior Court for a number of years, where he became known, at least in some circles, as the "rhyming judge."<sup>24</sup> Coincidentally, he had issued an opinion on a prior prenup appeal partly in verse:

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.<sup>25</sup>

And perhaps Eakin's most superior Superior Court effort in the genre was his opinion upholding a modest tort award in the case of a collision of car and canine:

Appellee and two little dogs were walking down the street,  
tending to business as they went, but soon they were to meet  
Appellant, who this wintry day was driving toward the pair;  
their mistress reined them to a stop along the thoroughfare.  
.....  
The car was coming much too close, something inside told her;  
the next thing Mrs. Zangrando knew, a poodle flew over her shoulder.  
.....  
Be it interstate or neighborhood, drivers get no free shot

at things they may encounter, whether in the street or not.  
 So while counsel raises issues that are worthy and well taken  
 in the end we find the effort to apply them here's mistaken.<sup>26</sup>

When he ran for the Pennsylvania Supreme Court, Eakin made no secret of his rhyming ways. The "Vote for Mike Eakin for Pennsylvania Supreme Court" Web site proclaimed:

On a lighter note, he is known as the "rhyming judge" who issues some of his opinions in poetic stanzas offering his additional talent and, when appropriate, levity to the court.<sup>27</sup>

Thus, while it might be hyperbolic to suggest that he was elected with a popular mandate to versify on the High Court, at least the better informed among the electorate were on notice of the potential rhyming repercussions of a pro-Eakin vote.

As an inveterate versifier myself,<sup>28</sup> I acknowledge that verse is evidently a lesser literary form than real poetry. Good verse combines the latter-day faults of being readable, digestible, and—at its best—witty. As I understand it, any self-respecting modern poet, excepting of course the wonderfully clever Wendy Cope,<sup>29</sup> would be insulted to have his (or her) work described with such encomia. Is this perhaps the key? Is the vice of the verse that it is accessible to the parties, not just the lawyers?

Unquestionably, if Lou (the giver of the less than genuine gem) should read the Eakin dissent, he might well conclude that Eakin thinks him a cad and a bounder. But, if he reads—and understands—the lead opinion upholding his appeal, he will find that Madame Justice Newman, and those who joined her, share that view. At least implicitly, they found him guilty of the first four elements of fraudulent misrepresentation in the case:

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it.<sup>30</sup>

The Court's opprobrium is a lot more understandable for the layperson when a justice simply refers to Lou (as Eakin does) as "our deceiver."<sup>31</sup> One supposes that Lou was already willing to run the risk of being ruled a roué if that was the price of preserving his pile.

As for Sue, certainly there is nothing in the Eakin dissent to hurt her feelings. Yes, she is portrayed as having been somewhat naïve, but that was part of her case:

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  
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?<sup>32</sup>

Surely Sue should find more solace in this dissent than in the lead opinion.

What about the public perception, if any, of the state supreme court? [Quick! Name the justices on *your* state supreme court. No fair peeking.] It's not often that state appellate decisions in civil appeals involving private parties make it into the popular media, but this one did. "Rhyming judge prompts criticism from state justices," heralded the headline in the state capital's daily newspaper, *The Patriot News*.<sup>33</sup> One might ask what prompted such coverage, the rhyming judge or the criticism? In any event, the headline was *not*, "Rhyming judge besmirches the Court's escutcheon."

This courtly controversy expanded beyond the borders of the Commonwealth of Pennsylvania. The *New York Times* picked up on the story: "Justices Call on Bench's Bard to Limit his Lyricism."<sup>34</sup> *FHM* (For Him Magazine), for reasons that remain obscure, ran an article on Eakin's versifying and chastisement, although it must be confessed that "The Girls of Buffy Tribute" got higher billing.<sup>35</sup> Indeed, the controversy went international. There was an interview with Justice Eakin on the BBC in December 2002,<sup>36</sup> and an autographed copy of Eakin's *Porreco* dissent is now proudly displayed in the Museo della Poesia in Cesa, Val di Chiana, in beautiful Tuscany.<sup>37</sup>

Could it be that the real reason for the adverse verse reaction is the realization that the rhymed dissent will cause this case to live on? That what would otherwise be a not terribly bright spot in the long history of the oldest state supreme court in these United States<sup>38</sup> is now doomed to be cited and quoted in the popular press and, for some time to come, in academic circles? Could there also be the realization that the majority view—not the verse view—will be the one that looks rather silly as time goes by?

In the final analysis, is there any rhyme or reason to a judge-made per se rule that engaged parties must appraise not just each other, but each other's gifts of jewelry? No more so, I submit, than a per se rule that judges not reason in rhyme.

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1. *Porreco v. Porreco*, 811 A.2d 566 (Pa. 2002).
  2. *Id.*, at 575 (Eakin, J., dissenting).
  3. *Id.*, at 572 (Zappala, C.J., concurring).
  4. *Lindh v. Surman*, 742 A.2d 643 (Pa. 1999).
  5. *Albinger v. Harris*, 48 P.3d 711, 719 (Mont. 2002).
  6. *Simeone v. Simeone*, 522 A.2d 392, 403 (Pa. 1990).
  7. John Miller, *Gemology and Lapidary Pages*, "Cubic Zirconia (CZ)," May 1998, <http://www.tradeshop.com/gems/cz.html>.
  8. Pennsylvania Rule of Appellate Procedure 1114.
  9. *Porreco*, *supra* note 1 at 571–72. (The Court remanded for consideration of alternative bases for setting aside the agreement.)
  10. *Id.*, at 576 (Eakin, J., dissenting).
  11. *Id.*, at 572 (Zappala, C.J., concurring).
  12. *Id.*, at 573 (Cappy, J., concurring).
  13. Baltimore County Public Library, "Fort McHenry, Birthplace of Our National Anthem," <http://www.bcpl.net/~etowner/anthem.html>.
  14. Diana Bell, *The Complete Gilbert and Sullivan* (Secaucus, NJ: Wellfleet Press, 1989), 22–24.
  15. "Lord Chancellor's Song," *Iolanthe*, Act. I.
  16. Robert Kimble, ed., *The Complete Lyrics of Cole Porter* (New York: Alfred A. Knopf, 1983), xxi.
  17. "Friendship," *Du Barry Was a Lady*. Dir. Roy Del Ruth. Score Cole Porter (Warner Studios, 1943).
  18. Charles Schwartz, *Cole Porter: A Biography* (New York: The Dial Press, 1977), 37.
  19. *Mackensworth v. American Trading Transportation*, 367 F. Supp. 373 (E.D. Pa. 1973).
  20. "Becker to Step Down as Chief Judge," *26 Pa. Law Weekly* (April 14, 2003), at 19.
  21. *Fisher v. Lowe*, 333 N.W.2d 67 (Mich. App. 1983).
  22. *In re Love*, 61 B.R. 588 (Bankr. S.D. Fla. 1986).
  23. Alex Kozinski and Eugene Volokh, "Lawsuit, Shmawsuit," 103 *Yale L.J.* 463 (1993), at 464 n. 7; Kenji Yoshino, "What's Past Is Prologue: Precedent in Literature and Law," 104 *Yale L.J.* 471 (1994), at 507 n. 173.
  24. George Strawley, "'Rhyming Judge' Takes Over High Court," *The Pittsburgh Post-Gazette*, January 5, 2002, <http://www.post-gazette.com/regionstate/20020105supremes0105p8.asp>.
  25. *Busch v. Busch*, 732 A.2d 1274 (Pa. Super. 1999).
  26. *Zangrando v. Sipula*, 756 A.2d 73 (Pa. Super. 2000).
  27. <http://www.foac.pac.org/judicial/01-Eakin.html> (accessed December 6, 2002).
  28. See, e.g., "A Scramble for the Eggs," 50 *Hastings L.J.* 173 (1998); "Dealing Out Justice," 17 *ABA Family Advocate* 54 (1995); "The Case of the Vanishing Law Student," 5 *Green Bag*, 2d Series 463 (2002).
  29. See, e.g., Wendy Cope, "Bloody Men," in *Serious Concerns* (London: Faber and Faber, 1992), 3:
 

Bloody men are like bloody buses—  
 You wait for about a year  
 And as soon as one approaches your stop  
 Two or three others appear.

You look at them flashing their indicators,  
Offering you a ride.  
You're trying to read the destinations,  
You haven't much time to decide.

If you make a mistake, there is no turning back.  
Jump off, and you'll stand there and gaze  
While the cars and the taxis and lorries go by  
And the minutes, the hours, the days.

30. *Porreco*, 811 A.2d at 570–71.
31. *Id.*, at 575 (Eakin, J., dissenting).
32. *Id.*, at 575–76 (Eakin, J., dissenting).
33. *The Patriot-News* (Harrisburg, PA), Nov. 29, 2002, B5.
34. Adam Liptak, *New York Times*, Dec. 15, 2002, 25.
35. "Poetic Justice," 4 *FHM* 46 (June 2003).
36. You'll have to trust me on this one, but I do have email confirmation of it from the Justice himself.
37. Letter of Perla Cacciaguerra to Justice J. Michael Eakin, 22 Feb. 2003. One may visit the museo electronically at <http://museo.della.poesia.free.fr> (site in Italian).
38. See *Pennsylvania's Unified Judicial System*, "A History of Pennsylvania's Courts," April 1999, at <http://www.courts.state.pa.us/Index/UJS/courthistory.asp>.