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ARTICLES

TWELVE PROSE POEMS BY ROGER J. TRAYNOR
(WITH A NOD TO CHARLES BAUDELAIRE)

Jon B. Eisenberg*

The year 1869 brought something new to the world of literature: the prose poems of the French poet Charles Baudelaire, consisting of fifty pieces of very short prose he wrote during his last dozen years of life. They were published under the title *Petits Poèmes en Prose*, two years after Baudelaire died at the age of forty-six.¹ Most weighed in at a page or two; a few were just single paragraphs.

A hundred years later, I discovered Baudelaire's prose poems as a teenager, shortly after publication of a then-new English translation.² According to the translator's introduction to that volume, Baudelaire used prose poetry as "a medium that enabled him to illustrate a moral insight as briefly and as vividly as possible,"³ for "it could make a point, without too much

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1. To read the prose poems in their original French, consult, for example, Charles Baudelaire, *Petits poèmes en prose* (Garnier Flammarion 1967).

2. Charles Baudelaire, *Twenty Prose Poems* (Michael Hamburger, trans., Jonathan Cape Ltd. 1968).

3. *Id.* at 1.

argument or elaboration, and it could render a poetic state of mind in images akin to Baudelaire's verse."⁴ That description of Baudelaire's prose poems seemed just right to me.

A decade after first reading Baudelaire, I took a law school class taught by Roger J. Traynor.⁵ Even then, fresh to the profession, I knew that Traynor was a great judge. Only recently, however, as I chanced upon one of his many law review articles and then undertook a journey through nearly all of them, have I come to realize that Traynor was also a great prose poet—a Charles Baudelaire of the law.

Would Traynor have been surprised by the comparison? I doubt it. Read this about judicial lawmaking, penned a year after he retired from the bench:

Amid so much conflict, the fiction that a court does not make law is now about as hallowed as a decayed and fallen tree. True, a court does not make law on a massive scale, as legislatures do. Nonetheless it makes law on a limited basis whenever it enunciates a new rule, or reconstructs an old one in revisionist terms, or merely extends an old rule about some dobbin to a novel Pegasus. Unlike Moliere's *bourgeois gentilhomme*, who was astonished to learn that his customary language indeed made prose, a modern judge is quite aware that his customary language indeed makes law.⁶

And compare it to my favorite of Baudelaire's prose poems:

THE PORT

A port is a delightful place of rest for a soul weary of life's battles. The vastness of the sky, the mobile architecture of the clouds, the changing colouration of the sea, the twinkling of the lights, are a prism marvellously fit to amuse the eyes without ever tiring them. The slender shapes of the ships with their complicated rigging, to which

4. *Id.*

5. Already nine years retired from the California Supreme Court, Traynor died four years later in 1983.

6. Roger J. Traynor, *Transatlantic Reflections on Leeways and Limits of Appellate Courts*, 1980 Utah L. Rev. 255, 258-59.

the surge lends harmonious oscillations, serve to sustain within the soul the taste for rhythm and beauty. Also, and above all, for the man who no longer possesses either curiosity or ambition, there is a kind of mysterious and aristocratic pleasure in contemplating, while lying on the belvedere or resting his elbows on the jetty-head, all these movements of men who are leaving and men who are returning, of those who still have the strength to will, the desire to travel or enrich themselves.⁷

Surely Traynor realized that his customary prose made literature as well as law. He could, like Baudelaire, succinctly illustrate a moral insight in images akin to verse. That's prose poetry, and we can see the poems in his prose if we but mine the gems and set them as the poetic jewels that they are:⁸

THE VECTOR

Errors are the insects in the world of law, traveling through it in swarms, often unnoticed in their endless procession. Many are plainly harmless; some appear ominously harmful. Some, for all the benign appearance of their spindly traces, mark the way for a plague of followers that deplete trials of fairness.⁹

*Justice is subverted when judges excuse unfairness as
harmless error.*

TOOTH AND CLAW

The newspapers tell you well enough that this society of ours is changing. A new fiction has sprung up to record our visions of what lies beyond. We look out to space wondering what new tricks of reality science will play upon our vision. We have new machine slaves, docile monsters

7. Baudelaire, *supra* n. 3, at 65. Traynor's own last port was Hastings College of the Law, where he taught in his final years, and where I took his class.

8. I have added the titles and aphorisms accompanying Traynor's works.

9. Roger J. Traynor, *Foreword*, in *The Riddle of Harmless Error* (Ohio St. U. Press 1969).

to help us break the barriers to unknown worlds. It is unsettling that they develop their own protistan cleverness to multiply our wants and our dissatisfactions.

Technology is the speech du jour. Men huddle around their fires to speak of its wonders and to ask whether they have learned to live longer and more splendidly, the better to destroy one another. The question is basic. It is for the law to answer whether man, who has come so far in science, is ready for obligations that will make him something more than an animal that preys brutally or skillfully upon its own kind.¹⁰

Technological advances sometimes just make things worse.

PRUNING

I know how grateful the courts are when they look to the scholar's work and find an illuminating insight—not merely a flat line of paper cutouts lacking that *heimliche Perspective* of which Dürer wrote—but an imaginative synthesis of the motley precedents that endlessly grow up around them in the wilderness they tread. What immeasurable help they give us when they go beyond a pedestrian catalogue and work at the hard task of clearing away deadwood that the sunlight may penetrate and enlighten the way for justice. Surely it can advance more rationally if it is not blind. Who but the scholars have the freedom as well as the nurturing intellectual environment to differentiate the good growth from the rubbish and to mark for rejection the diseased anachronism, the toadstool formula, the scrub of pompous phrases?¹¹

Scholars help judges by making order from the chaos of the common law.

10. Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. Ill. L. Forum 230, 230.

11. *Id.* at 233.

USA PATRIOT

It is a homely possession, this constitution, a part of our everyday lives. The judges whose job it is to apply it must carry liberty in their hearts even when other men have ceased to. Who is to say that liberty is dead in the hearts of men who are silent? Liberty is not lost suddenly, catastrophically; it is lost imperceptibly, by erosion. Who is to say it is irretrievably lost until it has died in the hearts of those whose job it was to care that it lived in the hearts of others?

The responsibility is not an easy one in a day when we must reconcile national security and personal liberty. But it is a ceaseless one now to see that we do not destroy the very values we purport to protect. It is a joint concern of judges and people—not people in a symbolic mass—but individuals.¹²

*In times of war, the judiciary is liberty's best, and
sometimes only, hope.*

STILL ENNUI

In an age of transition from the values of many small worlds to the inchoate values of one small world, the dramatic arts that edit life are shifting from wooden to wormwooden formula. Yesterday's vogue featured mobs at large or glass-eyed duos deadlocked in dim dialogue as night falls. Today's vogue features casually paired sleepyheads who mutter instant philosophies to the four walls as day breaks. What the old slices of life had was monotony. What the new slices of life have is monotony *espresso*.¹³

The tedium of a brave new world is still boring.

12. *Id.* at 241.

13. Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223, 223 (1962).

LEGAL ZERO

In modern laws, *trouvez la femme*. She has not been easy to find as a person in her own right. We need not look back very far to note how scarce she was even in relatively modern law, how phantom an existence she eked out on the isles of man. Who today would condemn his mother or sister, let alone his wife or daughter, to banishment in the world of Blackstone? In that nineteenth-century world, he scarcely noticed a phantom until she emerged briefly from the shadows to walk down the aisle and become wedded to the idea that she had no life of her own. Blackstone made it plain that "the husband and wife [became] one person in law," and then made it plainer that the wife was not the one. He found eminently right magic words for this blunt fiction: "the very being or legal existence of the woman [was] suspended during the marriage . . ." Any woman who did not stick to her knitting as she mastered the art of not living soon learned to mend her ways. There were abundant legal rules to keep her in order as the zero in oneness.¹⁴

The law has never been kind to the second sex.

DOWN WITH BULLIES!

At one time the dominant leaders were those who bullied the meek into viewing with alarm any and all changes on the fragile spaceship we occupy for a lifetime. I have not listened meekly in earlier years to such contemporaries, who were going to pot on the status quo. Neither have I been listening meekly in recent years to their direct decedents, who are going to poppy-seed on non-negotiable demands. The new bullies and the old, motivated by a common craving for lordliness, have a hard headstart on the meek. The new aspirants to power have improved on the rituals of blunt old kings. They have popularized fraternal

14. Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 *Cath. U. L. Rev.* 401, 412 (1968) (footnote omitted).

handgrips and chants of power for the people, taking shrewd advantage of the meek who yearn for bit parts as campfollowers. As crowd scenes grow larger, the leaders become haloed.

It seems therefore timely to advance the thesis, validated more by experience than booklearning, that bullies adept at riding good causes threaten to ride them to destruction unless we raise voices of reason effectively against them. Blasted are the meek, when bullies are blessed.¹⁵

Stand up to strident ideologues of every stripe.

TOO MUCH INFORMATION

New questions did not unduly disturb the prim tenor of lawbooks in old English or French or Latin. In our own time, when exploding knowledge is a daily phenomenon, new questions are calling forth endless volumes of answers in an expanding modern language of law. Still, there is little drama in that evolution to compare with such electrifying wonders as have evolved from yesteryear's dated super dreadnoughts to yesterday's dated super warheads to today's unmanned super celluloid noughtheads who beam their derring-do by satellite everywhere from central cities to remote villages. There is little drama in the common law to compare with anything brutish spellbinders can do to rally crowds with loudspeakers of tom-toms or buzz-words or to stupefy a populace with swift executions of justice. Savages are now splendidly equipped to out-perform any unwary domesticated beings among whom they dwell.

How will the common law survive amid a medley of primitive and sophisticated sorcerers skilled in sinister uses of magic words or technology? The explosion of knowledge need not culminate in strongholds of lawless force or folly if there are enough people determined to live by rational laws. At least the appellate courts can set an example of reasoned judgments so lucid as to command the

15. Roger J. Traynor, *Blasted Are the Meek, When Bullies Are Blessed*, 75 Dick. L. Rev. 551, 552-53 (1971)

respect even of savages. May we still believe, as an act of faith, that it is within the power of judicial reasoning to ward off evil spells that would cast out enlightenment in the not quite bright Age of Knowledge.¹⁶

Beware of highwaymen on the information superhighway.

PAX LEXUS

The multinationalism that engenders conflict of laws is a *fait accompli*. Such conflict does not necessarily signify everlasting wars. Each and all can survive with flying colours amid the flying missiles, if they work out a rational *pax in bello*, or what the Romans might call peaceful co-existence. It would be rash to say that easy does it, or that EEC does it, or that the mists will lift if we meet on a summit. Certainly no one from the Far West of the United States is going to rush on to an Old World summit where no guardian angels tread.¹⁷

In the conflict of laws, as elsewhere, we can work it out.

SOLITUDE

For the most part the lonely judges wander the badlands resignedly, discouraged at their extent but deterred by work or temperament from calling for true amici curiae to come see for themselves the rough areas. We need not linger on the obvious pleasantry that any court could do with a few friends, centered as it is between lawyers convinced that it never read their briefs and commentators convinced that it read them all wrong. Though its isolation is rendered less than splendid by plainsongs of grumbling and arias of

16. Traynor, *supra* n. 6, at 284-85 (footnote omitted).

17. Roger J. Traynor, *War and Peace in the Conflict of Laws*, 25 Intl. & Comp. L.Q. 121, 121 (1976).

scholarly agony, a well-tempered court can still hear the counterpoint of genial declarations that the court must have read the briefs, else how did declarants win, and an occasional discreetly approving warble from the reserved section of scholarly judge-watchers that it has soundly resolved the issues, broken only by a querulous note that the court need not have gone so far as it did to redress the Sliding Rule Against Ambiguities.¹⁸

The thoughtful appellate judge is a lonely hunter.

LEX TORTOISE

The reasoning judge makes haste slowly. Unlike the legislator, whose lawmaking knows no bounds, the judge stays close to his house of the law. He invariably takes precedent as his starting point; he is constrained to arrive at a decision in the context of ancestral judicial experience: the given decisions, or lacking these, the given dicta, or lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it in the often rewoven but always unbroken line with the past. The greatest judges of the common law have proceeded in this way, moving not by fits and starts, but at the pace of the tortoise that steadily advances though it carries the past on its back.¹⁹

Be patient with judges; they'll likely get there eventually.

18. Roger J. Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 Utah L. Rev. 157, 157-58 (1960).

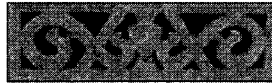
19. Roger J. Traynor, *The Limits of Judicial Creativity*, 29 Hastings L.J. 1025, 1031-32 (1978).

GRAZING NEW PASTURES

To say that a judge must plod rather than soar is not to call him pedestrian. It takes vision to recognize the junctures where markers can best help those who travel the long trails of the law. Such vision is essential in the occasional cases where a judge must choose between conflicting lines of precedent or, in an unprecedented case, between conflicting lines of policy. How now, brown cow, when here comes a white one?²⁰

Rumination takes time!

Roger J. Traynor died twenty-five years ago. Let us remember him as, among other wonderful things, the Charles Baudelaire of appellate jurisprudence—for, as his wife once pointed out, “[w]ords were for him a sacred trust, to be used with the greatest care . . . vault keys to ideas.”²¹



20. *Id.* at 1037.

21. Madeleine Traynor, typewritten note (June 9, 1985) (on file with Roger J. Traynor Ctr., Spec. Collections Dept., Library, U. of Cal. Hastings College of the L.). Madeleine was herself a writer, one whose work influenced that of her husband. *See e.g.* Open Ltr. from Roger J. Traynor, former C.J., Cal. S. Ct., to “Law Commentators or [O]ther Readers” (June 11, 1980) (on file with Roger J. Traynor Ctr., Spec. Collections Dept., Library, U. of Cal. Hastings College of the L.) (acknowledging Madeleine Traynor’s “collaboration on the writing of the lectures, essays, and sketches” that Traynor “contributed to various legal publications” and describing her “imaginative turns of phrase” that “sharpened” his “perception of the next turn in analysis” and her “flashes of insight . . . from her gifted way with words for even the most ponderous problems”).