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The Poetry of Law

Sidney W. DeLong

"Poets are the unacknowledged legislators of the world."¹

Legal writing is justly scorned for its style. I don't mean the ostentatious displays by judicial peacocks seeking to wring cheap praise from their benumbed readers. I refer instead to the literature of statutory drafting. This underappreciated genre is perhaps the last place one would expect to find a sensitive soul struggling to escape the prison house of language. Yet the economic realities facing today's graduate students mean that many former lit majors will find their way onto legislative drafting committees, whence they peek out at us from under the sub-sections of their lives.

It is time that this genre was formally recognized. Of course, its artists struggle against the challenge of the form and their achievements must be measured in millimeters rather than miles. All the more reason, I say, to develop an ear sensitive to their muted voices. So I offer this brief catalogue of the technique and art of statutory poetry. With examples.

The Evocative Phrase

Given the constraints of the genre of statutory writing, the poet-drafter must usually be satisfied with a single word or phrase. If well chosen, however, a brief phrase can summon up a rich font of emotion. The first specimen is from the Model Rules of Professional Responsibility, 1.17, comment 13 (2004):

This Rule applies to the sale of a law practice by representatives of a deceased, disabled, or disappeared lawyer.

A "disappeared lawyer." What poignancy lies in that phrase! The image triggers a flood of allusion: Judge Crater, the Cheshire cat.

And consider the prosodic significance of the alliterative series "deceased, disabled, or disappeared." One cannot help but wonder what additional alternatives the poet considered and rejected: dissipated, diseased, demented, despondent, depressed, degenerate, dejected, defunct.

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1. Percy Bysshe Shelley, *In Defense of Poetry* (London, 1840).

A second evocative phrase appears in the quaintly named Chicago “Gang Congregation Ordinance” tested before the Supreme Court.² This is not, as you might expect from its title, a law requiring homeboys to attend religious services but one prohibiting them from loitering, on pain of being dispersed by the police. The statute defines “loiter” as “to remain in any one place with no apparent purpose.” The statute’s drafter somehow makes us envy the sweetness of the loiterer’s repose and to pity the restless, lawful souls whose standing around somehow exhibits a purpose patent to the long eye of the law. (Do they fidget? Glance at their watches? Solicit drug deals?) On the principle of *exclusio unis*, I assume that while this ordinance was in effect, it remained legal in Chicago to go about from place to place with no apparent purpose. Or was there a companion “Gang Gamboling Ordinance” to deal with unlawful frolic and detour?

Metrics

It has long been noted that legal language is fond of pairs of words or terms. It is a mistake to conclude that these doublets endure only by virtue of their vestigial reminder of the Norman Conquest and its legacy of law French. The paired terms are powerfully rhythmic in the hands of a master. Nowhere is the comfortable symmetry of the lawyer’s doublet more pronounced than in the following definition from section 101 (54) of the Bankruptcy Code:

“transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor’s equity of redemption;³

For ease of scansion, permit me to display this poem in the more traditional format of the shaped poem:

“transfer” means every mode
 direct or indirect,
 absolute or conditional,
 voluntary or involuntary
 of disposing of or parting with
 property or with⁴ an interest in property,
 including retention of title as a security interest and
 foreclosure of the debtor’s equity of redemption;

The rhythm of this verse is hypnotic. I always find myself davening back and forth as I repeat this wonderful passage, and I’m not even Jewish. As the verse progresses, the doublets grow longer and more complex. This progress has the effect of training the reader’s eye and ear to encompass more and more variety, until he acquires the capacity to grasp the last pair and its elegant

2. Chicago v. Morales, 527 U.S. 41 (1999).

3. 11 U.S.C. §101(54).

4. This second “with” is an unfortunately superfluous non-parallism.

substitution of “and” for “or.” Sub-section 54 thus illustrates the quality of the best poetry, which teaches us how it is to be read even as we are reading it.

Statutory language also illustrates the influence of poetic meter. The UCC, for example, contains several triplets that scan so well that they might be rearranged into a poem:

to simplify, clarify, and modernize the law⁵
 (custom, usage, and agreement⁶)
 good faith, diligence, reasonableness, and care⁷
 (actual, implied, or apparent⁸)

Metaphysical Poets

Law deals explicitly with life and death, but also occasionally with the after-life, as in the following from revised Article 9:

A debtor who is an individual is located at the individual's principal residence. . . .

(d): A person that ceases to exist. . . continues to be located in the jurisdiction specified by subsections (b) and (c).⁹

Intertextuality

As Bloom argues in the *Anxiety of Influence*, all great poets write in response to their forbears, struggling to establish their own identity. Drafters of statutes and regulations signal their Oedipal struggles subtly, yet unmistakably.

To digress for a moment, the following poem by Robert Herrick is said by some to contain the loveliest line in English verse:

Whenas in silks my Julia goes
 Then, then (methinks) how sweetly flows
 That liquefaction of her clothes.

Next, when I cast mine eyes and see
 That brave vibration each way free;
 Oh, how that glittering taketh me!

Inspired by Herrick's neologism, a nameless scribe penned a verse destined for the Code of Federal Regulations:

5. UCC §1-102 (2) (a).
6. *Id.* at §1-102 (2) (b).
7. *Id.* at §1-102 (3).
8. *Id.* at §1-201 (43). Other rhythmic triplets from the Code include “a place, vocation, or trade,” (*id.* at §1-205 (2)) and “kind, quality and quantity” (*id.* at §2-314 (2) (d)).
9. UCC §9-307 (b) (1). There is no cross-reference in the Code to exorcism as a mode of clearing title to the debtor's residence.

3. Each semen specimen should be collected in a clean, widemouthed, glass jar (not necessarily pre-sterilized) in a manner designated by the examining physician. Any part of the seminal fluid exam should be initialed only after **liquefaction** is complete, i.e., 30 to 45 minutes after collection.¹⁰

Borrowed Poetry, or Making a Statute out of a Sow's Ear

If the muse fails, the aspiring lawmaker/poetaster can always appropriate ready-to-hand poetry for legislative use. The official state song, "Maryland, My Maryland," began life as a lamentable bit of Civil War era doggerel penned by James Ryder Randall. Elevated into law, however, the full text of the poem was enacted by the Maryland legislature as § 13-307 of the Maryland Code. The resulting statute includes the following evocative reflection on the invasion of Maryland by the Union troops:

I hear the distant thunder-hum,
 Maryland!
 The Old Line's bugle, fife, and drum,
 Maryland!
 She is not dead, nor deaf, nor dumb—
 Huzza! she spurns the Northern scum!
 She breathes! she burns! she'll come! she'll come!
 Maryland! My Maryland!"

Maybe it's a regional thing, but in what other jurisdiction may one bolster one's reference to "Northern scum" with an appropriate citation to an official state code?

Humor

Regulations and statutes can exhibit not only the language and rhythms of poetry but also other literary virtues, of which the most common may be humor in all its variations. This should come as no surprise to the literary theorist: because law is both ironic and cruel, it exemplifies both of the essential elements of humor.

Nevertheless, the occasions for humor in a statute are even more limited than those for other poetic devices. As when reading a poet in a totalitarian regime, the reader must find the laughter smuggled into the text and must be satisfied with a subtle gesture in lieu of the slapstick or pratfall.

10. 29 C.F.R. § 1910.104. If Lexis is to be trusted, this is the only use of the term "liquefaction" to be found in the United States Code or the Code of Federal Regulations. Is it not more than suggestive that it appears in a provision (albeit concerned with hazardous materials) that has a sexual reference?

11. Md. An. Code 1957, art. 41, § 79; 1984, ch. 284, § 1.

Which is not to say that the occasional yowler does not make its appearance. At one point, the Bankruptcy Code provides:

A person may be a debtor under chapter 7 of this title only if such person is not a railroad...¹²

It may surprise the laity to learn that lawyers achieve a state of mind in which they can read that sentence without snickering. The legally trained may thus need a form of consciousness-raising to appreciate the more subtle forms of statutory humor.

In spotting statutory humor, it is important to be sensitive to the effects of placement. Because the punch line is to be found at the end of a joke, you should always look for humor lurking in the terminal phrase. An oft-cited example concludes the definition of a buyer in the ordinary course of business, appearing in former UCC § 1-201 (9):

“Buyer in the ordinary course of business” means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker.

A subtler example comes from the Bankruptcy Code’s “Strong-arm” clause, section 544. This provision gives a bankruptcy trustee the rights and powers of

a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists... .

Did you catch the joke?¹³

I admit that statutory humor, like irony, is always a somewhat questionable category. It is sometimes unclear whether one is reading self-consciously humorous prose or just uncommonly bad drafting, to wit:

In the absence of explicit agreement identification occurs...when the crops are planted or otherwise become growing crops or the young are conceived if

12. 11 U.S.C. § 109 (b).

13. “[W]hether or not such a creditor exists.” I assume experienced commercial lawyers have not deigned to look below to the explanation, so for the rest of you: Try to imagine a creditor who would fit the statutory description. It extends credit, the debtor defaults on the loan, the creditor files a lawsuit and obtains a judgment against the debtor, the sheriff is given a writ of execution and serves it on the debtor, and the writ is returned unsatisfied. All these events must occur simultaneously, at the very instant that the bankruptcy petition is filed: a physical, if not metaphysical, impossibility. Yet the drafter is careful to assure the reader that the trustee has these powers “whether or not such a creditor exists.” Were such a creditor to exist, it would be bigger news than any bankruptcy.

the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

Now I have always assumed that this jewel was the product of comedic malice, but I must concede that it is just possible that the drafter was sincerely trying to express an idea as clearly as he or she could, in which case the example is pathetic indeed and I feel bad about having brought it up. Nevertheless, following Ronald Dworkin's interpretive principle that I should always read the law to make it the best that it can be, I choose instead to see this provision as an excellent example of statutory humor.

Post-Script: A Concluding Plea for the Human Author

Although we think of poetry as a distinctly human artifact, there are occasional reports of computers that can use artificial intelligence to generate texts that cannot be distinguished from human poems. Evidence has surfaced that a similar phenomenon may be at work in the field of statutory drafting.

In the recent revision of Article 9 of the Uniform Commercial Code, the (allegedly human) committee produced the following gem, in the definition of "Proceeds":

Proceeds, except as used in Section 9-609 (b), means the following property....

*thereafter listing five categories of property deemed to be proceeds.*¹⁴

The drafter of the passage thus cautions the reader not to apply the definition to the cited section. The risk of mistake can be seen in the language of that section:

*A secured party may proceed under subsection (a): (1) pursuant to judicial process; or (2) without judicial process, if it **proceeds** without breach of the peace.*¹⁵

This example confirms what many have long suspected: Revised Article 9 was drafted not by human beings at all, but by non-English speaking robots, capable of "recognizing" identical letter-strings but incapable of distinguishing nouns from verbs. Or perhaps this is the first known case of a joke having been both created by artificial intelligence and enacted by human legislators.

14. U.C.C. §9-102 (a) (64). (Emphasis supplied.)

15. *Id.* at §9-609 (b) (emphasis supplied).