The Poetics of American Common Law

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There is a long-acknowledged relationship between poetry and law.[1] But what is the exact nature of that relationship? The common law tradition is one in which the rulings of individual judges are passed down from bench to bench, and each ruling adds to the body of law itself. This process has produced a wealth of legal reasoning and an entire system that has functioned for centuries. But it has not only produced law, it has also produced poetry. The most enduring common law definitions are not only good law, but also rhythmic and euphonic. This paper explores the common ground between law and poetry, and attempts to evaluate the common law as a unique form of poetry: eternal and universal principles expressed as legal definitions.

POETRY: EXPRESSION OF THE ETERNAL AND UNIVERSAL

To evaluate the common law as poetry, one must first have a working definition of poetry. Percy Bysshe Shelley's essay *A Defence of Poetry* provides ample material from which to form such a definition.[2] It is clearly the work of an extremely talented writer as well as a very well-

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[1] Although there is nothing new in the claim that poetry and law are related, I am not aware of any other attempts to evaluate the common law as poetry. For more on the relationship between law and poetry, see Largent, "The Kinship and Demise of Poetry and Law: 1868-1927" and Eberle and Grossfeld, "Law and Poetry."

[2] All references to Shelley's essay refer to the pagination in *The Harvard Classics*, vol. 27.

read intellectual. Although he died before the age of thirty, Shelley was a prolific writer of both poetry and drama.

In *A Defence of Poetry*, Shelley initially proposes a general definition of poetry as "the expression of the imagination" (345). Without more, however, this definition would be far from complete. Throughout the essay, he gives body to his definition by explaining what poems *are* and what poets *do*.

First, Shelley makes it clear that poetry and prose are not mutually exclusive concepts. To divide writing along those lines would deny poetry its rightful claim over a great number of works that are not in verse, but are nonetheless true expressions of the imagination. It is the content, rather than the form, that makes a poem.

This is not to say, however, that sound is not important. Shelley writes of Francis Bacon, for example, "His language has a sweet and majestic rhythm, which satisfies the sense, no less than the almost superhuman wisdom of his philosophy satisfies the intellect" (351). Bacon's writing, although it is not in verse, is poetry. The sound of his writing and the effect that it has on the reader at a physical level is very important. However, the sound of a poem is not merely the result of rigid adherence to a formula, but something much deeper.

The true source of poetry is its ability to reveal some truth about the world: "A poem is the very image of life expressed in its eternal truth" (351). By this, Shelley means that a poem is limited to neither the traditional elements of poetry (rhyme patterns, meter, etc.) nor the elements of a story. Poetry is a glimpse of unchanging nature, regardless of mere form. What makes something a poem is the fact that it conveys something of the universal and the eternal.

Because poems are distinguished by their expression of the universal and eternal, otherwise prosaic writings rise to the level of poetry wherever the author has reached these lofty subjects. When historians such as Herodotus, Plutarch, or Livy conveyed profound and eternal truths, their writing was elevated to the order of poetry (352). And although a very long work may not be poetic itself, a single sentence or even a single word within it may be seen as a poem if it contains "a spark of inextinguishable thought" (352).

If poems are expressions of the eternal and the universal, what does that make poets? Poets are "those who imagine and express this

indestructible order" (348). They are not only artists, but "they are the institutors of laws, and the founders of civil society," and the founders of religion (348). A prophet or a legislator is a poet if he "discovers those laws according to which present things ought to be ordered, [and] he beholds the future in the present" (348). Those who organize society in accordance with the dictates of the eternal and universal are just as much poets as they are legislators, judges, or executives.

LAW: REASONED FROM NATURE

The "laws according to which the present ought to be ordered" that Shelley mentions are the laws of nature. Throughout history, the term "natural law" has been used in a number of ways.[3] A quick review of the principles of natural law will provide a picture of how poetry and natural law have grown together.

The earliest known expression of natural law is by Aristotle.[4] "[B]y general laws," he writes in *Rhetoric*, "I mean those based upon nature. In fact, there is a general idea of just and unjust in accordance with nature, as all men in a manner divine, even if there is neither communication nor agreement between them."[5] For Aristotle, natural law is "immanent in the primordial constitution of man," part of the development of man, and "a part of his final cause or purpose."[6] Just as "poetry is connate with the origin of man" (345), so law is connate with the origin of man and integral in his development.

The Stoics equate nature with reason, so for them, the law of nature was the same as the law of reason.[7] For the Stoics, natural law is the result of the universal principles of reason. All people would reach this "ideal law" were they only capable of purely rational thought.[8] Since people are not capable of purely rational thought, the quality of human law must be judged by how closely it approaches the eternal and universal law of reason.

John Locke enumerates certain rights that nature provides to all men. These rights are life, liberty, and property.[9] Men have a right to

[3] Alschuler, "Rediscovering Blackstone," 22.
[4] Barker, "Translator's Introduction," xxxviii.
[5] Aristotle, *Rhetoric*, 1373 b.
[6] Barker, "Translator's Introduction," xxxv.
[7] Ibid., xxxv.
[8] Ibid., xxxvi.
[9] Alschuler, "Rediscovering Blackstone," 23.

live, to act as they please, and to own whatever they create or gain through trade. These natural rights give rise to a corollary natural law: the exercise of one's rights must be limited so as not to interfere with the rights of others. Regarding natural law, Locke writes that "reason, which is that law, teaches all men who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty or possessions."[10]

Shelley himself was a proponent of natural law. In his *Declaration of Rights*, he announces his view that "[g]overnment cannot make a law, it can only pronounce that which was the law before its organisation, viz. the moral result of the imperishable relations of things."[11] The eternal and the rational are the true sources of law, just as they are the true sources of poetry.

More recent, and more important for understanding how common law participates in this universal and eternal law, is the work of William Blackstone. Blackstone's *Commentaries on the Laws of England* has been called "the most influential law book in Anglo-American history."[12] All of the founding documents of this country, including the Declaration of Independence, the Constitution, and the Federalist Papers were written with Blackstone as a common ground. Although today's legal scholars often dismiss Blackstone,[13] and despite the *Commentaries* being 250 years old, Blackstone is still an important influence in American jurisprudence. Well over a dozen Supreme Court decisions, concurrences, and dissents from 2015 alone cited Blackstone.[14]

To Blackstone, and the innumerable judges and jurists who followed him, natural law is "superior in obligation to any other. It is binding over all the globe, in all countries and at all times: no human

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[10] Locke, *The Second Treatise of Government*, 5.

[11] Shelley, "Declaration of Rights," para. 15.

[12] Alschuler, "Rediscovering Blackstone," 1.

[13] Ibid., 16.

[14] See *Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015); *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015); *Kerry v. Din*, 135 S. Ct. 2128 (2015); *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Elonis v. United States*, 135 S. Ct. 2001 (2015); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *DOT v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015); and *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015).

laws are of any validity if contrary to this."[15] American and British judges, when forming the common law, had this philosophy in mind. Consequently, the common law declarations on the rights and duties of citizens tend to approach the eternal and reasonable laws of nature. The common law takes on the characteristics of Aristotle's general law, the Stoics' law of reason, and Locke's natural rights.

In the same way that poetry expresses the eternal and universal, natural law also reflects the eternal and universal. It is no wonder that Blackstone's work is said to be replete with "the poetry of the law."[16] And it is no wonder that the common law that inspired him, and that he in turn influenced, is poetic itself. Common law is both "the moral result of the imperishable relations of things" and the expression of "the indestructible order"—both poetry because it is law, and law because it is poetry.

THE COMMON LAW: BOTH POETRY AND LAW

Blackstone built his philosophy on the study of the common law. He was the first professor of common law at Oxford.[17] As the common law continued to develop under his scholarship, it took on a decidedly natural law approach. Judges created law over time, and handed it down from bench to bench. Those rulings that most closely adhered to the principles of nature and reason became entrenched as the whole common law came to resemble more closely the precepts of natural law. Since these precepts are also at the heart of poetry, traditional common law definitions have poetic characteristics. Their universality and eternality make them good poetry as well as good law.

Take, for example, the common law definition of burglary:

> The breaking and entering of a dwelling house at night, with the intent to commit a felony therein.

It reads like a poem. The repetition of the "-ing" sound at regular intervals builds up to the hard "night" at the end of the first clause. There is a beat between "night" and "with." Then the intent clause sweeps down from that peak to the conclusion. As with Shelley's

[15] Alschuler, "Rediscovering Blackstone," 24.
[16] Ibid., 16.
[17] Ibid., 4.

analysis of Bacon, however, the sound alone is not what makes this definition a poem, but rather the universality of the crime it describes. Contained in under a score of words are a number of universal concepts: the sanctity of the home; the right to property; fear of the dark; the "guilty mind." If any of those elements were missing, the crime would have a decidedly different character. The definition would be less in keeping with natural law, and also less poetic.

Consider the common law definition of arson:

> The willful and malicious burning of the dwelling house of another.

Again, the definition is poetic. As noted above, Shelley claims that a single word could be a poem if it contains "a spark of inextinguishable thought" (352). In spite of its unsavory definition, the word "malicious" is delightful and poetic on its own. The very sound of the word seems to convey its sinister meaning. As a legal term of art, malice means "the intent, without justification or excuse, to commit a wrongful act."[18] Like the definition of burglary, the definition of arson contains an element of criminal intent. Likewise, the definition of arson upholds the sanctity of the home. Finally, the words "of another" preserve a couple of universal principles. On the one hand, it upholds Locke's principle that liberty extends only so far as the rights of one's neighbor. One has no right to act in a way that interferes with the rights of another. On the other hand, everybody has the right to "dispose of their possessions and persons, as they think fit."[19] The common law definition of arson acknowledges that the right to property without the right to dispose of it is incomplete.

Any law student could recite the elements of common law negligence in his sleep:

> Duty,
> breach,
> causation,
> damages.

[18] *Black's Law Dictionary*, MALICE.
[19] Locke, *The Second Treatise of Government*, 4.

The definition of negligence is extremely simple, yet utterly complete. How could one be found liable for negligence if he had no duty of care? How could one be held responsible for injury to another if he had upheld his duty? What justice could there be if one had to pay for another's injury even though his own action was not the cause of that injury? And what could the court demand of somebody whose breach of duty did not result in any damage? Common law negligence is comprised of four short words, but a wealth of reason.

The common law definition of murder is also familiar to all law students:

> The unlawful killing of another human-being with malice aforethought.

This common law definition is perhaps the ultimate common law poem. It can be read as three lines:

> The unlawful killing

For a finding of murder, there must be a killing. The universal right to life makes killing naturally repugnant. Killing is the ultimate interference with the rights of another because it denies not only life, but also all other rights with it. However, for there to be a murder the killing must also be "unlawful." Killings in self-defense or at war are not murders, because they are actions taken to preserve one's own right to life.

> …of another human-being…

For there to be a murder, the victim must be a human. Animals do not have the same rights as man, and it is natural that man should kill animals for food. The victim must also be another. Suicide, while repugnant to nature is not the same kind of crime as murder because it does not rob another of his rights.

> …with malice aforethought.

Malice aforethought is a legal term of art. It refers to the intent to kill, the intent to cause great bodily injury, a reckless indifference to the value of

human life, or intent to commit a dangerous felony.[20] In short, malice aforethought means that the killing is done with a guilty mind. There is an undeniable difference between a death that is the result of circumstance or accident, and a death that is the result of criminal intent.

These and other common law definitions have all of the characteristics of poetry. They have the sound and rhythm that satisfies the sense, but more importantly, they express universal and eternal truth. For the same reasons that common law definitions embody natural law, they are also excellent examples of poetry.

STATUTORY LAW: A STEP AWAY FROM NATURE

Unfortunately, the common law is no longer all that common. Although judges continue to interpret law, legislation has replaced the common law on most points. In Illinois, for example, the common law felonies have all been superseded by statutes. The common law felony once known by the delightfully apt term "mayhem" is now the clunky "aggravated battery" of the Illinois Compiled Statutes.[21] Common law rape is now "criminal sexual assault."[22] These "updated" laws were certainly passed with the purpose of making the law stronger and broader, but to the extent that they distance the law from universal truth, they weaken law in general.

To illustrate just how un-poetic statutory law is, consider this excerpt from the Illinois Mechanic's Lien Act:

> (a) Any person who shall by any contract or contracts, express or implied, or partly expressed or implied, with the owner of a lot or tract of land, or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land or for the purpose of improving the tract of land, or to manage a structure under construction thereon, is known under this Act as a contractor and has a lien upon the whole of such lot or tract of land and upon adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business; and in case the contract relates to 2 or more buildings, on 2 or more

[20] *Black's Law Dictionary*, MALICE AFORETHOUGHT.
[21] 720 ILCS 5/12-3.05.
[22] 720 ILCS 5/11-1.20.

> lots or tracts of land, upon all such lots and tracts of land and improvements thereon for the amount due to him or her for the material, fixtures, apparatus, machinery, services or labor, and interest at the rate of 10% per annum from the date the same is due. This lien extends to an estate in fee, for life, for years, or any other estate or any right of redemption or other interest that the owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire and this lien attaches as of the date of the contract.[23]

Buried deep within that unreadable paragraph is actually a glimpse of the universal and reasonable. The Mechanic's Lien Act applies Locke's principle that by mingling one's labor with the land, he earns a property right to it. Those who contribute value to property should be among the first to be able to make a claim against that property for payment. However, that small spark of natural law is all but smothered by nearly 250 words crammed into two impossible sentences. In trying to list all of the possible particulars, the legislators failed to state the universal clearly.

The draftsmanship in the Illinois Mechanic's Lien Act may be very bad, but it is not exceptional. Legislation is not as poetic as the common law because it is not the product of a single mind attempting to put a universal truth into practice. Rather, legislation is a collaboration among a committee of elected politicians with various interests. So even when there is a universal and eternal principle involved, it is drowned out by the many voices of the legislature. In the words of John Steinbeck, "There are no good collaborations, whether in music, in art, in poetry, in mathematics, in philosophy. Once the miracle of creation has taken place, the group can build and extend it, but the group never invents anything." [24] This is why the pronouncements of individual jurists, handed down from judge to judge, are so much more poetic than statutes. Myriad interests pull legislative bodies in innumerable directions, resulting in very muddled ideas. Good judges, however, are guided by a pursuit of eternal and universal ideals. It is no wonder that the product of legislatures is cacophony and the product of the common law is poetry.

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[23] 770 ILCS 60/1.

[24] Steinbeck, *East of Eden*, 132.

CONCLUSION

If as Shelley wrote, "Poets are the unacknowledged legislators of the world" (377), then the judges of the common law are the unacknowledged poets of the world. Over the centuries, common law tradition has produced some very good law, but also some very good poetry. Consequently, the common law remains at the center of legal education in this country. To study the common law is to study the law of reason, and that is the only way to understand legal thinking, writing, and practice. Beyond law school, though, reams of legislation have buried the common law, pushing society further from the principles of natural law. As a society, we risk losing touch with excellent law and excellent poetry if this trend continues.

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